Case Number: 3312297/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Kotecha	v	London Borough of Hillingdon

Heard at: Watford, in person and by Cloud Video Platform

On: 1-5 August 2022

Before: Employment Judge Hyams

Members: Mr R Alldritt
Ms G Bhatt

Representation:

For the claimant: Mr L Bronze, of counsel
For the respondent: Mr I Wright, of counsel

UNANIMOUS JUDGMENT ON LIABILITY

1. The claimant's dismissal was not unfair.

2. The claimant was not discriminated against contrary to sections 15 and 39 of the Equality Act 2010.

3. The claimant's claims of (1) direct discrimination within the meaning of section 13 of that Act, (2) a failure to make reasonable adjustments within the meaning of section 20 of the Equality Act 2010, (3) breach of contract and (4) unpaid wages are dismissed on their withdrawal by the claimant.

REASONS

Introduction; the claimant's claims

1 By a claim form presented on 9 October 2020, the claimant claimed unfair dismissal, "Disability Discrimination", "Failure to Make Reasonable Adjustments", "Unpaid Wages", "Unpaid Holiday Pay" and "Breach of Contract".

2 There was a preliminary hearing conducted by Employment Judge ("EJ") Alliott on 9 July 2021. There was a record of it at pages 101-106 of the hearing bundle. (Any reference below to a page is, unless otherwise stated, a reference to a page of that bundle.) EJ Alliott did not determine the issues at or after that hearing. Rather, he simply recorded that (in paragraph 5 of his case management summary, at page 102) "A finalised agreed list of issues will be submitted to the Tribunal", and at page 103 ordered the claimant "to send to the Tribunal by 4pm on 20 August 2021 the finalised agreed list of issues". There was a list of issues at pages 125-129, but it was described as the claimant's list of issues and it was, we were told by Mr Wright, in fact not agreed. We ourselves, through EJ Hyams, on the first day of the hearing (1 August 2022) pointed out to the parties that the list was in a number of respects not quite apt. During that discussion Mr Bronze said that the claimant accepted that the reason, or if not the reason then the principal reason, for his dismissal was capability by reason of ill-health. What was not in the list of issues but was in paragraph 32(f) of the claimant's witness statement was an allegation of predetermination.

3 On 2 August 2022, Mr Bronze, on behalf of the claimant, orally withdrew the claims of (1) direct disability discrimination, (2) a failure to make reasonable adjustments within the meaning of section 20 of the Equality Act 2010 ("EqA 2010"), (3) breach of contract and (4) unpaid wages. As a result, the issues were helpfully reduced in complexity. We on 2 August 2022 put it to the parties that the issues as they then stood, after those withdrawals, were best stated in the manner stated in paragraphs 4-11 below. We did that by reference to the list of issues at pages 125-129, but bearing in mind also what was in the particulars of claim at pages 16-24.

The issues as agreed with the parties on 3 August 2022

Unfair dismissal

4 Was the claimant's dismissal unfair by reason of being predetermined in the sense that the decision to dismiss him was made before hearing from him?

5 Did the respondent fail to make such efforts as it would have been within the range of reasonable responses of a reasonable employer to make to ascertain the claimant's likely ability to return to work in the future?

6 Was the procedure followed by the respondent in deciding that the claimant should be dismissed in any way one which it was outside the range of reasonable responses of a reasonable employer to follow?

7 Was the claimant's dismissal outside the range of reasonable responses of a reasonable employer? In this regard, it was the claimant's case that it was outside that range

7.1 to fail to permit him to return to work on reduced hours initially doing only work which did not involve contact in person with offenders;

7.2 to dismiss him at the point at which he was dismissed, since he might have become better and been able to return to work if the decision to dismiss him had been deferred;

7.3 to decide that he could no longer work effectively in his role of Restorative Justice Officer; and

7.4 to fail to redeploy him (although he was unable to point to a particular job that he could have done).

Disability discrimination

8 Was the claimant disabled within the meaning of section 6 of, and Schedule 1 to, the EqA 2010 at any material time, i.e., applying *All Answers Ltd v W* [2021] IRLR 612, at the time of the claimed discriminatory act or acts? The following questions arose only if the answer to that question was "yes".

9 Did the respondent know, and if it did not know, could it reasonably have been expected to know, that the claimant was so disabled? (In fact, we could not see how on the facts before us it could reasonably be asserted that the respondent did not know about the claimant's back condition.)

10 Did the respondent treat the claimant unfavourably by dismissing him because of something arising in consequence of his disability? (We could not see any alternative answer to that question but "yes".)

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

<u>Additional issues raised by Mr Bronze</u>

12 On 3 August 2022, after we had heard all of the evidence, and before the parties withdrew to finalise their written submissions, we discussed the above list of issues with both parties' counsel and Mr Bronze put it to us that in addition to the above issues the claimant was saying that his dismissal was unfair

12.1 as a result of the respondent failing to ask to see his GP's notes, and

12.2 because the procedure followed was unfair because

12.2.1 the respondent's appeal procedure did not in terms state that the decision-maker could overturn the decision to dismiss on the basis that it was disproportionate and

12.2.2 the person who had on 27 July 2020 decided the claimant's appeal had focused only on the correctness of the decision to dismiss the claimant taken on 31 March 2020.

13 Those points had not before then been stated. In addition, Mr Bronze argued (and again this point had not been articulated before he did so) that the claimant's dismissal was outside the range of reasonable responses of a reasonable employer because the respondent had not given the claimant help with using the respondent's redeployment portal. When EJ Hyams asked what was the help it was said should have been given, Mr Bronze said initially that it was simply "support" with doing so. He then said that the help which he was saying should have been given was in the form of offering to train the claimant to do any other role that he might have been able to fulfil in the event that he could not otherwise fulfil that role. However, Mr Bronze accepted that the claimant was (despite suffering from dyslexia) able to, and did, access the respondent's redeployment portal, and that he had not identified any job which he said he could have done with training.

14 Mr Bronze also argued that it was outside the range of reasonable responses of a reasonable employer to fail to defer the decision to dismiss the claimant until he had exhausted his entitlement to sick pay, which was a right to at least full pay for six months and half pay for the following six months. In the event that the claimant's absence from work was because of an accident at work, then the sick pay could have been increased to full pay for 12 months, and that possibility likewise meant (contended Mr Bronze) that it was outside the range of reasonable responses of a reasonable employer to dismiss the claimant before the anniversary of the commencement of the period of sickness absence which led to the claimant's dismissal.

Compensation

15 While it was agreed by the parties with the approval of EJ Alliott that the hearing of 1-5 August 2022 should determine liability only, we agreed with the parties on 1 August 2022 that we would, if the claim succeeded to any extent, decide what would (or might) have happened if the claimant had not been as the case may be dismissed unfairly or discriminated against contrary to section 39 of the EqA 2010.

The evidence which we heard

16 We heard oral evidence from the claimant on his own behalf and, on behalf of the respondent, from the following witnesses, in the following order (we heard from them before hearing from the claimant):

16.1 Ms Kathryn Wyatt, the respondent's Head of Service for Youth Justice, AXIS, Adolescent Development and Youth Services; she decided on 31 March 2020 that the claimant should be given notice of dismissal;

16.2 Ms Sally Ellis, who was at the time of the hearing before us and had been since June 2018 employed by the respondent as its Restorative Justice Co-ordinator and in that post was the claimant's line manager; and

16.3 Mrs Julie Kelly, the respondent's Executive Director of Children and Young Peoples Service, who determined the claimant's appeal against the decision of Ms Wyatt that he be dismissed.

17 We had before us a bundle containing 538 pages, including the witness statements. During the afternoon of 2 August 2022, the respondent disclosed and put before us copies of the notes of the three parts of the appeal hearing conducted by Mrs Kelly. We took all of those documents into account.

18 Having heard that evidence and the parties' submissions, we made the following findings of fact.

Our findings of fact

The period of the claimant's employment with the respondent

19 The claimant was employed by the respondent from 2 June 2003 until 22 June 2020, when his dismissal (on notice) took effect. Throughout that period, the claimant was employed to do the job with the title Restorative Justice Officer ("RJO"). The claimant was the only RJO employed by the respondent.

The claimant's role in his employment with the respondent

20 There was a conflict of evidence about the extent to which the claimant's role was practical and the extent to which it was office-based or in the alternative could have been done by the claimant working from home. It was contested by reference to percentage figures, which was, as we (through EJ Hyams) pointed out, unhelpful without some sort of objective analysis of the tasks required to be done by the claimant. In paragraphs 2-3 of his witness statement, the claimant described the tasks which he did in the course of his employment by the respondent. We accepted the following passage in paragraph 2 of that statement:

> 'The Respondent is a Local Authority and as part of my role I worked with the local community including residents, offenders and victims to deliver effective restorative justice (see pages C150 - 156). My role involved arranging, booking and overseeing the community service undertaken by youth offenders. A key part of this was to facilitate restorative justice

> programmes and undertaking Restorative Justice ("RJ") conferences. This involved interviewing a perpetrator, interviewing their victim and trying to come to an outcome where the perpetrator understood what they had done wrong, and the victim obtains a good outcome by understanding why they were targeted. Through the RJ conferences we would agree a plan so that both parties' *[sic]* benefit and for example if they saw each other six months later there would be no hard feelings.'

21 In the rest of that paragraph and in paragraph 3 of his witness statement, the claimant claimed that "a lot" of his role "covered office court duty", and that he spent over a day per week updating the respondent's "CareWorks" database. It was therefore the claimant's evidence that he spent 60%-70% of his time doing work which was in effect office work rather than practical work.

22 In contrast, it was the evidence of Ms Ellis and Ms Wyatt (whose evidence, which was not challenged and which we therefore accepted on this issue, was that she had herself previously been the claimant's line manager) that the claimant spent 60%-70% of his time doing the practical work which he described in paragraph 2 of his witness statement in the passage which we have set out in paragraph 20 above. Ms Ellis's witness statement contained in paragraph 3 this passage:

> "The role [of Restorative Justice Officer] entails a high level of frontline work with young people and communities as detailed in Job Description, point 3 (Operational Delivery) [page 151]. Within the role, the Claimant was required to engage with communities to identify reparation placements, undertake on site risk assessments of reparation placements, supervise young people undertaking reparation including adherence to health and safety protocols and deliver restorative justice interventions with victims and offenders. As the Claimant's line manager, I met with him on a monthly basis for formal supervision as well as having regular informal discussions and meetings to discuss work related issues."

23 The claimant did not challenge that passage, which in any event we accepted. Similarly, Ms Wyatt's witness statement contained, in paragraph 3, this passage:

> "Sanjay Kotecha (herein referred to as 'the Claimant') was employed as a Restorative Justice Officer. This is a role I am familiar with given my extensive period of employment in the same service. The role entails a high level of frontline work with young people and communities as detailed in Job Description. Within the role, the Claimant was required to engage with communities to identify reparation placements, undertake on site risk assessments of reparation placements, supervise young people undertaking reparation including adherence to health and safety protocols, deliver restorative justice interventions with victims and offenders."

24 In resolving the conflict of evidence about the balance between what Ms Wyatt referred to as "frontline" work and office-based work done by the claimant, we took into account the reliability of the claimant's evidence, by reference both to its internal consistency and to its consistency (or otherwise) in material respects with the contemporaneous documentation. Given (1) the factors to which we refer in paragraphs 59-60 and 64-66 below about the nature of the claimant's role and (2) what (a) Ms Wyatt said as we record in paragraph 64 below (the accuracy of which we accepted, as we record in paragraph 66 below) and (b) Mrs Kelly said in paragraph 7 of her witness statement, which we have set out in paragraph 68 below (the accuracy of which so far as relevant we accepted, as recorded in paragraph 69 below) about preferring to stay in his current role because he enjoyed its practical work rather than doing office-based work, we concluded that the claimant's role as the respondent's RJO was more practical than office-based, and that the evidence of Ms Ellis and Ms Wyatt about the percentage balance of the work which the claimant did was more accurate than that of the claimant. We did not need to conclude what was the precise percentage of the split between work which was done outside any office and work which was, or could be, done by the claimant working on his own (whether in an office or at home), but we did conclude that more than half of the claimant's work was done, and had to be done, outside an office, and so was what the parties referred to as "practical" work.

The circumstances and events which led to the claimant being dismissed

<u>The claimant's back pain and its effects</u>

25 The claimant had made a statement which was headed "Disability Impact Statement". It was at pages 43-45, but it was unsigned and undated. When the claimant was cross-examined about it, he said that he had finalised it after the case management hearing conducted by EJ Alliott on 9 July 2021. In the statement, the claimant said that

25.1 he had started to suffer with "lower back pain in 2002",

25.2 he was in 2004 involved in a car accident following which he suffered from back and neck pain,

25.3 in 2017 he sustained an injury at work while assisting youth offenders painting a fence,

25.4 he "sustained a further lower back injury on 12 August 2019 whilst at work", and (in paragraph 14)

25.5 "I have to manage my pain with Ibuprofen and Paracetamol, which I take daily, as without this the pain in my lower back is unbearable."

26 In paragraphs 10-16 of that impact statement, the claimant described his physical state as a result of his back pain at the time of making that statement. We return to the impact of that evidence in paragraph 107 below, when stating what we would have concluded about the likelihood of the claimant being able to return to work if he had not been dismissed.

The respondent's absence management policy

27 At pages 170-187 there was a copy of the respondent's absence management policy. It provided for absence management reviews and absence capability hearings. It also provided for an appeal against a decision made at one of those hearings. It did so in this way (at the bottom of page 181):

> "You may appeal the decision of the *Absence Capability Hearing* by completing the appropriate appeal documentation (available on the Council's intranet 'Horizon)."

28 That was all that was said about the right to appeal: it was not stated whether or not the appeal would be for example only a review of the original decision or a complete reconsideration of the matter.

29 Apart from the complaint stated as recorded by us in paragraph 12.2 above (which was so stated for the first time after we had heard evidence), no complaint was made to us that the policy had not been followed except in relation to the following paragraph headed "Accidents at Work", which was at the top of page 186:

> "[Y]ou should report all incidents of accidents at work appropriately on the Council's SAFETYnet system. If you are absent following an injury sustained in an accident at work the usual absence management procedures will apply, However, extra consideration will be given in regards to supporting rehabilitation through, for example, physiotherapy treatment. In addition, the Council's Conditions of Service of employment can provide for up to a 12 month period of full pay as opposed to any occupational sick pay (OSP) allowance limits."

The procedure which the respondent required employees to follow when they were first unable to attend work because of sickness

30 The parties agreed that the claimant was required to report the start of an absence because he was too unwell to attend work by contacting an organisation called "FirstCare", which provided what Ms Ellis described in paragraph 4 of her witness statement as "the absence management services for Hillingdon".

What happened on the first day of the claimant's long-term sickness absence, i.e. 12 August 2019

31 On 12 August 2019, the claimant contacted FirstCare to report the first day of the sickness absence which subsequently continued until his dismissal. There was a record of that report at pages 426-427. The report was emailed to Ms Ellis at 11:53. It was completed at 11:52. The reason for the absence was stated (in the box to the right of the box with "Reason" on it at the top of page 427) to be "Awaiting update". There was a box immediately below that row, i.e. the second row at the top of page 427, with these words in the box on the left: "Work related". In the box on that row next to those words, there was the word "No". There was below that row a row with the heading "Additional information from employee", below which there was this entry:

> "Sanjay Kotecha has not given any additional information to FirstCare that needs to be passed to his manager during this absence."

32 The claimant accepted that the report at pages 426-427 was created by the person to whom he spoke at FirstCare on the basis of what he (the claimant) told that person.

33 In paragraph 11 of his witness statement, the claimant said this:

> "On the 12 August 2019, I sustained a further lower back injury whilst supervising the youth offenders painting a fence at a residential home, in order to comply with their community service. I injured my lower back whilst unravelling a hose pipe. This was witnessed by the student, and she reported this to her line manager. The Respondent failed to provide an incident report and, as a result of this injury, I was signed off sick for a month."

34 In his oral evidence, the claimant said that he had informed Ms Ellis of that injury before he had called FirstCare, which was why there were on page 427 the words "Sanjay Kotecha has not given any additional information to FirstCare that needs to be passed to his manager during this absence" which we have set out in paragraph 31 above.

35 In paragraph 4 of her witness statement, Ms Ellis said this.

> "On Monday 12th August 2019, the Claimant reported as unable to work due to illness. However, this was not reported to me in the first instance as his direct line manager and nor was it reported to any other manager as per the service's absence reporting process. I attempted to contact the Claimant that day to check on his well-being and to clarify the reason for his absence, but I was unable to make contact with the Claimant until much later that day or possibly the next day. The Claimant did however report his absence to First Care on Monday 12th August 2019. The Claimant reported to First Care that the reason of his absence is Musculoskeletal – Back but

did not report this as a work-related injury and neither was this reported as work-related in any of the subsequent updates that the Claimant reported to First Care."

36 Ms Ellis then referred in a footnote to pages 426-445, and since there was no reference at pages 426-427 to the absence of the claimant on 12 August 2019 having been caused by a "Muscoloskeletal – Back" injury, she must have been referring to the "updated" report at pages 428-429. That updating occurred at 11:55 on 12 August 2019, and consisted of the addition of a "contact details" row, stating that the claimant had given permission for him to be contacted on his mobile telephone and the replacement of the words "Awaiting update" in the row with the word "Reason" in the box on the left with the words: "Musculoskeletal - Back".

37 Ms Ellis's witness statement continued:

> "5. The Claimant never informed me that the cause of his injury was work related. If the Claimant had reported this as a work-related injury, I would have ensured that an Incident Record Report was completed as I had done when the Claimant reported a previous work-related injury which occurred on Sunday 4th November 2018."

38 Ms Ellis then, in a footnote, referred to page 190. At that page there was an "Incident Record Report" of what was recorded to have been an "incident" on 4 November 2018, which was described in the box for its "details" on page 190 in this way:

> "I was moving paints around from our stationary cupboard, the paints had to be removed from our store cupboard. They were stored under the staircase in the store cupboard. However the position to get them out was very uncomfortable and could not bend my knees all the time to get to them."

39 On page 192 there was a section called "Investigation Conclusions", which stated that an investigation was undertaken on 12 November 2018 and that its findings were these:

> "Sanjay was moving tins of paint (some used, some full) between 2.5l, 5l and 10l capacity from the store cupboard in Link 1A. He states that some of the tins had been pushed under the stair crevice and in bending to get them out has hurt his neck. Sanjay states that he was following correct safe working procedures and has completed his health and safety training including manual handling. He states that he is aware of how to move and lift items correctly but was unable to do so on this occasion due to the location of the tins. Sanjay stated that he did not seek medical advice or attend the doctors and has now fully recovered."

40 When being cross-examined, the claimant said that while he accepted that it was his obligation to report any accident at work, he did not have his laptop with him at home on 12 August 2019, and that he could not report the incident from what he referred to (as recorded by EJ Hyams; any record of the oral evidence below is drawn from those notes but was agreed by the tribunal as being accurate) as "an external computer". However, the claimant subsequently said that he could have worked from home not least because he had "historically done a lot of work from home" and that he was "the only one who had a laptop and dongle and who did work from home". When he was later asked by EJ Hyams where he normally kept his laptop, he said that staff in the team of which he was a member had "locked pedestals where" they were "told to leave" their laptops if they were on training, but that he would normally have had his laptop at home with him.

41 At page 224, at the end of the letter dated 6 October 2020 in which she recorded her reasons for her dismissal of the claimant's appeal against the decision that he be dismissed, Mrs Kelly wrote this:

> "I have been informed that you are still in possession of Council ICT equipment, including a work laptop, and I must therefore ask that you return all items and your ID as a matter of urgency."

42 The claimant accepted that he had at that time (6 October 2020) had his work laptop at home with him.

43 The claimant's GP's notes relating to the claimant were not put before the respondent (and the respondent did not seek them) before the claimant was dismissed. We did, however, have them before us. On page 252 there was this entry for 12 August 2019, timed at 10:57, made by a Dr Botros:

> "History: Back went again 4 days ago. LBP referred to left leg. Left leg numbness on/off. No perineal numbness.
> Currently on Co-codamol and Ibuprofen.
> Examination: Well. Walking with slightly flexed back. Lumbar spasm. No lumbar spine tenderness. SLR is limited on left side to 60 degrees
> Diagnosis: Sciatica (XE1FC)
> Plan: Management discussed.
> eMED3 (2010) new statement issued, not fit for work (XaX1E)".

44 We saw that the claimant later, on 14 November 2019, as recorded in the GP's notes at page 254, told a physiotherapist that he had suffered pain when he pulled a hose pipe at work. That was in this passage at the top of page 254:

> "Referred for low back pain
> Originally started 2 years ago- pain was manageable since then and worsened recently this year. He was at work when he was pulling a hose

pipe and felt back locked and couldn't move. Works with offender kids so it is physical. Went to GP who advised diazepam."

45 We saw also that in his appeal against his dismissal, the claimant said this (at page 212):

> "I wish to appeal against the decision to dismiss me for capability, since I have been off sick following an incident at work in August 2019 when I was seriously injured.
>
> I have not yet been off work for a full year, but I have been dismissed, despite having a right, under a Council policy to sick pay until September 2020. This is clearly shown on page 10 of the Absence Management Policy. How can it be correct that I am dismissed when there is a policy in place to provide me, based on my length of service with 12 months' pay – 6 months' full pay and 6 months at half pay.
>
> It should also be noted that that it was an incident at work that caused my injury. Page 17 of the Absence Management Policy, states that, if I am absent following an injury sustained at work, extra consideration will be given towards rehabilitation and can provide for up to 12 months on full pay as opposed to any occupational sick pay allowance limits."

46 However, the first time (speaking chronologically) that the claimant was recorded in the documents before us to have said to the respondent that his absence starting on 12 August 2019 was caused by an "incident at work" was in his letter of appeal at page 212. That in itself diminished such force as there might otherwise have been in the fact that he referred to it in that letter.

47 In those circumstances, we preferred the evidence of Ms Ellis to that of the claimant about what the claimant had said to Ms Ellis on 12 August 2019 and subsequently about the cause of his absence on 12 August 2019, namely that he never did tell her before his dismissal that he had suffered an injury at work on 12 August 2019.

48 In addition, we concluded on the balance of probabilities that he had not in fact suffered an injury at work on that day. That was for the following reasons.

48.1 The doctor's note at page 252 was unlikely to have included the words "Back went again 4 days ago" unless that was what the claimant had himself said to his doctor on that day.

48.2 If the claimant's allegation that he had suffered an injury at work that day when "unravelling a hose pipe" was correct, then he must have done that before 10:57. He must also have been able to get an urgent appointment in

person with his doctor before 10:57. That was unlikely, although it was in theory possible.

48.3 If the claimant had in fact suffered an injury at work that day then one would have expected him when speaking to FirstCare to answer the question whether the injury was "work related" in the affirmative rather than the negative. Even if he had in fact told Ms Ellis before speaking to FirstCare that he had suffered a back injury when unravelling a hose pipe, there was no reason not to repeat the substance of that message when speaking to FirstCare.

48.4 However, given our finding of fact stated in paragraph 47 above about what the claimant had in fact told Ms Ellis, we concluded that there was all the more reason, if the claimant had in fact suffered a work-related back injury in the morning of 12 August 2019, to say to FirstCare that the absence was indeed work-related.

48.5 In addition, the claimant (we concluded on the balance of probabilities on the evidence before us) had had his laptop with him at least at some point during the period after 12 August 2019 and before 27 July 2020. His failure to report the absence of 12 August 2019 as a work-related absence formally could therefore not be justified on the basis that he had not had access to the respondent's secure systems to do so.

Relevant events which occurred between 12 August 2019 and 27 July 2020

49 The claimant's absence because of sickness which started on 12 August 2019 continued without interruption until his appeal against the decision of Ms Wyatt that he should be dismissed on notice on 31 March 2020 (to which we refer further below) was, on 27 July 2020, dismissed by Mrs Kelly in the circumstances to which we return below. We now turn to the material events which occurred between 12 August 2019 and 27 July 2020.

50 On 13 September 2019, Ms Ellis held what she referred to in paragraph 7 of her witness statement as a "First Long Term Absence Review Meeting by telephone in relation to the Claimant's absence since Monday 12th August 2019." She recorded the outcome of that meeting and what was said at it in a letter dated 18 September 2019 of which there was a copy at pages 194-195.

51 On 18 October 2019, Ms Ellis held what she referred to in paragraph 8 of her witness statement as "a Second Long Term Absence Review Meeting by telephone in relation to the Claimant's absence". The content and outcome of that meeting were recorded by Ms Ellis in her letter dated 22 October 2019 at pages 196-197, in which she wrote this:

> "At this meeting I decided that a further review period of 4 weeks would be set from the date of our meeting until Friday 15th November. The rationale for my decision is that you have expressed that you feel that you are getting better and would like to return to work as soon as possible."

52 That meeting of 15 November 2019 was postponed in the circumstances described by Ms Ellis in paragraph 9 of her witness statement, which was in these terms:

> "An Absence Capability Hearing was held on Friday 6th December 2019. I attended this meeting, which was conducted by YJS Head of Service, Lynn Hawes. This meeting was rescheduled from Friday 15th November 2019 due to awaiting receipt of the Occupational Health report following the Claimant's visit / appointment on 12th November 2019."

53 There was a copy of that report in the bundle at pages 134-135. The report was written by Mr Kevin Wilson, an Occupational Health Advisor, and was dated 12 November 2019. It appears that it was written after a telephone consultation. The report started with the following summary.

> "In my clinical opinion Mr Kotecha is currently not fit to continue in his current role. And his symptoms area [*sic*; i.e. are a] barrier to him return[ing] at present. He has undergone a MRI scan of his spine which has shown a prolapsed disc, for which he is awaiting consultant spinal surgeon review. I am unable to answer your questions until this review has taken place."

54 Under heading "Opinion/Recommendations", there was this passage:

> "In my clinical opinion Mr Kotecha's condition remains and his current symptoms present a barrier to returning to work at present. A timeframe for Mr Kotecha return to work is subject to his progress and response to a change in treatment prescribed by his spinal surgeon on his planned review, more information will be available after this has been undertaken and your questions can be answered.
>
> Having discussed his duties, he is currently unfit to be at work but if he shows an improvement in symptoms with additional treatment them [*sic*] a phased returns [*sic*] to work could be envisaged undertaking light duties."

55 Under the heading "Recommendations to Manager/HR", this was said:

> "The terms of the Equality Act 2010 are likely to apply, although ultimately this would be a legal decision and not a medical one."

56 Ms Hawes did not (as can be seen from what we say above) give evidence to us. Ms Ellis described in paragraph 10 of her witness statement what happened at the hearing of 6 December 2019 in the following way.

> "During the aforesaid Absence Capability Hearing, the Claimant outlined that he had just started on a course of 12 weeks of physiotherapy and that the medical professionals would be deciding about his treatment plan at the end of this. As such, the outcome of the meeting was to set a review period of 8 weeks. This measure was taken to give the Claimant the opportunity to complete his treatment, at which point the Claimant said that he would be able to give a more definite update as to what the next steps would be."

57 There was a written record of that meeting of 6 December 2019 at pages 527-532. On pages 528-529, this was recorded:

> "Sally highlighted the impact on the service and said
>
> - Sanjay's work and responsibilities have had to be shared amongst his colleagues particularly the Restorative Justice Coordinator [i.e. her, Ms Ellis] and the Interventions Coordinator. Aspects of their work, in particular victim liaison and restorative justice work have not been carried out fully due to lack of capacity.
>
> - Case work managers have had to be more involved in reparation delivery, impacting on their work loads.
>
> - Additional sessional work hours have had to be commissioned to support the service."

58 There was then what Ms Ellis and Ms Wyatt referred to in their witness statements as a "Second Long Term Capability Hearing" on 3 February 2020. It was conducted by Ms Wyatt. Ms Wyatt's witness statement contained the following passage, which we accepted.

> "4. On 03rd February 2020, I conducted a second long term capability hearing in relation to the Claimant's absence. At this stage, I would like to clarify to the Tribunal that the first long term capability hearing was carried out by Lynn Hawes in her capacity as the previous Head of Service. During this meeting discussions took place between myself and the Claimant regarding reasonable adjustments to support a return to work for the Claimant. I considered the Claimant's role and the possibility of a working from home arrangement. However, due to the nature of the role and the face-to-face contact needed with the services users, working from home would not have met the needs of

the services users, and therefore it would not have been a suitable or viable adjustment.

5. The role requires the Claimant to interact with service users frequently on a face-to-face basis. I was mindful as to whether the Claimant would be able to safely carry-out the duties of his role. It might assist the Tribunal to know that I have worked within the Youth Justice Service for over a decade, thus, I was very familiar with the role, requirements and the associated risks presented by young people. I therefore wanted reassurance that the Claimant would be able to safely remove himself from any conflict. As such, I advised the Claimant that I would be referring him to an Occupational Health specialist for further guidance to ensure that I fulfilled my duty of care as an employer, given that the Claimant's role required the supervision of young people who had offended in community settings. The Occupational Report, dated 14th February 2020, concluded that the Claimant would not be able to remove himself from such situations given his current state of health. Additionally, it may assist the Tribunal to know that at the aforesaid meeting, I discussed with the Claimant not only the possibility of any adjustments for a phased return to work, but also the option of a possible redeployment. I therefore provided the Claimant with access to the redeployment portal. Thus providing the Claimant with the option to explore alternative roles within the Council."

59 There was a set of notes of that meeting of 3 February 2020 on pages 533-538. On page 535 there was this passage:

"**Impact on Service**

The main impact has been the following;

Sanjay's work and responsibilities have had to be shared amongst his colleagues particularly the Restorative Justice Coordinator and the Interventions Coordinator. Aspects of their work, in particular victim liaison and restorative justice work have not been carried out fully due to lack of capacity.
Case work managers have had to be more involved in reparation delivery, impacting on their work loads.
Additional sessional work hours have had to be commissioned to support the service."

60 Mr Bronze pressed Ms Ellis and Ms Wyatt in cross-examination and urged us to accept that the fact that those words were materially the same as those which we have set out in paragraph 57 above meant that neither set of words was reliable, and that there was in the circumstances no, or no convincing, evidence

before us that the claimant's absence from work was having a negative impact on the respondent's operations. We state our conclusion on this issue in paragraph 66 below.

61 The occupational health report of 14 February 2020 to which Ms Wyatt referred in paragraph 5 of her witness statement was at pages 136-138. It was written by Dr Galia Sperber, an Occupational Health Physician, who saw the claimant in person on 14 February 2020. The report showed that the claimant had had an MRI scan which "indicate[d] that he no longer ha[d] any slipped discs and [that] there [was] only evidence of minor age related wear and tear in the base of the spine." The report continued:

> "Despite the improvement in the scan, Mr Kotecha continues to experience back pain and his mobility is still restricted. On assessment today, he walked very slowly and there was limited spinal movement. He was very tender over his lower back when I examined him. He was in pain when bending and when rising from a seated position. He is trying to increase the amount of walking he is doing but is only able to manage five minutes at a time before needing to stop and rest. He is not driving at the moment. He also reports pain at night and is dependent on painkillers throughout the day.
>
> **Advice on fitness for work.**
>
> In my opinion, Mr Kotecha remains unfit for work, as his mobility is still restricted and he is in pain. I believe that his symptoms are now mainly caused by muscle spasm and therefore with ongoing exercise his symptoms should improve over the next six weeks or so. However, given the physical demands of his role, he will need to be in a more robust state to be able to handle offenders and not cause a recurrence of symptoms. Once he is able to return to work, a phasing period would be appropriate, beginning with shorter shifts, perhaps no more than four hours per day initially and building up gradually over the first four weeks. I would also recommend that Management consider carrying out a workstation assessment to ensure that when he is office-based, he has appropriate ergonomic support. However, I do not expect that any long-term adjustments or restrictions will be required. Management will need to determine whether the above recommendations are operationally feasible.
>
> **Response to questions not already addressed.**
>
> I do not believe that in his current mobility state, Mr Kotecha would be physically able to remove himself from any potentially challenging situations with service users.

> Mr Kotecha is expected to recover in due course and therefore redeployment to a less physical role is currently not necessary from a medical perspective.
>
> As long as Mr Kotecha is careful with manual handling in the future, I would expect him to be able to provide reliable service and attendance.
>
> His back condition would affect his performance at present, because he has limited mobility. However, I would expect this to resolve in due course.
>
> I note that Management ask us to request a GP report. As I have seen the results of his most recent MRI scan and have all the clinical details I require to advise Management, I do not think that there is any value in obtaining a GP report at present.
>
> If Mr Kotecha has not returned to work within the next two months, we would be happy to review him once more and advise Management accordingly.
>
> **Advice on the Equality Act.**
>
> The medical condition would not appear to cause substantial impairment of day to day activities and/or is unlikely to persist beyond 12 months, which in my opinion is likely to mean that the provisions of the Act will not apply at the present time. However, as you will appreciate I cannot give any more definitive view than that as ultimately this is a legal and not a medical decision."

62 On 31 March 2020, Ms Wyatt conducted what she referred to in paragraph 6 of her witness statement as "a third long term capability hearing". Ms Wyatt's description of what occurred at that meeting was in paragraphs 6-11 of her witness statement. She decided that the claimant should be dismissed for the reason recorded in the note of that hearing, at page 207, which was this:

> "The OH report [of 14 February 2020] stated you should be fit to return to work by now however you have since been signed off for another 13 weeks and the absence has caused a detrimental impact on service delivery."

63 The certificate under which the claimant was so signed off was at page 266 and stated in unqualified terms that the claimant was unfit to work, i.e. so that it was not said at that time by the claimant's GP that he could do any kind of work at all, with for example an adjustment such as permitting him to work from home.

64 Ms Wyatt formally recorded her decision of 31 March 2020 and the reasons for it in a letter dated 24 April 2020 of which there was a copy at pages 209-211. That letter contained rather more detail than the note to which we refer in

paragraph 62 above. The relevant passage in the letter was on page 210 and was this:

> "As a supportive measure during your absence, you have been referred to Occupational Health on two occasions. I reviewed the recent OH referral made in February 2020, the purpose of which was to seek a medical opinion on your fitness to carry out the physical duties of your role and to determine if there are any reasonable adjustments that would facilitate your return to work at this time.
>
> The OH advice dated 14th February 2020, states that you are currently attending physiotherapy sessions and are undertaking exercises regularly. You shared a copy of your recent MRI scan for your back with the OH Doctor and they confirmed that while there is evidence of minor age related wear and tear in the base of your spine, there has been complete recovery in relation to your slipped spinal discs. You informed OH that despite the improvement in the scan, you continue to experience back pain and your mobility is still restricted. The OH Doctor confirms that you currently remain unfit for work and your symptoms are mainly caused by muscle spasm, which should improve with ongoing exercise over the following six week period. The advice states there will need to be further improvements in your condition before you are able to undertake the physical aspects of your role and you would not currently be able to remove yourself from potentially challenging situations involving service users, however it is expected that you would recover in due course and be able to provide reliable service and attendance, provided that you are careful with manual handling in the future. There are recommendations for adjustments and support for consideration when you are fit to return, including phased working hours and a workstation assessment. The OH Doctor confirms there will be no long-term adjustments or restrictions will be required.
>
> We discussed your prognosis and you explained there have been improvements in your symptoms, although you continue to experience pain and your mobility remains limited to approximately 15 - 20 minutes of physical activity at a time. You told us you are continuing with strengthening exercises, and your physiotherapist confirms your condition is improving. You told me that you recently had a fall on the stairs and do not feel this has impacted your condition. Your current Fit Note states that you are unfit for work for another 13 weeks until 24th June 2020 and you told us that your GP has advised you to minimise the use of your back, and to take painkillers to manage any associated pain. You shared with us that you have a diagnosis of Asthma and given the current Covid 19 situation, in the event that you are fit to return to work, you would not expect to be in the workplace. You confirmed exploring alternative roles within the Council via your redeployment access, however you told us that you prefer a practical based role and most of the vacancies were office based.

> I confirmed that reasonable adjustments such as a phased return and initially limiting your physical duties can be accommodated to facilitate a return to the workplace, however throughout the hearing you were clear that your absence would continue at least up to 24th June 2020.
>
> I reviewed the impact of your absence on service provision and the residents of Hillingdon. Your role of Restorative Justice Officer is within a vital front line service and in your absence, colleagues have taken on additional work which has resulted in a reduction of service provision in areas such as victim liaison and restorative justice work. The workload of case work managers has increased because they have been involved in reparation delivery, and additional sessional work had to be commissioned to support the service. This has both an operational and financial impact on the service due to the increased sessional staff payments.
>
> Having given due consideration to all of the information available to me, including your fitness for work, your continued long term absence and the impact this is having on the service, I informed you of my decision to dismiss you on grounds of incapability."

65 In oral evidence, Ms Wyatt referred to an incident which had happened in November 2019 at the respondent's youth justice service's offices which had caused a change in the working practices of the persons providing that service. What happened then was that there was a group session during which, after an altercation which took only a matter of seconds, one child murdered another. That had led to a decision to conduct meetings only on a 1-1 basis and no longer in group sessions. Ms Wyatt said (and we accepted) that that had (1) increased the pressure on the respondent's youth justice service staff, and (2) caused an even greater focus on the need to ensure for the sake of the claimant's own safety that he was able to extricate himself with alacrity from a dangerous situation. Ms Wyatt also said (and we accepted) that the young offenders with whom the respondent's youth justice service staff interacted often had additional needs such as learning and behavioural difficulties, and were on occasion likely to behave in a manner which was dangerous to those around them.

66 Despite the brevity of the note at page 207 which we have set out in paragraph 62 above, having heard and seen Ms Wyatt give evidence, we accepted the passage from her letter to the claimant dated 24 April 2020 which we have set out in paragraph 64 above as an accurate statement of the real reason for the claimant's dismissal. We also accepted the penultimate paragraph of the extract set out in the paragraph 64 above as an accurate and reliable statement of the operational and financial impact on the respondent of the claimant's absence from work and of the importance of the claimant's work to the delivery of "victim liaison and restorative justice work" and "reparation". That was in part because it was consistent with the passages set out and discussed in paragraphs 57 and

59-60 above, but it was also because we concluded that those passages were accurate. We came to that conclusion on the basis of Ms Ellis's and Ms Wyatt's oral evidence and because the passages were likely to be true, bearing in mind the fact that the claimant was the respondent's only RJO.

67 The following two paragraphs of Ms Wyatt's letter of 24 April 2020, which were on page 211, were also material. We concluded on the basis of Ms Wyatt's evidence that they were sincere.

> "You will continue to have access to Council vacancies as a redeployee, up to your last day of service. I encourage you to use this access if you would wish to apply for alternative roles which may be suited to your skills. As a redeployee your application will be considered first before any other candidates and alongside other redeployee applications. If you find any suitable vacancies please inform your manager Sally Ellis or Chris Walker. If you have any difficulties using the portal please discuss this with your line manager who will be able to assist you.
>
> I do appreciate this has been a difficult time for you and I would like to thank you for being open and honest with us throughout the process. Please continue to submit Fit Notes during your notice period. As advised at the hearing, if there is a change to your medical condition during the notice period, you should notify me immediately so this can be considered. In the event that a return to the workplace is agreed within your notice period, the Council will reclaim any notice pay already paid to you, and this will be offset against your sick pay entitlement for the same period."

68 We have already referred (in paragraphs 45 and 46 above) to the claimant's letter of appeal at page 212. That letter was said in the index to the bundle to have been sent on 8 May 2020. Mrs Kelly heard the claimant's appeal against the decision that he be dismissed. In her witness statement, she said this about the manner in which she considered and determined that appeal.

> "3. ... Following the Claimants dismissal from his employment, I was appointed as the appropriate senior officer to undertake the Claimant's Absence Capability Appeal Hearing, which took place over three different dates and via Microsoft Teams. The first meeting was held on 8th June 2020, the second on 25th June 2020 and final meeting taking place on 27th July 2020.
>
> 4. The hearing on 8th of June 2020 was adjourned as the Claimant entered new information that required further clarity and investigation. The Claimant advised that his absence from work was a result of a work-related injury. The Claimant also raised that he believed that he had been unfairly treated as he had asthma. This information had not been presented to me prior to the hearing.

5. The hearing was reconvened on 25th June 2020. Prior to the meeting, I was able to seek clarity from our internal systems that the Claimant had not logged his absence from work because of a work-related injury in line with required processes and expectations. It was also clarified that this was never discussed in the absence management meetings and hearings undertaken by the service prior to the decision to dismiss. At this hearing, the Claimant confirmed that he had not recorded the injury as per the Local Authority process but alleged that had told his line manager. However, I was unable to find any evidence of this.

6. During the reconvened hearing on 25th June 2020, I clarified with the Claimant that his sick note had expired. I enquired as to whether the Claimant now felt that he was fit to work. The Claimant advised that he was still experiencing some pain, wished to return to work, but that he would need to see his GP before doing so. I asked the Claimant about his asthma, and he advised that he managed this and has inhalers to take when required. Given that the Claimant had raised concerns as to the gap since the last Occupational Health Assessment was undertaken, his fit note had expired, and that he felt that he would be able to return to work, as well as the additional information in relation to his asthma, I felt it fair and proportionate that I had up to date information from Occupational Health and the Claimant's GP before coming to a decision. I therefore sought consent from the Claimant to refer for a further Occupational Health Assessment and I requested the Claimant arrange to see his GP to consider his fitness for work. The Claimant agreed to both, and the hearing was further adjourned.

7. The hearing was finally reconvened on 27th July 2020. At the meeting, I had the benefit of the updated Occupational Health Assessment dated 8th July 2020. The Assessment concluded that the Claimant would be 'fit for work in 2 weeks if a suitable role could be provided'. I clarified with the Claimant discussion with OH Assessor regarding alternative suitable roles. The Claimant advised that he did not wish to seek alternative role and wished to remain in the Restorative Justice role though working from home in line with Occupational Health recommendations. I asked the Claimant if he had met with his GP to discuss his fitness for work, he advised he had not but that he felt fit for work as per working at home recommendations above.

8. On review I could find no evidence that the Claimant's absence was a result of a work-related injury. The medical evidence submitted to the hearing indicated recovery from previous disc injury and evidence of minor wear and tear. The OH doctor advised that this was unlikely to

meet the definition of a disability in accordance with the Equality Act 2010. The OH report in February 2020, indicated that the Claimant was not fit to carry out his current duties as a result of ongoing back pain, though improvement within 6 weeks was anticipated. The OH report dated 8th July 2020 stated the Claimant could return to work in 2 weeks if a suitable role was found and included recommendations about working from home, long term redeployment, phased return and weekly meetings. I considered if there were other roles that may be suitable for the Claimant, though noted that despite being given access to Council vacancies as a redeployee, no applications had been made. The Claimant told me that he did not want an alternative role as it was his contractual role he wished to return to. The Claimant has also not taken medical advice from his GP, since his GP Fit Note was issued in March 2020. The Claimant told me that since the Absence Management Hearing, his physical and mental health had improved, however he remained unable to commit to a return to the workplace. I noted that the Claimant remained unfit for work at the Absence Management Hearing and throughout his 3-month notice period and the prolonged Appeal Hearing process

9. It was my finding that the decision made at the absence capability hearing, to dismiss the Claimant, was reasonable in the circumstances and that the policy was applied correctly."

69 We accepted that evidence of Mrs Kelly with the following clarification. It was put to her by Mr Bronze and submitted by him to us that the final paragraph in that sequence showed that Mrs Kelly merely considered whether Ms Wyatt's decision that the claimant should be dismissed was reasonable and whether or not the respondent's policy had been applied correctly. Mrs Kelly pointed out that if that had been the case then she would not have asked for the further occupational health advice of 8 July 2020 to which she referred in paragraphs 6-8 of her witness statement. Her evidence to us was to the clear effect that she had reviewed the decision to dismiss the claimant carefully and considered carefully whether or not he should be dismissed. Her outcome letter was dated 6 October 2020, and was at pages 221-224. She explained in the letter the delay between her dismissal in person of the appeal (27 July 2020) and that letter as being "due to the Covid19 situation", and apologised for the delay. As for the way in which she conducted the appeal, she said this at the top of page 221:

"**My role as hearing chair**
When considering an appeal against a decision reached at formal hearing, in your case the outcome being your dismissal under the Council's Absence Management procedure, my role is to ensure that;

- There were no procedural irregularities or failure to adhere to the agreed process.

- The outcome reached was not wrong on points of fact.
- The original decision is reviewed in light of new information that has become available."

70 As we say in paragraph 17 above, the bundle did not contain any copies of the notes of the three stages of the appeal hearing. That was, Mr Wright told us, the result of the fact that they had apparently been lost from the respondent's computer systems when there was what he called a data migration. Mrs Kelly had, however, found copies of those notes on her personal computer, and that was why they were put before us when (on 2 August 2022) they had been found. We read them with care and a number of passages in them were the basis of cross-examination of Mrs Kelly and then, later, the claimant. We saw that in the third stage of the meeting, i.e. on 27 July 2020, there was this exchange:

> "JK [i.e. Mrs Kelly] - positive that mobility is continuing to improve. OH referral mentioned alternative roles, I understand we discussed this previously but there was some disagreement between SK and KW [i.e. Ms Wyatt] a[b]out the suitability of the role, at the time you said you were not looking for another role but the OH referral says different.
>
> SK [i.e. the claimant] - I told OH I would like to stay in my role.
>
> JK - another point of clarity, in relation to Covid-19, we were previously working from home, working towards return to work for staff. Not clear on the necessity of working from home for your role.
>
> SK - OH recommended I work from home as much as possible
>
> JK - is that based on your health rather than Covid-19?
>
> SK - yes that's right
>
> JK - thank you. As time has moved on, any other information you would like to present to me?"

71 We were satisfied from the evidence of Mrs Kelly, especially when seen in the light of the notes of the three stages of the appeal hearing and the content of her letter of 6 October 2020 at pages 221-224, that she had indeed considered carefully whether the claimant should be dismissed, and that she had done so in the light not only of what was before Ms Wyatt at the time of the latter's decision that the claimant should be given notice of dismissal but also in the light of the occupational health report of 8 July 2020 and what the claimant said to her during the appeal hearing.

72 Mrs Kelly also said that she had not made the decision to dismiss the claimant's appeal lightly, because it was difficult to find, and retain in the respondent's

employment, good members of staff in the area in which the claimant worked. We accepted that evidence also.

The occupational health report of 8 July 2020

73 The final occupational health report concerning the claimant's back condition, which Mrs Kelly caused to be sought and which was a significant factor in her decision to dismiss the claimant's appeal, was made by Ms Lisa Willis, an Occupational Health Adviser, after a telephone consultation which took place on 8 July 2020. The report of that consultation was dated 8 July 2020 and was at pages 139-140. It started with this summary (the bold font and underlining being in the original):

> "In my clinical opinion Mr Kotecha **is fit to resume work in the next 2 weeks if a suitable role can be provided.**"

74 In the following section, headed "Relevant history/current situation", this was said:

> "Currently he describes improvement in his mobility, is requiring no prescription medication and that he has increased his daily exercises/ activity with physiotherapy advice, but this has been impacted due to delays in treatment (prescribed Aqua Physio) and Covid 19.
>
> I have advised that he contact his Physiotherapy service to expedite treatment as is feasible."

75 Under the heading "Opinion/Recommendations", this was said:

> "In my clinical opinion Mr Kotecha is fit to resume work in the next 2 weeks if suitable equipment and the provision of working from home can be provided.
>
> I would suggest temporary adjustment of reduced hours e.g. week 1-3: 50% of his typical hours / day, week 4-6: 75% of his typical working day / hours with weekly monitoring meetings / discussion on any concerns / progress.
>
> I have reiterated the importance of him completing a DSE self assessment and having suitable equipment in his home office e.g. suitable desk, chair, separate monitor, keyboard and mouse and that he must ensure that he takes a 5 minute break every hour away from his desk and a micro pause every 15 / 20 minutes (1 – 2 minutes taken at the desk) to alleviate any static [positions] and encourage simple stretching exercises."

The claimant's evidence about the viability of him doing the practical part of his post despite his ongoing back pain

76 Despite that report to the clear effect that it was only if the claimant were able to work from home in a suitable post that he could return to work, the claimant said that he would have been able to do the practical work of reparation and restorative justice in meetings at the respondent's offices because the place where he would have carried out such meetings would have been with reach of the security staff of the respondent who were based in the respondent's reception area. The security staff were, the claimant accepted, some distance from the room in which he would have been present with young offenders. When it was put to him that the security staff would be behind a closed door, he said that he had carried out meetings with the door to the room kept open so that the security staff could intervene in an emergency.

77 The claimant did not, however, address in oral evidence the viability of him doing restorative justice work in the community.

Ms Wyatt's evidence given in cross-examination about the possible impact of the claimant telling her that he was disabled within the meaning of the EqA 2010

78 Ms Wyatt was pressed in cross-examination on whether or not she accepted that the claimant was disabled. She said that she had sought a further occupational health report because of the report of November 2019 which (as we record in paragraph 55 above) had indicated that the claimant might be disabled within the meaning of the EqA 2010. When she was asked whether her decision that the claimant should be dismissed would have been different if he had said to her that he was disabled, she said: "Potentially, yes". She was then asked by Mr Bronze whether she had at any time applied her mind to the change of advice, i.e. from the view that the claimant might be disabled to the view that he was not, and she said that she had done so. She also said that the claimant's role was "predominantly" a physical one, and that while in the first stage of the response to the Covid-19 pandemic, i.e. in the period from March to June 2020, the respondent had sought to deliver the youth justice service via online meetings, that had not worked in practice. As a result, the respondent had introduced what she called "Covid safe pods" in July 2020, and it had then, in August 2020, moved back to what she called "full face-to-face" engagements with young offenders. We accepted all of that evidence of Ms Wyatt.

Ms Wyatt's oral evidence about the relevance of the claimant's length of service and the reasons why she decided that he had to be dismissed

79 It was put to Ms Wyatt in cross-examination in effect that she had ignored the claimant's length of service in making the decision to dismiss him. Her response was that his length of service was not relevant to his ability to undertake his role, and that he was dismissed because of his inability to undertake his role in the circumstance that there was no indication of when he would be able to do so. She also said that her whole process was trying to enable the claimant to return

to work. When it was put to her that the impact on the youth justice service remained the same over the period from December 2019 onwards, she said that that impact "was not sustainable". She said that the reason why she allowed for the review period of 8 weeks after the meeting of 3 February 2020 to which (see paragraph 58 above) she referred in paragraph 4 of her witness statement, was that she "needed to take into account continuity of services and the impact on children and young people." We accepted all of that evidence of Ms Wyatt despite the fact that it was not in her witness statement or her letter of 24 April 2020 at pages 209-211.

Relevant legal principles

The law of unfair dismissal

80 To an extent, we have indicated the relevant legal principles in our formulation of the issues in paragraphs 4-11 above. Both counsel put careful written submissions before us. Mr Bronze relied on the following proposition of law in relation to the claim of unfair dismissal.

> '[I]t is an error of law to ignore length of service when deciding to dismiss. ... *B S v Dundee City Council* [2014] IRLR 131 saw the Inner House of the Court of Session demonstrate the significance of significance of long service:
>
> > "In cases involving dismissal on the ground of ill-health, the relevance of length of service is not quite so clear cut. In an appropriate case, however, it may show that the employee in question is a good and willing worker with a good attendance record, someone who would do his utmost to get back to work as soon as he could. The critical question in every case is whether the length of the employee's service, and the manner in which he worked during that period, yields inferences that indicate that the employee is likely to return to work as soon as he can".'

81 In regard to the submissions advanced by Mr Bronze on the fairness of the procedure followed by the respondent, we referred him and ourselves to the passage in paragraphs DI[992]-[1015.01] of *Harvey on Industrial Relations and Employment Law* ("*Harvey*"). Mr Bronze then relied on the first part of the following extract from that passage, and we took the whole of the passage into account:

> "[1013] One particular issue which sometimes arises is the significance of procedural safeguards or appeals. Two questions then arise. First, can defects in the appeals procedure render a dismissal unfair even although the initial hearing was procedurally satisfactory? Second, can a satisfactory appeal remedy defects at earlier stages of the disciplinary process?

> [1014] As to the former, in *West Midlands Co-operative Society Ltd v Tipton* [1986] 1 All ER 513, [1986] IRLR 112, [1986] ICR 192 the House of Lords held that the failure to permit an employee to exercise a right of appeal may render an otherwise fair dismissal unfair. It would seem to follow that procedural defects in the handling of the appeal are also in principle capable of rendering the dismissal unfair, though as the EAT commented in *Whitbread & Co plc v Mills* [1988] IRLR 501, [1988] ICR 776, minor defects may be ignored. In *Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664 the EAT stated that the suggestion in *Post Office v Marney* [1990] IRLR 170 that a defect in the appeal process will only be relevant if a properly conducted appeal would have made a difference to the outcome was wrong and inconsistent with the decision of the House of Lords in *West Midland Co-Operative Society Limited v Tipton* [1986] 1 All ER 513, [1986] IRLR 112, [1986] ICR 192. The EAT in *Tarbuck* noted that if dismissal would be likely to have occurred in any event, then that would affect compensation, but not the finding of unfairness itself.
>
> [1015] As to the latter, if an appeal hearing is sufficiently comprehensive it is capable of remedying earlier defects in the disciplinary process. Whether or not the appeal process is sufficiently comprehensive to redress any earlier procedural defects will be a question of fact for the employment tribunal (see *Taylor v OCS Group Ltd* [2006] IRLR 613, CA following *Whitbread & Co plc v Mills* [1988] IRLR 501, [1988] ICR 776, EAT). However this will not depend upon an analysis of whether or not the relevant appeal was by way of rehearing or simply a review. Indeed the Court of Appeal in *Taylor* specifically commented that the terms rehearing and review should not be used in this context. What is necessary is for the employment tribunal to consider the disciplinary process as a whole when assessing the fairness of the dismissal."

82 Concerning the impact of a sick pay scheme, we referred ourselves and the parties to paragraphs DI[1271]-[1272] of *Harvey*, which start with the following words, which are followed by references to two cases decided in 1975.

> "It is a commonly held misapprehension that it will be unfair for the employer to dismiss an employee who remains entitled to receive remuneration under the company's sick-pay scheme, and fair to dismiss the employee once the rights under that scheme have been exhausted. In fact the existence of such a scheme is merely one of the factors to consider in evaluating the overall fairness of the dismissal. The existence of the scheme may indicate that the employer had envisaged the possibility of illnesses at least for the length of time for which the employee can recover under the scheme, and may be taken to have implicitly indicated that he is able to cater for such absences. But a tribunal is not bound to make the assumption that any such

implication can be drawn from the existence of a sick-pay scheme, particularly if its terms are generous."

Disability discrimination

The definition of disability

83 Section 6(1) of the EqA 2010 provides:

"(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

84 Paragraph 2 of Schedule 1 to the EqA 2010 provides:

"(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."

85 The word "substantial" in section 6(1)(b) means, according to section 212(1) of the EqA 2010, "more than minor or trivial".

86 Paragraph 5 of Schedule 1 to the EqA 2010 provides:

'(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.'

Proportionate means of achieving a legitimate aim

87 Mr Bronze made lengthy submissions on the application of section 15 of the EqA 2010. However, his submissions on that issue were made also in relation to the question whether the claimant's dismissal was outside the range of reasonable responses of a reasonable employer. That was on the basis that, as Underhill LJ said in paragraph 53 of his judgment in *O'Brien v Bolton St Catherine's Academy* [2017] EWCA Civ 145, [2017] IRLR 547

> "The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law."

88 However, we saw that having referred to that sentence in paragraph L [377.04], the editors of *Harvey* said this:

> 'However, *Sales LJ in City of York Council v Grosset* [2018] EWCA Civ 1105, [2018] IRLR 746 held at [55] that:
>
> > "'Underhill LJ was addressing his remarks to the particular facts of that case, and was not seeking to lay down any general proposition that the test under s 15(1)(b) EqA and the test for unfair dismissal are the same. No doubt in some fact situations they may have similar effect, as Underhill LJ was prepared to accept in *O'Brien*. But generally the tests are plainly distinct, as emphasised in *Homer [v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] IRLR 601]".

89 As the paragraph following that one in *Harvey* showed, if we decided that the claimant was in fact disabled at the material times then it was essential for us to decide firstly whether what the respondent did involved the pursuit of a legitimate aim, and then, if we concluded that it did, to carry out a balancing exercise in deciding whether the detrimental effect on the claimant of the application of the legitimate aim (the unfavourable treatment done because of something arising in consequence of the disability in question) outweighed that legitimate aim. We reminded ourselves in that regard that section 15 provides this:

> "(1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

90 We referred ourselves and the parties to the following helpful summary in paragraph L[377.01] of *Harvey* of the principles to be applied when deciding whether any unfavourable treatment "is a proportionate means of achieving a legitimate aim":

> "The EAT in *Hensman v Ministry of Defence* UKEAT/0067/14/DM, [2014] EqLR 670 applied the justification test as described in *Hardy and Hansons Plc v Lax* [2005] EWCA Civ 846, [2005] IRLR 726, [2005] ICR 1565 to a claim of discrimination under EqA 2010 s 15. Singh J held that when assessing proportionality, while an ET must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. (Applied *Monmouthshire County Council v Harris* UKEAT/0010/15 (23 October 2015, unreported)). As stated expressly in the EAT judgment in *City of York Council v Grosset* UKEAT/0015/16 (1 November 2016, unreported), the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the ET was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the ET. The Court of Appeal in *Grosset* ([2018] EWCA Civ 1105, [2018] IRLR 746) upheld this reasoning, underlining that 'the test under s 15(1)(b) EqA is an objective one according to which the ET must make its own assessment'."

91 The respondent's case in regard to the application of section 15(1)(b) of the EqA 2010 was stated in paragraphs 30-32 of its document entitled "Grounds of Resistance (Further Reply to ET1)" at pages 121-122, namely:

> "30. In any event, if any such treatment [i.e. unfavourable treatment because of something arising in consequence of the claimant's disability, i.e. assuming that he had one] is found to have occurred, the Respondent's treatment of the Claimant was a proportionate means of achieving a legitimate aim.
>
> 31. The legitimate aim which was being pursued was ensuring that the workforce and finances were effectively and proportionately managed.
>
> 32. The decision to dismiss and not to uphold the appeal was proportionate because: (i) the Claimant had been off for months and had been given a long period of time to recover, (ii) the OH report had expected recovery by the end of March 2020 but at that date the Claimant was signed off work by his GP for a further 13 weeks, (iii) the evidence was not clear as to when he would be able to return to his role, (iv) the Claimant was not interested in an alternative role

and/or no alternative role was available for him, (v) the Claimant's continued absence was having an operational and financial impact on the Respondent's service. His absence meant that colleagues had to take on additional work, in a reduction of service provision, in additional sessional work having to be commissioned to support the service."

92 Mr Bronze's skeleton argument on behalf of the claimant contained the following passage in this regard:

> '33. The vagueness of the Respondent's approach would not have escaped the Tribunal's attention. There is a pleaded case of the objective justification being "ensuring that the workforce and finances were effectively and proportionately managed". This is explored in a little more detail to mean "colleagues had to take on additional work, in a reduction of service provision, in additional sessional work having to be commissioned to support the service" [122].
>
> 34. There has been no tangible evidence presented of this despite every opportunity for it to be recorded [E526] which is rehashed later [E535]. Further, the confusion of the Respondent's position further unravelled at the appeal stage as the decision was looking back [C224].
>
> 35. When determining whether or not a measure is "proportionate" it is, the Claimant suggests, relevant to consider whether or not a lesser measure could have achieved the employer's legitimate aim; *Naeem v Secretary of State for Justice* [2017] UKSC 27.
>
> 36. It is an error of law, it is averred, for a Tribunal not to engage with an employee's challenge to an employer's justification defence; *Brightman v TIAA Limited* UKEAT/0318/19.'

93 We accepted the validity of the final two paragraphs of that sequence. We do not need to refer to all of the arguments advanced by Mr Bronze on behalf of the claimant in support of his claims. We emphasise that we considered them all and mean no disrespect to Mr Bronze and the claimant by not referring to them all here. We state our conclusion on the argument advanced in paragraphs 33 and 34 of Mr Bronze's skeleton argument in the following section below, where we state our conclusions on the claims.

Our conclusions

The claim of unfair dismissal

94 We had difficulty understanding how the fact that an appeal procedure is not stated by an employer to require the person hearing the appeal to rehear the

case rather than simply review on a limited basis the original decision could in itself render a dismissal unfair. In our view the key issue in regard to the determining of an employee's appeal against dismissal is whether the way in which the appeal was conducted was in itself outside the range of reasonable responses of a reasonable employer. If the employer heard an appeal and then ignored any new evidence which was put before it during the course of the appeal then that would be likely to lead to the conclusion that the dismissal was outside the range of reasonable responses of a reasonable employer, but that would be what one might call a substantive rather than a procedural unfairness (recognising that it is usually unwise to categorise particular flaws in a process leading to a dismissal as either substantive or procedural).

95 However, those considerations were academic here. That is because, given our conclusions stated in paragraphs 68-72 above, we rejected Mr Bronze's submission that the procedure followed by the respondent in deciding that the claimant should be dismissed was to any extent unfair within the meaning of section 98(4) of the Employment Rights Act 1996 because of the manner in which his appeal against Ms Wyatt's decision that he should be dismissed was determined by Mrs Kelly.

96 Those conclusions in paragraphs 68-72 were in themselves enough to justify the conclusion that the claimant's dismissal was not predetermined, but in any event we were of the clear view that Ms Wyatt had genuinely wanted the claimant to return to work well enough to do his job. We came to that conclusion on the basis of the evidence of Ms Wyatt to which we refer in paragraphs 58 and 62-67 above. That in turn helped us to conclude (which we did independently of that evidence, having heard and seen Ms Wyatt give evidence) that she had not decided in advance of 31 March 2020 that she would dismiss the claimant no matter what he said, i.e. the claimant's dismissal was in no way predetermined by her.

97 In our view the only substantial issue which arose in the claim of unfair dismissal was whether it was in the circumstances as they stood on 27 July 2020 within the range of reasonable responses of a reasonable employer to dismiss the claimant. Those circumstances included the content of the occupational health reports of 14 February 2020 and 8 July 2020 to which we refer in paragraphs 61 and 73–75 above respectively. They also included Ms Wyatt's decision that the claimant should be dismissed and the circumstances in which that decision was made.

98 We concluded that the fact that the report of 8 July 2020 said that the claimant could return to work only "if a suitable role [could] be provided" showed the practical importance of the claimant working only from home. The claimant himself was not, as we understood it, saying that he could realistically have done any kind of practical work in August 2020, but if we were wrong in that regard we concluded that it was not realistic given his state of health at that time for him even to work within the theoretical reach of the respondent's security staff in the

circumstances to which we refer in paragraph 76 above. That was because of (1) the potential volatility of the situation, which was vividly illustrated by the evidence of Ms Wyatt to which we refer in paragraph 65 above, and (2) the claimant's inability at least at that time to move quickly.

99 We came to the conclusion after a very careful weighing up of the evidence that the claimant's contention that he could reasonably have been permitted to return to work in the sense that he could have been permitted to work from home doing only office work, which was the only thing which the occupational health report of 8 July 2020 said was possible, was unrealistic. That was because the office work would have related to the practical work which the claimant would have done if he could have, but which would in the proposed circumstances have been done by for example Ms Ellis and other members of staff in his place. That would in all probability have been practically difficult and would not have lightened the load on Ms Ellis and those other members of staff. Thus in our view it was not outside the range of reasonable responses of a reasonable employer to decide not to permit the claimant to return to work doing only office work from home.

100 We also came to the conclusion that it was not outside the range of reasonable responses of a reasonable employer to decide that the claimant should be dismissed in the circumstance that we accepted the evidence of the respondent on the impact on the respondent's youth justice service of the claimant's absence, as we state in paragraph 66 above. That impact was both operational and financial.

101 Further, we concluded that the efforts made by the respondent to enable the claimant to obtain an alternative post in the respondent's employment were not outside the range of reasonable responses of a reasonable employer. That was for the following reasons.

101.1 Ms Wyatt specifically offered (in the first paragraph of the extract from her letter which we have set out in paragraph 67 above) the claimant help in using that portal if he needed it.

101.2 As for the possibility of training being provided in the event that the claimant identified a post which he could, with training, have fulfilled, that was not in our view material in the event that the claimant had identified no such post.

102 In addition, it was in our view wrong to suggest that the respondent had not made efforts of the sort which it was within the range of reasonable responses of a reasonable employer to make to obtain sufficient information about the likelihood of the claimant returning to work and being able to do the full range of the work required of an RJO. That was because of the occupational health reports of 14 February 2020 and 8 July 2020 to which we refer in paragraphs 61 and 73-75 above. The criticism that the respondent should have sought the claimant's GP's

notes was misplaced in our view given those reports and given that Dr Sperber had on 14 February 2020 (as we record in paragraph 61 above) said this:

> "As I have seen the results of his most recent MRI scan and have all the clinical details I require to advise Management, I do not think that there is any value in obtaining a GP report at present."

103 We also concluded that the fact that the claimant's sick pay entitlement (to 6 months at full pay and 6 months at half pay) had not expired did not in itself or in conjunction with any other factor mean that the claimant's dismissal was outside the range of reasonable responses of a reasonable employer. Having concluded (in paragraph 48 above) that the claimant did not suffer an accident at work on or around 12 August 2019, we concluded that the respondent was under no implied contractual obligation to consider whether he should be given sick pay at the full rate for a full year, but if we had concluded that such an obligation had arisen, then we would have concluded that it was not outside the range of reasonable responses of a reasonable employer to dismiss the claimant in the circumstances as they would then have been. That was because of the practical impact on the respondent's operations and finances of the claimant's continued absence from work to which we refer in paragraph 100 above.

104 For all of those reasons, we concluded that the claimant's dismissal was for capability and was not unfair.

Disability discrimination

105 Despite the views of the occupational health advisers stated in the reports of 14 February 2020 and 8 July 2020 to which we refer in paragraphs 61 and 73-75 above, namely that the claimant was likely to recover from his back pain relatively soon so that he was not to be regarded as disabled within the meaning of the EqA 2010, we concluded that the claimant was so disabled. That was because in the first of those reports the adviser had thought that the claimant would be able to return to work soon but that optimistic view had (given what we say in paragraphs 62-63 above) not been borne out by what happened next in regard to the claimant's health. In addition, the fact that by the time of the report of 8 July 2020 the claimant was thought by the relevant occupational health adviser to be able only to work from home and only if a suitable post could be found for him, meant that he was in practice in our view suffering from an impairment in the form of back pain (even though it was not by then being caused by a prolapsed disc) which was having a more than minor or trivial effect on his ability to carry out normal day-to-day activities. We came to that conclusion without taking into account the effect of such non-prescription painkillers as the claimant might have been taking at the time, but we accepted that he habitually took such over-the-counter painkillers as Ibuprofen, which thus strengthened our conclusion that he was disabled within the meaning of the EqA 2010 even on 27 July 2020.

106 However, we came to the clear view that the claimant's dismissal was a proportionate means of achieving a legitimate aim essentially for the reasons relied on by the respondent in the passage from its grounds of resistance set out in paragraph 91 above. We ourselves concluded that the respondent had the legitimate aims of (1) using its financial resources effectively, i.e. avoiding spending money if it could reasonably be avoided, and (2) providing an effective youth justice service. In the circumstances which were relied on in paragraph 32 of the respondent's grounds of resistance, all of which we accepted existed, i.e. so that we accepted that all of the factors relied on in that paragraph existed in the sense that we found them to be factually well-founded, we concluded (applying our minds to the matter afresh, irrespective of our conclusion on the fairness of the claimant's dismissal) that the claimant's dismissal was a proportionate means of achieving a legitimate aim.

107 If we had concluded that the claimant's dismissal was not a proportionate means of achieving a legitimate aim, however, then we would have concluded that the claimant would have been dismissed at the latest by the end of September 2020, given his ongoing inability (to which we refer in paragraph 26 above) to do what we concluded were the essential parts of his role.

108 We concluded too that the fact that Ms Wyatt said that if the claimant had said that he was disabled then she might have come to a different conclusion on the question whether he should be dismissed, did not mean that she would have come to such a different conclusion. We concluded that even if she had thought that he was disabled within the meaning of the EqA 2010, she would have come to the conclusion on 31 March 2020 that he should be given notice of dismissal.

109 For the avoidance of doubt, we concluded that the respondent did know of the claimant's disability, and that the test in section 15(2) of the EqA 2010 was satisfied. We did so by analogy with the pragmatic approach taken by Simler P (as she then was) in paragraph 32 of her judgment in *Pnaiser v NHS England* [2016] IRLR 270. Also for the avoidance of doubt, the respondent accepted that that it treated the claimant unfavourably by dismissing him because of something arising in consequence of his disability.

110 Nevertheless for all of the above reasons, none of the claimant's claims succeeded and they were (in so far as they were not withdrawn) dismissed accordingly.

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Employment Judge Hyams
Date: 8 August 2022

SENT TO THE PARTIES ON

26 August 2022

N Gotecha

FOR THE TRIBUNAL OFFICE