EMPLOYMENT TRIBUNALS

Claimant: Mr N Hanafy

Respondent: Metroline Travel Ltd

Heard at: Watford **On:** 28, 29, 30 & 31 June 2022
4 & 6 July 2022
5 July 2022 [panel only]

Before: Employment Judge Maxwell
Mrs L Thompson
Mr S Woodward

Appearances
For the claimant: in person
For the respondent: Miss K Moss, Counsel

REASONS

1. Oral judgement and reasons having been given to the parties, written reasons were requested by the Respondent in an email of 14 July 2022.

Preliminary

2. The Claimant was employed from 19 November 2004 as a Bus Driver. He complains of:

   2.1 unfair dismissal;

   2.2 disability discrimination;

   2.3 age discrimination;

   2.4 victimisation;

   2.5 unlawful deductions.

3. We received witness statements from:

   3.1 Nady Hanafy, the Claimant;

3.2 Khaled Hadj Ali, a former employee;

3.3 Silmaine Ouchene, a former employee;

3.4 Rodolfo Brusa, Garage Manager;

3.5 Ian Ray Dalby, Area Operations Director;

3.6 James Robert Wright, Garage Manager.

Issues

4. The parties had, very nearly, agreed a list of issues. A version of this document was included in the final hearing bundle and there were only a small number of points on which there was a dispute. Whilst a helpful document, the parties' list in some limited respects:

   4.1 did not fully reflect all of the issues arising from the Claimant's claim;

   4.2 had been used as a vehicle setting out the Respondent's case, rather than the issue;

   4.3 an important point was set out in generic terms and specific particulars were absent, such as the detriments for the direct discrimination or the PCP for indirect discrimination.

5. The issues were discussed with the parties to obtain further clarification and a revised list was prepared by the Tribunal. Hard copies were given to the parties at the end of day-1, so they might consider this overnight.

6. On the morning of day-2, Ms Moss sought to amend the list of issues insofar as it related to the Respondent's aims with respect to justification for the discrimination arising from disability claim under EqA section 15 to add:

   6.1 at 4.4.2 ensure the Respondent is appraised of reasons for via sick notes or self-certification;

   6.2 at 4.4.3 ensure employees remain reasonably informed of employment matters during sick leave.

7. The Claimant objected he said the list was agreed and should not be added to now.

8. We decided it was appropriate to amend the list of issues as requested by the Respondent. This involved a clarification its aims. It did not significantly change the scope of the scope of its response. The Claimant did not say and we do not believe he will be prejudiced by this small change. He can cross-examine the Respondent's witnesses about this and make submissions in closing. We also considered this was appropriate, as it involved putting the parties on an equal footing. We had, yesterday, allowed the Claimant to clarify the matters he was relying upon for his direct and indirect discrimination claims. We are affording the Respondent a similar opportunity. In neither case did we consider that permission to amend was required, although if it had been we would have

allowed this as any addition was minor, would not put the opposing party at a disadvantage, would assist the Tribunal and both sides to understand clearly what was relevant and needed to be addressed. It was in the interests of justice so to proceed.

9. A copy of the final list of issues is attached to these written reasons.

Witness Orders

10. By an email of 13 June 2022, the Claimant applied for witness orders with respect to three named individuals, who were all former colleagues. He said that each of them had suffered injuries and been provided with more support by the Respondent than he was. On 17 June 2022, the Respondent wrote arguing these witnesses would not assist the Tribunal with respect to the issues it had to decide on the Claimant's reasonable adjustments claim. The Respondent would be calling the manager who searched for light duties in the Claimant's case and found none were available. The point was further made that the Claimant was not pursuing a direct discrimination claim in this regard, to which a comparator might be relevant. On 18 June 2020, the Claimant applied for another witness to be the subject of an order, she was identified as an employee in the Respondent's HR department. His email said she had dealt with a number of unsuccessful applications for jobs the Claimant had made, between 2015 and 2017.

11. By letter of 20 June 2022, the Claimant's applications were refused by REJ Foxwell, on the basis the Claimant had not sought to obtain the attendance of the witnesses on a voluntary basis.

12. Having very recently written to the witnesses asking them to attend to give evidence, the Claimant renewed his application at the beginning of this hearing. His oral argument reflected the same points as set out in his emails.

Law

13. Rule 32 provides:

> **The Tribunal may order any person in Great Britain to attend a hearing to give evidence, produce documents, or produce information. Where an order is made under this rule, the Tribunal shall notify the parties in writing that the order has been made, and the name of the person required to attend the hearing.**

14. In **Dada v Metal Box Co Ltd 1974 ICR 559**, NIRC, Sir John Donaldson laid down two criteria to be applied by tribunals when exercising their discretion over applications for witness orders. An employment judge must be satisfied that:

14.1 the intended witness can, prima facie, give evidence which is relevant to the issues in dispute, and

14.2 it is necessary to issue an order to compel attendance.

Conclusion

15. Dealing with the last witness first, she is not relevant to any of the issues the Tribunal has to decide. The Claimant's claims do not include a complaint about the Respondent's failure at earlier times to appoint him to a different position.

16. As far as the first three witnesses are concerned, we carefully considered the issues which arise from the Claimant's claim. Clarification of those issues was the starting point for the Tribunal. As far as the questions we must answer on the Claimant's reasonable adjustments claim (which involves the contention that the Respondent should have taken more steps to continue his employment, including by the provision of light duties) it does not appear these witnesses would give any evidence likely to assist the Tribunal. They could speak to their own personal circumstances, in terms of their injuries and any adjustments they required, along with the steps the Respondent took to assist them. Such evidence will not, however, address: whether the Respondent applied one or more of the PCPs alleged by the Claimant; whether any such PCP put the Claimant at a substantial disadvantage; whether it was reasonable for the Respondent to have to take any of the steps contended for. Assuming for a moment that the Claimant succeeded on the first two issues, the evidence of these witnesses would at best be of marginal relevance. The steps it was reasonable take would depend on the Claimant's needs and the extent to which the Respondent could, reasonably, accommodate them. For example, whether or not it was reasonable to provide the Claimant with light duties may depend upon what he was able to do and what, if any, work of that sort the Respondent had available at the time. It is doubtful the proposed witnesses could say much if anything in this regard. Our conclusion is that the evidence these three witnesses could give, is of no or only marginal relevance.

17. Furthermore, argument about witness orders was taking place in the afternoon on day-1 of a seven day listing. The introduction of further witness evidence, the precise content of which would not be known until witness was examined in chief (there were no witness statements) and might require the Respondent to take further instructions, had the potential to disrupt an already tight timetable. It is of great importance that the Claimant's claims are determined at this hearing. The matters he complains about go back to 2017. Given the passage of time, it would be surprisingly if the recollection of witnesses was unaffected. Should the matter be postponed for any reason, the question of whether there could be a fair trial at a later date would be at large.

18. The Claimant's application for witness orders was refused.

Additional documents

19. We were provided with agreed bundle of documents running to page 689. During the hearing it emerged the Claimant had been working from a version with different pagination from about page 619. Where the Claimant referred us to a document beyond this point in the bundle, we were careful to ensure we had the correct page number in the bundle the Tribunal was using.

20. The Respondent applied to add a further document to the hearing bundle. This had not been previously disclosed. The reason for its late emergence was that it was discovered when a search was conducted in response to a specific enquiry made by the Respondent's counsel. The grievance appeal outcome letter of 11

January 2018 referred to what was said to be paragraph 9.5 of the Claimant's contract of employment. The relevant text did not match the one contractual document the Respondent had been able to find, which related specifically to the Claimant. It transpired the author of the letter was referring to the wording of a standard contractual document which had been used at one point by the Respondent, albeit no version of that specific to the Claimant could be found. The Respondent wished to put the standard contractual terms in the bundle, so as to show where the author of the letter had taken the text from. The Claimant objected to this on the basis he said he had never seen this document before. The Tribunal having made no ruling on this point when it was first raised, the Respondent did not subsequently pursue its admission.

21. During the course of the hearing, the Claimant sought to introduce various additional documents. These were mostly in the form of submissions he wished to make or party correspondence, as opposed to contemporaneous documents. No objection was taken by the Respondent to these. There were two further proof of postage documents, one undated, one from 28 October 2017 and one from 25 November 2017.

Timetable

22. The following timetable was agreed the end of day-1:

    22.1 Day-2: Claimant's evidence;

    22.2 Day- 3: Claimant's evidence continued (morning) followed by Respondent's evidence (afternoon);

    22.3 Day-4: Respondent's evidence continued;

    22.4 Day-5: Respondent's evidence continued (morning) followed by closing submissions (afternoon);

    22.5 Day-6: deliberation;

    22.6 Day-7: further deliberation (if necessary) followed by judgement and remedy (if appropriate).

Hearing

23. the Judge explained to the Claimant the process Tribunal would follow, with respect to determining preliminary applications, hearing evidence and receiving the parties submissions, before deliberating and making a decision. Having addressed the matter in overview, at various stages during the hearing the Judge expanded upon what was coming next and what the Claimant might consider doing by way of preparation.

24. From time to time, the Judge reminded the Claimant to focus his questions upon the matters the Tribunal would be determining. He took this on board and did as had been suggested.

25. At midday on day 4 of the hearing, the Claimant asked not to proceed in the afternoon as he had become mentally and physically exhausted. We adjourned

until 2 PM, to see if a longer lunch break might improve the position. When we reconvened, the Claimant still wished not to proceed. The Claimant has physical health problems for which he is taking medication. Conducting a hearing such as this is a litigant in person is a demanding task. It appeared to the Tribunal as being in the interests of justice to adjourn, to ensure the Claimant was able to actively engage with the evidence and participate in the hearing. Miss Moss, very fairly, did not oppose the adjournment, which we granted.

26. We resumed on day-5, the Claimant cross-examined Mr Wright in the morning and we had submissions in the afternoon. Both parties prepared written representations, which they expanded upon. In his oral submissions, the Claimant concentrated on events prior to the matters about which he was bringing claims in these proceedings. The Judge pointed out it up to him how he used his time in closing submissions, although he was invited to address the issues we would be deciding. As with his witness statement, the Claimant spent a great deal of time speaking to an earlier dispute about sick pay and various unsuccessful job applications. Had the Claimant been pursuing claims of discrimination with respect to the earlier pay issue or job applications, then we would have expected the Respondent to address this. In the absence of claims, the Respondent did not advance evidence relating to this. Whilst background evidence is sometimes relevant, we did not find the Claimant's thumbnail sketches of the successful candidates and their relative demerits a helpful source of evidence, when considering whether to draw inferences in connection with his claims.

27. On the morning of day-7, the Claimant contacted the Tribunal to say he wished not to attend in person but instead for the hearing to be by way of CVP because he was suffering with a medical condition of unknown duration. The Tribunal caused an email enquiry to be made of him, asking what medical condition was and how this prevented him from attending. The Claimant replied he was suffering with depression and stiffness in his ankles, such that he did not wish to leave the house. In light of this, and the absence of any objection by the Respondent, we change the hearing to CVP.

Witness Evidence

28. We were satisfied that all witnesses were doing their best to give an honest and accurate account of events. The matters at large in this case do, however, now go back many years and the passage of time has undoubtedly affected the reliability of individual memories. Where appropriate, we were assisted by placing more reliance upon the content of contemporaneous documents than current recollection.

Facts

Background

29. The Claimant was employed as a bus driver by the Respondent, which is in business as a provider of transport services. The Claimant is an educated man, with a number of academic and professional qualifications. His career history has included prior employment in a managerial capacity.

30. The Claimant's dissatisfaction with his treatment by the Respondent substantially predates the matters about which he complains in his claims. As already referred to, there is much the parties disagree about in the period from 2011 to 2017. The Claimant put forward a considerable body of documentary evidence in this regard, including correspondence and grievance proceedings. Indeed, on one view, the scope of these earlier matters is greater than the claims proceeding in the Tribunal, which all relate to the period from 2017 to 2018. Whilst we have taken his evidence about these earlier matters into account, we have concentrated our fact-find on the matters necessary to determine the issues, as clarified at the beginning of the case. It is unnecessary and would be disproportionate for the Tribunal to attempt to resolve and rule upon all of the earlier factual contentions about which the parties do not agree.

Disability

31. The Claimant has suffered with osteoarthritis for many years. This affects his feet, ankles, knees, hands, left elbow and spine. The Respondent has conceded the Claimant was a disabled person at material times by reason of this physical impairment.

32. The Claimant also relies upon suffering with depression for being a disabled person. He has experienced periods of low mood, in particular when engaged in disputes with his employer. He described symptoms including talking to himself and a reluctance to go outside. We were not, however, provided with a detailed account of the periods when he was so affected. Furthermore, the Claimant has not sought assistance from his GP for this. He has not received any counselling or prescribed medication. He did on occasion tell his employer he felt depressed but this appeared to be a passing comment and his focus was always upon the physical symptoms he was suffering. As with many other employers, the Respondent has a well-publicised Employee Assistance Program ("EAP"). The Claimant neither sought this out nor was he referred to it.

Earlier Matters

33. In the period from 2012 to 2017, various adjustments were made to the Claimant's working pattern to accommodate his needs as a disabled person and also because he was studying. The last such adjustment before the matters with which we are concerned was made in July 2017 when, at the Claimant's request, his number of working days was increased to 4.

Policies

34. The employee handbook included rules about the certification of sickness absence:

> **A self-certification form must be completed immediately on the day of return to work to cover up to the first seven days of sickness absence. (Note; if an employee is expected to be off work due to sickness for greater than seven days, It may be necessary for Metroline to send the employee a self-certification form to their home address for completion and return immediately).**

Self-certification forms must be signed by the line manager (or a designated person within the garages) who will ensure the relevant process for any sick payment is complete.

For absence of longer than seven days (Including weekends and rest days), employees must provide a doctor's medical certificate. This must be sent directly to the employee's place of work for the attention of their line manager on the eighth day of absence as this may effect SSP payments outside of the Company's control A doctor's medical certificate must be provided on a regular basis thereafter to cover all subsequent absence, until the employee returns to work.

Any period of absence not covered by a medical certificate may be classified by the Company as unauthorised absence and will therefore be unpaid. Such unauthorised absence may also be dealt with under the disciplinary procedure.

[…]

Any employee not complying with this procedure may find that payment of any sick pay to which he or she is entitled may be delayed or not paid at all.

35. The Managing Sickness Policy included:

Long Term Sickness

Identified as:-

(a) Continuous sickness absence of 4 weeks or more (with no likely early return to work).

or

(b) Where the manager (having taken advice from Occupational Health or has appropriate medical information) considers that an employee's absence may be long term and/or affects fitness or ability to carry out the job (e.g. heart diseases and attacks, neurological diseases, infectious diseases, certain patterns such as alcoholism and psychiatric disorders).

Note that sickness calculations are based on a rolling 12 months and not a calendar year. The only time a calendar year operates in line with sickness is in evaluating holidays.

[…]

If the absence involves long-term ill-health, a meeting will be arranged which may, in certain circumstances, take place at the employee's home. The employee may be accompanied by a work colleague or Trade Union representatives if he or she wishes. The meeting will seek to;

Establish the reasons for the absence and Its likely duration. The employee may be requested to allow the Company to contact his or her doctor or consultant in order to establish the likely length of absence and the long-term effect on their capability in relation to job performance and attendance at work. The employee may be asked to see a doctor

appointed by the company to enable a medical report to be prepared for the employer. Failure to allow the company to obtain professional medical advice may result in the Company having to make a decision based on limited information relating to the employee's health.

Consider offering alternative employment and use of the Employee Assistance Programme, if appropriate.

Inform the employee that long-term absence due to ill-health may put their employment at risk.

[…]

If the employee's attendance record does not improve, or if the employee's long-term sickness continues, the Company will obtain up to date medical evidence on the employee (as above). Preventing the Company from obtaining up to date medical advice may result in a decision being made without full information. Thereafter, the employee will be invited (In writing) to further Interview/s, The employee may be accompanied by a Trade Union representative or work place colleague if he or she wishes and will be advised that their continued employment will be discussed, including the possibility that they may have their employment terminated If they are still unable to return to work.

Unless the manager has reasonable grounds to believe that there will be an improvement in the foreseeable future, the Company's decision to dismiss the employee by reason of capability due to ill-health could be taken. This may take immediate effect or be delayed pending a further a review, which will be at the manager's discretion.

36. The Respondent's Diversity and Inclusion policy provides:

- **will make reasonable adjustments where a disability places people at a substantial disadvantage in relation to a provision, criterion or practice, a physical feature of the premises or the availability of an auxiliary aid.**

2017 Sickness Absence

37. On 7 August 2017, the Claimant began a period of sickness absence. By a letter of 8 August 2017, the Respondent's Operations Manager, Geoffrey Seers, invited the Claimant to attend an informal sickness review meeting in connection with his absence from work, to take place on 14 August 2017 at 11 am.

38. At 10:38 am on 14 August 2017 (i.e. 22 minutes before the scheduled meeting) the Claimant sent an email to Mr Seers, saying that he would be unable to attend the meeting at 11 am because he would be coming back to work at 12:40 PM, was heading towards a full recovery from his recent attack of arthritis and gout, and wished to conserve his energy for this purpose. He then went on to set out the recent history of his illness and explain his views about why the meeting he had been called to was unnecessary.

39. The Claimant did indeed return to work that day. This was a point before he had made a full recovery. He proceeded in this way because he wished to avoid attending the meeting with Mr Seers. The Claimant had a difficult working

relationship with Mr Seers, and believed the sickness review meeting would be an occasion for him to be mistreated. When he arrived at the depot the Claimant had a return to work meeting with one of the Garage Administration Supervisors ("GAS"). The form completed and signed by them both included:

39.1 the response "no" to the question "has a self certificate been received for absences 7 days and under?", alongside which there is also an adjacent manuscript note "at time of completion by OM";

39.2 the response "yes" to the question "did the employee follow the correct reporting procedure?";

39.3 The response "yes" to the question "Will employee received company sick pay?", underneath which is also written "entitled".

40. In his evidence at the Tribunal, when answering questions asked by Miss Moss, the Claimant said he had filled in a self certificate when he returned to work on 14 August 2017 and this he argued was supported by the return to work form recording that he had followed the correct procedure and was entitled to sick pay. When it was drawn to his attention that the self certificate in the bundle of documents had a later date and appeared to be retrospective, the Claimant said this must have been a second certificate he completed. He went on to explain he had a clear recollection of the first occasion when he completed a self certificate but not of the second. We were surprised he had such good recall of an unremarkable occasion nearly 5 years ago for which there was no document but could not recall a subsequent point, when it is clear he did sign and date a self certificate. This was a different account from that he had given during the internal grievance proceedings, when he said he had only completed the self certificate at a later date, after being prompted to do so by advice from the DWP. We conclude the Claimant is mistaken in his current recollection and what he said very much closer to the events in question, which is consistent with the contemporaneous document, is more likely to be more accurate. The GAS has most likely recorded the Claimant being entitled to sick pay and having followed the correct procedure because he had done so up to that moment, with the self certificate not yet completed but expected to follow swiftly. On this basis, we find the Claimant did not complete and submit a self certificate on 14 August 2017. Rather, he provided one at a much later date.

41. The Claimant was familiar with the obligation to complete a self certificate. There was earlier dispute with his employer connected with the need to evidence periods of absence. The staff handbook, which the Claimant could have obtained from the depot or on the intranet, included:

> **A self-certification form must be completed immediately on the day of return to work to cover up to the first seven days of sickness absence. (Note: if an employee is expected to be off work due to sickness for greater than seven days, it may be necessary for Metroline to send the employee a self-certification form to their home address for completion and return immediately).**
>
> **[…]**

> **Any employee not complying with this procedure may find that payment of any sick pay to which he or she is entitled may be delayed or not paid at all.**

42. In the absence of a self certificate for the relevant period, the Claimant was recorded on the Respondent's systems as having unauthorised absence. One consequence of this was he did not receive sick pay.

43. On 16 August 2017, the Claimant was involved in a road traffic accident. When driving the Respondent's bus, he emerged from the depot onto a public road and into the path of an oncoming vehicle. He completed an accident report form. In connection with witnesses, the Claimant noted "black cab driver". No name or contact details were entered.

44. By a letter of 24 August 2017, Mr Seers required the Claimant to attend a disciplinary hearing on 31 August 2017 at 2 pm in connection with the vehicle collision. The Claimant signed for receipt of this on 29 August 2017.

45. Later on 29 August 2017, the Claimant wrote to Mr Seers:

> **This afternoon I received your invitation letter for the above subject at 14:45 (less than 48 hours notice !??!.) Apparently, it is a very short notice to prepare my case against the allegations mentioned in your letter.**
>
> **Therefore, please reschedule that appointment for a later date, ideally in two weeks time or at least ten days from now.**

46. The following morning, 30 August 2017, Mr Seers replied:

> **Good morning Nady. Thank you for your email but I do not find your request to postpone the hearing reasonable. However, you are correct in that you should be given 48 hours' notice before a hearing, so I have rearranged the hearing for 31/08/17 at 14:45.**

47. Later the same day, at 1:15 PM, the Claimant telephoned the GAS to say he would not be able to attend work because of pain in his leg and joints, for which he was seeing his doctor.

48. On 31 August 2017 at 9:47 AM, Mr Seers sent another email to the Claimant:

> **Good morning Nady. I note that you have claimed to be sick as of 30/08/17. I am writing to let you know that because of the circumstances surrounding this issue, I do not accept your plea of sickness and you are currently being marked absent.**
>
> **In addition, the disciplinary hearing planned for this afternoon at 14:45 will still go ahead, in your absence if necessary. Therefore I implore you to attend in order to put your side of the story.**
>
> **I have attached a request for you to come and see me to discuss this issue on Monday 04/09/17 at 10:00, copies are also in the post as is normal procedure.**

A letter inviting the Claimant to attend an informal review meeting on 4 September 2017 was attached.

49. Although we did not hear any evidence from Mr Seers, who is no longer an employee of Respondent, the inference we draw is that he doubted the genuineness of the reported illness because of its close proximity to the disciplinary hearing, which the Claimant did not wish to attend and it appeared to him as being a device to avoid do so.

50. In the afternoon of 31 August 2017, Claimant wrote to Mr Seers at some length: pointing out Mr Seers was not qualified to assess the Claimant's health; he did not agree to attend the disciplinary hearing on 31 August 2017; proceeding in the Claimant's absence would be "illegal"; he was exercising his right to have a member of the Respondent's HR team present at the meeting and to receive copies of the CCTV for analysis; he wished to invite a witness to the disciplinary hearing; the date for the informal review meeting was unreasonable; Mr Seers was singling the Claimant out for a catalogue of unfair treatment and concluding:

> **Finally, due to your transparent unfair treatment which makes me more ill and sick (deep depression), please DO NOT contact me by emails unless it's absolutely necessary.**

51. Mr Seers replied, shortly thereafter:

> **Good afternoon Nady. I am sorry to contact you by e-mail again, however please be assured this will be the last time. Please ensure that you do the same and do not contact me in this manner in the future.**
>
> **I feel I have to make the following points:**
>
> **You claim you are immobile yet were able to visit your doctor yesterday. As such I expect you to attend the garage on Monday 04/09/17 at 10:00 as requested.**
>
> **You claim you have a witness yet you failed to note this on the invitation that you signed on 29/08/17.**
>
> **I have consulted with my manager who is in agreement that the hearing should go ahead. The change of time you are obviously fully aware of.**
>
> **I will send the outcome letter to you in the post.**

52. The Claimant further replied, the same afternoon:

> **I have to inform you that neither you nor your manager does own the Metroline Travel Limited. The company has procedures in place which professional managers must adhere to it. Managers must be professional in their conduct, attitude and their decision making must be fair and not subject to their personal and stubborn state of mind.**
>
> **Therefore, I found your email UNACCEPTABLE as it is baseless of any correct procedures or facts.**
>
> **If you or your manager deny me justice, surely you would know who does!**

53. Notwithstanding the timing, we accept the Claimant had genuinely experienced an exacerbation of physical symptoms. This may have resulted from stress,

stemming from the disagreement he was now engaged in with Mr Seers. Equally, however, we can see how from Mr Seers' perspective, the timing will have seemed both convenient to the Claimant and suspicious. Furthermore, the Claimant's correspondence did not evidence a lack of ability to argue his corner.

54. Mr Seers proceeded to conduct the disciplinary hearing in the Claimant's absence on 31 August 2017. The notes record Mr Seers summarising the recent history of correspondence, as he saw it, before concluding the Claimant's position on this "did not seem credible". The notes continue to set out the evidence reviewed and then a list of questions Mr Seers would have asked the Claimant. Mr Seers found the Claimant was at fault, having emerged onto a road when he did not have priority and into the path of a vehicle which had the right to proceed. A 12-month written warning was issued. This decision was conveyed to the Claimant by letter of 31 August 2017, which included his right to appeal.

55. The Claimant did not attend the review meeting on 4 September 2017. Mr Seers wrote to him that day, referring the Claimant to a provision in the handbook requiring employees to attend meetings when requested by their managers. Mr Seers called the Claimant to a further meeting, which was to take place on 7 September 2017.

56. Also on 4 September 2017, the Claimant wrote to Mr Seers. He said he could not attend the meeting that day because he was unwell. He went on to summarise the recent position with his health and said he would be sending supporting documents the following day. He asked for a member of HR to be present "at my review meeting which you will rearrange for a later and more convenient date/time".

57. Their respective letters of 4 September 2017 crossed, they were not written in response to one another.

58. In his witness statement, having referred to Mr Seers conducting the disciplinary in his absence, the Claimant says he sent "the relevant fit note" to the Respondent confirming he was not well, on 4 September 2017 by recorded delivery. He refers to a post office receipt of that date.

59. Looking closely at the post office receipt, we have identified it has tracking numbers for two letters being sent by recorded delivery on 4 September 2017. On the receipt, the Claimant has written that one is addressed to Mr Seers and one to Mr Smith. During the grievance hearing, the Claimant told Mr Brusa he had sent his fit notes to both Mr Seers and HR (i.e. Mr Smith). In light of what the Claimant was then saying, Mr Brusa made enquiries of both the Garage and HR. Neither had any record of receiving the Claimant's fit note. His letter of 4 September 2017 was, however, received. A copy was in the bundle for this hearing, date stamped as received 5 September 2017. In cross-examination, the Claimant agreed he sent his letter to Mr Seers by recorded delivery. The question is, therefore, at large as to what it was the Claimant posted on 4 September 2017. The possibilities would appear to be that he sent the fit note to both Mr Seers and Mr Smith, the letter to both, or the fit note to one and the letter to the other. We found this point a difficult one to resolve. On balance, we think it most likely the Claimant sent the letter of 4 September 2017 to both Mr Seers and Mr Smith. This was an important letter, as it included the Claimant's

explanation for not attending a meeting with his line manager he had been required to that day. He would know this risked being characterised as a failure to follow a management instruction. The letter was intended to preserve his position. He would have an interest not only sending this to Mr Seers but also to make sure HR had a copy and to avoid the risk of any later dispute about the fact of it being sent. At the time, the Claimant's explanation for not attending this meeting will have seemed more important to him than the more routine matter of submitting a fit note. We thought it unlikely that both Mr Seers and HR would have received and then lost the fit note. We also see that in the Claimant's email to Mr Smith of 7 September 2017, he refers to his "recorded delivery mail" of 4 September 2017, before going on to make various complaints about Mr Seers. He does not say anything about a fit note, which we would have expected if that was the content of what had been posted to Mr Seers. The content of this email does not suggest the Claimant appreciated the importance of evidencing, contemporaneously, his lack of fitness for work.

60. By 4 September 2017, the Claimant had his Med3 from 30 August 2017. The most obvious course of action would have been to include this with his letter of 4 September 2017 and yet even on his own evidence, he did not do so. The Claimant told us he sent the Med3 separately, on the same day. This seems an odd way of proceeding. We conclude the Claimant is now mistaken. Most likely, he delayed sending the Med3 because he believed this would allow him to deploy it to better effect at a later point. The Claimant had been in dispute with Mr Seers (and at least one other line manager) on previous occasions. He was familiar with contesting matters vigorously in correspondence and grievance proceedings. He may have hoped that if he presented all of his medical evidence in one go, it would create a stronger case. In any event, we find the Claimant's current recollection is not correct. He did not send his Med3 on 4 September 2017, this was provided to the Respondent for the first time somewhat later. Because of the volume of the Claimant's correspondence (postal and email), he has lost track of this.

61. On 5 September 2017, the Claimant, who had now received Mr Seers' letter of the previous day, wrote objecting to the content of that and complaining about being required to attend an appointment on 7 September 2017.

62. The Claimant raised a grievance. This was done in an email to Sam Smith of the Respondent on 5 September 2017. Claimant summarised the recent correspondence, from his perspective. This includes "upon my return to work on Monday 14/08/17 at 12:40 PM, a member of the (GAS) team insisted on filling up a (Return to Work) form, which she wrote the answers to its questions by her own handwriting". We note in passing, the Claimant appears not to have welcomed the requirement to participate in the return to work procedure and says nothing about having completed a self certificate.

63. The initial grievance was followed up by a further email to Mr Smith on 7 September 2017. He complained that Mr Seers and the Garage Manager, Mr Webley, were "desperate to terminate my employment". The email continued, variously asserting his rights were violated, he had been discriminated against, sick pay had been unlawfully deducted from his wages in the period 7 to 14 August 2017 and objecting to the manner in which Mr Seers had dealt and corresponded with him since that time. The Claimant asked for a meeting about

this with a "credible" manager and he named several suitable individuals, including Rodolfo Brusa. He also attached a number of documents.

64. In connection with the non-receipt of sick pay, the Claimant had been recorded as having unauthorised absence for the period from 30 August 2017.

65. By a letter of 8 September 2017, Mr Seers required the Claimant to attend a disciplinary hearing on 14 September 2017. The allegation was "unauthorised absence from 30 August 2017 to present".

66. Mr Brusa was appointed to hear the Claimant's grievance. The latest disciplinary process was suspended pending the outcome of this.

67. The Claimant attended a grievance meeting with Mr Brusa on 21 September 2017. At the beginning Mr Brusa asked the Claimant about the grounds of his grievance. The Claimant said this was discrimination and also he had "some other issues to mention here that are relevant". Mr Brusa asked when these other issues happened and the Claimant said in 2016. Mr Brusa said the Claimant had waited too long before complaining about these other matters and he would address the Claimant's grievance as set out in recent correspondence. They discussed matters at great length. The Claimant provided numerous documents to support his contentions, including GP fit notes dated 30 August and 6 September 2017. Mr Brusa did not understand why the Claimant was alleging that Mr Webley wished to terminate his employment. This was clarified as being based solely upon Mr Seers' email of 31 August 2017 including "I have consulted with my manager who is in agreement that the hearing should go ahead". Having run out of time, at 5 pm the meeting was adjourned to be reconvened at a later date.

68. Because of the ongoing issues, management of the Claimant's sickness absence was removed from Mr Seers and given to James Wright, Operations Manager at Cricklewood. The Claimant attended a sickness interview with Mr Wright on 3 October 2017. The Claimant explained he was suffering due to a recurrence of gout and arthritis. This was a long-standing problem which affected his right knee, both ankles and joints in his toes. He was taking various medication with noted side-effects. There had been little "progression" (i.e. improvement) in his condition since the commencement of his most recent sickness absence. He required surgery on his knee and was awaiting a date. Asked whether he had submitted fit notes, the Claimant became upset. Mr Wright offered, if given the tracking numbers, to trace who had signed for their receipt. Mr Wright explained the company was unable to cover the Claimant's duties indefinitely and long term absence due to ill-health may put his employment at risk.

69. The grievance meeting resumed on 3 November 2017. At the beginning Mr Brusa reminded the Claimant he was not allowed to record the hearing. The Claimant said he did not intend to and he had found the email answering his request to do this, offensive and intimidating. Mr Brusa said the email was to ensure clarity about the process and avoid any misunderstanding. Mr Brusa then proceeded to explore the Claimant's complaint about sick pay not being received. He asked the Claimant whether he had submitted a self certificate for the first 7 days of absence (i.e. 7 to 14 August 2017). The Claimant did not

provide a direct answer to this question, which Mr Brusa pointed out. The Claimant confirmed he had signed the return to work form. The Claimant was then referred to a self certificate he had completed, retrospectively, on 4 October 2017 for the period 7 to 14 August 2017. When asked, the Claimant said he had been prompted to do this by the DWP. Mr Brusa asked the Claimant whether he knew that in order to receive sick pay, an employee had to comply with the requirement to provide self certificates. The Claimant responded with his view that this was the responsibility of his employer.

70. At the first grievance meeting the Claimant had provided copies of various GP fit notes, which appeared to cover part of the period in which he received no sick pay. At the resumed hearing, Mr Brusa discussed with the Claimant when and how these Med3s had been provided to the Respondent. The Claimant provided two proof of postage documents and said the certificates were sent on these occasions. The Respondent's records did not reflect the fit notes having been so received.

71. Mr Seers had told Mr Brusa the Claimant had issues with authority. Mr Brusa passed this on and asked the Claimant to comment on the suggestion. The Claimant did not agree and referred to the respect he had for his previous line manager, Mr Farhall. Mr Brusa was most surprised by this example being cited as he had been involved in an earlier dispute involving the Claimant and Mr Farhall, which stemmed from a letter the Claimant had sent, which Mr Brusa reminded the Claimant included "foul and abusive language". That letter was included in the bundle of documents for this hearing and it could not be said that Mr Brusa's characterisation was unfair.

72. Subsequent to the meeting, Mr Brusa made enquiries, separately, of the garage where the Claimant was employed and HR. Both advised documents had been received from the Claimant on dates consistent with his proof of postage but these did not include the Med3s. Mr Brusa had also been made aware of an earlier dispute with the Claimant, which also included an alleged failure to provide necessary documents in good time. In light of this, he concluded it was more likely than not the Claimant did not send the GP fit notes when he received them and, therefore, Mr Brusa was the first manager to see them.

73. We do not find that either fit note was sent to the Respondent at the points the Claimant contended for when speaking to Mr Brusa. Although Mr Brusa relied upon the earlier dispute about sick pay in reaching his conclusion, we do not; we note the grievance outcome in that earlier matter appeared to vindicate the Claimant. More pertinent, however, were the results of Mr Brusa's contemporaneous enquiries into what documents had been received by the Respondent and when.

74. Mr Brusa's grievance outcome was sent to the Claimant in a letter of 8 November 2017. The Claimant takes exception to the first conclusion set out, in particular the use of the word "treacherous":

> **I have carefully investigated your claims and first and foremost I would like to dispel the belief that every decision an Operation Manager takes is closely scrutinised by the Garage Manager. Operation Managers like any other member of Metroline staff have a defined remit and have full**

> **authority on certain areas of the business. Attendance being one of them. It is true that Garage Managers supervise Operation Managers, but not to the extent you believe this happens. Believing that Mr Webley could be supporting Mr Seers in his scheme just because of a single line in an email, which you did not even cross-examine with the interested person, seems to me a treacherous assumption.**
>
> **At the time of the conversation between Mr Webley and Mr Seers the garage was not in receipt of your self-certificate/doctor certificate yet and the absence could have seemed suspicious given the email exchange between yourself and Mr Seers and the incumbent Disciplinary Hearing that you were strongly opposing. The agreement expressed by Mr Webley was based on the compliance with our internal procedures in regard of a Disciplinary Hearing carried out "in absence". As this would have not caused a breach of procedures di per se, Mr Webley did not deem appropriate to stop the proceedings and agreed for the hearing to go ahead. This was confirmed to me by Mr Webley during our meeting in regard of this grievance.**

75. Mr Brusa's thinking on this point is set out in his letter and he expanded upon it in evidence at the Tribunal. He thought it highly inappropriate for the Claimant to make a serious allegation against the Garage Manager on such a flimsy (our word not his) basis.

76. As far sick pay was concerned, Mr Brusa was satisfied the reason for this not being paid was the Claimant's failure to provide a self certificate or fit note for the relevant periods. Mr Brusa's decision was to award the Claimant sick pay from 22 September 2017, on the basis he was satisfied the fit note covering this later period was presented to the Respondent in a timely fashion.

77. The Claimant's grievance had included a complaint about the volume of correspondence sent by Mr Seers in the period from 30 August 2017. Mr Brusa's conclusion was that this had been appropriate, consistent with the Respondent's policies and in keeping with the issues which needed to be dealt with then. Mr Brusa was not persuaded that these communications had been intimidating. Nor did he find anything improper in the Claimant having been required to attend a disciplinary hearing. Mr Brusa was concerned the Claimant believed he could tell his managers what do and had a tendency to jump to conclusions. The grievance was not upheld, albeit sick pay from 22 September 2017 was awarded.

78. On 16 November 2017, the Claimant wrote to Ian Dalby to raise an appeal against the grievance outcome. He said he was finalising his letter of appeal. The following day, 17 November 2017, the Claimant wrote to Mr Dalby applying for an extension of time in which to submit his appeal, referring to his disability and current health condition. Attached to this email was a lengthy letter which amounted to a legal argument in support of the Claimant being given more time. It ran to 6 pages and included a number of authorities, which would be familiar to an employment lawyer.

79. Mr Dalby replied on 20 November 2017. He said there appeared to be some confusion, as the Claimant had presented his appeal within the seven-day time limit. There was no requirement for him to submit full grounds within that time.

He also suggested the Claimant might have used his time to better effect if he had worked on the grounds, rather than creating a lengthy legal argument on time. Mr Dalby said he was more than happy for the Claimant to set matters out fully and asked him to focus on doing so in plain language, as he, Mr Dalby, was not a lawyer. The Claimant replied to this letter with his own of 21 November 2017. He adopted the format of inserting comments into the digital version of Mr Dalby's letter. These comments were far longer than the original letter and amounted to a detailed critique.

80. On 22 November 2017, the Claimant attended a further sickness interview with Mr Wright. He was still in pain and his arthritis was affecting a number of joints. There had been a degree of progression. He had received a steroid injection into his right knee and the same procedure would take place with respect to the left. He continued to be signed off work unfit by his GP and was unsure when a return to work might take place. Mr Wright again explained that long-term absence due to ill-health could not be sustained indefinitely and the Claimant's employment may put at risk. On this occasion Mr Wright also decided to refer the Claimant to occupational health for an assessment.

81. By an email of 30 November 2017 the Claimant provided further grounds in support of his appeal against the grievance decision. This included a document dated 28 November 2017 setting out his grounds of appeal. This was a substantial piece of work. It ran to 45 pages. Notwithstanding Mr Wright's request for plain language, the Claimant cited numerous employment law provisions or principles and relevant authorities. He also wished to rely upon his documentary representations rather than attend a hearing.

82. In response on 1 December 2017, Mr Dalby wrote inviting the Claimant to an appeal hearing. He asked the Claimant to attend a meet with him face-to-face, suggesting:

> **Having read the contents of your email, I need to point out to you that this is not an Employment Tribunal at which submissions are made, but the purpose of this meeting is to understand what has happened, and what it is that you are looking for in order for me to bring this matter to a satisfactory conclusion. This is the reason why I would like you and me to meet face to face.**
>
> **I have therefore arranged a further meeting to take place at the above address on Wednesday 20th December at 09:00 hours. If the location is not suitable, I can arrange to chair this meeting at Cricklewood Bus Garage, as I understand you have recently visited this location for a sickness review meeting. However please indicate your preference, otherwise I will assume you are happy for the meeting to take place at Willesden Bus Garage.**
>
> **Should you fail to arrive for this meeting, you will me no alternative but to continue this meeting in your absence and I will make my decision accordingly with the information I have available from your previous meeting with Mr Brusa.**

83. On 7 December 2017, the Claimant attended another sickness interview with Mr Wright. He said he was still the same and there had been no progression. There were now side-effects from the steroid injection including clicking and instability.

The Claimant had further clinical appointment on 19 December 2017 for an arthritic assessment. He continued to be signed off work and did not know when a return to work would take place. Mr Wright advised that if the outcome of the occupational health assessment indicated a prolonged period of absence then he might convene a Formal Medical Capability Hearing to assess the Claimant's capability and if he concluded the Claimant was unable to carry out his role for the foreseeable future then a possible outcome was the termination of his employment.

84. The Claimant wrote to Mr Dalby on 18 December 2017, saying he would attend the grievance appeal meeting on 20 December 2017. He also made further representations on the appeal in writing. This included a chronology and record of absence.

85. The Claimant attended the grievance appeal hearing on 20 December 2017. The main area of discussion was about sick pay and certification, along with what the Respondent's procedures required. Another area developed concerned what allowances or adjustments the Respondent made for disabled employees. Mr Dalby said there was a need for flexibility in the application of policies. Mr Dalby adjourned to consider his decision, which he explained would take a number of weeks.

86. On 3 January 2018, the Claimant attended another sickness interview with Mr Wright. The Claimant reported not having a gout attack for 20 days. He went on to say, he had declined the planned operation on his left knee on the basis his right did not improve following the same procedure at an earlier time. He had a further specialist appointment scheduled for 12 January 2018. The Claimant said there had been a significant improvement in his condition. He was in less pain and his level of movement had increased. Notwithstanding a more positive picture, in part at least, the Claimant did not foresee a return to work in a driving capacity. He did think he could do alternative light work, non-driving duties.

87. Given the increasing appearance of it being unlikely the Claimant would return to driving, Mr Wright issued a light duties request. This form included information about the Claimant's qualifications and previous experience. A response was required from the Respondent's various garages. This was sent by email on 3 January 2018. Responses, mostly by email, were included in the bundle for the Tribunal hearing. The Claimant suggested these were not genuine because a number had been received very quickly (within a few minutes) after the request was sent. We were not, however, persuaded this was a fabricated exercise. The simple explanation for prompt replies (all of which were negative) is that the relevant managers had no vacancies and it was a simple matter to reply straightaway, saying this. The Respondent's need, to which we will return later, was for drivers.

88. Shortly thereafter, Mr Wright received the occupational health report prepared following the Claimant having attended an assessment on 27 December 2017. This did not provide a positive prognosis for the Claimant returning to his duties as a bus driver. He was, however, fit for light duties. Somewhat surprisingly, the report included that as the Claimant's condition had not lasted for 12 months and was unlikely to, it was probable he was not a disabled person within the meaning of the Act. This last point was, clearly, based on a misunderstanding about when

the Claimant's impairment had begun. The Claimant had also explained rather more about the activities he engaged in than were reflected in the report. The Claimant did not, otherwise, dissent from what was set out or the opinion expressed and we accept this as accurate.

89. On 10 January 2018, Mr Wright met with the Claimant for another sickness interview. The Claimant had not suffered a further attack of gout. He also explained that he had another medical appointment due on 12 January 2018, in connection with his arthritis. They discussed the recent occupational health report. The Claimant told Mr Wright that he had informed the doctor about more activities than were reflected in the report. They also touched upon the recommendation with respect to exercise.

90. By letter of 11 January 2018, Mr Dalby informed the Claimant of his decision on the grievance appeal. Insofar as material, he found that whilst Mr Seers had acted within the Respondent's procedure when he required the Claimant to attend a disciplinary hearing, with just over 48 hours notice, in his view adopting a more flexible approach and allowing the Claimant more time might have improved his engagement in this process, which was intended to be a corrective. As far as sick pay was concerned, Mr Dalby did not support this being paid for the first short absence in August 2017, as the Claimant did not provide a self certificate until a point more than six weeks after the event, which he considered to be an unreasonable delay. Mr Dalby was, however, prepared to exercise his discretion to allow sick pay for the period from 1 September 2017, provided the Claimant did then send the required fit notes to the Garage Manager, Mr Webley. We note, the Claimant never did send copies of these fit notes to Mr Webley. This was a most surprising course of action, since it seemed to prolong the dispute, unnecessarily. When asked by the Tribunal why he had not simply sent copies, the Claimant said he had made a mistake. In his decision, Mr Dalby also said he had given advice to Mr Seers in connection with several matters the Claimant had complained about. In substance, Mr Dalby made significant findings in the Claimant's favour, in connection with his grievance. He did also go on to emphasise to the Claimant the benefits of meeting with his employer face-to-face (i.e. talking to Mr Seers rather than corresponding with him).

91. On 16 January 2018, Mr Wright issued a further request for light duties, in like terms as the form previously sent out. Once again, there were a number of very prompt replies. Unfortunately, none of these were positive.

92. Mr Wright decided to convene a medical capability hearing. The Claimant was invited to attend this by a letter of 16 January 2017. Mr Wright reminded the Claimant of his right to be accompanied and enclosed a copy of the Respondent's sickness procedure:

> **This hearing is being arranged to consider your capability in- light of your arthritis, which has caused you to be off work for a considerable period. This is considered to be part of Metroline's formal procedure and therefore could result in action being taken against you. If you are unable to undertake the job for which you are employed (and if there is no other suitable work that you can do), your employment with Metroline may be terminated with notice, on the grounds of capability due to ill health.**

93. On 23 of January 2018, the Claimant's GP issued a fit note for three months stating the Claimant was unfit for work because of "Back pain, left ankle and right knee pain". The GP did not say the Claimant was fit for work with adjustments or make any recommendations in that regard.

94. On 24 January 2018, the Claimant wrote Mr Wright asking him to reschedule the capability hearing and identified a colleague by whom he wished to be accompanied. Mr Wright responded following day, saying it shouldn't be an issue to rearrange the hearing and asking where the colleague worked, so Mr Wright might make arrangements with his manager for that person to be released.

95. The Claimant attended the capability meeting on 26 January 2018. He was not accompanied at that point. There was a discussion of the Claimant's health and the factors preventing him from returning to his duties. Claimant explained he had been suffering with arthritis for many years and had experienced a great deal of pain whilst driving. He had a further appointment with the medical specialist arranged for 31 January 2018. Asked if he foresaw a return to work in a driving capacity, the Claimant replied:

> **I don't think so, it would be harmful to my right knee joints and my left ankle. From 2012 it has deteriorated. I am trying not to further increase the damage. I can't cycle but I can swim.**

96. Mr Wright asked the Claimant how he was coping mentally, to which the Claimant responded:

> **Depressing I cannot lie to you. It's not something that you wish to be with. I cannot do things normal people do, just things like getting down the stairs is difficult.**

97. Mr Wright decided not to make a final decision, instead to adjourn the hearing to allow the Claimant to meet with his specialist.

98. On 8 February 2018, the Claimant wrote to Mr Wright explaining the current position medically and inviting a final decision be made in his absence. The Claimant provided a leaflet about knee replacement surgery and a recent report from Mr Bartlett, consultant orthopaedic surgeon. This did not anticipate any improvement, without surgery. The Claimant had explained during this consultation that he considered the surgical option to be a "last resort". Mr Wright replied to this inviting the Claimant to attend a resumed meeting in person, so that a fully informed decision might be made. The Claimant further replied to that, querying the extent to which it was necessary for any further matter to be clarified.

99. The capability hearing resumed on 15 February 2018. On this occasion the Claimant had a trade union representative with him. Asked about his recent medical appointment, the Claimant said there was "nothing new" and this was for a routine x-ray. Mr Wright said his understanding was the Claimant had decided to seek knee replacement surgery and he was on the waiting list. The Claimant didn't know how long the waiting list was. Mr Wright said his understanding (drawn from the materials he had received) was that the recovery period from such procedure was 4 to 6 months and the Claimant agreed with this. The

Claimant had no further medical appointments lined up. Mr Wright adjourned to consider his decision. When he came back he advised the Claimant that he had decided to give him notice of termination on grounds of capability. Mr Wright explained his thinking and this culminated in a conclusion there was no return to work date likely in the foreseeable future.

100. Mr Wright wrote to the Claimant to confirm his decision the same day. His reasoning included:

> **As part of this long term sickness process, you visited Occupational Health 27th December 2017 for a management sickness referral. The outcome of this referral indicates that there are lots of scope for improvement in relation to your condition however the timescales of recovery are partly dependent on condition and ability to engage with an energetic mobilization programme. Having engaged with a more active lifestyle since this referral, this has unfortunately not been enough to improve your condition to a point whereby a return to work in the foreseeable future can be mapped. As part of this referral, Dr Kahtan had recommended that you could perform light duties with immediate effect. In light of this recommendation I have enquired of any light, alternative, non-driving duties on two occasions that may be available across the business for you to undertake whilst still trying to recover however all responses received on both occasions were negative.**
>
> **With this in mind i would have to take the view' that you are not fit to return in any reasonable timeframe although I do understand that you want to return your body will not let you return. We have discussed that long term sickness cannot -be sustained indefinitely and that I had given you extra time due to your condition however there-is no sign of any improvement moving forwards and this will certainly be the case until you have undergone and recovered from surgery. You must understand as mentioned at previous reviews that long term sickness cannot be sustained and may put your employment at risk. Having tried everything I can to get you back to work in some capacity in a reasonable timeframe, I can confirm that I have exhausted all the options that 1 can.**
>
> **We discussed your capability fully at the hearing and I have taken all your concerns, and the medical information available, into account. However, as you do not have a date within the foreseeable future when you would be able to resume your contractual role, and there is no suitable alternative, after careful consideration, I have decided to dismiss you by reason of capability due to ill-health. This is in accordance with the Company's Managing Sickness Policy.**

101. Although advised of his right to appeal, the Claimant did not exercise this.

102. Since dismissal, the Claimant has lost a great deal of weight and has sought to be proactive in improving the position with respect to his arthritis. By July 2021 he felt well enough to apply for another driving job, although he was unsuccessful in this.

Law

Unfair Dismissal

103. In order to find the reason for dismissal, it is necessary to look into the mind of the decision maker. The reason for dismissal is "a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee"; see **Abernethy v Mott [1974] ICR 323 CA**.

104. Pursuant to section 98(1)(a) of **the Employment Rights Act 1996** ("ERA"), it is for the respondent to show that the reason for the Claimant's dismissal was potentially fair and fell within section 98(1)(b).

105. If the reason for dismissal falls within section 98(1)(b), neither party has the burden of proving fairness or unfairness within section 98(4) of ERA.

106. ERA section 98(4) provides:

> **In any case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair having regard to the reason shown by the employer -**
>
> > **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee, and**
> >
> > **(b) shall be determined in accordance with equity and the substantial merits of the case.**

107. In a case where the employee is incapable of doing their job by reason of ill health, the basic question to be answered when looking at the fairness of the dismissal is, in all the circumstances, whether the employer can be expected to wait any longer before dismissing and if so, how long; **see Spencer v Paragon Wallpapers [1976] IRLR 373 EAT**.

108. The employer will be expected to consult the employee about their ill health, the effect this has on their ability to do their job, how this might change in the future and any alternative role the individual might undertake instead; see **East Lindsey District Council v Daubney [1977] IRLR 181 EAT**.

109. Factors which may be relevant to incapability cases may include:

109.1 whether steps were taken to clarify the nature of the employee's ill health, the prognosis and prospects for a return to work;

109.2 whether support could be provided which would assist with a return to work;

109.3 the effect the employee's absence has on other employees in the business, the needs and resources of the employer;

109.4 whether there was any suitable alternative employment.

110. The function of the employment tribunal is to review the reasonableness of the employer's decision and not to substitute its own view. The question for the employment tribunal is whether the decision to dismiss fell within the band of reasonable responses, which is to say that a reasonable employer may have considered it sufficient to justify dismissal.

Direct Discrimination

111. In the employment field and so far as material, section 39 of **the Equality Act 2010** ("EqA") provides:

> **(2) An employer (A) must not discriminate against an employee of A's (B) -**
>
> **(a) as to B's terms of employment;**
>
> **(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;**
>
> **(c) by dismissing B;**
>
> **(d) by subjecting B to any other detriment.**

112. As to the meaning of any other detriment, the employee must establish that by reason of the act or acts complained of a reasonable worker might take the view that they had thereby been disadvantaged in the circumstances in which they had thereafter to work. An unjustified sense of grievance cannot amount to a detriment for these purposes; see **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL**.

113. EqA section 13(1) provides:

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

114. The Tribunal must consider whether:

114.1 the claimant received less favourable treatment;

114.2 if so, whether that was because of a protected characteristic.

115. The question of whether there was less favourable treatment is answered by comparing the way in which the claimant was treated with the way in which others have been treated, or would have been treated. This exercise may involve looking at the treatment of a real comparator, or how a hypothetical comparator is likely to have been treated. In making this comparison we must be sure to compare like with like and particular to apply EqA section 23(1), which provides:

> **(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.**

116. Evidence of the treatment of an actual comparator who is not close enough to satisfy the statutory definition may nonetheless by of assistance since it may help to inform a finding of how a hypothetical comparator would have been treated.

117. As to whether any less favourable treatment was because of the claimant's protected characteristic:

    117.1 direct evidence of discrimination is rare and it will frequently be necessary for employment tribunals to draw inferences from the primary facts;

    117.2 if we are satisfied that the claimant's protected characteristic was one of the reasons for the treatment complained of, it will be sufficient if that reason had a significant influence on the outcome, it need not be the sole or principal reason;

118. In the absence of a real comparator and as an alternative to constructing a hypothetical comparator, in an appropriate case is may be sufficient to answer the "reason why" question - why did the claimant receive the treatment complained of.

119. The definition in EqA section 13 makes no reference to the protected characteristic of any particular person, and discrimination may occur when A is discriminated against because of a protected characteristic that A does not possess; this is sometimes known as 'discrimination by association'.

120. The burden of proof is addressed in EqA section 136, which so far as material provides:

> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision occurred.**

121. When considering whether the claimant has satisfied the initial burden of proving facts from which a Tribunal might find discrimination, the Tribunal must consider the entirety of the evidence, whether adduced by the claimant or respondent; **see Laing v Manchester City Council [2006] IRLR 748 EAT**.

122. Furthermore, a simple difference in treatment as between the claimant and his comparators and a difference in protected characteristic will not suffice to shift the burden; see **Madarassy v Nomura [2007] IRLR 246 CA**.

123. The burden of proof provisions will add little in a case where the ET can make clear findings of a fact as to why an act or omission was done or not; see **Martin v Devonshires Solicitors [2011] IRLR 352 EAT**, per Underhill P:

> **39. This submission betrays a misconception which has become all too common about the role of the burden of proof provisions in discrimination cases. Those provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination generally, that is, facts about the respondent's motivation**

> **(in the sense defined above) because of the notorious difficulty of knowing what goes on inside someone else's head "the devil himself knoweth not the mind of man" (per Brian CJ, YB 17 Ed IV f.1, pl. 2). But they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law […]**

Discrimination Arising

124. Insofar as material, EqA section 15 provides:

> **(1) A person (A) discriminates against a disabled person (B) if—**
>
> > **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
> >
> > **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**

125. The causal connection between treatment and disability was considered in **Pnaiser v NHS England, Coventry City Council [2016] IRLR 170**, per Simler J:

> **31. In the course of submissions I was referred by counsel to a number of authorities including IPC Media Ltd v Millar [2013] IRLR 707 , Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN and Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893 , as indicating the proper approach to determining section15 claims. There was substantial common ground between the parties. From these authorities, the proper approach can be summarised as follows:**
>
> > **(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.**
> >
> > **(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.**
> >
> > **(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive**

> **in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572 . A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).**
>
> **(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15 , namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.**
>
> **(e) For example, in Land Registry v Houghton UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.**
>
> **(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.**
>
> **[…]**

126. Justification involves two stages: firstly, the identification of a legitimate aim and then secondly, a consideration of whether proportionate means were adopted in its pursuit.

127. Proportionality requires, a balance between the discriminatory effect of the treatment on the claimant on the one hand, as against the reasonable needs of the business on the other. Relevant to striking that balance will be a consideration of:

127.1 the nature and extent of the discriminatory impact upon the claimant;

127.2 the more serious the impact, the more cogent must be the justification;

127.3 whether the employer's aim could have been achieved less discriminatory means.

Indirect Discrimination

128. Insofar as material, EqA section 19 provides:

> **19 Indirect discrimination**
>
> **(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**
>
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—**
>
> > **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
> >
> > **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
> >
> > **(c) it puts, or would put, B at that disadvantage, and**
> >
> > **(d) A cannot show it to be a proportionate means of achieving a legitimate aim.**

129. The conventional approach to establishing, for the purposes of section 19(2)(b), whether those who share the claimant's protected characteristic were at a particular disadvantage compared with those who do not share that characteristic, is to identify a relevant pool of employees, or potential employees, and to look for evidence of disparate impact as between those who do or do not have the particular characteristic.

130. As to identifying the correct pool for comparison, see the observations of Potter LJ in **London Underground v Edwards (No.2) [1998] IRLR 364 CA**: is

> **24. […] The identity of the appropriate pool will depend upon identifying that sector of the relevant workforce which is affected or potentially affected by the application of the particular requirement or condition in question and the context or circumstances in which it is sought to be applied. In this case, the pool was all those members of the LU workforce, namely train operators, to whom the new rostering arrangements were to be applied (see paragraph 3 above). It did not include all LU employees. Nor did the pool extend to include the wider field of potential new applicants to LU for a job as a train operator. That is because the discrimination complained of was the requirement for *existing* employees to enter into a new contract embodying the rostering arrangement; it was not a complaint brought by an applicant from outside complaining about the terms of the job applied for. […]**

131. In **Rutherford v Secretary of State for Trade and Industry (No.2) [2006] IRLR 551** the correct pool for comparison was held to be the national workforce over 65, in connection with an indirect dissemination claim arising from the prohibition then in place on unfair dismissal claims being brought by those who were over

that age. Per Lady Hale, discounting the argument that the pool ought to have been those aged 16 to 79, or those aged 55 to 74:

> **82. The common feature is that all these people are in the pool who want the benefit – or not to suffer the disadvantage – and they are differentially affected by a criterion applicable to that benefit or disadvantage. Indirect discrimination cannot be shown by bringing into the equation people who have no interest in the advantage or disadvantage in question. If it were, one might well wish to ask whether the fact that they were not interested was itself the product of direct or indirect discrimination in the past.**

132. EqA section 19(2)(d) affords a defence to what would otherwise be discrimination, in that it permits the employer to justify measures which have a discriminatory affect. Once disadvantage has been shown, the employer has the burden of making out that defence.

133. The ECJ in **Bilka-Kaufhaus GmbH v Weber von Hartz [1986] IRLR 317** addressed the question of objective justification for a pay policy which adversely affected part-time workers:

> **45 […]**
>
> **2. Under Article 119 a department store company may justify the adoption of a pay policy excluding part-time workers, irrespective of their sex, from its occupational pension scheme on the ground that it seeks to employ as few part-time workers as possible, where it is found that the means chosen for achieving that objective correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end.**

134. The Court of Appeal in **R (Elias) v Secretary of State for Defence [2006] IRLR 934 CA** at paragraph 151, adopted the same formulation; per Mummery LJ:

> **151.[…] As held by the Court of Justice in Bilka Kaufhaus GmbH v Weber von Hartz [1986] IRLR 317 at paragraphs 36 and 37 the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group. It is not sufficient that the Secretary of State could reasonably consider the means chosen as suitable for attaining the aim.**

135. Accordingly, when considering whether the employer has shown that which is required to justify an otherwise discriminatory measure pursuant to EqA section 19(2)(d), the following must be established:

135.1 the measure corresponds to a real need on the part of the employer;

135.2 the measure is appropriate with a view to achieving the employer's objective;

135.3 the measure is necessary to that end.

136. Per Balcombe LJ in **Hampson v Department of Education and Science [198] ICR 179 CA**. justification in this context requires an objective balance to be stuck:

> **34. However, I do derive considerable assistance from the judgment of Lord Justice Stephenson. At p.423 he referred to:**
>
> > **'... the comments, which I regard as sound, made by Lord McDonald, giving the judgment of the Employment Appeal Tribunal in Scotland in the cases of Singh v Rowntree MacKintosh Ltd [1979] IRLR 199 upon the judgment of the Appeal Tribunal given by Phillips J in Steel v Union of Post Office Workers [1977] IRLR 288 to which my Lords have referred.**
> >
> > **What Phillips J there said is valuable as rejecting justification by convenience and requiring the party applying the discriminatory condition to prove it to be justifiable in all the circumstances on balancing its discriminatory effect against the discriminator's need for it. But that need is what is reasonably needed by the party who applies the condition; ...'**
>
> **In my judgment 'justifiable' requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition.**

137. The required balancing exercise will include a consideration of:

137.1 the nature and extent of the discriminatory impact of the PCP;

137.2 the more serious the impact, the more cogent must be the justification;

137.3 the reasonable needs of the business;

137.4 whether the employer's aim could have been achieved less discriminatory means.

138. The meaning of 'necessary' in this context was considered by the Court of Appeal in **Hardys and Hansons plc v Lax [2005] IRLR 727**, per Pill LJ:

> **32. Section 1(2)(b)(ii) requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (Barry) and I accept that the word 'necessary 'used in Bilka is to be qualified by the word 'reasonably'. That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably 'reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants 'submission (apparently accepted by the EAT) that, when**

> **reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.**
>
> **33. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in Allonby and in Cadman, a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal. In considering whether the employment tribunal has adequately performed its duty, appellate courts must keep in mind, as did this court in Allonby and in Cadman, the respect due to the conclusions of the fact finding tribunal and the importance of not overturning a sound decision because there are imperfections in presentation. Equally, the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification.**

139. The employer seeking to establish justification should produce cogent evidence in that regard rather than merely making assertions. Note, however, the observations of Elias P in **Homer v Chief Constable of West Yorkshire Police [2009] IRLR 262 EAT**:

> **48. We also have reservations about other aspects of this part of the decision. We think there is force in the appellant's submission that it is unjustified to put any real weight on the fact that there is no evidence in the short period subsequent to the changes having been made to demonstrate an improvement in the quality of recruits. An employer might be reasonably justified in making changes which he genuinely and on proper grounds considers will improve the standard of his workforce and these may well be capable of justification, notwithstanding that with the benefit of hindsight the improvements which he reasonably anticipated were not realised. It is an error to think that concrete evidence is always necessary to establish justification, and the ACAS guidance should not be read in that way. Justification may be established in an appropriate case by reasoned and rational judgment. What is impermissible is a justification based simply on subjective impression or stereotyped assumptions. Moreover, the timescale is in any case too short to reach any satisfactory conclusion on the point.**

140. Justification needs to be shown at the time when the measure was applied to the employee; **Cross v British Airways plc [2005] IRLR 423 EAT**.

Reasonable Adjustments

141. EqA sections 20 and 21 provide, so far as material:

> **20 Duty to make adjustments**
>
> **[…]**

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

142. Pursuant to EqA schedule 8, paragraph 20(1)(b), a person is not subject to the duty to make reasonable adjustments if they neither knew nor could have been reasonably expected to have know of the claimant's disability and that they were likely to be placed at a disadvantage by the relevant provision, criterion or practice ("PCP"):

> **20 Lack of knowledge of disability, etc.**
>
> **(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—**
>
> **[…]**
>
> **(b) [in any case referred to in Part 2 of this Schedule]1 , that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.**

143. The Equality and Human Rights Commission ("EHRC") EqA Code of Practice identifies factors which may be relevant to the reasonableness of a proposed step:

> **6.28 The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:**
>
> **• whether taking any particular steps would be effective in preventing the substantial disadvantage;**
>
> **• the practicability of the step;**
>
> **• the financial and other costs of making the adjustment and the extent of any disruption caused;**
>
> **• the extent of the employer's financial or other resources;**
>
> **• the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and**
>
> **• the type and size of the employer.**

144. Pursuant to the decision in **Secretary of State for Work and Pensions v Wilson [2009] UKEAT/0289/09** the Employment Tribunal must have regard to:

144.1 the extent to which it would be practicable for the employer to take the steps proposed;

144.2 the feasibility of the steps proposed.

145. When considering the reasonableness of an adjustment the practical effect, objectively assessed is key; see **Royal Bank of Scotland v Ashton [2011] ICR 632 EAT**, per Langstaff J:

> **24 Thus, so far as reasonable adjustment is concerned, the focus of the tribunal is, and both advocates before us agree, an objective one. The focus is upon the practical result of the measures which can be taken. It is not - and it is an error - for the focus to be upon the process of reasoning by which a possible adjustment was considered. As the cases indicate, and as a careful reading of the statute would show, it is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment. It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons.**

146. A claimant does not, however, need to go so far as to show a 'good' or 'real' prospect, it is sufficient if there is 'a' prospect the disadvantage will be removed or reduced; see **Leeds Teaching Hospital NHS Trust v Foster [2011] UKEAT/0552/10/JOJ**, per Keith J:

> **[17] In fact, there was no need for the tribunal to go as far as to find that there would have been a good or real prospect of Mr Foster being redeployed if he had been on the redeployment register between January and June 2008. It would have been sufficient for the tribunal to find that there would have been just a prospect of that. That is the effect of what the Employment Appeal Tribunal (Judge McMullen QC presiding) held in Cumbria Probation Board v Collingwood (UKEAT/0079/08/JOJ) at 50. That is not inconsistent with what the Employment Appeal Tribunal (Judge Peter Clark presiding) had previously said in Romec Ltd v Rudham (UKEAT/0069/07/DA) at 39. The Employment Appeal Tribunal was saying that if there was a real prospect of an adjustment removing the disabled employee's disadvantage, that would be sufficient to make the adjustment a reasonable one, but the Employment Appeal Tribunal was not saying that a prospect less than a real prospect would not be sufficient to make the adjustment a reasonable one. When those propositions were put to Mr Boyd, he did not disagree with them.**

<u>Harassment</u>

147. Insofar as material, EqA section 26 provides:

> **(1) A person (A) harasses another (B) if—**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of—**
>
> **(i)violating B's dignity, or**
>
> **(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **[…]**

> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
>
> **(a)the perception of B;**
>
> **(b)the other circumstances of the case;**
>
> **(c)whether it is reasonable for the conduct to have that effect.**

148. Whilst the unwanted conduct need not be done 'on the grounds of' or 'because of", in the sense of being causally linked to, a protected characteristic in order to amount to harassment, the need for that conduct be 'related to' the protected characteristic does require a "connection or association" with that; see **Regina (Equal Opportunities Commission) v Secretary of State for Trade and Industry [2007] ICR 1234 QBD**. Notwithstanding it was decided under the prior legislation including the formulation "on the grounds of", the observations made by by the EAT in **Nazir v Asim [2010] ICR 1225** may still be of some relevance:

> **69 We wish to emphasise this last question. The provisions to which we have referred find their place in legislation concerned with equality. It is not the purpose of such legislation to address all forms of bullying or anti-social behaviour in the workplace. The legislation therefore does not prohibit all harassment, still less every argument or dispute in the workplace; it is concerned only with harassment which is related to a characteristic protected by equality law—such as a person's race and gender.**

149. The EAT further considered the relevant causal test **in Bakkali v Greater Manchester Buses (South) Ltd t/a Stage Coach Manchester: UKEAT/0176/17/RN**; per Slade J:

> **31. […] Conduct can be "related to" a relevant characteristic even if it is not "because of" that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, "related to" such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader enquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. […] "the mental processes" of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the Claimant […] However such evidence from the alleged perpetrator is not essential to the determination of the issue. A tribunal will determine the complaint on the material before it including evidence of the context in which the conduct complained of took place.**

150. In relation to the proscribed effect, although C's perception must be taken into account, the test is not a subjective one satisfied merely because C thinks it is. The ET must reach a conclusion that the found conduct reasonably brought about the effect; see **Richmond Pharmacology v Dhaliwal [2009] IRLR 336 EAT**.

151. Guidance on the threshold for conduct satisfying the statutory definition was given by the EAT in **Betsi Cadwaladr University Health Board v Hughes [2014] 2 WLUK 991**; per Langstaff P:

> **10. Next, it was pointed out by Elias LJ in the case of Grant v HM Land Registry [2011] EWCA Civ 769 that the words "violating dignity", "intimidating, hostile, degrading, humiliating, offensive" are significant words. As he said:**
>
> > **"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."**
>
> **11. Exactly the same point was made by Underhill P in Richmond Pharmacology at paragraph 22:**
>
> > **"..not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."**
>
> **12. We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.**

Victimisation

152. So far as material, EqA section 27 provides:

> **Victimisation**
>
> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because—**
>
> > **(a) B does a protected act, or**
> >
> > **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act—**
>
> > **(a) bringing proceedings under this Act;**
> >
> > **(b) giving evidence or information in connection with proceedings under this Act;**

> **(c) doing any other thing for the purposes of or in connection with this Act;**
>
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**

Unlawful Deductions

153. So far as material, section 13 of the **Employment Rights Act 1996** ("ERA") provides:

> **13 Right not to suffer unauthorised deductions.**
>
> **(1) An employer shall not make a deduction from wages of a worker employed by him unless—**
>
> **(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or**
>
> **(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.**
>
> **(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—**
>
> **(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or**
>
> **(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.**
>
> **(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.**

Conclusion

Disability

154. The Respondent admits the Claimant was a disabled person at material times by reason of the physical impairment of osteoarthritis.

155. As far as depression is concerned, we find the Claimant had some days during the material period when he was reluctant to go outside and interact with others. We do not believe he was unable to do these things but rather he preferred not to, when he was feeling low. This was an understandable reaction to adverse life events. These periods were intermittent and coincided with the exacerbation of

his physical symptoms or his perception of workplace injustice. The symptoms were not such that he required or sought any medical assistance. Whilst the bar for substantial adverse effect is not a high one, the consequences the Claimant described do not satisfy this. Given our conclusion the adverse effect was minor, it is unnecessary to consider whether it was long-term. The Claimant was not a disabled person by reason of depression.

Direct Discrimination

156. The Claimant did not present sick notes for the period from 30 August 2017, when he was off work. As a result, this period was recorded as unauthorised absence. The Claimant did not receive the sick pay he would have, if fit notes had been submitted by him in a timely fashion.

157. The detriment of not paying sick pay at the time complained of was done. This was not, to any extent whatsoever, because of the Claimant's disability or age. If a non-disabled or younger comparator had failed to provide GP fit notes for a period they took off work, whilst saying they were sick, they would have been dealt with in the same way, their absence would have been recorded as unauthorised and they would not have been paid. The Claimant says comparators were paid for the entirety of their sick leave. There is no evidence before us that any such comparator did as the Claimant did, which is to say fail to submit fit notes when they were due.

158. Far from Mr Seers dealing with the Claimant in this way because he was a disabled person, on the contrary, is all too clear that Mr Seers doubted the Claimant's health was the reason for him not attending for work. He would have approached a non-disabled or younger bus driver in the same way, if that person was taking time off work, saying they were ill but not providing the evidence.

159. Mr Seers referred the Claimant to a disciplinary hearing because he had not received the fit notes, nor any other medical evidence, at the time he made this decision. As with his decision to record the absence as unauthorised in the first place, this had nothing to do with the Claimant being disabled person or age. On the contrary, Mr Seers doubted the genuineness of the Claimant's explanation for his absence.

160. The focus during the hearing before us was very much on the question of whether the Claimant was treated as he complains because of being a disabled person. His claim also includes a complaint about the same treatment as being because of his age. No basis for the non-payment of sick pay being connected with age was advanced. For the reasons already given, however, we are satisfied the way in which Mr Seers recorded the Claimant's absence and the resulting non-payment of sick pay, had nothing whatsoever to do with age. The same is true of the decision to refer him to a disciplinary.

161. As a result of Mr Brusa's grievance decision, the Claimant was awarded sick pay for the period from 22 September 2017. This decision was not arrived at on the basis that Mr Seers had erred in applying the policy, rather Mr Brusa decided to exercise his discretion given the Claimant had by that point, belatedly, provided fit notes and he considered that for the period from 22 September 2017 this was sufficient. As a result of this decision, the Claimant received an element of

backpay in November 2017. During the course of this hearing, however, it became apparent the Claimant did not in fact receive all of the backpay which Mr Brusa's decided he should. The Claimant had not articulated this particular point himself, rather it emerged from questioning of him and an analysis of the documents available. No positive explanation for this discrepancy has been advanced and we find the most likely reason is an administrative error by the Respondent's payroll department. We can see no basis upon which to infer that the Claimant's disability or age had anything to do with it.

162. In the grievance appeal decision, Mr Dalby went further still. He decided, again as an exercise of discretion rather than on the basis that Mr Seers was in error, to award the Claimant sick pay for the period from 30 August 2017. He did, however, require the Claimant to send his fit notes to Mr Seers. Astonishingly, the Claimant did not do this. When asked by the Tribunal why not, the Claimant said this was a mistake. The most likely reason for the pay position not being rectified to reflect Mr Dalby's decision appears to be, the Claimant's failure to send the fit notes to Mr Seers following the grievance appeal outcome.

163. To the extent the second detriment is the Claimant being recorded as having unauthorised absence despite providing medical evidence and sick notes, we have found he did not do this, initially. To that extent, the detriment was not done. If we limit the detriment to simply the record being made, then for the reasons already set out that was not because of the Claimant's disability, it was because he had not then submitted the fit notes or any other medical evidence. These steps to evidence his absence were first taken during the grievance process, when relevant documents were provided by the Claimant to Mr Brusa.

164. In no respect where we satisfied there were facts from which in the absence of an explanation we could have found there was discrimination. On that basis, the burden did not shift the Respondent. In any event, we were satisfied by the explanation given and were able to make findings of fact are set out above. The reason for the treatment complained of was in no sense whatsoever the Claimant's disability or age.

Discrimination Arising

165. The something arising from disability the Claimant relies upon is his absence from work. As set out above, we are satisfied the Claimant's absence from work at this time was genuinely because of an exacerbation in the symptoms of his osteoarthritis. On this basis, his absence from work was something arising from his disability.

166. As far as the failure to pay sick pay is concerned, whilst this was undoubtedly unfavourable treatment, it was not done because of the Claimant's absence from work. The receipt of sick pay can only follow at all in the case of an employee who is absent from work. The reason the Claimant did not receive sick pay, is because he failed to provide fit notes or any other medical evidence in a timely fashion. On this basis, the non-payment of sick pay was not because of something arising from the Claimant's disability. The same is true with respect to the position arrived at on sick pay after the grievance and appeal outcomes. The reasons for the Claimant's sick pay position not being rectified thereafter have

been set out above and are not because of something arising from disability. The Claimant's failure to present fit notes had nothing to do with his disability.

167. We next turn to the various communications from Mr Seers about which the Claimant complains.

168. By email on 30 August 2017 at 10.49 am, Mr Seers replied to the Claimant's request to postpone the disciplinary hearing. He did not agree to put this off for as long as the Claimant had sought. He did, however, put the time back until 2:45 pm, with the result that the meeting would take place more than 48-hour is after the Claimant was first told of the need to attend it. Given this was a minimal accommodation and in substance a refusal of the Claimant's request, we find it amounted to unfavourable treatment. This was not, however, done because of the Claimant's absence from work. The Claimant was not off work at this time. The Claimant had not suggested that he was unwell, or that he would soon begin a period of absence from work because of sickness. Given the unfavourable treatment was not because of something arising from disability, the need for justification does not arise. We would, however, have been satisfied on that point. This was a step taken in pursuit of the following legitimate aim: to ensure that standards of conduct and behaviour are met. The Claimant had been involved in a road traffic accident. The Respondent's policy, agreed with the trade union, was to hold meetings of this sort promptly, to get to the bottom of what happened, to avoid it hanging over an employee, and to issue corrective advice where fault was find for minor accidents. Whilst more time could have been allowed, the Claimant had made almost no case for that, simply saying he wanted time to prepare without saying why 48 hours was insufficient.

169. Mr Seers' letter of 30 August 2017, merely notified the Claimant that his disciplinary hearing would now take place at 2:45 pm. Given a change in time, it was necessary for the Respondent to notify the Claimant of this in a proper way. Whilst the Claimant may, subjectively, have wished not to be invited to such a meeting at all, we are not persuaded that, objectively, notifying the Claimant of this change formally amounted to unfavourable treatment. Furthermore, even if it had been unfavourable, it was not done because the Claimant was absent from work. Once again, this communication was drafted and sent before the Claimant began his period of absence. Had the point require determination, for the same reasons set out for the previous unfavourable treatment, we would have been satisfied this was proportionate and in pursuit of the legitimate aim.

170. Mr Sears' email of 31 August 2017 at 9.47 am, informed the Claimant that his explanation for being absent had not been accepted and his absence would be recorded as unauthorised. This was done in part because of the Claimant's absence from work, which had just begun, albeit the main reason is found in the surrounding circumstances. We find, however, that this communication was a proportionate step taken in pursuit of a legitimate aims, namely: to ensure that standards of conduct and behaviour are met. Whilst we are satisfied the Claimant was genuinely ill at this time, we can see how from the perspective of Mr Seers it would have appeared suspicious. Only at the point of being required to attend a disciplinary, when he was reluctant to do so, did the Claimant become unwell such that he could not attend for work. The Claimant had not provided any fit note. The seemingly convenient timing and lack of corroborative evidence would, understandably, concern Mr Seers. Given Mr Seers did not

accept the explanation for absence, he had decided to proceed with the RTA disciplinary hearing in any event. It was most important that he informed the Claimant of this decision, so the Claimant might decide how to proceed and make an informed decision in that regard. We also note that even if the Claimant were not fit for work, it does not follow he could not attend a disciplinary hearing or receive an email about that.

171. The position on proportionality might have been different if the Claimant were absent from work by reason of a mental health impairment, a doctor had advised it would be harmful for him to receive communications from his employer at this time and the Respondent were aware of that. This was not, however, the circumstance at the time. The need for communication in writing to be avoided was not engaged by the Claimant's disability, which was a physical impairment, namely osteoarthritis. The Claimant not wishing to hear from Mr Seers would not seem to be connected with his protected characteristic of disability.

172. The next communication complained of is Mr Seers' email on 31 August at 2.13 pm. We accept this was unfavourable to the extent Mr Seers disagreed with the Claimant in it. This communication was not, however because of the Claimant's absence from work. This email was in reply to one the Claimant had sent shortly before, in which he set out various contentious points and criticisms of Mr Seers. Mr Seers replied, in modest terms, apologising for having to do so and briefly responding. The Claimant cannot expect a one-sided correspondence, in which he is entitled to write to Mr Seers in strong terms without any opportunity for the latter to reply.

173. Also on 31 August 2017, Mr Seers conducted the disciplinary in the Claimant's absence. Having done this, he decided to issue a written warning. Receipt of this was unfavourable. This decision was not, however, made because of the Claimant's absence from work rather it reflected Mr Seers' view of the circumstances in which this accident occurred, which were not significantly disputed. The Claimant was emerging from the depot and came into collision with a vehicle which was already established on the public road and had priority. Whilst the need for justification does not arise, we are in any event satisfied this was a proportionate step in pursuit of a legitimate aims: to ensure that standards of conduct and behaviour are met. Having made this decision, Mr Seers had to inform the Claimant of it. In cross-examination the Claimant said that Mr Seers should not have informed him of the outcome of this disciplinary hearing. This strikes us as a most unrealistic position.

174. On 4 September 2017, Mr Seers invited to the Claimant to attend an interview on 7 September 2017, following his failure to attend the interview he had been called to on 4 September 2017. Mr Seers also reminded the Claimant of the provision in the Respondent's Handbook obliging attendance when so required by a manager or medical advisor. We are satisfied this was unfavourable, as the Claimant had already said he was not well enough. This was done in part at least because of the Claimant's absence from work, albeit as before the main reason was in the surrounding circumstances. Nonetheless, we are satisfied this was proportionate step. Even on the Claimant's account, he had not by this point submitted a fit note or any other medical evidence to justify his absence. Whilst the circumstances appeared somewhat suspicious, Mr Seers had not accused the Claimant of wrongdoing. Rather, the Claimant had been required to attend a

meeting where this could all be discussed. Such a meeting would provide the Claimant with an opportunity to explain the position. He had by this point obtained a fit note and could have provided it to Mr Seers at such a meeting. The Claimant's preference appears, not just with Mr Seers but also other managers, to be for the litigation of disputes by way of correspondence. The Respondent was not obliged to conduct itself in this way. Not unreasonably, the Respondent wished the line management relationship between the Claimant and Mr Seers to be conducted by way of face-to-face communications, as opposed to extensive correspondence.

175. On 8 September 2017, the Claimant was required to attend a disciplinary hearing. The allegation was unauthorised absence from 30 August 2017 to date. This was unfavourable treatment. It was not, however, because he was absent from work. The cause for concern on the part of the Respondent, was the lack of a fit note or any other medical evidence from the Claimant at this time, to justify his absence from work. The issue here was not absence per se, it was the Claimant's failure to comply with his obligations under the sickness absence policy. Even if this had been because of absence, we would have found this was a proportionate step in pursuit of the aim: to ensure that standards of conduct and behaviour are met. The Claimant was, or should have been, well aware of the reporting obligations. His manager faced with an unauthorised and unevidenced absence, in the case of an employee who was refusing to attend meetings to discuss this but had not provided any medical evidence to show he was unwell, could legitimately address this as a disciplinary matter.

176. As far as the Claimant being recorded as having unauthorised absence, whilst this was unfavourable treatment it was not because of the Claimant's absence from 30 August 2017, rather it was because he had not submitted GP fit notes and complied with the reporting procedure. For similar reasons as set out in connection with the invitation letter, had this been because of absence we would have found it justified. The record made reflected the information the Respondent had at the time.

Indirect Discrimination

177. The Respondent's policy provides for a disciplinary hearing to be arranged at a minimum of 2 calendar days' notice. The policy expressly allows for a longer period to be agreed, where reasonable. This was supported by witness evidence, to the effect that whilst in most cases the hearing would be convened swiftly, where necessary this could be delayed. As such, the PCP formulated by the Claimant was not applied.

178. In case we are wrong about the discretion to extend notice of a disciplinary hearing meaning there was no such PCP, we have gone on to consider the remaining elements of indirect discrimination.

179. That PCP was applied to the Claimant, insofar as he was required to attend a disciplinary hearing within 48 hours. For the purpose of this exercise, we have also assumed such PCP would be applied to others, generally.

180. Our conclusion, is that such PCP would not put persons with the same disability as the Claimant, namely osteoarthritis, at a particular disadvantage. Nor is there

anything to suggest those over 60 would be so disadvantage. The reason for this is that we can see no reason why those with arthritis or those over 60, would be unable to attend a disciplinary hearing on 48-hours notice, in the same way as others.

181. Furthermore we are satisfied the Claimant was not put at a disadvantage. Whilst the Claimant told his employer he wanted more time, this had nothing to do with his arthritis or age, it was because he said he needed more time to prepare for the hearing. In evidence at the Tribunal, the Claimant explained he wished to track down a Black Cab Driver who had witnessed the accident and needed more time for this. Whilst there are doubtful about the Claimant's prospects of being able to find an unnamed taxi driver, it is quite clear this had nothing to do with his disability or age.

Reasonable Adjustments

182. The Respondent did have a policy of requiring the fit notes to presented within strict time limits, as set out in the company handbook. Furthermore, it was expressly provided that non-compliance may result in the loss of sick pay.

183. The Respondent did not have a PCP of "failing to redeploy the Claimant in a role with light duties". A PCP is a rule or practice of general application that was or could be applied to others. This form of words is a complaint about how the Claimant was treated. Nor did the Respondent have a rule or practice against re-deployment, generally. On the contrary, the Managing Sickness policy expressly includes the requirement to consider alternative employment for those on long term sick leave. The consequence of not redeploying the Claimant into a role with light duties was that he was still required to be fit to carry out the duties of his substantive role in order to return to work. The Respondent certainly had a PCP of requiring employees to carry out the duties of their substantive role.

184. The Respondent did not have a PCP of "failing to disregard the Claimant's disability-related absence when applying its sickness policy". Again, this formulation is a complaint about the Claimant's treatment, not a rule or practice of general application. We have looked to see if there is a PCP that is contained within or close to that contended for. The nearest we could find was a PCP of "counting all sickness absence when applying the sickness absence policy". We do not find there was such a policy, as this would presuppose a numerical trigger point that was mechanistically applied. The Respondent's policy was not of that sort. Rather, it provided for a far broader exercise to be conducted, taking into account not merely the length of any absence, but the cause of the same, the prognosis for a return to work and medical evidence. For the sake of completeness we should add that even if there had been a relevant PCP, we could not have made a finding that it was a reasonable step for the Respondent to have to disregard all disability-related absence. This would amount to an obligation to employ, indefinitely, all disabled employees on long-term sick leave for so long as they continued to be unfit for work. The policy of the Equality Act is to assist disabled employees in accessing the workplace and this would not be served by the adjustment contended for. Furthermore, it would create an excessive and unmanageable burden on the employer.

185. The Claimant does not in his claim form contend for a PCP of being given a written warning. He would require an amendment in order to pursue such a claim. We would not grant an amendment application if it were made, as it would not be in the interests of justice to do so. Once again, this formulation does not amount to a PCP, rather it is a complaint about what was done to the Claimant in particular. A PCP of general application would need to be something along the lines of "giving written warnings, where minor misconduct is found". There would be no value to the Claimant in being able to rely upon such a PCP, as there is no reasonable prospect of him being able to show that it placed him at a substantial disadvantage compared with employees without his disability. Suffering with arthritis would not make the Claimant or anyone else, more likely to commit acts of minor misconduct.

186. Accordingly, the PCPs we have found were applied are:

    186.1 requiring fit notes to presented within strict time limits;

    186.2 requiring employees to carry out their duties.

187. We next go on to address whether either PCP place the Claimant at a substantial disadvantage compared to non-disabled employees.

188. The PCP with respect to fit notes did not place the Claimant at a substantial disadvantage. The Claimant was able to attend upon his GP and obtain fit notes in good time. We do not accept he was at any disadvantage in sending these to his employer. He could have done this by post, which in any event he says he did, albeit we're found he was mistaken in this regard. The Claimant could also have sent the fit notes as scanned documents by email, which is something he did on another occasion.

189. As far as being required to carry out his duties is concerned, this did put the Claimant at a substantial disadvantage compared to nondisabled employees. His arthritis meant he was unable to carry out his driving duties. No alternative light duties could be found. Neither the Claimant's representations nor the medical evidence suggested a return to work was likely, save unless he had knee replacement surgery, for which there was a waiting list of uncertain length and this would then followed by a recovery period of 4 to 6 months. In the circumstances, the Claimant was at a disadvantage because his inability to carry out his duties put him at risk of dismissal and he was in due course dismissed.

190. We last turned to whether it was reasonable for the Respondent to have to carry out any of the steps contended for.

191. It would not be reasonable for the Respondent to permit the Claimant to remain off sick without presentation of fit note(s) In a timely manner or at all. This would make the Claimant's long-term sickness absence entirely unmanageable. The Respondent would have no certification from the Claimant's GP with respect to whether or not he was fit for work, the cause of any unfitness or likely duration. In order to manage sickness absence within the business and to support disabled employees, making adjustments where it is reasonable to do so, the Respondent needs accurate and up-to-date information. The adjustment contended for is not a reasonable step.

192. It was not reasonable for the Respondent to have to create a role for the Claimant, which he was capable of doing. We accept the evidence advanced by the Respondent with respect to the search for light duties. Enquiries were made of all the premises where the Claimant might reasonably have worked and there was no need for any such duties to be carried out. The Claimant carried out his own search at the time of the Respondent's vacancies and in the course of this hearing referred the Tribunal to one such position, making the point the Respondent did not prompt him to apply for it. In cross examination, however, he accepted that he did not meet the essential criteria for the role and this was not suitable alternative employment for him. His point appeared to be that because the Respondent did not proactively invite him to apply for it, this cast doubt on the genuineness of the search for alternative employment in his case. We were not persuaded this evidence demonstrated anything of the sort. The fact the Claimant searched amongst the vacancies the Respondent had at the time and could find nothing suitable supports the Respondent's position in these proceedings. We can see no sense nor any grounds for criticism of the Respondent in failing to prompt the Claimant to apply for an unsuitable position. Furthermore, we accepted the evidence given by Mr Wright about the Respondent's need for employees. We were struck in particular by his account of the demand for bus drivers. Commonly, in Employment Tribunal proceedings where there has been TUPE transfer, the transferor or transferee will each seek to distance themselves from the claimants as being their employees. In the present industrial context, where one contractor succeeds another in securing particular routes from TFL, both the new and outgoing contractor will often wish to obtain or retain the existing drivers because they are in such short supply. The numbers of drivers are limited. There is significant cost and expense involved in training new drivers. We accept the evidence given by Mr Wright that the Respondent was keen to retain the Claimant, if it could. The difficulty, however, was that he could no longer drive. The Respondent's need for staff to carry out administrative duties is limited and there was no evidence of any need for additional staff resource at the time of the Claimant's dismissal. We do not find it was reasonable for the Respondent to have to create a role it did not need. The Claimant did not point to and nor is there any evidence of a specific need of this sort. The Claimant merely pointed to others who he said had been accommodated in the past, when they had been unable to drive, such as when recovering from an illness or after an accident. Beyond his thumbnail sketches, we had little evidence in this regard. We very much doubt that the Respondent has created an unneeded role for any employee, let alone on a permanent basis. The fact of other employees being found or successfully applying for alternative roles, whether of short or long duration, at earlier times, tells us nothing about what was available when the Claimant was dismissed, or during the sickness absence management process leading to that point.

193. As for the final adjustment contended for the Respondent to disregard the Claimant's absence and retain him indefinitely, this is not a step it was reasonable for the Respondent to have to take. We repeat the observations set out above in connection with the adjustment contended for of disregarding uncertified sickness absence. The adjustment contended for would require the permanent retention of disabled employees when they were unable to render any service for their employer. This is not consistent with the policy of the act and would represent an unreasonable burden on the Respondent.

Harassment

194. The Respondent did invite the Claimant to attend disciplinary on less than 48 hours notice and later following his complaint, extended that only slightly. That was unwanted conduct by the Claimant. It did not, however, relate in any way to his disability or age. The Respondent was merely applying its policy and seeking to arrange the hearing promptly.

195. The Respondent did not pay sick pay to the Claimant for a period when he was absent. That was unwanted conduct by the Claimant. Once again, it did not relate in anyway to his disability or age. This happened because the Claimant did not provide a self certificate following his absence in August 2017, nor fit notes in a timely fashion for his absence from 30 August 2017. His failures in this aspect were not themselves caused by his disability or age.

196. The Respondent contacted the Claimant when he was off work sick. This is a complaint about the communications referred to above that he received from Mr Seers in the period 30 August to 8 September 2017. None of these communications related in anyway to his disability or age. Furthermore, these communications did not, objectively, have the prescribed effect nor were they sent with that purpose. These were legitimate business communications sent for the reasons we have already discussed and were proportionate.

197. Insofar as the Claimant was warned that continuing absence may result in the termination of his employment on grounds of capability, we accept this was unwanted by him. We also find it related to his disability. This did not, however, have the prescribed effect or purpose. This was a proper warning to give to an employee on long-term sick leave. Part of a fair and proportionate approach to managing long-term absence involves warning the employee of the consequences that may follow if they are unable to return to work. It is important the employee knows where they stand. That the Claimant would, subjectively, prefer not to have been told any of these things does not mean it was improper for the Respondent to have written to him as it did.

Victimisation

198. The Claimant did a protected act by sending his grievance of 7 September 2017, to the extent that he referred to discrimination. It was not necessary for the Claimant to specify a particular protected characteristic. In context his language would appear to be a reference to discrimination under the Equality Act. He refers to Mr Seers committing a “discriminat[ory] act” and says he “discriminated against me”. The Claimant does not appear to be using the word colloquially, rather this reads as a reference to a contravention of his rights not to be discriminated against. He also refers to an Employment Rights Act claim “unlawful deduct[ion]”. The impression given is that he is relying upon both sources for his legal rights. This amounted to the Claimant alleging a contravention of the Equality Act.

199. We do not find the Claimant gave false evidence or made this allegation in bad faith. Either of those conclusions would involve the Claimant knowing or believing that what he alleged was untrue. We find he thought he was justified in

what he wrote. The Claimant is able to adhere to a belief strongly even where there is little or no evidence to support it.

200. We go on to address the various detriments alleged.

201. The Claimant's grievance was not upheld, insofar as this was the case, for the reasons Mr Brusa gave. As we have already set out, much was found in the Claimant's favour. To the extent Mr Brusa did not go with the Claimant, we are satisfied he did so for the reasons in his outcome letter. This had nothing whatsoever to do with the Claimant making a vague passing reference to discrimination in his grievance letter. Mr Brusa worked through the various complaints diligently and at length. He made appropriate enquiries and arrived at reasoned conclusions.

202. Mr Brusa did not label the Claimant's grievance as "treacherous". He used that word to describe an assumption the Claimant had made that the Garage Manager, Mr Webley, was desperate to terminate his employment on the basis of a single line in an email from Mr Seers to the effect he had agreed a disciplinary hearing called should go ahead. Mr Brusa's reaction is understandable one. The Claimant had made an extremely strong allegation on a very flimsy basis. The availability of a grievance procedure is an important protection for employees in the workplace. This should not, however, be misused to make excessive complaints on the basis of no or little evidence, which is what it appears Mr Brusa believed the Claimant had done by accusing Mr Webley in this way. This had nothing to do with the Claimant saying elsewhere in his grievance that he had been discriminated against.

203. As far as the reference in Mr Brusa's decision to the Claimant not overstepping boundaries or giving unsolicited advice is concerned, again this had nothing whatsoever to do with the Claimant using the word discrimination in his grievance. There was tension between the Claimant and his line manager. In correspondence the Claimant, more than once, told Mr Seers what he should do. It appeared to Mr Brusa that the Claimant had difficulty at times accepting management instructions. This is the point which Mr Brusa is referring to. It has nothing to do with any suggestion of discrimination.

204. There was no evidence of the Claimant being told to shut his mouth.

<u>Unauthorised Deductions</u>

205. Company sick pay was a discretionary benefit. As such an employee cannot insist on payment and maintain that any default is a breach of contract or unlawful deduction. The most can be insisted upon is that such discretion is exercised in a rational manner. Rather like the position with a discretionary bonus, however, once the discretion has been exercised, then the entitlement crystallises and if this is not paid, there will be a breach of contract and / or unlawful deduction.

206. In the present case, Mr Brusa exercised the Respondent's discretion with respect to sick pay when he issued his grievance decision. His decision was to award the Claimant pay for the period from 22 September 2017. Unfortunately, due to an administrative error this payment was not correctly processed. Only

part was paid. A balance remained due. The part payment was made in November 2017. This involved the Claimant receiving less than was properly payable. Time for a claim began to run. The Claimant had three months from that point in which to bring a claim. The time might be extended by ACAS conciliation if that were engaged in before the expiry of the primary limitation period. In the present case the Claimant engaged in ACAS conciliation between 8 December 2017 and 8 January 2018. He presented his claim on 14 January 2018. This was in time. His unlawful deductions claim succeeds.

207. Whilst there was a subsequent rational exercise of discretion, by Mr Dalby at the grievance appeal stage, which was more generous and allowed the Claimant to recover sick pay for the entire period from 30 August 2017, this payment was made conditional upon the Claimant sending his fit notes to Mr Seers. This was not an improper condition and certainly not irrational, since it merely required the Claimant to fully comply, albeit belatedly, with the Respondent's procedure. The Claimant did not do what was required. As such his entitlement to this additional payment did not crystallise. His unlawful deductions claim for the period 30 August to 21 September 2017 does not succeed.

Unfair Dismissal

208. The Claimant was dismissed for capability. The Respondent, in the person of Mr Wright, believed that he was not capable of carrying out his duties. This is a potentially fair reason for dismissal. We go on to consider whether it was fair to dismiss the Claimant for this reason, in all the circumstances of the case.

209. The Claimant was absent from work on continuous sick leave from 30 August 2017, through to his dismissal on 15 February 2018. This was 24 weeks. The unchallenged evidence of Mr Wright was that the Respondent in long-term sickness absence cases, generally, looks to dismiss after the 12 week point. In this case a decision was delayed for the reasons Mr Wright explained.

210. The Respondent followed its sickness absence policy. Whilst the Claimant argued that it should have been dealt with otherwise, he did not point to any breach of the Respondent's own procedure.

211. Mr Wright had a number of meetings with the Claimant before he decided to dismiss him. The Claimant had a very full opportunity to explain his health position, his intentions, his belief about the prospects for a return to work and to discuss the medical evidence and occupational health reports.

212. The Claimant was advised several times that if he remained unable to carry out his duties by reason of ill-health then a decision maybe made to terminate his employment. He knew what might happen and was able to make representations about this.

213. One of the Claimant's arguments at this hearing was that his employment ought not to have been terminated because of the Respondent having PHI. When the point was put to Mr Wright in cross examination, he answered that the company had no such insurance policy.

214. As set out above, we are satisfied the Respondent undertook a genuine and thorough search for alternative employment. Unfortunately, none was found.

215. Mr Wright sought and obtained medical evidence. He had benefit of up-to-date Occupational health advice. He also had a report from the Claimant's surgeon. This material all lead to a clear conclusion. The Claimant was most unlikely to see an improvement and return to driving duties, save unless he had knee replacement surgery. The Claimant was reluctant to undergo this procedure, for understandable reasons.

216. Towards the end of the period in which Mr Wright was managing this absence, the Claimant indicated he had decided to go ahead with surgery. This meant he went on to the waiting list. The length of the waiting list was unknown. Following any surgery, the recovery period would be in the order of 4 to 6 months. Only at or near the end of that would it become clear whether not the Claimant had improved, to such extent as would allow him to resume driving duties.

217. For all of these reasons, at the point he decided to dismiss, Mr Wright had reasonable grounds to conclude there was no reasonably foreseeable point at which the Claimant would return to work.

218. Fairness does not require the Respondent to delay a decision indefinitely. Nor to put off a decision for many months or, perhaps, more than a year, to see whether at that point there has been an improvement. The steps taken by Mr Wright had already led to a longer period on sick leave in the Claimant's case than many others.

219. In cross examination the Claimant asked Mr Wright whether there had been cases where a longer period on sick leave had been allowed, so as to avoid dismissal. Mr Wright said there had been some cases where as much as a year have been waited. He went on, however, to explain these were cases where there was an identifiable date for return or the Respondent had good reason to expect this would take place within a reasonable period. Mr Wright gave the example of a case where the employee had recovered from illness and was merely awaiting the return of his driving licence from the DVLA.

220. We are satisfied the decision to dismiss was within the band of reasonable responses, given the steps Mr Wright had taken to ensure sure he was fully informed, the opportunity for the Claimant to make representations, the period of time waited and the lack of a reasonably foreseeable point of returning the Claimant's case.

221. Whilst the dismissal cannot become fair or unfair as a result of subsequent events, we now know the Claimant himself did not consider that he was fit to return to driving until mid 2021, which is to say more than three years after his dismissal.

Time Limits

222. We addressed the question of time limits in connection with the Claimant's unlawful deductions claim. Given his other claims were found not to have merit,

the question of whether the Tribunal had jurisdiction on the basis of time does not arise.

Postscript

223. We should add that our findings do not reflect any concern about the Claimant's performance during his employment by the Respondent. It is quite clear that he was very dedicated to his role and hard working. We are sure that he provided a most valuable service to his employer and the public, travelling on his bus. Nor do we understand the Respondent to dissent from that view.

EJ Maxwell

Date: 8 August 2022

Sent to the parties on:

15 September 2022

For the Tribunal Office:

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