EMPLOYMENT TRIBUNALS

Claimant: Mr C Cornish
Respondent: Govia Thameslink Railway Ltd

Heard at: Croydon - in person**,** by cloud video platform and hybrid
On: 18 to 22 July 2022

Before: Employment Judge Nash
Mr Westwood
Ms Boyce

Representation
Claimant: Mr Toms of Counsel
Respondent: Ms Breslin of Counsel

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS - LIABILITY

The Hearing

1. Following ACAS Early Conciliation from 4 June 2020 to 4 July 2020, the claimant presented his claim to the Tribunal on 3 August 2020. There was a case management hearing by telephone on 13 December 2021 at which a case management order was made.

2. At this hearing the Tribunal heard from the claimant on his own behalf. He swore to both a witness statement and a disability impact statement. From the respondent, the Tribunal heard from the following witnesses who swore to their written witness statements:-

    a. Mr Andy Gardner, the claimant's station manager;
    b. Ms Kate Richards, a station manager, who made the decision to dismiss;
    c. Mr Rob Walker, an area manager, who heard the appeal.

3. Ms Richards during evidence said that she did not remember seeing certain documents and occupational health records, when making the decision to dismiss. When she was taken to those documents in re-examination, she said that she had

seen them when making her decision. Accordingly, the Tribunal agreed to the claimant's Counsel's request to cross-examine Ms Richards again on this point. Ms Richards remained on oath throughout.

4. The Tribunal had sight of an agreed bundle to 249 pages.

The Claims

5. The claims before the Tribunal were:-

   i. discrimination arising from disability under section 15 of the Equality Act 2010;

   ii. Failure to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010; and

   iii. Unfair dismissal under section 98 of the Employment Rights Act 1996.

The Issues

6. The issues were as set out in the case management order as follows:-

DISABILITY – Section 6 of the Equality Act, 2010 ("EqA")
1. Was the Claimant disabled under section 6 of the EqA?
1.1. Did the Claimant have a mental impairment, namely depression and anxiety?
1.2. If so, did such impairment have a substantial and long-term adverse impact in the Claimant's ability to carry out normal day-to-day activities?
2. If so, was the Claimant disabled at the material time(s)?
3. If the Claimant was disabled at the material time(s), did the Respondent know that the Claimant was disabled at the material time(s)?
4. If so, from when did the Respondent have such knowledge?
5. If the Respondent did not have actual knowledge of the Claimant's disability, could the Respondent not reasonably have been expected to have known that the Claimant was disabled at the material time(s).
6. If so, from when could the Respondent have reasonably been expected to know of the Claimant's disability?

B. FAILURE TO MAKE REASONABLE ADJUSTMENTS – Sections 20-21 of the EqA
7. Did the Respondent apply the following PCP:
7.1. Requiring the Claimant to maintain a certain level of attendance in order not to come within the scope of the MFA policy and, ultimately, to avoid dismissal for ill health capability.
8. If so, did that PCP put the Claimant, as a disabled person, at a substantial disadvantage compared to people who were not disabled?
9. If so, did the Respondent take such steps as were reasonable to have to take to avoid the disadvantage? In particular, were the following reasonable adjustments that should have been made:
9.1. disregarding the historic disability related sickness absence; and/or
9.2. giving the Claimant adjusted targets for sickness absence, particularly, given he was only just over the threshold at the time of the dismissal hearing; and/or

9.3. keeping separate tallies for disability and non-disability related sickness absence.
10. Would the proposed adjustments, in fact, have avoided the disadvantage?

C. DISCRIMINATION ARISING FROM DISABILITY – Section 15 of the EqA
11. The Respondent accepts that it dismissed the Claimant (at least in part) because of his sickness absence record.
12. Was the Claimant's sickness absence record a matter arising from his disability?
13. If so, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim. The Respondent relies on the legitimate aims of: Maintaining a high level of attendance in order to run its train services on time and safely and avoiding the strain placed on other employees because of the Claimant's absence.

D. DISMISSAL – Section 98 of the *Employment Rights Act*, 1996 ("ERA")
14. What was the reason (or, if more than one, the principal reason) for the dismissal? The respondent contends that the Claimant was dismissed by reason of capability or some other substantial reason (namely persistent short term absences).
15. If the reason for the dismissal was capability or some other substantial reason, was the dismissal fair or unfair within the meaning of section 98(4) of the ERA? The Claimant relies upon the following allegations:
15.1. The he was dismissed without any up-to-date medical evidence. The Claimant contends that this was relevant in relation to his medication now working to control his mental health condition and, consequently, his future attendance prospects;
15.2. That the Respondent did not have any form of conversation with the Claimant as had been agreed in the Stage 3 meeting; and
15.3. That he had substantial service and was only just over the threshold for Stage 4.

E. REMEDY
16. What remedy is the Claimant entitled to if he succeeds?
17. What loss, if any, has the Claimant sustained?
18. Has the Claimant properly mitigated his loss?
19. Should compensation be reduced to reflect the possibility that the Claimant would have been dismissed in any event?
20. Should any compensation awarded to the Claimant be reduced to reflect contributory fault?
21. Does any conduct of the Claimant justify the Tribunal reducing any award made?

7. There were the following amendments to the issues :-

a. It was agreed that the claimant had a mental impairment, being anxiety or depression. The respondent accepted that the impairment had a substantial impact on daily activities only from May to October 2019. It did not accept there was the necessary adverse impact outside of this period and, accordingly the effects were not long-term and the claimant did not meet the definition.

b. The claimant relied, outside of May to October 2019, on deduced effects because he was on medication and, in the alternative, that he suffered from a recurrent condition.

c. In respect of the reasonable adjustment complaint, the respondent accepted that if it had knowledge of any disability then the duty to make reasonable adjustments had arisen. The only issue would be whether or not the respondent had taken such steps as were reasonable.

d. In respect of discrimination arising from disability, the respondent's position was essentially the same. If the respondent had knowledge of any disability the only issue would be whether the treatment was a proportionate means of achieving a legitimate aim.

The Facts

The Background

8. The claimant started work for the respondent, which runs rail services in Southeast England, at East Croydon Station on 1 April 2001. He developed anxiety and depression which was diagnosed around September 2008.

9. In around 2015 he lost the sight in one eye and as a result was unable to continue in his role as station supervisor in East Croydon. He was therefore transferred and, in effect, demoted first to Brighton station and then working on the gate line at Lewes Station. He was responsible for the barriers through which passengers enter the platforms and was the first point of contact for most passengers. His working environment was cold and whilst covered, it was open to the elements to some extent. His demotion resulted in led to a lower salary, and therefore he had to move to a smaller house.

10. The claimant's history of medication was as follows. He was fully compliant with his medication. If he did not take the medication, he believed that he would suffer from a downward spiral. He said that he would "lose himself". He said that he would become suicidal and unable to cope.

11. He was taking 20mg of Fluoxetine daily until March 2019 when the dose was increased to 40mg. He said that the side effects of the medication included memory loss, difficulties with concentration, diarrhea and night sweats. He described fluoxetine as keeping him on an "even keel", but it did not help if he had an acute attack. He was then moved to Mirtazapine in May 2019. He suffered side effects including significant weight gain. He was therefore prescribed Sertraline in September 2019 at a 100mg per day and he remained on this dose until the date of the hearing.

12. The respondent operates a noncontractual Managing for Attendance Procedure known as MFA. Its stated aim is to provide a clear set of guidelines for the management of sickness absence in a fair and consistent way. The MFA operates a fifty-two week monitoring period for an employee's attendance. Each stage of the procedure is triggered when an employee has five days sickness or two instances of

sickness in a fifteen-week period, or ten days sickness or five instances of sickness in a fifty-two week period.

13. At any stage in the procedure, the line-manager has the discretion to keep the employee on the current stage and continue monitoring them for a fifty-two week period or take them out of the process altogether. Absent this discretion, the employees move from stage 1 to 2 to 3, and finally to stage 4, dismissal, if they reach the appropriate trigger points.

14. The only reference to disability in the MFA is

> GTR is aware that sickness absence may result from a disability. The MFA procedure will still apply, but at each stage of the procedure, particular consideration will be given to whether there are reasonable adjustments that could be made to the requirements of the employee's job or other aspects of their working arrangements that will provide support at work and/or assist a return to work.

15. The respondent's witnesses told the Tribunal that the respondent had an anti-harassment and equal opportunities policy which includes some reference to disability, but this was not before the tribunal.

16. Mr Walker told the tribunal that the respondent had a capability procedure policy which was relevant where absences were caused by an underlying medical condition, whether or not this amounted to a disability in law. This was not before the tribunal. There was no reference to this policy in the MFA.

<u>The Claimant's Attendance History</u>

17. Problems with the claimant's attendance started in late 2017. He was absent from work from 11 December to 13 December 2017 due to sickness and diarrhea. He was absent from 11 January to 31 January 2018 due to flu and a bereavement and then again from 14 April to 18 April 2018 due to sickness, diarrhea and a cold.

18. As a result of the sickness absences, the claimant triggered stage 1 of the MFA procedure. He was duly interviewed by his line-manager, station manager Andy Gardner, on 30 April 2018. However, Mr Gardner exercised his discretion and took no action because he said that the bulk of the absences were related to a bereavement.

19. The claimant was issued with a letter of suitable advice dated 22 July 2018. He was warned that failure to attend without notice again would result in formal disciplinary action.

20. Before the tribunal, the claimant said that he did not attend work at the rostered time because of disturbances in sleep. He said that sleep deprivation was a side effect of anxiety and depression. However, when he was specifically asked by Mr Gardner if there were any underlying problems, he did not say so or mention sleep deprivation.

21. According to his GP records, the claimant's clinical mental health worsened from around 10 August 2018. He suffered from anxiety, depression and suicidal thoughts, according to a letter from mental health professionals.

22. The claimant was absent from work from 1 to 7 September 2018 with toothache following a tooth extraction. This resulted in him triggering stage 1 of the MFA.

23. The claimant attended a second stage 1 meeting on 28 September 2018 with Mr Gardner. Mr Gardner confirmed that the claimant was on stage 1 and that he had taken 22 days absence over 52 weeks. There was no mention in this meeting of depression and anxiety, including when Mr Gardner asked the claimant if there was any underlying reason for his sickness record. The claimant said that medically he had been given the all-clear. When asked, the claimant put his absence down to getting older and working outside. That day Mr Gardner provided him with a letter of advice confirming that he was at stage 1. The letter stated that his level of attendance would be closely monitored for fifty-two weeks to ensure that he maintained an acceptable level.

24. The claimant was off sick for five days from 3 January 2019 with a cold. He therefore triggered stage 2 of the MFA.

25. Mr Gardner held a stage 2 MFA meeting on 8 January 2019. The claimant told him that he was cold standing outside, and he felt extremely cold. Mr Gardner asked the claimant if there were any other issues that he wanted to talk about. In reply, the claimant referred only to platform staff's poor behaviour. The claimant said that he did not want to move inside to a job. Mr Gardner said that if the claimant progressed to stage 3, it would be dealt with by a different manager.

26. The respondent sent a letter to the claimant confirming that he was on stage 2 on 29 January. The letter stated that the claimant had unacceptable levels of absence within the parameters of the MFA. The letter referred to the informal advice that he had received at stage 1. It stated that he was on stage 2 and that his attendance would be monitored for the next fifty-two weeks up to 11 January 2020. It was important that he show an immediate and sustained improvement in attendance. If not, there would be further formal action.

27. Mr Gardner accepted after some questioning that he had taken the claimant's bereavement into account when calculating whether he had triggered stage 2.

28. The claimant was absent sick on 29 March 2019 due to vomiting. He reported into work two hours after his start time. This was what the respondent referred to as 'AWOL', absent without leave, that is, when an employee failed to turn up for work without notifying the respondent in advance.

29. The claimant told Mr Gardner that he was struggling especially with sleep and Mr Gardner referred him to occupational health. The claimant was absent on 10 May 2019.

30. The claimant attended occupational health for the first time on 19 May 2019. He told occupational health that he was suffering from insomnia and night sweats.

According to the operational health report, the respondent was aware that the claimant had been taking anti-depressants for anxiety and depression for ten years. However, the medication was not very effective and he probably needed to change his medication. The claimant was waiting for counselling and was not fit to attend meetings.

31. Mr Gardner held a medical review meeting at the claimant's home on 5 July 2019. The claimant said that his sleeping was bad, he was suffering from headaches and was staying home all day. He told Mr Gardner that he had suffered from depression and/or anxiety for ten or eleven years. He said that he was moved to a different job from East Croydon, and this had caused the depression. According to the claimant's medical records, this was not strictly accurate and the Tribunal understood him to mean that the move had exacerbated his depression. Mr Gardner said that if the claimant was unable to do his current job , then he would need to look for a different job. The claimant told Mr Gardner that he had changed his medication recently but no effect had yet taken place. He said that he was suffering from debilitating memory issues. It was agreed to wait to let the new medication take effect.

32. The claimant had a second occupational health assessment on 2 August 2019. He reported suffering insomnia, anxiety, depression, sleep disturbances, and feeling unwell. He had been on his new medication for 5 weeks. OH found him still unfit to return and stated that there needed to be a significant improvement before a phased return. OH did not envisage a return to work before two months unless the change of medication effected a significant improvement.

33. There was a second medical review meeting with Mr Gardner at the claimant's home on 2 September 2019. The claimant told Mr Gardner that he had improved. He was taking more walks. However, he was suffering with weight gain.

34. The claimant attended occupational health for a third time on 25 September 2019. The Tribunal understood that the claimant had just started on Sertraline at this time. OH recorded that the claimant's medication had changed in the last week and he felt generally well, and his sleep had improved. Occupational health judged him fit to return on a phased return over four weeks.

35. The claimant returned to work and had a return-to-work meeting on 2 October 2019. At the return-to-work meeting, he said that he was taking 100mg of Sertraline daily. His phased return was that he worked four hours a day for the first two weeks and then six hours a day for another two weeks, and then have a second occupational health review.

36. The claimant attended an occupational health review (the fourth occupational health meeting) on 1 November 2019. OH considered that he was fit for work. It stated that he was still vulnerable due to mental health issues, and minor issues could upset him. It was vital that there was good communication with management and the respondent should have regular conversations with the claimant.

37. The claimant was discharged by OH who judged that there was no need for further review.

38. On 15 November 2019 the respondent invited the claimant to a stage 3 MFA meeting because he had taken 81 days sick between 30 May and 29 September 2019, due to his mental health.

39. On 25 November 2019 the claimant attended a stage 3 meeting with Mr Gardner. Mr Gardner confirmed him as being on stage 3 for a further twelve months. Mr Gardner told the claimant that he would have, "a conversation" prior to being placed on stage 4. "Placed on stage 4" in the view of the Tribunal was a euphemism for dismissal, although the respondent was reluctant to accept this.

40. The respondent sent a letter to the claimant that day in the same terms as the stage 2 letter, save that it stated that the claimant was now on stage 3 and if he triggered stage 4 of the procedure, he was at risk of dismissal.

41. The claimant was absent sick from 5 to 13 February 2020 with a 'virus with flu-like symptoms' according to his fit note. As this was in the early days of the pandemic, the claimant thought he might have caught Covid.

42. As a result of this sickness absence, the claimant triggered stage 4 of the MFA.

<u>The Dismissal</u>

43. The respondent prepared a Managing for Absence Report with a timeline of the claimant's absences. The claimant did not dispute its accuracy save the overcount of one day which was corrected at the stage 4 meeting.

44. The claimant was invited to a stage 4 MFA meeting. The letter warned of the possibility of dismissal. The letter enclosed the documents on which the respondent relied, including the MFA timeline report. It asked him to provide any additional documents on which he wished to rely. It informed him that he could bring a union representative.

45. On 20 March the claimant was marked 'AWOL' because he had overslept and failed to attend without any warning.

46. The claimant attended the stage 4 meeting chaired by Ms Kate Richards on 24 March 2020. He was accompanied by his RMT Union rep.

47. Ms Richards's evidence as to the documents she had seen was inconsistent. In her witness statement she incorrectly stated that the last occupational health meeting was 25 September, 'Mr Cornish had last been examined by OH on 25 September and as far as I understand it, there had been no change in his health since then.' In fact, the last meeting was on 1 November when the claimant was passed as fit for work, following a successful completion of a phased return. Accordingly, there had been a considerable change in his ill-health situation after 25 September.

48. Her initial evidence was that, whilst she knew the claimant had been to occupational health and she should therefore have been provided the records, she was not sure that she had been seen them. Because there was no reference to the occupational health records in the minutes of the meeting, it was likely than not that she did not

have the records. She thought that she did have the notes of the medical review meeting on 5 August. However, when taken to the documents before the tribunal, she said that she had seen the occupational health records.

49. At the meeting, Ms Richards in effect went through the respondent's checklist of factors to take into account when making a decision at stage 4. It was agreed that the claimant's workplace was very cold. Ms Richard made it clear that the respondent accepted his sick record was genuine. Ms Richard considered occupational health. She decided not to take further information from occupational health on the basis that a further referral did not appear helpful. This was not challenged at the meeting.

50. The claimant said that he had long service and that he had, 'turned a corner on ill health.' Ms Richards considered the patterns and reasons for the sickness absences. She said that she had to look to see if there were any underlying problems. She mentioned that the claimant had suffered mental health difficulties the previous year although the condition appeared to be more longer lasting. The claimant's representative said, "this isn't related to any underlying health condition." Ms Richards said, "that right".

51. Ms Richards considered the need for an improvement in attendance, and the effects of the claimant's absences on his colleagues and the business. She considered the claimant's AWOL on 20 March. The claimant and his rep objected because this absence was not included in the MFA report (because it happened after the report was generated). Ms Richards said that the AWOL was relevant. The tribunal found that Ms Richards treated this as a material factor because there was considerable discussion of it at a meeting which only lasted about twenty minutes, and the fact that the claimant had an AWOL after being warned of the risk of dismissal. Further, the letter of dismissal specifically detailed the facts of the AWOL for the 20 March.

52. Ms Richards concluded that there was no underlying cause to the claimant's ill health absences. She decided to dismiss the claimant and she confirmed this by way of a letter on 23 March 2020. The letter stated that following a MFA meeting he had been dismissed due to his unacceptable absences. He had been formally advised on previous occasions that his level of attendance was unacceptable and he had been given adequate time to improve his attendance. The letter acknowledged the claimant's long service and the fact that he had paid for talking therapy.

53. The claimant was given a twelve-week payment in lieu of notice and informed of his right of appeal.

<u>The Appeal</u>

54. The claimant appealed on 27 March 2020. The appeal meeting occurred on 20 May 2020 before Mr Rob Walker, an Area Manager. The review meeting took place over Teams because of lockdown and took over 3 hours. The claimant was again represented by a union representative.

55. Mr Walker explained that he had checked the calculation of absences against rosters and that he was satisfied that they were correct. As a result of comments

by the union representative at the meeting, he checked again but remain satisfied that they were correct.

56. About two hours or two and a half hours into the meeting, the union rep raised the claimant's mental health as a disability. It was stated that mental health was a registered disability but since the 81 day absence there had been no further absences.

57. Mr Walker said that he had extensive experience of working with unions in disciplinary meetings. Mr Walker said that in his view, if there was a real question of disability, the union would put this would be "front and centre", rather than mention it very briefly late in the meeting. It was only a brief reference in a lengthy meeting. When Mr Walker recapped the main points at the end of the meeting, he did not mention disability, and this was not challenged. Mr Walker accepted that it was somewhat unusual for occupational health to discharge an employee with a mental health condition even if under control.

58. Mr Walker said that he did not take into account the claimant's personal circumstances and would treat an unpopular and a popular worker the same. Therefore, the fact that the claimant was a popular worker and well liked was not a relevant factor.

59. Mr Walker, after the meeting, considered the occupational health evidence. He said that he actively considered whether the claimant was disabled and decided that he was not. When making his decision, he said that he took into account his personal knowledge of mental health and medication. Further, because the mental health condition accounted for only 81 days out of the total and the claimant was now doing well, he was satisfied that the claimant was not disabled. He said that he was in no doubt that the claimant was not disabled.

60. Mr Walker rejected the appeal by way of a letter of 21 April 2020. He acknowledged that there were some errors in the MFA letters, but these were not material. Mr Gardner's references to the claimant getting another job were not a threat. According to the respondent's medical advice, the claimant was unlikely to have had Covid on his last absence.

The Law

61. The applicable law on unfair dismissal is found in the Employment Rights Act 1996 as follows

> **98 General.**
>
> (1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a)the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2)A reason falls within this subsection if it—

(a)relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(3)In subsection (2)(a)—

(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, …

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b)shall be determined in accordance with equity and the substantial merits of the case.

62. The applicable law on discrimination is found in the Equality Act 2010 as follows

15 Discrimination arising from disability

(1)A person (A) discriminates against a disabled person (B) if—

(a)A treats B unfavourably because of something arising in consequence of B's disability, and

(b)A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2)Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

20 Duty to make adjustments

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

(2)The duty comprises the following three requirements.

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

21 Failure to comply with duty

(1)A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2)A discriminates against a disabled person if A fails to comply with that duty in relation to that person…

Submissions

63. Both parties provided helpful and detailed written submissions followed by brief oral submissions. The Tribunal asked questions and the parties were given an opportunity to comment on each other's submissions.

Applying the Law to the Facts

64. The first issue was whether the claimant was a disabled person for the purposes of section 6 Equality Act 2010 at the material time. Under section 6(1) the burden of proof is on the claimant to show that he satisfies the definition.

65. The Tribunal had regard to the Equality Act 2010 Guidance to be Taken into Account in Determining Questions Relating to the Definition of Disability. It also had regard to the EHRC Code of Practice.

66. In this case there was a relatively narrow point of dispute. There was no dispute that the claimant's anxiety and depression constituted a mental impairment. The parties agreed that the claimant came within the definition in section 6 from May to October 2019. However, the respondent did not accept that his mental impairment had a more than trivial impact on the claimant's ability to carry out daily activities outside of this period and, accordingly, the condition was not long term.

67. In reply, the claimant relied on the deduced effects of his condition. His case was that if he had not been taking medication, the impairment would have had a serious impact on his ability to carry out daily activities. In the alternative, he relied on depression and anxiety being a recurrent condition.

68. As to deduced effects, according to paragraph 5(1) of schedule 1 of the Equality Act 2010: –

> "If an impairment would be likely to have substantial adverse effects but for the fact that measures have been taken to treat or correct it, it is to be treated as having that effect"

According to 5(2), "measures" include, in particular, medical treatment.

69. According to the Employment Appeal Tribunal in *Goodwin v The Patent Office* 1999 [ICR302/EAT],

> "The Tribunal will wish to examine how the claimant's ability has actually been affected at the material time whilst on medication and then to address their minds to the difficult question of the effects which they think there would have been but for the medication: the deduced effects. The question is then whether the actual and deduced effects on the claimant's abilities to carry out normal day-to-day activities [are] clearly more than trivial'"

70. The tribunal had regard to the obiter comments of the EAT in *J v DLA Piper UK LLP* 2010 [ICR1052],

> 'There is nothing particularly surprising in the proposition that a person diagnosed as suffering from depression who is taking a high dose of anti-depressants would suffer a serious effect on her ability to carry out normal day-to-day activities if treatment were stopped', although that proposition 'could of course be challenged'.

71. In respect of analysing whether the impairment has a substantial impact, The Tribunal applied the guidance in *Goodwin v Patent Office* 1999 ICR 302, EAT*:*-

> 'What the Act is concerned with is an impairment on the person's ability to carry out activities. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. Thus, for example, a person may be able to cook, but only with the greatest difficulty. In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts. Experience shows that disabled persons often adjust their lives and circumstances to enable them to cope for themselves. Thus a person whose capacity to communicate through normal speech was obviously impaired might well choose, more or less voluntarily, to live on their own. If one asked such a person whether they managed to carry on their daily lives without undue problems, the answer might well be "yes", yet their ability to lead a "normal" life had obviously been impaired. Such a person would be unable to communicate through speech and the ability to communicate through speech is obviously a capacity which is needed for carrying out normal day-to-day activities, whether at work or at home. If asked whether they could use the telephone, or ask for directions or which bus to take, the answer would be "no". Those might be regarded as day-to-day activities contemplated by the legislation, and that person's ability to carry them out would clearly be regarded as adversely affected.'

72. Essentially the focus for the Tribunal is what a claimant cannot do or would not be able to do absent any medication.

73. The Code and the Guidance in similar terms explain that "substantial" in section 6 can be understood as, "the requirements and effect must be substantial and reflects the general understanding of disability as a limitation going beyond the normal difference in ability which might exist amongst people."

74. According to Paterson v Commissioner of Police of the Metropolis 2007 ICR 1522, EAT, the comparison is with what a claimant could do if they did not have the impairment, rather than with what a group of non-disabled people could do.

75. The Tribunal considered the relevant evidence available.

76. The claimant had been on medication for ten years. He had been compliant with his medication. Accordingly, there was limited evidence of what had actually happened to the claimant when he was not taking his medication.

77. The claimant had been on Fluoxetine to May 2019 having had his dose increased in March 2019. He was then prescribed Mirtazapine. From October 2019 onwards he was prescribed Sertraline.

78. In the view of the Tribunal, in respect of the disputed period, it was not possible to conclude that the claimant was on a high dose of antidepressants. Accordingly, the guidance in *DLA Piper* did not apply.

79. The Tribunal considered the claimant's evidence as to the effects on his day-to-day activities whilst on medication.

80. There was little medical evidence going to this, or any explanation why there was no medical evidence. The case law states that deduced effects in a disability case is a difficult issue. A Tribunal normally would expect to see medical evidence going to this point, or an explanation as to why there is no medical evidence.

81. However, the claimant's impact statement included only one sentence going to deduced effects, " If I did not take this medication my blood pressure along with my depression/anxiety would escalate to a point of a possibility of becoming suicidal and not being able to cope with everyday life". He said that, even on medication, the mental impairment had a significant effect.

82. The disability impact statement was written in the present tense and provided no chronology. The claimant's evidence in his statement was that his life had been changed by his depression. He gave evidence as to how the number of daily activities had been affected, such as shopping, sleeping:-

> A favourite past time of mine was reading about sports and true-life crime, but now due to my memory and concentration being affected I get exceedingly frustrated with myself as I have to repeatedly re-read. I can no longer enjoy simple things such as going to the cinema or watching the latest Netflix series as I find it difficult to keep up with storylines because of my memory and feel like I constantly pester my wife by constantly asking her questions as to what has happened in order to keep up.
>
> I have no regular sleep pattern. I either sleep too much or not enough. I constantly feel tired. I thrash around in my sleep and suffer from night sweats which I find highly embarrassing, not just for me but my wife also. I am lethargic for large parts of the day and find myself day often distracted.
>
> I struggle to motivate myself to complete even basic household tasks leaving this all to my wife to deal with. This compounds to my feelings of guilt. Some days I find I feel I cannot even be bothered to wash, shave or change my clothes especially at the weekend when I have no sense of routine or need to.
>
> I get overwhelmed on small and crowded environments and find myself getting indecisive when I am confronted with different products and too many choices. The weekly food shop and even a quick trip to the local shop can be extremely frustrating as I have to work from a list to remember even a handful

> of items, which has now become a further burden on my life to alleviate my stresses.

83. Accordingly, the Tribunal carefully considered the oral evidence and the documents.

84. According to the medical records, in 2010 the claimant had been referred by mental health specialists to cognitive behavioural therapy. The Tribunal had sight of depression and anxiety forms (GAD-7 and PHQ-9 **-** standard self-reported questionnaires) from 2014. According to the PHQ-9 questionnaire the claimant scored 21 out of 27, which amounts to severe depression. According to the GAT-7 questionnaire, he scored 17 out of 21, which amounts to severe anxiety. These were the highest categories. Therefore, whilst on his medication, there was evidence that in 2014, he was suffering from severe depression and severe anxiety. On 10 August 2018, the GP received information from specialist mental health practitioners that the claimant's clinical mental health was worsening, he was suffering from depression anxiety, and suicidal ideation. The claimant's dose of Fluoxetine was doubled in March 2019.

85. The Tribunal noted that the claimant had suffered a number of identifiable triggers whilst he was suffering from depression, such as the death of his mother, losing the sight in one eye in 2015, having to move jobs and being demoted to a lower wage and having to move house. Accordingly, there were life events during the period when he was suffering from depression which, it was more likely not, would have exacerbated his depression and anxiety.

86. Taking all of the evidence into account, noting the burden was on the claimant, the Tribunal found that on the balance of probabilities the claimant would, without his medication, have suffered a more than trivial impact on his ability to carry out day-to-day activities since his diagnosis of depression, than if he had not had the impairment. As he had been suffering from depression for more than 12 months, the impairment was long-term and the claimant was a disabled person for the purposes of section 6 of the Equality Act 2010.

<u>Section 15 Equality Act-Discrimination Arising from Disability</u>

87. The first issue was whether the respondent had actual or constructive knowledge of the claimant's disability.

88. Section 15(2) of the Equality Act stipulates that sub-section (1) does not apply if the employer shows that it "did not know and could not reasonably have been expected to know" of the employee's disability. The EHRC code states that : the

> 5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.

> 5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. "

89. The claimant had said that he was generally in his daily and work life reluctant to consider himself as being adversely affected by his mental health. In the experience of the Tribunal, such reluctance is not unusual amongst those with mental health difficulties because of the unfortunate stigma that can attach to mental health. It is not unusual for those who suffer from mental health difficulties to be unwilling or reluctant to discuss or admit this.

90. The Tribunal considered the respondent's state of knowledge. On the balance of probabilities, the Tribunal found that Ms Richards did have the operational health report's reports when she made her decision. The reasons were as follows.

91. As Ms Richards said, she would be expected to have had them in the normal course of events. It was the respondent's practice to supply OH documents to the decision makers. The email chain, although not conclusive, was consistent with her having received the reports.

92. Ms Richards's evidence changed once she was taken to the documents. She originally said that she was not sure if she had the reports but that was based on the fact that it had not been mentioned during the dismissal hearing. When she was taken to the emails, she said, in effect, "oh yes, I did have them". In the view of the Tribunal, her evidence on this point was not particularly helpful because it appeared to be heavily influenced by whatever document she was taken to. This perhaps was not surprising because the relevant events occurred over two years previously.

93. There was no dispute that Ms Richards had the minutes of the sickness review meetings with the claimant at his home. She also had sight of a timeline.

94. However, it is not enough to consider the information that the decision-maker did have. It is also necessary to establish what the employer might reasonably have been expected to know if it had made the relevant enquiries.

95. By the time of dismissal, Ms Richards was aware of the constituent parts of the definition of disability. Occupational health had stated in terms that the claimant had been dealing with anxiety and depression symptoms for the last ten years. Accordingly, Ms Richards was on notice that the claimant had been suffering from a mental impairment on a long-term basis. She was on notice that the claimant said that there was an impact on daily activities, as set out in the OH documents, such as lack of sleep, memory problems, insomnia, headaches, sleep problems, an increased dose of anti-depressants and that he had gone to counselling. According to occupational health, the claimant had been in September unfit for work and would remain so until his depression significantly improved.

96. Mr Gardner thought that the claimant was not "in a good place" mentally. On the balance of probabilities, it was likely that when they discussed the claimant, Mr Gardner had shared this information with Ms Richards.

97. However, there were factors going in the opposite direction. Occupational health stated that the current sickness only started on 30 May 2019, i.e. that it was not long-term. The claimant at stage 4 was asked about on-going mental health issues, said in terms that they were not on-going. He said, "I am on Sertraline and it is doing wonders". In the experience of the tribunal, it is not uncommon, for those with mental health conditions, to seek to hide and minimise the effects because of stigma. This may particularly be the case when an employee is job is on the line in a final formal meeting.

98. The test is whether the employer had enough information for them to "find out ". In the view of the Tribunal, that word suggests at least some form of pro-active behaviour on an employer's part as to whether a claimant is disabled. This respondent knew enough to be on notice. In particular it did not take advantage of the opportunity to send the claimant back again to occupational health to ask the necessary questions.

99. There was no evidence that Ms Richards had received any effective training on disability. Mr Walker, who said he had received training, said that he thought that Ms Richards had been invited to the training. However, it was notable that Ms Richards had no recollection of any such training. The deduced effects provisions of the Equality Act are not straightforward. In view of the tribunal, the respondent might wish to consider further training on this issue for those who have to make decisions, particularly as to long-term sickness absence.

100. Accordingly, the Tribunal determined that the respondent was fixed with constructive knowledge of the disability.

101. There was no challenge to the claimant's contention that he had been subjected to an act because of something arising out of his medical condition. The crux of this case was justification, whether the respondent could show that the treatment, the dismissal, was a proportionate means of achieving a legitimate aim.

102. According to case law and the EHRC Employment Code a legitimate aim must be legal, not be discriminatory in itself and must represent a real, objective consideration. According to paragraph 4.29

> "Although reasonable business needs and economic efficiency may be legitimate aims, an employer solely aiming to reduce costs cannot expect to satisfy the test. For example, the employer cannot simply argue that to discriminate is cheaper than avoiding discrimination."

103. According to *General Dynamics Information Technology Ltd v Carranza 2015 ICR 169, EAT*, it would always be regarded as legitimate for an employer to aim for consistent attendance at work. The claimant in submissions accepted that the respondent same, of ensuring consistent attendance at work was a legitimate aim. The case, therefore, turned on proportionality.

104. The Employment Code states that the measure adopted by the employer, in this case dismissal, does not need to be the only possible way of achieving an employer's legitimate aim, but the treatment will not be proportionate if less discriminatory

measures could have been taken to achieve the same objective, (see paragraph 4.3.1). Essentially, could the same objective have been achieved by not dismissing the claimant?

105. According to the Employment Appeal Tribunal in *Stott v Ralli Limited* 2022 IRLR 148, the test is an objective one. The tribunal does not apply the so-called band of reasonable responses test to the employer's decision. Rather, the Tribunal must engage in critical scrutiny by weighing an employer's justification against the discriminatory impact, considering whether the means correspond to a real need of the undertaking and were appropriate with a view to achieving the aim in question. Essentially, this is a balancing exercise between the needs of both parties.

106. The EAT summed up the crux of section 15 in *General Dynamics Information Technology Limited v Carranza* 2015 ICR 169 as, "the extent to which an employer was required to make allowances for a person's disability".

107. In *Griffiths v Secretary of State for Work and Pensions 2017 ICR 160,* Lord Justice Elias observed,

> 'The fact that the employer may be under no duty to make positive adjustments for a disabled employee in any particular context does not mean that he can thereafter dismiss an employee, or indeed impose any other sanction, in the same way as he could with respect to a non-disabled employee. The employer is under the related duty under S.15 to make allowances for a disabled employee. It would be open to a tribunal to find that the dismissal for disability-related absences constituted discrimination arising out of disability contrary to S.15. This would be so if, for example, the absences were the result of the disability and it was not proportionate in all the circumstances to effect the dismissal'.

108. In his submissions, the claimant essentially contended that the absences, other than the 81 days mental health absence, were disability related. However, there was an absence of medical evidence going to this. For the Tribunal to find that the other absences (outside of the agreed 81 days) were disability related would be unsupported by evidence.

109. The Tribunal carried out the balancing exercise. The claimant relied on the fact that he was some six weeks short of coming off the MFA altogether when he triggered stage 4. However, the tribunal did not find this a weighty factor. Absence procedures, including the respondent's, often operate by means of trigger dates. Some of the employees who trigger a stage in the procedure will be inevitably just over the trigger point. This is inevitable when a procedure is premised on the number of days absence accumulated by an employee.

110. Apart from one lengthy disability -related absence, this employer had to consider a long-standing pattern of mainly short term absences and failures to attend – AWOLs, for a variety of unrelated reasons. The claimant denied in strong terms that there was any link between these various absences and his mental health condition at his hearings.

111. On the employer's side, the MFA was based on the premise that staff had to attend work reliably. As Mr Walker succinctly put it, the employer paid a wage and expected effective attendance in consideration of that wage. The Tribunal accepted that the claimant's failure to attend would be costly to the respondent in terms of agency fees and disruption, although there was no suggestion that the claimant's absences caused any particular or unusual disruption or cost. This was not an employer who rigidly refused to exercise discretion. It had previously exercised discretion in the MFA following the claimant's bereavement.

112. On the employee's side, this was a matter of fundamental importance. He stood to lose his job. He had twenty years' service, factor to which the employer appeared to attach very little weight. Further, the claimant fully engaged with the respondent's process. He went to occupational health meetings. He was further engaged and committed to minimising the effects of his condition and getting back to work. He went to CBT. He paid for his own talking therapies.

113. Further when making the decision to dismiss, the employer did not take the disability related absences into account. According to Ms Richards when making the decision, and – from the evidence – during the appeal, the employer looked to the employee's past rather than the future. 81 days absence were disability related. The effects of this disability were now under control with new medication. According to operational health, subject to the claimant receiving appropriate support, the effects were unlikely to recur. In effect, there was every reason to believe the claimant's prognosis was good and that his absence record should materially improve. The claimant had very long service and a good record. He had suffered from an acute episode of depression. According to the evidence before respondent, the depression was now seemingly well controlled by Sertraline. With reasonable monitoring and support, the evidence indicated that he should be able to carry out his duties, including attendance, to an acceptable standard. The evidence before the respondent when it made the decision to dismiss did not suggest that the respondent would be running a significant risk of future absences, as long as monitoring and support were put in place.

114. Essentially, the claimant had a not good but not very bad record of unconnected absences and AWOLs. There had been a single significant disability related absence, but the employer was advised that with support he would remain stable.

115. Most importantly, the respondent witnesses agreed that, were not for what the tribunal had found to be a disability-related absence, the claimant would not have been dismissed. Ms Richards, according to her witness statement, had failed to take account of the last occupational health report which provided the up-to-date information including the prognosis.

116. The Tribunal weighed up all the factors in the balance and found that it was not proportionate for the respondent to dismiss. The respondent did not give the claimant a chance, in effect, to prove that he could keep his absences to acceptable level on his new medication and with support in place. The Tribunal did not think it proportionate to wipe the slate clean, so to speak, because of the claimant's relatively poor record of unrelated sporadic absences and AWOLs. In the view of the Tribunal, it was would have been proportionate for the respondent to have kept

the claimant at stage 3 and not to have triggered stage 4, that is not to have dismissed.

117. In the view of the Tribunal, balancing the needs of the employer and the employee, dismissal at this time, taking into account the information available to the respondent, was not a proportionate means of achieving the respondent's legitimate aim.

118. Accordingly, the claimant's complaint under section 15 Equality Act succeeded.

Section 20 Equality Act - Reasonable Adjustments

119. As the claimant had succeeded under section 15 and, taking into account the comments of Elias LJ, in *Griffiths,* in the view of the Tribunal it was not proportionate to go on to consider the reasonable adjustments complaint. The tribunal concluded that the claimant was unlikely to succeed. As Elias LJ pointed out in *Griffiths*, taking into account the views of Richardson J in the EAT, there are material differences in running a disability related absence case under section 20 and 21.

120. Accordingly, the Tribunal dismissed the reasonable adjustments complaint.

Section 98 Employment Rights Act – Unfair Dismissal

121. The burden in unfair dismissal is upon the respondent to show the reason for dismissal. The reason for dismissal is the "set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee": *Abernethy 22 Matt, Hay and Anderson* [1974] ICR 323.

122. The respondent relied in the alternative on either capacity, ill health or on some other substantial reason. In *Wilson v The Post Office* 2000 IRLR 834, the Court of Appeal held that the dismissal of an employee for persistent absences was capable of amounting to some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. The reason for dismissal will depend on the facts in the case.

123. The Tribunal considered the respondent's case on the reason for dismissal. In the grounds of resistance, it did not refer to a reason at all. In the list of issues, it relied on both capability and some other substantial reason. In in its submissions, it made it clear that its primary case was some other substantial reason.

124. The Tribunal considered what was operating in the respondent's mind when it made the decision to dismiss. The Tribunal considered the letter of dismissal carefully because it viewed it as the most reliable evidence about what was operating in the decision maker's mind at the material time. It was contemporaneous evidence.

125. The letter of dismissal set out in terms that the reason for dismissal was the claimant's absence record. Whilst his attendance record included considerable sickness absence there were also AWOLs (failure to attend without warning). The letter of dismissal made specific reference to the fact that although the claimant was on notice of a stage 4 meeting - and his job was in jeopardy – the claimant failed

to attend work without notice on one occasion, he was AWOL. The fact that the letter of dismissal went into some detail about this particular absence, suggested that this was a factor operating on the employer's mind.

126. Further, the Tribunal took into account the evidence of the dismissing officer. She said that she was looking back to see how his attendance matched the MFA, rather than forward to consider how his future health affected his attendance.

127. Mr Walker, a more senior and experienced manager, stated that the MFA was about whether an employee could provide an acceptable level of attendance at his work in return for their salary. Whilst this was far from determinative - because the explanation was given by someone who did not make the decision and was given over two years later - it was consistent with the respondent dismissing for some other substantial reason.

128. Although ill health was the cause of many of the claimant's absences, the respondent's reason for dismissal was that the claimant's attendance record did not meet the requirements of its attendance procedure. Accordingly, the Tribunal found that the reason operating on the employer's side was some other substantial reason, that is the employee's failure to comply with the employer's attendance requirements.

129. The Tribunal, having found that the employer had a potentially fair reason for dismissal went on to consider reasonableness. The first issue was whether the respondent had carried out a fair procedure in dismissing the claimant. In analysing an employer's procedure, the Tribunal may not substitute its view for what constitutes a fair procedure for that of the employer. A Tribunal must ask whether the procedure adopted by this employer came within a range of procedures available to a reasonable employer in the circumstances.

130. In the view of the Tribunal, this was an unexceptional procedure. There was no dispute that the respondent had accurately and correctly applied the trigger points in its own procedure. It had carried out meetings according to its procedure. The claimant had been warned from stage 1 through to stage 3 in clear written terms about the potential consequences of his absences. He was warned in terms of the possibility of dismissal relatively early in the process and in the invitation letter to the final stage 4 meeting. He was invited to the stage 4 meeting in good time. He was provided with relevant documents on which the decision would be made, including a chronology of his absences, in good time before the meeting. He was allowed a union representative. He and his union representative were allowed to speak and make his case at the meeting. Further, he was provided with a lengthy appeal hearing before a more senior independent manager at which he was entitled to be represented by a union representative. He and his union representative were able to speak freely at the appeal meeting.

131. In the view of the Tribunal, there was nothing to take this procedure out of a range of procedures available to a reasonable employer in these circumstances.

132. The Tribunal, accordingly, went on to consider sanction. It considered whether the decision to dismiss came within a range of responses available to a reasonable

employer in the circumstances. A Tribunal may not substitute its own view of the appropriate sanction.

133. In a dismissal some other substantial reason, both the employer's and the employee's compliance with the policy are relevant. The Tribunal had found that the respondent complied with its MFA procedure, with one exception. In general, the respondent's approach was reasonable in that the absences were investigated properly and promptly, and the employee was asked for an explanation at a return-to-work interview. In respect of the long-term absence, Mr Gardner, the line manager, attended the claimant at home with his consent on two occasions. The claimant had been told what improvement in attendance was expected and was warned of the likely consequences if this did not happen.

134. However, Ms Richards in her witness statement when dealing with the decision to dismiss, did not refer to the most recent occupational health report (in November) but to the penultimate report (from September). In September occupational health reported that the claimant was fit to return to his duties on a phased return and that he be reviewed in 4 weeks' time. In November occupational health reported that the claimant was fit to return on a standard basis, subject to appropriate support and monitoring. In effect, in November occupational health found that the claimant had "passed" the four-week review.

135. The tribunal did not find that this failure had a material impact on the reasonableness of the decision to dismiss. This was because in both the September and November reports occupational health expected the claimant to be able to return full-time to his previous duties. The November report simply confirmed that the plan set out in the September report had worked. This was not materially relevant to Ms Richards thought process because she was focused not on the claimant's future absences going forward but on his past absence record. Because the reason for dismissal was some other substantial reason, being the claimant's failure to comply with the respondent absence management procedure, Ms Richards failure did not take the decision to dismiss outside of the reasonable range.

136. The Tribunal considered the claimant's specific points as to unfairness. He contended that, contrary to what he had been led to understand by Mr Gardner, there was no "conversation" before he triggered stage 4. This was a miscommunication. The claimant understood that someone would have a conversation with him before invoking stage 4, whereas Mr Gardner understood that the conversation would be at the formal stage 4 meeting.

137. The Tribunal accepted Mr Gardner's explanation that he was trying to soften the blow. Unfortunately, he inadvertently gave the claimant the wrong impression. In the view of the tribunal, it would be better for managers to be more straightforward in such circumstances. Nevertheless, the claimant cannot have been under any doubt that his job was in jeopardy. The letters made it clear that dismissal was an option being actively considered by the employer. Further, the claimant had a full opportunity to make his case at a stage 4 meeting where he was represented by his union. In the view of the Tribunal, Mr Gardner's comment was not sufficient to take the procedure outside of the reasonable range.

138. The claimant otherwise essentially contended that the respondent failed to exercise the discretion it had reserved to itself in its policy. For instance, he had only just crossed the threshold into stage 4. Further, in less than two months he would have exited from stage 3. He had significant service. There was no suggestion of any issues save as to attendance. He was a well-liked member of staff. There was no question that his absences were genuine.

139. In the view of the Tribunal, the decision to dismiss the claimant was arguably harsh. The respondent, in the person of Mr Gardner, had expended considerable effort in getting the claimant back to work. Following this, there were further problems with his attendance, including a virus and an AWOL which resulted in dismissal. The claimant had told the respondent, backed up by evidence from occupational health, that his mental health condition was now under control. With the support of management, although he would remain vulnerable, he could do his job. He was released from OH's review. In the future there was a good chance of acceptable attendance.

140. The respondent made the decision to dismiss an employee who had a relatively poor record including a significant 81 day absence. He was asked at this stage 4 meeting if there was an underlying condition and asked about a long-standing mental health condition. The union said that there was no underlying health condition and the claimant did not object or say anything inconsistent with this. When Ms Richards referred to an underlying mental health issue, the claimant said it was not on-going.

141. If the claimant had asked the respondent to refer him back to OH, this would have been a material factor which might have influenced the tribunal's decision. However, it cannot be outside of the reasonable range for an employer to dismiss when the employee's absence record exceeds a properly operated and established absence management procedure and the employee indicates there is no underlying medical condition. The claimant had not triggered stage 4 purely on disability related matters but for a variety of reasons including failure to attend work without warning.

142. To find otherwise would be to impermissibly substitute the Tribunal's view for that of the employer.

143. The respondent invited the tribunal to consider the case of *City of York Council v Grosset* [2018] EWCA Civ 1105, paragraphs 54 and 55. The Court of Appeal considered a case where a party had succeeded under section 15 Equality Act 2010 but had failed in a claim for unfair dismissal under section 98 Employment Rights Act. It was argued that this was impermissible. However, the Court of Appeal upheld the Employment Tribunal decision for the following reasons, at paragraph 54:-

> "there is no inconsistency between the ET's rejection of the claimant's claim of unfair dismissal and its upholding his claim under section 15 EqA in respect of his dismissal. This is because the test in relation to unfair dismissal proceeds by reference to whether dismissal was within the range of reasonable responses available to an employer, thereby allowing a significant latitude of judgment for the employer itself. By contrast, the

> test under section 15(1)(b) EqA is an objective one, according to which the ET must make its own assessment: see *Hardy & Hansons plc [2005] EWCA Civ 846; [2005] ICR 1565* , [31]-[32], and *Chief Constable of West Yorkshire Police v Homer [2012] UKSC 15; [2012] ICR 704* , [20] and [24]-[26] per Baroness Hale of Richmond JSC, with whom the other members of the Court agreed."

144. The appellant in the York City Council case had sought to rely on dicta in *O'Brien v Bolton St. Catherine's Academy [*2017] EWCA Civ 145; [2017] IRLR 547 by Underhill LJ as follows : –

> that the tribunal, which had found that the dismissal in question in that case was in breach of section 15 EqA , was also entitled to conclude from this that it had been unfair as well. [The] suggestion was that this meant, in our case, that the ET should have reasoned in the opposite direction, by saying that by virtue of its ruling in relation to unfair dismissal it should also have concluded that there was no breach of section 15 EqA . However, I think it is clear that Underhill LJ was addressing his remarks to the particular facts of that case, and was not seeking to lay down any general proposition that the test under section 15(1)(b) EqA and the test for unfair dismissal are the same. No doubt in some fact situations they may have similar effect, as Underhill LJ was prepared to accept in O'Brien . But generally the tests are plainly distinct, as emphasised in Homer .

145. In the view of the Tribunal, this was a case where the "plainly distinct" tests in section 15 and section 98 had different results. When viewed objectively under section 15 the respondent's conduct was not a proportionate means of achieving its legitimate aim. However, when viewed under sections 98 the employer had a notably wider "latitude of judgement" and the decision to dismiss for the claimant's failure to comply the absence management procedure came within a reasonable range of responses.

REASONS - REMEDY

The Issues

146. The parties were able to agree a significant number of issues as to remedy. They asked the tribunal to determine two issues: –

    a. the amount of any injury to feelings award; and
    b. whether under the Employment Tribunal Principles for Compensating Pension Loss there should be a simple or complex analysis and what should be the withdrawal factor in any complex analysis.

The Law

146. An award of injury to feelings is intended to compensate a claimant for the anger, distress and upset caused by the discrimination. The matters compensated for by an injury to feelings award encompass subjective feelings of upset, frustration,

worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression (see *Vento v Chief Constable of West Yorkshire* Police (No2) [2003] IRLR 102).

147. Awards are compensatory, not punitive. The focus is not on the seriousness of the respondent act that upon the effect on the claimant (see *Komeng v Creative Support Ltd* UKEAT/0275/18/JOJ).

148. The Employment Appeal Tribunal in *Prison Service v Johnson* [1997] IRLR 162, at para 27 general principles as follows:

    a. Awards should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award.
    b. Awards that are too low would diminish respect for the parlour policy of discrimination legislation. Excessive awards could be seen as the way to untaxed riches. Tribunals should bear in mind the need for public respect for the level of awards.

    c. Awards should bear some general broad similarity to the range of awards in personal injury cases.
    d. Tribunal should take into account the value in everyday life of the award.

149. In *Vento* the Court of Appeal identified three broad bands for compensation, the top, middle and lower bands. Within each band there is considerable flexibility allowing the tribunal to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case:-

    a. The top band - sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment.
    b. The middle band should be used for serious cases, which do not merit an award in the highest band.
    c. The lower band is for awards for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.

150. The parties agreed that the tribunal should consider an award for loss of pension in line with the third revision to the fourth edition of the Employment Tribunal's Principles for Compensating Pension Loss.

Applying the Law to the Facts

<u>The Injury to Feelings Award</u>

151. The Tribunal agreed with the claimant's submission that the award should fall in the middle band for the following reasons.

152. The Tribunal reminded itself that it must focus on the effect of the discrimination on the claimant rather than the seriousness of the respondent act.

153. The effects on the claimant had been significant but relatively short lived. The claimant had worked for the respondent for 20 years. Being dismissed was an ignominious end to long and loyal service. He lost not only his employment but his immediate contact with his colleagues with whom he got on well. The tribunal accepted the claimant's evidence that it was a real blow to lose his job after 20 years' service.

154. The claimant's job could not be described as unusually congenial employment because the claimant made complaints about the cold environment. The respondent accepted that this was a justified complaint. Nevertheless, the claimant showed loyalty and commitment to his work going beyond the normal employer/employee relationship. The tribunal accepted that the claimant was particularly committed to his work for the respondent as shown by his accepting a (necessary) demotion involving having to downsize his house.

155. The tribunal accepted the claimant's plausible and detailed account in his witness statement of the effect of the dismissal as follows: –

> I went into a shell. I just sat in my bedroom with my head down. I was in a dark place. I didn't want to go out. People would come to the door and I wouldn't answer. I just wanted to be alone.
>
> I felt I had let my whole family down and suffered inwardly as a result and felt embarrassed and ashamed following my dismissal.
>
> I became snappy and difficult to live with. I stopped speaking to my wife. We started sleeping in different rooms again.
>
> I also rowed with my children. Eventually one weekend my wife left as she said I was unbearable to live with. A friend of mine finally managed to get me to answer the door. I was a complete mess. I hadn't shaved for three weeks and I was also not washing properly. I looked like a tramp.
>
> My friend contacted my wife and she came home. It was thanks to her support and that of my friends and family that I was able to get through this time. Without them I don't know what I would have done.
>
> The Sertraline also saved me. Before my dismissal I felt I was in an increasingly good place with my mental health. My dismissal really set me back a great deal.

156. Although he was suffering from depression and anxiety and was on medication at the time, fortunately there was no need for medical input. Despite the restrictions imposed by the Covid pandemic and lockdown, the claimant was able to take advantage of his family support network and coping strategies he had learnt from earlier from his talking therapies, for instance taking long walks. He was able to obtain further work, despite the difficult circumstances of lockdown.

157. The financial boundaries of the three *Vento* bands have been revised since 2003. According to the third addendum to the Presidential Guidance: Employment

Tribunal Awards for Injury to Feelings and Psychiatric Injury Following De Souza v Vinci Construction (UK) Ltd, the boundaries of the middle band in a case presented after 6 April 2020 but before 6 April 2021 were £9000 to £27,000. These figures take into account the 10% uplift following *Simmons v Castle.*

158. In the circumstances and taking all the evidence into account the tribunal determined that an appropriate award would be £13,500, being at the top of the lower quartile of the middle band.

Withdrawal factor in Complex Pension Loss Calculation

159. The claimant was a member of the respondent's defined benefit pension scheme. He had 20 years' service. There is no compensation cap in a discrimination award. In the circumstances, it was not arguable that compensation should not be calculated according to the complex analysis in the Principles, because the claimant would continue to experience a potentially substantial and quantifiable pension loss.

160. The parties had, in line with their duty to assist the tribunal in furthering the overriding objective, made considerable and very welcome progress in discussing between themselves how pension loss should be approached. The sole issue on which they sought a Tribunal determination was the correct withdrawal factor. Accordingly, they agreed that there was no need to have the common two-stage remedy hearing in a complex pension loss case. This was because they had done most of the necessary work prior to the liability hearing.

161. It was agreed that the retirement age in the claimant's employment with the respondent was 62. The claimant's case was that, if he had not been unlawfully dismissed at age 55, he would have worked until retirement at age 62. The tribunal accepted the claimant's case for the following reasons.

162. The tribunal had already accepted that the claimant was particularly committed to his work with the respondent as illustrated by his accepting a demotion and relocation when he became unable to continue at East Croydon Station. There were significant adverse consequences to this in that he had to downsize his house. Nevertheless, he stayed working with the respondent.

163. There was no indication that he was thinking of any career change in the 7 years leading up to retirement. His work was local to where he lived and this factor was likely to be more attractive as he approached retirement and got older. Further the Tribunal took notice, in particular relying on the experience of its lay members in the regional job market, that older workers are, all things being equal, less likely to change employment than younger workers. The claimant had the benefit of a defined benefit pension scheme which was unlikely to be replicated in any alternative employment. Accordingly, although there were material disadvantages to his work, being the cold working environment, the tribunal accepted that the claimant would continue to work to age 62 absent any dismissal.

164. The respondent's case, as put forward in a further witness statement from Mr Gardner, was that it was highly likely that the claimant would have been dismissed

within a relatively short period of time in any event, given his sickness absence record.

165. The Tribunal determined that there were no other obvious factors which might result in the claimant's employment terminating lawfully before age 62. It accordingly considered what were the prospects of the respondent lawfully terminating the claimant on sickness absence grounds before age 62.

166. The claimant submitted that the tribunal should apply a withdrawal factor of 10% to reflect the likelihood of the claimant lawfully coming to an end before age 62.

167. The tribunal directed itself in line with the findings of the Employment Appeal Tribunal in *Chief Constable of Northumbria Police v Erichsen* EAT 0027/15 that, when a tribunal is required to assess what might happen in the future, it has to assess the realistic chances and factor that assessment into the calculation. It was not required to factor in every imaginable possibility. If there is a realistic chance of something happening, the tribunal has to make its best assessment of that chance, taking into account any material and plausible evidence, even if that involved a high degree of speculation.

168. The tribunal considered what were the prospects of the claimant's future absences triggering stage 4 of the absence management process. Based on the tribunal's findings on liability, the respondent acting lawfully would have recognised the claimant as a disabled person.

169. The tribunal did not accept the claimant's case that as a recognised disabled person he would have been managed according to a different procedure than the MFA. Ms Richards said that some disabled employees were managed under the MFA. Mr Gardner's evidence was that when disabled employees were managed under the MFA more discretion was exercised, for instance disability-related absences were disregarded.

170. Had the claimant had further significant disability and non-disability related absences then it was possible if not probable that he would have been lawfully dismissed under the MFA. The tribunal liability judgement took into account the evidence available to the employer at the time of dismissal. At that point the employer and employee could not know with certainty what the future absence sickness record might be. However, at the remedy stage, the tribunal was able to take into account further information, being the claimant's sick record in his new employment following dismissal.

171. There was no indication on the medical evidence that the relatively optimistic occupational health prognosis at the time of dismissal would have proved incorrect. The claimant had suffered an acute depressive episode following his dismissal. The tribunal accepted that this was as a direct result of his dismissal and would not have occurred had he remained in employment. Absent this dismissal there was no evidence of further significant mental health absences. Nevertheless, further absences remained an inevitably possibility. The tribunal had sight of very poor high scores for anxiety and depression in questionnaires dating back to 2014.

172. In respect of non-disability related ill-health, the evidence was mixed. The Claimant did not have a good record with the respondent. However, his sickness record in his new employment was materially better. The tribunal accepted that this was not a like-for-like comparison. Due to the difference in terms and conditions as to sick pay in the new employment, there was a greater incentive to attend work than there had been with the respondent. On the other hand, the new employment was a less physically challenging environment and therefore the claimant might have been expected to suffer less ill-health. The physical effects of a cold working environment on the claimant's health would only have got worse with age, had he stayed with the respondent.

173. The tribunal did not accept the respondent's contention that it was likely the claimant would have been dismissed for ill-health absences shortly after his actual dismissal. The evidence did not support this contention. Nevertheless, there was a real risk of lawful ill-health dismissal over a future seven-year period. This was an inevitable risk with a claimant with a record of mental and physical health problems and a relatively poor absence record.

174. Accordingly, the Tribunal accessed the withdrawal factor at 25% to reflect that there was a real risk of the claimant being lawfully dismissed for ill-health reasons, but it was more likely than not that he would remain in employment until age 62.

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Employment Judge Nash
Date 29 August 2022

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