EMPLOYMENT TRIBUNALS

Claimant: Mr Tushar Patel (Deceased) by his Personal Representative Mr D Patel

Respondent: The Home Office

Heard at: London South **On: 17, 18, 19, 24, 25 October 2022 and in Chambers on 26 October 2022 and 5 December 2022**

Before: Employment Judge Khalil sitting with panel members
Ms B Leverton
Ms G Mitchell

Appearances

For the claimant: Mr Harris, Counsel
For the respondent: Ms Robinson, Counsel

JUDGMENT WITH REASONS

Unanimous Decision

The claimant's claims for a failure to make reasonable adjustments contrary to S.20/21 Equality Act 2010 are not well founded and are dismissed.

The claimant's claim for discrimination arising from disability contrary to S.15 Equality Act 2010 is well founded and succeeds.

The claimant's claim for unfair dismissal contrary to s.94/98 Employment Rights Act 1996 is well founded and succeeds.

The age discrimination claim is dismissed upon the claimant's withdrawal of that claim.

Reasons

Claims, appearances and documents

1. This was a claim for Unfair Dismissal and Disability Discrimination – S.15 (discrimination arising from disability) and S.20 (failure to make

reasonable adjustments) and notice pay. Pleaded claims for Race Discrimination and Age Discrimination had been withdrawn. The claim for age discrimination had not been dismissed but will now be dismissed by judgment.

2. The claimant was represented by Mr Harris, Counsel and the respondent was represented by Ms Robinson, Counsel.

3. The Tribunal had an agreed bundle running to 1142 pages. The issues in the case were agreed set out at pages 1119 to 1123 covering all four heads of claim.

4. The Tribunal heard from the claimant's brother Mr Dilip Patel and Mr Dominic Grealy, a friend of the claimant. Unfortunately, the claimant had passed away in April 2020. The claim was continued by Mr Dilip Patel in his capacity as personal representative.

5. For the respondent, the Tribunal heard from Ms Gloria Smythe, Higher Executive Officer, Asylum Operations, Ms Mandy Bailey, Local Authority Engagement Lead for Resettlement, Hannah Honeyman, Head of Temporary Unaccompanied Asylum-Seeking Children ('UASC') and Mr Thomas Wiseman, HR Business Partner.

Relevant Findings of fact

6. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the Hearing, including the documents the Tribunal was directed to read and taking into account the Tribunal's assessment of the witness evidence.

7. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was a document the Tribunal was directed to read or was taken to in evidence or submissions.

8. The respondent is a Government department which has responsibility for Immigration amongst other matters.

9. The claimant was an administration officer in the respondent's Asylum team in London and the Southeast. He was previously an executive officer but stepped down to administration officer in February 2016.

10. The claimant was dismissed with effect from 18 December 2018. The claimant's employment commenced on 2 May 2002.

11. The respondent is bound by a Civil Service Management Code (November 2016). The Code is issued under the Constitutional Reform and Governance Act 2010, part 1, under which the Minister for the Civil Service, has the power to make regulations and give instructions for the management of the Civil Service, including the power to prescribe the conditions of service of civil servants. The introduction to the Code sets out that the recognised unions have been consulted. The power to determine terms and conditions includes those relating to attendance (section 3 (b) (v)). The delegation of power in section 4, is made subject to the condition that recipients of the delegation, comply with the provisions of the code.

12. Under Section 9.6 ('Absence due to injury, disease or assault at work'), it is stated that departments *must* operate the following rules and procedures where absence is due to, inter alia, injury sustained in the course of duty.

13. Under section 9.6.2 (page 177) it says:

    If a member of staff is absent due to an injury sustained or disease contracted in circumstances that satisfy the qualifying conditions for injury benefit under the Principal Civil Service Pension Scheme, departments and agencies must:

    (a) Provide six months' injury absence on full pay before normal department or agency sick pay arrangements are applied;

    (d) ensure that where an injury is due wholly or in part due to the negligence of the Crown, the whole of such period of absence, or

proportionate part thereof, does not reckon towards the time limits of the department's or agency's sick absence scheme; and

(e) ensure that any proportion of any contributory negligence by the injured officer reckons towards the time limits of the department's or agency's sick absence scheme."

14. The respondent operates a sickness absence procedure, which the Tribunal found was at pages 215 to 229 (version April 2018). Under section 3 (Accidents – Absence due to injury sustained on duty), it was stated that up to six months injury absence on full pay may be paid before normal departmental sick pay arrangements are applied (3.1.1). Following this six month period, an employee is entitled to 85% of pensionable pay for continuous absence if this is because of the qualifying injury (3.1.5).

15. Under 3.1.6 (page 224), there was a table setting out an employee's entitlement to payment during injury absence by reference to:

- Departmental sick pay, temporary injury benefit and permanent injury benefit award
- Time from date of accident – 6 months, 6 months and 28 days, 9 months, 12 months and 18 months
- Management action – regular keeping in touch, 28 days, 3 months, 6 months, 9 months and 12 months.

16. Under this table (page 225) it was stated:

All management action is six months later, so any mandatory consideration of dismissal, would be at the 18 months stage of continuous absence.

17. The Tribunal found there was no clause under this section dealing with absence due to injury wholly or in part due to the negligence of the Crown.

18. There was a clause (3.2.4) on page 225, under a different section (Accident occurring otherwise than on duty), which says:

Where a member of staff is injured as a result of an accident in the United Kingdom in which the Crown is involved and there was no contributory negligence on their part, the period of sickness absence will be excused from reckoning against entitlement. A proportion of the period of sickness absence may be excused where there was contributory negligence

19. There were also Guidelines for Managers in respect of Injury Benefit Applications at pages 898 to 903. In this document, under 'sick excusal and injury benefit pay', the Tribunal found that the guidelines broadly mirrored the sickness absence procedure (pages 215-229). It was also stated:

    Once the injury has been accepted as qualifying and there was no contributory negligence on the employee's part, the periods of sickness absence will be excused from reckoning against entitlement

20. On 29 March 2017, the claimant had an accident at work. The claimant's right foot was caught on some loose wires under his desk. As a result, he fell and banged his head on a cupboard.

21. As a result, the claimant was absent from work from 30 March to 21 April 2017. On 28 May and 30 May 2017, Ms Smythe completed an accident at work form and an HSE incident report form respectively. The injury was recorded as a head injury and Ms Smythe recorded that the underlying cause of the injury was poorly maintained equipment. These reports were at pages 483-486 and 487-488.

22. After the accident, the claimant did have conversations with Ms Smythe during which he expressed sentiments about wishing for his life to end. He was also tearful and also suggested he might have cancer. Ms Smythe also observed that the claimant had on occasions smelt of alcohol at work. Ms Smythe recommended the claimant contact the Employee assistance programme about his thoughts. These thoughts were recorded by Ms Smythe at the time (pages 480-482).

23. The claimant was referred to Occupational Health ('OH') and a report dated 8 June 2017 was received (pages 489-491) from Dr Fox. This report referred to the claimant's (pre-existing) diabetes and epilepsy being well controlled. Dr Fox considered that the main issue with the

claimant was his anxiety, for which the claimant was not taking his medication. Whilst the claimant was not considered to have an excessive drinking problem, Dr Fox did recommend he reduce his intake of alcohol. Dr Fox recommended that any management of his absence related to his anxiety, diabetes or epilepsy had relaxed triggers. He considered that the claimant's anxiety would be protected by disability legislation. Whilst noting the claimant's recent absence, Dr Fox stated that he considered the claimant fit for work.

24. A report dated 20 July 2017 was also received by OH, from the claimant's GP (Dr Tay), pursuant to a request from OH. The report stated that the claimant's epilepsy and diabetes were well controlled and his liver function was within normal range. Further that the claimant's accident/fall had not contributed to any of his underlying health issues (page 510). There was thus no impact on his continuing employment.

25. A further report from OH dated 10 August 2017 was also received essentially confirming the update from the claimant's GP (page 516).

26. Between 1 and 14 August 2017, the claimant was also absent by reason of Cellulitis. The claimant was subsequently signed off until 28 August 2017 by reason of 'foot symptoms.' There was also an admission document from Croydon Emergency Department, dated 8 August 2017, which recorded a metatarsal bone fracture and reference to a swollen left foot (page 514).

27. The claimant was also diagnosed with Charcot's foot (Orthopaedic note printed on 21 August 2017). The claimant was signed off between 28 August 2017 and 28 September 2017 for foot pain (pages 518-519). The note said the claimant was being referred to Kings Hospital for further investigation. The claimant had also called Ms Smythe to say that his foot was in a brace and he was unable to leave the house.

28. The claimant was signed off from 29 September 2017 until 3 November 2017 for foot pain (521).

29. The claimant was also signed off from 9 October 2017 to 9 November 2017 with acute left Charcot foot from Kings College. The note also recorded that the claimant's mobility would be limited for the next 6 to 9 months (page 522). A further note dated 23 October 2017 from the

Diabetic Foot Clinic, Kings Healthcare, also signed the claimant off until 6 January 2018 for acute left Charcot foot (page 523).

30. The claimant's pay was reduced to half pay with effect from 1 January 2018.

31. In an email dated 19 February 2018, following a call with the claimant, Ms Smythe wrote to her Manager, Mr Green, to update him on the claimant's absence. She reported that the claimant's foot could take as long as 18 months to fully heal. She mentioned that on a few occasions he had blacked out and had hit his head on boxed panels and upon regaining consciousness, he did not have the strength to climb into his bed and had slept on the floor instead, which she was very concerned about. She said she had arranged to see the claimant on 1 March 2018 (page 533).

32. The claimant's pay was reduced to nil pay from 4 March 2018.

33. In a conversation with Ms Smythe on 5 March 2018, the claimant informed her he was being measured for special shoes and that his foot remained in plaster. He said he was advised to keep his foot elevated at all times.

34. On 16 March 2018, Ms Smythe visited the claimant at home. Ms Smythe considered the claimant to have lost a lot of weight and she described him as very frail. The claimant's brother was also present. The claimant informed Ms Smythe that when he attended the hospital on 14 March 2018, a fresh cast had been applied. He said his consultant had said he needed to use 2 crutches (not one) to keep his foot elevated. He had also been informed he had lost too much weight and needed to eat high protein foods. She was concerned that when his brother left, even though Mr Grealy could help him, the claimant would need daily care. She informed the claimant she would make an OH referral to consider ill health retirement ('IHR') having regard to a further 3 to 8 months prognosis of the condition. The claimant saw himself coming back soon and enquired if there was any work he could do from home. The discussions at this meeting were summarised in an email to Mr Green on 19 March 2018 (pages 541-542).

35. The Tribunal found there was no discussion or response to the claimant's enquiry about home working at this meeting. In her witness statement for these proceedings, Ms Smythe said as follows:

"There were some tasks which could be carried out from home, but Tushar had been absent for several months and would need to be fit for work to attend the office for training, meetings and to share office-based tasks with colleagues. In 2018, the Home Office IT Systems were not as robust as today and we still relied on a lot of paper documents."

36. Ms Smythe referred the claimant to OH on 19 March 2018 (pages 537-540). Ms Smythe referred to the claimant's foot being in a cast and that he was on full crutches. The consultant's prognosis (on 14 March) was that the claimant would need to be off for another 3 to 8 month period. She was requesting an opinion on whether the claimant would be able to return to work in the near future. She said when she had seen him, he looked very frail, depressed and isolated, especially as he lived alone and his mobility was very limited. The purpose of the referral was stated to be to assess his fitness to carry out his role and IHR. The information requested from the questions were related to a projected return to work timescale, his functional capability to perform his job duties, whether he was likely to have reliable service and attendance in the future and whether the case merited IHR. There was a question on the form about a phased return, adjustments or a different job, but this was not ticked.

37. On 23 April 2018, the respondent accepted liability for the claimant's accident, subject to proof of causation. This was set out in an email from the respondent's insurers in relation to a purported personal injury claim which the claimant had initiated via Thompsons Solicitors. The email, at page 730, sought medical evidence and a schedule of loss. This (conditional) admission of liability was provided to the claimant, upon request, on 12 February 2019 (page 729). It was confirmed in testimony in these proceedings that this claim was not ultimately pursued.

38. The claimant was signed off from 1 May 2018 to 31 July 2018 by the Diabetic Foot Clinic, King's Healthcare (page 546). The claimant also informed Ms Smythe that he had a meeting on 14 May 2018 to be fitted with a shoe, to have an MRI scan and some physiotherapy. Ms Smythe considered the claimant to be upbeat and looking forward to returning to work.

39. On 3 May 2018, HR (Ms Tamsin Coussell) advised Ms Smythe that the claimant might not be eligible for IHR as he was over pensionable age.

40. Following the claimant's appointment with his consultant on 14 May 2018, he called Ms Smythe to inform her he would need to return to see an orthopaedic surgeon on 4 June 2018, as his foot was not healing as it should. The claimant remained upbeat about returning to work. He informed Ms Smythe however that he was still walking with a zimmer frame and could not leave the house. She questioned, in her mind, if he was thus being honest with himself. Ms Smythe emailed Mr Green summarising her discussion on the same day (page 550).

41. On 11 June 2018, Ms Smythe visited the claimant at home. He was able to move around his house with a zimmer frame. The claimant still expressed a desire to return to work which Ms Smythe found to be a concern as he seemed to be housebound. She wrote to Ms Coussell about her meeting and mentioned the possibility of IHR at her next meeting with the claimant and asked who would need to make any final decisions about a dismissal on health grounds. She said she was also awaiting a response from OH (page 554).

42. On 20 June 2018, Ms Coussell wrote to Ms Smythe and reminded her that IHR may not be possible as the claimant was over pension age. She said a decision about dismissal would need to be taken at SEO level or above. She also asked Ms Smythe if she needed to request an estimate of what compensation might be payable (page 555).

43. On 22 June 2018, the claimant was signed off until 22 September 2018 with left acute Charcot foot by the diabetic clinic, Kings Healthcare (page 556).

44. In a letter dated 25 June 2018, from Dr Vas, Kings College Hospital, the claimant was advised to limit mobilisation. Dr Vas also stated that the claimant's accident could be one explanation for his Charcot foot. He expected the claimant to regain mobility with surgical footwear, but he did not give a timeline. He further said about 20% of patients would get a second attack and 20% would develop Charcot in the other foot. The claimant was advised to limit mobilisation (pages 557-558).

45. In an amended letter from Dr Vas dated 26 June 2018 (pages 559-560), it was stated that though the claimant's right foot had been caught in the cables, the claimant fell on his left side and all his body weight was on his left foot. This had not been stated in the letter of 25 June 2018.

46. On 6 July 2018, Ms Coussell provided Ms Smythe with a case analysis document in order for her to prepare for the next formal attendance review meeting. The analysis set out the recent chronology and factors to consider before dismissal including an OH report within the last three months and consideration of workplace adjustments (pages 562-563).

47. On the same day, Ms Coussell requested a compensation estimate from 'My CSP' for medical retirement.

48. On 10 July 2018, the claimant was invited to attend a formal attendance management meeting to take place on 17 July 2018. This was in the light of the claimant's continued absence of 245 days since July 2017. It was agreed that the claimant could be accompanied by his friend Mr Grealy. Ms Smythe said that whilst the latest report from Kings College Hospital had been received, the OH report was still outstanding (pages 564-565).

49. The meeting was rearranged to 24 July 2018 to accommodate the attendance of Mr Grealy. At this meeting, Ms Smythe informed the claimant that the respondent may not be able to sustain the claimant's absence and discussed ill health and early retirement options with the claimant. The claimant advised his cast was to be removed on 3 August 2018 and he would get a shoe to help with his recovery. Ms Smythe did mention the option of the claimant informing senior management to wait before further action, but she said there were no guarantees. The outcome of this meeting was for the claimant to obtain pension estimates and to reflect on his options subject to that. The minutes were at pages 568-569. The outcome was also confirmed in a letter dated 30 July 2018 (page 570). A further call was to take place on 10 August 2018.

50. On 3 August 2018, the claimant was informed that he would not be entitled to compensation for medical inefficiency as he was beyond pensionable age. Thus, ill health retirement would not be different to a 'normal' retirement. Ms Smythe was encouraged by Ms Coussell to

consider a retirement option for the claimant as an alternative to dismissal for medical inefficiency (page 572).

51. By a letter dated 30 July 2018, the claimant also wrote to Ms Smythe believing that the third option of giving him time to recover his mobility and return to employment had not been captured. He cross referred to Dr Vas's report of 25 June 2018 which had stated that he expected the claimant to regain mobility with his surgical footwear. He said an appointment had been made for 7 September 2018 for the fitting of his surgical footwear. He also said he was not able to get ill health/early retirement figures which he said could only go to his line manager, upon request (page 574).

52. In an OH report dated 6 August 2018, Dr Fox stated as follows:

"We cannot be certain at the moment, that Tushar will reach a point of stability that would be compatible with the requirements of his post, on top of the levels of risks of mitigation that his specialists believe he needs to put in place. If you did agree with Tushar that the appropriate way forward was to make an application to the Civil Service Pension Fund for consideration of Ill Health Retirement, then that would have my support" (pages 575-576)

53. The report also referred to the need for the claimant to take safety measures at home and at work and the risk of trauma to his legs and feet was also relevant in any commute.

54. By a letter dated 8 August 2018, Ms Smythe informed the claimant that as he was beyond retirement age, he would not be entitled to a compensation payment for medical inefficiency. Ms Smythe also said that based on the medical evidence and the way the claimant had presented on 24 July 2018, she did not share the claimant's optimism about returning to work within a reasonable timescale. The claimant was asked to confirm by 17 August 2018 if he wished to retire (and claim his full pension immediately). She also stated that if she did not hear from the claimant by then, she would need to refer the matter to senior management for them to make a decision about dismissal action (pages 579-580).

55. By a letter dated 12 August 2018, the claimant responded reminding Ms Smythe of his appointment on 7 September 2018 when he would be fitted with surgical shoes, which he said would bring an early restoration of his mobility. He said he hoped to return to work by late September 2018 and continue working until his state retirement age of 66 (pages 582-583).

56. In a letter dated 14 August 2018, the claimant challenged Dr Fox's advice report of 6 August 2018 essentially believing it was out of date (pages 585-586). Thereafter, Dr Fox did write to the claimant on 16 August 2018 agreeing to re-assess his situation. He also wrote to Ms Smythe on the same day informing her that the claimant needed to be seen again to assess any change or improvement in his condition. He said she should hold off any actions based on his previous advice. The Tribunal found this meant his advice letter of 6 August 2018 had been sent (pages 588-590).

57. On 28 August 2018, Ms Smythe wrote to the claimant saying that any decision about the claimant's on-going absence was being delayed until 22 September 2018, when the claimant's sick certificate would expire and because of the claimant's appointment on 7 September 2018 for the fitting of the claimant's surgical footwear (595).

58. Following an OH meeting on 20 September 2018, Dr McClearney recommended the claimant would be fit to return to work on a planned basis. He recommended Access to Work be asked about taxi support and a workplace assessment be undertaken to ensure the workplace was safe and appropriate. He suggested 4 hours a day, 3 days a week for the first 2 weeks building up thereafter over 5 weeks. He said home working could also be considered. He did not currently advise IHR and considered that the medical condition did cause substantial impairment of day-to-day activities which was likely to persist beyond 12 months (pages 600-601). Ms Smythe was at this meeting and observed the claimant was wearing his new surgical footwear, that he had a black eye and was unsteady on his feet.

59. On 21 September 2018, the claimant had to attend A&E as his foot had swollen and he was in pain. His foot was put back in a cast. The claimant was then signed off from 21 September 2018 to 19 October 2018 (page 602).

60. Following meetings between Ms Smythe and Ms Bailey on 3 and 8 October 2018, it was agreed that if the claimant was wearing his surgical boot and was expected to return to work within the next 6 to 8 weeks, the respondent could sustain the absence. If his cast was still on and there was no reasonable timeframe for a return (6-8 weeks), a decision would need to be made. It was agreed to find out how his next hospital appointment had gone and that in any event, further OH advice would be needed. HR had supported Ms Bailey before these matters were agreed (page 607).

61. On 10 October 2018, Ms Smythe visited the claimant. His surgical boot had been removed and the cast was back on his foot.

62. On 29 October 2018, the claimant was signed off for another 2 months.

63. On 12 or 13 November 2018, Ms Smythe spoke to the claimant informing him of a telephone consultation with OH on 20 November 2018. The clamant had missed an earlier planned call. The claimant informed Ms Smythe that on 24 October 2018, his consultant had informed him that his bones were not healing as expected. He also said he had an MRI scan on 28 November 2018. Ms Smythe did not envisage the claimant returning to work after his certificate expired on 24 December 2018. Ms Smythe updated Ms Bailey in relation to the foregoing on 14 November 2018 following her enquiry seeking an update upon the claimant being signed off for a further 2 months (pages 605 to 606).

64. On 20 November 2018, OH advised that the claimant would be unfit for another 4 to 6 weeks. OH also stated the claimant had a further appointment on 28 November 2018 with his consultant which would include discussion about future treatment options. The report was at pages 613 to 614. In the clinical notes taken at this assessment, it was recorded that the claimant used a zimmer frame indoors and crutches outside. Further, that the claimant was concerned about going outside because of the weather and that the claimant would need considerable treatment and improvement in symptoms before a return to work. A discussion about IHR was also recommended (pages 609-612).

65. On 28 November 2018, the claimant was signed off for another 2 months by the diabetic foot clinic, Kings College Hospital (page 615).

66. On 29 November 2018, Ms Smythe called the claimant who informed her that he was now wearing an open cast to enable him to wear his surgical shoe to walk a few minutes at a time. He would also be seeing a physiotherapist to build up his muscles.

67. On 7 December 2018, Ms Bailey wrote to the claimant inviting him to a meeting to discuss his absence. The claimant was offered the option of having the meeting at his home with a family member present. The claimant was forewarned that dismissal was a possible outcome of the meeting. The claimant was informed that his absence since 2 August 2017 amounted to 492 days. A copy of the Attendance Management procedure was also sent. The meeting was scheduled for 18 December 2018.

68. Ms Bailey was provided with a Case Analysis Submission from Ms Coussell on 10 December 2018, essentially setting out the key chronology to date. In particular, Ms Bailey was directed to consider if an OH report was available following the OH meeting on 20 November 2018 and also whether any reasonable adjustments might be possible (pages 623-625).

69. Following a telephone call on 13 December with the claimant, Ms Smythe informed Ms Bailey that the claimant had attended A&E the previous day as his open cast had caused blistering resulting in his foot and toes becoming very swollen. He had been placed on an IV drip and given antibiotics. He had an appointment with his consultant on 19 December 2018 for an MRI scan. He also requested a taxi for his meeting with Ms Bailey and a holiday pay payment (which Ms Smythe was able to agree with HR). Ms Bailey also agreed to the taxi provided the claimant was well enough to attend. (pages 626-627).

70. At the meeting on 18 December 2018, the claimant was accompanied by his union representative and his brother Mr Dilip Patel. Ms Bailey

was supported by Ms Hayhow, HR. At this meeting the following matters were discussed/raised:

- The claimant reported that he was getting better and his bones had begun to settle, apart from two of his toes

- He said he had another MRI scan on 20 December 2018 when the cast would be removed and subject to the report, the cast may be put back on

- In response to a question about when he would regain full mobility, the claimant said he did not know and Ms Bailey would need to write to his consultant.

- The claimant said he had been given physiotherapy exercises to do as his muscles had weakened.

- The claimant stated that although the 20 November OH report said the claimant was not fit for work, the September OH report said he was.

- The claimant was asked what had happened at the appointment on 28 November and he replied the cast was put back on

- The claimant said he felt he was fit to return to work

- When asked about his mobility, he said he needed assistance to get up when sitting down.

- In connection with a discussion around reasonable adjustments, Mr Hughes (union representative) asked if the claimant could work from home by using a laptop or mobile phone. In response Ms Bailey responded by reference to some tasks the claimant had outlined, that the role required the linking of post, she added she had a health and safety concern and as the claimant had been absent for 17 months, there was a training need too. Thus, she said working from home 5 days a week was not sustainable.

- Mr Hughes asked if some elements could be done from home and then suggested that his accident last year may have caused the

current problem which would have triggered sick excusal and injury benefit payment. He asked if this had been considered.

- Ms Bailey said this might be considered in relation to pay and could be looked into further, but the claimant had been off for 17 months and she was looking at the need for the claimant to return to work. In response to when the claimant would be fit to return, the claimant said it was impossible to say and it would be down to the consultant

- HR would confirm whether the claimant would be entitled to a compensation payment for IHR as he was beyond pension age and management was to provide information about the injury benefit scheme.

- Mr Hughes asked Ms Bailey to give the claimant more time, as the situation had been triggered from work and to put in place some adjustments.

- Ms Bailey said the respondent had been lenient, it was now 17 months of absence and whilst there had been signs of the claimant coming back, there had then been a setback, though noting this was not the claimant's fault.

- There was a discussion about whether a further report could be obtained from the claimant's consultant.

- After an adjournment, Ms Bailey confirmed that following a discussion with HR, the only decision she could make that day was dismissal, having regard to the rehabilitation period that she considered would be needed and whether anything would change if a further medical report was to be received.

71. The dismissal was confirmed in a letter dated 27 December 2018. In this letter, Ms Bailey referred to the several keeping in touch telephone meetings and home visits conducted by Ms Smythe, the OH reports of 6 August 2018, 20 September 2018 and 20 November 2018 and the report from the diabetic foot clinic dated 25 June 2018. Ms Bailey noted that the claimant had been absent for 17 months, that the most recent OH report expected the claimant to be off for the next 4 to 6 weeks, that the claimant was not confident when he would be able to return and that

there had been numerous setbacks in recent months. Ms Bailey also commented on the link between the accident at work and Charcot foot, referring to the report of 25 June 2018, which said it was not definitive, however Ms Bailey considered that as the claimant had no prospect of a return within a reasonable timeframe, his absence could not be sustained any longer. In relation to any application to The Civil Service Injury Benefit scheme for sick excusal, Ms Bailey said even if an application was successful and could alter sick pay entitlement, it would not prevent her from deciding if the current absence could be sustained. Ms Bailey said taxis were not appropriate because of the risk of injury in the office because of the claimant's health and mobility. In relation to working from home, Ms Bailey said the claimant's usual duties required him to be in the office and he would need to attend the office for training, meetings and to share office-based duties on a rota. She added that home working could have been considered in the short term but not indefinitely and as the claimant was not fit to return to work in a reasonable time frame, working from home was not an option. The claimant was informed that as he was beyond pensionable age, he would not get a medical inefficiency payment. He was given a right of appeal (pages 664-667).

72. On 3 January 2019, the claimant emailed Ms Smythe and Ms Bailey seeking assistance in respect of his injury benefit application (page 668). Ms Smythe met with the claimant on 11 January 2019 and thereafter emailed him on 15 January 2019 requesting a personal statement from him as part of the injury benefit application. This was subsequently received by Ms Smythe via Mr Grealy (pages 712-716). A copy of the completed application was sent to the claimant on 11 February 2019 (which Ms Smythe confirmed to the claimant's brother on 22 February 2019 (page 741).

73. On 6 January 2019, the claimant appealed. His grounds were set out in writing (pages 679-683):

- First that the reason for his dismissal should have been ill -health or medical retirement, not efficiency.

- Second, that no financial compensation was paid under the Civil Service Management Code. Under this ground of appeal, the claimant also referred to 'some link' between his accident in March

2017 and the onset of the medical complications with his foot. He said he had been advised that liability for the accident had been accepted and for the injuries sustained.

- Third, deficiencies in the procedure employed from the start through to dismissal. The claimant referred to the Civil Service Injury Benefit Scheme which he said he had not been made aware of and which he intended to apply for retrospectively

- Fourth, insufficient weight given to length and quality of service over 16 years' service

- Fifth, the non-payment of salary for notice pay (because the claimant was on nil pay).

74. The appeal hearing took place on 15 March 2019. The Tribunal found the delay was owing to the unavailability of the claimant's union representative and/or friend Mr Grealy. The minutes were at pages 743-749. The claimant was accompanied by Mr Bailey (union representative) and Mr Grealy. The appeal was heard by Ms Honeyman.

75. At the hearing the following matters were discussed/raised:

- At the outset, Mr Bailey provided a copy of a report from the claimant's consultant at Kings College Hospital dated 20 December 2018 (pages 658 to 659) and the claimant's written statement in support of his grounds of appeal (Pages 679-683). In the Consultant's report of 20 December 2018, it was stated at the end:

  "*Your diabetic foot condition needs to be taken in context of your other medical issues. You have type 2 diabetes, established diabetic neuropathy and more recently being losing weight and developing muscle loss (sarcopenia). This has led to dizziness, unsteadiness and I am aware you have had a number of falls. Taking all this into consideration, I would like to support an application for ill-health retirement."*

- Mr Bailey stated that the accident at work had caused the claimant's Charcot foot. He said the Home Office had accepted liability for the

work-related injury, but further evidence was awaited to show the Charcot foot was linked.

- The claimant said whilst he was signed off until the end of January 2019, he had told Ms Bailey he was fit to work. He said he also said this to Ms Smythe in the first week of December 2018. He said he would have needed taxis to get to and from work as a reasonable adjustment, but this was ignored. The claimant accepted that it was a new ground of appeal that he had said he was fit for work.

- Mr Bailey said although it had not been offered, he cannot do his work from home.

- The claimant said he wished to come back to work and could get proof from the hospital. He said he was on nil pay relying on friends and family to support him.

- Ms Honeyman stated that as the claimant was of pensionable age, he could not get ill health retirement or compensation for medical inefficiency

- The claimant also alleged that management did not want to have a second wheelchair user in the department. This was also a new ground of appeal. The claimant also said that Ms Smythe had said his performance would be monitored and if he was not performing, he would be dismissed.

- In response to a question about what the claimant envisaged about returning to work, he said this was at the office as he cannot open mail at home.

- In relation to the injury benefit claim, the claimant said his consultant had said his accident might have caused his foot injury.

- Ms Honeyman said the claimant could have another five days to produced additional medical evidence. Mr Bailey, however, confirmed that Ms Honeyman should proceed based on the information before her. He said he did not know when they would get the medical evidence to show the causative effect of the Charcot foot.

76. In a report dated 2 May 2019, Dr Kelly, a consultant OH Physician, in considering whether the claimant had a qualifying injury (one that occurs in the course of official duty and is wholly or mainly attributable to the nature of the duty), concluded as follows:

    - That there was a direct causative relationship between the index event and the medical cause of the absence under consideration.
    - That the medical cause of the absence under consideration was 50% or more attributable to the Index event.
    - The medical criteria of a qualifying injury appeared satisfied.
    - The whole absence under consideration was caused by the qualifying injury.

77. Thus, Dr Kelly concluded, that in her opinion, on balance, the medical evidence was consistent with the account of the injury and therefore she would advise that this was a qualifying condition (page 771). The report was sent to the claimant on 7 May 2019, with an indication that it would be released to the respondent within 4 working days.

78. On 23 May 2019, Ms Honeyman notified the claimant of the outcome of the claimant's appeal. The appeal was rejected. The outcome was sent by email at 17:07 on 23 May 2019 (page 787). Ms Honeyman concluded:

    - Determination of whether or not there was a causative effect between the accident and the absence was for the Chief Medical Officer to determine through the Civil Service Injury Benefit Scheme ('CSIBS'). She concluded there had been no failure in relation to procedures and that if the claimant wished to make an application for excusal of sickness absence, this could be facilitated.

    - Any determination by the CSIBS which recognises a causal link between the accident at work and the absence could potentially affect sick pay, but this would not be a determining factor in the consideration of dismissal in these circumstances.

    - The claimant had not raised Access to Work with his manager before his dismissal and the onus was on him to do so.

- The claimant was assessed by OH as fit to return to work subject to the recommendations relating to Access to Work and a phased return on 20 September 2018. However, his condition deteriorated later that day resulting in admission to hospital. A further OH report of 20 November 2018 concluded that the claimant was likely to remain absent from work for at least a further 4-6 weeks and the GP's 'Statement of Fitness to Work' of 28 November stated that the claimant was not fit to work and this would be the case for 2 months. Ms Smythe had no recollection of a conversation in December 2018 in which the claimant had advised that he was fit to work, however the claimant had advised during a telephone conversation on 13 December 2018 that he had attended A&E the previous day due to a deterioration in the condition of his foot and discussed union representation at the upcoming formal attendance meeting. During the formal attendance meeting on 18 December 2018, the claimant advised Mandy Bailey that he was fit to work, however the OH report, Statement of Fitness to Work and the letter from his consultant dated 20 December 2018 did not support this.

- There was no evidence to suggest that wheelchair use was a factor in the decision-making process

- In these circumstances and in the context of the absence being supported for 17 months, Ms Honeyman was satisfied that Mandy Bailey's dismissal decision of 18 December 2018 was reasonable and there were no procedural errors which undermined it. Having reviewed all the facts of the case and taken account of the further information provided at the hearing, she upheld the dismissal decision.

79. On the same day (23 May 2018), at 14.15, Ms Bailey informed Ms Honeyman (and HR) that the claimant's application for injury benefit award had been successful (page 792). Ms Bailey had been informed by Smythe. Ms Bailey commented:

"*This will alter his pay, but If I understand the process correctly, it doesn't alter my decision to dismiss given the length of absence and lack of prospect of imminent return.*

Happy to be corrected"

80. There was no response from Ms Honeyman. On the following day (24 May 2019), Ms Kinman (HR) responded:

"*The CSIBS sickness excusal relates directly to pay. However, where a direct workplace link to an injury is found advice is often given about not taking punitive action with regards to that period of absence. There is a possibility that the sickness excusal pay element can be given but trigger points/long term sickness absence action remain in place but you will need to seek HR Casework advice around this about the risks to such a decision at appeal and at ET."*

81. Ms Honeyman did respond on 24 May 2019 to Ms Bailey and Ms Kinman advising that the appeal had been dismissed yesterday and the decision to dismiss upheld (page 804).

82. On 3 June 2019, Ms Bailey asked Ms Honeyman if she had received HR advice in dealing with the appeal in response to which Ms Honeyman said she did take advice and sick excusal was a separate matter (page 804).

83. In a further email on 3 June, Ms Bailey said:

"*I understood Ali's email to mean that where an absence is caused by an accident at work, the advice is often not to take punitive action, which in this case was dismissal. I was asking whether you discussed this with HR caseworker assigned to the appeal and if it had therefore already been considered when you made your decision, or whether I now need to go to the HR caseworker who helped me with the dismissal for advice -which I'm very happy to do.*

We will deal with all pay related issues linked to the CSIBS outcome."

84. In response, on the same day, Ms Honeyman said:

"*Ahhhh - that makes more sense. In answer to your question, no I did not discuss this with the HR caseworker as I had already dismissed the appeal when this assessment came in. Not sure where we stand given that the appeal has been concluded. You will need to refer back to HR casework. I attach the appeal outcome."*

85. In consequence, Ms Bailey emailed Ms Hayhow (HR) on the same day as follows:

"You provided advice in relation to the absence/dismissal of Tushar Patel back in December. The appeal was dismissed and my decision upheld on 23/05. However, we found out around the same time that his injury benefit application was successful - there is a causal link between his accident at work and the absence and a sick leave excusal should be applied (I attach the report). Our HRBP has advised that we take HR casework advice, as sometimes where an absence is found to be as a result of an accident at work we decide against taking punitive action. Obviously in this situation Tushar had already been dismissed and the decision upheld. What do you recommend? I think you're already aware that Tushar has an ET."

86. A response to this was chased up by Ms Bailey on 25 June 2019 and a reply received from Ms Hayhow on 3 July 2019 as follows:

"*We would always highlight that formal action under attendance management processes is not punitive action, although it can be appreciated it may feel that way. It is about recognising that the level of absence and/or restriction is not sustainable for the business and thus not reasonable to accommodate. The SLE is the reflection of not taking negative action where an injury is resulting from work as they will not have the pay reductions for a set period of time. The fact that an absence either in full or part relates to an injury at work would not normally prevent attendance management procedures being followed to their fullest, although moving to a formal stage may be delayed where a return seems more likely. With Mr Patel, his absence had already been supported much longer than is normally seen elsewhere in Home Office, and at the point of dismissal, a return to work did not have a reasonable or certain timescale"*

87. There was no further action thereafter on the appeal. The Tribunal accepted that from the foregoing chronology, Ms Honeyman did not know that the claimant's application for injury benefit had been accepted before her appeal outcome was sent. Even though there was an email which had been sent to her on the same day (a few hours before), the Tribunal accepted this had not been considered or read first and paragraph 25 of her witness statement was accepted. The Tribunal had regard to the email exchange thereafter which manifested a willingness

of Ms Bailey and Ms Honeyman to review their own decisions, if required.

88. In respect of payments made to the claimant, the Tribunal found that the following sums were paid to the claimant, (which were agreed by the parties):

    - 31 July 2019 – sick leave excusal 6 months £12,697.97 (gross)
    - 4 June 2021 – injury benefit 85% top up £8,616.22 (gross)
    - 29 November 2021 – injury benefit 85% notice pay £5,321.72 (gross)

Applicable Law

Unfair Dismissal

89. Under S. 98 (2) Employment Rights Act 1996 ('ERA') an employer needs to have a potentially fair reason for dismissal. The employer has the burden of showing the reason. The respondent relies on capability by reason of the claimant's ill health.

90. Pursuant to S.98 (4) ERA, an employer must act reasonably, having regard to reason shown, to treat that as a sufficient reason for dismissing the employee. This is a neutral burden.

91. In ***Spencer v Paragon Wallpapers 1976 IRLR 373*** the EAT set out the key question in determining the fairness of a dismissal based on absence: whether the employer can reasonably be expected to wait any longer for the employee to return. This can include consideration of:

    - The nature of the illness
    - The likely length of the absence
    - The need for the employer to have done the work the employee was engaged to do (which should be balanced with the employee's need for time to recover)

'The Spencer Guidance'

92. An employer is also expected to consult and ascertain the true medical position (***East Lindsey District Council v Daubney 1977 ICR 566).***

93. If an employer is culpable in relation to an employee's absence, the employer may still fairly dismiss the employee but may be expected to "go the extra mile*"* ***McAdie v Royal Bank of Scotland 2007 IRLR 895.***

94. The Tribunal must also have regard to the 'range of reasonable responses' test. It has long been established that, under section 98(4), a Tribunal must assess objectively whether dismissal fell within the range of reasonable responses available to the employer. Whether or not the Tribunal would have dismissed the employee if it had been in the employer's shoes is irrelevant: the Tribunal must not "substitute its view" for that of the employer. (***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439)***. The range of reasonable responses test applies not only to the question of whether the sanction of dismissal was permissible, but also to that of whether the employer's procedures leading to dismissal were adequate. (***Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23).***

95. In ***Spencer*** it was stated:

"*In the first instance, the decision how to act in circumstances such as the present is that of management. Secondly it is the function of the Tribunal to determine whether the management had satisfied them that in the circumstances (having regard to equity and the substantial merits of the case) they acted reasonably in treating it as a sufficient reason for dismissing the employee. It is not the function of the Tribunal to take the management's decision for it"*

Disability Discrimination

96. S.15 Equality Act 2010 ('EqA') provides:

Discrimination arising from disability

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

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

97. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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.

S.20 provides:

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 ('PCP') of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

98. The general burden of proof is set out in S.136 EqA. This provides:

"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."

99. S.136 (3) provides that S. 136 (2) does not apply if A shows that A did not contravene the provision.

100. The guidance in ***Igen Ltd v Wong 2005 ICR 931*** and ***Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205 EAT*** provides guidance on a 2-stage approach for the Tribunal to adopt. The Tribunal does not consider it necessary to set out the full guidance. However, in summary, at stage one the claimant is required to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, (now any other explanation) that the respondent has committed an act of discrimination. The focus at stage one is on the facts, the employer's explanation is a matter for stage two which explanation must be in no sense whatsoever on the protected ground and the evidence for which is required to be cogent. The Tribunal notes the guidance is no more than that and not a substitute for the Statutory language in S.136.

101. More specifically, in relation to reasonable adjustments, a claimant must establish he is disabled and that there is a provision, criterion or practice which has caused the claimant his substantial disadvantage (in comparison to a non-disabled person) and that there is apparently a reasonable adjustment which could be made. The burden then shifts to the respondent to prove that it did not fail in its duty to make reasonable adjustments ***Project Management Institute v Latif 2007 IRLR 579***. The respondent may advance a defence based on a lack of actual or constructive knowledge of the disability and of the likely substantial disadvantage and the nature and extent of that because of a PCP - S.20, Part 3, Schedule 8 EqA & ***Newham Sixth Form College v Sanders 2014 EWCA Civ 734.***

102. In relation to discrimination arising from disability, once a claimant has established he is a disabled person, he must show that 'something' arose in consequence of his disability and that there are facts from which the Tribunal could conclude that this something was the reason for the unfavourable treatment. The burden then shifts to the employer

to show it did not discriminate. Under S.15 (2) EqA, lack of knowledge of the disability is a defence but it does not matter whether the employer knew the 'something' arose in consequence of the disability. Further an employer may show that the reason for the unfavourable treatment was not the 'something' alleged by the claimant. Finally, an employer may show the treatment was a proportionate means of achieving a legitimate aim.

Conclusions and analysis

Claim 1- Reasonable Adjustments 'Trigger points'

103. The Tribunal concluded that the respondent did not apply the trigger points in its sickness absence procedure. It was clear to the Tribunal that whilst a process was started in relation to the claimant's long-term absence, this was not by way of application of structured or prescribed management reviews at the various stages. There was not a 28 days, 3 months, 6 months or 9 months formal review. Ms Smythe did get the ball rolling in respect of the claimant's continuous absence when she had her formal review meeting on 24 July 2018. However, by then, Ms Smythe had already contemplated an ill health retirement. Whilst there were references to 'trigger points' (pages 564 and 570), these did not, in effect, reflect the reality of the approach. This was a continuous uninterrupted absence with the respondent's focus on whether and if so when, the claimant might be able to return to work.

Claim 2 – Reasonable Adjustments 'Auxiliary aids 20 September to 18 December 2018'

104. The Tribunal concluded that the respondent did not fail to provide a wheelchair or taxis to and from work during this period. In relation to the wheelchair, the Tribunal concluded that this was never requested by the claimant or considered by the respondent. This only emerged as a discussion point at the appeal hearing as a new ground of appeal. It was rejected as ever being part of the decision-making process at dismissal. This did not mean it could not be considered by the Tribunal, sitting in Judgment as to whether it could and ought to have been considered. The Tribunal concluded however, that this could not have been a reasonable

adjustment in the period claimed as the claimant was certified as unfit for work throughout this period. Neither could the provision of a taxi to enable the claimant to travel into work and back home. The claimant had suffered a setback on 21 September and was signed off until 19 October by the diabetic foot clinic, Kings College Hospital; he was also signed off for 2 months on 29 October 2018 and OH said on 20 November 2018, that he was not fit for work for at least another 4 to 6 weeks. He was also signed off for 2 months on 28 November 2018 after seeing his consultant. Neither the claimant, his consultant or OH certified the claimant as being fit for work, with adjustments, during this period. It followed that no auxiliary aid during this period would have enabled a return to work.

Claim 3 –Reasonable Adjustments 'Requirement to be office-based August 2017 to December 2018'

105. The Tribunal concluded that the respondent did require the claimant to be office based, when fit. The Tribunal concluded that the respondent did not give serious consideration to the prospect of the claimant working from home on a temporary basis. However, any failing in this regard was offset and mitigated completely by the claimant's unfitness for work. In particular, the Tribunal concluded that the planned phased return in September 2018, following the suggestion that home working could be considered (page 601), might have provided the occasion or opportunity for the claimant to work from home as part of the phased return to work. It did not and could not transpire thereafter because of the claimant's deterioration. In addition, the Tribunal noted that the claimant did not himself envisage a return to work as being from home at the appeal hearing as he said he could not open mail from home. Moreover, at the appeal hearing, the claimant's union representative ruled out the possibility that the claimant could do his work from home. The Tribunal understood and concluded these comments were not about the time of the appeal hearing, but retrospective too. The Tribunal thus concluded that the claimant was not subjected to a substantial disadvantage by reason of the provision, criterion or practice to be office based, as the claimant was never fit enough to return to work during the relevant period. Whilst the Tribunal accepted that the respondent had not indicated to the claimant that home working might have been a possibility, ultimately this would not have made a

difference as there was never a period when this could actually have been implemented. As agreed by Mr Grealy in evidence, it might have made the claimant feel better, but the Tribunal concluded it would not have made a difference to any adjustment to work from home as he was not fit to do so.

Discrimination arising from disability – S.15 EqA

106. The Tribunal had little trouble in concluding that the claimant was treated unfavourably by being dismissed, further that this was because of long term and on-going absence (with little or no prospect of a return to work) in consequence of the claimant's Charcot foot. In addition, the Tribunal concluded that the respondent's aims of following appropriate procedures (which the Tribunal understood to mean attendance management procedures) and business efficacy (which the Tribunal understood to mean a sensible and pragmatic prospect of returning to work following absence) were legitimate. Although the impact on the department and other administration staff was not advanced expressly by the respondent, the Tribunal concluded, there would, inevitably be some impact of the claimant's absence and the management of that, otherwise it begs the question why the claimant would be employed and why his absence/attendance would need to be managed.

107. The key issue was thus whether the respondent's treatment was a proportionate means of achieving its legitimate aims.

108. This part of the case engaged the Tribunal in substantial deliberation. Having done so, the Tribunal concluded that the respondent's treatment of the claimant, by dismissing him, was not a proportionate means of achieving its legitimate aims. There were two key reasons for this conclusion.

109. First, the Tribunal concluded that the respondent overlooked and/or failed to consider the effect of the claimant's absence being caused by the negligence of the Crown. The respondent asserted that negligence had not been established or proven by the claimant. The Tribunal did not agree. By a combination of the respondent's acceptance of liability, subject to causation (in respect of the resultant injury) *and* the subsequent medical decision that the claimant's Charcot foot was

directly causatively attributable to the accident at work, the respondent was in the arena of negligence. The latter was not known (by Ms Honeyman) until the day after the appeal decision was conveyed but in circumstances where it had been tabled as a possibility as early as June 2018 and it was a live consideration at the dismissal and appeal hearings. After the conclusion of the appeal, it remained a live consideration too as the decision on whether the claimant had a qualifying condition was not known by the decision maker until after her appeal outcome had been sent. It was clearly a decision Ms Bailey and/or Ms Honeyman were prepared to re-visit as the email chain immediately after between 23 May 2019 and 3 June 2019 made clear (pages 801 to 806). There was already some element of doubt/uncertainty simply based on the causative link between the accident and the injury (before factoring in the earlier admission of liability for the accident) as Ms Bailey indicated she was 'happy to be corrected' about whether this impacted on her decision to dismiss, further HR offering the view that in circumstances where a direct workplace link to an injury is found, it is often not about taking 'punitive action'. Ms Honeyman then indicated that she did not know where they stood given that the appeal had been dismissed, which led to Ms Bailey referring the matter back to HR for further advice and in fact chasing it up. That final advice was received on 3 July 2019 (page 1002) to the effect that the workplace injury outcome/decision did not affect the decision to dismiss – a decision reached without considering/contemplating that liability for the accident had also been admitted.

110. Second, the respondent considered that the sick excusal provisions applied directly to pay only. This was clear from Ms Bailey's decision (page 666) that even though a successful application to the Civil Service Injury Benefit scheme might alter sick pay entitlement, it would not prevent her from deciding whether the current absence could be sustained. In her appeal decision, Ms Honeyman said any determination by the CSIBS which recognises a causal link between the accident at work and the absence could potentially affect sick pay, but this would not be a determining factor in the consideration of dismissal in these circumstances. Both of these conclusions were reached absent consideration/contemplation of negligence *and* consideration of the effect of section 9.6.2 of the Civil Service Code. This Code says, with the Tribunal's emphasis underlined:

If a member of staff is absent due to an injury sustained or disease contracted in circumstances that satisfy the qualifying conditions for injury benefit under the Principal Civil Service Pension Scheme, departments and agencies must:

(a) Provide six months' injury absence on full pay before normal department or agency sick pay arrangements are applied;

(d) ensure that where an injury is due wholly or in part due to the negligence of the Crown, the whole of such period of absence, or proportionate part thereof, does not reckon towards the time limits of the department's or agency's sick absence scheme; and

(e) ensure that any proportion of any contributory negligence by the injured officer reckons towards the time limits of the department's or agency's sick absence scheme."

111. There is no discretion provided about whether or not to have regard to these provisions. The Tribunal concluded that the respondent's sickness absence procedure was silent, in the applicable section, on the relevance/impact of negligence and accidents resulting in absence due to injury sustained on duty; the Tribunal rejected that 9.6.2 (d) could be read as referring to the same period of 6 months in 9.6.2 (a). Further, this consideration went beyond sick pay as sections (d) and (e) made clear in contrast to section (a). The Code did have a prevailing impact in such circumstances and the respondent did not submit or advance a case that that was not right. In fact, its primary submission in closing arguments was that negligence had not been established – thus leaving open the question - what if it had?

112. This did not mean however that there was only one outcome to that question. The respondent might assert that it was still open to it to dismiss in such circumstances based on a bleak or uncertain prognosis. It might assert that whilst it was not obliged to consider mandatory dismissal at 18 months, it was permitted to consider discretionary dismissal. The claimant might assert that the Code estops/prohibits consideration of dismissal in such circumstances and that it matters not that the provision is thus extremely benevolent. The situation might be comparable to an employee with the benefit of permanent health

insurance. There were also arguments made by the respondent about the absurdity of such an interpretation countered by the claimant submitting that such scenarios would often lead to agreed exits. The Tribunal considered that there may be other scenarios – there might be a personal injury claim (which could have an impact), there may be an ill health retirement (of an employee below pensionable age).

113. Ultimately all such imponderables or possibilities were arguments for another day and the Tribunal stopped short of reaching any conclusions on those matters. It was enough, in the Tribunal's conclusion, that the respondent's failure to consider section 9.6.2 at all or properly with the attendant effect of negligence on its decision making, including dismissal, meant that it had not satisfied the Tribunal that it had discharged its burden of establishing that its treatment of the claimant was a proportionate means of achieving its legitimate aims. There *may* have been an alternative, in these circumstances, short of dismissal.

Unfair Dismissal – issues 17 (a) to (m)

114. The Tribunal concluded that the respondent did have a potentially fair reason for dismissal, namely, capability, by reason of the claimant's ill health.

115. Issues 17 (a) and 17 (b), concerned the respondent's failure to refer the claimant to the injury benefit administrators for a medical assessment to determine if his Charcot foot had been caused by the accident at work and whether his absence between August 2017 and December 2018 should have been disregarded. Whilst it was raised as a possibility by the claimant's consultant in the reports of 25/26 June 2018, the latter of which was the amended report citing that the claimant had fallen on his left side, with his body weight on his left foot with swelling and colour change on his left foot in July 2017, it was resurrected by the claimant at the dismissal meeting. By the time of the appeal hearing however, although the failure to refer had been 'cured', as by then an application had been submitted (with the assistance of Ms Smythe), the appeal outcome was decided without waiting for the outcome of the assessment. However, the Tribunal accepted that the respondent had an open mind to review its own decisions at dismissal

and appeal thereafter. When that email dialogue occurred however, the respondent overlooked consideration/contemplation of negligence and what impact this might have had and to what extent the claimant's absence should have been disregarded beyond sick pay considerations. Had the respondent applied its mind to the combined admission of liability with the causal link between the Charcot foot and the accident, it might have affected its decision-making having regard to section 9.6.2 (d) of the Civil Service Code. Not to have done so rendered the dismissal unfair and/or was outside the range of reasonable responses.

116. In relation to issue 17 (c), the Tribunal concluded that the respondent did not fail to investigate if there were any alternative roles the claimant could do. Following the Tribunal's analysis under claims 2 and claim 3 above, there was no alternative role that the claimant was fit to undertake. When he was dismissed, the claimant was certified as unfit for work until the end of January 2019, having suffered a deterioration/set back since 21 September 2018, which unfortunately nullified the glimmer of hope the claimant had received from the report of 20 September 2018. Further, his consultant's report dated 20 December 2018 (post-dismissal but prior to his appeal), supported an application for ill health retirement which was wholly inconsistent with any prospect to work.

117. In relation to issue 17 (d), (e) and (f), the Tribunal concluded that the respondent did not fail to provide an Access to Work Assessment, a back to work plan (including working from home), or transport, or focus on what he could not do when assessing whether the claimant could work from home or fail to consider 'job carving'. Following the Tribunal's analysis under claims 2 and claim 3 above, these measures required the claimant being fit to return in some capacity. The claimant was not fit to return. When he was dismissed, the claimant was certified as unfit for work until the end of January 2019, having suffered a deterioration/set back since 21 September 2018, which unfortunately nullified the glimmer of hope the claimant had received from the report of 20 September 2018. Further, his consultant's report dated 20 December 2018 (post-dismissal but prior to his appeal), supported an application for ill health retirement which was wholly inconsistent with a prospect to work from home.

118. In relation to issue 17 (g), the Tribunal repeats its conclusions above in respect of trigger points, in its analysis in respect of claim 1.

119. Issues 17 (h) (failure to make an ill health retirement application before dismissal) and 17 (i) (failure to pay 6 months efficiency compensation when dismissing the claimant), were withdrawn by the claimant and thus no longer pursued.

120. In relation to issues 17 (j) to 17 (m), all of which related to the outcome of Dr Kelly's report on the claimant's eligibility for civil Service Injury Benefit, the Tribunal drew upon its own conclusions in respect of the proportionality of the dismissal in paragraphs 109 to 113 and paragraph 115 (in relation to issues 17 (a) and 17 (b)) to conclude that the respondent's failure to consider/non-consideration/contemplation of the effect of negligence in respect of the accident and the consequential absence on its decision making in respect of dismissal, also rendered the dismissal unfair and/or outside the range of reasonable responses.

121. The Tribunal thus concluded that the dismissal was unfair. This was not a case where the Tribunal was being asked to consider if the respondent could reasonably be expected to wait any longer or to assess if the respondent had gone the extra mile. If the considerations of fairness were exclusively limited to those questions it was highly likely the Tribunal would have determined the dismissal was fair as it was open to the respondent to conclude that the claimant's prognosis was uncertain at the point of dismissal and was worse, on the evidence, since dismissal which was considered at the appeal. Further, it had gone the extra mile in contemplating dismissal after 16 months of continuous absence (19 months by the time of the appeal) and having delayed contemplation in August 2018 in the light of the claimant's forthcoming OH review in September 2018. Contemplation of dismissal for capability was also delayed after the claimant was signed off again until 19 October 2018 and thereafter a further OH report was received and at the point of the claimant's dismissal, he had been signed off for 2 months from the end of November 2018 until the end of January 2019.

122. As noted above in paragraph 106, whilst the effect of the claimant's absence on others was not advanced as a prevailing concern, the Tribunal concluded it was inherent that there would be some effect of

such continuing absence and the management of that. However, that would not have tilted the claim towards the respondent's need to dismiss and thus the fairness of doing that.

Notice Pay

123. The notice pay claim was withdrawn and no longer pursued.

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Employment Judge Khalil

14 December 2022