EMPLOYMENT TRIBUNALS

Claimant: Mr C Clapham

Respondent: Chillaway Express Special Limited

Heard at: Bristol **On:** 16, 17, 18 & 19 January 2023

Before: Employment Judge David Hughes
Ms M Luscombe-Watts
Mrs L Simmonds

Representation
Claimant: In person (accompanied by a parent)
Respondent: Mr R Lyons, consultant

JUDGMENT having been sent to the parties on 07.02.2023 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

Introduction

1. The Claimant worked for the Respondent from 28.01.2019 to 15.03.2021, as a shift manager/transport planner. By a claim form dated 06.07.2021, he complains of unfair dismissal and discrimination on the grounds of disability. The Respondent disputes these claims.

2. A case management hearing took place on 12.07.2022, before Employment Judge Self. At that hearing, the tribunal identified the following as being the issues in this case:

1. Discrimination Arising from Disability (Equality Act 2010 section 15)

1.1 Did the Respondent treat the Claimant unfavourably by dismissing him?

1.2 Did the following thing arise in consequence of the Claimant's disability? The Claimant contends that his sickness absence arose from his disability

1.3 Was the dismissal because of the sickness absence?

1.4 Was the dismissal a proportionate means of achieving a legitimate aim? The Respondent has set out its legitimate aims within the Response.

1.5 The Tribunal will decide in particular: 1.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

1.5.2 Could something less discriminatory have been done instead;

1.5.3 How should the needs of the Claimant and the Respondent be balanced?

1.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? If so, from what date?

2. Unfair dismissal 2.1 It is accepted that the Claimant was dismissed.

2.2 What was the reason for dismissal? The Respondent asserts that it was a reason related to capability (ill-health) which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996.

2.3 Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

2.3.1 The Respondent genuinely believed the Claimant was no longer capable of performing their duties;

2.3.2 The Respondent adequately consulted the Claimant;

2.3.3 The Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position. The Claimant asserts that such information was mandatory under the internal ill-health policy and he was told it would be obtained;

2.3.4 Whether the Respondent could reasonably be expected to wait longer before dismissing the Claimant;

2.3.5 Whether the dismissal was within the range of reasonable responses.

2.4 Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

2.5 Did the Respondent adopt a fair procedure? The Claimant challenges the fairness of the procedure leading up to his dismissal and at the appeal.

2.6 Did the appeal cure any defects at the original hearing?

2.7 If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

3. The Tribunal canvassed with the parties whether they were content that those issues continued to reflect accurately the issues between them. The parties confirmed that they did.

4. At the hearing, it appeared to the Tribunal that a further issue, namely whether the Claimant had been supplied with a statement of the particulars of his employment as required by Employment Rights Act 1996 s1, may need to be considered, due to s38 Employment Act 2002. Mr Lyons for the Respondent acknowledged that this may be so.

Who everyone is

5. The Respondent is a small company – it had around 10 employees at the time of the events that concern us. It specialises in food transportation, in particular that of frozen foods.

6. As we have already said, the Claimant is a former employee of the Respondent. During the course of the hearing, the witnesses called on behalf of the Respondent have praised the Claimant: they spoke highly of his range of knowledge, and emphasised that he was an asset to their business.

7. The Claimant suffers from a number of medical conditions, including mild sleep apnoea, asthma, conductive hearing loss and diabetes. A letter from Dr JW Coleman of Birmingham and Solihull Mental Health NHS Foundation Trust dated 20.12.2021 was included in the bundle before us. It stated that the Claimant met the clinical criteria for a working diagnosis of Chronic Fatigue Syndrome.

The hearing

8. The Tribunal heard live evidence from the Claimant, and from two witnesses on behalf of the Respondent: Mr Gurjit Singh Bachra, and Mr Gurjinder Singh Rai. Those gentlemen were happy to be called “Mr Bachra” and “Mr Rai” during the hearing – although they were often referred to by their forenames – and we will do so in these reasons.

9. The Tribunal also had a statement from a Mr Michael Brennan. Mr Brennan was an important person in the events that concern us. He had been asked to attend on day 1 of the hearing. He didn’t do so, but we were assured that he would attend on the second day. The Claimant was content to present

his case before the Respondent, and the hearing was able to start and make good progress on the first day.

10. On the second day, Mr Brennan again did not attend. Mr Lyons, the Respondent's advocate, read to us an email communication, in which Mr Brennan explained work pressures, but offered an assurance that he could attend on the third day. Mr Lyons canvassed with the Tribunal the possibility of a witness order.

11. That was not satisfactory. The case had been listed for 4 days. To have heard Mr Brennan would have risked making little use of the second day, as it appeared that the evidence of Messrs Bachra and Rai would take considerably less time than, in fact, it did. Given the relatively narrow scope of the factual dispute in this case, we thought it was unlikely to be proportionate to risk wasting much of the second day. We therefore canvassed with the parties the option of reading Mr Brennan's statement, with the caveats that (a) we would consider the fact that Mr Brennan had not been cross-examined when deciding what weight to give it and (b) the Claimant would be free to comment on Mr Brennan's statement. The parties were content with this course, and that is what we decided to do.

12. The Claimant represented himself throughout the hearing. On each day, he was supported by one of his parents. He represented himself very ably. At the case management hearing, Employment Judge Self had identified a need for regular breaks for the Claimant during the course of the hearing. We accommodated this, breaking for 10 minutes every hour or so, and allowing other breaks when it appeared appropriate to do so.

13. The Respondent was represented by Mr Lyons. He too represented his client with considerably ability. We are grateful both to the Claimant and to Mr Lyons.

<u>What happened</u>

14. Much of what happened is not in dispute between the parties.

15. The Claimant started working for the Respondent when it was owned by its previous owner, one John Jones. Mr Jones and his wife had been directors of the company, although whether they owned it jointly we do not know and is, in any event, not important to these proceedings.

16. Messers Bachra and Rai are experienced business people in their own right. They are involved in a food manufacturing business of some scale. Although Mr Bachra has knowledge of logistics, as he is involved with the supply chain of his main occupation, he is not a specialist in transportation, and neither is Mr Rai.

17. Messrs Batra and Rai bought the Respondent business on the understanding that it was more or less self-running. They did not want to be in involved in the day-to-day running of the Respondents business, nor did they anticipate that they would be so involved. The Jones's daughter, Nicola, was the Respondent's transport manager and looked after finances, so Messers Bachra and Rai were advised to let her manage the business. She agreed to do so as a temporary measure, until they found someone.

18. Mr Brennan is a person with significant experience in the food industry. He had previously had significant experience as a manager in that industry. For personal reasons, he had decided to take a career break, and when Messrs Bachra and Rai took over the Respondent, he was working as a driver for the Respondent. Either before they took over or shortly thereafter, Mr Brennan started working as a planner in the Respondent's office, and was soon switched to managing the office and operations, with Nicola left in charge of finance and transport managing.

19. The Claimant's job description was included in the bundle before us. His title was office shift supervisor. His responsibilities were set out as;

    • Answer incoming calls from customers and make outbound calls.

    • Organising deliveries and collections to include cost, weight, pallet numbers and

    temperature in accordance with customer requirements.

    • Prepare and issue trip sheets and drivers boxes.

    • Monitor transportation through all phases of the journey.

    • Problem solving.

    • Keep customers informed of any issue & the resolution.

    • Rescue out of hours drivers.

20. Both Mr Bachra and Mr Rai were full of praise for the Claimant's capabilities. He was described as having a vast experience of driving hours, to be experienced in office planning, capable of maintaining vehicles, as well as being a driver himself. Mr Bachra told us that, if something came along, he'd ask for the Claimant's advice on many things such as routes,

how to plan routes more efficiently, even the choice of trucks to buy. He was described as a "*massive asset, never filled again*".

17th June incident[1]

21. On 17.06.2020, an incident took place in which the Claimant said that he was asked to run a driver illegally, by which we understand he was asked to task a driver with completing a route or routes that would have taken him over his maximum driving time.

22. Mr Bachra's recollection of this event was that it arose against the background of him attempting to increase the profitability of the Respondent. He told us that the Respondent had operated on a "*one job, one truck, one driver*" basis, which means that each job was allocated to a single truck and single driver. This meant that a driver having completed a delivery would often drive back to the Respondent's premises with an empty truck. Mr Bachra wanted to see if drivers and trucks could be occupied on both legs of a journey, possibly by making a diversion between a delivery point to a different pickup point, resulting in a triangular route.

23. Mr Brennan statement dealt with this incident very briefly. He said that he could recall an incident in which he had spoken to the Claimant to advise him to be respectful when speaking to the Respondent's directors. He described this as a chat between colleagues rather than a formal conversation. His statement did not go into the background or the detail of the incident.

24. The incident was referred to in an email dated 18 July 2020, that was included in the bundle. In the email, the Claimant says;

"*Going forward, could you please clarify what your expectations are of the office staff and drivers regarding rescues so that I am clear about what you would like to happen.*

I only ask as I feel extremely uncomfortable being asked to actively encourage a driver to exceed his maximum duty time of 15 hours reducing his daily rest below the minimum of nine hours as required under the EU and AETR rules. I want to make sure that I am acting according to legislation and am clear about your company policies and procedures. I really enjoy working for you and want to represent the company well.

…"

[1] Because of a typographical error, this date was read out at being in July when the Tribunal gave its oral reasons.

25. It is important to keep in mind the Claimant makes no claim in respect of this incident. He says its importance to these proceedings is that he believes it played a part in the Respondent deciding that it wanted to dismiss him. We do not accept that the Claimant was asked knowingly to direct or encourage a driver to work beyond that driver's permitted hours. We think that this incident is most likely the result of Mr Bachra canvassing different possibilities with the Claimant. We think it improbable that Mr Bachra intentionally directed the Claimant to encourage a driver to exceed their maximum hours.

The Claimant goes on sick leave

26. On 21st July 2020, the Claimant had his first day of absence. He said that this was due to tiredness/fatigue getting too much for him to handle. He had been battling tiredness and fatigue, so he told us, for about six months prior to this point. He said in his statement that he was literally driving home from a shift at work and going straight to bed, not waking up or getting ready for his next shift until the very last minute.

27. The Claimant's medical situation, such as it was in June 2019, had evidently been brought to the attention of the Driver and Vehicle Licensing Agency. The bundle included a letter from the DVLA from that month, concerning his ability to drive Group 2 (bus and/or lorry) vehicles. His then-current licence was withdrawn, and replaced with a "*medical review licence*".

28. On 21st of July, the Claimant contacted Mike Brennan about being unable to work. Mr Brennan acknowledged this, and asked the Claimant to let him know if the absence would be more than one day. We saw a number of messages on this day, in which the Claimant went on to explain that he had been asked to go for blood tests the following day, and then get the results from his doctor on Friday that week. Mr Brennan asked if the Respondent should plan for the Claimant being out for the rest of the week, to which the Claimant replied that it should.

29. On 24 July 2020, the Claimant sent a WhatsApp message to Mr Brennan, saying that his doctor had signed him off until 14 August. His doctor wanted him to have more tests. The Claimant said that he would drop in the sicknote and laptop the following day. Mr Brennan responded, "*OK, Diana will be here. Hope all goes well*".

30. On 11 September 2020, the Claimant messaged Mr Brennan said that he would not be back on Monday and was still not feeling any better. Mr Brennan replied, "*okay please let me know once you have the sicknote*".

31. On 14 September 2020, the Claimant sent Mr Brennan an image of a fit note.

Welfare meeting

32. On 22.09.2020, Mr Brennan wrote to the Claimant to invite him to a welfare meeting. The letter, which was included in the bundle before us, recorded that the Claimant had been off work since 21 July and was currently signed off with "tired all the time" until 11th October. It expressed concern about the Claimant state of health, and invited him to a welfare meeting on 25 September. In addition to expressing concern about the Claimant's health, the letter also said that the Respondent was concerned to know when he felt he might be able to return to his position. The letter read, in part, as follows;

> *Whilst temporary measures can be made to cover absences, a permanent arrangement of this kind is clearly unfeasible , therefore the purpose of the meeting is to enquire as to your current state of health and explore if, and when, you will be in a position to return to your job with the company .*
>
> *If this is unlikely to be in the near future, we will explore with you whether there is an alternative position that could be offered to you which is more suitable to your state of health. We will also discuss whether there are any adjustments we could reasonably make to your work arrangements, work provisions, criteria or practices or work environment which might enable you to return to work in some capacity.*
>
> *I enclose a consent form and information regarding access to medical reports for your perusal, with a view to discussing this at the meeting. As we are concerned that your state of health is preventing you from returning to work, we would request that you consider giving the company permission to contact your doctor in order to obtain a medical opinion on the likelihood of your return to health, and subsequent return to work*.

33. It appears that a meeting was scheduled for 25.09.2020, as the Claimant messaged Mr Brennan the day before to suggest that this be postponed. This was because his children were unwell and he was of the view that he ought to self-isolate in accordance with guidance then in force. They agreed to hold it by telephone, but this was moved to the following Monday.

34. On 29.09.2020, there was an exchange of messages between Mr Brennan and the Claimant about a video call. Mr Brennan eventually asked that the meeting be postponed to the following day due to things having "gone silly". The following day, the Claimant asked to postpone the meeting as he was having a bad day, fatigue-wise.

35. The welfare meeting was eventually held on 02.10.2020, by telephone. The Claimant explained that he was still suffering from fatigue, was awaiting blood tests, and wasn't yet ready to return to work.

Consent for medical records

36. On 12.10.2020, the Claimant advised Mr Brennan that his GP had signed him off for another month. Mr Brennan replied, asking the Claimant to send consent forms, to allow the Respondent to obtain information from the Claimant's GP. In his statement, Mr Brennan describes this as a "*gentle reminder*" to provide the consent form for the Respondent to approach his GP. We agree that the reminder was indeed gentle in its terms.

37. On 20.10.2020, there was an exchange of messages between the Claimant and Mr Brennan. Mr Brennan started the exchange, with a message that read "*hi Charles, sorry to chase but are you able to sign the consent form is for us to be able to contact your GP, if not please just let me know? Thanks".*

38. The Claimant responded, "*hi Mike, not a problem I can fill one in I am just struggling to get to post it at the moment. My car is off the road whilst the mechanic is fixing the smoke issue I had. Most likely off the road until early next week at the moment but ill* (sic) *see if I can get a lift before to post it."*

39. Mr Brennan's response was, "*ok thanks for letting me know*". The Claimant then advised him that he had been diagnosed with mild sleep apnoea, and that his doctor was referring him to hospital for possible ME/CFS.

40. On 02.11.2020, Mr Brennan sent the Claimant what he termed another "*gentle reminder that we still haven't received your signed consent letter*". The Claimant responded that he would do his best, but that his car was still off the road and booked for an MOT the following day. He said that, all being well, he would be able to get to the post office to send it in, but that he had been stranded for the last 3.5 weeks while his car was being worked on.

41. In his statement, Mr Brennan says that, by 20th October, he was "*beginning to think that Charles was delaying giving us consent*". Any suspicion that Mr Brennan had about this would, we consider, be justified. It strikes us as surprising that being unable to use his car would have meant that the Claimant was unable to find any way to get a consent form to the Respondent. We heard no evidence as to the distance between the Claimant's home and a post box, or a shop where he might buy stamps. We heard no evidence about whether a friend, neighbour or relative might have been able to assist with putting the consent form into the post. It is quite possible that none of these solutions were available to the Claimant. But we are not surprised that Mr Brennan says he entertained some suspicion that the Claimant might be delaying returning the consent form.

42. After an exchange of messages on 5 November about the consent form having been lost, the signed consent form was received by the Respondent on 6th November.

Capability hearing

43. On 12 November, Mr Brennan invited the Claimant to a capability hearing. The letter read as follows:

> *I write in connection with our letters of 22/09/20, in which we explained that we wished to obtain your consent for a report from your GP in relation to your current state of health and its impact on your ability to perform your duties.*
>
> *We would therefore like to arrange a further meeting to discuss the matter and when you are likely to return to your duties. We have made arrangements for a meeting to take place on 18/11/20 at 10:30 at Chillway Offices.*
>
> *At this hearing, the question of your capability to carry out the main duties of your job will be considered with regard to your long-term absence from work since 21/07/20 due to 09/12/20.*
>
> *I trust you understand that in any business, employees are required to carry out functions for the business , and continued absence only causes problems for the operation of the company. Whilst temporary measures can be made to cover absences, a permanent arrangement of this kind is obviously inappropriate and company needs to know if and when you feel you may be able to return to your position.*
>
> *In order to address your absence fairly and reasonably, we would like to explore if, and when, you will be in a position to return to your job with the company. If this is unlikely to be in the near future, we will explore with you whether there is an alternative position that could be offered to you which is more suitable to your state of health. We will also discuss whether there are any adjustments we could reasonably make to your work arrangements,*

work provisions, criteria or practices or work environment which might enable you to return to work in some capacity.

I would advise you that your continued absence from work is causing the company operational difficulties and if we are unable to do anything to assist in your return to work, we may consider terminating your employment.

As this is a possibility, you are entitled to be accompanied at the meeting by a work colleague of your choice or a trade union representative .

…

Grievance

44. The Claimant responded to the invitation to a capability hearing by raising a grievance. The grievance letter is dated 15th November, and is addressed to Mr Rai. In the letter, the Claimant says that he had been caused great anxiety, as he feared that Mr Brennan had already made the decision to dismiss him without following a fair process.

45. The Claimant said that he had been asked to attend the welfare meeting discussed above. After a description of the attempts to arrange the meeting, he said that, after the meeting had taken place, Mr Brennan had indicated there was no rush in returning the consent forms for the Respondent to contact his GP, because the Claimant was waiting for a sleep study to establish whether or not he had sleep apnoea. He explained that the delay in returning the form was due to the issues with his car. He mentioned that a trip to the post office required a 30 minute walk to a bus stop.

46. After setting out the history of matters, the Claimant wrote the following;

I would appreciate your assistance in understanding how the decision on the above date intends to be fair and balanced. I am confused as neither the report from my doctor or the assistance of a company occupational therapist has yet been sort. The eagerness to have a meeting and make a decision without all the facts and information present would be suggest that a decision over my future with the company has already been made. I have also been threatened with losing my job by Mike Brennan during a phone call on 17/06/20 because I refused to give a driver additional work which would have meant that they would be driving in contravention to the Drivers Hours & Regulations (Road Transport Working Time Regulations).

Whilst I have done my best to maintain regular contact with Mike and keep him updated with any news about my condition, Mike has not behaved in a way that is conducive to promoting healing with my condition. The constant stress of the build up to the 5 cancelled meetings in September/October

exacerbated my condition as a great deal of preparation went in to ensuring I was fit and able to attend the meeting. Whilst my condition is being investigated and is yet to be diagnosed, it is evident that stress exacerbates my symptoms and can leave me bed bound for several days at a time.

I thank you in advance for the continued opportunities you have provided for me during my employment at Chillway and look forward to hopefully being able to return to my role in the near future. If you have any questions or queries regarding any of the issues that I have raised, please do not hesitate to contact me.

47. It is understandable that the Claimant would be anxious about having a letter that even mentions the possibility of him losing his job. But we see no basis his expressed concern that a decision was to be taken that would not be fair and balanced. The Claimant told us, and we accept, that he had a very good relationship with Mr Brennan. There was no reason why he should not take at face value the statement that the capability hearing was intended to "*… explore if, and when, you will be in a position to return to your job with the company…"*. The statement that "*Whilst temporary measures can be made to cover absences, a permanent arrangement of this kind is obviously inappropriate and company needs to know if and when you feel you may be able to return to your position"* is perfectly reasonable, and there was no reason why the words " *If this (*any return to work) *is unlikely to be in the near future, we will explore with you whether there is an alternative position that could be offered to you which is more suitable to your state of health. We will also discuss whether there are any adjustments we could reasonably make to your work arrangements, work provisions, criteria or practices or work environment which might enable you to return to work in some capacity"* should not be given their face value. Read in context, the words "*I would advise you that your continued absence from work is causing the company operational difficulties and if we are unable to do anything to assist in your return to work, we may consider terminating your employment*" to which the Claimant took objection are not sinister. They are, we consider, a statement of the obvious.

48. The Claimant's grievance was considered by Mr Rai. A grievance meeting was held remotely on 30th November. A result was that Mr Rai directed Mr Brennan to make further attempts to contact the Claimant's GP, and not to postpone further meetings with the Claimant. Mr Rai in his evidence to the tribunal was clear that his instruction about medical evidence from the GP was particularly firm: no decision was to be taken without it.

49. In his response to the Claimant's grievance, which was sent in a letter dated 29 December, Mr Rai rejected any suggestion that the Claimant's position had been threatened as a result of the incident in June 2020, which he touched upon in innocuous terms. He explained that, the Claimant's consent form having been received, Mr Brennan had written to the Claimant's GP on 20 November and was awaiting feedback. Mr Rai said that he was satisfied that Mr Brennan was conducting matters in a fair

manner and that no decision had been taken about the Claimant's employment. He did ask Mr Brennan to make sure that dates for future meetings were not moved. The grievance was dismissed, and the Claimant advised of his right to appeal to Mr Bachra. He did not exercise that right.

Sickness and absence policy

50. Reference has already been made to attempts to get information from the Claimant's GP. Although the importance of medical information is self-evident in a case concerning sickness absence, it is also important to understand it in this case in the context of the Respondents absence policy.

51. The Respondent's absence policy was included in the bundle for the hearing. Its status was not clear until the third day of the hearing, when the Respondent provided the Claimant and the tribunal with documents saying that it formed part of employees' contracts of employment. The Claimant himself does not appear to have had a formal written contract of employment, but the Respondent conceded that the effect of the documents it disclosed was that the policy was contractual.

52. The relevant provisions, it seems to us, are as follows:

LONG TERM SICKNESS ABSENCE

While very sympathetic to long-term absences amongst our employees, we have to be attentive to our operational and business needs at all times. Accordingly, during any long-term absence we shall assess and review periodically with you, your capability to carry out your normal job. This process could ultimately result in a termination of your employment. In these circumstances we will:

• review your absence record to assess whether or not it justifies dismissal;

• fully consult with you and establish your own views and opinions with regard to your health;

• obtain up-to-date medical advice;

• consideration of any reasonable adjustments that could be made to facilitate your return to work;

• advise you in writing as soon as it is established that termination of employment has become a possibility;

• meet with you to discuss the options and to consider your views on continuing employment;

• consider whether there are any other jobs that you could do prior to taking any decision on whether or not to dismiss;

• allow a right of appeal against any decision to dismiss you on grounds of long-term ill

health; and

• arrange a further meeting with you to determine any appeal.

…

If you refuse us permission, or delay consent, to contact your medical practitioner, we may have to make a decision without the benefit of access to medical records.

53. Attention before us focused on the provision that the Respondent would "*obtain up-to-date medical advice*" in the course of any assessment and review of an employee's capability to perform their job, and the provision that should an employee refuse permission, or delay consent, to contact their doctor, the Respondent might make a decision in the absence of medical records. We address the question of how these provisions are to be interpreted below.

54. Mr Brennan attempted on a number of occasions to get a report from the Claimant's GP. We accept that he did write to the Claimant's GP on 20 November. A letter of that date was included in the bundle, as was proof of the Respondent having sent something in the post to the Claimant's GP on that date. It is improbable in the extreme that the Respondent would have sent anything else on that day to the Claimant's GP, and the Claimant put no other explanation for this proof of postage to any of the Respondent's witnesses and did not suggest any other explanation for it in his evidence. The bundle before us also contained a letter dated 29 December, chasing up the request. The bundle contained proof that this letter had been sent to the Claimant's GP, and we accept that it was.

55. In his grievance, the Claimant had mentioned the possibility of an occupational therapist (OT) report. In his statement, Mr Brennan says "*I recall our HR adviser saying that occupational health would be more relevant to how we get him back to work, and what we really needed was the GP opinion as to when he might return*". The Respondent made enquiries about seeking an OT report. Mr Brennan had contacted an occupational health advisor, but had been told that the service was closed for a further 3 weeks, and it would take about eight weeks after that to arrange an appointment because of the covid-19 pandemic. It therefore seemed to him that the best chance of getting medical information was through the Claimant's GP.

56. The Claimant has been very critical of the failure to obtain an OT report at this stage. The tribunal is not surprised that the Respondent was advised that OT input would be valuable. The tribunal is doubtful that a report from a GP would be particularly enlightening. But the advice as stated by Mr Brennan is reasonable advice. Bearing in mind the delay that he was advised would be involved in getting an OT report, it is understandable that he concentrated his attention on getting information from the Claimant's GP.

57. On 6 January, Mr Brennan messaged the Claimant, because his fit note was about to come to an end. He took the chance to ask the Claimant to see if his GP could provide the Respondent with a report, the Respondent having contacted the GP twice. The Claimant responded that he had an appointment the following day, and would ask about it. On 11 January, Mr Brennan asked the Claimant if he had managed to speak with his GP about the letter. The Claimant responded that the GP was cancelling all routine appointments at the moment to do covid vaccines, so he was not sure when it would be done. Mr Brennan responded to that message with "*Ok thanks*".

58. Mr Brennan said in his statement that he made attempts to telephone the Claimant's GP on a number of occasions, but that the phone generally ran off. Acknowledging that this was in the midst of the covid 19 pandemic and the resulting pressures on health care professionals, Mr Brennan also says that he *"… Simply didn't have the time to keep calling the GP and wait for someone to answer*". We accept that Mr Brennan probably did make some telephone calls to the GP surgery. Mr Brennan's frank acknowledgement that he was too busy to spend too much time calling the GP, together with his failure to attend the tribunal because of pressure of work, lead us to believe that contacting the Claimant's GP was unlikely to be high on his priorities. It is likely that the greater part of his attention was on the running of the Respondent's business. But we accept that he did make some attempts to do so.

59. Mr Brennan told us that the Respondent was struggling at this time. He was on call seven days a week, and was in work most weekends. Other members of staff were asked to extend their working days/hours, and agency staff contracted. The Claimant's absence coincided with a significant increase in the volume of business. We accept that the Respondent was indeed under significant business pressure at this time.

60. On 7 January, the Respondent received a fit note recommending the Claimant have a further three months off work. Although in his statement Mr Brennan gives the condition stated in the fit note as "*sleep apnoea*", in fact the fit note reads "*sleep apnoea/fatigue/pain*".

<u>A second capability hearing</u>

61. On 18 January 2021, Mr Brennan invited the Claimant to another capability hearing. In his statement, he explained that he did so at least in part because he thought it might make the Claimant make more of an effort to press his GP for the report. The letter inviting him to the meeting is in similar terms to the letter that had invited him to the previous meeting. Mr Brennan says in his statement that Claimant responded with a WhatsApp message, pointing out that Mr Rai had said that no decision would be made until there was medical evidence, and that Mr Brennan agreed to postpone the meeting. In fact, the WhatsApp messages show that it is Mr Brennan who asked that the meeting be postponed. He did so because he said he was "… *going to try again with your GP…"*. The Claimant responded that he was "*… happy to postpone if you wish to give you time to chase at the requested report*".

62. The capability hearing took place on 12 February. There was some disagreement as to the exact platform that was used to hold it, but it seems to us that nothing turns on that. Notes were taken by Nicola Casey, and the Claimant recorded the meeting, unbeknownst to the Respondent. A transcript of the recording was in the bundle, the transcript having been agreed.

63. The transcript of the meeting extends to over six pages. Early on in the meeting, Mr Brennan says "*what we are trying to understand, is essentially, because of, obviously, the long-term sickness and long-term absence yet what's the likelihood of a return and if there is a return on the horizon what does it look like? You know and what can we do as a reasonable employer to try and help you get back into work sooner rather than later so that's kind of the gist of the meeting…*". Shortly afterwards, he said "*but we will have already covered most of the questions as we go through this and is just questions around, you know, what can we do in terms of helping them get back to work? Reduced hours? Change of job? Change of shift patterns? Plexi hours? You know why me? There's all those types questions but we kind of do that towards the end, if that's okay?*"

64. In his evidence, the Claimant acknowledged that this was an example of Mr Brennan exploring the issues, but contended that it was difficult for him to answer questions like this on the fly. The Claimant's characterisation of this strikes us as unfair and unrealistic. What Mr Brennan was doing was not any kind of interrogation of the Claimant, demanding instant answers from him. Rather, Mr Brennan was setting out the purpose of the meeting, its aims. He was doing so in an unobjectionable way.

65. The meeting proceeded with a lengthy discussion of the Claimant's health. Towards the end, Mr Brennan said "*Well, look, there's nothing else for me Charles. I just wanted to ah, really catch up with you to see where you are at and see how you are feeling. Ah, more importantly. And if there is*

anything we can kind of do with the role to. Try and manipulated to help you. Kind of come back even if it were only part time. It's food for thought, not after an answer from you straight away but you can give it some thought. You got the weekend. Obviously speak with your wife. See what you think, very with developments come over the next week or so. Just give me a heads up." The Claimant responded to this with "*okay*".

66. On 16 February, Mr Brennan messaged the Claimant in the following terms:

"*Morning Charles, hope you had a pleasant weekend? I did say that I would follow up on our meeting last Friday, giving you the chance to consider over the weekend what we had discussed. To this end did you have any additional comments or questions in relation to our meeting? I look forward to hearing back from you. Regards Mike*".

67. The Claimant did not respond to Mr Brennan's message. This was unusual he generally responded promptly to messages.

Dismissal letter

68. Having received no response from the Claimant, Mr Brennan wrote to him on 17 February. The letter is quite lengthy. The most relevant parts of it, it seemed to us, read as follows;

You have now been signed off work since 21st July 2020, due to tiredness, fatigue, pain and sleep apnoea .

Your most recent Fit Note is for 3 months until 08th March 2021. We understand that you have been undergoing numerous tests which to date have come back inconclusive/negative and that you are awaiting your next hospital appointment.

We are pleased to hear that your diabetes is a little better and that your sleep condition is mild enough not to affect your driving.

However, you have advised that your fatigue is really bad, and when we discussed adjustments we could reasonably consider to allow a return to work you have stated that you are unable to commit to any return to work be it flexi or otherwise as you do not know how you will feel each day/week when you get up in the morning. I contacted you again on the 16th February via WhatsApp and email to see if you had any further thoughts on a potential phased return to work, but at the time of sending this letter had not received a response from you .

In light of this and your most recent Statement of Fitness for Work which details that you are not fit to return to work until at least 8th March 2021, it is

with great regret that I must now inform you that the company has decided to terminate your employment on the grounds of ill health capability.

This is because regretfully it is evident from your own submissions and the medical evidence available that your return to work will not be possible in the foreseeable future and there are no reasonable adjustments that can be made to facilitate your return to work.

In reaching this difficult decision, I have taken into account the length of your absence, the nature and current effects of your illness, the prognosis for your future health, the length of your employment and nature of your job, the needs of the company, whether you could be offered an alternative position within the company more suitable to your state of health and whether there are any adjustments we could reasonably make to your work arrangements, work provisions, criteria or practices of work in some capacity.

…

You may appeal against this decision if you feel it is inappropriate or unfair. Should you decide to do so, please submit your appeal in writing, clearly setting out the reasons. We would normally allow for an appeal to be submitted 5 working days of receipt of this letter and addressed for the attention of Mr Gurj Bachra. However, we are happy to extend this period to 2 weeks, to 4th March 2021, to allow for any late submission for a medical report in case this can support the retention of your employment to allow for a return to work in the foreseeable future.

69. The Claimant wrote to Mr Bachra to appeal his dismissal on the 28 February. In his appeal letter, the Claimant said that, at the meeting on 12 February, he had explained that he was very much being guided by his doctor about his condition and was unsure when he would be well enough to return to work, but had expressed his eagerness to recover enough to return to work even though he was not able to provide an exact date. The Claimant said that the letters threatening his dismissal, together with Mr Brennan's refusal to follow the company's guidelines and procedures, had exacerbated his condition. He said that he was given 15 hours to respond to Mr Brennan's follow-up message, which was not reasonable in the light of his condition. He referenced the "*Equalities Act 2010*" (sic), and stated that he believed his condition met the Equality Act's definition of disability. He also said that references to the difficulties the Respondent was experiencing with its business exacerbated his condition.

70. He asked for confirmation of any "qualifications" that Mr Brennan might have to enable him to make a decision to terminate the Claimant's employment on the grounds of ill health capability without waiting for advice from the Claimant Dr, the advice of an OT or following company procedures. The reference to the following company procedures was, it seems from the totality of the evidence that we heard in the case, a reference to the making of a decision to dismiss him without having received a medical report.

71. An appeal meeting took place on 17 March. The Claimant was accompanied by his wife. Mr Batra's daughter attended and took notes. The Claimant again surreptitiously recorded the appeal meeting, and an agreed transcript was in the bundle.

72. In his evidence before us, the Claimant doubted the good faith of the appeal meeting. He said that Mr Batra had used phrases such as "*you're not giving me much to go with here, Charles*", that Mr Batra's tone and manner led him to believe that he was being pushed to give definitive answers as to what a return to work might look like but that the Claimant felt that this was inappropriate without professional advice about a new condition that he was learning to manage. He accepted in cross examination that it was Mr Batra's job to find out what he could and couldn't do, but only in accordance with company policies and procedures. In response to the suggestion that Mr Batra was entitled to think of what was best for the company, the Claimant said that he had asked the meeting whether there had been any changes to the equality act to remove his right to a fair process and not be discriminated against, and met with a response that the company finances outweighed such considerations.

73. We do not accept that that is a fair reflection of the meeting. The meeting started amicably, and Mr Batra made perfectly reasonable and appropriate queries as to the Claimant's efforts to get a report from his GP. The Claimant did not remember when he had last chased up the report with his GP although in fairness to him his condition may explain that. Mr Batra asked "*is there anything in that report that you think will now make a difference in terms of the decision made by the company to, obviously dismiss you based on your ill health*?" The Claimant answered, "*Well, the honest answer is I don't know Gurj. But with the doctor that's dealing with the request for the report being a specialist in occupational therapy as well, obviously I couldn't second guess what he is going to suggest, but it's quite possible that he could suggest some kind of reasonable changes that might allow me to return, yes*".

74. A short while later in the meeting, the Claimant said to Mr Batra "*What I'm saying is even if I had said to Mike on that meeting, yes I feel great, I'll return in a week or two weeks' time, I couldn't anyway because my doctor, well the NHS, have put me on a list of shielded patients because of my health conditions. I'm too high risk to be able to go out and leave my home now. I've got to stay at home until the end of this month*".

75. To this, Mr Batra asked, when the period of shielding ended in April, did the Claimant think he would be in a position to have any sort of capacity to come back to work. The Claimant responded, "*Well, I certainly want to be in a position to be able to come back to work. I'm trying hard to get myself into a position where I can, but Mike's letters, telling me how much of the*

inconvenience I am to you, and how much of a drain I am on company resources does not help to promote that recovery. In fact, every time you get a letter, it knocks me back".

76. There followed a discussion about whether procedures had been followed, and of whether the Claimant might be able to return to work after shielding.

77. Mr Batra asked whether there were any sort of adjustments that the Claimant felt the Respondent might make to allow him to return to work. The Claimant responded that the only thing he could think of would be some kind of flexitime arrangement with severely reduced working hours. Mr Batra queried whether that would work, as the Claimant didn't know what sort of day he was going to have, by which he meant that the Claimant did not know whether he would be able to come into work on a particular day until he woke up that morning. The Claimant responded that he thought it would have to be an arrangement for one or two days a week, three or four hours, and a job that he could come in and do on a good day. He canvassed whether he might be redeployed to a back-office role, assisting with back-office work more. He acknowledged that any such arrangement would depend on his condition enabling him to work on any particular day.

78. Mr Batra queried how such an arrangement would work with the rest of the team, to which the Claimant had no response other than to observe that he was being honest with Mr Batra. Mr Batra in turn observed that he was not hearing anything from the Claimant about reasonable adjustments that the Respondent might make and that a business cannot work like that. He indicated flexibility, mentioning two hours a day or four days a week, but said that it needed to be something firm. The Claimant agreed with this, but replied that that is why they needed to wait for a doctor's report.

79. The meeting went on. Mr Batra acknowledged that the Claimant had a lot of experience and was "*brilliant*", but that he – Mr Batra – had "*nothing to go with*". There was further discussion about the difficulties experienced in obtaining a medical report, and Mr Batra suggested that it might be worth a phone call to chase the GP for the report. Later in the meeting, he said that he was listening to what the Claimant was saying and take back and have a look at the suggestion that the Claimant had made about accommodating him in a back office role of a flexible nature. Mr Batra stressed that the Claimant was not an inconvenience, but that the Respondent had kept open his job for over a year – in fact, Mr Bachra over-stated the length of time - and it was not case that the company had not made reasonable allowance for him to return, but that even at the meeting the Claimant was not able to give him any indication of when he might be able to come back to work. In response to this, the Claimant said "*well possibly in April, if the suggestion that I've made it workable and possibly in April, I could consider that. But it depends on what you can consider and what we can come to*". Mr Batra said that he would have to have a look at how the business could work

around the Claimant's suggestion, given that he could not be definitive in days or hours.

80. Mr Bachra wrote to the Claimant on 3 April. He said that, in the appeal, it was agreed that the Claimant would phone his GP about the report and consider whether he would be willing to consider a flexible return to work in April, if that was something that the Respondent was able to accommodate. He advised the Claimant that the Respondent had tried one last time to chase the report with the GP.

81. The Claimant's response was also in the bundle. He started off with a complaint that he had not received the minutes of the meeting. He then sought confirmation that the Respondent had chased up the GP report as he believed had been agreed in the meeting. In fact, Mr Batra's email had said that the Respondent had indeed chased the report with the GP. The Claimant said that he had spoken to his GP, who had told him that they would happily discuss the progress of the report with the Respondent, but he also observed that doctors were extremely busy at that time. The Claimant said that he did not currently feel able or ready to return to work, but did not feel that that should influence Mr Batra's decision.

82. The Claimant said that;

"*The basis of the appeal is centred around whether or not due or fair process has been followed. If this was an assessment of my fitness to return to work, it would have needed to be completed by a suitably qualified doctor or occupational health advisor.*

To take my fitness to return to work into account would be unfair and against company policies and procedures; as per my original complaint. The issue being questioned is whether or not the decision Mike Brennan made to dismiss me was fair or not. The ACAS code of practice states that 'fairness and transparency are promoted by developing and using rules and procedures for handling disciplinary and grievance situations'. The rules were not followed as I was dismissed without a doctor's report being obtained despite company policy stating one will be obtained prior to a decision being made."

83. The appeal outcome was notified to the Claimant in a letter dated 27.05.2021. The decision letter is lengthy, and we do not set it out in full. Mr Batra concluded as follows:

Based on all the information I have looked at in relation to your long-term absence from work due to ill health, it is my view that Mike has attempted to engage with you throughout your absence. I can see that he has

postponed/ delayed meetings as the situation has evolved and to allow you sufficient time to prepare for and/or attend such meetings. He has made attempts to obtain a medical report.

Despite the lack of a report, the information presented by you, in relation to the ongoing Fit Notes and submissions at the capability hearing that you were not in a position to return to work in any regular capacity were taken into account alongside the impact of your absence on the team and company as a whole.

It is evident from the record of the meeting and the letters issued to you, that conversations were had in relation to what adjustments could be made.

I have also considered your further submissions at the appeal.

84. The decision letter continued:

Next Steps

Unfortunately, we do not have a role of the nature you have requested, and are not in a position to create one, especially in light of the fact that you would need such a role to be ad hoc in nature due to the nature of your condition.

However, I am mindful of the passage of time from your appeal hearing to date. As such, before I confirm my findings to the appeal, I am proposing one further attempt to ascertain whether or not you are in a position to return to work in the foreseeable future with any necessary reasonable and workable adjustments.

With your consent, I would like to make a referral to an Occupational Health provider. Please can you confirm by return and within the next 5 working days whether you would be willing to consent to this referral and if so I will make the necessary arrangements. If you wish to decline this offer, or I do not hear from you by Friday 4th June 2021 I will confirm the outcome of your appeal in line with my findings above.

…

85. The Claimant responded the next day. Insofar as is material to this case, his reply read as follows:

Thank you for your recent letter. I am unable to accept any communication from you at this time, however, as the matter has already been escalated to ACAS who have also been sent this email. All future communications should be made through them during the early conciliation process.

I appreciate that you now wish to involve an occupational therapist to evaluate my ability to work.

This has come too late as you have already dismissed me and not given me a response to my appeal against your decision. You were requested to wait for a doctor's response many times whilst I was employed by you. This is arguably irrelevant at this stage as this matter has progressed to Early Conciliation through ACAS and any representation should be made by them.

86. On 15 June, Mr Batra wrote to the Claimant, confirming his dismissal.

Law

Equality Act 2010 (EA)

87. EA defines disability in s6, providing as follows:

6 Disability

(1) A person (P) has a disability if—

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

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

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

(6) Schedule 1 (disability: supplementary provision) has effect.

88. Discrimination arising from a disability is dealt with in s15 of the EA, which reads:

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.

Employment Rights Act 1996 (ERA)

89. S1 of the ERA provides as follows:

1.— Statement of initial employment particulars.

(1) Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment.

(2) Subject to sections 2(2) to (4)—

(a) the particulars required by subsections (3) and (4) must be included in a single document; and

(b) the statement must be given not later than the beginning of the employment.

(3) The statement shall contain particulars of—

(a) the names of the employer and worker,

(b) the date when the employment began, and

(c) in the case of a statement given to an employee, the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period).

(4) The statement shall also contain particulars, as at a specified date not more than seven days before the statement (or the instalment of a statement given under section 2(4) containing them) is given, of—

(a) the scale or rate of remuneration or the method of calculating remuneration,

(b) the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals),

(c) any terms and conditions relating to hours of work including any terms and conditions relating to—

(i) normal working hours,

(ii) the days of the week the worker is required to work, and

(iii) whether or not such hours or days may be variable, and if they may be how they vary or how that variation is to be determined,

(d) any terms and conditions relating to any of the following—

(i) entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the [worker's]8 entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated),

(ii) incapacity for work due to sickness or injury, including any provision for sick pay,

(iia) any other paid leave, and

(iii) pensions and pension schemes,

(da) any other benefits provided by the employer that do not fall within another paragraph of this subsection,

(e) the length of notice which the worker is obliged to give and entitled to receive to terminate his contract of employment or other worker's contract,

(f) the title of the job which the worker is employed to do or a brief description of the work for which he is employed,

(g) where the employment is not intended to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end,

(ga) any probationary period, including any conditions and its duration,

(h) either the place of work or, where the worker is required or permitted to work at various places, an indication of that and of the address of the employer,

(j) any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the persons by whom they were made,

(k) where the worker is required to work outside the United Kingdom for a period of more than one month—

(i) the period for which he is to work outside the United Kingdom,

(ii) the currency in which remuneration is to be paid while he is working outside the United Kingdom,

(iii) any additional remuneration payable to him, and any benefits to be provided to or in respect of him, by reason of his being required to work outside the United Kingdom, and

(iv) any terms and conditions relating to his return to the United Kingdom,

(l) any training entitlement provided by the employer,

(m) any part of that training entitlement which the employer requires the worker to complete, and

(n) any other training which the employer requires the worker to complete and which the employer will not bear the cost of.

(5) Subsection (4)(d)(iii) does not apply to a worker of a body or authority if—

(a) the worker's pension rights depend on the terms of a pension scheme established under any provision contained in or having effect under any Act, and

(b) any such provision requires the body or authority to give to a new worker information concerning the worker's pension rights or the determination of questions affecting those rights.

(6) In this section *"probationary period"* means a temporary period specified in the contract of employment or other worker's contract between a worker and an employer that—

(a) commences at the beginning of the employment, and

(b) is intended to enable the employer to assess the worker's suitability for the employment.

90. S98 of the ERA provides:

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,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(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, and

(b) "qualifications" , in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(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.

(6) Subsection (4)4 is subject to—

(a) [sections 98A to 107]6 of this Act, and

(b) [sections 152, 153, 238 and 238A of the Trade Union and Labour Relations (Consolidation) Act 1992]7 (dismissal on ground of trade union membership or activities or in connection with industrial action).

91. S123 of the ERA deals with compensatory awards. It reads:

123.— Compensatory award.

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of—

(a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or

(b) any expectation of such a payment,

only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122 in respect of the same dismissal.

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

(5) In determining, for the purposes of subsection (1), how far any loss sustained by the complainant was attributable to action taken by the employer, no account shall be taken of any pressure which by—

(a) calling, organising, procuring or financing a strike or other industrial action, or

(b) threatening to do so,

was exercised on the employer to dismiss the employee; and that question shall be determined as if no such pressure had been exercised.

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

(6A) Where—

(a) the reason (or principal reason) for the dismissal is that the complainant made a protected disclosure, and

(b) it appears to the tribunal that the disclosure was not made in good faith,

the tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the complainant by no more than 25%.

(7) If the amount of any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy (whether in pursuance of Part XI or otherwise) exceeds the amount of the basic award which would be payable but for section 122(4), that excess goes to reduce the amount of the compensatory award.

(8) Where the amount of the compensatory award falls to be calculated for the purposes of an award under section 117(3)(a), there shall be deducted from the compensatory award any award made under section 112(5) at the time of the order under section 113.

92. S124 of the ERA deals with the limit on compensatory awards. S124A deals with adjustments under the Employment Act 2002. S126 ERA deals with

acts which are both unfair dismissal and discrimination. These would only be relevant in the event that we find in favour of the Claimant on liability.

93. In considering any award, the Tribunal must be guided by the principle set out in the case of Polkey –v- A.E. Dayton Services Ltd [1988] A.C. 344. In Polkey, Lord Bridge of Harwich cited the formulation of Browne-Wilkinson J in Sillifant v. Powell Duffryn Timber Ltd. [1983] I.R.L.R. 91, that:

If the industrial tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment.

94. This principle is often put in terms reflected in the issue identified in the list of issues drawn up by Employment Judge Self: What are the chances that, following a reasonable investigation and a fair disciplinary procedure, the employer would have fairly dismissed the Claimant?

95. Mr Lyons referred us to an observation of Lord Bridge in Polkey, in which he said:

It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under section 57(3) may be satisfied.

96. It is for the employer to adduce evidence that the Claimant would have been dismissed in any event: Software 2000 Ltd –v- Andrews [2007] ICR 825.

97. Although Polkey is a question that goes to remedy rather than liability, the assessment of whether the Claimant would have been fairly dismissed, and when, in the event that we find the dismissal was unfair, is one that is conveniently done when considering liability.

Employment Act 2002

98. S38 of the Employment Act 2002 provides:

38 Failure to give statement of employment particulars etc.

(1) This section applies to proceedings before an employment tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5.

(2) If in the case of proceedings to which this section applies—

(a) the employment tribunal finds in favour of the worker , but makes no award to him in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 (c. 18) (duty to give a written statement of initial employment particulars or of particulars of change) or (in the case of a claim by an employee) under section 41B or 41C of that Act (duty to give a written statement in relation to rights not to work on Sunday),

the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the worker and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

(3) If in the case of proceedings to which this section applies—

(a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 or (in the case of a claim by an worker) under section 41B or 41C of that Act,

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

(6) The amount of a week's pay of a worker shall—

(a) be calculated for the purposes of this section in accordance with Chapter 2 of Part 14 of the Employment Rights Act 1996 (c. 18), and

(b) not exceed the amount for the time being specified in section 227 of that Act (maximum amount of week's pay).

(6A) The provisions referred to in subsection (6) shall apply for the purposes of that subsection—

(a) as if a reference to an employee were a reference to a worker; and

(b) as if a reference to an employee's contract of employment were a reference to a worker's contract of employment or other worker's contract.

(7) For the purposes of Chapter 2 of Part 14 of the Employment Rights Act 1996 as applied by subsection (6), the calculation date shall be taken to be—

(a) if the worker was employed by the employer on the date the proceedings were begun, that date, and

(b) if he was not, in the case of an employee, the effective date of termination as defined by section 97 of that Act or in the case of all other workers the date on which the termination takes effect.

(8) The Secretary of State may by order—

(a) amend Schedule 5 for the purpose of—

(i) adding a jurisdiction to the list in that Schedule, or

(ii) removing a jurisdiction from that list;

(b) make provision, in relation to a jurisdiction listed in Schedule 5, for this section not to apply to proceedings relating to claims of a description specified in the order;

(c) make provision for this section to apply, with or without modifications, as if—

(i) any individual of a description specified in the order who would not otherwise be an employee for the purposes of this section were an employee for those purposes, and

(ii) a person of a description specified in the order were, in the case of any such individual, the individual's employer for those purposes.

Contractual interpretation

99. In this case, a question of contractual interpretation arises, the Respondent contending that the words of the Respondent's Sickness Absence Policy should not be given their literal meaning. A term can be implied into a contract where it is necessary to do so to give business efficacy to the contract, or where it is necessary to do so in order to give effect to the obvious, but unexpressed, intention of the parties such that the parties must have intended it to form part of their contract: see Chitty on Contracts, 34th edition including 1st supplement, 16-006 to 16-013 and cases cited therein.

Conclusions on the issues

100. The issues identified by Employment Judge Self narrowed. In the course of his closing submissions on behalf of the Respondent, Mr Lyons acknowledged that the question posed in issue 1.1 had to be answered, "yes, the Respondent did treat the Claimant unfavourably by dismissing him".

101. Mr Lyons conceded that the Claimant was disabled, and had been for the entirety of the time that concerns us. The condition in respect of which disability was conceded was Chronic Fatigue Syndrome. This was perhaps inevitable, as Mr Bachra had frankly admitted that he knew the Claimant was disabled when considering the appeal.

102. We consider that the Respondent had constructive knowledge that the Claimant was probably disabled from 20 October. On that date, it knew that the Claimant had been off sick for some months, and it knew from the Claimant's WhatsApp message that he had been referred to hospital for investigation of possible CFS. It certainly had constructive knowledge of the Claimant's disability at the time of the decision to dismiss.

103. Turning to issues 1.2 and 1.3, Mr Lyons acknowledged that a finding that the Claimant's sickness absence arose because of his disability was all but inevitable. He was right to do so. It is plain that the Claimant was dismissed because of his sick leave, and we find that his absence did arise from his disability. No other explanation for his absence was postulated before us.

104. Issue 1.4 involves a consideration of two things: the legitimacy of the aim, and the proportionality of the means. The Claimant acknowledged, sensibly, the legitimacy of the Respondent's aim, which is set out fully in the grounds of resistance, but can fairly be summarised as, business efficacy. The Claimant's dispute was with the proportionality of dismissing him as a means of seeking to achieve that aim.

105. Context is important. The Respondent is a small business. Mr Bachra told us – and was not challenged – that the Covid-19 pandemic had brought huge changes to the food industry. Food retailers, he told us, had seen their volume of sales grow by £4billion, due to custom switching from hospitality. There was, we were told, significant challenge to supply chains. Accounts for the Respondent showed topline sales increased by 63% (Mr Bachra's figure), from £762,000 to £1.2million, from the year ending April 2020 to the following year. Mr Bachra told us that the true impact on the business was in the accounting item "subcontractors and surcharges", which represented

primarily agency staff. This increased by 180%. Whereas previously a need for an agency staff might require calls to 2 or 3 agencies, this changed and calls to 10 or 11 might need to be made before someone was sourced. This in turn tied up time. Mr Bachra said the Respondent was facing all this, whilst with 25% fewer staff. That figure must mean office staff, of which there were 4, including the Claimant, but it is clear, and we accept, that the loss of the Claimant placed considerable stress on the Respondent at a time when it was facing considerable challenges.

106. In this context, the Respondent took considerable steps to accommodate the Claimant. We have already accepted that Mr Brennan did seek to contact the Claimant's GP, although he probably did not consider that his most pressing priority. We accept that, after the second Capability Hearing, the Respondent again contacted the Claimant's GP. Although it would have been better to take more steps regarding an OT report than contacting just one possible source, the decision made to focus on the GP was, in the circumstances, understandable. The Claimant was given the opportunity to engage with the Respondent with proposals regarding how he might return to work before he was dismissed, and again in the appeal. The appeal even resulted in an offer to obtain an OT report.

107. Asked what more the Respondent could have done, the Claimant answered that he understood that ACAS guidelines say an OT report was required. Obtaining an OT report would have made good sense. But it is difficult for the Claimant to criticise the Respondent for failing to obtain an OT report, when the Respondent did offer to obtain such a report, only for the Claimant to reject the suggestion.

108. The Claimant's only answer to that was, that, by that stage, trust had started to break down. He feared that an OT report from an OT not specialising in CFS might be biased. That is not a reasonable answer. If the Claimant so feared, the sensible response would be to say that any OT report should be from a specialist. It appears to the Tribunal that the Claimant, unfortunately, became fixed on the idea that the earlier failure to obtain an OT report was a procedural failure from which there was no return for the Respondent.

109. Addressing specifically the sub-issues in issue 1.5, we consider that the Claimant's dismissal was an appropriate and reasonably necessary way of achieving the Respondent's aim. A business of that size, under the pressures that it was, could not employ the Respondent indefinitely without him working. It tried to see if something less discriminatory could be done instead of dismissing him, by engaging with him regarding options, seeking to get a GP report and offering to commission an OT report. As to the balancing of the needs of the Claimant and the Respondent, the Claimant's employment is clearly important to him. But so are the Respondent's business needs important to it. It tried hard to retain an employee whom it

clearly valued. We do not think that the Claimant's dismissal represented and unfair tilting of the balancing of their interests towards the Respondent.

110. In the circumstances of this case, we find that the Claimant's dismissal was a proportionate means of pursuing the legitimate aim. Indeed, we consider that the Respondent showed considerable willingness to accommodate the Claimant.

111. We have already dealt with issue 1.6.

112. Turning to the issues in the claim for unfair dismissal, we accept that the reason for the dismissal was capability, a potentially fair reason for dismissal.

113. The Respondent genuinely believed that the Claimant was no longer capable of performing his duties. It sought to find ways in which he might be able to do so, but none were identified.

114. The Respondent did adequately consult the Claimant.

115. The Respondent did carry out a reasonable investigation. It did not obtain a medical report, but that was not for the want of trying. Its decision not to obtain an OT report, or enquire about other possible sources of an OT report, was regrettable, but understandable in the circumstances.

116. The Claimant contends that the Respondent's policy meant that it could not dismiss him unless a report was obtained, and it was accepted by the Respondent that the Claimant had been told (and that Mr Brennan was told) that no decision would be taken without a medical report.

117. Mr Lyons referred us to caselaw supporting the position that an employer can find itself in a position, in considering a capability dismissal, of having the make a decision based on the limited information before it and without medical evidence. The assistance we gain from the caselaw, however, is limited by the fact that the cases do not appear to have been considering the application of the contractual policy that we have in this case.

118. Looking at the wording of the policy, "*obtain up-to-date medical advice*" is, on one view, plain enough: it doesn't mean "use its best endeavours to obtain", it means, obtain.

119. The position is not that simple, however. The policy also says that, "*If you refuse us permission, or delay consent, to contact your medical practitioner, we may have to make a decision without the benefit of access to medical records*". So "*obtain*" cannot be absolute, because the contract itself contemplates that a decision might have to be made without medical records.

120. Nothing turns, we consider, on the different terms, "*medical advice*" and "*medical records*". Medical advice obtained without medical records, about an employee who has refused or delayed consenting to supply such records, is unlikely to be of any use to the Respondent.

121. Does that mean that the Respondent can dismiss without medical advice only where the employee in question has refused or delayed consent? In this case, the Claimant did not refuse consent initially. Did he delay consent? He certainly did not provide his consent with any degree of dispatch. But it was not contended by the Respondent that he deliberately delayed consent. The policy does not expressly require that any delay be deliberate, and we heard no submissions on whether it need be deliberate.

122. We are not satisfied that such delay as there was would entitle the Respondent to dismiss the Claimant without medical advice. Consent was provided long before the decision to dismiss was made.

123. We must therefore return to the question, is refusal or delay of consent the only circumstance in which the Respondent can dismiss without medical advice?

124. We think not. It is not for the Tribunal to re-make the Respondent's policy, but it is for us to interpret it. Applying the principle identified above, we consider that it is necessary for business efficacy to interpret "*obtain*" as meaning "*use its best endeavours to obtain*". It would be nonsensical, and contrary to any notion of business efficacy, if the Respondent could be compelled permanently to employ someone because it was unable to obtain medical advice.

125. There is also this: in this case, when offered an OT report, the Claimant did refuse to cooperate with it. Although that was not a refusal to allow the Respondent to contact the Claimant's medical practitioner, it was very closely akin to it. Effectively, the Claimant prevented the Respondent from obtaining medical advice, the very advice that the Claimant himself said it should have obtained. We consider that it is necessary to imply into the provision that the Respondent would obtain up-to-date medical advice, or

use its best endeavours to do so, a term that the Claimant would cooperate with the obtaining of such advice, to the extent that it is reasonable for him to do so. We also consider that this is so obvious as to go without saying.

126. We do not think the Claimant's reasons for refusing to cooperate in obtaining an OT report after the appeal were reasonable. We have already dealt with his concern that the OT might be biased. He also said during the hearing that he feared the offer might be a ploy to cause him to delay commencing these proceedings. We do not think that was a reasonable fear. We do not believe that the Respondent's offer was anything other than genuine. But, even if the Claimant feared it was not, there was nothing to stop him starting his claim, and engaging with the offer of an OT report at the same time. He had nothing to lose from engaging with the offer of an OT report.

127. We do not think the Respondent could reasonably have been expected to wait any longer. It had waited for months, it had extended the time in which the Claimant could appeal his dismissal, and even then was prepared to wait further whilst an OT report was obtained. But it could not reasonably be expected to wait longer in the case of an employee who showed no sign of being able to return to work and who refused to engage with its offer of an OT report.

128. We consider that dismissing the Claimant was within the range of reasonable responses open to the Respondent.

129. Regarding issue 2.4, the decision to dismiss is perhaps inappropriately described as a sanction, but it was within the range of responses reasonably open to an employer faced with these facts.

130. Regarding issue 2.5, was the procedure fair? The Claimant believed that Mr Brennan had pre-determined that he was to be dismissed. We do not accept that. Mr Brennan would have been well aware of the Claimant's importance and value to the Respondent. There is no reason to believe a trivial misunderstanding in July 2020 would have caused him to want the Claimant dismissed.

131. What about the failure to obtain an OT report? It would have been better had one been obtained, or more enquiries made about sourcing one. But the judgment made by the Respondent to focus on getting a GP report was a reasonable one. The entitlement is to a fair procedure, not a perfect one.

132. Insofar as that was a defect, we do not consider that it rendered the procedure unfair. And, if we were wrong on that, the Respondent's offer to get an OT report after the appeal hearing would, we consider, cure the defect.

133. In the light of the above findings, we do not need to consider issue 2.7.

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Employment Judge David Hughes
Date 20 February 2023

Reasons sent to the Parties on 06 March 2023

For the Tribunal Office