EMPLOYMENT TRIBUNALS

Claimant: Mr C Elliott

Respondent: Salisbury NHS Foundation Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Southampton **On:** 23 and 24 May 2023
(and 30 May 2023 – Members Meeting)

Before: Employment Judge Gray
AND Members Dr N Thornback and Mr L Wakeman

Appearances
For the Claimant: Miss N Gyane (Counsel)
For the Respondent: Mr N Caiden (Counsel)

RESERVED JUDGMENT (LIABILITY ONLY)

The unanimous judgment of the Tribunal is that:

The complaints of unfair dismissal and discrimination arising from disability, all fail and are dismissed.

REASONS

1. By claim form submitted on the 19 March 2021 (supported by an ACAS certificate dated 18 January 2021 to 8 February 2021) the Claimant complains of unfair dismissal and disability discrimination.

2. The Respondent denies unfair dismissal and discrimination.

3. The effective date of termination is the 9 December 2020.

4. The appeal was determined on the 8 March 2021.

5. No time limit jurisdictional matters arise in this claim.

6. There was a case management preliminary hearing in this matter on the 29 March 2022 before Employment Judge Midgley. At that hearing the issues were agreed (save for the subsequent addition of a new paragraph 2.4.4, so that the original 2.4.4 became 2.4.5). Also, it was listed for final hearing for four days.

7. The case management orders recorded that the final hearing would take place in Bristol, however the parties had agreed Southampton. This was corrected by subsequent correspondence. Also, due to a lack of Judicial resource the Tribunal contacted the parties shortly before the final hearing was to commence to confirm that only two days could be provided from the 23 May 2023. The parties agreed to proceed on that basis.

8. At the commencement of the final hearing the issues and timetable were discussed. The agreed issues were confirmed as set out below. It was agreed that the two-day hearing would be used to hear evidence and submissions on liability and then judgment reserved. Further case management would then follow the liability Judgment to address determination of remedy, if appropriate.

9. The final hearing timetable proposed by Employment Judge Midgley had the Claimant giving evidence first. The parties confirmed they still wished to present the case in that order.

10. The final hearing timetable was then agreed and was met, with submissions concluding at just before 16:30 on day two. We are grateful to the parties Counsel for their assistance in achieving the agreed timetable.

11. Judgment was reserved, and it was then possible to arrange for a members' meeting on the 30 May 2023 for deliberations.

12. For reference at the final hearing, we were provided with:

a. An agreed bundle consisting of 521 pages (not including the index).

b. A supplemental policies bundle consisting of 37 pages not including index.

c. An agreed factual chronology and cast list.

d. Witness statement of the Claimant.

e. Witness statement from Paula Elliot (PE), the Claimant's sister in support of the Claimant. Her witness statement word count was higher than directed, but the Claimant's was lower, so there was no increase overall. No objection was raised, and this was agreed.

f. Three witness statements in support of the Respondent from:

   i. Jane Dickinson (JD) (Divisional Director of Operations for Medicine/Deputy Chief Operating Officer at the material time), who took the decision to dismiss the Claimant.

   ii. Lisa Thomas (LT) (Chief Finance Officer at all material times), who conducted the Claimant's appeal hearing.

   iii. Ian Robinson (IR) (Head of Facilities and Sustainability Lead), who was involved in the Claimant's absence management and presented the management case at the final review meeting.

g. Written closing submissions from Respondent's Counsel.

13. The agreed issues as to liability are set out below as taken from the case management order of Employment Judge Midgley (pages 38 to 48 of the bundle) and as repeated at pages 55 to 57 of the bundle with the addition of a new paragraph 2.4.4:

1. Unfair dismissal

1.1 It is admitted that the Claimant was dismissed.

1.2 What was the reason for dismissal? The Respondent asserts that it was a reason related to capability, alternatively some other substantial reason, which is a potentially fair reason for dismissal under s. 98(2) of the Employment Rights Act 1996.

1.3 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 whether:

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

1.3.2 The Respondent adequately consulted the Claimant;

1.3.3 The Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

1.3.4 The Respondent could reasonably be expected to wait longer before dismissing the Claimant;

1.3.5 Dismissal was within the range of reasonable responses.

1.4 Did the Respondent adopt a fair procedure? The Claimant challenges the fairness of the procedure in the following respects;

1.4.1 The Respondent dismissed the Claimant when the medical evidence presented to the Respondent indicated that:

1.4.1.1 the Claimant was fit to return to work as a car park enforcement officer;

1.4.1.2 other than returning on a short phased basis, no adjustments were necessary to enable the Claimant to return to work and continue to perform his duties;

1.4.1.3 the risk of absences from work in the future due to the effects of bipolar affective disorder were low due to the Claimant's changed medication and improved relapse prevention plan;

1.4.1.4 the risk of inappropriate behaviour towards his colleagues (which in any event was isolated), was low due to the Claimant's changed medication and improved relapse prevention plan.

1.4.2 The Respondent rejected the medical evidence from both Dr El-Khayat and Dr Gemmell, preferring the unqualified medical assessment by those who made the decision to dismiss the Claimant, placing inappropriate weight upon how they perceived the Claimant's involvement at the remote meeting on 4 December 2020.

1.4.3 The Claimant was subjected to unlawful disability discrimination by the Respondent and relies upon this in contending that he was unfairly dismissed.

1.5 If it did not use a fair procedure, what is the percentage chance that the Claimant would have been fairly dismissed in any event and, if so, when would that have occurred?

1.6 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the Claimant committed the misconduct alleged.

2. Discrimination arising from disability (Equality Act 2010 section 15)

2.1 Did the Respondent treat the Claimant unfavourably by:

2.1.1 Dismissing the Claimant;

2.1.2 Rejecting his appeal

2.2 It is accepted that the following arose in consequence of the Claimant's disability: the Claimant's sickness absence and inappropriate conduct at work.

2.3 It is further accepted that the Respondent dismissed the Claimant because of those things.

2.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

2.4.1 Ensuring that its car park estate was run in a smooth and business efficient manner,

2.4.2 having staff in place that maintain a certain level of attendance so as to avoid overtime and additional pressure on other members of staff;

2.4.3 Avoiding increased cost and decreased revenue due to absences;

2.4.4. To protect the health & safety of staff, patients and visitors in the event of a relapse;

2.4.5 The Respondent relies upon the adjustments made for the Claimant (ET3 para 36) to demonstrate that dismissal was proportionate.

2.5 The Tribunal will decide in particular:

2.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims?

2.5.2 Could something less discriminatory have been done instead?

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

THE FACTS

14. We found the following facts proven on the balance of probabilities after considering the whole of the presented evidence, both oral and documentary, and after considering and listening to the factual and legal oral submissions made by and on behalf of the respective parties.

15. It was by claim form submitted on the 19 March 2021 (supported by an ACAS certificate dated 18 January 2021 to 8 February 2021) that the Claimant complained of unfair dismissal and disability discrimination. The Respondent denies unfair dismissal and discrimination.

16. The focus of this claim is the Claimant's dismissal. Firstly, as to the fairness of his dismissal, was it procedurally fair and did it fall within the range of reasonable responses? Secondly, whether the asserted unfavourable treatment the Claimant complains about, being his dismissal and the rejection of his appeal (or as agreed with the parties during submissions, best understood as a dismissal and then a maintaining of that dismissal at appeal), which it is not disputed (in respect of the dismissal) arose in consequence of the Claimant's disability (being the Claimant's sickness absence and inappropriate conduct at work) is justified.

17. It is not in dispute that the Claimant suffers from bipolar effective disorder and has done so since 1996, following a head injury. It is accepted that this means the Claimant is a disabled person within the meaning of the Equality Act 2010.

18. It is not in dispute that from his disability arises sickness absence and inappropriate conduct at work.

19. We were assisted in this case by the parties presenting the Tribunal with an agreed chronology.

20. We would observe that there were almost no factual disputes in this case. The only two that arose concerned whether the Respondent had agreed to use the Claimant's sick pay to help the NHS rather than pay it to him and about the covert recordings of the dismissal and appeal hearings (both of which we address below).

21. The extent of the agreed fact can be seen from the agreed factual chronology we were presented.

22. The Claimant commenced work with the Respondent on the 8 June 2015 initially as a Security and Car Park Officer based at the Salisbury District

Hospital (the terms of employment are at pages 128 to 133 and the job description at pages 104 to 111).

23. There is no dispute between the parties that the Claimant had three significant periods of absence connected to his bipolar effective disorder. These were 23 March 2016 until the 14 January 2017, 8 March 2017 to 9 January 2018 and then from 22 May 2018.

24. There are numerous OH reports throughout this period. The agreed factual chronology references 14 OH reports, the most recent being on the 20 November 2020 (pages 422 to 423).

25. The agreed chronology also notes that concerns were raised with the Claimant in March 2016 as to verbal aggression (see pages 172 to 174) and that on the 6 March 2017 there is an alleged assault by the Claimant on a colleague. Further, on the 7 March 2017 the Claimant is allegedly aggressive and threatening during a home visit. On the 13 December 2017 a colleague put in complaint against the Claimant.

26. A Relapse Prevention Plan is then put in place (pages 297 to 298) dated 22 March 2018 to assist in spotting a deterioration in the Claimant's health (referenced at paragraph 34 of IR's witness statement). The plan is best considered as an early warning system for a deterioration in the Claimant's health.

27. The agreed chronology also records the redeployment of the Claimant, initially on 30 April 2018 temporarily to the role of a Catering Assistant. On the 31 May 2018, OH states the Claimant is not enjoying the temporary role of Catering Assistant. Then on the 2 August 2018 the Claimant attends a meeting with the Respondent and is told of temporary redeployment as a Car Park Attendant. It is then on the 1 October 2018 the Claimant withdraws from the temporary role within the Catering Department.

28. By letter dated 19 October 2018 the Claimant's redeployment as a Car Park Attendant is confirmed it being recorded … "Your performance in the role of Security Guard was significantly affected by your deteriorating health condition and it is for this reason I am unable to support a return to this post." (page 310).

29. On the 1 November 2018 the Claimant returns to work starting in the Car Park Attendant role. It is then on the 1 February 2019 the Claimant is confirmed in substantive role as a Car Park Attendant.

30. From the 22 May 2019 the Claimant then commences a third period of long-term sickness absence.

31. The agreed factual chronology describes how on the 17 June 2019 the Claimant resigned (page 320) and on the 6 August 2019 the Respondent accepted the resignation (page 321). On the 9 August 2019 the Claimant's sister calls IR to request the resignation is disregarded; this is refused (page 323). On the 9 August 2019 the Claimant's Consultant Psychiatrist writes to IR explaining the Claimant's incapacity at the point of his resignation and requesting that the Claimant is re-appointed (page 324). On the 9 August 2019 the Claimant's Ward Manager writes to IR requesting that the Claimant is allowed to rescind his resignation. On the 14 August 2019 the Claimant's solicitor Sampson Coward writes to the Respondent requesting the Claimant's reinstatement. On the 23 August 2019 the Respondent agrees to treat the Claimant as not having resigned (page 330).

32. On the 23 July 2020 the Claimant's solicitors enquire about ill health retirement (page 381). As IR refers in his witness statement at paragraphs 62 and 63, information about Ill Health Retirement (IHR) was provided but the Claimant did not pursue that option.

33. The Claimant confirmed at this hearing that he decided he did not want to pursue ill health retirement.

34. Chronologically we then get to the medical report of Dr El-Khayat dated 24 November 2020 (pages 426 to 429). This is a report that was obtained by the Claimant and is relied upon by the Claimant to evidence his medical position at and around the time of dismissal.

35. Also, by correspondence dated the 24 November 2020, the Claimant is invited to an Absence Review Meeting which is scheduled to take place on the 4 December 2020 by video (page 424).

36. The absence review meeting takes place on the 4 December 2020 (pages 439 to 443 and 489 to 503).

37. The decision is then taken to dismiss the Claimant and he is sent a letter dismissing him from his employment confirming he will be paid in lieu of notice and informing him of his right of appeal (pages 445 to 446).

38. The agreed chronology refers to the effective date of termination as being 9 December 2020. There is a typographical error in the dismissal letter (referring to the 4 December 2020 as the date of dismissal) but it is not in dispute that the Claimant was dismissed with the effective date of termination being the 9 December 2020.

39. An issue for us to determine is what was the reason for dismissal. The Respondent asserts that it was a reason related to capability, alternatively some

other substantial reason, which is a potentially fair reason for dismissal under s. 98(2) of the Employment Rights Act 1996.

40. About the reason Respondent's Counsel submits that … "There can be little doubt that the reason for the dismissal was 'capability' – namely the Claimant's prolonged sickness absence and poor attendance record which the Respondent was of the view would continue upon any return to work. Additionally, even the concern as to the risk to others from 'relapses' falls within the broad definition of capability under s.98(2)(a) ERA.".

41. We also acknowledge from the evidence presented to us and as reminded by the references made in the written submissions of Respondent's Counsel that:

    a. We were referred in evidence to the Respondent's Attendance Management Policy (pages 133 to 155 of the bundle). Within that it records at paragraph 3.4 (page 137) that the policy will be used to manage employees who reach any of the following trigger points … "3 episodes of sickness absence in any rolling 12-month period" … "More than 14 calendar days of sickness absence in any rolling 12 month period".

    b. It is not in dispute that the Claimant's attendance met the trigger points. This is referred to in paragraph 25 of JD's witness statement. It is also set out in management's statement of case (page 415 paragraph 11), and set out in the dismissal letter (page 445) … "The panel heard that since you started employment with the Trust on 8th June 2015 up to the 20th November, you have taken a total of 1163 calendar days sickness due to ill health and as a result you level of attendance at work has continued to be unsatisfactory.".

    c. The Claimant never met the rolling 12-month period threshold since his first period of long-term sick on 23 March 2016. The Claimant confirmed in cross examination that his absence record was not in dispute.

    d. As IR sets out in paragraph 61 of his statement … "I wrote to Chris on 18 June 2020 (pages 353). As Chris had not been fit to work for more than 12 months at this stage, with no anticipated return date, I advised that he would be invited to a meeting to determine the viability of his continued employment with the Trust. I advised that it was possible that the outcome of this meeting could be the termination of his employment.".

    e. That meeting was delayed for a variety of non-contentious reasons. Then as referred to in the statement of JD at paragraph 14 … "On 26 November 2020, I invited Chris to the Hearing in line with the Trust's Management of Attendance Policy (page 424). Chris was also provided

with the Management Case and advised of his right to be accompanied. The Hearing was to take place on 4 December 2020 at 11:00 via Microsoft Teams. Prior to the postponements, Ian Robinson had written to Chris on 18 June 2020 to provide more detail of the purpose of the Hearing (page 353). The Hearing was for the Trust to consider Chris's future employment considering his ongoing long-term absence and his pattern of recurring absences, considering the associated risks that the deterioration in Chris's health involved.".

42. Claimant's Counsel submitted in her closing submissions that the Claimant accepts that the Respondent relies on capability as the reason for dismissal but asserts that it did not act reasonably in using that as a sufficient reason to dismiss.

43. It is not in dispute that the build up to the meeting on the 4 December 2020 that resulted in the Claimant's dismissal is within the context of an absence review, nor that the outcome from that could be the Claimant's dismissal.

44. The Claimant attends that meeting relying upon a report from a medical expert (Dr El-Khayat) that he has obtained and who was instructed to … "… provide us with a report which he would intend to disclose to his employer when seeking to persuade them to allow his employment to continue." (page 418).

45. It is by letter dated 9 December 2020 the Claimant's employment was terminated with a payment in lieu of notice. The letter confirms … "I have now had time to review thoroughly the situation and consider an outcome. The decision that has been made was based on the facts presented to the panel in the Management Case and Doctors reports made available for the hearing. I am not confident in light of the information provided that you will be able to improve your level of attendance in the foreseeable future and the impact this is having on the service does not make this sustainable. It is with regret that in the circumstances I have no alternative but to make the difficult decision to terminate your contract of employment with Salisbury NHS Foundation Trust. This is due to your continued failure to demonstrate a significant improvement in your attendance record and as a consequence you are unable to provide the Trust with a full and effective service." (page 446).

46. Paragraphs 25 to 46 of the witness statement of JD sets out her reasons in further detail.

47. At paragraph 45 of JD's statement, she confirms … "In summary, we were not satisfied that Chris's absence pattern would change in the future and there were no further adjustments that could be made by the Trust to ensure increased attendance. We felt that, given the impact Chris's absences had on the service, it was appropriate to dismiss Chris. In addition, we considered that any future

absence was also linked to a risk of potential violence and/or threats to staff, patients, and visitors.".

48. In cross examination the Claimant agreed that he appreciated he had been dismissed for his attendance record. He also agreed that it was the Trust's view that they were not confident his attendance would get better.

49. The Claimant does not dispute his absence record as summarised in the dismissal letter and at paragraph 25 of JD's witness statement. It is an absence level that triggers action under the Attendance Management Policy.

50. The current fit note for the Claimant had him signed as unfit until the 15th January 2021 (page 400).

51. The most recent OH report did confirm the Claimant was in their view able to return to work on a phased return, but also included a paragraph at the conclusion of the letter that says … "I would be happy to support him should he return to work but I accept the grounds for IHR are also quite compelling given his attendance over a 5 year period. Ultimately it is a management decision." (page 423).

52. We accept as submitted by Respondent's Counsel that in respect of the apparent contradiction in the OH report (i.e., the Claimant is fit now but the grounds of IHR are also quite compelling) it is a reasonable reading of the report to rely on the reference to IHR. OH would not say IHR is an option if the scheme rules are not met. As JD articulates in paragraphs 33 and 34 of her statement:

    "33. The OH Report can appear contradictory in that, on the one hand, it says that Chris can return to work, and, on the other, it supports ill-health retirement. We considered whether clarification should be sought, however on consideration it was not felt that would take us any further forward. The way we understood the OH Report was that it said that, at this moment in time Chris was able to go back to work, but that it was likely that there would be future absences (hence the OH support for ill-health retirement).

    34. My understanding is that ill-health retirement is available where an individual is unable to efficiently carry out their duties in their current NHS job because of permanent ill health. Ill-health retirement comes at a significant cost to the NHS Pension Scheme, and, in my experience, it is only on very rare occasions that an OH physician supports an application for ill-health retirement. The fact that the OH physician supported it on this occasion meant that they believed that Chris's circumstances were such that he was entitled to it."

53. The Claimant acknowledged in cross examination when asked, given what OH says in support of IHR, did he agree that they were giving the view that his future attendance is not likely to improve, that yes, he supposes so. He also

agreed with reference to paragraph 33 of JD's statement that her view is reasonable as that is how he understood the OH report.

54. Reference is also made by JD to the way the Claimant presented at the review meeting (paragraph 37) … "The panel did not feel that Chris himself presented at the Hearing as somebody who was ready to return to work. Paula was very much the dominant individual throughout the Hearing and Chris himself said very little and did not appear to be fully engaged in the Hearing. The Hearing was held on a remote basis and Chris was almost in the background, sitting slightly behind Paula. We accepted that the medical advice stated that he was ready to return, but that was not the impression he gave during the meeting, where he hardly contributed to the discussion at all and did not give any assurances that he was ready to return to work or that he would be able to maintain an acceptable level of attendance in the future.".

55. Although the concern over any future absence being linked to a risk of potential violence and/or threats to staff, patients, and visitors was not articulated to the Claimant in the dismissal outcome communication, the Claimant did confirm in re-examination that because his behaviour was unreasonable and he accepted that, he would have anticipated management to take that into account.

56. We find that the reason for dismissal by JD is that which is stated within the dismissal letter … "I am not confident in light of the information provided that you will be able to improve your level of attendance in the foreseeable future and the impact this is having on the service does not make this sustainable.". This is also confirmed in paragraph 45 of JD's witness statement … "In summary, we were not satisfied that Chris's absence pattern would change in the future and there were no further adjustments that could be made by the Trust to ensure increased attendance. We felt that, given the impact Chris's absences had on the service, it was appropriate to dismiss Chris.".

57. This is a capability reason.

58. It is also re-enforced as the reason in the appeal outcome letter which states … "… The panel acknowledges the steps you have taken to try to improve your health, however the panel was not sufficiently assured these measures would materially change your attendance levels." (page 462).

59. We find that the reason for the Claimant's dismissal was capability.

60. The focus of the Claimant's challenge to this reason is that the Respondent did not act reasonably in using that as a sufficient reason to dismiss.

61. We therefore move next to consider whether the Respondent did act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant.

62. As we are reminded from the agreed legal summary the band of 'reasonable responses' applies to all aspects of section 98(4) of the Employment Rights Act (with reference to Sainsbury's Supermarkets Ltd v Hitt), our role is to assess the Respondent's decision against this band, it is not to substitute and decide what we would have done.

63. It was not in dispute that the Claimant was at the time of dismissal in a unique role at the Respondent dealing with car park enforcement. The Claimant did not disagree with the service impact of his absence as evidenced by IR in paragraphs 74 to 76 of his witness statement:

"74. Chris's absence had a real impact on the Trust's ability to manage its car park estate. I attached a car park graph to the Management Case (page 158) which illustrates the reduction in the number of car parking tickets issued when Chris was absent. However, Chris's absence did not just impact on the number of tickets issued, but it impacted on the Trust's general ability to manage car parking and ensuring car parking spaces were managed appropriately. The Trust's enforcement system is more based on warnings, than on the issuing of tickets. Further, a very important part of the role is to ensure that access points and roads are free from obstruction. This is vital, for example, for ambulance access to the emergency department. Actual examples where the Trust has not had adequate car park cover has resulted in the following: a frustrated patient has parked on the access road to the heli pad, preventing the helicopter from getting out in medical emergencies; another car blocked access to the mortuary, so that the funeral directors were unable to access the deceased. Chris was the only person employed to ensure that things like that did not happen and that abandoned cars were moved.

75. We really struggled to cover the role during Chris's sickness absence. The dual Security & Car Park role had always focused more on security than car parking, and when Chris moved to a pure Car Parking role, the rest of the team had been able to move away from the car park aspect. As they no longer routinely had covered the car parks, they were not upskilled in that area of work. Further, the Security & Car Park team were of course one man down when Chris was off sick. Chris's redeployment had not meant additional substantive recruitment to the Security team, but simply a reorganisation of resources with Chris covering the car park and the rest of the team focusing on Security.

76. There had been real manning issues in the Security team for a number of years. The Trust relied heavily on Security contractors to backfill Chris's shifts during his first two absences and this came at considerable expense for the Trust. The Trust Security team also needed to work overtime. The work levels in Security does fluctuate, but during Chris's absences, we have needed to deal with the Novichok poisoning in March 2018. This involved having counter terrorism units on site until September 2018, and there was almost constant

presence from the world's media that needed managing. In addition, as referred to above, the Covid crisis commenced in March 2020. In addition to their normal duties, the Security team were asked to provide 24/7 security to the protection of assets (vital PPE stores on site), support social distancing with daily patrols within public spaces and distribute vital PPE (face masks) to all public areas/entrances. The team also provided a presence at the main entrances into Trust buildings to promote the use of face masks. Additional security staff were engaged to support social distancing and mask wearing. Further, in April 2020, an excess death facility was erected onto car park 10/10a, reducing parking spaces which required close management and regular contact with colleagues from Wiltshire Council, who were operating the site.

64. We also note paragraph 77 of IR's statement:

77. At the time of Chris's hearings, the Security Team's duties were to be expanded further. In October/November 2020, I was tasked with establishing a COVID vaccination centre for Salisbury, to be operational by 15 December. This was about to create further pressure on the Security Team, as they would then also need to provide 24/7 security to the City Hall Vaccination Centre as well."

65. IR also confirmed in his oral evidence that a driver would be issued a warning before a parking charge notice, the issue is the graph is an indicator of the level of revenue it would receive through the car parks not generated from the issuing of tickets. If there is no evidence of enforcement then it is highly likely drivers will not pay as they are aware it will not be enforced, so the payments into machines will go down. Loss of parking income (from notices) is a fraction of what it gets from the parking machines.

66. The evidence of IR is relied upon by JD as referred to in paragraphs 29 and 30 of her statement:

"29. We considered the service impact that Chris's absence had had on the Trust's car park estate. Chris was the only Car Park Enforcement Officer, as that job had been created for him and car park enforcement had previously been covered by the dual Security Guard & Car Park Officer role. We understood that the Security Guards had initially again been asked to cover the car park when Chris's absence commenced in May 2019, but that this had been unsustainable since October 2019 and that, since then, the Trust had been unable to provide the enforcement required to maintain the car park estate. This was obvious from the car park graph at page 152, which shows the number of car parking tickets issued each month.".

30. However, Chris's role did not just involve issuing tickets. As stated in the Management Case, when Chris was absent there was a general impact on the Trust's ability to manage car parking for patients, visitors, and staff, in ensuring

car park spaces were managed appropriately. Chris was responsible for generally managing the car parks and providing general directions for everyone using the car park. Car parking and specifically payment for parking is a such an emotive subject at hospitals and staff and patients can get very animated if they feel they have been unfairly treated, so it needs to be managed sensitively and appropriately.

67. The Claimant didn't disagree that the adjustments as summarised at page 70 of the bundle (paragraphs 36.1 to 36.8) were done. This included adjustments to rota and shift patterns and phased returns to work, including light duties and reduced hours. Also, redeployment into a car park enforcement officer role, created to suit the Claimant's needs and support his health and minimise the risk of further absence.

68. In the agreed list of issues, it is recorded that in a capability dismissal the Tribunal will usually need to decide whether the Respondent genuinely believed the Claimant was no longer capable of performing their duties. We note that this is an issue framed generically and is more accurately framed in light of the reason for dismissal in this case as whether the Respondent genuinely believed that the Claimant's absence pattern would not change in the future and there were no further adjustments that could be made by the Trust to ensure increased attendance. Did the Respondent genuinely believe the Claimant was no longer capable of performing their duties, because he could not ensure increased attendance.

69. We have already considered the evidence as to reason relied upon by JD as set out above.

70. The key evidential piece relied upon by the Claimant to challenge the genuineness of JD's position is the report of Dr El-Khayat (pages 426 to 429).

71. JD addresses this report in paragraphs 35, 36, 38 and 39 of her witness statement:

"35. The letter from Dr El-Khayat, the private psychiatrist, was written following a telephone conversation with Chris on 19 November 2020. It stated that Chris's medication had been changed and that he was doing much better following the change. It said that at the end of September 2020, they had discussed a Relapse Prevention Plan that was proposed by the Community Mental Health Team and to which Dr El-Khayat had added a few points: that Chris and Paula had the liberty to increase medication if they saw any warning signs of relapse, that Chris should have a prompt assessment in the case of early signs of relapse and that the threshold for admission under the Mental Health Act should be lowered because of his previous history of rapid decline. He stated that, if Chris and Paula found it difficult to access the Community Mental Health Team

at the time of a relapse, he was happy to support Chris if he needed urgent intervention although noted he did not provide an on-call service.

36. Dr El-Khayat stated that Chris's new medication should significantly reduce the risk of future relapses, but that the risk could not be eliminated. He stated that the elaborate Relapse Prevention Plan referred to above included identification of early warning signs and what to do about them, but again could not eliminate the risk of relapse. He stated that Chris's previous medication had likely played a part in his extended periods of sickness absence.

… 38. In terms of the future, we were not satisfied that Chris would be able to maintain an acceptable attendance level. This was supported by the pattern of previous absences and the most recent OH Report's comments about ill-health retirement. Further, despite Dr El-Khayat assessment that the risk of a future relapse was reduced, taking all the medical evidence into account, we still considered there was a real risk of a relapse. Serious consideration was given to the account provided by Dr El Khayat, however it was felt that this letter could not be taken as evidence in isolation but was considered in the context of the whole case with all the other evidence provided.

39. The new Relapse Prevention Plan had not been shared with us in its entirety but was referred to in Dr El-Khayat's letter. It did not seem that there were any material differences to the previous Plan. The Relapse Prevention Plan from 2018 (page 297-298) had included identification of early warning signs, reporting chains and so on, but this had not prevented a relapse or indeed a further sectioning of Chris. Further, the Trust had previously been told that Chris was to receive support through the Rapid Access Scheme and therefore be able to have an early intervention if required, but this had still not worked to prevent a relapse.".

72. The way JD describes the content of the Dr El-Khayat report and the way she views it is not unreasonable in our view. In our view the Relapse Prevention Plan (RPP) is better described as a Relapse Management Plan or Early Warning Plan, it cannot prevent a relapse happening. We accept what JD says about it.

73. We also note that such a plan would help to mitigate the concerns the Respondent had as to a risk of potential violence and/or threats to staff, patients, and visitors.

74. As we have already identified the main factor for dismissal was the Claimant not being able to ensure increased attendance, and the impact his absences have on the service.

75. We accept what JD says that … "Serious consideration was given to the account provided by Dr El Khayat, however it was felt that this letter could not

be taken as evidence in isolation but was considered in the context of the whole case with all the other evidence provided.”.

76. We find that JD did genuinely believe at the time of dismissal that the Claimant could not ensure increased attendance. JD was not confident in light of the information provided that the Claimant would be able to improve his level of attendance in the foreseeable future and the impact of that on the service did not make it sustainable.

77. We also need to consider whether the Respondent adequately consulted the Claimant.

78. Respondent’s Counsel refers in his written closing submissions when asserting that the level of consultation fell within the reasonable band, that in short it is evidenced to us that there were numerous meetings with the Claimant, his sister, management and with Occupational Health over the period of March 2016 to the point of dismissal, which also included consultation on potential redeployment and correspondence about potential ill health retirement. We note that this is also apparent from the agreed factual chronology.

79. In the submissions of Claimant’s Counsel, the challenge to consultation focused on three elements, being the risk of harm to others, the impact of the medication changes and how the Claimant presented at the review meeting.

80. Addressing each in turn it is not in dispute that the risk of potential violence and/or threats to staff, patients, and visitors was not articulated as a factor for dismissal in the dismissal outcome letter. We though do not find this as a material factor in the reason for dismissal as it was acknowledged by JD that there was no incident since March 2017 and the RPP (or in our view more accurately described as a relapse management or early warning plan) had proven successful in advance of the third relapse. In our view this is a neutral impact to the reason we have found for the dismissal, so is not one that further communication about would change.

81. In respect of the changes to medication JD accepted that the medication had a negative impact on the duration of the third absence, but that it did not explain the previous relapses, nor did it prevent relapses. This qualification is not in dispute. The Claimant in cross examination agreed that the medication did not cause a relapse, and it was only prescribed in the third absence when hospitalised and slowed his return to work after that third sickness absence. In our view this is a neutral impact to the reason we have found for the dismissal, so is not one that further communication about would change.

82. The way the Claimant presented at the review meeting is not in dispute, i.e., the Claimant does not assert that JD could not form the impression she did, because he had in fact presented differently. There may be explanation for the

way the Claimant presented at the meeting that was not explored with him, but how he presented is not a determining factor in our view. Reliance is placed on the level of absence, the impact on service, what OH says in relation to IHR, and the fit note. Also, that Dr El-Khayat stated that the new medication should significantly reduce the risk of future relapses, but that the risk could not be eliminated. Neither could the RPP eliminate the risk of relapse. The way the Claimant presented, which is not in dispute, did not contradict these other factors.

83. Further, as both Counsel reminded us in their submissions the fit note (at page 400) is dated 9 October 2020. It signs the Claimant as unfit until 15 January 2021 (from the 15 July 2020). The OH report confirms that the medication was changed in August 2020 (page 422). The medication change therefore predates the fit note.

84. Consideration also needs to be given to whether the Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position.

85. The Respondent had an up-to-date medical position. As is noted in the appeal outcome no new evidence is presented for the appeal about the Claimant's fitness to attend work. We accept what Respondent's Counsel submits about this, that the Respondent had regard to all the fit notes including as at the point of dismissing which was produced on 9 October 2020 and signed the Claimant off until at least 15 January 2021 (page 400). Moreover, it sought input from Occupational Health who produced an up-to-date report on 20 November 2020 (pages 422 to 423). It also had regard to the Claimant's own private psychiatrist's report (page 426 to 428). As Respondent's Counsel submits … "Fundamentally, there is nothing said that rendered this aspect outside the reasonable band. The dispute, and really the crux of the Claimant's case is that it should have not dismissed the Claimant in light of the private psychiatrist's report and medical report in general. That is in fact a challenge as to the dismissal falling within the reasonable band not the procedure of obtaining the evidence. It has never been the Claimant's case that some more medical evidence was needed and that the evidence had upon which to base the decision did not fall within the reasonable band.".

86. Also, the Tribunal should usually consider whether the Respondent could reasonably be expected to wait longer before dismissing the Claimant.

87. The evidence at the time of dismissal was the Claimant was fit to resume work (as per the OH report and based on Dr El-Khayat). The change of medication also explains why the third absence was as long as it was. There is also a relapse management plan available.

88. It is not in dispute that the Claimant was good at his car park enforcement role when he was fit and able to undertake it and his attendance had a positive financial impact on car parking revenue. All of this though does not ensure the Claimant's increased attendance in the context of the evidenced absence levels, the undisputed evidence of the negative impact that has on the service, and that future relapses cannot be ruled out. With this clear context for the reason for dismissal, we do not find that it was unreasonable for the Respondent not to wait longer. Conversely therefore we do not find that the Respondent could reasonably be expected to wait longer before dismissing the Claimant.

89. As to whether dismissal was within the range of reasonable responses we note and accept the following points as submitted by Respondent's Counsel:

    a. "the cause of the poor attendance was not a condition for which there was a cure or treatment to prevent as such. By its very nature, the Claimant's bipolar disorder is something that has relapses and all the historic data supported that. Thus, it is not a case of simply when will the Claimant be able to return, it is a case of when will he return and what do we expect his attendance to be;"

    b. "the Claimant had only been employed for a relatively brief period of time and had a significant absence record following diagnosis of a condition well before he started employment. In concrete terms, having started employment on 8 June 2015 up to 20 November 2020, the day used in the dismissal letter for working out length of absence (**p.445**), the Claimant was absence for 1163 calendar days out of a possible 1992. So, over a 5-year period nearly 60% of the time the Claimant was not (in calendar days) able to attend work;"

    c. "the Claimant's absence, as he accepted during cross-examination, never met any of the Respondent's absence thresholds. Over 5 years there was no rolling 12-month period where these were not being breached;"

    d. "as set out above, the medical position reasonably supported that future absences from work were likely, hence the Claimant being eligible for ill health retirement, which was explored and rejected by the Claimant. In relation to the rejection of ill health retirement, it is acknowledged that the Claimant has explained his reasons in live evidence for not wanting it. For this Tribunal the key is that it has been established during the live evidence that the Claimant did not want to take any ill health retirement and he accepted he had "*removed it as an option*". In these circumstances it is within the reasonable band to not 'force' this on the Claimant or explore it again;"

e. “the Claimant’s absence was having a significant impact on the Respondent. There was a significant dropping of tickets, and hence revenue (**p.158**). Additionally, others were having to be paid to cover the role or being taken away from other duties, in fact the role was one that the Respondent struggled to cover. See Ian Robinson’s witness statement at [74]-[77] which the Claimant during live evidence accepted as being correct;”

f. “various adjustments to enable a return to work were implemented and still did not have the desired effect. The Claimant was redeployed roles and eventually in effect a bespoke role was made. The extent of adjustments applied were summarised at **p.36** [35] in the response and the Claimant in live evidence agreed all these steps had been taken prior to his dismissal;”.

90. Considering then the appeal and the decision to reject the Claimant’s appeal, thus maintaining the dismissal.

91. The agreed chronology confirms that on the 21 December 2020 an appeal is made against the dismissal (page 450).

92. Then on the 3 February 2021 the Claimant is invited to an appeal hearing (page 454) which then takes place on the 2 March 2021 (pages 507 to 520).

93. By letter dated 8 March 2021 the appeal is dismissed (pages 461 to 462)

94. The conclusions of the appeal are (page 462) …

“After careful consideration of all of the evidence, the panel reached the following conclusions:

1. The evidence presented at the formal hearing showed you were fit to return to work - the Appeal panel were not presented with any new evidence to further demonstrate that you were fit to attend work.

2. No further issues should arise with your Bipolar Affective Disorder due to the elaborate prevention plan in place referred to by Dr El-Khayat: The panel acknowledges the steps you have taken to try to improve your health, however the panel was not sufficiently assured these measures would materially change your attendance levels.

3. That your decision to not explore the possibility of ill health retirement was treated in a negative manner by the Trust. The panel were satisfied of the explanations from the management side that this did not negatively impact their decision making in the outcome of the Stage 4 hearing.

4. The decision to terminate your employment was both unfair and constituted disability discrimination. The Appeal panel were satisfied that the Trust Management of Attendance policy had been followed and that the management case demonstrated numerous reasonable adjustments that had been put in place to try and improve your attendance."

95. LT sets out in paragraph 9 of her statement …. "9. The purpose of the appeal hearing was to review the dismissal decision and consider whether the correct process had been followed, not to re-hear the evidence or to go back over the information discussed at the previous Meeting.".

96. This is not in dispute.

97. Then at paragraphs 15 and 16 of LT's statement …

"15. The panel deliberated immediately after the appeal hearing to discuss the case. I recall discussing the psychiatric report from Dr El-Khayat (page 426) at length. We were satisfied that the report had been taken into account in full by the panel at the final review meeting, before the decision to dismiss Chris had been made. The change in medication, the fact that there was a new relapse prevention plan, and the fact that Chris was considered fit to return to work, had been considered by the original panel.

16. We felt that, despite the contents of the report, it had been reasonable for the dismissal panel to conclude that it was likely that there would be further absences and that Chris would be unable to sustain an acceptable attendance level at work. We took into account the history of Chris's absences, and the fact that the report said that the risk of future relapses could not be eliminated. Further, previous relapse prevention plans had not been successful in preventing a relapse and absence, or indeed hospitalisation, and it was reasonable to conclude that the new plan may also fail to achieve its goal despite Chris trying new medication. The appeal panel were not sufficiently assured that the measures outlined in Dr El-Khayat's report would materially change Chris's attendance levels. We noted that, at the appeal hearing, Paula stated that she had a "hotline" to the psychiatrist, but that Dr El-Khayat's report said that he did not provide an on-call service. Further, we considered Chris's representations, saying that he recognised the signs when he was going into a manic episode and that he would increase his medication if it looked like he was becoming unwell. However, the evidence suggested that had not been the case over the previous years.".

98. Also paragraphs 22 and 23 of LT's statement ….

"22. Finally, the panel were satisfied that the Trust Management of Attendance policy had been followed and that the Management Case had demonstrated numerous reasonable adjustments that had been put in place to try to improve

Chris's attendance at work. We noted that the Trust had made significant adjustments for Chris over the years in an attempt to avoid terminating his employment and that this included creating a bespoke role to accommodate his needs.

23. On the basis detailed above, and taking into account the impact that Chris's absence had on the Trust's ability to manage its car park estate, the panel concluded that Chris's appeal was not upheld and that the outcome of the original final review meeting, which resulted in termination of employment, still stood. We did not consider that the dismissal decision had been unfair or that it amounted to disability discrimination."

99. The findings at appeal uphold the original decision. There is no new evidence to consider, it is in short whether the appeal panel agreed with the dismissal and that it was procedurally fair. It did and the Claimant's appeal is rejected.

100. As to procedural fairness and whether the Respondent adopted a fair procedure. The Claimant challenges the fairness of the procedure in the following respects:

101. The Respondent dismissed the Claimant when the medical evidence presented to the Respondent indicated that:

a. The Claimant was fit to return to work as a car park enforcement officer. About this it is not in dispute that based on the OH report and that of Dr El- Khayat the Claimant is said to be fit to resume work.

b. Other than returning on a short, phased basis, no adjustments were necessary to enable the Claimant to return to work and continue to perform his duties. This is not in dispute.

c. The risk of absences from work in the future due to the effects of bipolar affective disorder were low due to the Claimant's changed medication and improved relapse prevention plan. In our view this has not been proven at the point of dismissal, this is an opinion expressed at that time and future relapses cannot be ruled out. The Claimant acknowledged this in his oral evidence as he confirmed that Dr El- Khayat had got it wrong as he did relapse.

d. The risk of inappropriate behaviour towards his colleagues (which in any event was isolated), was low due to the Claimant's changed medication and improved relapse prevention plan. It is not in dispute that there were no such issues since March 2017 and a relapse warning / management plan is in place.

102. It is further asserted that the Respondent rejected the medical evidence from both Dr El- Khayat and Dr Gemmell, preferring the unqualified medical assessment by those who made the decision to dismiss the Claimant, placing inappropriate weight upon how they perceived the Claimant's involvement at the remote meeting on 4 December 2020. For the reasons we have set out above we do not accept that this assertion has been proven on the balance of probability. The reason for dismissal is the Respondent does not believe the Claimant can ensure increased attendance. We have found that is a genuinely held belief, formed in the context of all the evidence presented to it.

103. We do not find that the dismissal was procedurally unfair.

104. The procedural challenges as asserted by the Claimant are really a challenge of the band of reasonable responses i.e., Dr El- Khayat and OH say the Claimant is fit to work at that point, so no employer would reasonably dismiss in those circumstances, they would keep him employed in the hope that there were no further relapses with extended absences.

105. Turning then to the complaint of Discrimination arising from disability (Equality Act 2010 section 15).

106. It is not in dispute that the Claimant suffers from bipolar effective disorder and has done so since 1996, following a head injury. It is accepted that this means the Claimant is a disabled person within the meaning of the Equality Act 2010.

107. It is not in dispute, and it is accepted that from his disability arises sickness absence and inappropriate conduct at work.

108. It is not in dispute that the Claimant is dismissed, and that the dismissal is upheld at appeal (the Claimant's appeal is rejected) and that is unfavourable treatment of the Claimant.

109. It is accepted that the Respondent dismissed the Claimant because of sickness absence which arises from his disability.

110. It is common ground that the key matter for us in the disability discrimination complaint is whether the treatment (that is the dismissal and maintaining a dismissal) is a proportionate means of achieving a legitimate aim.

111. The Respondent says that its legitimate aims are:

a. Ensuring that its car park estate was run in a smooth and business efficient manner.

b. having staff in place that maintain a certain level of attendance so as to avoid overtime and additional pressure on other members of staff.

c. Avoiding increased cost and decreased revenue due to absences.

d. To protect the health & safety of staff, patients and visitors in the event of a relapse.

112. These legitimate aims are not in dispute. Claimant's Counsel in her submissions confirmed about the aims that she had no qualms in saying they are legitimate.

113. The Claimant in cross examination agreed that high levels of absence affect service efficiency. He agreed in respect of the first aim that if the person responsible for car parking was absent it is difficult to run it efficiently. The Claimant agreed that one of the ways to do it is to dismiss and replace them. As to the second aim, the Claimant accepted there was cover needed for him and they were stretched, possibly resulting in overtime and more costs, and placing more pressure on others. He agreed dismissing and replacing is an option. The Claimant accepted about the third aim that his absence was causing increased cost and decreased revenue.

114. As already noted, the Claimant agreed with the impact to service evidence as set out by IR in paragraphs 74 to 76 of his witness statement. We have also noted paragraph 77 of IR's statement and his oral evidence given to this hearing, as detailed already in our fact find.

115. We accept the legitimate aims relied upon.

116. We therefore need to decide in particular:

a. Was the treatment (the dismissal) an appropriate and reasonably necessary way to achieve those aims?

b. Could something less discriminatory have been done instead?

c. How should the needs of the Claimant and the Respondent be balanced?

117. As to proportionality we note and accept the following points as submitted by Respondent's Counsel:

a. "the Claimant was subjected to the Attendance Management Policy and Procedure which specifically states that absences as well as impacting on the "*care that we can provide* [in this case in relation to the parking estate], *high levels of sickness absence also affect service efficiency,*

staff morale and the financial standing of the organization" (**p.136** [1.4]). The C acknowledged this in live evidence;"

b. "the Tribunal has specifically heard evidence that these impacts occurred in this particular case, see Ian Robinson's witness statement at [74]-[77] and **p.158** showing the drop in tickets/revenue. Significant management time and resources were put into dealing with these absences, and as set out above the Claimant did not dispute the impact his absence had;"

c. "additionally, the same policy set trigger points, so the Claimant and any others were aware at the outset of the position (**p.137** [3.4]). This is a general rule which is justifiable and accordingly following **Seldon** the treatment that results from it (in this case dismissal) ordinarily is also justified;"

d. "the trigger points were in fact not strictly applied to the Claimant but plainly amended. He would have been dismissed much earlier and he never met it appears following starting his first long term absence the trigger points. Indeed, the Claimant's absence level was particularly high – he was nearly absent 60% of the time over a 5-year period on average;"

e. "adjustments were made to the Claimant, and he saw Occupational Health some 30 times during a 5-year period to address these. The adjustments included phased returns, shift pattern and lone working changes, and changes to the role that eventually led to redeployment in a 'bespoke' role of Car Parking only. So other less discriminatory ways of achieving the aims were pursued, things to improve attendance, but none had the desired result. The Claimant was asked by the Tribunal what else the Respondent could have done and the only thing he put forward was they could have employed temporary cover for him whilst on sick leave. But, that still amounts to a cost and impact (finding and training), in circumstances where it was not clear the length of time the cover would have needed to be employed for. So in the circumstances not taking such an approach cannot lead to the proportionality defence failing;"

118. As is also recorded in the agreed list of issues the Respondent relies upon the adjustments made for the Claimant (in the ET3 paragraph 36) to demonstrate that dismissal was proportionate. It is not in dispute that these adjustments were done.

119. We accept, as does the Claimant for the first and second aims, that dismissing him does achieve the legitimate aims.

120. Delaying the dismissal does not achieve the first three legitimate aims because at that point it cannot be ensured that the Claimant would be giving increased attendance. As it transpires unfortunately, the Claimant did have further relapses and required further hospitalisation and sickness absence.

121. The Claimant's health circumstances post dismissal was explored in cross examination as part of the Respondent's Polkey case. That process confirmed that the Claimant around September/October 2021 did relapse (which was linked to the reason for his dismissal from his new employment). From 12 November 2021 until about 15 March 2022, the Claimant was hospitalised. Then in 2022 the Claimant's poor health continued as he was in hospital again from October 2022 onwards and was only released on 12 January 2023.

122. As Respondent's Counsel submits about this matter the Claimant … "… agreed that his "case" is that the Respondent should have given him one last chance and agreed that if "he had another relapse within 12 months it was likely he would be dismissed". Further, he agreed that in effect the "private psychiatrists optimistic view was wrong" as a matter of fact. In re-examination he was questioned on this aspect and squarely asked "Why do you say he [Dr El-Khayat] was wrong?" to which he replied "He stated that the chances of me relapsing had diminished. Obviously, I did relapse, so that was incorrect.".

123. The Claimant's level of attendance cannot be ensured enough to meet the first three legitimate aims.

124. We recognise from the evidence presented that the Respondent did do things to balance the needs of the Claimant, it was a long process, adjustments were made, and alternatives considered and implemented.

125. There were only two significant factual disputes in this case. They both arose from the Claimant's oral evidence, not being mentioned in his written witness statement.

126. One concerned a suggestion by the Claimant that he had agreed to sacrifice sick pay for the benefit of the NHS. There was no written witness statement evidence about this and no documentary evidence confirming that such an arrangement was in place nor what its terms were. IR denied such an arrangement.

127. We do not find this has been proven on the balance of probability as the Claimant asserts.

128. The other concerned the issue that if the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the

Respondent to prove, on the balance of probabilities, that the Claimant committed the misconduct alleged.

129. It was submitted by the Respondent that we should find that the Claimant had committed an act of gross misconduct in relation to the covert recording of the dismissal and appeal meetings.

130. The Claimant confirmed in oral evidence that it was his sister doing it and he denied he knew about it until the end of the appeal meeting with reference to the appeal hearing notes at page 520 of the bundle which at the end record PE saying … "…..oh hang on I've still got this recording, I have been recording it!".

131. The Respondent seeks to rely upon this alleged act of gross misconduct by the Claimant but has in our view not proven on the balance of probability that the Claimant did know or in effect turned a blind eye to the recording.

THE LAW

132. In this claim it is not in dispute that the Claimant was dismissed.

133. It is not in dispute that the Claimant is a disabled person within the meaning of the Equality Act 2010, nor what substantial disadvantage arose from that disability.

134. As already referred to in our fact find set out above the key issues in this case are whether the decision to dismiss fell within the band of reasonable responses and whether the dismissal (the original decision and it being upheld at appeal) was a proportionate means of achieving a legitimate aim).

135. We were assisted by being presented with an agreed summary of the law, which was presented within Respondent's Counsel's written closing submissions and then agreed to by Claimant's Counsel as part of her oral submissions.

136. That summary confirmed:

Unfair Dismissal Claim

137. The relevant parts of the Employment Rights Act 1996 (ERA) state as follows in terms of liability:

s.94 The right
(1) An employee has the right not to be unfairly dismissed by his employer.

…

s.98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

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

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

…

(3) In subsection (2)(a)—

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

…

(4) [In any other case where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

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

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

138. The case of **BS v Dundee CC** [2013] CSIH 91; [2014] IRLR 131 reviewed the authorities in relation to 'long-term' ill health dismissal and noted the following key principles, at [26]-[28] and [34], as:

a. the key question is whether in all the circumstances of the case any reasonable employer would have waited longer before dismissing for lack of capability due to ill-health. So, if the decision to dismiss, given the length of the absence, was within the range of reasonable responses open to the employer the unfair dismissal claim must fail (with the fact that sick pay has been exhausted being a relevant factor, as well as length of prior service potentially being relevant);

b. procedurally there is a need to consult the employee and take their views into account;

c. procedurally there is a need to take steps to discover the employee's medical condition and likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered.

139. It is well established that in a claim of unfair dismissal a tribunal must not substitute their view for that of the employer but instead apply the 'band of reasonable responses' referred to above. Furthermore, it is also clear that the 'band of reasonable responses' test applies to all aspects of s.98(4) ERA – from investigation to the decision to dismiss: **Sainsbury's Supermarkets Ltd v Hitt** [2002] EWCA Civ 1588, [2003] IRLR 23 (Although a misconduct case, the Court of Appeal's ratio has equally been applied in 'capability' (ill-health) dismissal cases (see for example Sayers v Loganair Ltd EATS/0084/04 at [25])); *per* Mummery LJ at [29]-[30]. In an ill health dismissal context, it has been stressed by the EAT that the decision is a 'managerial one' and not a medical one, so whilst due regard should be had to the medical position it does not dictate the outcome; thus even if the medical position suggests an employee is or will be fit it does not mean any ensuing dismissal is unfair under s.98(4) ERA (**DB Schenker Rail (UK) Ltd v Doolan** UKEATS/0053/09/BI at [35] in particular, but with the relevant context being found in [23], [27], [30], [33]; and **Lynock v Cereal Packaging Ltd** at [1988] IRLR 510 at [14]).

140. The legal summary also referenced relevant matters in respect of remedy related issues being 'Polkey' and contributory fault. The legal summary confirmed that the statutory footing for these is found in the ERA, namely s.122(2), s.123(1) and s.123(6):

s.122 Basic award: reductions

…

(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

S.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.

…

(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.

141. As well as 'Polkey' and contributory fault deductions we were also referred to the case of **Phoenix House Ltd v Stockman** [2019] IRLR 960, it being submitted that it is of particular relevance as it summarised the principles at [60]-[80] of the general principles and their applications to reductions being made for 'covert recordings'.

Arising From Claim

142. The definition of discrimination arising from disability is contained in s.15 Equality Act 2010:

s.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.
…

143. In this case, s.15(1)(a) EqA is not in issue, and the case turns on whether s.15(1)(b) EqA 'justification' is made out. The leading cases on this 'justification defence' of **Homer v Chief Constable of West Yorkshire Police** [2012] UKSC 15; [2012] IRLR 601 and **Seldon v Clarkson Wright and Jakes** [2012] UKSC 16; [2012] IRLR 590 (and consideration of these at EAT level in **Kapenova v Department of Health** UKEAT/0142/13/SM) establish the following:

d. the employer needs to show that the alleged act of discrimination was a proportionate means of achieving a legitimate aim (**Homer** at [19]), however that aim need not have been articulated or even realised at the time which means post event justification is possible (**Seldon** at [59]-[60]);

e. the first issue to consider therefore is whether the employer has a legitimate aim, which is a question of fact for the Tribunal, and in the context of arising from discrimination there is no requirement of it amounting to a social policy or other objectives derived from any directive, as is the case in direct age discrimination (**Homer** at [19]-[20]);

f. the second issue is whether the particular measure is capable of achieving that aim (**Homer** at [20]);

g. the third and final issue is whether this measure is proportionate means of achieving the aim, which requires the Tribunal to balance the discriminatory effect against the legitimate aims being pursued (**Seldon** [62] and **Homer** at [20] and [24]). It has been clarified in **Kapenova** at [83] that there is no rule that if a less discriminatory means of achieving the employer's aim the 'justification' defence must fail; it is a balancing exercise and even in those circumstances justification can be made out;

h. notably where one is dealing with a general rule, and such is justified, then the existence of the rule will usually justify the treatment that results from it (**Seldon** at [65]);

i. finally, it is stressed that justification may be established in an appropriate case by reasoned and rational judgment, there is no need for specific/concrete evidence in all cases (**Homer** in EAT at [48]).

144. In addition to the above guidance the following principles should be borne in mind following the decision in **Harrod v Chief Constable of West Midlands Police** [2017] EWCA Civ 191; [2017] IRLR 539; and EAT judgment at [2015] IRLR 790 (EAT):

j. the fact that 'justification' is assessed by the Tribunal objectively, not only allows it to consider 'post' event justification/evidence but equally means that what has to be justified is the outcome, not the process by which it is achieved (hence it does not matter whether the decision maker considered or failed to consider the 'justification' at all) *per* EAT at [41]-[43];

k. a business is entitled to make decisions about allocations of its resources and the test of 'real need' in terms of determining if there is any legitimate aim is not to be equated with absolute necessity (which in respect of financial aims is tantamount to unaffordability). Importantly it need not be the only course open to the employer to be legitimate, and it is an employer's decision as to how to allocate its (financial) resources which itself amounts to a 'real need' (legitimate aim) *per* CA at [26]-[27];

l. in light of the above, one can draw an analogy with redundancy where it is not for the Tribunal to decide upon the economic case for redundancies, and there is no legal, or general, rule in relation to discrimination that an employer is obliged to minimise dismissals and thereby take reasonable steps to avoid them *per* CA at [29] and [48];

m. it is not open to the Tribunal to reject a justification case on the basis that the employer should have pursued a different aim which would have had a less discriminatory impact *per* CA at [47].

145. The points made in **Harrod** as to the objective nature of the test is reinforced by **City of York Council v Grosset** [2018] EWCA Civ 1105, [2018] IRLR 746 at [54] "*the test under s.15(1)(b) EqA is an objective one, according to which the ET must make its own assessment*". Notably, in **Grosset** at [55] this point was made to explain that the dicta in **O'Brien v Bolton St Catherine's Academy** [2017] EWCA Civ 145, [2017] IRLR 547at [51]–[55] is not to be equated with any general rule that the result (or test) for unfair dismissal and s.15(1) EqA is the same. In **Grosset** the Tribunal was therefore permitted to rely upon evidence that was not available to the Respondent at the time of dismissing (in that case it was medical evidence). The **Grosset** point in relation to **O'Brien** was followed by the EAT in **Knightley v Chelsea & Westminster Hospital NHS Foundation Trust** [2022] IRLR 567 at [38]-[40], which pointed out that there are different ingredients, and that one matter is that post-event evidence/knowledge cannot be used in unfair dismissal for liability purposes but can under s.15 EqA.

146. The legal summary also referenced relevant matters in respect of remedy related issues. In so far as there is found to be a discriminatory dismissal it is much the same compensatory principles that apply under s.124(6) EqA as under the ERA. It is compensatory the award, it being assessed under ordinary tortious principles (it is a statutory tort after all). The aim being to put the employee in the position he would have been had there been no discrimination (that is no tort). Hence, Tribunals must consider whether absent any discrimination the employee would have been dismissed (either at the date originally dismissed or at some point in the future). The most cited example of this is probably **Chagger v Abbey National** [2009] EWCA Civ 1202; [2010] IRLR 47 (see at [55]-[64] in particular) where the well-known test of "*It is necessary to ask what would have occurred had there been no unlawful discrimination*" is restated.

THE DECISION

147. As already observed, there were very few factual disputes in this case.

148. We were assisted by the parties' Counsel with the presentation of an agreed factual chronology and legal summary.

149. Considering the dismissal and the reason for it first.

150. It is admitted that the Claimant was dismissed. It is not in dispute that the Claimant was dismissed with an effective date of termination of 9 December 2020.

151. What was the reason for dismissal?

152. The Respondent asserts that it was a reason related to capability, alternatively some other substantial reason, which is a potentially fair reason for dismissal under s. 98(2) of the Employment Rights Act 1996.

153. We have carefully considered the undisputed facts around this matter and the parties' submissions which support capability being the reason.

154. It is not in dispute that the build up to the meeting on the 4 December 2020 that resulted in the Claimant's dismissal is within the context of an absence review, nor that the outcome from that could be the Claimant's dismissal.

155. The Claimant attends that meeting relying upon a report from a medical expert (Dr El-Khayat) that he has obtained and who was instructed to … "… provide us with a report which he would intend to disclose to his employer when seeking to persuade them to allow his employment to continue." (page 418).

156. JD explains the reasoning behind the decision to dismiss in paragraphs 25 to 46 of her witness statement.

157. In particular at paragraph 45 of her statement, she confirms … "In summary, we were not satisfied that Chris's absence pattern would change in the future and there were no further adjustments that could be made by the Trust to ensure increased attendance. We felt that, given the impact Chris's absences had on the service, it was appropriate to dismiss Chris. In addition, we considered that any future absence was also linked to a risk of potential violence and/or threats to staff, patients, and visitors.".

158. It is by letter dated 9 December 2020 the Claimant's employment was terminated with a payment in lieu of notice. The letter confirms … "I have now had time to review thoroughly the situation and consider an outcome. The decision that has been made was based on the facts presented to the panel in the Management Case and Doctors reports made available for the hearing. I am not confident in light of the information provided that you will be able to improve your level of attendance in the foreseeable future and the impact this is having on the service does not make this sustainable. It is with regret that in the circumstances I have no alternative but to make the difficult decision to terminate your contract of employment with Salisbury NHS Foundation Trust. This is due to your continued failure to demonstrate a significant improvement in your attendance record and as a consequence you are unable to provide the Trust with a full and effective service." (page 446).

159. The Claimant does not dispute his absence record as summarised in the dismissal letter and at paragraph 25 of JD's witness statement. It is an absence level that triggers action under the Attendance Management Policy.

160. The current fit note for the Claimant had him signed as unfit until the 15th January 2021 (page 400).

161. The most recent OH report did confirm the Claimant was in their view able to return to work on a phased return, but also included a paragraph at the conclusion of the letter that says … "I would be happy to support him should he return to work but I accept the grounds for IHR are also quite compelling given his attendance over a 5 year period. Ultimately it is a management decision." (page 423).

162. We accept as submitted by Respondent's Counsel that in respect of the apparent contradiction in OH report (i.e., he is fit now but the grounds of IHR are also quite compelling) it is a reasonable reading of the report to rely on the reference to IHR. OH would not say IHR is an option if the scheme rules are not met. We accept what JD articulates in paragraphs 33 and 34 of her statement.

163. The Claimant acknowledged in cross examination when asked, given what OH says in support of IHR, did he agree that they were giving the view that his future attendance is not likely to improve, that yes, he supposes so. He also agreed with reference to paragraph 33 of JD's statement that her view is reasonable as that is how he understood the OH report.

164. Reference is also made by JD to the way the Claimant presented at the review meeting (paragraph 37).

165. Although the concern over any future absence being linked to a risk of potential violence and/or threats to staff, patients, and visitors was not articulated to the Claimant in the dismissal outcome communication, the Claimant did confirm in re-examination that because his behaviour was unreasonable and he accepted that, he would have anticipated management to take that into account.

166. We find that the reason for dismissal to be as stated within the dismissal letter that … "I am not confident in light of the information provided that you will be able to improve your level of attendance in the foreseeable future and the impact this is having on the service does not make this sustainable.". This is also confirmed in paragraph 45 of JD's witness statement … "In summary, we were not satisfied that Chris's absence pattern would change in the future and there were no further adjustments that could be made by the Trust to ensure increased attendance. We felt that, given the impact Chris's absences had on the service, it was appropriate to dismiss Chris.".

167. This is a capability reason.

168. It is also re-enforced as the reason in the appeal outcome letter which states … "… The panel acknowledges the steps you have taken to try to improve your health, however the panel was not sufficiently assured these measures would materially change your attendance levels." (page 462).

169. We find that the reason for the Claimant's dismissal was capability.

170. The focus of the Claimant's challenge to this reason is that the Respondent did not act reasonably in using that as a sufficient reason to dismiss.

171. We move next to consider whether the Respondent did act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant.

172. As we are reminded from the agreed legal summary the band of 'reasonable responses' applies to all aspects of section 98(4) of the Employment Rights Act and our role is to assess the Respondent's decision against this band, it is not to substitute and decide what we would have done.

173. It was not in dispute that the Claimant was at the time of dismissal in a unique role at the Respondent dealing with car park enforcement. The Claimant did not disagree with the service impact as evidenced by IR in paragraphs 74 to 76 of his witness statement. This evidence is relied upon by JD as referred to in paragraphs 29 and 30 of her statement.

174. The Claimant didn't disagree that the adjustments as summarised at page 70 of the bundle (paragraphs 36.1 to 36.8) were done. This included adjustments to rota and shift patterns and phased returns to work, including light duties and reduced hours.

175. In the agreed list of issues, it is recorded that in a capability dismissal the Tribunal will usually need to decide whether the Respondent genuinely believed the Claimant was no longer capable of performing their duties. We note that this is an issue framed generically and is more accurately framed in light of the reason for dismissal in this case whether the Respondent genuinely believed that the Claimant's absence pattern would not change in the future and there were no further adjustments that could be made by the Trust to ensure increased attendance. Did the Respondent genuinely believe the Claimant was no longer capable of performing their duties, because he could not ensure increased attendance.

176. We have already considered the evidence as to reason relied upon by JD as set out above.

177. They key evidential piece relied upon by the Claimant to challenge the genuineness of JD's position is the report of Dr El-Khayat (pages 426 to 429).

178. JD addresses this report in paragraphs 35, 36, 38 and 39 of her witness statement (as set out above). The way JD describes the content of the Dr El-Khayat report and the way she views it is not unreasonable in our view. Further, in our view the Relapse Prevention Plan is better described as a Relapse Early Warning Plan, it cannot prevent a relapse happening. We accept what JD says about it.

179. We also note that such a plan would help to mitigate the concerns the Respondent had as to a risk of potential violence and/or threats to staff, patients, and visitors.

180. As we have already identified the main factor for dismissal was the Claimant not being able to ensure increased attendance, and the impact his absences have on the service.

181. We accept what JD says that … "Serious consideration was given to the account provided by Dr El Khayat, however it was felt that this letter could not be taken as evidence in isolation but was considered in the context of the whole case with all the other evidence provided.".

182. We find that JD did genuinely believe at the time of dismissal that the Claimant could not ensure increased attendance. JD was not confident in light of the information provided that the Claimant would be able to improve his level of attendance in the foreseeable future and the impact of that on the service did not make it sustainable.

183. We also need to consider whether the Respondent adequately consulted the Claimant.

184. In the submissions of Claimant's Counsel, the challenge to consultation focused on three elements, being the risk of harm to others, the impact of the medication changes and how the Claimant presented at the review meeting.

185. Addressing each in turn it is not in dispute that the risk of potential violence and/or threats to staff, patients, and visitors was not articulated as a factor for dismissal in the dismissal outcome letter. We though do not find this as a material factor in the reason for dismissal as it was acknowledged by JD that there was no incident since March 2017 and the RPP (or in our view more accurately described relapse management or early warning plan) had proven successful in advance of the third relapse. In our view this is a neutral impact to the reason we have found for the dismissal, so is not one that further communication about would change.

186. In respect of the changes to medication JD accepted that the medication had a negative impact on the duration of the third absence, but that it did not explain the previous relapses, nor did it prevent relapses. This qualification is not in dispute. In our view this is a neutral impact to the reason we have found for the dismissal, so is not one that further communication about would change.

187. The way the Claimant presented at the review meeting is not in dispute, i.e., the Claimant does not assert that JD could not form the impression she did, because he in fact presented differently. There may be explanation for the way the Claimant presented at the meeting that was not explored with him, but how he presented is not a determining factor in our view. Reliance is placed on the level of absence, the impact on service, what OH says in relation to IHR, and the fit note. Also, that Dr El-Khayat stated that the new medication should significantly reduce the risk of future relapses, but that the risk could not be eliminated. Neither could the Relapse Prevention Plan eliminate the risk of relapse. The way the Claimant presented, which is not in dispute, did not contradict these other factors.

188. Further, as both Counsel reminded us in their submissions the fit note (at page 400) is dated 9 October 2020. It signs the Claimant as unfit until 15 January 2021 (from the 15 July 2020). The OH report confirms that the medication was changed in August 2020 (page 422) so this predates the fit note.

189. Consideration also needs to be given to whether the Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position.

190. The Respondent had an up-to-date medical position. As is noted in the appeal outcome no new evidence is presented for the appeal about the Claimant's fitness to attend work. We accept what Respondent's Counsel submits about this, that the Respondent had regard to all the fit notes including as at the point of dismissing which was produced on 9 October 2020 and signed the Claimant off until at least 15 January 2021 (page 400). Moreover, it sought input from Occupational Health who produced an up-to-date report on 20 November 2020 (pages 422 to 423). It also had regard to the Claimant's own private psychiatrist's report (page 426 to 428). As Respondent's Counsel submits … "Fundamentally, there is nothing said that rendered this aspect outside the reasonable band. The dispute, and really the crux of the Claimant's case is that it should have not dismissed the Claimant in light of the private psychiatrist's report and medical report in general. That is in fact a challenge as to the dismissal falling within the reasonable band not the procedure of obtaining the evidence. It has never been the Claimant's case that some more medical evidence was needed and that the evidence had upon which to base the decision did not fall within the reasonable band.".

191. Also, the Tribunal should usually consider whether the Respondent could reasonably be expected to wait longer before dismissing the Claimant.

192. The evidence at the time of dismissal was the Claimant was fit to resume work (as per the OH report and based on Dr El-Khayat). The change of medication also explains why the third absence was as long as it was. There is also a relapse management plan available.

193. It is not in dispute that the Claimant was good at his car park enforcement role when he was fit and able to undertake it and his attendance had a positive financial impact on car parking revenue. All of this though does not ensure the Claimant's increased attendance in the context of the evidenced absence levels, the undisputed evidence of the negative impact that has on the service, and that future relapses cannot be ruled out. With this clear context for the reason for dismissal, we do not find that it was unreasonable for the Respondent not to wait longer. Conversely therefore we do not find that the Respondent could reasonably be expected to wait longer before dismissing the Claimant.

194. As to whether dismissal was within the range of reasonable responses, we accept what Respondent's Counsel submits that … "… the Respondent is not obliged to merely accept the statements by or in any medical report. Whilst it has to have regard to it, just like a court or tribunal it can reach another conclusion so long as it has a rational basis for such. As made clear in the case law, the decision is ultimately a managerial one and not just a medical assessment (**Doolan**).". Also, … "… that the present case is not a standard long term sickness case. The Claimant's condition was such that future absences and potential risk of danger in relapses could occur. The fact that the Claimant may have been fit to return to work at the time is not the answer, the true issue and assessment is whether given the historic poor attendance, would the Claimant upon any return maintain adequate attendance? Hence, as stated in **Doolan** and **Lynock,** fitness as at the time of dismissing does not inevitably render the dismissal unfair.".

195. We do not accept that what the Respondent decided in this case fell outside the range of reasonable responses. We remind ourselves that a range of responses is just that at one end could be dismissal and at the other a 3-month trial period. For a dismissal such as this to be unfair we need to find that it is outside the range.

196. Considering then whether the Respondent adopted a fair procedure. The Claimant challenges the fairness of the procedure in the following respects:

197. The Respondent dismissed the Claimant when the medical evidence presented to the Respondent indicated that:

a. The Claimant was fit to return to work as a car park enforcement officer. About this it is not in dispute that based on the OH report and that of Dr El- Khayat the Claimant is said to be fit to resume work.

b. Other than returning on a short, phased basis, no adjustments were necessary to enable the Claimant to return to work and continue to perform his duties. This is not in dispute.

c. The risk of absences from work in the future due to the effects of bipolar affective disorder were low due to the Claimant's changed medication and improved relapse prevention plan. In our view this has not been proven at the point of dismissal, this is an opinion expressed at that time and future relapses cannot be ruled out. The Claimant acknowledged this in his oral evidence as he confirmed that Dr El- Khayat had got it wrong as he did relapse.

d. The risk of inappropriate behaviour towards his colleagues (which in any event was isolated), was low due to the Claimant's changed medication and improved relapse prevention plan. It is not in dispute that there were no such issues since March 2017 and a relapse warning / management plan is in place.

198. It is further asserted that the Respondent rejected the medical evidence from both Dr El- Khayat and Dr Gemmell, preferring the unqualified medical assessment by those who made the decision to dismiss the Claimant, placing inappropriate weight upon how they perceived the Claimant's involvement at the remote meeting on 4 December 2020. For the reasons we have set out above we do not accept that this assertion has been proven on the balance of probability. The reason for dismissal is the Respondent does not believe the Claimant can ensure increased attendance. We have found that is a genuinely held belief, formed in the context of all the evidence presented to it.

199. We do not find that the dismissal was procedurally unfair.

200. The procedural challenges as asserted by the Claimant are really a challenge of the band of reasonable responses i.e., Dr El- Khayat and OH say the Claimant is fit to work at that point, so no employer would reasonably dismiss in those circumstances, they would keep him employed in the hope that there were no further relapses with extended absences. We do not find this to be so.

201. It is also asserted that the Claimant was subjected to unlawful disability discrimination by the Respondent and relies upon this in contending that he was unfairly dismissed. For this to engage we would need to find that the Claimant has been subjected to unlawful disability discrimination.

202. Turning then to the complaint of Discrimination arising from disability (Equality Act 2010 section 15).

203. It is not in dispute that the Claimant suffers from bipolar effective disorder and has done so since 1996, following a head injury. It is accepted that this means the Claimant is a disabled person within the meaning of the Equality Act 2010.

204. It is not in dispute, and it is accepted that from his disability arises sickness absence and inappropriate conduct at work.

205. It is not in dispute that the Claimant is dismissed, and that the dismissal is upheld at appeal (the Claimant's appeal is rejected) and that is unfavourable treatment of the Claimant.

206. It is accepted that the Respondent dismissed the Claimant because of sickness absence which arises from his disability.

207. It is common ground that the key matter for us in the disability discrimination complaint is whether the treatment (that is the dismissal and maintaining a dismissal) is a proportionate means of achieving a legitimate aim.

208. The Respondent says that its legitimate aims are:

a. Ensuring that its car park estate was run in a smooth and business efficient manner.

b. having staff in place that maintain a certain level of attendance so as to avoid overtime and additional pressure on other members of staff.

c. Avoiding increased cost and decreased revenue due to absences.

d. To protect the health & safety of staff, patients and visitors in the event of a relapse.

209. These legitimate aims are not in dispute. Claimant's Counsel in her submissions confirmed about the aims that she had no qualms in saying they are legitimate.

210. The Claimant in cross examination agreed that high levels of absence affect service efficiency. He agreed in respect of the first aim that if the person responsible for car parking was absent it is difficult to run it efficiently. The Claimant agreed that one of the ways to do it is to dismiss and replace them. As to the second aim, the Claimant accepted there was cover needed for him and they were stretched, possibly resulting in overtime and more costs, and placing more pressure on others. He agreed dismissing and replacing is an

option. The Claimant accepted about the third aim that his absence was causing increased cost and decreased revenue.

211. As already noted, the Claimant agreed with the impact to service evidence as set out by IR in paragraphs 74 to 76 of his witness statement. We have also noted paragraph 77 of IR's statement and his oral evidence given to this hearing, as detailed already in our fact find.

212. We accept the legitimate aims relied upon.

213. We therefore need to decide in particular:

d. Was the treatment (the dismissal) an appropriate and reasonably necessary way to achieve those aims?

e. Could something less discriminatory have been done instead?

f. How should the needs of the Claimant and the Respondent be balanced?

214. As to proportionality we note and accept the following points as submitted by Respondent's Counsel:

a. "the Claimant was subjected to the Attendance Management Policy and Procedure which specifically states that absences as well as impacting on the "*care that we can provide* [in this case in relation to the parking estate], *high levels of sickness absence also affect service efficiency, staff morale and the financial standing of the organization*" (**p.136** [1.4]). The C acknowledged this in live evidence;"

b. "the Tribunal has specifically heard evidence that these impacts occurred in this particular case, see Ian Robinson's witness statement at [74]-[77] and **p.158** showing the drop in tickets/revenue. Significant management time and resources were put into dealing with these absences, and as set out above the Claimant did not dispute the impact his absence had;"

c. "additionally, the same policy set trigger points, so the Claimant and any others were aware at the outset of the position (**p.137** [3.4]). This is a general rule which is justifiable and accordingly following **Seldon** the treatment that results from it (in this case dismissal) ordinarily is also justified;"

d. "the trigger points were in fact not strictly applied to the Claimant but plainly amended. He would have been dismissed much earlier and he never met it appears following starting his first long term absence the

trigger points. Indeed, the Claimant's absence level was particularly high – he was nearly absent 60% of the time over a 5-year period on average;"

e. "adjustments were made to the Claimant, and he saw Occupational Health some 30 times during a 5-year period to address these. The adjustments included phased returns, shift pattern and lone working changes, and changes to the role that eventually led to redeployment in a 'bespoke' role of Car Parking only. So other less discriminatory ways of achieving the aims were pursued, things to improve attendance, but none had the desired result. The Claimant was asked by the Tribunal what else the Respondent could have done and the only thing he put forward was they could have employed temporary cover for him whilst on sick leave. But, that still amounts to a cost and impact (finding and training), in circumstances where it was not clear the length of time the cover would have needed to be employed for. So in the circumstances not taking such an approach cannot lead to the proportionality defence failing;"

215. As is also recorded in the agreed list of issues the Respondent relies upon the adjustments made for the Claimant (in the ET3 paragraph 36) to demonstrate that dismissal was proportionate. It is not in dispute that these adjustments were done.

216. We accept, as does the Claimant for the first and second aims, that dismissing him does achieve the legitimate aims.

217. Delaying the dismissal does not achieve the first three legitimate aims because at that point it cannot be ensured that the Claimant would be giving increased attendance. As it transpires unfortunately, the Claimant did have further relapses and required further hospitalisation and sickness absence.

218. The Claimant's health circumstances post dismissal was explored in cross examination as part of the Respondent's Polkey case. That process confirmed that the Claimant around September/October 2021 did relapse (which was linked to the reason for his dismissal from his new employment). From 12 November 2021 until about 15 March 2022, the Claimant was hospitalised. Then in 2022 the Claimant's poor health continued as he was in hospital again from October 2022 onwards and was only released on 12 January 2023.

219. As Respondent's Counsel submits about this matter the Claimant … "… agreed that his "case" is that the Respondent should have given him one last chance and agreed that if "he had another relapse within 12 months it was likely he would be dismissed". Further, he agreed that in effect the "private psychiatrists optimistic view was wrong" as a matter of fact. In re-examination

he was questioned on this aspect and squarely asked "Why do you say he [Dr El-Khayat] was wrong?" to which he replied "He stated that the chances of me relapsing had diminished. Obviously, I did relapse, so that was incorrect.".

220. The Claimant's level of attendance cannot be ensured enough to meet the first three legitimate aims.

221. We recognise from the evidence presented that the Respondent did do things to balance the needs of the Claimant, it was a long process, adjustments were made, and alternatives considered and implemented.

222. We also accept the general submissions made by Respondent's Counsel as to why the legitimate aim defence is made out in this case. As Respondent's Counsel submits … "… the Claimant's dismissal was in pursuit of legitimate aims. The various ways these are articulated relate to the 'Operational Needs' to ensure adequate attendance so that car parking can be smoothly and efficiently run without increasing costs and pressure on others, as well as 'Health and Safety' given the risk to others if there was a relapse at work. Dismissing the Claimant was a means of achieving these aims given it would allow him to be replaced with someone more reliable to meet the 'Operational Needs' aim and remove the risk to others to meet the 'Health and Safety' aim;". Also, … "… the legitimate aims were proportionate. The Tribunal has to objectively assess this and can have regard to post dismissal events which it has knowledge of. In this case is the future relapses and hospitalisation that effectively neuter any weight in the private psychiatrist report which has been shown to be wrong as a matter of fact. Moreover, the matter is akin to redundancy where an employer is entitled to make assessments as to the allocation of resources and there is no general rule in relation to discrimination that an employer is obliged to minimise costs. In the present case the dismissal was proportionate having regard to: the Claimant being subjected to an attendance management policy which drew attention to in effect the aims pursued and impact absence had on the organisation, that impact was the subject of evidence before the Tribunal, trigger points were not inflexibly applied with the Claimant never in fact meeting it throughout his employment, adjustments were made and Occupational Health consulted but the attendance and aims were not reached, as well as the future relapses and hospitalisation that eventuated.".

223. To consider the remaining unfair dismissal issues, we have not found the dismissal to be procedurally unfair so we do not need to go on and considered what is the percentage chance that the Claimant would have been fairly dismissed in any event and, if so, when would that have occurred.

224. Further, we have not found the dismissal to be unfair, so we do not need to go on an consider whether the Claimant contributed to the dismissal by culpable conduct.

225. For all these reasons our unanimous decision is the Claimant's complaints of unfair dismissal and discrimination arising from disability, all fail and are dismissed.

Employment Judge Gray
Date 6 June 2023

JUDGMENT SENT TO THE PARTIES ON
19 June 2023 By Mr J McCormick

FOR THE TRIBUNAL OFFICE