EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105494/2022

Held in Glasgow on 17, 18, 19 and 20 April 2023

Deliberation on 26 April 2023

Employment Judge R King

Members D McFarlane and N Elliot

Mr E Milrine	**Claimant** **In Person**
DHL Services Limited	**Respondent** **Represented by:** **Mr P Sangha - Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant's claims are dismissed.

REASONS

Introduction

1. Following his dismissal, the claimant has presented claims of unfair dismissal and disability discrimination contrary to section 15 of the Equality Act 2010. He also claims the respondent has failed to pay him notice pay and accrued holiday pay on termination of his employment. The respondent admits that it dismissed the claimant on grounds of capability and that he was a disabled person at the material time, but it denies that it treated him unlawfully in so doing, or that he is owed notice pay or holiday pay.

Relevant law

Unfair dismissal

2. Section 94 of the Employment Rights Act (ERA 1996) provides the claimant with the right not to be unfairly dismissed by the respondent. It is for the respondent to prove the reason for the dismissal and that it is a potentially fair reason in terms of section 98 of the ERA 1996. At this first stage of enquiry, the respondent does not have to prove that the reason did justify the dismissal, merely that it was capable of doing so.

3. If the reason for dismissal is potentially fair, the Tribunal must determine, in accordance with equity and the substantial merits of the case, whether the dismissal was fair or unfair under section 98 (4) of ERA 1996. This depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. At the second stage of enquiry, the onus of proof is neutral.

4. In determining whether the respondent acted reasonably or unreasonably, the Tribunal must not substitute its own view as to what it would have done in the circumstances. Instead, the Tribunal must determine the range of reasonable responses open to an employer acting reasonably in the circumstances and determine whether the respondent's response fell within that range. The respondent's response can only be considered unreasonable if no employer acting reasonably would have responded in that way.

5. The range of reasonable responses test applies both to the procedure adopted by the respondent and the fairness of its decision to dismiss – *Iceland Frozen Foods Limited v Jones* [1983] ICR 17 EAT.

6. In *DB Schenker Rail (UK) Limited v Doolan* [2010] UKEAT/0053/09**,** the EAT found that the Burchell test applies to ill health dismissals, since the employer must show that:

    a. it had a genuine belief that ill health was the reason for the dismissal;

b. it had reasonable grounds for that belief;

c. it carried out a reasonable investigation.

7. Fairness dictates that an employer should:

a. ascertain the up-to-date medical condition position,

b. consult with the employee,

c. consider the availability of alternative employment,

d. consider whether it can be expected to keep an employee's job open any longer. How much longer an employer may be reasonably be expected to be able to continue to employ an employee on long term absence is a sensitive question based on the nature and content of the employee's job and the nature and length of the illness.

8. In *BS v Dundee City Council* [2013] CSIH 91, the Court of Session found that the following factors may be relevant to how long an employee may be expected to wait.

a. availability of temporary cover (including its cost);

b. the fact that the employee has exhausted his/her sick pay;

c. the administrative cost that might be incurred by keeping the employee on the books;

d. the size of the organisation.

9. In *O'Brien v Bolton St Catherine's Academy* [2017] EWCA Civ 145, Underhill LJ made certain observations in relation to ill health dismissals in respect of the question of how long an employer can be expected to wait:

"The argument "give me a little more time and I am sure I will recover" is easy to advance, but a time comes when an employer is entitled to some finality. That is all the more so where the employee has not been as co-operative as the employer had been entitled to expect about providing an up to date prognosis." (Paragraph 37)

"In principle the severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness absence must be a significant element in the balance that determines the point at which their dismissal becomes justified, and it is not unreasonable for a tribunal to expect some evidence on that subject. What kind of evidence is appropriate will depend on the case. Often, no doubt, it will be so obvious that the impact is very severe that a general statement to that effect will suffice; but sometimes it will be less evident, and the employer will need to give more particularised evidence of the kinds of difficulty that the absence is causing." (Paragraph 45)

As with mitigating factors in misconduct cases, length of service should be weighed in the balance when an employer is deciding to dismiss and failure to give any weight to length of service may render the dismissal unfair.

Disability discrimination – discrimination arising from disability

10. Section 15 of the Equality Act 2010 provides that:

15. Discrimination arising from disability

(1) A person (A) discriminates 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.

11. In *Basildon and Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14, Mr Justice Langstaff held that there were two distinct steps for a test to be applied by Tribunals in determining whether discrimination arising from disability has occurred:

a. Did the claimant's disability cause, have the consequence of or result in "something"?

b. Did the employer treat the claimant unfavourably because of that "something"?

12. In *Pnaiser v NHS England & another* [2016] IRLR 170, the EAT summarised the proper approach to claims for discrimination arising from disability as follows:

a. The Tribunal must identify whether the claimant was treated unfavourably and by whom;

b. It then has to determine what caused that treatment, focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought process of that person, but keeping in mind that the motive of the alleged discriminator in acting as he or she did is irrelevant.

c. The Tribunal must then determine whether the reason was *"something arising in consequence of the claimant's disability",* which would describe a range of causal links. At that stage, the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

d. The knowledge required is of the disability; not knowledge that the "something" leading to the unfavourable treatment was a consequence of the disability. An employer cannot be liable for discrimination arising from disability under the Equality Act 2010 unless it knew (or should have known) about the claimant's disability. In claims of "unfavourable" treatment, no comparator is required.

Notice pay

13. Section 13 of the Employment Rights Act 1996 provides:

13 Right not to suffer unauthorised deductions

(1) – An employer shall not make a deduction from wages of a worker employed by him unless –

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent of the making of the deduction.

Holiday pay

14. Regulation 14 of the Working Time Regulations 1998 provides:

''14 – (1) Paragraphs (1) to (4) of this regulation applies where –

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect, the "termination date", the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which is expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3)''

Issues

15. The issues for the Tribunal were identified in advance of the hearing.

Unfair dismissal – Employment Rights Act 1996

16. Was the claimant dismissed for a potentially fair reason? The respondent will say that the claimant was dismissed on the grounds of ill health capability under section 92A of the Employment Rights Act 1996.

17. If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? In particular, the Tribunal should consider whether:

a. the respondent had a genuine belief that ill health was the reason for dismissal;

b. there were reasonable grounds for the belief;

c. the respondent carried out a reasonable investigation; and

d. dismissal fell within the range of reasonable responses.

Discrimination arising from disability (Equality Act 2010, section 15)

18. Did the respondent treat the claimant unfavourably by dismissing him?

19. Did the following things arise in consequence of the claimant's disability – the claimant's sickness absence?

20. Was the unfavourable treatment because of any of those things i.e. did the respondent dismiss the claimant because of that sickness absence?

21. Was the treatment a proportionate means of achieving a legitimate aim?

22. The Tribunal will decide in particular:

a. Was the treatment an appropriate and reasonably necessary way to achieve that aim?

b. Could something less discriminatory have been done instead?

c. How should the needs of the claimant and the respondent be balanced?

Notice pay

23. What was the claimant entitled to receive in respect of notice pay? It is the respondent's case that the claimant was entitled to be paid for eight weeks' notice. The claimant argues he is due twelve weeks' notice pursuant to an addendum to his contract. Did the respondent fail to pay the claimant's notice pay correctly?

Holiday pay

24. Was the claimant paid for holiday accrued but not taken upon the termination of his employment in accordance with Regulation 14 of the Working Time Regulations 1998?

Remedy

25. If the claimant's claims are successful, what compensation is he entitled to receive?

26. Should there be any adjustments to any awards for unfair dismissal on account of any contributory conduct on the claimant?

27. Should there be any adjustment for a failure to follow the Acas Code of Practice on Disciplinary and Grievance Procedures?

28. Has the claimant taken reasonable steps to replace his lost earnings, for example by taking another job?

29. If not, for what period of loss should the claimant be compensated?

30. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed or for some other reason?

31. If so, should the claimant's compensation be reduced and if so and by how much?

Witnesses

32. On behalf of the respondent, the Tribunal heard evidence from Marian Cooper (Transport Team Leader) and Claire Gard, (HR Manager). The claimant gave evidence on his own behalf. A joint bundle of documents was lodged along with a brief agreed statement of facts, which provided a helpful chronology. Both parties made submissions at the conclusion of the hearing.

Findings in fact

33. Having heard evidence, the Tribunal makes the followings findings in fact. Where there is a dispute, it reached the conclusion on the balance of

probabilities. It is not the Tribunal's intention to recite or make findings in fact on every piece of evidence that it has heard, since that would include facts that were ultimately irrelevant to its conclusions on the disputed issues to be determined.

Background

34. The respondent is a logistics and transportation company operating throughout Great Britain. It employed the claimant as an HGV/LGV driver from 14 October 2013 until 3 June 2022 when it dismissed him with nine weeks' pay in lieu of notice.

35. Prior to the termination of his employment, the claimant's contractual weekly gross pay was £638 per week.

36. In respect of notice, an addendum to the claimant's contract of employment, signed by him on 19 March 2014, provided as follows:

"TERMINATION OF EMPLOYMENT AND NOTICE PERIOD

Continuous employment notice entitlement to the employee is as follows:

During 12 week Probation – 1 week

12 Weeks to 4 complete years of service - 4 weeks

5 years complete – 5 weeks

Thereafter statutory provisions up to 12 years or more – 12 weeks.

The company reserves the right to pay in lieu of notice although it is not normal practice to do so. The company also reserves the right to summarily dismiss i.e. without notice or payment in lieu of notice."

37. During his employment, the claimant worked out of the respondent's premises at Westfield Cumbernauld. His normal days of work were Sunday to Thursday, working 9 hours each day. A typical day would involve him driving a loaded trailer from Westfield to Tebay Services in the north of England,

swapping trailers at Tebay with another driver and returning to Cumbernauld for 9 p.m. with that new trailer and load.

38. At all material times relevant to this claim the claimant worked on the respondent's contract with Marks & Spencer from 2014 until the termination of his employment. The claimant enjoyed his work and the steady hours that it provided him.

The claimant's illness

39. In January 2020, the claimant became unwell with anxiety and depression, brought on by a workplace incident in 2016/2017, which had resulted in his raising a grievance that was partially upheld. The claimant's anxiety resulted in his experiencing symptoms of vertigo and a "spinning sensation". As a result, the claimant went off sick on Thursday 12 January 2020, which ultimately proved to be the last day when he attended work with the respondent.

40. Initially, the claimant was referred by his local GP to the Ear, Nose and Throat ('ENT') department at Monklands Hospital in Airdrie. The beginning of his treatment and initial attempts to diagnose his condition coincided with the COVID lockdown and as a result he experienced delays in arranging medical appointments.

Health review meeting – 14 February 2020

41. On 14 February 2020, the respondent's Hazel Doogan, its then transport manager, met with the claimant to discuss his ongoing absence. Marian Cooper, who was then in the position of transport controller, attended as a note taker. The notes of this meeting record that the claimant had recently attended two GP appointments in connection with a possible viral infection in his ear and had been advised at the second appointment that he was suffering from vertigo. He had also attended an audio clinic on 6 February 2020 and his next appointment would be with an ENT specialist at Hairmyres Hospital.

42. The claimant explained to Miss Doogan that he was suffering from dizzy spells. The notes record that the claimant described his symptoms as follows

- *"at times when I am walking, I don't know I am walking in a straight line, if I am in the car I have to look at the floor to keep eyes off the road."*

43. During this meeting, the claimant informed Ms Doogan that he had been in touch with the DVSA on 20 January 2020 and they had not yet advised him to return his licence because a diagnosis of vertigo had not yet been confirmed. However, they would contact his GP for more information. In response to a question from Miss Doogan the claimant explained that he did not feel able to do any alternative work, such as office duties, because of his dizzy spells, which meant he did not feel comfortable driving to and from the respondent's Westfield site.

Health review meeting – 6 March 2020

44. A further health review meeting took place on 6 March 2020 with Miss Doogan and with Marian Cooper again attending to take notes. The claimant informed Miss Doogan that the DVSA had now revoked his driving licence because of his health. He explained that his HGV licence had been revoked for a minimum period of one year but that the DVSA would consider returning his licence to drive his car and motorcycle if his GP confirmed he had been symptom free for a period of three months. So far as his symptoms were concerned, the claimant explained that he was still suffering the same symptoms that he had reported to the respondent on 14 February 2020, although he had been taken off all medication.

45. In the meantime, the claimant had arranged an ENT appointment on 19 March 2020. Miss Doogan told him the respondent could do no more until the results of that were available. She would however take advice from her HR business partner about the possibility of the claimant doing alternative duties, either at Cumbernauld or at the respondent's larger East Kilbride site, while his driving licence was revoked, subject to his being able to return to work in a non-driving role subject to his feeling well enough to take part in such duties. At this time, the claimant made it plain to Miss Doogan that he felt unable to return to any form of work yet, because of problems related to his balance, symptom of dizziness and the impact of those symptoms on his sleep pattern.

Occupational health report – 11 May 2021

46. The claimant underwent a telephone assessment with the respondent's occupational health advisers on 11 May 2021. The purpose of this assessment was to enable the respondent *''to understand the situation better with a view to knowing if his condition is amenable to treatment, and if he can be expected to return to his Group II driving role and what (if any) support could be considered for him to return to and be maintained at work''*

47. The report from occupational health dated 11 May 2021 confirmed that the claimant had reported his symptoms as light-headedness, vertigo and dizziness, tinnitus, and nausea. He had expressed frustration that he had been unable to live a normal life since January 2020 and said he *''wanted to return to work as part of a general return to normality''.*

48. The occupational health opinion was that '*'while he has been seen and attended by a number of specialists the picture is not quite clear with regards to a diagnosis, or at least the employee has not been able to mention a diagnosis for his condition''.*

49. The report discussed the need to have further medical information, including a report from the claimant's otologist, before reasonable evidence based occupational health advice could be given. Until then, any medical report '*'may not bear all the desired information, especially if a significant management plan will be considered following the review by the otologist.''* It also stated that alternative work had been discussed with the claimant but that "*he is not confident that he will be able to cope."*

Medical capability investigation review meeting – 27 October 2021

50. The next review meeting between the respondent and the claimant took place on 27 October 2021. By this time, Hazel Doogan had left the respondent's employment and Marion Cooper had been promoted to transport team leader. As part of her role Miss Cooper had taken over direct management of the claimant's absence, as well as management of sixteen other employees on restricted duties. She called this meeting to discuss with the claimant his

ongoing condition and to see if there was any more support the respondent could offer him. Claire Gard, HR business partner, was also in attendance.

51. During the meeting, the claimant explained that he was waiting for an appointment with a neurologist at the Royal Alexandra Hospital, Paisley, but meantime he had attended a cardiologist and '*'everything was clear".* He reported to Miss Cooper that he was still suffering from the same symptoms as he had suffered all along, namely vertigo, dizziness, headaches, migraines, pain in his ear and tinnitus. He had also lost his self-esteem and felt anxious and depressed, for which his GP had prescribed sertraline. He remained unable to drive any vehicle.

52. When Miss Cooper raised the possibility with him of his doing alternative duties, the claimant responded by saying that he could not. He told her that even when sitting watching TV, '*things were moving about'* and it made him feel disorientated. Further, when he was sitting in the passenger seat of a stationary car he felt as though it was moving, and this impacted on his stability. He had now been referred to a neurology specialist in the hope that this would provide a diagnosis. It was agreed that the respondent would wait until the results of that neurology consultation were available before consulting with the claimant on further action to be taken.

53. In due course, the claimant attended the consultation with his neurological consultant on 13 February 2022. As a result of that consultation, the claimant was put on a new course of medication, namely amitriptyline.

Health review meeting – 13 April 2022

54. A further health review meeting took place on 13 April 2022 between the claimant and Marion Cooper, by way of follow up to the claimant's appointment with his neurology consultant. The purpose of this meeting was to discuss the claimant's health and the possibility of his returning to work on alternative duties.

55. During the meeting the claimant explained that while his symptoms had initially been improved by the new medication, he had had to stop taking it

temporarily because he had also been prescribed antibiotics for a throat infection and he could not take both together. As a result, the claimant told Miss Cooper that he was currently still experiencing the same symptoms as before and still no firm diagnosis of his condition had been made. Further, while he wanted to get back to work, he did not yet feel he was able to do alternative duties because of his headaches, balance problems and the difficulties he was having sleeping. When asked by Miss Cooper if there was anything that the respondent could do to support him further, he replied: *"I don't think so Marion, I don't even have my car licence and I don't know if I will be able to drive again, you never foresee these things."*

56. At the end of the meeting, Miss Cooper informed the claimant that taking into consideration the length of his absence, the respondent required a better understanding from its occupational health advisors about his diagnosis and prognosis, and that another referral would be arranged.

57. During an adjournment in this 13 April 2022 review meeting, the claimant struggled with his balance when he stood up to walk out of the meeting room and he then dropped his high visibility vest on the floor.

Occupational health report – 22 April 2022

58. Further to the review meeting on 13 April 2022, the respondent's occupational health advisors conducted a telephone consultation with the claimant on 22 April 2022, providing a written report that same day.

59. The report contained the following material findings:

"Background

From the history provided today, I understand that Mr Milrine has been absent from work for over two years with dizziness, headaches and unsteadiness.

I understand that he has been reviewed by several different specialists including Ear, Nose and Throat, Audiology, Otology, Cardiology and Neurology. He also reports undergoing vestibular rehabilitation, however, I understand this was disrupted during the COVID-19 pandemic.

Mr Milrine tells me he was diagnosed with vestibular migraines earlier this year. He was prescribed medication, however, unfortunately he reports an interaction with another medication prescribed for a fungal throat infection. Mr Milrine has now completed the course of medication for his throat and restarted the medication for migraines this week. He is on an increasing regime over several weeks. I understand he has had further Neurology follow up appointment in about 4 months.

Current situation and function

Mr Milrine reports ongoing symptoms including daily headaches with both background headaches and more severe episodes which require him to lie down; frequent dizziness exacerbated by bending, reaching, turning his head or moving images on a screen; tinnitus; and disrupted sleep.

Mr Milrine does not report an improvement to his symptom burden at present which is not surprising as he has only recently commenced treatment.

Functionally, Mr Milrine struggles with day to day tasks due to his symptom burden and reports feeling unsteady on his feet. He is independently mobile but feels lightheaded when looking into the distance and uses the trolley for support in the supermarket. He reports difficulty crossing the road as his symptoms are triggered by turning his head to check for oncoming traffic. Activities such as watching TV may also trigger dizziness due to moving images on the screen.

Mr Milrine informed me that his Group 1 (car) and Group 2 (HGV) driving licences have been revoked. He has been advised to reapply once the dizziness is adequately controlled.

The last few years have been particularly enduring for Mr Milrine and he does report an adverse impact on his mental wellbeing. He is well supported by his GP in this regard.

Examination

Examination was limited due to the fluctuating nature of the consultation. Mr Milrine described his current symptoms and the impact on functioning. I was unable to perform a physical examination.

In response to these standard questions asked:

Is there any underlying medical condition/s?

Based on the history provided, I understand that Mr Milrine has recently been diagnosed with vestibular migraines. This is a type of migraine where people experience a combination of vertigo, dizziness or balance problems with other migraine symptoms.

Mr Milrine has been commenced on a medication to treat this condition.

If a return to work is not expected, would it be appropriate to consider ill health retirement?

Mr Milrine does not have a Group 2 (HGV) driving licence at present and therefore is not fit to undertake his contractual duties as an LGV driver at present.

DVLA guidance stipulates, that for Group 2 licensing, the patient must be asymptomatic and completely controlled for 1 year from an episode of disabling dizziness before reapplying for their licence. Mr Milrine has only recently commenced treatment for his condition and it may take weeks to months before the benefits of treatment may be observed. Alternative medications may be considered if Mr Milrine does not report adequate symptom control with the current treatment. Mr Milrine has a follow up appointment with neurology in about four months to review the situation.

Therefore, based on the above, Mr Milrine will not be fit to return to work for at least a year, potentially longer, depending on the response of his symptoms to treatment.

If Mr Milrine's symptoms are adequately controlled, a return to non-driving duties could be achieved sooner if available. However, at this time, in my opinion, Mr Milrine is not fit to undertake alternative duties.

There is no evidence to indicate that Mr Milrine has undergone all reasonable treatment options available to address his condition and therefore, in my opinion it would be premature to consider Mr Milrine for ill health retirement at this time."

60. On 6 May 2022 Miss Cooper had a telephone conversation with the claimant during which they discussed the occupational health report. While the claimant indicated his intention to return to work he accepted that meantime he was incapable of any form of work. Miss Cooper informed him that she would invite him to a further medical capability investigation meeting to discuss the occupational health report ‘*'more in depth".* At this stage, while she had sympathy for him, she was concerned that the claimant was unable to fulfil his contract. So far as ill health retirement was concerned, she did not feel it was necessary to pursue that possibility further in view of the report having advised that it would be premature to consider that outcome.

Medical capability investigation meeting – 18 May 2022

61. A further medical capability investigation meeting took place on 18 May 2022 between the claimant and Marion Cooper, Transport Controller. Nicola Wylie, HR business partner, attended to take notes. The claimant explained to Miss Cooper that he had not yet felt any difference from the new medication yet, albeit he referred again to the delay because he had to stop taking it temporarily because it clashed with his antibiotics. He also explained that he had a further consultation, which he expected to be in June, although that had not yet been confirmed.

62. When asked if he now felt able to undertake any other duties, his response was: *"no, because of my balance, sleeping pattern, headaches."* He felt frustrated because of time lost because of COVID delays.

63. Following a short adjournment Miss Cooper explained to the claimant that in circumstances where he had informed her that he was unable to carry out alternative duties and there was no possibility meantime of recovering his HGV licence she would now arrange a medical capability hearing. She advised him that one potential outcome of this was his dismissal. She also

confirmed to him that the respondent would not be seeking a further occupational health report.

64. In response to a question from the claimant, Miss Wylie confirmed that Marion Cooper would be the decision-making manager in the event that the respondent gave consideration to the claimant's dismissal *"unless you have any reason to ask for a different manager."* The claimant did not at that stage object to Miss Cooper's involvement as decision maker.

Medical capability hearing on 3 June 2002

65. On 30 May 2022, Miss Cooper wrote to the claimant inviting him to a medical capability hearing on Friday 3 June 2022 at the respondent's Westfield Cumbernauld premises.

66. In this letter, she explained that:

"This hearing is being convened due to the following concerns over your Medical Capability:-

- *Being absent from work since 12th January 2020,*
- *Ongoing health issues linked to Vertigo that is still trying to be controlled by medication, no signs of any improvement,*
- *Recent occupational health report advises that the patient must be asymptomatic and completely controlled for 1 year from an episode of disabling dizziness before reapplying for their licence and at this stage we are still trying to manage the vertigo.*

The aims of the Capability Hearing include:

- *Discuss your job role and the areas that you are not able to undertake due to your medication condition.*
- *Allowing you to ask questions, present evidence, call witnesses, respond to evidence and make representations.*
- *Review the medical evidence received and any recommendations.*

- *To decide what action, if any, may be appropriate. Action may be taken up to and including Dismissal.*

- *If dismissal is a possibility, establishing whether there is any likelihood of a significant improvement being made within a reasonable time and whether there is any practical alternative to dismissal such as redeployment or a modified role."*

67. The medical capability hearing took place as planned on 3 June 2022. Marion Cooper chaired the meeting and Carol Jones, transport controller, attended to take notes. The claimant attended alone and unaccompanied.

68. During the meeting, the claimant was offered every opportunity to make representations in response to the possibility that his employment may be terminated because of his long-term absence. He explained that he had still not felt any improvement from the change of medication recommended by the neurologist in February 2022 but that this was an ongoing process, as a result of which his dosage had recently been increased. He told Miss Cooper that his diagnosis was *"vestibular migraine",* which was similar to vertigo.

69. In response to a question from Miss Cooper about alternative duties, the claimant said that he did not yet feel able to carry out such duties as he did not have a car driving licence and was still suffering from symptoms of vertigo, dizziness, headaches, balance problems and lack of sleep. When asked if there was anything else that the respondent could do for him in order to create the conditions for his returning to work, he responded: *"no, I think I would be a liability."* This meant that while he wished to return to work he believed that because of his ongoing health problems his presence in the workplace may be a risk to the health and safety of others.

70. Following a brief adjournment, Miss Cooper informed the claimant that she sympathised with his position, which was beyond his control. However, she could not reasonably foresee a return to work for him because he continued to suffer symptoms and he would not be able to regain his HGV licence unless he was symptom free for one year. Furthermore, based on the claimant's own view, there was no possibility of his carrying out alternative duties.

71. In the circumstances Miss Cooper informed the claimant that her decision was that he would be dismissed with notice. While his contract only entitled him to eight weeks' notice for his eight years completed service, as a goodwill gesture he would be paid nine weeks pay in lieu of notice because he had completed almost nine years' service.

72. In reaching her decision Miss Cooper took account of the operational impact and the cost of his absence. Prior to his lengthy absence the claimant had worked on the respondent's contract with Marks & Spencer. That is an 'open book' contract, which allows the customer full visibility of financial information as well as other key performance indicators, including details of sickness absence and holidays of employees working on their contract.

73. As a result of the claimant's absence the respondent had incurred costs for agency drivers to cover his shifts, the cost of which was greater than the cost of employing the claimant as it had to pay them a higher daily rate as well as shift premiums and a higher weekend rate. Such additional costs had in turn been passed on to the customer. Agency drivers were also less reliable.

74. Having explained her decision. Miss Cooper confirmed to the claimant that he had a right of appeal against dismissal and that his letter of appeal should be addressed to the site manager David Forbes.

75. At this stage of the hearing the claimant expressed surprise that Miss Cooper had dismissed him, because he did not consider her sufficiently senior to do so. As far as he was concerned a dismissal decision should be made by a more senior manager such as Andrew Hutchison, the transport manager, or David Forbes, the site manager overall.

76. Miss Cooper's decision and reasons were sent to the claimant by letter dated 9 June 2022. In her letter she set out the following reasons for his dismissal:

*"**Summary of discussion and evidence***

I have enclosed a copy of the Medical Capability Hearing Meeting notes and have summarised the key points of the discussion below.

- *You have been absent from work since 12th January 2020 due to ongoing symptoms related to vertigo and vestibular migraine, all of which fall under a similar medical umbrella.*
- *You experience dizzy spells and other symptoms which has resulted in both your car and HGV licence being removed by the DVSA.*
- *You have been prescribed various medication to manage the ongoing condition but to date have noticed no significant improvement in your symptoms.*
- *You have a follow up appointment with your Consultant on 25th June 2022, however due to a throat infection, you have been unable to take the full course of medication prescribed to you and have only recently been able to increase your dosage to 3 tablets per day.*
- *We have spoken on a regular basis over the last 6-9 months and you have been referred to occupational health to provide us with medical evidence of your condition and the likely timescale for a return to work.*
- *The OH physician has advised that the DVSA will not consider reinstatement of your licence until you have been asymptomatic and condition completely controlled for 1 year, leaving the business with no expected return to work date.*
- *We have discussed redeployment but this is not something that you wish to consider.*
- *You confirmed that you feel unable to fulfil any other duties within the business as you feel that you would be a liability.*

Decision

I appreciate that this is a very difficult time for you, however I have to consider all of the facts and the evidence available to me. You currently hold no car or HGV licence and your medical condition is still under investigation. There is no return to work date for the foreseeable future, therefore I have decided to terminate your employment on the grounds of Medical Capability. This

decision was very difficult and can only be made after careful consideration of all the medical evidence, taking into account your future prognosis, the availability of suitable alternative roles and the business need to have you in your role."

77. Ms Cooper also confirmed the claimant's right of appeal against dismissal, which he should send by letter or e-mail to the site manager, David Forbes.

The appeal against dismissal

78. In due course, the claimant sent an email to David Forbes on 10 June 2022 in the following terms:

"Dear David

Re: outcome of medical capability investigation/hearing

I wish to appeal the decision to terminate my employment on 3rd June 2022.

I feel it is unfair to terminate my employment due to my Medical Condition. During my Medical Capability Investigation, it was discussed that I would be contacted by your Occupational Health provider which they due ally (sic) sent back their report.

I feel it is unfair to terminate my employment because of the absence of Medical Condition, that I was unable to see any Medical Staff/GPS/Consultants as due to the Covid Pandemic mentioned in Occupational Health Report please read the report.

Due to the action taken to terminate my employment, I feel it is unfair and also being discriminated against myself.

I would appreciate if you could contact myself regarding my Appeal Hearing soon.

Looking forward to hearing from you."

79. On 17 June 2022, Claire Gard, HR business partner, e-mailed the claimant in relation to his having raised a concern that Miss Cooper was not sufficiently

senior to dismiss him. She sent this e-mail having had the benefit of legal advice since the medical capability hearing. It said as follows:

"You queried whether Marion had the authority to carry out the capability hearing. As the department team leader and with delegated authority from the Transport Manager, we believe that she was a suitable manager. However we have reviewed the department collective agreement and it is a grey area, therefore we would like to offer you the opportunity to re-hear the Capability Hearing. I have attached a template invite letter with the date and time of the hearing.

I completely understand that this is a difficult time for you however as a business we want to be supportive and transparent with our processes. You have already been processed as a leaver, however this can be reversed depending on the outcome of the re-hearing. Can you please respond directly to Andrew if you are able to attend the re-hearing on Friday.

Kind regards,

Claire"

80. Although the claimant had been informed that his appeal letter should be sent to David Forbes, the respondent subsequently decided that the appeal would be heard by Andrew Hutchison, transport manager. This decision was taken because Mr Forbes insisted that as he was mainly concerned with the respondent's warehousing operation at Cumbernauld the appeal should be kept within the transport division where the claimant worked. That decision was taken without any consultation with the claimant. As a result, when the claimant did exactly as he had been asked to do and made direct contact with Mr Forbes about his appeal, he received no response from him. The claimant was rightly frustrated and upset about this. He was entitled to feel that he had been left *'in limbo'.*

81. Although the appeal hearing was originally scheduled for Friday 24 June 2022, the claimant was unable to attend on that date because he did not have

a representative to accompany him. Therefore, a rescheduled appeal hearing was fixed to take place on 28 July 2022 at 12.30pm.

The appeal hearing

82. Unfortunately, Mr Hutchison was unwell on 28 July 2022 and sent a text in advance to Miss Gard to cancel the hearing. However, Miss Gard did not read his text in time to call off the meeting in advance. The claimant therefore attended the respondent's premises as arranged, with his union representative, Debbie Hutchings. The claimant and his union representative were disappointed and agitated that the hearing had been cancelled at short notice.

83. In order to make progress with the appeal Miss Gard proposed that they could appoint a different manager, David Connolly to hear his appeal that same day. However, Miss Hutchings advised the claimant that Mr Connolly would not be suitable because he is a warehouse manager and that his appeal should be heard within the transport division. The claimant accepted that advice and told Miss Gard that he considered Mr Connolly to be unsuitable.

84. Recognising the claimant's frustration at the hearing being cancelled as well as his dissatisfaction and confusion at Mr Hutchison having been appointed to hear the appeal in place of of Mr Forbes, Miss Gard informed him that in the circumstances she would leave it up to him to decide who would hear the appeal – Mr Hutchison or Mr Forbes - and also the date of the appeal subject to his and his representative's availability. Miss Gard intended to escalate matters above Mr Forbes if he continued to refuse to hear the appeal.

85. The aborted appeal hearing therefore concluded on the basis that Miss Gard would await hearing from the claimant and his union when they had decided which manager they wished to hear the appeal and with confirmation of their availability for the rescheduled hearing.

86. Following the aborted appeal hearing, the claimant and his union representative did not make any further contact with the respondent about rearranging the appeal. Instead, the claimant commenced early Acas

conciliation. Having done so, his genuine belief was that he was now prevented from pursuing his internal appeal.

Post dismissal

87. Since the claimant's dismissal, he has not sought any alternative work as his health condition has not improved to the extent that he is able to consider a return to any form of work. His driving licence remains fully revoked.

Comparator

88. During the evidence, the claimant led evidence of a comparator, namely a fellow employee who had also been subject to the respondent's attendance management process because of long term sickness absence. The claimant's position was that the comparator had been treated more favourably because he not been dismissed even though he had a longer sickness absence record than the claimant.

89. In evidence, it was established that the comparator had a similar length of absence to the claimant, namely two and a half years, and that he too *had* been dismissed on grounds of medical capability. Unlike the claimant however he had a diagnosis of his long-term condition and a treatment plan with reasonable prospects of a recovery. The decision to dismiss the comparator was therefore made subject to his having the opportunity to revert to the respondent if his condition improved during his notice period in which case it would reconsider its decision.

90. While the Tribunal heard no evidence as to the precise dates in question, it was able to conclude that the comparator had returned to work having satisfied the respondent that he was fit and able to do so.

Collective agreement

91. In the course of evidence, the Tribunal was referred to a memorandum of agreement (the 'collective agreement') between the respondent, previously known as JRL Westfield, and the TGWU, now Unite The Union. The issue

date of the agreement was October 2000. So far as managing absence was concerned it referred only to short term intermittent absences.

92. The claimant sought to argue that the respondent's treatment of his dismissal had been in breach of the collective agreement because it referred to dismissal decisions having to be taken by the "JRL site manager", in this case being David Forbes.

93. As the collective agreement had not been updated with the passage of time and change of job titles, and nor did it apply to handling long term absence cases, it did not therefore apply to the claimant's dismissal and therefore it was not relevant to the issues in dispute.

94. In any event, Miss Cooper did not have regard to that agreement at any time during her management of the claimant's absence.

Respondent's submissions

95. On behalf of the respondent, Mr Sangha made the following submissions.

Authority to dismiss

96. There was no legitimate basis, either in the Collective Agreement or anywhere else, upon which the claimant could show that Marion Cooper did not have authority to dismiss. There was in reality no doubt about Miss Cooper's competence to dismiss the claimant. Miss Gard's offer to rehear the capability hearing had been overcautious in its interpretation of the Collective Agreement, which was now well out of date and irrelevant, having not been updated with the passage of time and changes of job titles. Ultimately this approach had only demonstrated the respondent's intention to act fairly and transparently. In any event, the Collective Agreement was not legally binding but 'binding in honour' only, and any breach would not have been contractual. Further, it was on the face of it only applicable to *"short term intermittent periods of absence"* and therefore inapplicable in the claimant's case.

97. Miss Cooper had 17 years' experience with the respondent. At the time, when she dealt with the claimant's dismissal, she was managing around 17

employees on restricted duties, only one of whom (the claimant) was on long term sickness absence. There was no reason to believe she was unsuitable to carry out the dismissal decision that had been delegated to her and she had done so sympathetically, compassionately, thoroughly and fairly.

Comparator

98. Mr Sangha noted that while there was no direct discrimination claim, he accepted that the evidence of a comparator may be relevant to issues of proportionately in respect of the section 15 claim. He submitted however that in any event, there were material differences between the claimant and the comparator's circumstances, namely that:

    a. The comparator had a firm diagnosis and plan for surgery but the claimant did not.

    b. The comparator was able to provide an estimate of timescales but the claimant did not.

    c. The comparator's DVLA was suspended, but not revoked.

99. Furthermore, the comparator had also been dismissed because of his lengthy absence, which was the same treatment meted out to the claimant. However, unlike the claimant, the respondent had reinstated him because, unlike the claimant, he had been able to persuade the respondent that there was light at the end of the tunnel in terms of his being able to return to work.

Ill health retirement

100. It was submitted that in *First West Yorkshire Limited v Haigh* UKEAT/0246/07, the EAT held that as a general rule for employees absent through ill health in the long term an employer will be expected prior to dismissing the employee to take reasonable steps to consult them to ascertain by means of medical evidence, the nature and prognosis for his condition and to consider alternative employment. An employer who takes such steps will generally meet the standard set out in section 98 (4). This includes taking reasonable

steps to ascertain whether the employee is entitled to the benefit of ill health retirement.

101. Mr Sangha submitted that the usual position for ill health retirement is that the employee is medically assessed as being permanently unable (or likely to be unable) to carry out their normal work due to physical or mental illness resulting in sickness or disability. That was also Claire Gard's evidence about how the respondent's ill health retirement worked. The respondent had obtained an occupational health assessment, which had concluded that it would be premature to consider him for ill health retirement because there was no evidence to indicate that he had undergone all reasonable treatments available to him. It had discussed that opinion with him on 3 June 2022. Further, the claimant had not sought out ill health retirement on his own behalf. In any event, the claimant was not on a DHL pension scheme so he would not entitled to ill health retirement benefit anyway.

Unfair dismissal

102. With regard to section 98 (4), Mr Sangha submitted that there had been adequate consultation between the respondent and the claimant and clear evidence of the respondent regularly consulting with him about his ongoing sickness absence, updates on his medical position, consideration of alternative duties and about when a return to work was likely to take place. After any occupational health referrals, meetings would then take place and the medical reports were discussed with the claimant. The claimant's viewpoint had always been sought, in order to obtain a full picture.

103. So far as medical investigation was concerned, the claimant had been undergoing medical investigation through his specialist consultants at hospitals and he had updated the respondent inside and outside his regular consultation meetings with his managers.

104. Referring to *Spencer v Paragon Wallpapers Ltd* [1977] ICR 301 (EAT), on the question of whether the respondent could be expected to wait any longer for him to return, Mr Sangha submitted that:

a. the claimant had been absent since 12 January 2020 due to ongoing symptoms related to vertigo and vestibular migraines;

b. he had been experiencing dizzy spells and other symptoms which resulted in both car and HGV licences being removed by the DVSA;

c. medication had shown no significant improvement in the symptoms;

d. there was a follow-up appointment arranged with a consultant on 25 June 2022 but this was a review/follow-up and there was no reason to think that matters would change going forward; and

e. the OH assessment was that the DVSA would not consider reinstating.

105. Referring to *East Lindsay District Council v Daubney* [1977] ICR 566 and *DB Scheneker Rail (UK) Ltd v Doolan* UKEAT/0053/09/B1, Mr Sangha submitted that there was no higher standard of enquiry than required under *Burchell* for a misconduct dismissal. Accordingly, the Tribunal should simply ask itself whether a reasonable employer could find from the material before it that the employee was not capable of returning to work in the foreseeable future. *Scheneker* made it clear that while medical evidence informed a manager, the question was not a medical one.

106. In all the circumstances, the respondent's decision to dismiss had been fair. The medical evidence had informed it that a return to work was not foreseeable, and the claimant would need to be asymptomatic for one year from an episode of disabling dizziness before reapplying for his licence. There was no need for a further OH report at the time of dismissal as that would have served no useful purpose. There had been adequate consultation over a lengthy period and a genuine attempt to explore all relevant matters with the claimant before his dismissal. The respondent could not be expected to wait any longer than the two and a half years that had elapsed since he had gone off sick originally. It had been reasonable for the respondent to rely on past events to assess matters going forward and the claimant's continued absence would continue to put pressure on the business.

107. Dismissal had been within the band of reasonable response available to the respondent. While it was not accepted that there had been any procedural unfairness, Mr Sangha submitted that if the dismissal had been unfair, there was a 100% chance of his being dismissed if a fair process had been followed in the light of the medical evidence and there being no prospect of the claimant returning to work at any time in the foreseeable future.

Disability discrimination

108. While it was accepted that the claimant was disabled, the law did not require that employers indefinitely retain disabled employees who were incapable of performing their duties under their contracts. An employer was entitled to manage the absence of its workforce to meet its business objectives and minimise disruption to its clients.

109. In this case, the respondent's legitimate aim was to ensure that its customers' needs – in the claimant's case, Marks & Spencer's needs – were met in a cost-efficient way. Its 'open book contract' allowed the customer to scrutinise certain key performance indicators including absence and agency costs, both of which the claimant was contributing to by his long-term sickness absence. The respondent's evidence was that the cost of using agency workers was paid at higher rates than for using its core employees and in addition there were also concerns over the reliability of agency staff.

110. In *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, the Supreme Court had made it clear that to be proportionate, a PCP must be both an appropriate means of achieving a legitimate aim and a reasonably necessary means of doing so. "*Appropriate"* meant that there must be a rational connection between the legitimate aim relied on and the measure by which it sought to give effective aim. "*Reasonably necessary"* meant that the PCP should disadvantage the protected group no more than reasonably necessary in order to achieve a legitimate aim.

111. It was for the Tribunal to look at the reasonable needs of the respondent's business against the discriminatory effect of the decision to dismiss and to

make an assessment of whether the former outweigh the latter – *Hardys & Hansons plc v Lax* [2005] EWCA Civ 846.

112. In that regard, Mr Sangha invited the Tribunal to have regard to the following factors:

a. The length of the claimant's absence – close to two and a half years with no end in sight despite having consulted various medical specialists.

b. The medical evidence, which did not indicate a likely return to work in the near future.

c. The operational disruption while the respondent was required to use agency staff to fill the gap created by the absence at higher rates than it paid its core employees.

d. The respondent could do no more while waiting for the claimant's condition to improve.

e. The claimant having himself candidly described his situation being that he would be a *"liability"* if he returned to work.

f. Nothing short of dismissal was identified as potentially being more proportionate.

Notice pay/holiday pay

113. In Mr Sangha's submission, the central issue here was whether the claimant was correct in his interpretation of his contract of employment. Mr Sangha submitted that the proper interpretation was that the contract provided him with a notice period in line with the statutory provisions in the Employment Rights Act 1996. The respondent had no discretion in that regard standing the terms of the contract.

114. Accordingly, the claimant was neither entitled to any additional notice pay or additional holiday pay consequent to his employment being extended by the further three weeks that he had sought but to which he was not entitled.

Claimant's submissions

115. The claimant submitted that he did not consider Marion Cooper to have had the authority to dismiss him as she was insufficiently senior. A more senior manager would have known about the legal obligations incumbent on the respondent and would have taken his disability into account, which he believed Ms Cooper had not.

116. He believed that the respondent had deliberately delayed the rehearing/appeal in order to disadvantage him.

117. While he accepted that the respondent had relied on his ill health as the reason for his dismissal, he believed that the respondent had not waited long enough, following his consultation with the neurological consultant in February 2022, to see whether the change of medication would make the required difference to his health that would enable him to return to work. He believed that the respondent's decision could have been delayed, particularly when he had a further consultation with a consultant in June 2022, only a matter of weeks after the decision to dismiss him had been taken.

118. In all the circumstances, he believed that following the neurological consultation in February, the respondent had acted too quickly by dismissing him on 3 June 2022, particularly as there had been a period of time when he had been unable to take the new medication prescribed by his neurological consultant because of the complications of taking that along with antibiotics for a throat infection.

119. He also submitted that there had been a breach of the collective agreement, which had been accepted by the respondent in its reference to there being a "grey area".

120. Finally he maintained that he had been treated less fairly than the comparator identified who had been on long term sickness absence for the same period as he had been but yet the comparator had not been dismissed.

Discussion and decision

121. Taking the list of issues in turn, the Tribunal finds as follows.

Was the claimant dismissed for a potentially fair reason?

122. The Tribunal had no doubt that the claimant was dismissed for a reason related to his capability which is a potentially fair reason in terms of section 90 of the Employment Rights Act 1996.

If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? In particular, whether: the respondent had a genuine belief that ill health was the reason for dismissal; there were reasonable grounds for the belief; the respondent carried out a reasonable investigation; and dismissal fell within the range of reasonable responses.

123. The Tribunal was satisfied that the respondent had a genuine belief that ill health was the reason for his dismissal. The claimant had been absent through ill health since January 2020 and by the time of his dismissal in June 2022, he was still suffering from the same disabling symptoms, which prevented him from driving his own family car and motorbike in addition to preventing him from having returned to him the HGV licence that was necessary for him to perform his contract.

124. Having regard to the investigation conducted by the respondent as to the claimant's medical position and the full consultation that took place with him the Tribunal finds that the respondent carried out a reasonable investigation in all the circumstances.

125. Having carried out that investigation and consultation it had reasonable grounds for its belief that there was no prospect of the claimant returning to work in the foreseeable future. It was entitled to conclude that he was unable to return either in his contracted role as an HGV driver or in any alternative role (which it fully considered and consulted with him about), such was the commanding nature of his medical condition, which rendered him incapable of a return to work in any capacity.

126. In reaching its decision the respondent was also entitled to take account of the ongoing cost to its customer, Marks & Spencer, of the claimant's absence, including the increased cost of employing agency workers on the contract, which cost the customer bore. In all the circumstances the respondent was entitled to find that it could not keep the claimant's job open any longer when there was no end in sight to his absence.

127. The Tribunal also finds there was no evidence of permanent incapacity, such as would have required the respondent to consider his eligibility for ill health retirement as an alternative to dismissal on grounds of capability without the benefits of ill health retirement.

128. The Tribunal also rejects the claimant's assertion that he was treated more harshly than his comparator in similar circumstances. It was clear from the limited evidence before the Tribunal that, while the claimant had a similar length of absence to him. unlike the claimant he had a diagnosis and a treatment plan and, most significantly, he was capable of offering a return to work within a timeframe acceptable to the respondent.

129. The Tribunal was also in no doubt that Miss Cooper was properly authorised to dismiss the claimant, having regard to her relative seniority to him. It was also appropriate that she made that decision having regard to her experience of having dealt with his case personally for some considerable time. In that regard there was no breach of the historic and by now irrelevant collective agreement between the respondent and its trade union, which was inapplicable to the present case.

130. Looking at the procedure adopted overall the Tribunal finds that the claimant was treated fairly. While the respondent did not handle the appeal according to best practice the claimant was undeniably offered an opportunity to appeal, which he ultimately elected not to pursue because he believed that commencing Acas early conciliation meant that he could no longer go through with it.

131. The Tribunal therefore finds that the respondent's decision to dismiss the claimant was within the range of reasonable responses and therefore fair. His claim for unfair dismissal is therefore dismissed.

132. The Tribunal is nevertheless critical of certain aspects of the respondent's handling of the claimant's dismissal; namely (1) the unsatisfactory way that it appointed Mr Forbes to hear the appeal against dismissal and then removed him without informing the claimant initially, thus leaving him uncertain about what was happening and in his own words 'in limbo', (2) its handling of the appeal hearing on 28 July 202 when the claimant and his union representative attended unnecessarily at the respondent's premises in circumstances where better communication would have prevented that and (3) its leaving the claimant and his union representative to revert to Miss Gard on the identity of the appeal manager and the date of the appeal hearing – the respondent should have managed this decisively in line with good industrial practice.

Discrimination arising from disability

Did the respondent treat the claimant unfavourably by dismissing him?

133. The Tribunal was satisfied that the claimant had established that by virtue of his dismissal he had been treated unfavourably for a reason related to her disability.

Did the following things arise in consequence of the claimant's disability – the claimant's sickness absence?

134. The Tribunal also had no difficulty in concluding that the claimant's entire period of sickness absence resulting is his dismissal arose as a consequence of his disability

Was the unfavourable treatment because of any of those things i.e., did the respondent dismiss the claimant because of that sickness absence?

135. The Tribunal also found that the respondent's genuine reason for dismissing the claimant was his disability related sickness absence.

Was the treatment a proportionate means of achieving a legitimate aim?

136. The Tribunal will decide in particular: was the treatment an appropriate and reasonably necessary way to achieve that aim? Could something less discriminatory have been done instead? How should the needs of the claimant and the respondent be balanced?

137. The Tribunal accepted the respondent's aim to ensure its customer's needs were met in a cost-efficient way was a legitimate aim for these purposes and corresponded with a real need on its part. The Tribunal also accepted the respondent's evidence that its ability to deliver its 'open book' contract as cost effectively as it reasonably could was compromised by the increased agency cost to the customer of the claimant's ongoing absence.

138. The respondent was also entitled to conclude that the situation would not improve in the foreseeable future, having regard to the length of claimant's absence at the point of his dismissal and the absence of any medical evidence that a return to work was possible in the foreseeable future in any capacity.

139. The Tribunal also recognised the seriousness of dismissal, and that the respondent's decision would undoubtedly have had an impact on the claimant who had enjoyed his work with the respondent and had taken particular pride in working on the Marks & Spencer contract.

140. However, weighing that in the balance with the operational impact and cost of the claimant's absence, the Tribunal finds that the respondent acted proportionately by dismissing him because of the length and adverse impact of his absence and because there was no reasonable prospect of a return to work either in any capacity. There was no evidence that any lesser measure than dismissal would have achieved the respondent's legitimate aim.

141. In all the circumstances the Tribunal finds that the respondent's decision to dismiss the claimant because of his disability related absence was a proportionate means of achieving its legitimate aim. His claim that he suffered discrimination arising from disability in terms of section 15 of the Equality Act 2010 is therefore dismissed.

Notice pay

What was the claimant entitled to receive in respect of notice pay? It is the respondent's case that the claimant was entitled to be paid for eight weeks notice.

142. The claimant argues he is due twelve weeks notice pursuant to an addendum to his contract. Did the respondent fail to pay the claimant's notice pay correctly?

143. The Tribunal interprets the claimant's contract of employment as meaning that for an employee with between five and twelve completed years of service, the statutory provisions in the Employment Rights Act 1996 would apply. It therefore finds that his eight completed years' service entitled him to eight weeks' notice pay. In those circumstances, the respondent treated him more generously than it was required to do when it paid him nine weeks' notice pay because he had completed almost nine years. The Tribunal therefore finds that the claimant's notice pay was paid to him correctly and his claim in that regard fails.

Holiday pay

Was the claimant paid for holiday accrued but not taken upon the termination of his employment in accordance with Regulation 14 of the Working Time Regulations 1998?

144. The claimant's claim for holiday pay being based on his being entitled to additional notice and that claim having failed, it follows that his holiday pay claim also fails and is dismissed.

Employment Judge: **R King**
Date of Judgment: **29 June 2023**
Entered in register: **30 June 2023**
and copied to parties