EMPLOYMENT TRIBUNALS

Claimant: **Mr C Orogbu**

Respondent: **Duncan Lewis Solicitors Limited**

Heard at: **East London Hearing Centre (in public)**

On: **12, 13, 14, 19, 20 September 2023 and 9 October 2023**
21 and 22 September 2023 (in chambers)

Before: **Employment Judge Gordon Walker**
Members: **Dr L Rylah**
Miss S Harwood

Appearances:

For the claimant: Mr M Maitland Jones (counsel)

For the respondent: Mr C McDevitt (counsel)

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

REASONS

Introduction

1. The claimant presented a claim of unfair dismissal and disability discrimination on 14 April 2021. This followed a period of ACAS early conciliation from 1 February 2021 to 15 March 2021.

Agreed adjustments to the hearing

2. The claimant was given regular breaks to accommodate his disability. During the second half of his cross examination, the claimant requested, and was given, a break of at least ten minutes every forty minutes.

Issues

3. The issues were defined at a preliminary hearing on 8 June 2022 as follows:

1. ***Time limits***

*1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before **2 November 2020** may not have been brought in time.*

1.2 Were the discrimination [claims] made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. ***Unfair dismissal***

2.1 Was the claimant dismissed? The respondent accepts the claimant was summarily dismissed on 12 November 2020.

*2.2 What was the reason or principal reason for dismissal? The respondent says the reason was a reason related to conduct, namely**:***

2.2.1 Failing to carry out his employment role on 70 days between April and October 2020;

2.2.2 a failure to report absences in accordance with the respondent's absence reporting procedure in its Absence Management Policy ("AMP");

*2.2.3 a failure to complete self-certificate forms and/ or provide GP Fit notes in accordance with the respondent's **AMP.***

2.3 The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

2.4 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a

sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

2.4.1 there were reasonable grounds for that belief;

2.4.2 at the time the belief was formed the respondent had carried out a reasonable investigation;

2.4.3 the respondent otherwise acted in a procedurally fair manner;

2.4.3.1 The claimant challenges the fairness of the procedure in the following respects:

(i) R did not offer C the opportunity to represent himself at the disciplinary hearing on 9 Nov 2020, despite his request for a postponement;

(ii) C says R did not provide C with the bundle of documents referred to at the hearing a reasonable time before the hearing. C says these were not received until 30 November 2020 and critical documents were missing regarding C's mitigation;

2.4.4 dismissal was within the range of reasonable responses.

2.4.4.1 C says dismissal was not in the range of reasonable responses because:

(i) R failed to consider his absences from work might be disability related and that his symptoms may have prevented C from following R's normal policies and procedures;

(ii) R's conclusion that C's failure to report his absences was 'grossly incompetent' was unreasonable and failed to take into account his debilitating health condition;

(iii) R failed to consider failures by its own HR department to follow up with C and arrange adjustments after committing to do so;

(iv) R failed to take into account its failure to take proactive steps to support C and arrange a referral to an Occupational health professional;

(v) R failed to consider and properly weigh C's previously unblemished record;

(vi) R failed to consider or apply a lesser sanction than dismissal.

*3. **Remedy for unfair dismissal***

3.1 The claimant does not seek reinstatement or re-engagement but seeks compensation only.

3.2 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.2.1 What financial losses has the dismissal caused the claimant?

3.2.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

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

3.2.4 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?

3.2.5 If so, should the claimant's compensation be reduced? By how much?

3.2.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.2.7 Did the respondent or the claimant unreasonably fail to comply with it?

3.2.8 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

3.2.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

3.2.1 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

3.2.11 Does the statutory cap of fifty-two weeks' pay or £88,519 apply?

3.3 What basic award is payable to the claimant, if any?

3.4 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

*4. **Disability***

4.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

4.1.1 Did he have a physical or mental impairment: extreme fatigue?

4.1.2 Did it have a substantial adverse effect on his ability to carry out day-to-day activities?

4.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

4.1.4 Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?

4.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

4.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

4.1.5.2 if not, were they likely to recur?

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

5.1 Did the respondent treat the claimant unfavourably by:

5.1.1 Denying C the opportunity to represent himself at his disciplinary hearing on 9 November 2020, despite his request for a postponement;

5.1.2 Summarily dismissing the claimant on 12 November 2020; and

5.1.3 Requesting the claimant repay the sum of £9,647.90 as a recoverable overpayment of wages on 16 December 2020?

5.2 Did the following things arise in consequence of the claimant's disability:

5.2.1 The claimant's absence from work during extended periods from March 2020 onwards?

5.2.2 C's physical and mental exhaustion?

5.2.3 C's inability to follow R's usual absence reporting procedures due to his physical and mental exhaustion?

5.3 Was the unfavourable treatment because of any of those things?

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

5.4.1 Ensuring that its clients' case files were professionally run and that the claimant was not overpaid.

5.5 The Tribunal will decide in particular:

5.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.5.2 could something less discriminatory have been done instead;

5.5.3 how should the needs of the claimant and the respondent be balanced?

5.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

*6. **Reasonable Adjustments (Equality Act 2010 sections 20 & 21)***

6.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

6.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

6.2.1 Requiring staff doing C's role or similar roles to work full time?

6.2.2 Requiring staff doing C's role or similar roles to meet specified billing targets?

6.2.3 Requiring staff to comply with R's absence reporting procedure?

6.2.4 Requiring staff doing C's role or similar roles to work from home throughout 2020?

6.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

6.3.1 C was put under stress and anxiety that contributed to his physical and mental exhaustion?

6.3.2 C was absent from work for extended periods from March 2020 onwards?

6.3.3 C was summarily dismissed on 12 November 2020?

6.3.4 C was requested to repay the sum of £9,647.90 to Ras a recoverable overpayment of wages on 14 December 2020?

6.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

*6.5 What steps could have been taken to avoid the disadvantage? The claimant has been ordered to identify suggested steps by **22 June 2022**.*

6.6 Was it reasonable for the respondent to have to take those steps and when?

6.7 Did the respondent fail to take those steps?

7. ***Remedy for discrimination***

7.1 What financial losses has the discrimination caused the claimant?

7.2 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

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

7.4 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

7.5 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

7.6 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

7.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

7.8 Did the respondent or the claimant unreasonably fail to comply with it?

7.9 If so is it just and equitable to increase or decrease any award payable to the claimant?

7.10 By what proportion, up to 25%?

7.11 Should interest be awarded? How much?

4. The claimant was ordered to provide further information about his proposed adjustments by 22 June 2022, which he did not do. The claimant provided that information at the outset of the liability hearing, which the respondent did not object to. The claimant's case was that the following adjustments should have been made by the respondent:

   a. Unpaid leave for one month or longer;
   b. Reduction to performance targets;
   c. Part-time working; and
   d. Referral to occupational health.

5. At a preliminary hearing on 20 June 2023, the claimant was found to be a disabled person within the meaning of section 6 Equality Act 2010. Therefore, the issues relating to disability status did not fall to be determined at the liability hearing.

6. The parties narrowed the issues in dispute at the outset of the liability hearing:

a. The claimant admitted that he was absent from work on 70 days from April to October 2020 and that he did not report the absences, or provide evidence of them, as required by the respondent's procedures.

b. The respondent admitted:

   i. That the claimant's absences from September to October 2020 were disability related.
   ii. That the dismissal was unfavourable treatment.
   iii. The second, third and fourth PCPs (paragraphs 6.2.2, 6.2.3 and 6.2.4 "PCP2", "PCP3" and "PCP4"), save that some additional wording was inserted for PCP2 and PCP4.

c. The respondent contended that only paragraph 2.2.2 of the list of issues was the reason for dismissal, although it conceded that the level of absence was relevant to the sanction.

7. The issues were further narrowed in closing submissions:

a. As the last in time date for limitation purposes was 2 November 2020, the parties agreed that the unfair dismissal and section 15 Equality Act 2010 claims were presented to the Tribunal in time. The claim of failure to make reasonable adjustments was potentially presented outside of the time limits.

b. The respondent conceded constructive knowledge of the claimant's disability from the 19 October 2020 investigation meeting.

c. The claimant narrowed the reasonable adjustments claim:

   i. Only PCP2 and PCP3 were relied upon. Those PCPs were admitted by the respondent, save that PCP2 had the following words inserted at the end *"or be subject to a performance management process"*.

   ii. The substantial disadvantage for PCP2 was paragraphs 6.3.1 and 6.3.2 of the list of issues, namely that the claimant was put under stress and anxiety by PCP2, which contributed to his exhaustion, and that his disability related absence made it more difficult for him to achieve his billing targets.

   iii. The substantial disadvantage for PCP3 was the something arising at paragraph 5.2.3 of the list of issues read with the substantial disadvantage at paragraph 6.3.3 of the list of issues. In other words, the claimant's case was that the PCP that required him to comply with the absence reporting procedure placed him at a substantial disadvantage because, by virtue of his disability, he was unable to follow the reporting procedures, and this caused him to be summarily dismissed. The respondent did not object to this formulation of the claim.

iv. The proposed adjustments for the PCP2 claim were part-time hours with a consequential pro-rata reduction to performance targets and/or unpaid leave.

v. The proposed adjustments for the PCP3 claim were a referral to occupational health and/or unpaid leave.

vi. All other elements of the reasonable adjustments claim were dismissed upon withdrawal. We did not make findings of fact or conclusions on them.

8. As agreed at the outset of the liability hearing, we heard evidence on liability, and on the following remedy issues: (1) that a fair procedure would not have made a difference to the outcome; and (2) contributory fault. We heard submissions on liability only. Our findings and conclusions are on the issue of liability only.

Procedure and evidence heard

9. The parties produced an agreed hearing bundle (1471 pages plus an additional two pages that were inserted at the end of the bundle), and bundle of evidence relevant to the issue of disability (121 pages).

10. We had written witness statements and heard evidence from five witnesses:

a. The claimant;
b. Mr Robert Poulter (performance management co-ordinator);
c. Mrs Ariadna Stanciu (human resources generalist, investigating officer);
d. Miss Sangita Shah (performance director, dismissing officer); and
e. Mr Jason Bruce (practice director, appeals officer).

11. The parties made oral closing submissions and did not refer to legal authorities.

Findings of fact

12. The Tribunal took all the evidence into account. We only make findings of fact on the matters relevant to issues in the claim.

13. The claimant commenced employment with the respondent on 5 February 2018, as a director in the housing department. His role was largely dealing with housing litigation, both private work and legal aid work [claimant's witness statement paragraph 5]. He was the sole employee in the housing department at the respondent's Dalston branch. He reported to Ms Nina Joshi (managing director).

14. The claimant worked full time. The oral evidence of Miss Shah, which we accept, was that most directors worked full time, although some worked part time.

Absence management procedure

15. The respondent has an absence management policy.

16. The policy has a section entitled occupational health [809] which states that the respondent has engaged the services of an occupational health provider and reserves the right to require an employee to undergo a medical examination at the respondent's expense. The policy also envisages circumstances where it might be appropriate to obtain a medical report from the employee's own GP. The procedure states that on receipt of an occupational health report all available options will be discussed. Such options might include a phased return to work; part-time or flexible working arrangements if available at the time and considered reasonable; and dismissal on grounds of ill health [812].

17. The absence management policy requires the absent employee to contact the respondent no later than 10am on the first day of absence to provide information about their absence and when they are likely to be able to return to work. The employee must maintain regular contact with their supervisor during their absence. The employee must complete self-certification for absences up to 7 days and provide a medical certificate for absences of longer duration [807-808; 218-219].

18. These requirements were set out in the office manual, with a hyperlink from that manual to the actual procedure. The claimant accepted under cross examination that he was made aware of the office manual in his initial induction. The claimant's contract of employment stated that the claimant "*shall*" comply with the rules and regulations of the office manual [99, paragraph 4.2.9].

19. The absence reporting requirements were repeated in the contract of employment [104] and in other written policies, such as the e-manual [485].

20. The respondent's human resources ("HR") policies remained in force during the pandemic, and staff were reminded of this by email [845]. New policies were also put in place, but the requirement to report absences did not change [842; 874].

21. The respondent's disciplinary procedure gives examples of gross misconduct, including "*serious breach of company's policies*" and "*continued unauthorised absence from work and failure to communicate appropriately regarding ongoing absence*" [481].

22. The claimant accepted under cross examination that he was aware of the absence reporting requirements, and that he did not comply with them in relation to absences from April 2020 onwards.

Performance management procedure

23. The claimant, like all directors, was subject to performance targets. His targets were adjusted to account for the fact that he did not have any supervisory responsibilities. The claimant's billing to salary target was 3 x salary [91], which equated to around 4 hours of chargeable/billable time a day. The claimant also had a chargeable hours' target.

24. The claimant's performance against these targets was managed by Ms Joshi and Mr Poulter.

25. The claimant was subject to a probationary period which he passed following a probationary review on 28 September 2018.

26. The claimant was sent monthly performance reports by Mr Poulter, some of which were in the bundle.

27. The claimant attended meetings to discuss his performance with Mr Poulter and Ms Joshi on:

    a. 5 December 2018 [352-355];
    b. 28 March 2019 (Ms Joshi did not attend this meeting) [392-395];
    c. 1 August 2019 [402-405];
    d. 23 July 2020 [913-914];
    e. 23 September 2020 [916-919];
    f. 7 October 2020 [926-927].

28. The claimant did not meet his billing to salary target at any stage. Although he was subject to these targets throughout his employment the respondent did not expect him to meet the target straight away and gave him some latitude in that regard, given his was a new department and he had to build up business [Mr Bruce's witness statement paragraph 45]. The percentage of the billing to salary target achieved by the claimant, and as discussed at these meetings were:

    a. 5 December 2018 (figures are as of 31 October 2018): 19% of target.

    b. 28 March 2019 (figures are as of 28 February 2019): 23%.

    c. 1 August 2019 (figures are as of 30 June 2019): 22%.

    d. 23 July 2020 (figures are as of end of June 2020): 30% (this figure was not provided in the documents. It was calculated on the basis that the claimant was said to have achieved 0.91 of 3).

    e. 23 September 2020 and 7 October 2020 (figures are as of 31 August 2020): 21%.

29. The claimant's performance against the chargeable hours' target, as discussed at these meetings were:

    a. 5 December 2018 (figures are as of 31 October 2018): 86% of target.

    b. 28 March 2019 (figures are as of 28 February 2019): 85%.

    c. 1 August 2019 (figures are as of 30 June 2019): 113%.

    d. 23 July 2020: no figure provided.

    e. 23 September 2020 and 7 October 2020 (figures are as of 31 August 2020): 57%.

30. On 29 July 2019, Mr Bruce wrote to the claimant and others to inform them that, from 1 August 2019, the respondent would apply a stricter approach to staff who were not achieving their chargeable daily hours target, or minimum 90% of target. Miss Shah was moved into the role of director of performance management, supported by Mr Poulter, to facilitate this change of approach [397]. Miss Shah did not directly manage the claimant's performance, as this was managed by Ms Joshi. The performance management of the directors was shared between Ms Joshi, Miss Shah, and Mr Bruce: they were each responsible for the performance management of different directors.

The claimant's health

31. At a preliminary hearing on 20 June 2023, Employment Judge Volkmer found that the claimant was a disabled person within the meaning of section 6 Equality Act 2010, from 1 September 2020, due to the impairment of extreme fatigue.

32. Employment Judge Volkmer found that this impairment caused the claimant to experience lack of energy, difficulty reading and drafting documents, problems concentrating, and difficulty sleeping. She found that, whilst this started in May 2019, it was at a minor level. She found that the effect on day-to-day activities was substantial from early September 2019, when the claimant wrote to his GP stating "*the fatigue is now debilitating I have to literally drag myself through the day to get the most basic tasks done. My work is seriously being affected*." Employment Judge Volkmer found that the effect continued at that level for more than 12 months [1466-1471].

33. The claimant's fatigue symptoms worsened after the covid-19 lockdown in March 2020 and remained at that worsened level until after his dismissal in November 2020. The claimant's evidence, which we accept, was that his energy levels were so low that he could hardly function. He said he would have to lie down most of the day, he could not do basic tasks like open his post or wash the dishes. We accepted the claimant's evidence as it was consistent with the evidence from his GP in September 2019 that the claimant had to: "*drag [him]self through the day to get the most basic tasks done"* and in November 2020 that his fatigue was having *"a significant impact on his ability to work and function on a daily basis"*.

34. On 4 December 2020 the claimant sent some medical evidence to the respondent as part of his appeal against the dismissal. We accept the claimant's oral evidence that it was not until after his dismissal, and not having the responsibility to his clients, that he had the mental energy to obtain and collate medical evidence. The evidence provided on 4 December 2020 was:

    a. A GP letter dated 27 November 2020 addressed "*to whom it may concern*". That letter stated "*this man has been attending the surgery repeatedly over the past year and a half due to symptoms of extreme fatigue, difficulty concentrating and other physical symptoms. He reports that these have had a significant impact on his ability to work and*

function on a daily basis. They have also had impact on his mood more generally…" [disability bundle p.9].

b. A fit note dated 27 November 2020 which said that the claimant was not fit for work from 27 November 2020 to 11 December 2020 because of fatigue [disability bundle p.8].

c. A letter from Royal London Hospital of Integrated Medicine dated 26 October 2020 from Dr Selsick, consultant in psychiatry and sleep medicine at university college London hospitals NHS foundation trust, which states that "*the main problem is fatigue, problems concentrating and poor sleep"* [disability bundle pp.1-4].

35. On 16 February 2022 Dr Selsick diagnosed moderate obstructive sleep apnoea and reported that *"[the claimant's] sleep has improved though there are still periods where he wakes in the night but he is able to get back to sleep quickly. He realised that his job was very stressful and he has moved to a less stressful job. His Epworth Sleepiness Score has dropped from 14/24 to 5/24*" [disability bundle pp.31-32]. The claimant's evidence in his witness statement at paragraph 127, which we accept, is that he obtained a new role in or around February 2022 as a locum solicitor and that he was able to work in this role, despite his health problems, because accommodations were made by his employer.

36. The claimant uses a CPAP machine to manage his sleep apnoea. He says that he has additionally received blood sugar and insulin results which are indicative of pre-diabetes and insulin resistance, for which he takes 500mg of metformin a day [Claimant's witness statement, paragraph 111].

Absence from work: April to October 2020

37. The claimant worked from home from the start of the covid-19 lockdown on 26 March 2020 [845].

38. It is admitted that the claimant failed to carry out his employment role on 70 days between April and October 2020. This is the number of days in the list of issues and in the letter giving the reasons for dismissal [965]. The invitation to the disciplinary meeting gave a slightly higher figure of 76 days [996].

39. These are the days when the claimant carried out no work. There were other dates when he carried out very little work.

40. The respondent has a time recording system which records active time spent by an employee on its remote case management system. The claimant accepted under cross examination that these records were accurate. These records show that the claimant was actively logged on to the system for:

a. 46.18 hours in April 2020 [847];
b. 25.18 hours in May 2020 [848];
c. 103.3 hours in June 2020 [849];
d. 56.48 hours in July 2020 [850];

e. 4.30 hours in August 2020 [851];
f. 26.36 hours in September 2020 [852];
g. 49.36 hours in October 2020 [853].

41. From April to October 2020 the claimant's total chargeable hours were 312.36 [869], which is slightly more, but broadly consistent with, the 311.16 hours active time spent on the respondent's system during the same period (based on the figures set out in the preceding paragraph).

42. The respondent admits that the claimant's absence from work from 1 September 2020 onwards was disability related. The parties agree that the disability related period of absence was 26 days [939].

Communications between the parties about absence, ill health, and support

43. On 1 August 2019 Mr Poulter wrote to the claimant with his performance report for June 2019 and with further agreed action points. These included under the heading "HR" "*new caseworker is added to the recruitment list for Dalston housing director Chinedu Orogbu (20th August)*". The claimant says that his work had become overwhelming at this time and that he had asked Ms Joshi for a team member to assist him [Claimant's witness statement, paragraph 22]. The claimant did not disclose his ill health at this time.

44. On or around 20 May 2020 the claimant informed Ms Joshi by email that he had been unwell [56, paragraph 9]. The email has not been disclosed but the respondent admits that the claimant informed Ms Joshi of his ill health in May 2020 [76, paragraph 17] and that, at a director's meeting later that month, the respondent's CEO wished the claimant a "*speedy recovery*" [56, paragraph 10; 77, paragraph 18].

45. On 24 July 2020 at the performance review meeting with Mr Poulter and Ms Joshi, the claimant's health was discussed, and an agreed action point was that HR would contact the claimant to see if any workplace adjustments were required [914]. The notes record that Ms Joshi made that request to HR that day [914]. The notes were copied to Mrs Stanciu of HR. This action point was not followed up by Mrs Stanciu or anyone else from HR.

46. On 21 September 2020 there was a telephone call between the claimant and Ms Satinder Bharj from HR, a transcript of which has been produced [1309-1314]. The claimant disclosed his ill health, specifically that he was experiencing fatigue "*for some time now*" and that he had been referred to hospital [1310]. The focus of the call was about the fact that Mr David Head had been trying to contact the claimant. The claimant said in evidence that Mr Head was the risk and compliance director, and this was about a client complaint. Mr Poulter accepted under cross examination that Mr Head was an employment lawyer. This was also Mr Bruce's oral evidence, who described Mr Head as the respondent's in-house employment law advisor. There was no discussion with Ms Bharj during this call about workplace adjustments or any other support for the claimant's health.

47. The notes of the 23 September 2020 performance review meeting record that *"[the claimant] has commented feeling unwell and has been in contact with HR and his own GP*" [918]. No HR representative was present at the

meeting [916] and there were no follow up points for HR [919]. Mr Poulter accepted under cross examination that the claimant's ill health was "*a big matter*" at this stage. He also agreed that Ms Joshi was forceful in that meeting, and that it was her who proposed a further meeting in two weeks, by which time she wanted to see that the claimant's performance had improved.

48. On 25 September 2020, in an email responding to Ms Joshi's email of the same date, the claimant proposed that he would repay the hours he had not worked by working overtime or using his annual leave [923].

49. The performance meeting of 7 October 2020 with Ms Joshi and Mr Poulter was recorded and a transcript has been produced [1315-1351]. The meeting consisted of three phone calls lasting in total just over an hour. Ms Joshi did most of the talking:

    a. She said that the claimant's unreported absences from work were "*gross misconduct*" [1316-1317;1318; 1324].

    b. She said that the claimant had been underperforming from the start [1339], his performance was "*wholly unacceptable*" [1324], such that he should have been dismissed a year ago [1345].

    c. There was a discussion about potential adjustments including a sabbatical / unpaid leave [1320; 1327; 1348] (of up to one year [1327]); reduced workload [1349]; and part time hours [1321; 1326; 1348]. Ms Joshi said that she would get HR to contact the claimant about that [1320; 1333; 1343; 1348].

    d. Ms Joshi also discussed the potential of the claimant resigning and reapplying for his role once he had recovered, which she said would be viewed favourably as he was "*one of us*" and held "*in high esteem*" [1337-1338]. She said that if he remained employed, subject to advice from HR, she believed that, even with adjustments, the matter would need to be referred for a panel to decide if the claimant was guilty of gross misconduct [1333; 1337], and any potential mitigation would be considered at that stage. The claimant submitted that Ms Joshi's comments about the claimant's potential reapplication post resignation demonstrated that she had not lost trust and confidence in him as an employee. We reject that submission because Ms Joshi's comments were said in the context of her trying to persuade the claimant to end the employment relationship. We consider that she was trying to flatter him into resigning, as that would be easier for the respondent than to have to go through a formal process, and that she was offering no guarantee that the respondent would in fact reemploy the claimant. Further she made it clear than if the claimant remained employed, a disciplinary process would be conducted, which is not inconsistent with a breakdown of trust and confidence.

    e. The claimant discussed his health. He said that he did not have any energy on some days [1319], the situation was temporary [1320], and that he was waiting for referrals and diagnosis [1320].

f. The claimant proposed that he could repay his salary, for example by taking half salary for four months [1317; 1324; 1329].

g. The claimant did not state at the meeting that he had been unable to report his absence due to his ill health. However, he was not asked a direct question about the reason for his failure to report his absence.

50. Mr Poulter sent a summary of the 7 October 2020 meeting to Mr Head later that day, copying in Mrs Stanciu and Ms Joshi. Mr Poulter explained in oral evidence that Mr Head was sent this information on Ms Joshi's request, given his expertise in employment law, because it was envisaged that formal action might be taken against the claimant. Mr Poulter's email stated that there were four further action points for HR [925]. Mr Poulter sent a similar summary of the meeting to the claimant [926-927]. We find that the reference to "*consultant medical appointment*" in these emails is a reference to the claimant's forthcoming consultant medical appointment on 26 October 2020, and not a reference to an occupational health ("OH") referral. We reach that conclusion because it is consistent with what was said at the 7 October 2020 meeting. The claimant informed the respondent at the 7 October 2020 performance meeting that he was to see a consultant on 26 October 2020 [1320]. There was no reference to occupational health at that meeting. Further, we find that the turn of phrase "*consultant medical appointment*" fits more naturally with the information provided from the claimant (that he was seeing a consultant), rather than with an OH referral which would be more likely to have been described as an OH referral, rather than a consultant medical appointment.

51. The claimant spoke with Ms Bharj for about one hour later that day [1352-1396]:

a. The claimant explained his ill health, that he was suffering from mental and physical fatigue that was impacting on his life, such as his ability to concentrate [1368], and that this had been ongoing for about a year [1369].

b. There was a discussion about potential adjustments such as unpaid leave, part-time and flexible working [1364; 1382].

c. A referral to occupational health was also discussed [1382-1383].

d. The situation was left that Ms Bharj would speak to management [1377; 1380] about the claimant having a month (or more) off unpaid, to focus on his health (medical recovery and investigations) [1365; 1393; 1395], with the possibility of the claimant doing some work remotely to alleviate his anxiety [1372; 1375].

e. There was also a discussion about the claimant's absences from work. Ms Bharj estimated that this was 71 days. The claimant broadly agreed, he said that he might have been doing some additional work on his laptop, but he was not going to "*split hairs*" [1388].

f. Ms Bharj proposed that the claimant's 25 days of accrued holiday could be applied to that to reduce the figure to 46 days [1385], and that she

would speak to management and revert to the claimant about that proposal and about how the remaining salary differential could be repaid [1393; 1395].

52. Ms Bharj did not revert to the claimant as promised. There is no evidence that she contacted anyone from "*management*" about the proposed adjustments. At most there is an email from Mrs Stanciu dated 3 November 2020 which states: *"please note I have spoken to Satinder yesterday and she confirmed that this has been discussed but not yet agreed…"* [941]. Mrs Stanciu's evidence was that, contrary to what was actually discussed in the 7 October 2020 meeting, Ms Bharj reported to her, on or around the time of that meeting, that the claimant had stated that he did not need adjustments.

53. The claimant stated in oral evidence that he thought that he was technically on unpaid leave from 7 October 2020, even though this was not formally agreed. He said he formed that belief because Ms Bharj had stated that the matter needed to be cleared by management, and Ms Joshi (of management) had been supportive of the idea when she spoke to him earlier that same day. Mrs Stanciu accepted in evidence that her email of 3 November 2020 [941] might have been confusing for the claimant on this issue because her statement *"please send me confirmation you have received from the company saying that you will be off for a month from 7th October 2020"* could imply that the unpaid leave had been approved.

54. The claimant was not referred to occupational health.

Reason for not reporting absence

55. The claimant admits that he did not report his absences from April to October 2020 in accordance with the respondent's procedures. He says that he was not well enough to do so. The claimant states that he did not think he needed to report his absences after his conversation with Ms Bharj on 7 October 2020, as he had disclosed his ill health to her during that conversation and he understood that he would be placed on a period of unpaid leave from that date.

56. When he was asked under cross examination how he could carry out work as a solicitor for vulnerable clients at this time but was not able report his absence, the claimant stated that *"most of the work I did during that period was work I was prompted to do. Those days I worked it was vulnerable people calling me, I was their last safety net. I was in a mental health crisis. I was only able to focus on what was in front of me"*. We accepted that evidence from the claimant as we felt (1) he was best placed to give evidence about this, and (2) that his evidence was consistent with the medical evidence from his GP that: the fatigue had a "*significant impact on his ability to work and function on a daily basis"* and "*the fatigue is now debilitating [the claimant has] to literally drag [him]self through the day to get the most basic tasks done".*

57. The respondent disputes that the claimant was too ill to report his absences. It relies on the fact that the claimant was well enough to log in to do some work after periods of absence, but he still did not report his absence.

58. Before we could decide the reason for the claimant's failure to report his absence, we needed to decide whether the allegation upheld against him by the respondent was a failure to report during the time he was absent from work, or whether this extended to the time when the claimant had returned to work after a period of absence.

59. In her witness statement Miss Shah stated: *"I concluded that dismissal was appropriate in the circumstances. The decision outcome was largely due to the fact that he was in a high-level position, the level of absence was considerable (over 70 days in total, where he had been paid but not worked) and spread over a period of time. There had been no contact from the claimant at any point in respect of his absences, even when he had been working* (emphasis added)*."* [Miss Shah's witness statement, paragraph 18]. The respondent relied on this as the basis for their submission that the wider context of the claimant not reporting his absence when he returned to work was part of the decision to dismiss.

60. We reject that submission because:

    a. Miss Shah stated in oral evidence that the failure to comply with the absence reporting procedure that she found proven against the claimant was the claimant's failure to comply with the policy at page 807. The parties agree that page 807 only requires the employee to report their absence during the period of absence itself, and not when they return to work.

    b. As set out at paragraph 59 above, at paragraph 18 of Miss Shah's witness statement, she says that the decision outcome was "*largely due to…"* We rejected the submission that "*largely due*" referred not just to the three matters stated in that sentence, but also to what is stated in the following sentence. That is not the natural reading of the witness statement, given the punctuation. Accordingly, we find that the decision outcome was not largely due to that fact that "*There had been no contact from the claimant at any point in respect of his absences, even when he had been working".*

    c. The grounds of dismissal letter is consistent with our finding that it was only the failure to report whilst absent that was relevant to the decision to dismiss:

        i. The second allegation in the grounds of dismissal letter [965] is a failure to follow the procedure set out in the absence management policy. That is the policy at page 807 which only requires absence to be reported during the period of absence.

        ii. The finding in relation to that allegation was that the claimant "*did not report [his] absence on any of the said dates* (emphasis added)". We read this as meaning he was found not to have reported his absence on the specific dates of absence.

        iii. The fifth allegation also refers to company procedures [966], which we take to be a reference to page 807.

iv. There is no reference in the letter to a requirement to report outside of the procedures, or outside the dates of absence.

61. We find that the respondent made assumptions about the claimant's ability to comply with the procedure which were not based on medical evidence:

a. Miss Shah said in evidence that she expected that, if the claimant was not able to pick up the phone, a family member or friend could have contacted the respondent on his behalf. She said that she did not know that the claimant lived alone. She said: *"looking back I don't know I just thought surely you will be able to tell us you're not working".* When asked what the basis of that belief was, she said *"when people are off sick, they manage to call in or email at some point to notify someone"*. Miss Shah stated that she didn't have much experience of mental health and had not had training on disability discrimination.

b. Mrs Stanciu's oral evidence was that, as expressed in her letter of 29 October 2020 [934-936], she doubted what the claimant told her about his ill health and the reason for his failure to report his absence. She said that from her own experience of tiredness and fatigue (which also included experience of other employees from other companies) she could not believe that it was not possible for the claimant to report his absence. Mrs Stanciu went on to say that if she had received a fit note from the claimant's GP stating that the claimant was not fit for work by reason of fatigue, that would have been enough to have put the doubt out of her mind about the claimant's disability and his stated reason for failure to report his absences.

c. Mr Bruce's oral evidence was that he "*had suspicions*" that the claimant's failure to report his absence was an act of dishonesty. However, no finding was made against the claimant of dishonesty at any stage.

62. We find that the reason the claimant was unable to report his absence during the period of his absence, as required by the respondent's procedure at page 807, was because of his ill health, which deteriorated from March 2020. We find that the claimant was unable to carry out basic tasks at this time and that he was not thinking rationally. This was his evidence, and this is consistent with the following facts:

a. There was a sudden deterioration in the claimant's attendance and compliance with the procedure from April 2020.

b. Prior to this he was a well-respected solicitor at the respondent [Mr Bruce's witness statement paragraph 47].

c. The claimant had 25 days of accrued but untaken annual leave. As the claimant explained in evidence, and we accept, if he was unwell but unable to afford to go on statutory sick pay ("SSP"), and if he was thinking rationally, he would have used his annual leave entitlement instead of taking unauthorised absence.

63. Although we do not find that the claimant was dismissed for failing to report his absence in the periods when he was working, this was something that

formed part of the appeal decision as it is set out in the appeal outcome letter. We find that the claimant's ill health played a part in his inability to contact the respondent on those days also. In evidence Mr Bruce said he could not understand how the claimant could log-on to the respondent's system and fail to hover his cursor over the "*submit HR query*" section of the home page to report his prior absence. We find that this was a simplistic view that failed to take into account the nuances of the claimant's mental ill health. We accepted the oral evidence of the claimant that when he was absent, the days merged into one and he was not conscious or aware of the extent of his absence. We accept his evidence that being contacted by vulnerable clients who needed his assistance brought him a level of focused lucidity, but that did not transfer to all elements of his life, including the need to notify the respondent of his absence.

Disciplinary investigation

64. Mrs Stanciu and Miss Shah accepted under cross examination that the allegations against the claimant were very serious and potentially "*career ending*" and it was therefore essential that the investigation was thorough [p.60 and pp.42-43 my notes].

65. On 15 October 2020 Mrs Stanciu emailed the claimant an invitation to an investigation meeting [928-929]. The claimant said in evidence that he was not checking his emails at this time due to his ill health, so he did not see the invitation.

66. On 19 October 2020 Mrs Stanciu telephoned the claimant as he had not attended the investigation meeting which was supposed to take place that day on Teams. The claimant stated that he was unaware of the meeting, but he was fine to proceed [930]. The meeting lasted about 45 minutes:

    a. The claimant explained that he could not concentrate, lacked energy to get out bed and do any work, and that he had not felt well since last June [930].

    b. He said that he had reported his ill health in the performance meeting in August 2020 and had expected HR to contact him [931].

    c. He said he was aware of the requirement to submit sickness certificates, but he was "*not fully functioning*" [932].

    d. He offered to repay his hours [932]

67. At 18:59 on 29 October 2020 Mrs Stanciu emailed the claimant about the investigation meeting [934-936]. Mrs Stanciu noted the claimant's assertion that he could not comply with the reporting procedures due to ill health and stated "*however you have not provided the company with a detailed explanation and/or documentation to support this assertion. Unfortunately, the lack of such an explanation causes the company to question your reasons for not carrying out your role and/or not reporting your absence. Accordingly, please would you provide me with your detailed explanation (with any supporting documents) by return of email?*"

68. Less than 24 hours later, at 16:10 on 30 October 2020, Mrs Stanciu wrote to the claimant inviting him to a disciplinary hearing on 4 November 2020, to be chaired by Miss Shah [937-940]. Six disciplinary allegations were made, including "*you failed to carry out your employment role, by not carrying out any work and/or being absent from work on …. 76 days*" [939]. The claimant was warned that a potential outcome of the disciplinary hearing was summary dismissal.

69. Mrs Stanciu's letter of 30 October 2020 begins by referring to her letter of 29 October 2020 and cites the claimant's "*failure to respond urgently*" to that, as being part of the respondent's decision to move to a disciplinary hearing [938]. Under cross examination, Mrs Stanciu accepted that it was "*possibly*" unrealistic to expect the claimant to have provided medical evidence within the time frame she provided.

70. Mrs Stanciu accepted the following under cross examination:

    a. It was an essential part of a fair investigation for there to be independent medical evidence of the claimant's condition.

    b. The claimant's statement that he could not report his absence due to sickness should have been investigated by way of a medical report.

    c. There was no reason why a referral to occupational health could not have been made.

Disciplinary meeting

71. On 3 November 2020 the claimant requested a postponement of the disciplinary meeting because "*the information required to address some of the allegations is not even available as medical investigation is still ongoing. Even the documents available would need to be collated. The preparation of a defence as requested and collation of all relevant documents for the hearing require time and mental energy which unfortunately I do not possess at this point in time given that my central complaint has been fatigue*" [942].

72. Mrs Stanciu sent the claimant two emails on 3 November 2020 [951; 941]. She accepted under cross examination that she did not respond to the claimant's request for a postponement.

73. On 4 November 2020 Mrs Stanciu and Miss Shah telephoned the claimant with the intention of holding the disciplinary meeting:

    a. The claimant stated that he was unaware of the purpose of the call [1397] and that he was unwell and not happy to proceed with the disciplinary meeting that day [1404].

    b. The claimant said that he needed medical information and mental energy to respond to the serious allegations and to get a fair hearing [1399].

c. Miss Shah said that the hearing was not to investigate the claimant's illness, as that was not disputed [1400].

d. Miss Shah proposed a postponement to the 9 November 2020 meeting to give the claimant time to collate everything, but "*if it doesn't go ahead on Monday, then we will make a decision on the information we already have*" [1402].

e. The claimant expressed some concerns about potential delay in obtaining medical evidence [1402-1405]. He did then say "*oh, okay that's fine*". We find that statement was made in response to a point about notifying the respondent if he intended to bring a representative to the meeting, as that is consistent with the transcript and the order of the questions and answers [1405]. We do not accept that the claimant agreed to a five-day postponement by choice. He was under pressure to accept this, as that was the only amount of time being offered by the respondent. He did express concerns about potential delays and said he would notify the respondent of those.

f. There was a discussion about the bundle of documents for the disciplinary meeting, the claimant said that the letter he had received "*makes reference to a bundle… there was no bundle*", Miss Shah's response was "*that's done by email*" [1405].

74. The evidence about the bundle of documents was as follows:

a. The claimant received two items from the respondent on 31 October 2020, which he signed for [1111-1112]. The claimant said that this was two letters with no accompanying documents. Mrs Stanciu's evidence [Mrs Stanciu's witness statement at paragraph 10 and her oral evidence] was that she sent the bundle of documents by post as well as email, and that it was bound in a file which was slightly smaller than a ring-binder.

b. On 4 November 2020 Mrs Stanciu sent two versions of an email to the claimant [954; 1472-1473]. The first email was sent before it was finished and was therefore recalled [954]. In the email Ms Stanciu explained that the disciplinary meeting was postponed to 9 November 2020 and the claimant was told that if he did not attend, the meeting would proceed in his absence. The electronic bundle of documents was attached to both emails. The claimant says that he did not read the emails due to his ill health.

75. On 6 November 2020 the claimant sent two emails to Mrs Stanciu at 16:42 and 16:49. Mrs Stanciu had left work before these emails were sent.

a. The first email was a request for a postponement of the disciplinary meeting to give the claimant time to prepare his response, given his ill health (including tooth pain) and the fact he had not received the bundle of documents [959].

b. The second email was a copy of an outpatient appointment letter dated 6 November 2020 for an appointment at King's Dental Institute that day, at 3pm [955-957]. The claimant's evidence, which we accept, was that

he had a tooth extracted on that day and he was in pain at this time and in the days prior and following the extraction. Given that the date of the letter and the date of the appointment are the same day, we accept that this was an emergency appointment. We accept that, given the claimant's tooth was extracted at an emergency appointment, he would have experienced tooth pain at and around that time. We do not think his omission to mention this tooth pain at the 4 November 2020 meeting meant he was not in pain at that time, as this was just two days prior to extraction, and it is therefore likely he was in some pain. We find that the claimant did not mention the tooth pain at that time because the meeting caught him by surprise, and he was focussing at the meeting on obtaining a postponement, and on trying to explain his more general and long-standing health issues to the respondent, namely his fatigue.

76. At 09:44 on Monday 9 November 2020 Mrs Stanciu replied to the claimant refusing the request for a postponement [958]. The claimant said in evidence that he did not read this email before the disciplinary meeting. In oral evidence Mrs Stanciu could not recall whether she discussed the decision not to postpone the hearing with anyone else. Miss Shah said that Mrs Stanciu did not discuss the decision with her, and that it was not until after the 9 November 2020 disciplinary meeting that she read the claimant's 6 November 2020 request for a postponement and Mrs Stanciu's reply refusing the postponement. We find that the decision not to postpone the meeting was the sole decision of Mrs Stanciu. We find that Miss Shah had the power to overrule or remake that decision, but she chose not to do so.

77. An email from Mrs Stanciu to Mr Head dated 4 December 2020 states that *"the reason why the second postponed disciplinary meeting went ahead was because [the claimant] didn't provide any of these evidences prior to the meeting"* [1116]. In oral evidence Mrs Stanciu said that the "*evidences*" she was referring to was the medical evidence attached to the claimant's letter of 4 December 2020. Mrs Stanciu also said in evidence that she thought part of the reason why she did not allow the postponement was because the claimant had provided evidence of his dental appointment at a late stage: Mrs Stanciu wrongly assumed that the claimant would have had advance warning of that appointment, even though the appointment and the letter are dated the same day.

78. Mrs Stanciu said in evidence that if the claimant had provided some evidence of his disability, she would have postponed the disciplinary hearing. She said that she would have expected that the claimant to have had fit notes from his doctor, and if he had sent a fit note stating that he was unfit for work, then she would have adjourned the hearing for a few weeks and she would also have taken occupational health advice. Mrs Stanciu also said that if Ms Bharj had informed her of what was discussed at the 7 October 2020 meeting with the claimant, and specifically that potential adjustments were being discussed, she would have adjourned the disciplinary meeting to give sufficient time to understand what adjustments could be made to accommodate the claimant, and to refer him to occupational health. She said, and we accept, that it would have taken up to a month to do this. Mrs Stanciu said that she did not consider placing the claimant on unpaid leave at this time, even though she was aware of that potential adjustment, as is clear from her email of 3 November 2020 [941].

79. The disciplinary meeting was held on 9 November 2020 in the claimant's absence. Very little happened at the meeting. Miss Shah waited forty minutes for the claimant to attend and also tried to telephone him. Miss Shah did not make the decision to dismiss until a later date. Miss Shah's evidence is that she made enquiries about whether the claimant had reported himself absent on 9 November 2020, and she discovered that he had not done so. She said that if the claimant had done so, or even answered her call of 9 November 2020 and said he could not go ahead with the meeting, she would have adjourned it. We find that Miss Shah placed too much weight on the claimant's failure to call in sick on 9 November 2020, given (1) his previous failure to report absence and his stated disability related reason for this; (2) his email of 6 November 2020 where he expressed that he was not well enough to participate in the disciplinary meeting of 9 November 2020; and (3) the uncertainty as to whether or not he was on unpaid leave at that time.

80. On 11 November 2020 the claimant was sent a letter summarily dismissing him with effect from 12 November 2020 [961-963].

81. This was followed on 16 November 2020 with a letter confirming the reasons for dismissal [964-968]. The 16 November 2020 letter upheld each of the six allegations from the invitation letter, save that there was a finding of "*gross incompetence*" rather than "*dishonesty*" in relation to the failure to comply with the absence reporting procedure (allegation five) [967]. Miss Shah concluded that *"there is insufficient evidence for me to find that you were dishonest"* [967].

82. Under the heading "*sanction*" the letter *stated "I have considered the disciplinary policy. If this matter was limited to your poor performance, your poor attendance at work and your possible failure to provide sick/fit notes I would have no hesitation in providing you with a first written warning. However, my findings relating to your gross incompetence, and your sustained and continued unauthorised absence from work, leads me to find that you have carried out an act or act that fundamentally breaches the contract of employment so as to justify instant dismissal. The company has lost its trust and confidence in you to carry out your work and/or to follow the absence management policy*" [967].

Reason for dismissal

83. The respondent submitted that the reason for dismissal was that the claimant had unauthorised absence; the absence itself was not a reason for dismissal. In support of this submission, the respondent relied on:

    a. The sanction section of the dismissal letter quoted in the preceding paragraph [967].

    b. The oral evidence of Mrs Stanchiu and Miss Shah that the unauthorised absence was the reason for dismissal.

84. The respondent accepted that the amount of absence was relevant to the sanction. It submitted that absence of more than five days was relevant.

This submission was based on Miss Shah's evidence under re-examination that the "*tipping point*" that made the unauthorised absence gross incompetence, was when the claimant had had unauthorised absence of more than five days. This evidence about the tipping point was not in any policy, document, or witness statement. It was first stated in re-examination. In re-examination Miss Shah's first answer was "*when I think about the amount of annual leave, that was how I measured it….you get 20 to 25 days annual leave"*.

85. The claimant says that the absence itself was a reason or principal reason for dismissal.

86. We accept the claimant's submission as it is consistent with the following evidence and documents:

    a. The grounds of resistance which state: "*the reasons for dismissal were: (1) you failed to carry out your employment role…"* [79, paragraph 29];

    b. The list of issues at paragraph 2.2.1 which states that a reason for dismissal was *"failing to carry out his employment role on 70 days between April and October 2020".*

    c. The grounds of dismissal letter. We find, because it is the natural reading of what is quoted below, that Miss Shah's conclusion of gross incompetence, which was the reason for dismissal, related to both the absence itself and the failure to report that absence:

        i. The sanction section of the dismissal letter states that the finding of gross incompetence is the reason for dismissal [967]. The finding of gross incompetence is allegation five. That allegation is *"your failure to carry out work <u>and/or</u> your failure to inform the company of your absence…"* (emphasis added) [966]. The allegation is therefore put in the alternative. This indicates that the absence itself would have been a sufficient reason for the finding of gross incompetence.

        ii. The conclusion on that finding was: "*I find that you failed to carry out any work on the days in question <u>and</u> that you did not inform the company of your absence from work or your inability to work"* (emphasis added) [967]. There was therefore a finding on both matters: the absence itself and its unauthorised nature.

        iii. The sanction section refers to the claimant's *"sustained and continued unauthorised absence"* [967], which suggests that the amount of absence (i.e. that it was sustained and continued) was a relevant factor.

    d. Mrs Stanciu's witness statement at paragraph 15:

        i. Before this paragraph was amended at the outset of her evidence, paragraph 15 stated: *"The dismissal reasons were as follows: (1) he failed to carry out his role as he did not complete work to a level expected. (2) He was absent for a total of 70 days*

between April and October, and in this time did not follow the reporting procedure set out in the Absence Management Policy by failing to report absences at work. (3) Where he stated his absence was due to sickness, he failed to follow the appropriate policies by not competing a sickness self-certification form/or provide us with a GP fit note". Points (1) and (2) relate to the absence itself. Point (2) also relates to the absence being unauthorised.

ii. Mrs Stanciu amended her statement to rely only on the second point as a reason for dismissal. Mrs Stanciu stated in evidence that she had not signed the statement before amending it because she did not have access to a printer, as she was away at the time. She said she would have signed the unamended statement if she had had access to a printer. She said that the reason why she changed her statement was because of the discussion at the outset of the liability hearing where the respondent stated the reason for dismissal was the unauthorised absence and not the amount of absence. This was not a valid reason for Mrs Stanciu to amend her witness statement. We find that the unamended version was an accurate account of her evidence.

iii. We note that, consistent with the deletion of Mrs Stanciu's third bullet point, it is not the respondent's case that the claimant was dismissed for his failure to evidence his absence by way of self-certification and med-3 documents.

e. Miss Shah's witness statement at paragraph 18. We find that this states that one of the main reasons for the dismissal was the amount of absence:

i. Paragraph 18 states: *"The decision outcome was largely due to the fact that he was a high-level position, the level of absence was considerable (over 70 days in total, where he had been paid but not worked) and spread over a period of time."*

ii. We have found that Miss Shah's witness statement should be read as saying that the decision outcome was largely due to the matters stated in that quoted sentence, and not what is stated in the following sentence. That is the natural reading of the statement. Miss Shah explained in evidence that "*largely*" meant the main reasons for her decision.

iii. We find that "*decision outcome*" refers to the dismissal as that is consistent with the sentence before which sates "*I concluded that dismissal was appropriate in the circumstances*". We rejected Miss Shah's evidence that "*decision outcome*" did not just refer to the dismissal, but to her findings on each allegation.

f. Mr Bruce's appeal outcome letter [1184, paragraph 1.2(i)]:

i. This states: "*reasons for [the claimant's] dismissal…: (i) failed to carry out his employment role as a result of his unauthorised absence over 76 days between April- October 2020…"*

ii. Mr Bruce confirmed in oral evidence that he was therein setting out Miss Shah's reason for dismissal.

iii. Mr Bruce accepted in oral evidence that the claimant's failure to carry out work as set out at page 1184 paragraph 1.2(i) was part of the reason for the respondent's conclusion that there was a significant breach of trust and confidence, which lead to dismissal.

87. We reject the respondent's evidence about the "*tipping point*". We find that this evidence, which was only provided in re-examination, was self-serving. Even in re-examination Miss Shah's evidence was unclear as she initially referenced the amount of annual leave and then reduced this to five days. There was nothing in any policy about a tipping point, and there is no evidence or suggestion that this was expressly considered at that time. The only references to the amount of absence in the formal correspondence are to it being 70 or more days of absence.

88. We accept Miss Shah's evidence that, at the time when she made the decision to dismiss, she was not aware that the claimant was saying he could not comply with the absence reporting procedure because of his health. That was notwithstanding the fact that the claimant raised this at the investigation, as evidenced by Mrs Stanciu's letter of 29 October 2020 [935].

89. Miss Shah stated that, when she reached her decision to dismiss, she took into account the respondent's pleaded justification defence, namely *"ensuring that its clients' case files were professionally run"*. Miss Shah accepted that this was not something that she mentioned in the documents or her witness statement. She said that the respondent had another housing department which the claimant worked closely with, and that they could have covered the claimant's files. Miss Shah said she did not consider unpaid leave as an alternative to dismissal, to give the claimant time to recover and prepare his defence. She said that she was not in a position to give unpaid leave, and she was not made aware of the discussions that the claimant had had with Ms Joshi and Ms Bharj about this.

Appeal process

90. On 19 November 2020 the claimant appealed the dismissal [969], sending full grounds of appeal on 20 January 2021 with medical evidence [1126-1131]. Medical evidence was also sent on 4 December 2020 [977].

91. On 7 December 2020 Mr Bruce, appeals officer, wrote to Mr Head in the following terms:

Hi David,
Just caught this.
(I have no read the papers in any depth yet (sic))
If I understand this correctly, when you remove the noise – his alleged illness and the fact that he missed his disciplinary hearing is not really an issue here (as in – we can accept

this and we can accept his reason for not meeting Sangita). The issue is – it is his failure to report his illness/absence to the company from the prolonged period of X to period Y and as a result of this, whether he received salary payments through false representations that he was working – when he in actual fact was not, if this is the case – whether this amounts to gross misconduct which justifies his dismissal.

If this is correct – then I see no reason why I cannot simply finalise this 'on the papers'. If you agree that this understanding of mine is correct – I will do this on the papers (and in the decision set out why it was right to dos so).
If – his dismissal is upheld, the company is then able to take whatever further action it feels is necessary.

92. Mr Bruce stated in evidence that the "*further action*" he referred to was the request for the claimant's repayment of salary.

93. The appeal hearing was rescheduled to be after 8 January 2021 at the claimant's request [979]. The hearing was held on 12 April 2021 [1159-1177], chaired by Mr Bruce. At the appeal meeting, the claimant was asked to explain his failure to comply with the absence reporting procedure. The claimant said it was because of his fatigue.

94. The appeal outcome was communicated by letter dated 28 April 2021 [1182-1215]. Mr Bruce accepted that there were elements that could have been handled more effectively, namely HR not following up after the 24 July 2020 performance meeting or after Ms Bhaj's conversation with the claimant on 7 October 2020. Mr Bruce felt that HR should have followed up with the claimant in late July 2020 to ascertain why he was unwell [1209]. Mr Bruce accepted the claimant's reported health complaints [1207] but rejected this as an explanation for his failure to report his absences [1207]. He therefore upheld the decision to dismiss.

95. In oral evidence, Mr Bruce stated that:

    a. He did not make any finding of dishonesty, but he had suspicions whether the claimant had been dishonest in drawing a salary whilst not working. Mr Bruce accepted that the grounds of resistance included an allegation of dishonesty: *"it is suggested that the claimant did not want to report his absences as he wanted to be paid his full salary"* [77, paragraph 20], and that Mr Bruce's statements "*false representations*" [1115] and "*intended lack of transparency*" [1208] were references to dishonesty.

    b. He did not consider the appeal in the context of the claimant having a disability. This was not on his radar. That was notwithstanding that he had received the claimant's full grounds of appeal which asserted that he was a disabled person [1126, paragraph 1]. Mr Bruce had no explanation for this omission. He had not received any disability discrimination or mental health training.

    c. In order for the claimant to have demonstrated that he was not grossly incompetent (given his admitted failure to report his absence) the claimant would have had to have provided a medical report that focused on that issue succinctly. Mr Bruce felt it was for the claimant to prove his appeal and therefore provide such evidence. Mr Bruce did not think it

was for him to send the claimant to occupational health at the appeal stage. We find, on the basis of Mr Bruce's oral evidence, that this thought (i.e. to refer the claimant to occupational health) had not occurred to him.

d. He had the transcripts for the 7 October 2020 and 4 November 2020 conversations, but the claimant did not. He said that he listened to the transcripts at the request of the claimant.

96. We find that Mr Bruce formed a view of the appeal on 7 December 2020 on the basis of a preliminary read of the papers as evidenced by page 1115. We place weight on this email as we find it was an unguarded expression of Mr Bruce's view of the matter, whereas the appeal outcome was drafted at a time when the litigation process had commenced. We find that the appeal outcome was consistent with Mr Bruce's initial opinion: it was much the same. We find that Mr Bruce had made up his mind by 7 December 2020 and that he was simply going through the motions with the claimant thereafter, and that there was no realistic prospect of the appeal being upheld. We find that Mr Bruce's suspicions about the claimant's dishonesty tainted the appeal process.

Request for repayment of salary

97. On 14 December 2020 the respondent requested the claimant to repay the sum of £9647.90 as overpayment of wages [1119].

98. The respondent submitted that this figure was calculated on the basis of the figures at page 1216 (which said that the gross sum due was £12,576.92) less a sum that would have been payable to the claimant by way of sick pay. We do not accept that the figures tally up. We were hindered in making findings on this as this point was first made in the respondent's closing submissions, so there was no witness evidence about it:

a. The claimant was contractually entitled to four days of sick pay at 50% pay which amounts to around £461 gross on the basis of his earnings of £5000 gross per month [104; 808].

b. The balance of the difference between the two figures (£12,576.92 minus £9647.90 minus £461) is £2,468.02. We believe this is more than the amount of SSP which the claimant would have been entitled to, as this would have been around £95.85 per week.

c. But we note that if the figures are wrong, they appear to be wrong in the claimant's favour.

99. Although there was no witness evidence as to the reason for the request for the repayment, the matter was discussed in the 7 October 2020 meeting with Ms Bharj. We find, based on that evidence, that the reason for the repayment request was because the claimant had been overpaid. The claimant was overpaid as he was paid his salary, rather than sick pay, when he was absent from work. The respondent has a contractual term which allows them to recover overpayment of salary [100, paragraph 5.3].

Proposed adjustments

100. Under cross examination the claimant stated that the unpaid leave, part-time working, and referral to occupational health adjustments should have been made following the 23 July 2020 meeting at the earliest, or by the 7 October 2020 meeting at the latest. These adjustments were not made.

101. In oral evidence the claimant stated that, to get back to work, he felt that he probably needed three months off work, combined with support from his employer and a phased return to work. He said that he would have needed to work 0.5 full time equivalent (FTE) hours. He felt that he could have built up to return to full time hours with support and appropriate medical intervention.

102. We accept that, given the claimant's health at the time, a three-month period of unpaid leave was required to enable him to improve his health and undertake medical investigations before he could have returned on a part time basis.

103. We find that there is evidence to support the claimant's assertion that he could have worked at 0.5 FTE and also achieved a pro-rata performance target:

    a. In September and October 2020, when the claimant was experiencing disability related symptoms and absence, the claimant was working approximately 0.5 FTE (77 hours) [852-853].

    b. The claimant achieved 57% of his target for chargeable hours in the August 2020 performance report. This is the last performance figure available for the claimant. We did not have evidence as to precisely how the chargeable hours figure was calculated. We note that the claimant worked 60 hours in July and August 2020, which is less than 0.5 FTE. If he achieved 57% of his chargeable hours' target over this reference period, that would demonstrate that the claimant could achieve 50% of his chargeable hours target whilst working less than 0.5 FTE.

Legal principles

Unfair dismissal

104. Section 94 Employment Rights Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer.

105. Section 98 ERA provides so far as relevant:

> *(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—*

…
(b) relates to the conduct of the employee ... ...

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

106. As noted in ***Abernethy v Mott, Hay and Anderson*** [1974] ICR 323, the reason for dismissal is the:

'… set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.'

107. It is a basic proposition of disciplinary proceedings that the charge against the employee facing dismissal should be precisely framed: ***Strouthos v London Underground Ltd*** [2004] IRLR 636.

108. The EAT has given guidance to Tribunals in considering the reasonableness of a conduct dismissal. In ***Burchell v British Home Stores*** [1980] ICR 303 at 304:

'What I have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case'.

109. Whereas the burden of proving the reason for dismissal lies on the respondent, the second and third stages of the ***Burchell*** test are neutral as to burden of proof and the onus is not on the respondent (***Boys and Girls Welfare Society v McDonald*** [1996] IRLR 129, [1997] ICR 693).

110. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss an employee for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. In ***Turner v East Midlands Trains Ltd*** [2013] ICR 525, Elias LJ (at paras 16–17) held:

> *'… the band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the*

> *dismissal process. This includes whether the procedures adopted by the employer were adequate: see Whitbread plc (trading as Whitbread Medway Inns) v Hall [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see J Sainsbury plc v Hitt [2003] ICR 111.'*

111. For there to be a higher standard of disciplinary process (such as the right to legal representation) in the case of a professional person who's right to practice their profession may be at risk, the disciplinary proceedings have to be determinative of the employee's right to practice their profession: they must have a 'substantial influence or effect' on the regulatory proceedings: ***R (on the application of G) v Governors of X School*** [2011] ICR 1033.

112. In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the Tribunal's view, have been appropriate, but rather whether dismissal was within the band of reasonable responses. The fact that other employers might reasonably have been more lenient is irrelevant (***British Leyland (UK) Ltd v Swift*** [1981] IRLR 91). The question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for the Tribunal to substitute its own decision.

Discrimination arising from disability

113. This right is contained in section 15 Equality Act 2010 which states:

> *(1) A person (A) discriminates against a disabled person (B) if—*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

114. Whether the treatment in issue could be described as '*unfavourable*' was the central issue in the case of ***Williams v Trustees of Swansea University Pension and Assurance Scheme*** [2018] UKSC 65, in which the Supreme Court upheld LJ Bean's statement in the Court of Appeal, that*: 'Shamoon is not authority for saying that a disabled person has been subjected to unfavourable treatment within the meaning of section 15 simply because he thinks he should have been treated better*'. Treatment that was advantageous to the claimant cannot be said to be 'unfavourable' because it was insufficiently advantageous to him.

115. As to the issue of causation. The guidance from ***Sheikholeslami v University of Edinburgh*** [2018] IRLR 1090 and ***Pnaiser v NHS England*** [2016] IRLR 170 is as follows:

    a. First the Tribunal must identify whether the claimant was treated unfavourably and by whom. It must then determine what caused that treatment, focusing on the reason in the mind of the alleged discriminator, but keeping in mind that the actual motive of the alleged discriminator in acting as they did is irrelevant. If the "*something*" was a

more than trivial part of the reason for unfavourable treatment, then this stage of the test is satisfied.

b. Second, the Tribunal must establish whether the reason was '*something arising in consequence of the claimant's disability*', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator. This is a question of objective fact for the Tribunal to decide based on the evidence. All that is required is a loose connection between the claimant's unfavourable treatment and the '*something*' that arises in consequence of the disability: ***Risby v London Borough of Waltham Forest*** EAT 0318/15*.*

c. It is not a "*but for*" causation test but rather a "*reason why*" test: ***Dunn v Secretary of State for Justice*** [2019] IRLR 298.

116. On the issue of objective justification:

a. In ***Homer v Chief Constable of West Yorkshire Police and West Yorkshire Police Authority*** [2012] IRLR 601, Lady Hale summarised the position as follows: *'To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so*.'

b. Elias J in ***MacCulloch v ICI*** [2008] IRLR 846, set out four legal principles with regard to justification, which have since been approved by the Court of Appeal in ***Lockwood v DWP*** [2013] IRLR 941:

i. *"The burden of proof is on the respondent to establish justification: see* ***Starmer v British Airways*** *[2005] IRLR 862 at [31].*

ii. *The classic test was set out in* ***Bilka-Kaufhaus GmbH v Weber Von Hartz*** *(case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or Tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (paragraph 36). This involves the application of the proportionality principle which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see* ***Rainey v Greater Glasgow Health Board*** *(HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30–31.*

iii. *The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it:* ***Hardy & Hansons plc v Lax*** *[2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].*

iv. *It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test in this context:* ***Hardy & Hansons plc v Lax*** *[2005] IRLR 726, CA."*

c. More fully on this last point, Pill LJ in ***Hardy & Hansons plc v Lax*** said as follows:

"32. … The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances."

117. An employer has a defence to a claim of discrimination arising from disability if it did not know and could not reasonably have been expected to know that the claimant had a disability. However, the employer cannot simply ignore evidence of disability. The EHRC Employment Code states that an employer must do all it can reasonably be expected to do to find out whether a person has a disability (see para 5.15). It suggests that *'[e]mployers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person"'* – paragraph 5.14.

Duty to make reasonable adjustments

118. The duty to make reasonable adjustments is contained in sections 20 and 21 (and schedule 8) Equality Act 2010, which says so far as is relevant to this claim:

20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

…..

21 Failure to comply with duty

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

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

119. "*Substantial disadvantage*" is defined in section 212 Equality Act 2010 as something more than minor or trivial.

120. The duty to make adjustments is, as a matter of policy, to enable employees to remain in employment, or to have access to employment. The duty will not extend to matters which would not assist in preserving the employment relationship. In ***Conway v Community Options Ltd*** UKEAT/0034/12, it was held that if an adjustment would not enable a return to work, it will not be 'reasonable' for it to be made. The essential rationale of the duty is to make adjustments that are effective in keeping a disabled person in employment, not to enable them to leave employment on favourable terms. The Tribunal must engage with how the step(s) that it finds should have been taken would have been effective to enable the disabled person to find work, continue working or return to work: ***Tameside Hospital NHS Foundation Trust v Mylott*** EAT 0352/09 and ***North Lancashire Teaching Primary Care NHS Trust v Howorth*** EAT 0294/13.

121. The duty to make the adjustment arises by operation of law, it is not essential for the claimant to have identified at the time what should have been done. The EHRC Code of Practice on Employment (2011) at paragraph 6.24 says that there is no onus on a disabled person to suggest what adjustments should be made.

122. However, the burden of proving the PCP and the substantial disadvantage before the Tribunal rests on the claimant. There must also be an indication before the Tribunal of what adjustments it is alleged should have been made. Once this is done the burden is on the Respondent to show that this could not have reasonably been made (***Project Management Institute v Latiff*** [2007] IRLR 579).

123. The EHRC Code of Practice on Employment (2011) at paragraph 6.28 lists factors which might be taken into account when deciding if a step is a reasonable one to take as follows:

    a. whether taking any particular steps would be effective in preventing the substantial disadvantage;
    b. the practicability of the step;
    c. the financial and other costs of making the adjustment and the extent of any disruption caused;
    d. the extent of the employer's financial or other resources;
    e. the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
    f. the type and size of the employer.

124. On the first point, the effectiveness of the proposed adjustment, the question of whether an adjustment is or would be effective has to be answered based on the evidence available at the time the decision to implement it (or not implement it) was taken. Medical evidence obtained after that time would only be relevant if and in so far as it casts light on what the likelihood was, objectively speaking, of the adjustment being effective: ***Brightman v TIAA Ltd*** EAT 0318/19. There does not necessarily have to be a good or real prospect of an adjustment removing a disadvantage for that adjustment to be a reasonable one. It is sufficient for the Tribunal to find that there would

have been a prospect of the disadvantage being alleviated: ***Leeds Teaching Hospital NHS Trust v Foster*** EAT 0552/10.

125. The EHRC Code says '*It is for the employer to justify the treatment. They must produce evidence to support their assertion that it is justified and not rely on mere generalisations*' (paragraph 5.12). It goes on to say at paragraph 5.21 that '*If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified'*.

126. As the EAT made clear in ***Royal Bank of Scotland v Ashton*** [2011] ICR 632 at paragraph 24, whether taking any particular steps would be effective in preventing the substantial disadvantage is an objective test. "*Thus, so far as reasonable adjustments are concerned, the focus of the tribunal is, and both advocates before us agree, an objective one. The focus is upon the practical result of the measures which can be taken. It is not— and it is an error—for the focus to be upon the process of reasoning by which a possible adjustment was considered. As the cases indicate, and as a careful reading of the statute would show, it is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment. It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons*."

Time limits

127. Section 123 Equality Act 2010 states, in so far as it is relevant:

> *(1) …Proceedings on a complaint within section 120 may not be brought after the end of:*
>
> > *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
> > *(b) such other period as the employment tribunal thinks just and equitable. …*
>
> *(2) For the purposes of this section*
>
> > *(a) conduct extending over a period is to be treated as done at the end of the period*
> > *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(3) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something*
>
> > *(a) when P does an act inconsistent with doing it, or*
> > *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

128. As to section 123(4) Equality Act 2010, where an employer has not deliberately failed to comply with the duty to make reasonable adjustments, they will be treated as having decided upon the matter either when they do an act inconsistent with the duty, or on the expiry of a period in which they might reasonably be expected to do it: ***Kingston upon Hull City Council***

v Matuszowicz [2009] ICR 1170, ***Olenloa v North West London Hospitals NHS Trust*** EAT 0599/11.

129. Whilst extension on just and equitable grounds is a broad discretionary power for the Tribunal, the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time and *'the exercise of discretion is the exception rather than the rule*' (***Robertson v Bexley Community Centre*** [2003] IRLR 434, at paragraph 25, per Auld LJ).

130. The issue of prejudice is almost always relevant to the exercise of the just and equitable discretion (Leggatt LJ in ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] ICR 194). However as Laing J drew attention to in ***Miller v Ministry of Justice*** UKEAT/0003/15, prejudice is an important but not a determinative factor, and it is forensic prejudice, rather than just the cost and hassle of meeting a claim that would otherwise be defeated on limitation grounds, that will be crucially relevant to the exercise of the discretion, telling against an extension of time. However, the converse does not necessarily follow: if there is no forensic prejudice that is not necessarily a decisive factor in favour of an extension of time.

131. In ***Adedeji v University Hospitals Birmingham NHS Foundation*** [2021] EWCA Civ 23, the Court of Appeal repeated a caution against tribunals relying on the checklist of factors found in s 33 of the Limitation Act 1980 (which applies to extensions of time for late personal injury claims in the civil courts). The Court of Appeal described that *'the best approach for a tribunal in considering the exercise of the discretion under s 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay"'*.

Conclusions

132. We took all of the above findings of fact and legal principles into account when reaching our conclusions. Our conclusions address the disputed issues in the list of issues broadly in turn, starting with the claim of unfair dismissal.

Unfair dismissal

133. First, the reason for dismissal and specifically paragraph 2.2 of the list of issues:

    a. We accept that the matter at paragraph 2.2.3 was not a reason for dismissal. The respondent does not rely on this as a reason and the claimant did not challenge that point.

    b. For the reasons set out at paragraph 86 above, we find that the reason for dismissal was both the claimant's amount of absence from April to October 2020 (issue at paragraph 2.2.1) and the failure to report the absences in accordance with the policy at page 807 (issue at paragraph 2.2.2).

134. Second, paragraph 2.3: whether the respondent had a genuine belief in the alleged misconduct. We accept that the respondent genuinely believed the allegations at paragraph 2.2.1 and 2.2.2. Those matters were admitted by the claimant. However, we do not find that the respondent genuinely believed that the absence itself (paragraph 2.2.1) was misconduct, given that the respondent did not dispute the genuineness of the absence, and accepted the fact of the claimant's ill health. Miss Shah's statement at the aborted 4 November 2020 disciplinary meeting was that the respondent did not question or dispute that the claimant was unwell. Mr Bruce said he accepted the claimant's reported health complaints at the appeal stage. Paragraph 2.2.1 was therefore a capability issue rather than misconduct.

135. Third, paragraph 2.4.1, we do not find that the respondent had reasonable grounds for their belief:

    a. The paragraph 2.2.1 issue was a capability matter. The genuineness of the claimant's ill health and associated absence was not in dispute. There was no reasonable grounds to believe this was misconduct.

    b. The respondent did not have reasonable grounds for the belief at paragraph 2.2.2, because:

        i. The respondent made incorrect assumptions about the claimant's health which led them to conclude that he was grossly incompetent. These assumptions were not reasonable grounds on which to form that belief.

        ii. Miss Shah was unaware of the claimant's stated reason for the misconduct, notwithstanding that this was raised by him at the investigation stage. Her unreasonable ignorance of this led her to conclude that the claimant was grossly incompetent, when his failure to report his absence was in fact due to his ill health.

        iii. The appeal was tainted by Mr Bruce's suspicions that the claimant was dishonest. There were no reasonable grounds for these suspicions given Miss Shah had rejected the allegation of dishonesty at the dismissal stage as "*there was insufficient evidence for me to find that you were dishonest*" [967].

136. Turning to paragraph 2.4.2 and the investigation. We do not find that there was a higher standard required of the investigation, or the disciplinary process more generally. We do not find that the outcome of the disciplinary process would have been determinative of the claimant's right to practice his profession. There was no evidence that the disciplinary process would have a substantial influence or effect on any regulatory proceedings. In any event, we find that the investigation was not within the ordinary reasonable range of responses, because:

    a. The paragraph 2.2.1 allegation was a capability issue which should have been investigated by obtaining medical evidence, either through an occupational health referral or by obtaining a report from the claimant's GP. Both options were open to the respondent, as set out in their absence management policy. Miss Stanciu accepted under cross

examination that this should have been investigated and could not explain her failure to do this.

b. Medical evidence was also required for the paragraph 2.2.2 allegation. The claimant informed Mrs Stanciu at the investigation that his ill health was the reason for his failure to report his absence. Mrs Stanciu accepted this under cross examination and could not explain her failure to commission an OH report about this.

c. It was not reasonable for Mrs Stanciu to require the claimant to obtain medical evidence himself, within a period of less than 24 hours, and to express doubt as to the truthfulness of what the claimant was saying. Mrs Stanciu accepted that this very short time frame was possibly unrealistic. This was particularly stark in the context of the claimant's disability and the respondent's constructive knowledge of this.

d. It was unreasonable for Mrs Stanciu at the investigation stage to make assumptions about the claimant's capability based on her own experience of being tired, rather than by commissioning medical advice about this.

e. It was also unreasonable for Ms Bharj to provide Mrs Stanciu with an inaccurate and incomplete summary of her 7 October 2020 meeting with the claimant. Mrs Stanciu said that if she had been properly apprised of the situation, she would have referred the claimant to occupational health.

f. Miss Shah and Mr Bruce also had the opportunity to refer the claimant to occupational health. It was not reasonable for them to make assumptions about the claimant's reasons for failing to report his absence. Miss Shah accepted that the claimant should have been investigated by way of a medical report, but this was not done.

137. Turning to paragraph 2.4.3.1(i). We find that it was outside the range of reasonable responses to refuse the claimant's request for a postponement of the 9 November 2020 meeting, because:

a. The claimant provided a good reason to postpone, namely that he was too ill, by virtue of his disability, to prepare for the meeting.

b. It was unreasonable for the respondent to place weight on the claimant's failure to report himself as absent on 9 November 2020 given (1) his past history of not reporting absence for disability related reasons; (2) his email of 6 November 2020 which stated that he was too ill to prepare for the meeting; and (3) the uncertainty as to whether he was on unpaid leave at this time.

c. It was also unreasonable for Mrs Stanciu to place weight on her incorrect assumption that the claimant would have had advance notification of his dental appointment, particularly as she had been sent the clinic letter which was dated the same day as the clinic appointment.

d. Mrs Stanciu stated that she would have postponed the hearing (and obtained OH advice) if (1) she had received a fit note from the claimant, which she assumed he would have had in his possession; or (2) she was made aware that the claimant was requesting adjustments. This position was outside the reasonable range of responses, because:

    i. Ms Bharj should have updated Mrs Stanciu about the 7 October 2020 meeting which discussed proposed adjustments.

    ii. Mrs Stanciu was aware that the claimant was requesting an adjustment of unpaid leave [941].

    iii. The claimant informed Mrs Stanciu that he did not have the mental energy, due to his fatigue, to collate relevant documents [942].

    iv. It was unreasonable for Mrs Stanciu to assume that the claimant would have had a fit note in his possession, given he had stated he needed time to collate medical evidence, and he was not complying with the absence reporting procedure for disability related reason for this.

138. Although the fairness of the appeal process was not expressly raised as a procedural issue at paragraph 2.4.3, we find that this falls within the issue to be determined, as it is an important part of any disciplinary process. We find that the appeal was outside the range of reasonable responses as Mr Bruce made up his mind before the claimant had the opportunity to make representations at the hearing. The appeal was tainted by Mr Bruce's unfounded suspicions of the claimant's dishonesty, which had been rejected by Miss Shah.

139. We reject the claimant's argument at paragraph 2.4.3.1(ii) of the list of issues. We find that the claimant was provided with a copy of the bundle at least by 4 November 2020 by email, and therefore before 30 November 2020, as alleged. We find that the claimant was aware of the existence of the bundle, and that it would be emailed to him, as this was discussed at the aborted 4 November 2020 meeting. We could not make findings about what was missing from the bundle as the evidence as to the contents of the bundle was unclear. However, the real issue for the claimant was not the timing of the provision of the bundle, or the contents of it, but his inability to engage with the documents and the process at that time due to his health. This goes to the points about the respondent's failure to allow a postponement or refer him to occupational health, as discussed above.

140. When considering all the circumstances of the case, and the factors set out at paragraph 2.4.4 of the list of issues, we find that the dismissal was outside the reasonable range of responses. We find in the claimant's favour on the matters at paragraph 2.4.4.1(i)-(iv) and (vi). These points overlap with the conclusions we have already reached. For completeness, we address each allegation at paragraph 2.4.4.1 in turn:

a. We accept the allegation against the respondent at paragraph 2.4.4.1(i). Miss Shah said that she was not aware of the claimant's disability related

reason for not reporting his absences. We have found that this was an unreasonable omission on her part and that she therefore had unreasonable grounds in her belief that the claimant was grossly incompetent.

b. This leads to paragraph 2.4.4.1(ii). We have found that the respondent's failure to take into account the claimant's health reasons (and instead relying on incorrect assumptions about the claimant's health) led them to unreasonably conclude that he was grossly incompetent.

c. Paragraph 2.4.4.1(iii): we have found that the respondent unreasonably failed to consider or commission medical evidence to understand the medical reasons for the claimant's absence and his failure to report his absence.

d. Paragraph 2.4.4.1(iv): we find that the respondent's HR department exacerbated the situation by failing to follow up with the claimant, or each other, in July 2020 and after the 7 October 2020 meeting about potential adjustments and a referral to occupational health. This rendered the investigation and the dismissal outside the reasonable range of responses.

e. Paragraph 2.4.4.1(v): we accept that the respondent took into account the claimant's employment record when reaching their decision.

f. Paragraph 2.4.4.1(vi): we find that the sanction was outside the reasonable range of responses given:

    i. The paragraph 2.2.1 absence reason was a capability issue, and the respondent did not dispute the claimant's ill health or his need to take time off work.

    ii. As to the paragraph 2.2.2 reason, dismissal was not an appropriate sanction given that Miss Shah rejected the allegation of dishonesty. Whilst gross incompetence could have been reasonable grounds for dismissal, it was outside the reasonable range of responses in this case as the respondent failed to take into account or investigate the claimant's disability related reasons for the misconduct.

Discrimination arising from disability

141. We find that the respondent had constructive knowledge of the claimant's disability from the 7 October 2020 meeting between the claimant at Ms Bharj. At that meeting the claimant disclosed his impairment (fatigue), that this was having a substantial adverse effect on his ability to carry out day to day activities (such as his ability to concentrate), and that those effects had been ongoing for a year. We do not find that the respondent had constructive knowledge from the 24 July 2020 performance meeting. Although potential adjustments were an HR action point following that meeting, and the claimant's health was discussed, the claimant did not disclose how long he had been unwell. As far as the respondent was aware

in July 2020, this had started two months prior in May 2020 when the claimant first informed Ms Joshi that he was unwell.

142. Turning to paragraph 5.1 of the list of issues and the alleged unfavourable treatment:

a. Paragraph 5.1.1: we find that the failure to postpone the disciplinary meeting was unfavourable treatment. The respondent's failure to do this meant the claimant was denied the opportunity to make representations at the disciplinary meeting, which ended in his dismissal. The appeal process did not rectify this as that process was unfair.

b. Paragraph 5.1.2: the respondent admits that summary dismissal was unfavourable treatment.

c. Paragraph 5.1.3: we do not find that the request for repayment was unfavourable treatment. We find that the claimant had been overpaid a sum at or more than this level, which he offered to repay. It was not unfavourable treatment for the respondent to seek repayment of this in accordance with the contract of employment and the claimant's offer to repay. The request was to put the claimant back in the position he would have been in if the overpayment had not been made. It was neutral rather than unfavourable treatment. The claimant did not strongly pursue this claim. He did not make submissions in support of this part of the section 15 Equality Act 2010 claim, although he did not concede the point.

143. As to the reason for this treatment:

a. The reason for dismissal was the claimant's absence from April to October 2020 and his failure to comply with the absence reporting procedure at page 807.

b. We find that the principal reason for the postponement was that the claimant had not provided medical evidence of his disability and he had not notified the respondent that he was absent from work on 9 November 2020. We reached that conclusion based on Mrs Stanciu's and Miss Shah's evidence. Although Miss Shah did not make the decision to refuse the postponement, she had the power to make a postponement herself, but declined to do this.

c. The reason for the request for the repayment was because the claimant had taken unauthorised absence and therefore been paid his salary during periods of sick leave, rather than his lesser sick pay entitlement.

144. Turning to paragraph 5.2 and the things said to arise in consequence of the claimant's disability:

a. Paragraph 5.2.1: it is admitted that the claimant's absence from September 2020 to October 2020 was something arising in consequence of his disability.

b. Paragraph 5.2.2: we find that the claimant's physical and mental exhaustion arose in consequence of his disability. We find that this was the principal symptom or effect of his fatigue. We reject the respondent's argument that this was the disability itself, and therefore cannot be the something arising.

c. Paragraph 5.2.3: we find that the claimant was unable to comply with the absence reporting procedure at page 807 (to report absence during the period of absence), because his disability meant he was unable to carry out the most basic tasks during the periods of his absence. This was therefore something arising in consequence of his disability.

145. Moving to paragraph 5.3. We find that the unfavourable treatment was because of something arising in consequence of the claimant's disability:

a. First, the unfavourable treatment of refusing the postponement request:

i. We find that the claimant failed to report his absence on 9 November 2020 due to his disability related inability to comply with the absence reporting procedures.

ii. We find that the claimant failed to provide medical evidence of his disability before 4 December 2020 because of his physical and mental exhaustion, this is consistent with the claimant's email at page 942 and what he said at the aborted 4 November 2020 meeting [1399].

iii. We therefore find that the decision not to postpone the 9 November 2020 meeting was because of something arising in consequence of the claimant's disability.

b. Second, the unfavourable treatment of summary dismissal:

i. The respondent admits that the dismissal was because of the claimant's failure to comply with the absence reporting requirements. We have found that the claimant's failure to report his absence arose in consequence of his disability.

ii. We have found that the dismissal was also because of the claimant's absence from April to October 2020. We find that part of the reason for dismissal was the disability related absence from September 2020 to October 2020. This amounted to 26 days of absence which was not a trivial amount of absence in the context of the 70 or so days of total absence.

c. Third, the request for the repayment. We have found that this was not unfavourable treatment. We find that the request was made because of something arising in consequence of the claimant's disability because the claimant's disability related inability to report his absence led to him being overpaid on 26 days from September to October 2020. This is not a trivial amount in the context of the 70 or so days of total absence.

146. Turning to paragraphs 5.4-5.5 and the objective justification defence:

a. The respondent's pleaded aims are ensuring its clients' case files were professionally run and that the claimant was not overpaid. We find that these were legitimate aims. They are real and objective considerations for the respondent's business given that it is a regulated professional services company, with vulnerable clients, striving to make a profit.

b. We do not find that the refusal of the postponement request was in the pursuit of the pleaded aims. There is no evidence that Mrs Stanciu considered these matters, and it is difficult to see the connection between the refusal and the aims. In any event, the decision was not a proportionate means of achieving the aims. The evidence was that there was another housing department that could have covered the claimant's work. Given his ill health and request for unpaid leave, the claimant could have been placed on sick leave, with SSP, or on unpaid leave for the period of the postponement. If that had been done, both aims (running client files professionally and ensuring that the claimant was not overpaid) could have been achieved in a less discriminatory way.

c. We accept that the aims were part of Miss Shah's decision-making process at the dismissal stage, although they were not expressly considered in the documentation. We find that the dismissal was not a proportionate means of achieving those aims. We have found that Miss Shah should have commissioned medical evidence and waited until the claimant was well enough to engage in the disciplinary process. The claimant could have been on SSP or unpaid leave during this period, and his files could have been transferred to a different housing department. If that had been done, both aims could have been achieved in a less discriminatory way.

d. We accept that the request for the repayment was to achieve the aim of not overpaying the claimant. It may have been preferable for the request to have been made for payment in instalments. We did not hear any evidence on that, or whether that would have been less discriminatory. However, given our finding that the request was not unfavourable treatment, the point is not material to our conclusions on this claim.

Reasonable adjustments claim

147. The claimant relies on the PCPs at paragraph 6.2.2 (PCP2) and paragraph 6.2.3 (PCP3). These PCPs are admitted, save that the words *"or be subject to a performance management process"* have been inserted at paragraph 6.2.2.

148. Addressing the PCP2 claim first, which relates to billing targets:

a. We find that the claimant's disability placed him at a substantial disadvantage in achieving his billing targets compared to those who are not disabled. We reach that conclusion because we find that, consistent with paragraph 6.3.2 of the list of issues, the claimant's disability related absence reduced his chances of achieving the level of billing and chargeable hours required to meet his targets.

b. We do not accept the substantial disadvantage at paragraph 6.3.1 of the list of issues. Whilst we accept that the billing targets created stress and anxiety for the claimant, there was no evidence that this was any more than the stress and anxiety created for non-disabled employees, and there was no evidence that this contributed to the claimant's exhaustion, as alleged. Insofar as the claimant may have found the targets more stressful, this could have been because he consistently failed to meet the billing to salary target, or because his absence made it more difficult for him to reach either target. The former point is not disability related as it continued throughout the period of employment and therefore before the claimant was disabled or unwell. The latter point adds nothing to the substantial disadvantage at paragraph 6.3.2.

c. As to paragraph 6.4 of the list of issues, we find that the respondent knew or ought to have known of the substantial disadvantage at paragraph 6.3.2. The respondent was aware of the claimant's performance from the monthly reports. The respondent was aware that the claimant's performance against the chargeable hours target had deteriorated. At the date of the respondent's knowledge of disability, it was aware of the claimant's disability related absence from work and his poor performance against the targets. It was logical that the claimant's poor attendance would hinder his performance against the targets.

d. We find that the proposed adjustments of part-time work and unpaid leave were reasonable, because:

    i. We find that there was a prospect that reducing the claimant to part-time hours would have alleviated the disadvantage and retained him in employment, because:

        1. In September and October 2020, the claimant was working approximately 0.5 FTE (77 hours) [852-853]. If his hours had been reduced to 0.5 FTE, his targets would have been reduced pro-rata. There is some evidence that he was able to achieve around 0.5 of his target for chargeable hours whilst working half full time equivalent. The last performance report was for August 2020. The claimant worked 60 hours in July and August 2020 and reached 57% of target chargeable hours. His performance against the billing to salary target was lower, but consistent with his performance throughout his employment.

        2. If the claimant worked 0.5 FTE hours, he would have had time off to focus on his health and wellbeing which would also have assisted him in reaching his targets and returning to full time hours. This conclusion is based on the claimant's oral evidence on this point which we accepted.

        3. In or around February 2022 the claimant was able to obtain and retain a role as locum solicitor with adjustments. The medical evidence from 16 February 2022 was that the claimant's sleep improved after he changed to a less stressful job. This supports a conclusion that the claimant

would have been able to work in a reduced part-time capacity with adjustments, albeit that this relates to a later time period.

4. The respondent did not adduce any evidence that part time hours would have been difficult for them to accommodate. This adjustment was discussed in the 7 October 2020 calls with Ms Bharj and Ms Joshi. It is an adjustment envisaged in the absence management policy. The evidence of Miss Shah was that some directors did work part time. The respondent had another housing department that could have covered the claimant's files whilst he worked part time. The respondent has therefore not proven that the adjustment was not a reasonable one.

ii. We find that a period of unpaid leave was also a reasonable adjustment:

1. Although this would not have directly reduced the claimant's billing targets, it would have given him time to improve his health, which would have increased his prospects of returning to work on part time hours and reaching his pro-rata billing targets. This is consistent with the claimant's evidence that he believed he needed three months unpaid leave before return on part time hours, and our finding that this period of absence was probably required.

2. The respondent did not adduce any evidence that unpaid leave would have been difficult for them to accommodate. This was discussed in the 7 October 2020 calls with Ms Bharj and Ms Joshi. The 3 November 2020 email from Mrs Stanciu [941] was that the unpaid leave adjustment was being considered. Miss Shah's evidence was that she did not consider unpaid leave as an alternative to dismissal. But that was not because this was an unreasonable adjustment, but because she did not think that was something she was in a position to offer. The respondent had another housing department that could have covered the claimant's files whilst he was on unpaid leave. The respondent has therefore not proven that the adjustment was not a reasonable one.

149. Addressing the PCP3 claim, which relates to the absence management policy:

a. First, substantial disadvantage, by reference to the claimant's amended formulation of the claim based on paragraphs 5.2.3 and 6.3.3 of the list of issues. We have found that the claimant was unable to comply with the absence management policy for disability related reasons (paragraph 5.2.3), and that this led to his dismissal (paragraph 6.3.3). We therefore find that PCP3 placed the claimant at a substantial disadvantage compared to someone without the claimant's disability.

b. Second, knowledge of the substantial disadvantage (paragraph 6.4). We find that the respondent knew of the substantial disadvantage from 29 October 2020 as Mrs Stanciu's letter of that date (1) recorded the claimant's statement that he could not comply with the reporting procedures for health reasons; and (2) invited the claimant to a disciplinary meeting, a potential outcome of which was summary dismissal. Given that the respondent's date of knowledge of the claimant's disability was slightly later (7 November 2020). We find that this later date is also the correct date for the respondent's knowledge of the substantial disadvantage.

c. We find that the proposed adjustments of unpaid leave and referral to occupational health were reasonable because:

    i. There is a prospect that if the claimant had been afforded these adjustments, he would have been able to defend himself successfully of the disciplinary charges and that he would have remained in the respondent's employment:

        1. The occupational health report should have supported the claimant's assertion that he was unable to comply with the reporting procedures due to his disability, as that is consistent with our findings, based on the medical evidence at and around the time.

        2. The occupational health report would have informed the respondent that the claimant's absences from September 2020 onwards were disability related, as that is consistent with the Tribunal's findings on disability status, based on the medical evidence at the time.

        3. If the claimant had been given unpaid leave, he would have had time to recover and engage in the disciplinary process and collate relevant medical evidence. This is demonstrated by his ability to provide medical evidence on 4 December 2020, and the claimant's oral evidence (which we accepted) that he was only able to do this after the responsibility to his clients was removed by virtue of the dismissal. If the claimant had been on unpaid leave that responsibility to clients would have been temporarily removed, affording him the mental energy to collate the relevant evidence.

        4. Mrs Stanciu's evidence was that the provision of a fit note from the claimant would have been enough to put the doubt out of her mind about the claimant's disability and his failure to report absences. Although Mrs Stanciu was not a decision maker at the dismissal or appeal stage, she provided HR advice to Miss Shah. Had the claimant provided medical evidence before the disciplinary meeting, it is likely that she would have provided this advice to Miss Shah.

5. The claimant was afforded time to prepare for the appeal hearing and he produced medical evidence for that purpose. However, we do not reach any conclusions from the fact that the appeal was not upheld. We have found that the appeal was outside the reasonable range of responses.

ii. The respondent has not adduced any evidence as to why unpaid leave was not a reasonable adjustment.

iii. As to the occupational health referral, the evidence of Miss Shah and Mrs Stanciu was that there was no good reason for the claimant not to have been referred to occupational health. This was therefore a reasonable adjustment even on the respondent's own evidence.

Time limits

150. The last in time date is 2 November 2020. The unfair dismissal and section 15 Equality Act 2010 claims were therefore presented in time.

151. The reasonable adjustments claims are potentially out of time. As the respondent does not appear to have deliberately failed to comply with the duty, the issue is whether they did an act that was inconsistent with it and, if not, the date of the expiry of a period in which they might reasonably have been expected to have made the adjustment.

152. Arguably the respondent's inconsistent act was the dismissal itself which would make the claims in time.

153. Alternatively, we considered the date when the respondent was reasonably expected to make the adjustments. The matter was not straightforward and there was evidence that pointed to dates both shortly before and after the limitation period:

a. The claimant's own evidence was that the adjustments should have been made by 7 October 2020 at the latest. This would make the claims out of time. We find that this time frame was unrealistic given that that was the date when these adjustments were first discussed, and there would need to be some time to assess their viability and obtain management approval. We do not find that 7 October 2020 is the relevant date.

b. Addressing the adjustment of unpaid leave first. Given the extent of the claimant's ill health on 7 October 2020, we find that this adjustment ought reasonably to have been made within two weeks of that meeting. That would make this claim out of time.

c. Occupational health referral adjustment. Given the evidence of Mrs Stanciu, the occupational health referral process would have taken around a month. The adjustment was first canvassed on 7 October 2020. We find that the claimant ought reasonably to have been referred to occupational health by no later than 29 October 2020, rather than

Mrs Stanciu putting the onus on the claimant to produce his own medical evidence on this date. We therefore find that the referral itself should have been made between 7-29 October 2020. However, we accept Mrs Stanciu's evidence that the entire referral process would have taken around a month after the initial contact with occupational health was made.

d. Part time work adjustment. This was discussed on 7 October 2020. We find that this adjustment would reasonably have taken longer to implement, as it would have involved wider business considerations than the other adjustments. We therefore find that the adjustment ought reasonably to have been made within approximately a month of that meeting. This claim is therefore in time.

154. Insofar as any of the reasonable adjustments claims are out of time, we find that it is just and equitable to extend time pursuant to section 123(1)(b) because:

a. The claimant's continuing ill health would have made it more difficult and time consuming for him to engage in the litigation process. Particularly given the nature of his ill health and the effect that this had on his ability to concentrate and draft documents.

b. The claimant's claims are meritorious.

c. The delay was short. Insofar as any of the claims are out of time, they were presented less than two weeks after expiry of the limitation period.

d. The respondent conceded that it was not prejudiced by that short delay.

Employment Judge Gordon Walker
Dated: 10 October 2023