EMPLOYMENT TRIBUNALS

Claimant:	**Mr A Booth**
Respondent:	**Delstar International, Limited**
Heard at:	**Leeds Employment Tribunal**
Before:	**Employment Judge Deeley, Ms Lancaster and Mr Taj**
On:	**27 (in public) and 29 September (in chambers) 2023**
Representation	
Claimant:	**Mr L Baynham (Pupil barrister)**
Respondent:	**Ms R Mellor (Counsel)**

RESERVED JUDGMENT (REMITTAL HEARING)

1. The claimant's complaints of discrimination arising from disability (s15 Equality Act 2010) relating to:

    1.1.1 the delay in applying for income protection for the claimant (paragraph 2(a)(i) of the List of Issues); and

    1.1.2 the 'attempt to dismiss' the claimant at the meeting on 5 February 2018 (paragraph 2(a)(iii) of the List of Issues); and

    succeed and are upheld.

2. The claimant's complaint of indirect disability discrimination (s19 Equality Act 2010) relating to the alleged PCP of "not applying for income protection for those employees who were permanently ill (i.e. unlikely to return to work)" (paragraph 5(a)(ii) of the List of Issues) fails and is dismissed.

3. The claimant is awarded an additional £2750 for injury to feelings plus interest of £1242, totalling £3992. This additional injury to feelings award has been calculated as follows:

    Additional injury to feelings award: £2750

    Calculation dates: 5th February 2018 (i.e. the date on which the act of discrimination started) – 27 September 2023 (i.e. the date of the Remittal Hearing)

Number of days: 2060 days
Interest rate: 8%

Interest calculation: £2750 x 0.08 x 2060/365 = £1242

WRITTEN REASONS

INTRODUCTION

Background

4. This part of the claim was remitted to this Tribunal following the judgment of the Employment Appeal Tribunal ("EAT") 0000958/20, handed down on 4 May 2023 (the "EAT Judgment"). In summary, Judge Keith concluded that:

   4.1 Discrimination arising from disability - the Tribunal had erred in failing to apply the guidance of Simler P in Pnaiser v NHS England [2016] IRLR 170, paragraph 31 in relation to the claimant's complaints of discrimination arising from disability (the "DAFD Complaints"):

      4.1.1 the delay in applying for income protection for the claimant (paragraph 2(a)(i) of the List of Issues) (the "Delay Complaint"); and

      4.1.2 the 'attempt to dismiss' the claimant at the meeting on 5 February 2018 (paragraph 2(a)(iii) of the List of Issues) (the "Dismissal Complaint");

      As a result: "It was not obvious as to which claim should succeed, which required a further assessment of the manager's thought processes. The ET needed to consider both claims afresh, by reference to the same 'something'."; and

   4.2 Indirect disability discrimination – in relation to the Delay Complaint, the Tribunal had also failed to consider whether the provision, criterion or practice applied by Delstar would put those who shared the same disability as the claimant at a particular disadvantage when compared with those who did not share that disability (the "Indirect Discrimination Complaint").

Tribunal proceedings

5. We considered the documents including those set out below during this hearing:

   5.1 the Liability Judgment dated 19 October 2020, the Remedy Judgment dated 4 December 2020 and the Remedy Extended Reasons dated 7 January 2021;

   5.2 the EAT Judgment;

   5.3 the parties' agreed hearing file for the remittal hearing, which included:

      5.3.1 selected documents form the liability and remedies hearing files;

      5.3.2 witness statements from the claimant, Mrs Booth, Mr Michael Booth and Mrs Davis; and

      5.3.3 the claimant's GP's letter dated 18 July 2023 and photographs of his skin condition.

Skeleton arguments and submissions

6. We also considered the helpful skeleton arguments and oral submissions made by both representatives during this hearing.

7. We have not reproduced the representatives' arguments and submissions in this Judgment in the interests of brevity, nor have we reproduced the law set out in the Liability Judgment, the Remedy Judgment and the Remedy Extended Reasons. However, we have taken these into account when reaching the conclusions set out in this Judgment.

Tribunal's Liability Judgment

8. The Tribunal's findings and conclusions in the Liability Judgment relating to the remitted complaints are set out in Annex 1 to this document.

EAT's judgment

9. The EAT's conclusions are set out at Annex 2 to this document:

   9.1 the DAFD Complaints are set out at paragraphs 28 to 33 of the EAT Judgment; and

   9.2 the Indirect Discrimination Complaint are set out at paragraphs 36 to 39 of the EAT Judgment;

Judgment on remitted complaints

DISCRIMINATION ARISING FROM DISABILITY COMPLAINTS

10. We have considered the statutory provisions and caselaw set out in the EAT Judgment, including the guidance set out by Simler J in Pnaiser v NHS England [2016] IRLR 170. Simler J noted at paragraph 31:

    "…it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

11. Simler P also held in Sheikholeslami v University of Edinburgh [2018] IRLR 1090, EAT, that:

    '…'the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable

treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence. (See City of York Council v Grosset [2018] EWCA Civ 1105, [2018] IRLR 746)'."

(a) Unfavourable treatment

12. The Pnaiser guidance states at paragraph 31:

(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

13. There is no dispute between the parties that the treatment of which the claimant complains could amount to 'unfavourable treatment', i.e.:

13.1 the delay in applying for income protection for the claimant (paragraph 2(a)(i) of the List of Issues); and

13.2 the 'attempt to dismiss' the claimant at the meeting on 5 February 2018 (paragraph 2(a)(iii) of the List of Issues); the

"Unfavourable Treatment".

(b) Cause of or reason for the Unfavourable Treatment

14. The Pnaiser guidance continues at paragraph 31 (with our emphasis in bold):

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).

15. There was no dispute that:

15.1 the claimant was on long term sick leave from 8 February 2017 and did not return to work due to his medical conditions set out in the Liability Judgment (see paragraphs 55 to 57);

15.2 the claimant's prognosis following his stroke in March 2017 was unclear. His treatment plan for his kidney disease had been postponed due to his stroke (see paragraph 56);

15.3 the claimant's company sick pay had run out by 8 October 2017, but the respondent continued to pay him discretionary sick pay (as set out in paragraphs 58 and 59 of the Liability Judgment);

15.4 Mrs Davis told the claimant that she intended to apply for income protection benefit for him under the PHI Scheme (arranged via Unum insurance company) and arranged for occupational health to assess the claimant on 7 December 2017.

16. We found in the Liability Judgment that Mrs Davis mistakenly believed that the respondent's PHI scheme only applied to employees who were able to return to work in the foreseeable future. This is set out at paragraphs 70 to 74 of our findings of fact in the Liability Judgment:

"70. Mrs Davis also wanted to discuss what might happen next with the claimant. She stated in evidence that she believed that the claimant was not eligible to receive income protection benefit under the Unum Scheme at that time.

71. We accept Mrs Davis' evidence that she mistakenly believed that the purpose of the Unum Scheme was to provide a means for the respondent to keep paying the employee's sick pay, pending an employee's return to work. She later stated in her email dated 21 March 2018 to Malcolm Hancock (Regional Organiser for Unite) that:

"…it is important to point out what the policy is and what it isn't. This is not a long-term disability policy covering our employees as insured parties…Instead it is a policy that covers SWM (not the employee) and pays SWM in order to allow us to continue to pay a partial salary to employees after the typical Company Sick pay would run out…

Accordingly, we have made use of the policy from time to time as to employees who have an expectation to return to work. However, we have not used it for employees who may be classed as permanently disabled and have no expectation or ability to return to work. It is not reasonable to expect the company to hold open his job for an employee for a guaranteed indefinite period of potentially numerous future years of incapacity.

Under the circumstances, it is not appropriate to engage this policy until Andrew returns to work because, if his medical report, is accurate, he will not be able to return to work at any time in any capacity. This is why we have not done so."

72. We also note Mrs Davis' evidence that:

72.1 she had limited experience of permanent health insurance or income protection policies, despite her 20 years' experience in HR;

72.2 she had not seen a copy of the Unum Scheme terms; and

72.3 she did not speak to Unum or to Finch (the respondent's brokers) regarding the claimant's eligibility for income protection benefit.

73. Mrs Davis believed that the respondent may need to consider terminating his employment because of her mistaken belief that he was not eligible for income protection benefit under the Unum Scheme.

74. Mrs Davis emailed Mr Millar (copied to Mr Fox) on 25 January 2018 regarding the meeting on 30 January and stated:

"We are concerned about [the claimant's] future capacity for work and will need to discuss his employment with us. Depending on how the meeting goes we may need to

adjourn and may even make a decision to terminate his employment on grounds of capability (incapacity)."

However, Mr Millar did not tell the claimant and Mrs Booth about his email at that time."

17. The claimant's representative submitted that the claimant's sickness absence was also a 'significant' (i.e. more than trivial) reason for the Unfavourable Treatment. The claimant's representative stated that the reason for the Unfavourable Treatment was due to a combination of Mrs Davis' mistaken belief and the claimant's long term sickness absence. He noted that:

    17.1 Mrs Davis originally intended to apply for income benefit for the claimant under the Unum scheme, as stated in her letter of 17 November 2017;

    17.2 Mrs Davis changed her mind when she received the occupational health report on 7 December 2017, which stated that the claimant was 'unfit for work' for the 'foreseeable future'.

18. The respondent's representative submitted that the claimant's sickness absence was part of the context of this claim, but was not the reason for the Unfavourable Treatment. The respondent's representative stated that the reasons why Mrs Davis formed her belief were those set out at paragraph 72 of the Liability Judgment (as quoted above), none of which related specifically to the claimant's sickness absence. She noted that Mrs Davis had intended to apply for income benefit under the Unum scheme for the claimant until she received the occupational health reported from the assessment on 7 December 2017.

19. The respondent's representative referred us to the case of Robinson v Department for Work and Pensions [2020] EWCA Civ 859 (which cross-referred to Dunn v Secretary of State for Justice and another [2018] EWCA Civ 1998). She stated that these cases illustrated the difference between an individual's disability or 'something arising' from disability being:

    19.1 the cause of unfavourable treatment; and

    19.2 the context in which unfavourable treatment takes place.

20. The respondent's representative that Mrs Davis had held the mistaken belief that only employees who were likely to return to work in the foreseeable future were eligible for benefits under the PHI scheme before the claimant's absences in 2017. She stated that Mrs Davis' mistaken belief only became 'operative' once the claimant was on long term sickness absence. In other words, she stated that 'but for' the claimant's disability, the claimant would not have been affected by Mrs Davis' mistaken belief.

21. The respondent's representative also sought to distinguish the recent Employment Appeal Tribunal's decision in Pilkington UK Ltd v Jones [2023] EAT 90 on the basis that the 'something arising' pleaded by the claimant in Pilkington was the employer's mistaken belief. She contrasted that with the current claim in which the claimant's long term sickness absence is relied on as the 'something arising'.

22. We have concluded that Mrs Davis' mistaken belief regarding the terms of the Unum scheme was a reason for the Unfavourable Treatment. However, we concluded that it was not the only reason when we reconsidered our findings on the DAFD complaints. The other reasons that we found included:

22.1 in relation to the Delay Complaint:

22.1.1 the claimant's long term sickness absence; and

22.1.2 the occupational health report of December 2017 stating that the claimant was unlikely to return to work;

22.2 in relation to the Dismissal Complaint:

22.2.1 the claimant's long term sickness absence;

22.2.2 the fact that the claimant's company sick pay entitlement had been exhausted in late 2017; and

22.2.3 the occupational health report of December 2017 stating that the claimant was unlikely to return to work.

23. We do not accept the respondent's representative's submission that the claimant's long term sickness absence was merely the 'context' to the Unfavourable Treatment because:

23.1 the respondent's representative is correct to say that Mrs Davis' mistaken belief existed before the claimant went on long term sickness absence;

23.2 however, this does not meant that the claimant's long term sickness absence was not a reason for the Unfavourable Treatment;

23.3 the background to the current discrimination arising from disability provisions in the Equality Act 2010 relates to the difficulties under the pre-Equality Act provisions (s3A(1)(a) of the Disability Discrimination Act 1995) highlighted by the House of Lords' judgment in Lewisham v Malcolm [2008] IRLR 700. (For an example of the difficulties under the 1995 Act, please see the EAT's decision in London Clubs Management Ltd v Hood [2001] IRLR 719, Mr Hood was refused sick pay when off work because of a medical condition amounting to a disability. 'But for' the existence of his medical condition, he would not have been in a situation where he was seeking sick pay. However, the EAT found that the employer's refusal to pay did not amount to unlawful discrimination. This is because the EAT held that the reason for the nonpayment was a decision taken by the manager that, in the exercise of a discretion which existed under the terms of the contracts of employment of staff, that sick pay would not be paid. The reason why Mr Hood was not paid sick pay was identified as not relating to his disability but rather to his employer's policy on sick pay);

23.4 Parliament's purpose in enacting the discrimination arising from disability provisions (which replaced the former disability-related discrimination provisions under the Disability Discrimination Act 1995) was to 'resurrect' the Clark v Novacold Ltd [1999] IRLR 318 Court of Appeal interpretation of the former disability-related discrimination provisions in the 1995 Act i.e. by not requiring a comparison with a non-disabled person (see, for example, Grosset);

23.5 the respondent's representative's contention that the claimant's sickness absence was merely 'context' to the Unfavourable Treatment in this case

would in effect re-introduce that comparison. The difference between this case and those of Robinson and Dunn, was that:

23.5.1 the difficulties experienced by the claimant in Robinson were technical IT difficulties (relating to the adaption of software) and delays in dealing with her second grievance. The Court of Appeal held at paragraph 59(b) that: "there was no finding of fact which could have established, even on a prima facie basis, that managers

> delayed the resolution of the grievance because of the claimant's disability or the symptoms arising from it.";

23.5.2 the claimant's ill health retirement process in Dunn was also mishandled for reasons unrelated to the claimant's disability. The Employment Tribunal in that case quoted at paragraph 117 of its reasons from a letter from the respondent's Case Manager Team Leader which stated that:

> "Overall it is clear from looking into the matters relating to your case that our process has failed to appropriately manage the filing of your referral papers, as well as keep you informed and updated on both the management of your referral and your complaint or manage your expectations on the sometimes lengthy processes in being supplied with FME [further medical evidence] related to the request for ill health retirement."
>
> The Employment Tribunal in Dunn also noted a number of contemporary expressions of dismay or concern by the claimant's line manager and other managers about how long the process was taking. The Court of Appeal observed at paragraph 44 that: "In truth the [claimant's] argument appeared to be "I would not be in the situation where I was the victim of delay and incompetence if I were not disabled";

23.6 in the current case, Mrs Davis' mistaken belief regarding eligibility for benefits under the respondent's PHI scheme was not 'unrelated' to the claimant's disability – we found that she believed that the scheme did not apply to the claimant because she received the December 2017 occupational health report stating that he his long term sickness absence would continue and he was unlikely to return to work in the foreseeable future.

24. We therefore concluded that the claimant's long term sickness absence was a 'significant' (i.e. more than trivial) reason for the Unfavourable Treatment.

(c) Whether the reason or cause is 'something arising in consequence of B's disability'

25. The Pnaiser guidance continues at paragraph 31 (with our emphasis in bold):

> (d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described

comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability. (e) For example, in Land Registry v Houghton UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

26. The respondent accepted that the claimant's long term sickness absence was 'something arising' from his disability (see paragraph 122 of the Liability Judgment).

27. The claimant's remitted DAFD Complaints therefore succeed and are upheld.

INDIRECT DISCRIMINATION COMPLAINT

28. The parties agreed that the provision, criterion or practice had been applied to the claimant i.e.: not applying for income protection for those employees who were permanently ill (i.e. unlikely to return to work) (the "PCP").

29. The parties' dispute relating to this complaint was limited to the pool for comparison. The claimant's representative contended that the pool consisted of all of the respondent's employees who were absent on long term sick leave, regardless of whether or not they were 'permanently ill'. He stated that the reason for this contention was that all such respondent's employees would be eligible to receive PHI benefits under the scheme if they met all of the other scheme criteria.

30. The claimant's representative stated that statistical evidence is not always required in this case. He stated that employees in the comparator group could include a range of individuals, such as:

    30.1 individuals who were not disabled for the purpose of the Equality Act 2010 (e.g. suffering from an orthopaedic injury but were likely to recover within a 12 month period);

    30.2 individuals who were disabled but whose conditions may have periods of relapse and recovery (e.g. multiple sclerosis, chronic depression and anxiety).

31. The respondent's representative contended that the pool consisted of all of the respondent's employees who had been were on long term sickness absence and

who were 'permanently ill' and who did not have the claimant's medical condition. She referred to paragraph 4.18 of the Code of Practice which states that:

31.1 the pool consists of the group that the PCP would affect (either positively or negatively); and

31.2 excludes those who are not affected by the PCP.

32. The respondent's representative stated that anyone who was likely to return to work would not, therefore, be affected by the PCP and should be excluded from the pool for comparison. She submitted that the claimant was not place at a particular disadvantage because of the PCP – Mrs Davis would have treated any other employees who were permanently ill in the same manner.

33. We note that it is settled law that the 'pool' of individuals upon whom the effect of the provision, criterion or practice is evaluated must be populated by persons whose circumstances are the same, or not materially different from the claimant. This is set out in section 23(1) of the Equality Act 2010 which states that on a comparison of cases s19 (indirect discrimination) there must be 'no material difference between the circumstances relating to each case'. (In relation to indirect discrimination this means that the comparison must be with those who (apart from the particular protected characteristic) are in circumstances that are the same or not materially different: see Pendleton v Derbyshire County Council [2016] IRLR 580, EAT.

34. We do not accept that the claimant's representative's submission regarding the pool for comparison. It was a material circumstance of the claimant's situation that he was on long term sick leave and was 'permanently ill (i.e. unlikely to return to work)'. The comparison must therefore be made between those employees on long term sick leave who were 'permanently ill (i.e. unlikely to return to work)' and:

34.1 who had the same medical conditions as the claimant (i.e. also suffered from the claimant's disability); and

34.2 who did not have the same medical conditions as the claimant (whether they were disabled or not for the purposes of s6 of the Equality Act 2010).

35. In any event, the claimant did not provide any statistical evidence regarding this pool. He provided a recent GP's letter dated 18 July 2023 (the "2023 GP Letter") and also relied on the medical evidence provided previously at the Liability and Remedies Hearings. We note that the 2023 GP Letter states:

"There is no doubt that all of these conditions together would have had a significant impact on anybody in terms of employment. I don't know the ins and outs of his job and what he did day in and day out. Again I am not an occupational health doctor, but the significant co-morbidities he now suffers from I believe would significantly affect anybody."

36. However, the 2023 GP Letter does not provide any evidence regarding the impact of the PCP on the claimant or others who were permanently ill.

37. The claimant's remitted complaint of indirect disability discrimination therefore fails and is dismissed.

Remedy for remitted complaints

38. The respondent's representative accepted that if the claimant's remitted indirect disability discrimination complaint failed, but his remitted discrimination arising from disability complaint (relating to delay) succeeded, then the Tribunal's injury to feelings award set out in the Remedy Judgment would stand.

39. The question for the Tribunal is therefore what additional injury to feelings award (if any), should be made in relation to our decision to uphold the Dismissal Complaint.

40. The claimant submitted the following additional evidence which we have taken into account when determining remedy:

    40.1 the 2023 GP Letter; and

    40.2 the claimant's photographs of his skin condition.

    He also relied on the witness statements and evidence provided at the Liability and Remedies Hearings.

41. Both representatives agreed that the correct approach to awarding injury to feelings would be for the Tribunal to:

    41.1 consider what the total injury to feelings award would have been, if awarded at the time of the Remedies Hearing;

    41.2 deduct the amount previously awarded in the Remedy Judgment and paid by the respondent; and

    41.3 award interest on the balance of the injury to feelings award.

42. The claimant's representative submitted that the award should be at the top of the lower band of Vento (i.e. around £8000 based on the Vento bands in force at that time).

43. The respondent's representative submitted that the Tribunal's previous award of £3250 plus interest was the correct award for both the Delay Complaint and the Dismissal Complaint because:

    43.1 the witness statement submitted by the claimant for the Remedies Hearing demonstrated that a large part of the overall upset that the claimant experienced was due to his perception of the handling of the grievance process and the lack of payment of the payment of his pension contributions at what he thought was the correct rate;

    43.2 the claimant's witness statement did not separate out the injury to feelings that he suffered under each of the Delay Complaint and the Dismissal Complaint because he experienced the same 'turmoil' under both heads of claim.

44. We note the findings made in our Remedy Extended Reasons:

    "22. On balance the Tribunal considers that any award ought to be assessed in the lower Vento band but at the lower end of that band. The key reasons for our conclusion include:

        22.1 We recognise that the claimant was upset and distressed but that the reasons for his distress were not solely related to the Unum Scheme Complaint. The causes of his distress included:

22.1.1 the claimant's serious ill health issues which had been ongoing since late 2016 and which understandably caused him significant ongoing concerns; and

22.1.2 other matters relating to his employment with the respondent that formed part of his disability discrimination claim, but which were not upheld by the Tribunal as acts of unlawful discrimination.

22.2 We have seen the medical evidence of the claimant's condition referred to in our findings of fact. However, the medical evidence does not specifically refer to any exacerbation of the claimant's existing medical conditions resulting from the Unum Scheme Complaint. The claimant's doctor's letter

of 27 February 2018 refers to his difficulties 'over the past year' and largely mirrors the symptoms reported in the occupational health report of 7 December 2017.

22.3 We found that the Unum Scheme Complaint related to a one-off act by the respondent, albeit one that had consequences that continued for around 3 months. We also found that the act resulted from Ms Davis' mistaken belief regarding the claimant's eligibility for income protection benefit under the Unum Scheme, rather than any deliberate action on the part of Ms Davis to prevent the respondent from applying for income benefit on behalf of the claimant.

23 The Tribunal considers an award of £4,000 (inclusive of interest) to be a fair assessment of an amount which is aimed at compensating the Claimant rather than punishing the Respondent. This award reflects the significant degree of upset suffered by the claimant and also the Tribunal's finding as to the actual act of discrimination which caused or contributed to it."

24 We have concluded that the claimant should be awarded £6000 for injury to feelings in total for the upheld discrimination arising from disability complaints (i.e. both the Delay and Dismissal Complaints). This amount is inclusive of the £3250 injury to feelings award already made in the Remedy Judgment.

25 In making this award, we have taken into account the relevant law summarised in the Remedy Extended Reasons. The key reasons for making the increased injury to feelings award are:

25.1 the 2023 GP Letter and the photographs of the claimant's skin condition do not assist us because they do not provide any medical evidence in relation to the Dismissal Complaint specifically (as opposed to any other distress that the claimant suffered);

25.2 the claimant was given the opportunity at the Remittal preliminary hearing to request to submit an additional remedies statement and medical evidence and chose not to do so, despite being represented on a pro bono basis by Mr Croxford KC at that hearing;

25.3 however, we concluded that the respondent's conduct complained of in the Dismissal Complaint did have a significant impact on the claimant's injury

to feelings, over and above that caused by the conduct in the Delay Complaint. In particular, in our Liability Judgment we concluded that:

25.3.1 when the claimant attended the meetings on 30 January and 5 February 2018, the respondent had not informed him that:

25.3.1.1 they no longer intended to apply to the Unum scheme for PHI benefit on the claimant's behalf; nor

25.3.1.2 that one potential outcome of the meeting was the termination of the claimant's employment. Although Mrs Davis had informed the claimant's union representative that this was a possibility, neither the claimant nor Mrs Booth were aware of this (otherwise Mrs Booth would have attended the meetings).

See paragraphs 74 to 79 of the Liability Judgment;

25.3.2 the discussions at the meeting caused the claimant's brain to 'shut down' to the point that he was unable to recall the discussions at the meeting and believed that he was being dismissed, which led Mrs Booth to write a letter appealing against his dismissal to Mr Ainsley (paragraphs 81 to 88);

25.3.3 we also found at paragraph 83:

"We accept the claimant's evidence that he experienced uncertainty and anxiety because of the discussions on 5 February 2018. The claimant was understandably worried about his financial position because he had a family to support and a mortgage to pay. The claimant was also concerned about the impact of the financial worries on his health because he had been told that worrying about things could lead to further damage whilst he was recovering from his stroke."

26 We previously awarded interest on the £3250 injury to feelings award made in the Remedy Judgment. The respondent has already paid the amount of £4000 set out in the Remedy Judgment.

27 The balance of the injury to feelings award is therefore £2750. The interest on the balance of that injury to feelings award is £1242, calculated as set out below:

Balance of injury to feelings award: £2750

Calculation dates: 5th February 2018 (i.e. the date on which the act of discrimination started) – 27 September 2023 (i.e. the date of the Remittal Hearing)

Number of days: 2060 days
Interest rate: 8%

Interest calculation: £2750 x 0.08 x 2060/365 = £1242

Case Number: 1807548/19

RESERVED JUDGMENT (REMITTAL HEARING)

Employment Judge Deeley

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Employment Judge Deeley

Dated: 16 October 2023

JUDGMENT SENT TO THE PARTIES ON

16 October 2023

FOR EMPLOYMENT TRIBUNALS

Public access to Employment Tribunal judgments
Judgments and written reasons for judgments, where they are provided, are published in full online shortly after a copy has been sent to the parties in the case.

Annex 1 – extracts from Liability Judgment

Delay Complaint

1. The Tribunal's original conclusions relating to the Delay Complaint were set out at paragraphs 118 to 125 of the Liability Judgment: Discrimination arising from disability (section 15 EQA)

   a. Did the respondent treat the claimant unfavourably by delaying the application for income protection?

   118. We found that the respondent could have applied for income protection benefit under the Unum Scheme on behalf of the claimant at any time from May 2017 onwards. The application could have been made after May 2017 because it was likely that his absence would continue beyond the six month deferred period (i.e. beyond 8 August 2017), although the respondent would not have received any payment for the claimant's absence until after 8 August 2017.

   119. However, the unfavourable treatment that the claimant has complained of did not commence at the time that the application could have been made. The claimant complains of two difficulties that he faced due to the respondent's delay:

   119.1 Anxiety and uncertainty – we found that up until the meeting on 5 February 2018, the claimant believed that the respondent intended to apply for income protection benefit under the Unum Scheme on his behalf. We found that the claimant did not experience uncertainty and anxiety caused by the respondent's delay until Mrs Davis told him at the meeting on 5 February 2018 that she believed that he was not eligible for the benefit because the occupational health report stated that he was unlikely to be able to return to work. This anxiety and uncertainty continued up until the claimant was informed in late April or early May 2018 that Mrs Davis was mistaken and that the respondent would make the application on his behalf.

   119.2 Financial disadvantage – the claimant's financial disadvantage started on 8 October 2017 (when his contractual sick pay ended) and ended on 14 September 2018 when Unum awarded him backdated cover. Mrs Davis' evidence was that the respondent paid employer pension contributions of 6.75% and employee pension contributions of 1.5% into the respondent's pension scheme on behalf of the claimant during that period, rather than the 7% employer contribution and 3% employee pension contribution under the Unum scheme.

   b. If so, was such unfavourable treatment due to something arising in consequence of the claimant's disability? The claimant relies on the following as the "something arising" in consequence of his disability: the fact that he was absent due to long term sickness was the reason why the respondent did not apply for income protection cover for the claimant until after 23 March 2018.

120. We have considered the EAT's decision in the Sheikholeslami case, referred to in the section on 'Relevant Law' above. We note that:

120.1 the first issue is whether the respondent treated the claimant unfavourably because of an identified 'something' and that this involves an examination of the respondent's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found;

120.2 the second issue is whether that something arose in consequence of the claimant's disability.

121. In relation to the first issue, we have concluded that Mrs Davis' delay in applying for income protection benefit under the Unum Scheme was due to her view that the scheme did not apply to employees on long term sickness absence who were unlikely to return to work. The key reasons for our decision are:

121.1 Mrs Davis initially intended to make an application. She changed her mind after she received the occupational health advice that the claimant would not be fit for work for the 'foreseeable future' due to his medical conditions.

121.2 Mr Hancock later challenged Mrs Davis' interpretation of the Unum Scheme rules. Mrs Davis' email response to Mr Hancock of 21 March 2018 stated (with our underlining added for emphasis):

"Accordingly we have made use of the policy from time to time as to employees who have an expectation to return to work. However, <u>we have not used it for employees who may be classed as permanently disabled and have no expectation or ability to return to work</u>."

Mrs Davis sought legal advice after this email exchange and realised she had made a mistake. The claimant's prognosis did not change materially throughout this period.

122. Turning to the second issue, the respondent has already accepted that the claimant's sickness absence was 'something arising' from his disability. This must be correct in light of the medical evidence provided at the time.

c. If so, can the respondent show that treatment was a proportionate means of achieving a legitimate aim? The respondent will rely on the following aim: to only make applications that were understood to have a reasonable likelihood of being accepted (e.g. that an employee's ill health would continue beyond the 26 week deferral period under the Unum policy or that otherwise met the policy requirements) and to make appropriate enquiries to establish this, to include receiving and responding to representations from the claimant's union. The respondent states that the delay was proportionate to this aim because the respondent continued to pay the claimant any entitlement he would have received under the policy as discretionary sick pay.

123. We accept that making applications that would have a reasonable likelihood of being accepted may be 'a legitimate aim'.

124. However, we find that the respondent's treatment of the claimant was not a proportionate means of achieving that aim. The reason for the respondent's delay

was Mrs Davis' mistaken belief as to the terms of the Unum scheme. Mrs Davis admitted that she did not read the terms of the scheme and that she did not contact Unum and/or Finch regarding the terms until Mr Hancock challenged her on this in March 2018. In addition, the claimant received lower employer and employee pension contributions as part of his discretionary sick pay than he would have received under the Unum Scheme.

125. The claimant's complaint of discrimination arising from disability in relation to this factual complaint is upheld.

Dismissal Complaint

2. The Tribunal's conclusions relating to the Dismissal Complaint were set out at paragraphs 133 to 136 of the Liability Judgment:

Discrimination arising from disability (section 15 EQA)

a. Did the respondent treat the claimant unfavourably by 'attempting to dismiss' the claimant at the meeting on 5 February 2018?

133. We have concluded that the events at the meeting on 5 February 2018 amounted to unfavourable treatment. The claimant was told that he was not eligible to receive the benefit of the Unum Scheme and was offered a settlement package based on the termination of his employment. At the time of this meeting the claimant's health was poor as set out in our findings of fact.

134. We also found that the respondent discussed what might happen if the claimant refused the settlement (i.e. that his employment may be terminated after a capability process). The respondent did not forewarn the claimant that a settlement package or any potential capability process might be discussed during the meeting.

b. If so, was such unfavourable treatment due to something arising in consequence of the claimant's disability? The claimant relies on the following as the "something arising" in consequence of his disability: the fact that he was absent due to long term sickness was the reason why the respondent decided to consider terminating the claimant's employment at the meeting on 5 February 2018.

135. We have concluded that the unfavourable treatment was not due to something arising in consequence of the claimant's disability. Rather, it arose from Mrs Davis' mistaken belief that the claimant was not eligible for income protection benefit under the Unum Scheme and that the respondent therefore needed to consider other options, such as a settlement.

136. The claimant's claim of discrimination arising from disability in relation to this factual complaint fails.

INDIRECT DISCRIMINATION COMPLAINT

3. The ET's conclusions relating to the Indirect Discrimination Complaint are set out at paragraphs 126 to 132 of the ET Judgment as follows:

Indirect discrimination (Equality Act 2010 section 19)

a. Did the respondent operate the following PCP: not applying for income protection for those employees who were permanently ill (i.e. unlikely to return to work)?

126 We concluded that the respondent did operate a PCP of not applying for income protection for employees who were permanently ill and unlikely to return to work. Until Mrs Davis realised her mistake in late March 2018, she would have applied the same PCP to any employee who was absent on sick leave and who may have met the definition of 'incapacity' under the Unum Scheme.

b. If so, did the respondent apply this PCP to the claimant?

127 The respondent did apply this PCP to the claimant.

c. Did the respondent apply the PCP to non-disabled persons or would it have done so?

128 The respondent was not considering any other applications for income protection at that time. However, it would have applied this PCP to non-disabled persons, albeit that it is difficult to envisage a non-disabled person in such circumstances. We note that any employee who was permanently ill (i.e. unlikely to return to work) and who was likely to meet the 'incapacity' criteria in the Unum Scheme was highly likely to be regarded as having a 'disability' for the purposes of s6 of the EQA.

d. Did the PCP put disabled persons at a particular disadvantage when compared with non-disabled persons, in that the claimant contends that he experienced uncertainty and anxiety for several months because he did not have the benefit of income protection during that period?

129 We have concluded that the PCP did put disabled persons at a particular disadvantage when compared with non-disabled persons. This is because disabled persons as a group were far more likely than non-disabled persons to be eligible to receive the benefit of income protection cover under the Unum Scheme.
e. Did the PCP put the claimant at that disadvantage?

130 The claimant was put at that disadvantage. He experienced uncertainty and anxiety because of the delayed application. He also received lower pension employee and employer contributions during that period.

f. Was the PCP a proportionate means of achieving a legitimate aim?

131 We have concluded that the PCP was not a proportionate means of achieving a legitimate aim for the reasons set out in relation to the discrimination arising from disability complaint.

132 The claimant's claim of indirect discrimination in relation to this factual complaint succeeds.

Annex 2 - extracts from Employment Appeal

Tribunal's judgment

DISCRIMINATION ARISING FROM DISABILITY COMPLAINTS

1. Judge Keith's conclusions on the remitted Delay and Dismissal Complaints are set out at paragraphs 28 to 33 of the EAT Judgment:

"Conclusions – Appeal and Cross Appeal - Section 15 EqA

28. There are aspects of both representatives' submissions with which I agree. I accept Mr Croxford's submission that part of the ET's error flowed from its failure to consider the fuller set of guidance provided at para 31 of Pnaiser, rather than the briefer recitation of Sheikholeslami. Both Presidential decisions are, of course, correct, but Pnaiser explores in more detail the two aspects of causation, namely the 'because of' stage involving A's explanation for the treatment (and conscious and unconscious reasons for it) and the 'something arising in consequence' stage, which requires consideration of whether, as a fact, the something was as a consequence of the disability. They may be answered in any order, but analysis of both is required. Pnaiser also discusses two other issues – the problem of multiple causes in the 'because of' analysis, and a chain of links in the 'something arising' analysis.

29. In its analysis of the dismissal claim, the ET referred at paragraph 135 to it having arisen from the manager's mistaken belief about the terms of the Unum policy alone. I accept Mr Croxford's challenge that there is no analysis of possible multiple causes. However, I also accept Ms Mellor's submission that there is a second error, which might have been identified more clearly, had the Pnaiser guidance been adopted. This is that the ET was not consistent in how it defined the 'something arising.' A lack of consistency meant that both stages of the section 15 analysis were undermined.

30. In the List of Issues, the 'something' was defined at item 2(b)(i) "the fact that he was absent due to long term sickness." This was for the delay and dismissal claims (items 2(b)(i)(a) and (b)). It did not refer to permanent incapacity. The ET reiterated this, at para b, after para 119, where it stated "The claimant relies on the following as "something arising"…the fact that he was absent due to long term sickness." At paragraph 120, the ET found that the manager's delay was due to her view that the Unum scheme did not apply "to employees who were on long term sickness absence who were unlikely to return to work…." The two are not necessarily inconsistent or mutually exclusive, but they are also not the same. The ET then returned to the original definition of 'something' at paragraph 122. In relation to the dismissal claim, at paragraph 134b, the ET referred to the claimant's reliance on "the following as something arising in consequence of his disability: the fact that he was absent due to long-term sickness was the reason why the respondent decided to consider terminating the claimant's employment at the meeting on 5 February 2018." In contrast to the delay claim, the ET did not refer to the manager's belief that the Unum policy did not apply to those employees who were unlikely to return to work, in the dismissal claim. Instead, the ET referred to the belief that "the claimant was not eligible for income protection benefit under the Unum scheme," and stopped there, without referring to the

likelihood of return to work. The ET did not explain why the same belief caused one unfavourable treatment, but not another, and how the findings on permanent incapacity related to the 'something' relied on for the purposes of the delay claim.

31. In summary, the ET erred in focussing on a single cause (the manager's belief at the 'because of' stage) when analysing the dismissal claim, while making findings in the delay claim which did not correspond to the 'something' relied on. These two errors, in combination, explain why the ET reached different decisions, which the representatives accepted could not both be correct.

32. I have considered whether it is appropriate to preserve either of the ET's conclusions. I conclude that it is not appropriate to do so. The issue of causation needs to be addressed with findings on the common, accepted 'something arising', namely the claimant's absence due to long term sickness absence, not permanent incapacity, and the ET needs to consider whether there are multiple causes. This is not a case where the facts only lend themselves to one conclusion. It is appropriate that the ET should consider each of these two claims afresh.

33. The claimant's appeal and Delstar's cross-appeal in relation to the section 15 EqA delay and dismissal claims both succeed. The ET's conclusions on both are not safe and cannot stand. I remit both issues to the ET to consider again, as the representatives have urged me to."

INDIRECT DISCRIMINATION COMPLAINT

2. Judge Keith's conclusions on the remitted Indirect Discrimination Complaint are set out at paragraphs 36 to 39:

Discussion and Conclusions (Section 19 EqA)

36. In contrast to section 15 claims, the PCP was stated as "not applying for income protection for those employees who were permanently ill, i.e. unlikely to return to work."

37. I accept Ms Mellor's submission that while the ET asked itself about two comparator groups, disabled and non-disabled people, that was not a correct comparison, as it reflected the section 20 EqA test, not the section 19 test. It is worth returning to the relevant statutory provisions. Section 19 EqA states:

"Section 19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if— (a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are— ….

Disability…"

38. Section 6(3) EqA states:

"6 Disability

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

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

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

39. The meaning of section 19, when read with section 6(3), is clear. There is a requirement of a PCP of potentially general application, not just to those sharing a claimant's disability. The group of people, of which the claimant is a member, must have the same disability as the claimant. There needs to a comparison between that group and those who do not share that disability. The comparator group may include those without any disabilities, and those with disabilities which are not the same as the claimant's. The comparison is not between people with disabilities and those without, which is a different requirement under the section 20 duty to make adjustments (where a PCP puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled). Both the claimant's group and the comparator group may be hypothetical, because of the word, "would", in subsections 2(a) and (b) of section 19. However, that does not avoid the need to analyse whether those in the claimant's group would be put to a particular disadvantage (without falling into the trap of asking "why", as it is often difficult to identify complex causes).

While statistical evidence may not be available, the impact on one person, with the same disability, may not necessarily be the same as the impact on another. For example, it may be, depending on the evidence, that a proportion of those who share the claimant's disability, a pulmonary embolism and kidney disease, would have still been viewed as likely to return to work, during the time period when the PCP was applied. While it is not a requirement that the PCP puts every member of the claimant's group at a particular disadvantage, the ET had not asked that question, or gone on to consider whether those with the same disability would be viewed as more unlikely ever to return to work, when compared with those with different disabilities or no disabilities at all. That, ultimately, was the flaw in Mr Croxford's reformulated PCP. It assumed that people with disabilities were more likely to be put to particular disadvantage than those without disabilities, without making a comparison between the two appropriate groups. As a consequence, the ET erred in its assessment of group disadvantage.

It is no answer to point to a person who is not disabled, who had an absence lasting or likely to last more than 26 weeks (the deferral period under the Unum scheme)

but less than twelve months, who would not be put to a particular disadvantage. While that person would be one member of the comparator group, it ignored other group members, including those with different disabilities, in comparison to those sharing the claimant's disability. Contrary to Mr Croxford's submissions, the ET's analysis was not consistent with Ryan, because of the flaw in the ET's analysis of group disadvantage. The ET will therefore need to revisit this analysis when assessing the section 19 EqA claim. I therefore also allow this part of Delstar's cross-appeal against the ET's decision on the section 19 claim.

EMPLOYMENT TRIBUNALS

Claimant: Mr A Booth
Respondent: Delstar International, Limited

Heard at: Leeds Employment Tribunal
Before: Employment Judge Deeley, Ms Lancaster and Mr Taj
On: 27 (in public) and 29 September (in chambers) 2023

Representation
Claimant: Mr L Baynham (Pupil barrister)
Respondent: Ms R Mellor (Counsel)

RESERVED JUDGMENT (REMITTAL HEARING)

1. The claimant's complaints of discrimination arising from disability (s15 Equality Act 2010) relating to:

    1.1.1 the delay in applying for income protection for the claimant (paragraph 2(a)(i) of the List of Issues); and

    1.1.2 the 'attempt to dismiss' the claimant at the meeting on 5 February 2018 (paragraph 2(a)(iii) of the List of Issues); and

    succeed and are upheld.

2. The claimant's complaint of indirect disability discrimination (s19 Equality Act 2010) relating to the alleged PCP of "not applying for income protection for those employees who were permanently ill (i.e. unlikely to return to work)" (paragraph 5(a)(ii) of the List of Issues) fails and is dismissed.

3. The claimant is awarded an additional £2750 for injury to feelings plus interest of £1242, totalling £3992. This additional injury to feelings award has been calculated as follows:

    Additional injury to feelings award: £2750

    Calculation dates: 5th February 2018 (i.e. the date on which the act of discrimination started) – 27 September 2023 (i.e. the date of the Remittal Hearing)

    Number of days: 2060 days
    Interest rate: 8%

Interest calculation: £2750 x 0.08 x 2060/365 = £1242

WRITTEN REASONS

INTRODUCTION

Background

4. This part of the claim was remitted to this Tribunal following the judgment of the Employment Appeal Tribunal ("EAT") 0000958/20, handed down on 4 May 2023 (the "EAT Judgment"). In summary, Judge Keith concluded that:

   4.1 Discrimination arising from disability - the Tribunal had erred in failing to apply the guidance of Simler P in Pnaiser v NHS England [2016] IRLR 170, paragraph 31 in relation to the claimant's complaints of discrimination arising from disability (the "DAFD Complaints"):

      4.1.1 the delay in applying for income protection for the claimant (paragraph 2(a)(i) of the List of Issues) (the "Delay Complaint"); and

      4.1.2 the 'attempt to dismiss' the claimant at the meeting on 5 February 2018 (paragraph 2(a)(iii) of the List of Issues) (the "Dismissal Complaint");

      As a result: "It was not obvious as to which claim should succeed, which required a further assessment of the manager's thought processes. The ET needed to consider both claims afresh, by reference to the same 'something'."; and

   4.2 Indirect disability discrimination – in relation to the Delay Complaint, the Tribunal had also failed to consider whether the provision, criterion or practice applied by Delstar would put those who shared the same disability as the claimant at a particular disadvantage when compared with those who did not share that disability (the "Indirect Discrimination Complaint").

Tribunal proceedings

5. We considered the documents including those set out below during this hearing:

   5.1 the Liability Judgment dated 19 October 2020, the Remedy Judgment dated 4 December 2020 and the Remedy Extended Reasons dated 7 January 2021;

   5.2 the EAT Judgment;

   5.3 the parties' agreed hearing file for the remittal hearing, which included:

      5.3.1 selected documents form the liability and remedies hearing files;

      5.3.2 witness statements from the claimant, Mrs Booth, Mr Michael Booth and Mrs Davis; and

      5.3.3 the claimant's GP's letter dated 18 July 2023 and photographs of his skin condition.

Skeleton arguments and submissions

6. We also considered the helpful skeleton arguments and oral submissions made by both representatives during this hearing.

7. We have not reproduced the representatives' arguments and submissions in this Judgment in the interests of brevity, nor have we reproduced the law set out in the Liability Judgment, the Remedy Judgment and the Remedy Extended Reasons. However, we have taken these into account when reaching the conclusions set out in this Judgment.

Tribunal's Liability Judgment

8. The Tribunal's findings and conclusions in the Liability Judgment relating to the remitted complaints are set out in Annex 1 to this document.

EAT's judgment

9. The EAT's conclusions are set out at Annex 2 to this document:

   9.1 the DAFD Complaints are set out at paragraphs 28 to 33 of the EAT Judgment; and

   9.2 the Indirect Discrimination Complaint are set out at paragraphs 36 to 39 of the EAT Judgment;

Judgment on remitted complaints

DISCRIMINATION ARISING FROM DISABILITY COMPLAINTS

10. We have considered the statutory provisions and caselaw set out in the EAT Judgment, including the guidance set out by Simler J in Pnaiser v NHS England [2016] IRLR 170. Simler J noted at paragraph 31:

    "…it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

11. Simler P also held in Sheikholeslami v University of Edinburgh [2018] IRLR 1090, EAT, that:

    '…'the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact

for an employment tribunal to decide in light of the evidence. (See City of York Council v Grosset [2018] EWCA Civ 1105, [2018] IRLR 746)'."

(a) Unfavourable treatment

12. The Pnaiser guidance states at paragraph 31:

(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

13. There is no dispute between the parties that the treatment of which the claimant complains could amount to 'unfavourable treatment', i.e.:

13.1 the delay in applying for income protection for the claimant (paragraph 2(a)(i) of the List of Issues); and

13.2 the 'attempt to dismiss' the claimant at the meeting on 5 February 2018 (paragraph 2(a)(iii) of the List of Issues); the

"Unfavourable Treatment".

(b) Cause of or reason for the Unfavourable Treatment

14. The Pnaiser guidance continues at paragraph 31 (with our emphasis in bold):

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).

15. There was no dispute that:

15.1 the claimant was on long term sick leave from 8 February 2017 and did not return to work due to his medical conditions set out in the Liability Judgment (see paragraphs 55 to 57);

15.2 the claimant's prognosis following his stroke in March 2017 was unclear. His treatment plan for his kidney disease had been postponed due to his stroke (see paragraph 56);

15.3 the claimant's company sick pay had run out by 8 October 2017, but the respondent continued to pay him discretionary sick pay (as set out in paragraphs 58 and 59 of the Liability Judgment);

15.4 Mrs Davis told the claimant that she intended to apply for income protection benefit for him under the PHI Scheme (arranged via Unum insurance company) and arranged for occupational health to assess the claimant on 7 December 2017.

16. We found in the Liability Judgment that Mrs Davis mistakenly believed that the respondent's PHI scheme only applied to employees who were able to return to work in the foreseeable future. This is set out at paragraphs 70 to 74 of our findings of fact in the Liability Judgment:

"70. Mrs Davis also wanted to discuss what might happen next with the claimant. She stated in evidence that she believed that the claimant was not eligible to receive income protection benefit under the Unum Scheme at that time.

71. We accept Mrs Davis' evidence that she mistakenly believed that the purpose of the Unum Scheme was to provide a means for the respondent to keep paying the employee's sick pay, pending an employee's return to work. She later stated in her email dated 21 March 2018 to Malcolm Hancock (Regional Organiser for Unite) that:

"…it is important to point out what the policy is and what it isn't. This is not a long-term disability policy covering our employees as insured parties…Instead it is a policy that covers SWM (not the employee) and pays SWM in order to allow us to continue to pay a partial salary to employees after the typical Company Sick pay would run out…

Accordingly, we have made use of the policy from time to time as to employees who have an expectation to return to work. However, we have not used it for employees who may be classed as permanently disabled and have no expectation or ability to return to work. It is not reasonable to expect the company to hold open his job for an employee for a guaranteed indefinite period of potentially numerous future years of incapacity.

Under the circumstances, it is not appropriate to engage this policy until Andrew returns to work because, if his medical report, is accurate, he will not be able to return to work at any time in any capacity. This is why we have not done so."

72. We also note Mrs Davis' evidence that:

72.1 she had limited experience of permanent health insurance or income protection policies, despite her 20 years' experience in HR;

72.2 she had not seen a copy of the Unum Scheme terms; and

72.3 she did not speak to Unum or to Finch (the respondent's brokers) regarding the claimant's eligibility for income protection benefit.

73. Mrs Davis believed that the respondent may need to consider terminating his employment because of her mistaken belief that he was not eligible for income protection benefit under the Unum Scheme.

74. Mrs Davis emailed Mr Millar (copied to Mr Fox) on 25 January 2018 regarding the meeting on 30 January and stated:

"We are concerned about [the claimant's] future capacity for work and will need to discuss his employment with us. Depending on how the meeting goes we may need to

adjourn and may even make a decision to terminate his employment on grounds of capability (incapacity)."

However, Mr Millar did not tell the claimant and Mrs Booth about his email at that time."

17. The claimant's representative submitted that the claimant's sickness absence was also a 'significant' (i.e. more than trivial) reason for the Unfavourable Treatment. The claimant's representative stated that the reason for the Unfavourable Treatment was due to a combination of Mrs Davis' mistaken belief and the claimant's long term sickness absence. He noted that:

    17.1 Mrs Davis originally intended to apply for income benefit for the claimant under the Unum scheme, as stated in her letter of 17 November 2017;

    17.2 Mrs Davis changed her mind when she received the occupational health report on 7 December 2017, which stated that the claimant was 'unfit for work' for the 'foreseeable future'.

18. The respondent's representative submitted that the claimant's sickness absence was part of the context of this claim, but was not the reason for the Unfavourable Treatment. The respondent's representative stated that the reasons why Mrs Davis formed her belief were those set out at paragraph 72 of the Liability Judgment (as quoted above), none of which related specifically to the claimant's sickness absence. She noted that Mrs Davis had intended to apply for income benefit under the Unum scheme for the claimant until she received the occupational health reported from the assessment on 7 December 2017.

19. The respondent's representative referred us to the case of Robinson v Department for Work and Pensions [2020] EWCA Civ 859 (which cross-referred to Dunn v Secretary of State for Justice and another [2018] EWCA Civ 1998). She stated that these cases illustrated the difference between an individual's disability or 'something arising' from disability being:

    19.1 the cause of unfavourable treatment; and

    19.2 the context in which unfavourable treatment takes place.

20. The respondent's representative that Mrs Davis had held the mistaken belief that only employees who were likely to return to work in the foreseeable future were eligible for benefits under the PHI scheme before the claimant's absences in 2017. She stated that Mrs Davis' mistaken belief only became 'operative' once the claimant was on long term sickness absence. In other words, she stated that 'but for' the claimant's disability, the claimant would not have been affected by Mrs Davis' mistaken belief.

21. The respondent's representative also sought to distinguish the recent Employment Appeal Tribunal's decision in Pilkington UK Ltd v Jones [2023] EAT 90 on the basis that the 'something arising' pleaded by the claimant in Pilkington was the employer's mistaken belief. She contrasted that with the current claim in which the claimant's long term sickness absence is relied on as the 'something arising'.

22. We have concluded that Mrs Davis' mistaken belief regarding the terms of the Unum scheme was a reason for the Unfavourable Treatment. However, we concluded that it was not the only reason when we reconsidered our findings on the DAFD complaints. The other reasons that we found included:

22.1 in relation to the Delay Complaint:

22.1.1 the claimant's long term sickness absence; and

22.1.2 the occupational health report of December 2017 stating that the claimant was unlikely to return to work;

22.2 in relation to the Dismissal Complaint:

22.2.1 the claimant's long term sickness absence;

22.2.2 the fact that the claimant's company sick pay entitlement had been exhausted in late 2017; and

22.2.3 the occupational health report of December 2017 stating that the claimant was unlikely to return to work.

23. We do not accept the respondent's representative's submission that the claimant's long term sickness absence was merely the 'context' to the Unfavourable Treatment because:

23.1 the respondent's representative is correct to say that Mrs Davis' mistaken belief existed before the claimant went on long term sickness absence;

23.2 however, this does not meant that the claimant's long term sickness absence was not a reason for the Unfavourable Treatment;

23.3 the background to the current discrimination arising from disability provisions in the Equality Act 2010 relates to the difficulties under the pre-Equality Act provisions (s3A(1)(a) of the Disability Discrimination Act 1995) highlighted by the House of Lords' judgment in Lewisham v Malcolm [2008] IRLR 700. (For an example of the difficulties under the 1995 Act, please see the EAT's decision in London Clubs Management Ltd v Hood [2001] IRLR 719, Mr Hood was refused sick pay when off work because of a medical condition amounting to a disability. 'But for' the existence of his medical condition, he would not have been in a situation where he was seeking sick pay. However, the EAT found that the employer's refusal to pay did not amount to unlawful discrimination. This is because the EAT held that the reason for the nonpayment was a decision taken by the manager that, in the exercise of a discretion which existed under the terms of the contracts of employment of staff, that sick pay would not be paid. The reason why Mr Hood was not paid sick pay was identified as not relating to his disability but rather to his employer's policy on sick pay);

23.4 Parliament's purpose in enacting the discrimination arising from disability provisions (which replaced the former disability-related discrimination provisions under the Disability Discrimination Act 1995) was to 'resurrect' the Clark v Novacold Ltd [1999] IRLR 318 Court of Appeal interpretation of the former disability-related discrimination provisions in the 1995 Act i.e. by not requiring a comparison with a non-disabled person (see, for example, Grosset);

23.5 the respondent's representative's contention that the claimant's sickness absence was merely 'context' to the Unfavourable Treatment in this case

would in effect re-introduce that comparison. The difference between this case and those of Robinson and Dunn, was that:

23.5.1 the difficulties experienced by the claimant in Robinson were technical IT difficulties (relating to the adaption of software) and delays in dealing with her second grievance. The Court of Appeal held at paragraph 59(b) that: "there was no finding of fact which could have established, even on a prima facie basis, that managers

> delayed the resolution of the grievance because of the claimant's disability or the symptoms arising from it.";

23.5.2 the claimant's ill health retirement process in Dunn was also mishandled for reasons unrelated to the claimant's disability. The Employment Tribunal in that case quoted at paragraph 117 of its reasons from a letter from the respondent's Case Manager Team Leader which stated that:

> "Overall it is clear from looking into the matters relating to your case that our process has failed to appropriately manage the filing of your referral papers, as well as keep you informed and updated on both the management of your referral and your complaint or manage your expectations on the sometimes lengthy processes in being supplied with FME [further medical evidence] related to the request for ill health retirement."
>
> The Employment Tribunal in Dunn also noted a number of contemporary expressions of dismay or concern by the claimant's line manager and other managers about how long the process was taking. The Court of Appeal observed at paragraph 44 that: "In truth the [claimant's] argument appeared to be "I would not be in the situation where I was the victim of delay and incompetence if I were not disabled";

23.6 in the current case, Mrs Davis' mistaken belief regarding eligibility for benefits under the respondent's PHI scheme was not 'unrelated' to the claimant's disability – we found that she believed that the scheme did not apply to the claimant because she received the December 2017 occupational health report stating that he his long term sickness absence would continue and he was unlikely to return to work in the foreseeable future.

24. We therefore concluded that the claimant's long term sickness absence was a 'significant' (i.e. more than trivial) reason for the Unfavourable Treatment.

(c) Whether the reason or cause is 'something arising in consequence of B's disability'

25. The Pnaiser guidance continues at paragraph 31 (with our emphasis in bold):

> (d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described

comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability. (e) For example, in Land Registry v Houghton UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

26. The respondent accepted that the claimant's long term sickness absence was 'something arising' from his disability (see paragraph 122 of the Liability Judgment).

27. The claimant's remitted DAFD Complaints therefore succeed and are upheld.

INDIRECT DISCRIMINATION COMPLAINT

28. The parties agreed that the provision, criterion or practice had been applied to the claimant i.e.: not applying for income protection for those employees who were permanently ill (i.e. unlikely to return to work) (the "PCP").

29. The parties' dispute relating to this complaint was limited to the pool for comparison. The claimant's representative contended that the pool consisted of all of the respondent's employees who were absent on long term sick leave, regardless of whether or not they were 'permanently ill'. He stated that the reason for this contention was that all such respondent's employees would be eligible to receive PHI benefits under the scheme if they met all of the other scheme criteria.

30. The claimant's representative stated that statistical evidence is not always required in this case. He stated that employees in the comparator group could include a range of individuals, such as:

    30.1 individuals who were not disabled for the purpose of the Equality Act 2010 (e.g. suffering from an orthopaedic injury but were likely to recover within a 12 month period);

    30.2 individuals who were disabled but whose conditions may have periods of relapse and recovery (e.g. multiple sclerosis, chronic depression and anxiety).

31. The respondent's representative contended that the pool consisted of all of the respondent's employees who had been were on long term sickness absence and

who were 'permanently ill' and who did not have the claimant's medical condition. She referred to paragraph 4.18 of the Code of Practice which states that:

31.1 the pool consists of the group that the PCP would affect (either positively or negatively); and

31.2 excludes those who are not affected by the PCP.

32. The respondent's representative stated that anyone who was likely to return to work would not, therefore, be affected by the PCP and should be excluded from the pool for comparison. She submitted that the claimant was not place at a particular disadvantage because of the PCP – Mrs Davis would have treated any other employees who were permanently ill in the same manner.

33. We note that it is settled law that the 'pool' of individuals upon whom the effect of the provision, criterion or practice is evaluated must be populated by persons whose circumstances are the same, or not materially different from the claimant. This is set out in section 23(1) of the Equality Act 2010 which states that on a comparison of cases s19 (indirect discrimination) there must be 'no material difference between the circumstances relating to each case'. (In relation to indirect discrimination this means that the comparison must be with those who (apart from the particular protected characteristic) are in circumstances that are the same or not materially different: see Pendleton v Derbyshire County Council [2016] IRLR 580, EAT.

34. We do not accept that the claimant's representative's submission regarding the pool for comparison. It was a material circumstance of the claimant's situation that he was on long term sick leave and was 'permanently ill (i.e. unlikely to return to work)'. The comparison must therefore be made between those employees on long term sick leave who were 'permanently ill (i.e. unlikely to return to work)' and:

34.1 who had the same medical conditions as the claimant (i.e. also suffered from the claimant's disability); and

34.2 who did not have the same medical conditions as the claimant (whether they were disabled or not for the purposes of s6 of the Equality Act 2010).

35. In any event, the claimant did not provide any statistical evidence regarding this pool. He provided a recent GP's letter dated 18 July 2023 (the "2023 GP Letter") and also relied on the medical evidence provided previously at the Liability and Remedies Hearings. We note that the 2023 GP Letter states:

"There is no doubt that all of these conditions together would have had a significant impact on anybody in terms of employment. I don't know the ins and outs of his job and what he did day in and day out. Again I am not an occupational health doctor, but the significant co-morbidities he now suffers from I believe would significantly affect anybody."

36. However, the 2023 GP Letter does not provide any evidence regarding the impact of the PCP on the claimant or others who were permanently ill.

37. The claimant's remitted complaint of indirect disability discrimination therefore fails and is dismissed.

Remedy for remitted complaints

38. The respondent's representative accepted that if the claimant's remitted indirect disability discrimination complaint failed, but his remitted discrimination arising from disability complaint (relating to delay) succeeded, then the Tribunal's injury to feelings award set out in the Remedy Judgment would stand.

39. The question for the Tribunal is therefore what additional injury to feelings award (if any), should be made in relation to our decision to uphold the Dismissal Complaint.

40. The claimant submitted the following additional evidence which we have taken into account when determining remedy:

    40.1 the 2023 GP Letter; and

    40.2 the claimant's photographs of his skin condition.

    He also relied on the witness statements and evidence provided at the Liability and Remedies Hearings.

41. Both representatives agreed that the correct approach to awarding injury to feelings would be for the Tribunal to:

    41.1 consider what the total injury to feelings award would have been, if awarded at the time of the Remedies Hearing;

    41.2 deduct the amount previously awarded in the Remedy Judgment and paid by the respondent; and

    41.3 award interest on the balance of the injury to feelings award.

42. The claimant's representative submitted that the award should be at the top of the lower band of Vento (i.e. around £8000 based on the Vento bands in force at that time).

43. The respondent's representative submitted that the Tribunal's previous award of £3250 plus interest was the correct award for both the Delay Complaint and the Dismissal Complaint because:

    43.1 the witness statement submitted by the claimant for the Remedies Hearing demonstrated that a large part of the overall upset that the claimant experienced was due to his perception of the handling of the grievance process and the lack of payment of the payment of his pension contributions at what he thought was the correct rate;

    43.2 the claimant's witness statement did not separate out the injury to feelings that he suffered under each of the Delay Complaint and the Dismissal Complaint because he experienced the same 'turmoil' under both heads of claim.

44. We note the findings made in our Remedy Extended Reasons:

    "22. On balance the Tribunal considers that any award ought to be assessed in the lower Vento band but at the lower end of that band. The key reasons for our conclusion include:

        22.1 We recognise that the claimant was upset and distressed but that the reasons for his distress were not solely related to the Unum Scheme Complaint. The causes of his distress included:

22.1.1 the claimant's serious ill health issues which had been ongoing since late 2016 and which understandably caused him significant ongoing concerns; and

22.1.2 other matters relating to his employment with the respondent that formed part of his disability discrimination claim, but which were not upheld by the Tribunal as acts of unlawful discrimination.

22.2 We have seen the medical evidence of the claimant's condition referred to in our findings of fact. However, the medical evidence does not specifically refer to any exacerbation of the claimant's existing medical conditions resulting from the Unum Scheme Complaint. The claimant's doctor's letter

of 27 February 2018 refers to his difficulties 'over the past year' and largely mirrors the symptoms reported in the occupational health report of 7 December 2017.

22.3 We found that the Unum Scheme Complaint related to a one-off act by the respondent, albeit one that had consequences that continued for around 3 months. We also found that the act resulted from Ms Davis' mistaken belief regarding the claimant's eligibility for income protection benefit under the Unum Scheme, rather than any deliberate action on the part of Ms Davis to prevent the respondent from applying for income benefit on behalf of the claimant.

23 The Tribunal considers an award of £4,000 (inclusive of interest) to be a fair assessment of an amount which is aimed at compensating the Claimant rather than punishing the Respondent. This award reflects the significant degree of upset suffered by the claimant and also the Tribunal's finding as to the actual act of discrimination which caused or contributed to it."

24 We have concluded that the claimant should be awarded £6000 for injury to feelings in total for the upheld discrimination arising from disability complaints (i.e. both the Delay and Dismissal Complaints). This amount is inclusive of the £3250 injury to feelings award already made in the Remedy Judgment.

25 In making this award, we have taken into account the relevant law summarised in the Remedy Extended Reasons. The key reasons for making the increased injury to feelings award are:

25.1 the 2023 GP Letter and the photographs of the claimant's skin condition do not assist us because they do not provide any medical evidence in relation to the Dismissal Complaint specifically (as opposed to any other distress that the claimant suffered);

25.2 the claimant was given the opportunity at the Remittal preliminary hearing to request to submit an additional remedies statement and medical evidence and chose not to do so, despite being represented on a pro bono basis by Mr Croxford KC at that hearing;

25.3 however, we concluded that the respondent's conduct complained of in the Dismissal Complaint did have a significant impact on the claimant's injury

to feelings, over and above that caused by the conduct in the Delay Complaint. In particular, in our Liability Judgment we concluded that:

25.3.1 when the claimant attended the meetings on 30 January and 5 February 2018, the respondent had not informed him that:

25.3.1.1 they no longer intended to apply to the Unum scheme for PHI benefit on the claimant's behalf; nor

25.3.1.2 that one potential outcome of the meeting was the termination of the claimant's employment. Although Mrs Davis had informed the claimant's union representative that this was a possibility, neither the claimant nor Mrs Booth were aware of this (otherwise Mrs Booth would have attended the meetings).

See paragraphs 74 to 79 of the Liability Judgment;

25.3.2 the discussions at the meeting caused the claimant's brain to 'shut down' to the point that he was unable to recall the discussions at the meeting and believed that he was being dismissed, which led Mrs Booth to write a letter appealing against his dismissal to Mr Ainsley (paragraphs 81 to 88);

25.3.3 we also found at paragraph 83:

"We accept the claimant's evidence that he experienced uncertainty and anxiety because of the discussions on 5 February 2018. The claimant was understandably worried about his financial position because he had a family to support and a mortgage to pay. The claimant was also concerned about the impact of the financial worries on his health because he had been told that worrying about things could lead to further damage whilst he was recovering from his stroke."

26 We previously awarded interest on the £3250 injury to feelings award made in the Remedy Judgment. The respondent has already paid the amount of £4000 set out in the Remedy Judgment.

27 The balance of the injury to feelings award is therefore £2750. The interest on the balance of that injury to feelings award is £1242, calculated as set out below:

Balance of injury to feelings award: £2750

Calculation dates: 5th February 2018 (i.e. the date on which the act of discrimination started) – 27 September 2023 (i.e. the date of the Remittal Hearing)

Number of days: 2060 days
Interest rate: 8%

Interest calculation: £2750 x 0.08 x 2060/365 = £1242

Employment Judge Deeley

_____

Employment Judge Deeley
Dated: 16 October 2023

JUDGMENT SENT TO THE PARTIES ON
16 October 2023

FOR EMPLOYMENT TRIBUNALS

Public access to Employment Tribunal judgments
Judgments and written reasons for judgments, where they are provided, are published in full online shortly after a copy has been sent to the parties in the case.

Annex 1 – extracts from Liability Judgment

Delay Complaint

1. The Tribunal's original conclusions relating to the Delay Complaint were set out at paragraphs 118 to 125 of the Liability Judgment: Discrimination arising from disability (section 15 EQA)

   a. Did the respondent treat the claimant unfavourably by delaying the application for income protection?

   118. We found that the respondent could have applied for income protection benefit under the Unum Scheme on behalf of the claimant at any time from May 2017 onwards. The application could have been made after May 2017 because it was likely that his absence would continue beyond the six month deferred period (i.e. beyond 8 August 2017), although the respondent would not have received any payment for the claimant's absence until after 8 August 2017.

   119. However, the unfavourable treatment that the claimant has complained of did not commence at the time that the application could have been made. The claimant complains of two difficulties that he faced due to the respondent's delay:

   119.1 Anxiety and uncertainty – we found that up until the meeting on 5 February 2018, the claimant believed that the respondent intended to apply for income protection benefit under the Unum Scheme on his behalf. We found that the claimant did not experience uncertainty and anxiety caused by the respondent's delay until Mrs Davis told him at the meeting on 5 February 2018 that she believed that he was not eligible for the benefit because the occupational health report stated that he was unlikely to be able to return to work. This anxiety and uncertainty continued up until the claimant was informed in late April or early May 2018 that Mrs Davis was mistaken and that the respondent would make the application on his behalf.

   119.2 Financial disadvantage – the claimant's financial disadvantage started on 8 October 2017 (when his contractual sick pay ended) and ended on 14 September 2018 when Unum awarded him backdated cover. Mrs Davis' evidence was that the respondent paid employer pension contributions of 6.75% and employee pension contributions of 1.5% into the respondent's pension scheme on behalf of the claimant during that period, rather than the 7% employer contribution and 3% employee pension contribution under the Unum scheme.

   b. If so, was such unfavourable treatment due to something arising in consequence of the claimant's disability? The claimant relies on the following as the "something arising" in consequence of his disability: the fact that he was absent due to long term sickness was the reason why the respondent did not apply for income protection cover for the claimant until after 23 March 2018.

120. We have considered the EAT's decision in the Sheikholeslami case, referred to in the section on 'Relevant Law' above. We note that:

120.1 the first issue is whether the respondent treated the claimant unfavourably because of an identified 'something' and that this involves an examination of the respondent's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found;

120.2 the second issue is whether that something arose in consequence of the claimant's disability.

121. In relation to the first issue, we have concluded that Mrs Davis' delay in applying for income protection benefit under the Unum Scheme was due to her view that the scheme did not apply to employees on long term sickness absence who were unlikely to return to work. The key reasons for our decision are:

121.1 Mrs Davis initially intended to make an application. She changed her mind after she received the occupational health advice that the claimant would not be fit for work for the 'foreseeable future' due to his medical conditions.

121.2 Mr Hancock later challenged Mrs Davis' interpretation of the Unum Scheme rules. Mrs Davis' email response to Mr Hancock of 21 March 2018 stated (with our underlining added for emphasis):

"Accordingly we have made use of the policy from time to time as to employees who have an expectation to return to work. However, <u>we have not used it for employees who may be classed as permanently disabled and have no expectation or ability to return to work</u>."

Mrs Davis sought legal advice after this email exchange and realised she had made a mistake. The claimant's prognosis did not change materially throughout this period.

122. Turning to the second issue, the respondent has already accepted that the claimant's sickness absence was 'something arising' from his disability. This must be correct in light of the medical evidence provided at the time.

c. If so, can the respondent show that treatment was a proportionate means of achieving a legitimate aim? The respondent will rely on the following aim: to only make applications that were understood to have a reasonable likelihood of being accepted (e.g. that an employee's ill health would continue beyond the 26 week deferral period under the Unum policy or that otherwise met the policy requirements) and to make appropriate enquiries to establish this, to include receiving and responding to representations from the claimant's union. The respondent states that the delay was proportionate to this aim because the respondent continued to pay the claimant any entitlement he would have received under the policy as discretionary sick pay.

123. We accept that making applications that would have a reasonable likelihood of being accepted may be 'a legitimate aim'.

124. However, we find that the respondent's treatment of the claimant was not a proportionate means of achieving that aim. The reason for the respondent's delay

was Mrs Davis' mistaken belief as to the terms of the Unum scheme. Mrs Davis admitted that she did not read the terms of the scheme and that she did not contact Unum and/or Finch regarding the terms until Mr Hancock challenged her on this in March 2018. In addition, the claimant received lower employer and employee pension contributions as part of his discretionary sick pay than he would have received under the Unum Scheme.

125. The claimant's complaint of discrimination arising from disability in relation to this factual complaint is upheld.

Dismissal Complaint

2. The Tribunal's conclusions relating to the Dismissal Complaint were set out at paragraphs 133 to 136 of the Liability Judgment:

Discrimination arising from disability (section 15 EQA)

a. Did the respondent treat the claimant unfavourably by 'attempting to dismiss' the claimant at the meeting on 5 February 2018?

133. We have concluded that the events at the meeting on 5 February 2018 amounted to unfavourable treatment. The claimant was told that he was not eligible to receive the benefit of the Unum Scheme and was offered a settlement package based on the termination of his employment. At the time of this meeting the claimant's health was poor as set out in our findings of fact.

134. We also found that the respondent discussed what might happen if the claimant refused the settlement (i.e. that his employment may be terminated after a capability process). The respondent did not forewarn the claimant that a settlement package or any potential capability process might be discussed during the meeting.

b. If so, was such unfavourable treatment due to something arising in consequence of the claimant's disability? The claimant relies on the following as the "something arising" in consequence of his disability: the fact that he was absent due to long term sickness was the reason why the respondent decided to consider terminating the claimant's employment at the meeting on 5 February 2018.

135. We have concluded that the unfavourable treatment was not due to something arising in consequence of the claimant's disability. Rather, it arose from Mrs Davis' mistaken belief that the claimant was not eligible for income protection benefit under the Unum Scheme and that the respondent therefore needed to consider other options, such as a settlement.

136. The claimant's claim of discrimination arising from disability in relation to this factual complaint fails.

INDIRECT DISCRIMINATION COMPLAINT

3. The ET's conclusions relating to the Indirect Discrimination Complaint are set out at paragraphs 126 to 132 of the ET Judgment as follows:

Indirect discrimination (Equality Act 2010 section 19)

a. Did the respondent operate the following PCP: not applying for income protection for those employees who were permanently ill (i.e. unlikely to return to work)?

126 We concluded that the respondent did operate a PCP of not applying for income protection for employees who were permanently ill and unlikely to return to work. Until Mrs Davis realised her mistake in late March 2018, she would have applied the same PCP to any employee who was absent on sick leave and who may have met the definition of 'incapacity' under the Unum Scheme.

b. If so, did the respondent apply this PCP to the claimant?

127 The respondent did apply this PCP to the claimant.

c. Did the respondent apply the PCP to non-disabled persons or would it have done so?

128 The respondent was not considering any other applications for income protection at that time. However, it would have applied this PCP to non-disabled persons, albeit that it is difficult to envisage a non-disabled person in such circumstances. We note that any employee who was permanently ill (i.e. unlikely to return to work) and who was likely to meet the 'incapacity' criteria in the Unum Scheme was highly likely to be regarded as having a 'disability' for the purposes of s6 of the EQA.

d. Did the PCP put disabled persons at a particular disadvantage when compared with non-disabled persons, in that the claimant contends that he experienced uncertainty and anxiety for several months because he did not have the benefit of income protection during that period?

129 We have concluded that the PCP did put disabled persons at a particular disadvantage when compared with non-disabled persons. This is because disabled persons as a group were far more likely than non-disabled persons to be eligible to receive the benefit of income protection cover under the Unum Scheme.
e. Did the PCP put the claimant at that disadvantage?

130 The claimant was put at that disadvantage. He experienced uncertainty and anxiety because of the delayed application. He also received lower pension employee and employer contributions during that period.

f. Was the PCP a proportionate means of achieving a legitimate aim?

131 We have concluded that the PCP was not a proportionate means of achieving a legitimate aim for the reasons set out in relation to the discrimination arising from disability complaint.

132 The claimant's claim of indirect discrimination in relation to this factual complaint succeeds.

Annex 2 - extracts from Employment Appeal

Tribunal's judgment

DISCRIMINATION ARISING FROM DISABILITY COMPLAINTS

1. Judge Keith's conclusions on the remitted Delay and Dismissal Complaints are set out at paragraphs 28 to 33 of the EAT Judgment:

"Conclusions – Appeal and Cross Appeal - Section 15 EqA

28. There are aspects of both representatives' submissions with which I agree. I accept Mr Croxford's submission that part of the ET's error flowed from its failure to consider the fuller set of guidance provided at para 31 of Pnaiser, rather than the briefer recitation of Sheikholeslami. Both Presidential decisions are, of course, correct, but Pnaiser explores in more detail the two aspects of causation, namely the 'because of' stage involving A's explanation for the treatment (and conscious and unconscious reasons for it) and the 'something arising in consequence' stage, which requires consideration of whether, as a fact, the something was as a consequence of the disability. They may be answered in any order, but analysis of both is required. Pnaiser also discusses two other issues – the problem of multiple causes in the 'because of' analysis, and a chain of links in the 'something arising' analysis.

29. In its analysis of the dismissal claim, the ET referred at paragraph 135 to it having arisen from the manager's mistaken belief about the terms of the Unum policy alone. I accept Mr Croxford's challenge that there is no analysis of possible multiple causes. However, I also accept Ms Mellor's submission that there is a second error, which might have been identified more clearly, had the Pnaiser guidance been adopted. This is that the ET was not consistent in how it defined the 'something arising.' A lack of consistency meant that both stages of the section 15 analysis were undermined.

30. In the List of Issues, the 'something' was defined at item 2(b)(i) "the fact that he was absent due to long term sickness." This was for the delay and dismissal claims (items 2(b)(i)(a) and (b)). It did not refer to permanent incapacity. The ET reiterated this, at para b, after para 119, where it stated "The claimant relies on the following as "something arising"…the fact that he was absent due to long term sickness." At paragraph 120, the ET found that the manager's delay was due to her view that the Unum scheme did not apply "to employees who were on long term sickness absence who were unlikely to return to work…." The two are not necessarily inconsistent or mutually exclusive, but they are also not the same. The ET then returned to the original definition of 'something' at paragraph 122. In relation to the dismissal claim, at paragraph 134b, the ET referred to the claimant's reliance on "the following as something arising in consequence of his disability: the fact that he was absent due to long-term sickness was the reason why the respondent decided to consider terminating the claimant's employment at the meeting on 5 February 2018." In contrast to the delay claim, the ET did not refer to the manager's belief that the Unum policy did not apply to those employees who were unlikely to return to work, in the dismissal claim. Instead, the ET referred to the belief that "the claimant was not eligible for income protection benefit under the Unum scheme," and stopped there, without referring to the

likelihood of return to work. The ET did not explain why the same belief caused one unfavourable treatment, but not another, and how the findings on permanent incapacity related to the 'something' relied on for the purposes of the delay claim.

31. In summary, the ET erred in focussing on a single cause (the manager's belief at the 'because of' stage) when analysing the dismissal claim, while making findings in the delay claim which did not correspond to the 'something' relied on. These two errors, in combination, explain why the ET reached different decisions, which the representatives accepted could not both be correct.

32. I have considered whether it is appropriate to preserve either of the ET's conclusions. I conclude that it is not appropriate to do so. The issue of causation needs to be addressed with findings on the common, accepted 'something arising', namely the claimant's absence due to long term sickness absence, not permanent incapacity, and the ET needs to consider whether there are multiple causes. This is not a case where the facts only lend themselves to one conclusion. It is appropriate that the ET should consider each of these two claims afresh.

33. The claimant's appeal and Delstar's cross-appeal in relation to the section 15 EqA delay and dismissal claims both succeed. The ET's conclusions on both are not safe and cannot stand. I remit both issues to the ET to consider again, as the representatives have urged me to."

INDIRECT DISCRIMINATION COMPLAINT

2. Judge Keith's conclusions on the remitted Indirect Discrimination Complaint are set out at paragraphs 36 to 39:

Discussion and Conclusions (Section 19 EqA)

36. In contrast to section 15 claims, the PCP was stated as "not applying for income protection for those employees who were permanently ill, i.e. unlikely to return to work."

37. I accept Ms Mellor's submission that while the ET asked itself about two comparator groups, disabled and non-disabled people, that was not a correct comparison, as it reflected the section 20 EqA test, not the section 19 test. It is worth returning to the relevant statutory provisions. Section 19 EqA states:

"Section 19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if— (a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are— ….

Disability…"

38. Section 6(3) EqA states:

"6 Disability

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

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

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

39. The meaning of section 19, when read with section 6(3), is clear. There is a requirement of a PCP of potentially general application, not just to those sharing a claimant's disability. The group of people, of which the claimant is a member, must have the same disability as the claimant. There needs to a comparison between that group and those who do not share that disability. The comparator group may include those without any disabilities, and those with disabilities which are not the same as the claimant's. The comparison is not between people with disabilities and those without, which is a different requirement under the section 20 duty to make adjustments (where a PCP puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled). Both the claimant's group and the comparator group may be hypothetical, because of the word, "would", in subsections 2(a) and (b) of section 19. However, that does not avoid the need to analyse whether those in the claimant's group would be put to a particular disadvantage (without falling into the trap of asking "why", as it is often difficult to identify complex causes).

While statistical evidence may not be available, the impact on one person, with the same disability, may not necessarily be the same as the impact on another. For example, it may be, depending on the evidence, that a proportion of those who share the claimant's disability, a pulmonary embolism and kidney disease, would have still been viewed as likely to return to work, during the time period when the PCP was applied. While it is not a requirement that the PCP puts every member of the claimant's group at a particular disadvantage, the ET had not asked that question, or gone on to consider whether those with the same disability would be viewed as more unlikely ever to return to work, when compared with those with different disabilities or no disabilities at all. That, ultimately, was the flaw in Mr Croxford's reformulated PCP. It assumed that people with disabilities were more likely to be put to particular disadvantage than those without disabilities, without making a comparison between the two appropriate groups. As a consequence, the ET erred in its assessment of group disadvantage.

It is no answer to point to a person who is not disabled, who had an absence lasting or likely to last more than 26 weeks (the deferral period under the Unum scheme)

but less than twelve months, who would not be put to a particular disadvantage. While that person would be one member of the comparator group, it ignored other group members, including those with different disabilities, in comparison to those sharing the claimant's disability. Contrary to Mr Croxford's submissions, the ET's analysis was not consistent with Ryan, because of the flaw in the ET's analysis of group disadvantage. The ET will therefore need to revisit this analysis when assessing the section 19 EqA claim. I therefore also allow this part of Delstar's cross-appeal against the ET's decision on the section 19 claim.