EMPLOYMENT TRIBUNALS

Claimant: Mr R Neeves
Respondent: BSH Home Appliances Ltd

Heard at: Watford
On: 4, 5, 6, 7, 8 September 2023

Before: Employment Judge McTigue
Tribunal Member Scott
Tribunal Member Bury

Representation
Claimant: Mrs C Neeves, Lay representative
Respondent: Mr S Way, Counsel

JUDGMENT having been sent to the parties on 18 October 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant was employed as a Customer Service Adviser with the Respondent from 1 May 2018 until the Respondent terminated his employment on the grounds of capability due to ill health on 12 August 2022. The Claimant claimed that he was subjected to disability discrimination (direct, indirect, discrimination arising from a disability, and a failure to make reasonable adjustments), victimisation and harassment. He also claimed unfair dismissal.

2. ACAS was notified using the early conciliation procedure on 24 December 2021 and the early conciliation certificate was issued on 3 February 2022.

Claims and Issues

3. The Claimant submitted his first ET1 form on 29 April 2022. In that form he claimed disability discrimination. He was still employed by the Respondent at that point in time. He later amended his claim to include a claim for unfair dismissal. That amendment was agreed by consent before Employment Judge Andrew Clarke KC on 13 December 2022.

4. The Tribunal was required to determine a list of issues which had been

agreed between the parties. Those issues were set out in the agreed bundle of documents at pages 108 to 116. In terms of his disability discrimination claim, the Claimant stated in his ET1 that he relied upon the following impairments, functional neurological disorder and anxiety and depression (page 13 of the bundle). The Respondent accepted that each of the Claimant's impairments amounted to a disability for the purposes of the Equality Act 2010.

Procedure, documents and evidence heard

5. The Tribunal heard evidence from the Claimant. Evidence was also heard from the following witnesses on behalf of the Respondent; David Ide, Charlene Jeffcoat, Susanne Collier, Jenny Wood and Brendan Bulfin. There was a Tribunal bundle of 644 pages. Oral submissions were made by both parties. The Claimant was represented by his mother.

6. The parties were asked if they wished to make any last minute applications before the Tribunal started to hear evidence. Neither party made any applications. The Claimant was asked if he required any adjustments to be made prior to the start of the hearing. The Claimant stated no adjustments were needed.

7. The morning of day 1 was set aside for the Tribunal to read. The Claimant gave evidence and was cross examined on the afternoon of Day 1 and then until approximately 3.30pm on Day 2. The Claimant's representative then re-examined the Claimant. It was abundantly clear there was a lack of preparation by the Claimant's representative. There were delays in formulating questions and it was apparent that the Claimant's representative had not familiarised themselves with the relevant paperwork.

8. On day 3 of the hearing, the Respondent's witnesses were due to commence evidence. That morning, the Claimant's representative said that the Claimant was ill. No medical evidence to support that fact was provided to the Tribunal. The Claimant said that he needed the toilet frequently as he was ill but indicated he would be able to proceed the next day. On the basis that the Claimant was ill, the Tribunal adjourned for the day. Before adjourning, the Tribunal agreed a revised timetable with both parties in order to prevent the case from going part heard.

9. The Respondent's witnesses were credible. They gave clear, cogent and consistent evidence. We accepted their evidence. Their evidence was also consistent with the documentary evidence before the Tribunal. The Claimant was an unreliable witness. His evidence frequently contradicted itself. By way of example, the claimant stated that his probationary period had only been extended once by the Respondent but when he was taken to the relevant documentation, he accepted it was in fact extended twice. The claimant was also wrong about the date he raised a grievance in respect of his bonus. He was adamant when being cross examined that the grievance was raised in 2019, but then quickly conceded when shown the relevant documentation, that the grievance was raised at the end of 2020. He gave evidence that he did not receive a letter from the Respondent inviting him to an ill health review meeting on 29 July 2022, and again immediately changed his account when it was put to him by the Respondent's representative that the documentation indicated otherwise.

10. This was a case where, given the unreliability of the Claimant's memory the Tribunal had regard to the principles enunciated in **Gestmin SGPS S.A. v Credit Suisse [2013] EWCA 3560** at paragraphs 15 to 22. Leggatt J, as he then was, stated:

> **…the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth**.

Fact-findings

11. The Respondent operates in the wholesale of appliances for consumers, including household appliances.

12. The Claimant was employed as a Customer Service Advisor. His duties included handling customer enquiries via incoming telephone calls for services such as registering appliance warranties, offering extended warranties, booking engineers' service visits, and assisting with troubleshooting and ongoing maintenance of appliances.

13. The Claimant's employment commenced on 1 May 2018. The Claimant did not disclose any relevant medical conditions or disabilities to the Respondent when he commenced employment – as seen by his new employee information form dated 3 May 2018.

14. The Claimant's probationary period was extended twice, initially for one month on 1 November 2018 and then again for a further month on 28 November 2018. Although the Claimant had a number of absences during his probationary period, he passed his probationary period on 11 January 2019 (page 165 of the bundle).

15. On 15 January 2019 the Claimant asked for a desk assessment. This was undertaken by the Respondent.

16. On 12 April 2019 the Claimant was admitted to Kettering General Hospital due to back pain and jerky movements he was experiencing. His discharge note stated that he had no neurological deficit. It also stated that neurology reviewed him and found that it was most likely a functional disorder. He remained stable and was discharged home (pages 605 and 606).

17. The Claimant was then absent from work between 12 April to 7 May 2019, this amounted to 12 days in total (page 168). In his return to work meeting on 7 May 2019 the Claimant stated that he had always had a bit of a bad back but that he had lived with it for the past few years (page 169). The Claimant saw his GP about his bad back around this time but his GP did not consider it to amount to a disability.

18. The Claimant was also absent between 9 May to 20 May 2019 and 22 May to 17 June 2019.

19. The Claimant was admitted to hospital on 22 May 2019 and discharged on 30 May 2019. Whilst in hospital he communicated with his manager, Mr Ide (page 173). Mr Ide made the Claimant aware of the Respondent's Employee Assistance Programme.

20. Around June 2019 the Respondent supplied the Claimant with a desk riser (page 178). The Claimant was then absent from 28 August 2019 to 11 September 2019.

21. The claimant was also absent from 16 September 2019 to 23 September 2019. On his return, the Claimant had a return to work meeting. This was his fifth return to work meeting and he was advised that a Stage 1 meeting was to be arranged in accordance with the Respondent's attendance management policy. That policy appears in the bundle at page 131.

22. On 27 September 2019 the Claimant received a letter informing him of the outcome of his Stage 1 Sickness Absence Review (page 183 – 184). In this letter the Claimant stated that he was happy with the desk riser that had been provided to him by the Respondent but that he would like another desk assessment.

23. On 30 November 2019 the Claimant was assessed by a Consultant Neurologist at Kettering General Hospital. He denied having any jerking episodes and his pain was not an issue. His neurological examination was normal (page 185).

24. The Claimant was then absent from 20 December 2019 to 6 January 2020. This triggered a Stage 2 Absence review meeting.

25. On 16 January 2020 the Stage 2 Absence meeting was held. The letter provided to the Claimant after the meeting stated, "we discussed your absence fully at the stage 2 meeting and decided that no further action is required on this occasion. We did agree that based on the information you gave me in meeting you would be referred to occupational health. However, upon further consultation with HR after the meeting took place, we believe the best referral for what was discussed in the meeting is a level 3 professional desk assessment conducted by an external company. I will liaise with you after your move to CCH this to be organised." (page 188)

26. The notes of the Stage 2 meeting appear at page 189 of the bundle. Page 190 shows that at this stage the Claimant stated he had not yet received a formal diagnosis of functional neurological disorder. The notes also show that a desk assessment had been undertaken for the Claimant and that both desk and back supports had been provided to the Claimant. The Claimant was also being provided with breaks. When he was asked how he found these adjustments the Claimant stated, "Brilliantly if I didn't have those I wouldn't have been able to stay here. I think the spasms would have started again." The Claimant was also asked in this meeting if he was happy with the support provided by the Respondent. His response was, "…the desk and the back support our great, the only thing I noticed in my notes we agreed about an external desk assessment as we weren't sure of the diagnosis so I don't know if we are not doing something that may help me they could give me something else" (page 190).

27. Following this, a DSE workstation assessment was carried out for the Claimant on 10 February 2020. He was then supplied with a specialist chair (pages 193 to 203).

28. The Claimant was absent between 21 February 2020 and 13 March 2020. During this time, he applied for the position of CIT assistant. He missed the interview he was offered in respect of this position as he was absent from work on both dates the Respondent invited him to interview. At the time, he made no complaint that the Respondent's treatment of him in relation to this incident amounted to discrimination, as indicated by his email of 12 March 2020 (page 206).

29. The Claimant was absent from 8 May 2020 to 11 May 2020. This triggered a second Stage 2 meeting. In that meeting, which took place on 15 May 202, the Claimant was asked about his desk assessment. He responded, "it was the most accurate assessment I have had. Since having the chair it has helped me more than anything else. The chair is suited to me" (page 214). The notes of this meeting also make clear that the Claimant was provided with a wireless headset and that this had also helped him.

30. On 15 May 2020 the Claimant was informed that no further action was going to be taken by the Respondent in respect of the second stage 2 absence management meeting (page 217).

31. The Claimant was absent between 23 August 2020 to 1 September 2020, and between 2 September 2020 to 11 September 2020. These absences triggered a Stage 1 sickness absence review meeting with the Claimant which was held on 16 September 2020 (pages 222 to 223).

32. The Claimant was then also absent from 16 November 2020 until 18 November 2020. This triggered a third Stage 2 Absence meeting which took place on 25 November 2020. Prior to this meeting on 24 November 2020 the Claimant sent an email to Mr Ides stating that he considered himself to be disabled and that he considered the non-payment of a bonus to him to amount to discrimination (page 236). It is clear that at this point in time the Claimant was aware of the Equality Act 2020. The Claimant's bonus was ultimately paid in the December 2020 payroll (p624). It was also paid to his satisfaction the following year.

33. The Stage 2 meeting was adjourned so that a referral could be made to Occupational Health ("OH"). It was also agreed at this meeting that as the Claimant had a first appointment at UCL Hospital on 7 December 2020 with a neurologist, his referral to OH would not be made until after that appointment. The Respondent also sought to rectify issues which had arisen with the Claimant's chair and foot rest (page 237).

34. On 8 January 2021 the Claimant received an OH assessment (page 246). OH made a number of recommendations which were implemented by the Respondent. The OH report also indicated that the Claimant's condition might improve following his planned review at UCL Hospital and the proposed adjustments.

35. On 20 January 2021 the Claimant had an annual review meeting. It was clear that he was failing to meet his adherence target of 98.5%. He scored 97.03% (page 251).

36. The third Stage 2 absence meeting was reconvened on 2 February 2021. No formal sanction was issued to the Claimant and in order to support the Claimant a number of adjustments were agreed. These were a reduction in his adherence target to 98% and the provision of an additional break of 10 minutes whenever the Claimant worked on a Saturday or Sunday shift (page 275).

37. The Claimant was absent between 24 February 2021 and 26 February 2021. This triggered a fourth Stage 2 meeting. The fourth Stage 2 meeting was held on 11 March 2021. The notes of that meeting appear at pages 284 to 289. Again, no action was taken against the Claimant. The Claimant was also directed to the Respondent's counselling service and CBT therapy services as evidenced by page 283.

38. The Claimant was subject to a performance improvement plan from 23 April 2021 (pages 294 to 302). This was because his adherence had fallen below the agreed 98% target. The plan lasted for six weeks and the Claimant considered that the 98% adherence target was achievable. The Claimant was removed from the plan on 25 June 2021 at which point his adherence had risen to 97.43%. Although this did not hit the 98% target, the Respondent considered this was sufficient for the Claimant to be removed from the plan.

39. The Claimant was absent from work from 28 May 2021 for five days. This triggered a fifth Stage 2 meeting which took place on 11 June 2021. No action was taken by the Respondent on this occasion as it was felt that the Claimant demonstrated that he was doing as much as he could to manage his condition (page 333). The Respondent also adjusted the Claimant's scheduled breaks which were to be split to 4 five-minute breaks throughout the day (page 333).

40. The Claimant was absent from work from 29 July 2021 to 1 August 2021. He was also absent from 10 August 2021 to 12 August 2021. This triggered a sixth Stage 2 meeting. That Stage 2 meeting took place on 17 August 2021. The meeting was adjourned as it was agreed that no decision was to be made until after the Claimant met his specialist at UCL Hospital on 6 September 2021 (p361). The Claimant was reminded at this meeting of the impact that his absence could have on the team and company as a whole and he was informed that further occasions of absence could lead to disciplinary action being taken which could result in a first written warning. He was also informed the company sick pay would not be paid for further occasions of absence from work where there was a live warning in existence.

41. On 17 August 2021 the Claimant was also placed on an improvement plan. This was because his work quality had fallen below acceptable levels.

42. The Claimant was absent from work from 23 August 2021 to 1 October 2021 (page 384). These absences were due to stress and functional neurological disorder. During this period of absence, he was seen by a specialist at UCLH on 6 September 2021. It was only at this point in time that his functional neurological disorder was definitely diagnosed. The specialist the Claimant saw thought that the best approach to treatment was by way of explanation and a multidisciplinary team approach including physiotherapy, neurology, psychology and psychiatry to help relearn more normal patterns of movement and avoid severe exacerbations (pages 608 to 609).

43. On his return to the office on 1 October 2021 the Claimant indicated that he was now set up to work at home and that he was happy to return to work

(page 385). The arrangement agreed was that the Claimant was to work one week in the office, followed by four weeks at home. This was an arrangement which at the time applied to all relevant employees of the Respondent due to the Covid pandemic. Despite this agreement, on the week commencing 4 October 2021 the Claimant worked from home when he should have been in the office. Later that week, on 7 October 2021, he was late logging into the work IT system. That prompted an email from his line manager at the time, Charlene Jeffcoat (page p394). That email is perfectly polite and indicates that Ms Jeffcoat wanted to check the reason for the Claimant working from home and see whether or not he had any issues. The email was supportive in nature.

44. The Claimant then experienced further IT issues whilst working from home. He was at this time still subject to a performance improvement plan regarding his unsatisfactory call quality. Due to the number of issues which were affecting the Claimant's work, he was informed by Ms Jeffcoat on 20 October 2021 that he would be required to return to work in the office permanently. The Claimant responded to Ms Jeffcoat that same day in a rude and aggressive manner via WhatsApp. He also stated to Ms Jeffcoat that he was suicidal in that message (page 591 to 593). This is contrary to his medical record of the following day which appeared in the bundle at page 595 where he informed a medical professional on 21 October 2021 that he had no suicidal thoughts and listed the reasons why he did not have suicidal thoughts.

45. The Claimant was absent from work between 21 October 2021 to 9 December 2021. After that point in time, the Claimant never returned to working at the Respondent's office. The Claimant attended a health review meeting on 8 December 2021 with Charlene Jeffcoat and Stephanie Ross. He informed the Respondent at this meeting that he had been formally diagnosed with functional neurological disorder. The notes of this meeting appear at pages 414 to 421. The Tribunal finds that from this point onwards the Respondent had knowledge of the Claimant's disability.

46. On his return to work, the Claimant indicated that he was well enough mentally and physically to work (page 427). The Respondent also agreed to a 4 week phased return to work for the Claimant (page 424). The Claimant agreed to the terms of the phased return.

47. On 17 December 2021, the Claimant requested an amendment to his phased return to work which the Respondent was happy to agree to (page 434).

48. On 21 December 2021 the Claimant sent a message to Ms Jeffcoat stating that he had blacked out for half an hour. Ms Jeffcoat checked to see the Claimant was okay, the Claimant indicated he was happy to continue at work.

49. On 23 December 2021 the Claimant's sixth stage 2 meeting was reconvened. It had been adjourned on 17 August 2021. The Claimant's line manager, Ms Jeffcoat, was present. Also in attendance was Ms Collier from Human Resources. Ms Collier was present in order to take notes. The outcome of this meeting was to issue the Claimant with a written warning. This was formally communicated to the Claimant in a letter dated 23 December 2021 (page 448). In this letter, Ms Jeffcoat stated, "whilst I empathise with your condition, 74 days of absence in a 12 month rolling period is extremely high and year on year you have had very high absence levels which as a business is not sustainable and therefore on this occasion, I decided to issue you with

a written warning, which would remain on your file for six months." The Claimant was also informed that any further absences could result in further formal disciplinary action. In line with the Respondent's policy, company sick pay would not be paid whilst the formal warning remained in place. This was the first time that the Claimant had been formally sanctioned by the Respondent for his level of absence.

50. The Claimant has made allegations about Suzanne Collier's conduct in the course of the reconvened sixth Stage 2 meeting. We find Ms Collier treated the claimant courteously and conducted herself in an entirely appropriate and professional manner.

51. The Claimant emailed Ms Collier on 24 December 2021 asking for the notes of the reconvened sixth stage 2 meeting. Upon receipt of those notes, the Claimant indicated that he wanted a number of amendments to be made (page 455). Ms Collier refused. Her email appears of 24 December 2021 appears at page 454. She stated, "I'm afraid I won't amend the notes as I do not recall saying that, I am sure I never referred to you having a disability as your condition is not classed as such".

52. The Claimant messaged Charlene Jeffcoat regarding this matter shortly after via WhatsApp (page 594). She did not reply as she was on leave.

53. On 29 December 2021, the Claimant emailed Ms Jeffcoat and asked to be placed on a less demanding phone line because of stress, anxiety and tremors. She agreed. The Claimant was still at this point in time on his phased return to work.

54. On 4 January 2022 Ms Jeffcoat agreed to extend the Claimant's phased return to work for a further one week period.

55. On 30 December 2021 the Claimant was absent without leave from work. He did not follow the company absence reporting procedure even though he was aware of the same. He was also one hour late to work on 31 December 2021.

56. On 4 January 2022 the Claimant emailed Michelle Burton to inform the Respondent that he wished to appeal the decision to issue him with a written warning (page 506). Also on 4 January 2022 Heather Emmett approached David Ide with information regarding the Claimant possibly call avoiding. Mr Ide was also made aware of performance and behaviour issues in respect of the Claimant plus the Claimant's absent without leave incident. Mr Ide scheduled a meeting with the Claimant for 6 January 2022 in order to discuss these allegations (page 467).

57. On 6 January 2022 the Claimant logged into his work IT system and saw that he had been invited to an investigation to discuss his possible call avoiding. He then phoned his line manager Ms Jeffcoat. The Claimant accepted in evidence, and we find as a fact, that the overall effect of his conversation was that it demonstrated that he did not wish to engage with the Respondent any further. He never returned to work after 6 January 2022.

58. On 7 January 2022 Claimant emailed Mr David Beamer of the Respondent. In that email the Claimant stated that he would regard any further communication from the Respondent as harassment (page 519). Later that same day the Claimant emailed Ms Ross, Ms Jeffcoat and Mr Ide alleging that he had been discriminated against (page 520).

59. On 10 January 2022 the Claimant emailed Ms Ross, Ms Jeffcoat and Mr Ide again (page 521). Later that same day he also emailed Ms Collier (page 522). This was despite the fact that he previously indicated he did not want any further communication with Ms Collier, and that he had stated to Mr Beamer that he would regard any further communication from the Respondent as harassment.

60. On 12 January 2022 Claimant was informed, by means of a letter sent via email, that his sick pay was being withheld in accordance with the Respondent's policies (page 525).

61. On 6 May 2022 the Claimant emailed Jenny Wood with some concerns he had about sick pay (page 543). This email then started a chain of correspondence between the Claimant and the Respondent. Notably on 25 May 2022 Ms Wood emailed the Claimant to check how he was and if he was feeling any better (page 557). Ms Wood also asked whether or not he was any closer to considering a date to potentially return to work. That email read as follows:

> "Hi Richard,
>
> I just thought I'd drop you a line to see how you are? and if you are feeling any better and so any closer to considering a date to potentially return to work?
>
> I am aware that you have been off work for some time now and so was hoping that you might be feeling closer to returning and if so would like to invite you to come in for a health review meeting. You will see that I have copied Sarah Hazard on this email. Some of the teams have been reorganised and Sarah is now officially your team leader. I appreciate you will not have met her in this capacity, although I'm sure you know Sarah, so if you feel able it would be good for you to come in and meet with Sarah and me so we can talk through the changes with you and also you can update us on how you are feeling.
>
> I'm also aware that you have an appeal meeting pending, which Michelle Burton has committed to leave open until you are ready. Do you feel that you might be fit enough to have this some time? (If you still wish to have this meeting?) You may not be fit enough for work, but may feel fit enough for this meeting – so please let me know about this too?
>
> Separately, I would just like to remind you that your current fit note expires on 28/5/22. We do require you certificate your absence with continuous fit notes (if you are going to continue being absent) so I would like to request that you send the next note (if applicable) in to me as soon as reasonably practicable.
>
> I look forward to hearing from you.
>
> Kind regards
>
> Jenny Wood"

62. The Claimant replied the next day in an aggressive manner and demonstrated a lack of willingness to engage with the Respondent other than to reach a settlement agreement. The email at page 554 states, amongst other things:

> "The longer I deal with you, the worse you become, and the less likely I ever am to be able to appeal – physically and mentally. I have told you this as well, and you have made no efforts to come to a realistic settlement agreement in the time that I have been off and requesting this. There is no longer any part of me that wishes to return to BSH now because I am certain you'll only make my health worse. I will **not** be discussing

> any subjects with anyone from BSH except from the settlement agreement, or the upcoming employment tribunal – if you would like to make a realistic offer for the claims, I will be making against you, then please do so because this is the only route you have as a company except for waiting for the employment tribunal – and the longer this process goes on, the more damage it causes me and the higher the compensation for damages caused would be. A few months ago, I could have also taken you to civil court for personal injury and the fact that I was diagnosed with depression and anxiety because of BSH and now I can go with the evidence that this process has caused me borderline anorexia, and with how I am not eating at the moment, I cannot see it being much longer before I am actually anorexic and in the interim you yourself have given me further evidence in writing of your company's foul play.
> Everyone in management decided that they would rather throw accusations at me or ignore me entirely. And make my working life as hard as physically possible making this process impossible for me in the time limit given. Your discrimination in this decision has caused the absence since, and if I was to appeal this now, how exactly would that remedy this?"

The email continues in a similar vein for some time. However the Tribunal should also quote from another section which indicates that at this point in time the claimant was clearly only interested in reaching a settlement agreement with the respondent. That section reads as follows:

> "Please let me know if you are willing to negotiate a serious settlement agreement, and we can continue. I am not going to communicate with you and allow my health to suffer simply to read the ridiculous offer you made, and to listen to you try and state you have done nothing other than support me. You have never supported me and the only adjustments you have ever made came as a consequence of me threatening legal action the first time, and even then you refused to admit any wrongdoing and claimed it was because the company had no knowledge of my disability.

63. The Claimant then sent a further email eight minutes after his first email of 26 May 2022. It accused the Respondent of failing to refer him to Occupational Health (page 554).

64. Ms Wood then emailed the Claimant again at 19.04 on 26 May 2022. Her email indicated that she wished to arrange an occupational health appointment for the Claimant and read as follows:

> "Hi Richard, I don't intend to go through your email line by line and reply to each point – As I would much prefer to actually talk to you if possible.
> My email to you was to enquire after your health and to ask if you anticipate coming back to work when your current fit not expires. I think from you reply that you do not, but I'd be really grateful if you would confirm whether or not this is correct – and supply another fit note if so.
>
> We do want to arrange for an Occupational Health appointment for you, if you wish to go. I was not involved back in September, but I am aware that you have been absent, certified by a fit note – since the beginning of the year (since you were asked to attend an investigation). I am also aware that you appealed against the Stage 2 warning you received also immediately before your absence. Your appeal was acknowledged by Michelle Burton and she confirmed a manager would be allocated to hear this as and when you supply the grounds for your appeal.
>
> As far as I am concerned both the issue which led to the investigation and the appeal remain outstanding, as a conversation with you is necessary to progress the investigation – and further details form you, as to your grounds for appeal, are needed for the appeal.

I am also aware that through an error you received full pay in March resulting in you being overpaid. The company recovered a part in April. It has been confirmed to you that this current period of absence does not qualify for company sick pay, you are not paid company sick pay in either January or February, and you were overpaid in March. As I understand it you are still in receipt of an overpayment and payroll are balancing any monies due against the money already received in error.

There is a section of your email below which has just come through to me as pretty much blacked out making it very difficult to read, on that basis I wish to reiterate that I would like to talk to you if you wish to discuss this. If you absolutely do not want to talk to us then I can treat your email as a "grievance" and would then arrange for all matters to be reviewed and responded to; however, I would once again say I would much prefer to talk to you about this.

In the meantime, I would like to remind you that your fit note expires on 28/5/22 and we require a further fit note to support your continued absence.

Many thanks.

Kind regards

Jenny Wood."

65. Again, the Claimant responded in an aggressive and unprofessional manner (page 550). The email ran to over two pages and included the following statements:

"Hello Jenny.

I'd like to start out by pointing out how outrageously unprofessional and unfair comment that you started with there. You have literally just told me that you cannot be bothered to so much as read an email that I have sent to you, and to reply to my questions. Do you realise that you are currently refusing to communicate with me, because I am not physically capable or comfortable holding a telephone conversation at the moment, but you are, and that is also discrimination . This is what is wrong with BHS. You do not know how to communicate with people, at all. BSH is meant to be a company of customer service and you should know better."

That email also includes the following quotation:

"I suggest you do read my emails, very closely, and RESPOND TO THEM in a proper, professional manner, because this email chain is going to the tribunal as evidence as well."

66. Ms Wood replied to the Claimant on 27 May 2022 (page 549). Her email was professional and courteous and indicated that she would like the opportunity to meet with the Claimant or have a Teams meeting with him. She also agreed to treat the Claimant's correspondence as a grievance. That email read as follows:

"Dear Richard, Thank you for your email.
In my email I have not said that I have not read your mail – I have said that I would much prefer to actually talk to you if possible. This does not mean that I have not read your mail, it means that I feel we would have more productive communication if we were able to meet.

I sincerely believe that an email chain is not the best way to try and solve this and would really like the opportunity, ideally, to meet you, and if that is not possible then to have a Teams call with you.

I am aware that you have resisted every suggestion I have offered to meet, and so I have offered you an alternative to a meeting, which is that you ask us to consider this matter as a formal grievance from you. You have not actually asked me to do this as yet, but I believe that this is your desire – and is really the only way I can think to try to move forward from this impasse, so this is the next step that I will take. I will, therefore, ask your communication to be reviewed and treated as a "grievance". In terms of your input in this there may be some questions for you, again these would best be answered in person, but can be addressed in writing if necessary.

I note that you state you wish to return to work; by suggesting an Occupational Health visit I am trying to obtain information to help assess when this could potentially be possible and also to understand how this could be done, in terms of what adjustments might be needed to be put in place to achieve that – bearing in mind that your role is a telephone based role and you are stating to me that you are currently unable to talk to me. I therefore want to understand how that could work in the context of your role and what needs to be done to facilitate that.

I will therefore, seek to get your communication reviewed as a grievance and ask you to ensure your fit note is returned to me on expiry of your current one, which is tomorrow."

67. The Claimant agreed to his correspondence being treated as a grievance. His agreement can be found in his email of 27 May 2022 timed at 19.12 (page 548). This is another aggressive email in which the Claimant falsely alleges that he was assaulted by the Respondent in December. That email read as follows:

"Good afternoon Jenny,

Yes, please feel free to record that email as a grievance. I believe it is now possibly the fourth or the fifth email I have now asked classed as such, regarding the exact same situation, why do I feel like you are circling us back to where we were in December? I asked for all of this back then, with multiple people. When do we move on to the stage where you as a company aid me? I was under the impression a grievance had been raised, you were here to deal with that, and if you were unable to settle it then that would be down to the tribunal. Considering this grievance is about your staff breaking the law, and flipping my life upside down because of it, and destroying my health, there isn't much we can talk about that is going to help at this point. I will reiterate I wanted to talk about it in December but I believe BSH did not give me the chance because when I asked, I was met with an offer for being fired instead.

So far, since I have raised these issues, your staff have only lied about events ever occurring, or lying about the knowledge of my disability, or lying about the fact you have always given me support. This is why I do not wish to engage with your staff. If I meet you in person, you can lie about what you have said. If I talk to you on Skype, or Microsoft Teams, BSH have already told me they would never agree to record these meetings, despite my permission being given, because your staff aren't comfortable being recorded. This means you could assault me in the same way I was in December, and again, just lie about it."

The tribunal can find no evidence whatsoever to support a finding that the claimant was assaulted in December by the respondent. The remainder of the claimant's email continues in a similar vein and again accuses the respondent of bullying him, harassing him, victimising and discriminating against him.

68. On 22 June 2022 the company wrote to the Claimant informing him that his grievance was not upheld (page 559). The grievance was dealt with by Ms

Emmett in a fair and professional manner. The Claimant was also informed of his right to appeal the decision.

69. On 12 July 2022 Ms Wood emailed the Claimant asking if he would consent to attending another OH appointment. She stated that she would like the Claimant to attend an appointment as he had now been off work for over six months and the Respondent would like to understand the prospects of his potential to return to work (page 569). The Claimant consented to this by way of a return email that same day (page 569 to 563).

70. Occupational health attempted to make contact with the Claimant on 21 July 2022 but the Claimant did not answer their telephone call. The Claimant made no attempt to establish contact with OH after missing their call on the day. He also provided no explanation to Ms Wood of the Respondent as to why he had missed the call .

71. Ms Wood emailed the Claimant on 21 July 2022 informing him that he had been advised by the Respondent's OH consultants that the OH review did not go ahead and asked the Claimant if you would like a second appointment to be made. The Claimant was also made aware that he would be liable for a cancellation charge of £350 should he fail to attend the second occupational health appointment (page 571). No response was received from the Claimant and he was chased again by Ms Wood by way of email on 25 July 2022 (page 570).

72. On 29 July 2022 Ms Wood wrote to the Claimant (page 572). The Claimant received this letter. In that letter Ms Wood informed the Claimant that he now been absent due to ill health since 6 January 2022. The Claimant was also informed that he had been unreachable since 21 July 2022 and that his current fit note had expired on 26 July 2022. The consequence of this is that he was now absent without leave from work. Even though being absent without leave was a disciplinary matter, the Respondent invited the Claimant to a health review meeting. The meeting was scheduled to take place on 9 August 2022 and four points of discussion were intended to be covered. These being:

    - Was there any reasonable prospect of the Claimant's return to his role?
    - Was there any reasonable prospect of the Claimant's return to his role on a part time basis?
    - Were there any alternative roles within the business which the Claimant could be considered for?
    - Were there any reasonable adjustments that could enable the Claimant to return to his role?

73. The Claimant chose not to engage with this process and the meeting went ahead in his absence on 9 August 2022. It was decided that the Claimant's employment was to be terminated on the grounds of capability because he was unfit to fulfil his contractual role. The Claimant was informed of his dismissal by way of a letter dated 12 August 2022 (page 574 to 576). He was also informed of his right to appeal the decision.

74. The Claimant then finally made contact with the Respondent on 26 August 2022 (page 583). He informed the Respondent that he wished to appeal the decision to dismiss him. Even though this was outside the normal five-day

appeal window of the Respondent, it was decided that his appeal would be considered.

75. By way of an email dated 14 September 2022 Ms Wood offered the Claimant a number of formats which were intended to enable the Claimant to comfortably participate in the appeal hearing. One option was for participation through written correspondence - where the appeal chair submitted any questions to the Claimant in writing, which the Claimant could then respond to (page 585). That was the option chosen by the Claimant in his email of 20 September 2022 (page 684).

76. The appeal hearing was held by Mr Bulfin on 20 September 2022 in the Claimant's absence. In the event, Mr Bulfin had no questions that he needed to ask of the Claimant through means of written correspondence. Consequently, no correspondence was entered into with the Claimant. Mr Bulfin conducted a fair review of the dismissal process and the Claimant's appeal against dismissal was not upheld. The Claimant was informed of this by means of a letter attached an email dated 28 September 2022 (page 586 to 587).

Law

Disability

77. The Claimant's has made a claim for disability discrimination. Disability is defined at section 6(1) Equality Act 2010 as follows:

> **"A person (P) has a disability if—**
>
> **(a) P has a physical or mental impairment, and**
> **(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."**

78. In this case the Respondent accepted that the Claimant was disabled within the meaning of section 6 Equality Act 2010. His impairments were functional neurological disorder and, anxiety and depression.

Burden of Proof

79. The burden of proof for Equality Act complaints is referred to in s.136 of the Equality Act 2010. It is applicable to all the contraventions of the Equality Act as per the allegations in this action. S.136 states in part that:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

80. This demonstrates a two-stage approach. At the first stage the tribunal considers whether the tribunal has found facts (having assessed the totality of the evidence from both sides) from which the tribunal could potentially conclude in the absence of an adequate explanation and that the contravention has occurred. At this stage it is not sufficient for the claimant to

simply prove that the facts that she alleges did happen. There has to be some evidential basis from which the tribunal could reasonably infer from the facts it has found that there was a contravention of the Equality Act. However, the tribunal can look at all the relevant facts and circumstances when considering this part of the burden of proof test and it can make reasonable inferences where appropriate. If the claimant succeeds at the first stage, then that means the burden of proof shifted to the respondent and the claim has to be upheld unless the respondent proves the contravention did not occur.

81. When considering whether the claimant has satisfied the initial burden of proving facts from which a Tribunal might find discrimination, the Tribunal must consider the entirety of the evidence, whether adduced by the claimant or respondent; see **Laing v Manchester City Council [2006] IRLR 748 EAT.**

82. In addition, a simple difference in treatment as between the claimant and his comparators and a difference in protected characteristic will not suffice to shift the burden; see **Madarassy v Nomura [2007] IRLR 246 CA.**

Direct Discrimination – s13 Equality Act 2010

83. In respect of the claim for direct disability discrimination, section 13 of the Equality Act states:

> **A person (A) discriminates against another if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

84. Direct discrimination under section 13 is about less favourable treatment. It requires comparison. Where a claimant does not have an actual comparator to rely on, then it is possible to rely on a hypothetical comparator, one who resembles the claimant in all material respects, except for the relevant protected characteristic. In making this comparison section 23 of the Equality Act 2010 provides:

> **(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.**
>
> **(2) The circumstances relating to a case include a person's abilities if—**
>
> **(a) on a comparison for the purposes of section 13, the protected characteristic is disability;**

85. The effect of this is that the appropriate comparator for a claimant is a person who has the same abilities as the claimant but who does not share the same disability. The EHRC Code gives useful guidance on this matter at paragraphs 3.29 and 3.30 in particular. It states:

> **3.29 The comparator for direct disability discrimination is the same as for other types of direct discrimination. However, for disability, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself).**

3.30 It is important to focus on those circumstances which are, in fact, relevant to the less favourable treatment. Although in some cases, certain abilities may be the result of the disability itself, these may not be relevant circumstances for comparison purposes.

Example: A disabled man with arthritis who can type at 30 words per minute applies for an administrative job which includes typing, but is rejected on the grounds that his typing is too slow. The correct comparator in a claim for direct discrimination would be a person without arthritis who has the same typing speed with the same accuracy rate. In this case, the disabled man is unable to lift heavy weights, but this is not a requirement of the job he applied for. As it is not relevant to the circumstances, there is no need for him to identify a comparator who cannot lift heavy weights.

Discrimination arising from a disability – s15 Equality Act 2010

86. In relation to discrimination arising from disability, s.15 Equality Act states:

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

87. The elements that must be made out for the claimant to succeed in a s.15 claim are that there must be unfavourable treatment, there must be something that arises in consequence of the claimant's disability and the unfavourable treatment must be because of (that is caused by) the something that arises in consequence of the disability. The claim fails if the Respondent can show that either 15(1)(b) or 15(2) apply.

88. The word unfavourable in s.15 is not separately defined by the legislation and it is to be interpreted consistently with case law including taking account of the Equality and Human Rights Commissions Code of Practice. This section does not require the disabled person to show that his or her treatment was less favourable than that of a comparator.

89. The unfavourable treatment must be because of something arising in consequence of the disability, as opposed to being because of the disability itself. The latter might be a breach of some other part of the Equality Act, but is not a breach of s.15.

90. We must consider two separate steps in relation to causation: (a) Is "something" arising in consequence of the disability. That is an objective test; (b) Was the unfavourable treatment (if any) because of that "something". That requires analysis amongst other things of the decision maker's thought processes, both conscious and sub-conscious. The unfavourable treatment does not have to have been caused solely by the "something" but the "something" must be more than a trivial reason for the unfavourable treatment.

91. In relation to s15(1)(b) and proportionality, it is not necessary for the respondent to go as far as proving that the course of action it chose to follow was the only possible way of achieving its legitimate aim. However, if less discriminatory measures could have been taken to achieve the same objective, then that might imply the treatment was not proportionate. It is necessary to carry out a balancing exercise taking into account the importance to the respondent of achieving its proposed legitimate aim and taking account of the discriminatory effect of the treatment on the claimant. It is not necessary for the respondent to prove that it itself carried out the balancing exercise at the time of the unfavourable treatment; the exercise is one for the tribunal to do. If a respondent employer has failed in an obligation to make a reasonable adjustment (as defined in the Equality Act 2010) which would have prevented or minimised the unfavourable treatment, then it will be difficult for the respondent to show that the treatment was a proportionate means of achieving a legitimate aim.

92. When considering what the respondent knew and/or what it could not reasonably have been expected to know, the relevant time is the time at which the alleged unfavourable treatment occurred. If there are examples of unfavourable treatment at different times, it is necessary to consider the respondent's state of knowledge or constructive knowledge as of the date of each time it treated the claimant unfavourably.

Indirect Discrimination – s19 Equality Act 2010

93. Indirect discrimination is defined in s.19 of the Equality Act. That section states:

> **(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.**

94. All four conditions in section 19(2) must be met before a successful claim for indirect discrimination can be established.

95. Section 136 applies. The matters that have to be established before the burden of proof is reversed are (a) that there was a provision, criterion or practice applied both to employees without the Claimant's disability and those with it (b) that it disadvantaged people with the disability generally, and (c) the aspect of the PCP which was a disadvantage to people with the disability generally created a particular disadvantage to the Claimant. If those facts are found, then the employer is required to justify the provision, criterion or

practice, by showing the explanation for the PCP and that it is a proportionate means of achieving a legitimate aim.

96. In terms of deciding whether the Respondent has the PCP or not, the question is to be analysed by considering the PCP as alleged by the Claimant, not whether the Respondent can establish a different PCP - **Allonby v Accrington and Rossendale College and ors 2001 ICR 1189 CA**. There are not different tests for whether something does/does not amount to a PCP when considering section 19(1) as opposed to section 20(3), which we shall refer to shortly.

97. When considering the disadvantage which the Claimant alleges has been caused by a PCP, it is necessary to construct a pool for comparison, which consists of those who are disadvantaged in that way by the PCP, and then consider whether more persons with the same disability as the Claimant are within the selected pool are within that pool than those without that same disability. The mere fact alone that an employee is placed at a disadvantage by a PCP (because of a disability) does not, in itself, mean that there is indirect discrimination; there has to be an ostensibly neutral PCP adversely affecting an identifiable group. However, the comparison can be a hypothetical one (for example, where there are no other actual employees with the same disability).

98. A complaint of indirect discrimination can succeed even if the Respondent was unaware that the Claimant had the disability.

Failure to make reasonable adjustments – s21 Equality Act 2010

99. In relation to failure to make reasonable adjustments s.20 and 21 of the Equality Act 2010 state, amongst other things:

> **20 Duty to make adjustments**
>
> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **21 Failure to comply with duty**
>
> **(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.**
> **(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.**
> **(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2);**

a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

100. Paragraph 20 of Schedule 8 states amongst other matters:

> **A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know …. … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.**

101. The expression provision criterion or practice or PCP is not expressly defined in the legislation, but we must have regard to the guidance given by the EHRC, and its Code of Practice on Employment, to the effect that the expression should be construed widely so as to include for example any formal or informal policies, rules or practices, arrangements, criteria, etc.

102. The claimant has to clearly identify the PCP to which it is asserted that adjustments ought to have been made. We must only consider the PCPs so identified by the claimant. When considering whether there has been a breach of s.21 we must precisely identify the nature and extent of each disadvantage to which the claimant was allegedly subjected. Furthermore, we must consider whether there is a substantial disadvantage when the relevant alleged PCP is applied to the claimant in comparison to when the same PCP is applied to persons who are not disabled. The claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and there are facts from which it could reasonably be inferred that the duty may have been breached. If she does so, then we need to identify the step or steps, if any, which the respondent could have taken to prevent the claimant suffering the disadvantage in question (including taking account of the Claimant's suggestions of possible steps). If there appear to be such steps the burden is on the respondent to show that the disadvantage would not have been eliminated or reduced by the potential adjustments and/or that the adjustment was not a reasonable one for it to have to had to make.

103. There is no breach of s.21 if the respondent did not know and could not reasonably have been expected to know that the claimant had the disability. Furthermore, in relation to a specific disadvantage there is no breach of s.21 of the employer did not know and could not reasonably have been expected to know that the PCP would place the claimant at that disadvantage.

<u>Harassment – s26 Equality Act 2010</u>

104. In respect of the claim for disability harassment, section 26(1) of the Equality Act 2010 provides:

> **(1) A person (A) harasses another (B) if—**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of—**
>
> **(i) violating B's dignity, or**

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

105. In deciding whether the conduct has the relevant effect, section 26(4) provides:

> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**

106. The test therefore has both subjective and objective elements to it. The subjective part involves the tribunal looking at the effect that the conduct of the alleged harasser (A) has on the complainant (B)). The objective part requires the tribunal to ask itself whether it was reasonable for B to claim that A's conduct had that effect. The effect of this is that although the Claimant's perception must be taken into account, the test is not satisfied merely because the Claimant thinks it is. The Tribunal must reach a conclusion that the relevant conduct reasonably brought about the effect; see **Richmond Pharmacology v Dhaliwal [2009] IRLR 336 EAT.**

107. Guidance on the threshold for conduct satisfying the statutory definition was provided by the EAT in **Betsi Cadwaladr University Health Board v Hughes [2014] 2 WLUK 991**; per Langstaff P:

> **10. Next, it was pointed out by Elias LJ in the case of Grant v HM Land Registry [2011] EWCA Civ 769 that the words "violating dignity", "intimidating, hostile, degrading, humiliating, offensive" are significant words. As he said:**
>
> > **"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."**
>
> **11. Exactly the same point was made by Underhill P in Richmond Pharmacology at paragraph 22:**
>
> > **"..not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and Tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."**
>
> **12. We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence."**

<u>Victimisation – s27 Equality Act 2010</u>

108. Victimisation is defined in section 27 of the 2010 Act. Section 27 provides:

> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because—**
>
> **(a) B does a protected act, or**
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act—**
>
> **(a) bringing proceedings under this Act;**
> **(b) giving evidence or information in connection with proceedings under this Act;**
> **(c) doing any other thing for the purposes of or in connection with this Act;**
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
>
> **(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.**

109. The causal connection required is the same as in a direct discrimination claim. It is not a "but for" test but an examination of the real reason of for the treatment. As such, it is necessary to consider the employer's motivation (conscious or unconscious). There is no need for the claimant to rely upon a comparator to make out a claim of victimisation.

110. Section 212 of the Equality Act 2010 provides that a detriment does not include conduct which amounts to harassment. Consequently, although victimisation and harassment claims may be pursued in the alternative, conduct will either amount to victimisation or harassment but not both.

Time Limits – s123 Equality Act 2010

111. The Tribunal now turns its attention to the law relevant to the time limit issues concerning the claims made under the Equality Act 2010. Section 123 of the Equality Act 2010 provides:

> **"(1) Subject to sections 140A and 104B proceedings on a complaint within section 120 may not be brought after the end of—**
>
> **(a) the period of 3 months starting with the date of the act to which the complaint relates, or**
> **(b) such other period as the employment Tribunal thinks just and equitable."**

112. Under section 123(3)(a), conduct extending over a period is to be treated as done at the end of that period.

113. The 3-month period allowed by section 123(1)(a) is extended by the legislation governing the effect of Early Conciliation (see section 140B of Equality Act 2010). The period from the day after "Day A" (the day early conciliation commences) until "Day B" (the day the Early Conciliation certificate is received or deemed to be received by the Claimant) does not count towards the 3-month period, and the Claimant always has at least one month after Day B to make a claim.

114. There is no presumption that time will be extended. In respect of this, we note the following passages from the Court of Appeal judgment in the case of **Robertson v Bexley Community Centre [2003] IRLR 434**:- **"If the claim is out of time there is no jurisdiction to consider it unless the Tribunal considers it is just and equitable in the circumstances to do so." (para 23) "…the time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule."** (para 25 of the Judgment). These comments have been supported in **Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT** and **Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA**.

115. The words "just and equitable" give the Tribunal a broad discretion in deciding whether to extend the time allowed for making a claim. A summary of the case law and was given by the EAT in **Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283** per HHJ Peter Clark:

> **"11. A useful starting point is the judgment of Smith J in British Coal Corpn v Keeble [1997] IRLR 336. That was a case concerned with the just and equitable extension of time question in the context of a sex discrimination claim. Smith J, sitting with members, in allowing the employers' appeal and remitting the just and equitable extension question to the employment Tribunal, suggested that in exercising its discretion the Tribunal might be assisted by the factors mentioned in section 33 of the Limitation Act 1980, the provision for extension of time in personal injury cases. The first of those factors, as Mr Peacock emphasised in the present appeal, is the length of and reasons for the delay in bringing that claim.**
>
> **12. However, as the Court of Appeal made clear in Southwark London Borough Council v Afolabi [2003] ICR 800, in deciding the just and equitable extension question, a Tribunal is not required to go through the matters listed in section 33(3) of the Limitation Act 1980, provided that no significant factor is omitted. That principle was more recently reinforced in a different context by the Court of Appeal in Neary v Governing Body of St Albans Girls' School [2010] ICR 473, where the leading judgment was given by Smith LJ. There, it was held that a line of appeal Tribunal authority requiring a Tribunal to consider the factors in the CPR, rule 3.9(1), as it then was, when deciding whether or not to grant relief from sanction following non-compliance with an unless order, was incorrect. Following Afolabi it is sufficient that all relevant factors are considered.**
>
> **13. Section 33(3) of the 1980 Act does not in terms refer to the balance of prejudice between the parties in granting or refusing an extension of time. However, Smith J referred to the balance of prejudice in Keeble, para 8, to which Mr Peacock has referred me. That, it seems to me, is consistent with the approach of the Court of Appeal in the section 33 personal injury case of Dale v British Coal Corpn, where Stuart-Smith LJ opined that, although not mentioned in section 33(3), it is relevant to consider the plaintiff's (Claimant's) prospect of success in the action and evidence necessary to establish or defend the claim in considering the balance of hardship. That passage neatly brings together the two factors which, Mr Dutton submits,**

were not, but ought to have been, considered by this Tribunal in the proper exercise of its discretion: prejudice and merits. I shall return to those factors in due course.

14. What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see Hutchison v Westward Television Ltd [1977] ICR 279) involves a multi-factoral approach. No single factor is determinative."

116. The Court of Appeal considered the discretion afforded to Tribunals in **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640** at paragraphs 18 and 19, per Leggatt LJ:

> **"18. First, it is plain from the language used ("such other period as the employment Tribunal thinks just and equitable") that Parliament has chosen to give the employment Tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the Tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a Tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corporation v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the Tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800, para 33. […]**
>
> **19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the Respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."**

117. Underhill LJ commented in **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23**, that a rigid adherence to any checklist of factors (such as the list in section 33 of the Limitation Act 1980) can lead to a mechanistic approach to what is meant to be a very broad general discretion. He observed in paragraph 37:

> **"The best approach for a Tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular …"The length of, and the reasons for, the delay"."**

118. As for the rule in section 123(3)(a) that conduct extending over a period is to be treated as done at the end of the period, the essential question is whether the alleged acts are continuing acts or separate distinct acts. This was considered by the Court of Appeal in **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96**, per Mummery LJ:

> **"52. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'. [...]Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an**

> **ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."**

119. In **Aziz v FDA 2010 EWCA Civ 304**, the Court of Appeal noted that, in considering whether separate incidents form part of an act extending over a period, 'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents'. In **Greco v General Physics UK Ltd EAT 0114/16**, the EAT held that despite six of seven acts of sex discrimination involving a particular manager, that involvement was not a conclusive factor and the employment Tribunal was justified in finding that the allegations concerned different incidents treated as individual matters. Accordingly, they were not considered as part of a continuing act and, in consequence, some were out of time.

120. A lack of evidence from the Claimant about any delay is a relevant factor to consider in deciding whether or not to exercise discretion, but a not necessarily decisive one as seen in **Owen v Network Rail Infrastructure Limited [2023] EAT 106.**

Unfair Dismissal

121. In respect of the unfair dismissal claim, where the dismissal is admitted, the respondent has the burden of establishing that it dismissed the claimant for an admissible reason in accordance with section 98 (1) of the Employment Rights Act 1996. Capability is an admissible reason.

122. In a capability dismissal where an employee has been absent from work for some time, it is necessary for the Tribunal to consider whether the employer can be expected to wait any longer for the employee to return, see **Spencer v Paragon Wallpapers Ltd 1977 ICR 301, EAT.**

123. The importance of consultation with the employee and discovering the true medical position was considered by the EAT in **East Lindsey District Council v Daubney 1977 ICR 566, EAT,** per Phillips J:

> **"Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employers' medical advisers, will cause them to change their opinion. There are many possibilities. Only one thing is certain, and that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done."**

124. A fair procedure is also necessary for an ill-health capability dismissal to be fair. This requires there to be consultation with the employee, a thorough medical investigation (to establish the nature of the illness or injury and its prognosis), and consideration of other options that might be available to the employee, for example alternative employment within the employer's business.

125. In terms of the decision to dismiss, the Tribunal must consider whether the employer's decision to dismiss fell within the band of reasonable responses that a reasonable employer in those circumstances might have adopted. In **Iceland Frozen Foods Limited v Jones (1982) IRLR 439**) Mr Justice Browne-Wilkinson summarised as follows:

> **"We consider that the authorities establish that in law the correct approach for the… tribunal to adopt in answering the question posed by s.98(4) is as follows:**
>
> **(1) the starting point should always be the words of s.98(4) themselves;**
> **(2) in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the… tribunal) consider the dismissal to be fair;**
> **(3) in judging the reasonableness of the employer's conduct [a] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;**
> **(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;**
> **(5) the function of the… tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."**

Legal Submissions

126. Both the Claimant and Respondent provided the Tribunal with oral submissions. The Respondent also provided written submissions.

Conclusions

127. In order to reach its conclusions, the Tribunal turns to the agreed list of issues.

1. Does the Employment Tribunal have jurisdiction to hear the Claimant's claims of disability discrimination under the Equality Act 2010 or are allegations against the Respondent out of time?

128. In this case the Claimant's initial claim form was presented on 29 April 2022. ACAS was notified using the early conciliation procedure on 24 December 2021 and the early conciliation certificate was issued on 3 February 2022. The position is that any acts which took place before 25 September 2021 are out of time.

2. If the claimant's claims are found to be out of time, is it just and equitable for the Tribunal to extend time for submission of the claims?

129. The Claimant provided no explanation as to why there was a delay in bringing his employment tribunal proceedings. In addition, there is evidence that the Claimant was aware of his legal rights. He referred to the Equality Act 2010 in his correspondence with the Respondent in November 2020 and the fact that he believed he had been subjected to discrimination. This can be seen in his email of 24 November 2020 at page 236 of the bundle.

130. The delay in this case is considerable in relation to the claimant's claim for direct discrimination set out at issue 6. That claim is approximately 18 months out of time.

131. In addition, some of the individuals involved in the matters under consideration have now left the employ of the Respondent and were not present to give evidence to the Tribunal e.g. Ms. Emmett and Ms Ross.

132. The Claimant did not establish any reason such as reasonable ignorance of his substantive rights or the time within which he would have to make a claim to the Employment Tribunal. Given the fact that the claimant was aware of the relevant legislation, the Tribunal is satisfied that the claimant could have presented a claim to the tribunal without difficulty had he wished to do so.

133. The Tribunal has also carefully considered the prejudice that would be suffered to the Respondent if an extension of time were allowed and balanced that against the prejudice that would be suffered by the Claimant if he were not able to bring certain aspects of his case. This is not a case where the entirety of the claimant's case is out of time, it is only those claims which relate to conduct prior to 25 September 2021 which are time barred.

134. Taking all factors into account, the Tribunal does not consider it just and equitable to admit the claimant to pursue his claims brought under the Equality Act 2010 in respect of any acts which took place before 25 September 2021.

3. <u>In respect of any complaints which are found to be out of time, do they form part of a continuing act, taken together with acts that are in time?</u>

132. On the facts of this case, the Tribunal finds no evidence that any acts which took place after 25 September 2021 were the continuation of a course of conduct. The events complained of by the Claimant after 25 September 2021 involved individuals who had previously had no prior contact or involvement with the Claimant. By way of example, Ms Collier had not met the claimant prior to the meeting of 23 December 2021 and had no real awareness of who the Claimant was. The tribunal is satisfied Ms Collier and others acted independently and that applying the case of **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96**, their actions cannot be said to represent the culmination of conduct extending over a period of time.

4. <u>Did the Respondent have actual or constructive knowledge of the Claimant's disabilities?</u>

133. The Tribunal finds that the Respondent had knowledge of the Claimant's disability from 24 November 2020. At that point in time, the Claimant described himself as being disabled in an email to the Respondent (page

236). He also stated that he had been diagnosed with functional neurological disorder. This latter statement was incorrect as it was only on 6 September 2021 that he was provided with a definitive diagnosis in respect of his functional neurological disorder. Although that statement was incorrect and he had not made specifically clear the effect of his impairment upon his ability to undertake day to day activities; the Tribunal finds that the Claimant stating he was disabled, taken together with his absence record, meant that the Respondent had constructive knowledge of his disability form 24 November 2020.

Direct disability discrimination

134. The Tribunal finds that the Claimant's claim of direct discrimination is out of time. If however, we are wrong on that, we make the following conclusions.

135. The Claimant's pleaded case here is essentially that by not offering him the role of CIT Assistant he was subjected to less favourable treatment because of his disability. Despite this, the Claimant accepted in cross examination that the reason he was not appointed to the role of CIT Assistant was because he was not able to attend the interview rather than because of his disability.

136. We do not find that the claim of direct discrimination has been made out by the claimant. The Claimant did not attend for an interview when he applied for the role of CIT Assistant. The reason he did not attend for the interview was because he was absent from work. In spite of that, the Respondent quite sensibly offered him an alternative date to attend. Despite being offered that alternative date, the Claimant still did not attend for interview. In the Tribunal's opinion, the appropriate comparator here is a non-disabled employee who was also absent from work and who also did not attend for interview. Such a comparator would also not get the role of CIT Assistant. Consequently, it cannot be said that the Claimant was treated less favorably than the relevant comparator here. The less favourable treatment was not because of the Claimant's disability but because of his failure to attend the interview for the position of CIT Assistant. The Tribunal also notes that, at the relevant point in time, the Claimant did not allege that the failure by the company to offer him the role of CIT Assistant amounted to less favourable treatment or indeed any form of discrimination.

137. The claim of direct discrimination does not succeed.

Indirect discrimination

138. Turning to the claim of indirect discrimination which is dealt with at points 9 to 13 of the list of issues. The first issue here is whether or not the respondent had the following provisions, criterions or practices (PCPs).

    138.3. A - "A requirement to meet key performance indicators and targets."

    138.4. B - "Subjecting an employee to a performance improvement plan without adjustments."

    138.5. C - "The requirement to have certain attendance requirements before being subjected to the absence management process."

138.6. D - "The requirement to return to the office to work on a permanent basis."

139. The Tribunal shall deal with the issue of the requirement to return to the office to work on a permanent basis first i.e. PCP D. The Tribunal finds that the Respondent did not have this as a provision, criterion or practice. There was never any requirement on the claimant to return to the office to work on a permanent basis and we prefer the evidence of Ms Jeffcoat, as set out at paragraph 32 of her witness statement on this point. Simply put, the Claimant never returned to the office in December 2021. In fact, it was agreed that the Claimant need not return to the office at that point in time rather that the situation would be reviewed in the future. In the event, the Claimant never actually returned to the office to work.

140. The Respondent accepted that PCPs A to C were applied to the Claimant at various points in time and would also have applied to individuals without a disability.

141. In respect of the other PCPs pleaded by the Claimant, the tribunal notes that the Claimant has not provided any evidence that he was placed at a disadvantage when compared to persons who were not disabled. As a result of this, the Tribunal has no basis on which it can draw the conclusion that any of the pleaded PCPs placed the Claimant at a disadvantage when compared to persons who were not disabled. The Claimant has not therefore met the requisite burden of proof.

142. In addition, the Tribunal accepts that PCPs A to C were proportionate means of achieving legitimate aims. So, in relation to PCP A, the Tribunal are satisfied that this was a means of ensuring that the Respondent's employees were working effectively and productively. In addition to this, the Respondent's use of key performance indicators and targets was proportionate, it measured only those indicators which it considers to be appropriate measures of productivity.

143. In relation to PCP B, the Tribunal are satisfied that this was a means of allowing employees to improve their performance at work which would enable them to work more productively and effectively. It would also mean that such employees would not be subjected to disciplinary sanctions if their performance improved. In the Tribunal's opinion, this PCP was a proportionate means of achieving legitimate aim.

144. In relation to PCP C, the Tribunal accepts that the legitimate aim here was the requirement for the Respondent to have an effective workforce. The Tribunal also accepts that the means of achieving this aim were proportionate. The Respondent operated and attendance management policy which set out objectively verifiable metrics which would trigger intervention from management as appropriate. It was clear to the Tribunal, from the facts found, that the attendance management policy was not rigid in nature. Rather, the Respondent adjusted their approach to the policy over time in order to take into account the individual circumstances of the Claimant. This can be seen by the fact that the Claimant had five Stage 2 Absence meetings before any formal action was taken against him.

145. The claim of indirect discrimination is not well founded and is dismissed.

Failure to make reasonable adjustments

146. Moving to the issues in respect of the failure to make reasonable adjustments claim, these are dealt with at points 14 to 21 of the list of issues.

147. In respect of point 14, the date on which the Claimant states there was a duty to make reasonable adjustments, is unclear but the tribunal finds that the Respondent was under a duty to make reasonable adjustments from 24 November 2020. That is the date when the Respondent had knowledge of the claimant's disability.

148. In respect of the PCPs relied upon at issue 15, these are substantially the same as those relied on in respect of the indirect discrimination claim. The Tribunal will again state that it finds that there was no requirement on the claimant to return to the office to work on a permanent basis.

149. The Tribunal finds that a number of adjustments were proposed during the Claimant's employment and those adjustments were made. In addition, the adjustments were reasonable. By way of example, the Claimant was provided with modified computer equipment, a modified chair, a footrest, and a headset. In addition, a number of his targets were amended, he was allowed to return to work on a phased return, and his scheduled rest breaks were adjusted. At no point, did the Claimant express any dissatisfaction with the adjustments that had been made. Indeed, on more than one occasion, the Claimant stated that he was satisfied with a number of the adjustments that had been made.

150. The Claimant at issue 18 asserts that a number of adjustments should have been made. On the evidence that it has heard, the Tribunal has not been satisfied that there is sufficient evidence that any of the adjustments suggested by the Claimant were reasonable or would have alleviated the substantial disadvantage upon which he relies.

151. The claim of a failure to make reasonable adjustments is not well founded and is dismissed.

Discrimination arising from a disability

152. Turning to the discriminaiton arising from a disability claim and the issues set out at points 22 to 25 of the list of issues. The unfavourable treatment that the Claimant relies on is set out at issue 23. The Respondent accepts that the Claimant's written warning and dismissal were unfavorable treatment.

153. The Claimant sets out what the "something" arising in consequence of his disabilities is at issue 24. The Tribunal should state that there was insufficient evidence before it to demonstrate that the Claimant needed to use the toilet more frequently whilst at work. We do however note that the Claimant is seeking to rely upon his absences which he states were disability related and this was accepted by the Respondent as being "something" arising out of the Claimant's disability.

154. Moving to issue 25, in respect of the alleged less favorable treatment, the Tribunal finds that was justified. The less favorable treatment relied upon by the Claimant must be set against the backdrop of a substantial and lengthy period of absence. During this period of absence, the Respondent had taken

numerous steps to assist, aid and engage with the Claimant. We also accept that the Respondent had a legitimate aim, ie, ensuring the satisfactory attendance of its employees. In addition, the Respondent sought to achieve that legitimate aim in a proportionate means. It had an attendance management policy which insured that employees with either repeated or long-term sickness absences could be supported and the reasons for those absences ascertained. By doing so, the impact of those absences upon the Respondent's business could be ascertained. The Tribunal accepts that is good business practice. The way in which the attendance management policy and procedure was applied to the Claimant was also reasonable and proportionate. The Claimant had six Stage 2 absence meetings prior to being given a written warning by the Respondent. It was only after the administration of that written warning, and the lengthy additional absence of the Claimant, that he was dismissed.

155. In terms of being placed upon a performance improvement plan and being the subject of allegations of call avoidance, the reason the Claimant was placed on the plan and investigated for call avoidance was not because of anything which arose from his disability but simply because the Respondent had genuine and reasonable concerns over the Claimant's ability to undertake his work, and his performance.

156. The respondent did not seek to rush thorough the attendance policy or procedures with the Claimant. It was open and understanding to the Claimant. Measures were taken to appreciate and understand the Claimant's illness and disability. Even when countered with aggressive emails from the Claimant, the Respondent continued to behave in a reasonable and proportionate manner.

157. The claim of discrimination arising from a disability is not well founded and is dismissed.

<u>Harassment related to disability</u>

158. The claim of harassment related to disability is in time. The issues in respect of harassment are set out at points 26 and 27 of the list of issues. The Claimant seeks to rely upon the following alleged acts of harassment. The first is that the Claimant was told by Ms Collier "People with your condition do not get better, do they"; The second is that Ms Collier compared the Claimant's level of absence to other disabled employees and said it was not sustainable. The third is that Ms Collier said "I need to make sure you are aware that this is not normal even for employees with permanent disabilities."

159. In respect of these first three alleged acts of harassment, we prefer the evidence of Ms Collier. She gave clear and cogent evidence. We fully accept her evidence. We also accepted the evidence of Ms Jeffcoat where she stated that Ms Collier had not made those comments and that if Ms Collier had, she personally would have objected to the comments. The Claimant was an unreliable witness on a number of issues. We did not find the Claimant credible on these issues and we simply do not accept that Ms Collier made any of these alleged comments.

160. The fourth alleged act of harassment relied upon by the Claimant is that in email correspondence addressed to him dated 24 December 2021, Ms Collier

said "I'm afraid I won't amend the notes as I do not recall saying that. I am sure I never referred to you as having a disability as your condition is not classed at such". With regard to the email in question, which appears at page 454 of the bundle, there is no doubt that Ms Collier used the words in question. However, we do not accept that the words used by Ms Collier in this email had the purpose of harassing the claimant within the meaning of s.26(1)(b) of the Equality Act 2010.

161. In assessing whether or not an act amounts to harassment and has the required effect, the tribunal is required to take into account s.26(4) of the Equality Act 2010. This requires us to take both an objective and subjective approach to the act in question. Our finding is that objectively, the words used by Ms Collier were not capable of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It was not reasonable for the conduct to have that effect upon the claimant. Ms Collier was within her rights to refuse to amend the notes. In her opinion, the notes amounted to an accurate record of the relevant meeting and this is the reason why she refused to amend the notes.

162. The claim of harassment related to a disability is not well founded and is dismissed.

Victimisation

163. The Claimant is pursuing a claim for victimisation and the issues in respect of this are set out at points 28 to 30 of the list of issues. This claim is in time. The Respondent accepts that the acts relied on by the claimant are protected acts.

164. There is no evidence before the Tribunal to support a finding that the detrimental treatment that the Claimant alleges he was subjected to was because of the making of any of his protected acts. The Claimant sets out his alleged detrimental treatment at point 29(a), (b) and (c) of the list of issues.

165. In respect of issue 29(a), the Respondent had good grounds at the time to suspect that the claimant was call avoiding, and this was the reason he was invited to an investigatory meeting rather than the fact that he had made any protected act.

166. The issue set out at 29(b) is that the Claimant alleges his mental health symptoms were further exacerbated and he took further time off which contributed towards his dismissal. In the Tribunal's opinion, this is not detrimental treatment that he was subjected to by the claimant. There is no evidence that the Claimant' mental health symptoms were exacerbated because of the making of any of his protected acts. In any event, in respect of him taking further time off, this was something which the Claimant chose to do. He was certainly not forced to do by the respondent.

167. In respect of the point raised at issue 29(c), the Claimant was not denied company sick pay as a result of his making of a protected act. The Tribunal heard evidence, which it accepted, that the reason the Claimant was not paid company sick pay was because of the Respondent's policy which was in place at that point in time which prevented an individual, who had received a

warning, from receiving company sick pay. This position is set out at point 5 of the Respondent's attendance management policy (page 134 of the bundle). The pleaded detrimental treatment therefore was not because of the making of a protected act.

168. The claim of harassment related to a disability is not well founded and is dismissed.

Unfair dismissal

169. The unfair dismissal claim, which is dealt with at issues 31 and 32 of the list of issues, is in time.

170. The Claimant had an extremely high absence record throughout his period of employment with the Respondent. The Respondent displayed a remarkable degree of tolerance and understanding towards the Claimant's level of absence. Indeed, it was only following the sixth formal absence meeting that the Claimant was given his first formal disciplinary warning. After being given this warning, the Claimant entirely disengaged from contact with the respondent. As detailed in numerous lengthy emails, the Claimant communicated with the Respondent in a rude and aggressive manner. He indicated that he had no interest in returning to work for the Respondent and wished to enter into a settlement agreement.

171. The Tribunal find that the Claimant was fairly dismissed for the reason of capability on 12 August 2022. Prior to dismissing the Claimant for capability the Respondent followed a fair process and procedure. The Claimant was invited to a meeting, a review of his absence record was conducted, and the Respondent gave thought as to whether or not the Claimant could return to work in any capacity. The claimant was also invited to a meeting and informed of his right to be accompanied. When he was dismissed, he was informed that he had the right to appeal his dismissal. In the Tribunal's opinion, a fair procedure was followed.

172. This was a fair dismissal. The claim for unfair dismissal is not well founded and is dismissed.

_____

Employment Judge McTigue

_____

Date: 5 December 2023

REASONS SENT TO THE PARTIES ON

7 December 2023

FOR THE TRIBUNAL OFFICE