EMPLOYMENT TRIBUNALS (SCOTLAND)
Case No: 4102866/2023

Held in Glasgow on 1, 4, 5, 6, 7 and 8 December 2023
with members' meeting on 5 January 2023

Employment Judge M Robison
Tribunal Member E Farrell
Tribunal Member G Mackay

Mr R Wright	**Claimant** **Represented by** **Mr L Kennedy - Advocate**
Kura (CS) Ltd	**Respondent** **Represented by** **Mr D Milne - Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

i) the claimant was disabled within the meaning of section 6 of the Equality Act 2010 at the relevant times; and

ii) the claims for unfair dismissal, disability discrimination and breach of contract are not well founded and are dismissed.

REASONS

1. The claimant lodged a claim in the Employment Tribunal for unfair dismissal, disability discrimination, breach of contract and arrears of pay on 3 May 2023 following his dismissal, effective 15 February 2023. The respondent resists the claims, asserting that the claimant was dismissed for a potentially fair reason namely capability; and that they acted reasonably in treating the claimant's long term absence as a sufficient reason for dismissing him.

2. In a judgment dated 3 October 2023, claims under section 100 of the Employment Rights Act 1996 (ERA) and for notice pay were withdrawn and dismissed.

3. At the outset of the hearing, we took some time to clarify matters arising from the final draft list of issues lodged by the claimant.

4. On the matter of the reason for dismissal, although reference had been made to "pretended" grounds of capability, Mr Kennedy confirmed that the claimant did not dispute the reason for the dismissal but argues that dismissal in the circumstances was both substantially and procedurally unfair. In terms of the procedural failures, he relies on the five reasons set out in the ET3.

5. Mr Milne argued, in regard to the breach of contract claim, that the references to certain clauses in the contract were not foreshadowed in the ET1, so that the claimant would require to amend. In any event he submitted that the breach of contract claim had no reasonable prospects of success.

6. We accepted that a claim for breach of contract had been validly pled and that further particulars of that claim had been set out in the first list of issues prepared by the claimant, in compliance with a direction of EJ McPherson. There was therefore no requirement to amend the claim, and we intimated that Mr Milne should deal with these points in final submissions.

7. Mr Kennedy was able to confirm that the claimant does not rely on anaphylaxis as a disability, rather that this was a source of the claimant's anxiety, which the claimant relies on as the sole disability.

8. Mr Milne also sought clarification regarding the time frame when the claimant alleged that he had suffered the disability. Mr Kennedy confirmed that the claimant would argue that he was disabled from the onset of the pandemic in March 2020, and that he was thus disabled when he was refused homeworking on 23 June 2020, and refused furlough on 8 July 2020.

9. During final submissions, the respondent was able to concede that the claimant was disabled as at February 2023, which is the date on which he was dismissed, but not in 2020.

10. Following initial discussions, and taking account of subsequent discussions regarding the issue of knowledge, and that concession during submissions, the final list of issues for determination by the Tribunal is as follows:

Unfair dismissal

a) What was the reason or the principal reason for the claimant's dismissal?

b) Was the claimant's dismissal fair within the meaning of s.98(4) ERA, that is did the respondent act reasonably in treating the reason as sufficient for dismissing the claimant?

c) What financial loss if any has the claimant suffered?

d) Should any award be reduced, on the basis that any failure to follow procedure would have made no difference; and/or on the basis of contributory fault?

Breach of contract

e) Did the respondent breach the claimant's contract of employment in the following ways:

(i) by failing to apply the Government Coronavirus Job Retention Scheme (CJRS) to the claimant, in breach of clauses 4, 5, 6 and 7;

(ii) by failing to allow the claimant to work from home from 23 June 2020, or as soon as reasonably practicable thereafter, in breach of clauses 4, 5, 6 and 7;

(iii) by dismissing the claimant on the grounds of capability in breach of the respondent's capability policy and procedure which it was the custom and practice to follow?

f) If so, what is the appropriate remedy?

Disability status

g) Was the claimant a disabled person as defined in section 6 of the Equality Act 2010 (EqA) at the relevant times (specifically March to December 2020) by reason of anxiety?

Indirect disability discrimination

h) Did the respondent apply any of the following PCPs:

(i) Failing to offer a place on the furlough scheme to all employees;

(ii) Failing to allow working from home at any time to all employees on 23 June 2020?

i) If so, does any PCP put or would it put persons suffering anxiety at a particular disadvantage when compared with persons who do not have

the same disability, those disadvantages being loss of income, loss of furlough pay, loss of the ability to work from home and loss of employment.

j) If so, was the claimant put at that disadvantage?

k) If so, was the PCP a proportionate means of achieving a legitimate aim?

Discrimination arising from disability

l) Did the respondent treat the claimant unfavourably by:

(i) dismissing the claimant; and

(ii) failing to allow the claimant to work from home; and

(iii) failing to apply the furlough scheme to the claimant.

m) Was any unfavourable treatment because of something (fear of infection and alarm for his own safety and that of his mother) arising in consequence of the claimant's disability?

n) If so, did the respondent know or could it reasonably be expected to know that the claimant had the disability?

o) If so, was the unfavourable treatment a proportionate means of achieving a legitimate aim?

Reasonable adjustments

p) Did the respondent apply either of the following PCPs:

(i) Not offering a place on the furlough scheme to all employees;

(ii) Failing to allow working from home to all employees on 23 June 2020?

q) Did any PCP put the claimant at a substantial disadvantage (as above) in relation to a relevant matter in comparison with persons who are not disabled?

r) Did the respondent take such steps as it was reasonable to have taken to avoid the disadvantage?

s) Did the respondent know, or could it reasonably have been expected to know, that:

(i) the claimant was disabled at the material time? and

(ii) that the claimant would be placed at a substantial disadvantage by the PCP?

t) What financial loss if any has the claimant suffered and what award if any should be made for injury to feelings?

Arrears of pay

u) Is the claimant entitled to arrears of pay and if so, what is the sum due?

Jurisdiction – Timing

v) Have the claimant's claims for disability discrimination, breach of contract and arrears of pay been brought within the relevant time period?

w) If not, do the alleged acts or omissions constitute a continuing act of discrimination, the end of which fell within the time limit?

x) If not, are there any grounds on which it would be just and equitable to extend time?

11. At this hearing, the Tribunal heard evidence from the claimant and from Professor M Taylor, consultant psychiatrist. For the respondent the Tribunal heard from Mr S Weir, the claimant's line manager; Ms J McIntosh, chief culture officer (with overall responsibility for HR), who conducted the grievance appeal; Mr C Rankin, dismissing officer; and Mr O Campbell, director of operations who conducted the appeal against dismissal.

12. A joint file of productions was lodged, with additional documents being lodged by both parties at the outset and during proceedings. There was no objection from either party to those additional documents being lodged.

Findings in fact

13. On the basis of the evidence heard and the documents lodged the following relevant facts are admitted or proved.

14. The claimant was employed by the respondent as a customer adviser from 17 October 2016 until his dismissal on 15 February 2023. He lives with his 93 year old mother who is extremely vulnerable due to her age and health conditions. He is her main carer.

15. The respondent is an outsourcer which among other things operates call centres for a variety of business clients.

16. On 19 October 2016 the claimant advised by completing an initial medical questionnaire that he did not have any underlying medical conditions and that

he had not discussed any major medical concerns with his doctor in the last 12 months.

17. The claimant was issued with a new contract of employment on 30 October 2017. Under the heading sickness and sick pay, this contract stated that a doctor's certification (fit note) was required for sickness absence lasting more than seven days, and further certificates were to be obtained for absences beyond the period of the original certificate, with the claimant being entitled to SSP after three days of illness.

18. Under the heading policies and procedures the contract stated that "from time to time the Employer will exercise its right to change, withdraw or replace existing Policies and Procedures or introduce new ones, for example, as a result of legislative changes. You will be required to comply with all changes and amendments…As a condition of your employment you are subject and are required to conform with all and/or any rules and regulations…that may from time to time be in force and to become thoroughly acquainted with those rules and regulations relevant to your work. Any policy operating within the employers business at the time of employment applies to you although these policies form a non-contractual element of your employment".

19. In June 2019, the claimant made an application for flexible working to help care for his mother which was ultimately refused on 19 January 2020. The claimant was offered the opportunity to work on an alternative campaign which would allow flexible working but he declined that offer.

Claimant's absence on sick leave from February 2020

20. On 20 February 2020, the claimant went absent on sick leave and did not return to work before the termination of his employment.

21. The respondent's managing attendance policy and procedure which applies to the claimant was updated on 5 October 2015, with subsequent minor updates to produce a version 7 in place after 23 September 2022, and a version 9 dated 11 September 2023.

22. The policy states that absences of four weeks or more are considered long term absences; that managers will maintain regular contact through absence welfare meetings and care contacts, to keep informed about the likely duration of the sickness absence and suggest support; reference may be made to occupational health for advice on an employee's fitness for work, a likely date of return and where relevant a return to work plan; and if return to work is not deemed possible it may be necessary to consider medical capability in terms of the capability procedure.

23. It states further that occupational health specialists are engaged to support employees and offer advice to the organisation on rehabilitation; prognosis on current absence; reasonable adjustments to support return to work; and preventative measures to mitigate against an employee's absence. Where information of past medical history is required, the employee's GP will be contacted with their permission.

24. The claimant's initial absence related to a physical condition. Fit notes issued by the claimant's GP from 20 February 2020 to 2 August 2021 indicated that the cause of absence was stress/anxiety. Fit notes continued to be issued until the claimant's dismissal.

25. Over the period from 20 February 2020 to 21 March 2022 over 150 care calls or attempted calls to the claimant are recorded in a "care calls log" in line with the respondent's attendance policy. His line manager Steven Weir called him at least once a month, often more frequently.

26. By 15 March 2020, during a care call, Mr Weir noted that the claimant had worries about the coronavirus and about his mother in that regard.

Furlough payment

27. On 29 March 2020, Mr Weir contacted the claimant to advise that there would be a conference call on 30 March 2020 with regard to furlough.

28. At that time, the claimant was working on a contract for a client called Esure which supplies car insurance. All staff working on that contract, totalling 16 including the claimant, were invited to join the conference call.

29. On that call Thomas Scally read out (verbatim) a communication briefing relating to furlough. Staff were advised that following the Government announcement about lockdown, all employees were to stay at home because they were not key workers. The respondent was attempting to arrange home working for as many as possible.

30. Staff were also advised that they had tried to make these arrangements for Esure, that client was not able to permit homeworking for any of their staff for security and data protection reasons, including the respondent's staff working on that contract.

31. This meant that employees on the Esure contract could not work from home or attend the workplace and there was then no work for them to do. Consequently, such staff were asked to agree to being furloughed. The Government furlough grant of 80% of their wage would be topped up by the respondent. Staff on the call were asked to confirm their agreement in writing to the offer to be placed on furlough.

32. The briefing stated that, "For any employees currently sick, self-isolating, on maternity, paternity, adoption and/or shared parental leave furlough does not apply to you at this time, and the normal contractual or statutory pay and procedures would apply". The briefing also sought the agreement of those in those absence categories (which included the claimant who was on sick leave) in the event that their absence ended while measures were in place.

33. In making this offer, the respondent was relying on the Government's CJRS. Their rationale for the offer was to ensure that those who could not work retained their jobs and had an income. Those on other forms of absence were excluded because they were not otherwise available for work and had other forms of income.

34. Mr Weir called the claimant later on 30 March 2020 and noted that the claimant agreed to furlough. As the claimant could not get onto the intranet due to limited internet access at home, he asked for the documents by post.

35. A letter dated 30 March 2020 was issued to the claimant setting out this briefing and seeking agreement to furlough, followed by one dated 6 April 2020 headed “confirmation of furlough”. The claimant states that he did not receive those by post and he did not access them through the intranet either. In April 2020, the claimant was paid 75 hours of furlough in error, in addition to being paid sick pay.

36. At first the senior leadership team were able to work from home and this was rolled out to all other groups of employees when the respondent was able to organise the technology and equipment to allow them to work from home, and as permitted by their clients. Approximately 10-15% of advisers were put on furlough.

Grievance relating to non-payment of furlough

37. On 8 July 2020, Mr Weir contacted the claimant to advise that he had been offered furlough in error due to being off sick at the point at which it was introduced. On 29 September 2020, the claimant wrote complaining about the failure to pay him furlough.

38. On 29 October 2020 the claimant had a telephone discussion with Mr Weir when he was accompanied by his sister. This was followed up by a letter dated 3 November 2020 confirming the points discussed and explaining why he had not been entitled to furlough. The claimant thought because he was shielding and/or living with someone who was classed as extremely vulnerable he should have received furlough. Mr Weir explained that all employees who were shielding were notified that they could return to work after 31 July but the claimant had chosen not to return and continued to send in fit notes. He was advised that the cut-off date provided by the Government to update claims for furlough was 10 June and since he was still in receipt of sick pay, he did not qualify for furlough, and his fit notes stated he was unfit for work due to stress at this time.

39. On 17 November 2020 the claimant lodged a grievance regarding the failure of the respondent to properly interpret Government furlough guidelines.

40. A grievance hearing took place on 22 December 2020, chaired by Mark Lonie, operations manager. Following several meetings, the claimant was informed on 8 April 2021 that his grievance had not been upheld. The respondent apologised for the administrative errors which led him to believe he would be placed on furlough, and confirmed they would not seek repayment of the furlough pay as a gesture of goodwill. Following an appeal hearing on 26 May 2021 conducted by Ms Julie McIntosh, the claimant was advised on 20 July 2021 that his appeal was not upheld.

Claimant's absence review meetings

41. On 15 June 2020, an absence review meeting was conducted by telephone by Elizabeth O'Keefe and Keighley Lefeuvre.

42. On 23 June 2020, the claimant had a further telephone conference call with Ms Le Feuvre and Ms O'Keefe, with his sister taking notes. It is noted that the claimant said "I do not feel good enough for work at moment". He also asked if he could work from home. The claimant was advised that he could not work from home. It is noted that Ms Le Feuvre stated "you are not ready to come back….as [you are] under severe stress". At that time, employees on the Esure contract were still not able to work from home in any event.

43. On 15 July 2020, Mr Weir noted following a care call that the claimant did not wish to attend occupational health. A further call took place on 21 July 2020 with a representative from HR to explain the occupational health review procedure. On 18 August 2020, following a care call, Mr Weir recorded that the claimant advised that he was still not feeling well both mentally and physically and still worried about coronavirus.

44. On 9 September 2020 an absence review meeting took place with Mr Weir. On 10 September 2020 the claimant's statutory sick pay (SSP) ran out.

45. On 22 September 2020, the Esure team started working from home. The claimant was unable to participate because he did not have broadband as required by the client. In any event, the claimant was on sick leave.

46. Absence review meetings took place with Mr Weir on 24 September, 11 November and 3 December 2020. On 18 December 2020, the claimant provided a letter from the NHS confirming that he was shielding his mother which he said meant he could not go into the office.

47. Further absence review meetings took place on 21 January, 3 March, 28 April, and 30 September 2021. On 15 November 2021, Mr Weir noted following a care call that the claimant was "still unsure if wants to work from home as needs broadband installed and worried about engineer bringing in the virus. Advised needs to be signed off as ok to work by doctors as well in order to work from home".

48. On 9 December 2021, following an absence review meeting, Mr Weir noted the reasons for the continuing absence, including stress worrying about himself and his mother catching covid. The claimant advised that he had been unable to speak to his GP because the surgery was so busy. It was recorded that he was "not feeling better and extremely anxious more so than last Absence Review and can see no light at the end of the tunnel. Genuine concern over risk to life with Covid". In addition, it was stated that the claimant had declined an offer of an occupational health referral and that he would prefer to speak to his GP directly. He was also advised that PAM assist (counselling service) was available for him. It is recorded that "estimated RTW unknown" and that he would be invited to a capability hearing.

49. On 23 February 2022 an absence review meeting was conducted by Angela Prentice when the claimant was again offered an occupational health referral, but again he said he would prefer to speak to his GP. He said that he did not believe a phone call was sufficient to understand his situation. He stated he believed he has an impaired immune system due to anaphylactic attack several years ago; that he was concerned about the lifting of restrictions and the uncertainty of the course of the pandemic. He was unable to give an estimated return to work date or advise what support he needed going forward, again declining counselling. He was advised that having been absent for two years, that level of absence could not be sustained, and they would move to ill health capability.

50. On 31 March 2022, Ms Prentice conducted an absence review meeting and recorded that the claimant did not feel comfortable returning to work because the virus was at record levels and likely to get worse. He remained concerned about allowing an internet installation engineer into his home. He was again asked about occupational health. No return to work date was suggested. He was told that a further absence review meeting would not be arranged as the decision has been made to move to ill health capability.

Capability process

51. The respondent's capability policy and procedure applied to the claimant. Version 3 was issued on 26 January 2018 and version 4 on 23 September 2022.

52. Under the heading purpose and scope, it states that capability issues can be caused by poor attendance related to ill-health which may include disability issues. It also states that the procedure was for guidance only and did not form part of an employee's contract of employment. It states that it can be revised from time to time and that the respondent could omit any stage of the procedure or not evoke the procedure as appropriate.

53. The policy states that if matters cannot be resolved informally and acceptable performance achieved, then the formal procedure will commence, with the employee being invited to a capability hearing. That hearing will be chaired by the employee's line manager who "will be accompanied by another employee of the company who may be a member of the human resources team and a note taker".

54. The policy also states that dismissal would only follow after a first formal hearing in exceptional circumstances. Consideration will be given to other options first but if other sanctions are deemed inappropriate, the employee may be dismissed.

55. On 7 April 2022, Mr Weir completed an ill-health capability report summarising the position following the absence management reviews.

56. By letter dated 11 April 2022, the claimant was notified of a capability hearing, to take place on 20 April 2022. He was advised that contrary to usual policy, his sister could attend to take notes rather than a work colleague or trade union representative. The claimant was advised that the capability hearing was being held to discuss his current health situation and ongoing employment and that termination of employment could be considered. The capability procedure, care call and absence review details as well as ill health capability report were enclosed.

57. That hearing did not take place because the hearing manager was unwell. There were then several attempts to convene the meeting but, primarily for reasons relating to the respondent's availability, the hearing could not proceed.

58. A hearing eventually took place on 17 August 2022. It was conducted by Ciaran Rankin, with Lynn Middler taking notes. The claimant was accompanied by his sister. The claimant refused to engage constructively, asserting that the capability procedure did not form part of his contract of employment.

59. A further meeting commenced on 5 October 2022. The claimant was not prepared to proceed with the hearing because he had not been advised that his sister could accompany him.

60. A further hearing commenced on 2 February 2023. This was conducted by Mr Rankin, with Emily Craig as note taker and Sarah Robert's HR representative. The claimant was accompanied by his sister. The claimant refused to co-operate because the respondent had three people attending whereas there had been only two in previous meetings, which in his view was not permitted by the policy. After lengthy discussion on that topic, Mr Rankin decided to proceed with the hearing and to ask his prepared questions in line with the capability procedure. The claimant refused to answer any of his questions.

61. The claimant was advised in a letter dated 3 February 2023 that the hearing would be reconvened on 8 February 2023 for Mr Rankin to advise of the outcome. The claimant was advised that his sister could take notes.

62. On 8 February 2023, approximately one hour prior to the time scheduled for the hearing, the claimant attended the respondent's offices to deliver a letter personally to Mr Rankin to advise he would not attend the meeting because his sister was not available. The meeting went ahead in his absence.

63. The outcome was confirmed in a letter dated 14 February 2023 and headed up "capability dismissal with notice". Under the heading "consideration" after listing the dates of the hearings and aborted hearings, the letter stated that Mr Rankin had asked the following questions, which the claimant had failed to answer, to understand and establish his current health situation: "can you talk me through your absence from 20/02/2020; can you give me an understanding over what your current treatment plan with your GP; how frequently do you meet with your GP in relation to your ongoing illness; what is their current process or diagnosis in terms of a recovery plan;...why was [PAM assist and occupational health] declined….what is your viewpoint in terms of your return to work; do you have an idea in terms of what steps you are taking between now and then; do you have a target date; what steps are you taking to make that happen". The letter also stated that the claimant had been absent since 20 February 2020, with absence reviews completed to 31 February 2022, and occupational health referrals, PAM Assist and work from home offered throughout and declined, with no foreseeable return to work date provided.

64. Under the heading "decision" it stated, "Having carefully considered everything mentioned above, I have decided to dismiss you from the company effective from 08/02/2023. As your dismissal does not constitute gross misconduct, you are entitled to 6 weeks payment in lieu of notice." The claimant was advised of his right to appeal.

65. By letter dated 20 February 2023, the claimant complained that this letter did not set out the reasons why he did not answer the questions; did not reference the letter he handed in on 8 February so he could not be said to have "failed" to attend that meeting. He set out seven grounds of appeal, asked for more time to prepare and for one months' notice so that his sister could attend.

66. By letter dated 28 February 2023, the claimant was invited to the appeal hearing due to take place on 31 March 2023; which had to be reconvened and he was invited on 23 March 2023 to a hearing on 24 April 2023.

67. That meeting was conducted by Owen Campbell, head of operations with Grace Anderson of HR in attendance and Kerry McAllister taking notes. The claimant was accompanied by his sister. He advised that the purpose of the appeal was to consider any additional information he wished to present.

68. On 4 May 2023 the claimant was advised that his appeal was not upheld because no additional evidence or information was provided. The seven points of the appeal are answered as follows:

"You felt the outcome of the capability meeting was too severe. No further evidence was provided ahead of the meeting and you didn't answer any of the relevant questions required to further understand the grounds of your appeal so I have no new information to change the outcome.

You felt that the meeting should have been conducted by two parties on KURAs side and that Ciaran Rankin was not a relevant party as he didn't have a responsibility over Esure employees. The policy states the hearing manager will be accompanied by a member of the HR team as company witness and note taker, I believe this is a suitable way to hold an appeal. Ciaran Rankin was also the Client Delivery Leader for Esure at the time of the meeting.

You felt that the volume of meetings rescheduled shouldn't have been included in your capability outcome. I have covered they are there as they are part of the case and so would be taken into consideration though would not necessarily have negatively impacted the decision.

You felt that Ciaran Rankin was not conducting the meeting fairly and analysing detail while adjudicating without prejudice. I have taken this into consideration while forming my decision and don't believe the evidence and examples provided would impact the course of the decision.

You felt that it was incorrect that the capability meeting notes and outcome state you would not answer the questions asked to provide further information. I attempted to ask the questions on the call to properly assess your appeal and you did not wish to answer them so I was unable to reassess this point.

You wished for an apology on the basis of the meeting on 16 November having to be rescheduled due to Kura management. I have apologised for this during the meeting.

You felt the confidentiality of the letters was meant to stop you presenting your case to an employment tribunal. Myself and Grace confirmed this is not the case and it should be kept confidential inside of the company but can be shared with ACAS or other bodies as you see fit".

Tribunal deliberations and decision

Observations on the witnesses

69. This was a difficult case for the claimant, due we appreciated to the symptoms which were apparently related to his disability. We have taken that into account in our assessment of credibility and reliability.

70. The claimant struggled to answer questions directly and was apt to go off on tangents to explain the wider picture relating to the events and science of the pandemic.

71. Professor Taylor described him as "over inclusive [with a] derailed tangential and eccentricity or different way of thinking about himself" and this is precisely the manner in which he gave evidence. We accepted that Professor Taylor is a respected expert in his field.

72. That said, we accepted that the claimant was telling the truth as he saw it, but the tendency to be over-literal and focus on process, and to seek to give evidence about tangential detail, distracted from the key points.

73. In contrast, the respondent's witnesses all gave evidence in a clear, cogent and straightforward manner. While there was in fact little dispute about the facts, where there was any conflicting evidence we preferred the evidence of the respondent's witnesses for these reasons.

Unfair dismissal

74. Section 98(1) ERA provides that, in determining whether dismissal is fair or unfair, it is for the employer to show the reason for dismissal and, if more than

one, the principal one, and that it is a reason falling within s.98(2) or some other substantial reason of a kind such as to justify dismissal. Capability is one of the potentially fair reasons for dismissal.

What was the reason or the principal reason for the claimant's dismissal?

75. The respondent asserted that the reason for dismissal was capability, and specifically ill health capability following long term absence. Although the claimant suggested that the reason was "pretended" capability, this seemed to relate to the assertion that the claimant was capable of doing his job, so long as he could do it at home and on a part time basis.

76. However, capability is defined in s.98(3) ERA by reference to "skill, aptitude, health or any other physical or mental quality". Thus incapacity deriving from ill health is a potentially fair reason for dismissal as it relates to the employee's capability of performing the work he was employed to do. Self-evidently, different considerations apply to ill-health related capability dismissals to those that apply to performance related capability dismissals.

77. Although the respondent's capability policy and procedures references capability issues caused by "poor attendance related to ill-health which may include disability issues", its focus is on improvement and warnings. This may well have been misleading for the claimant. However, it was clear that although it did not have contractual status, that policy applied to the claimant.

78. The claimant seemed to have formed the view that because it stated that he was not dismissed for gross misconduct, it could be implied that he was dismissed for misconduct short of that.

79. While we took the view that the reasoning in the dismissal letter could have been clearer, we concluded that there was no doubt that the dismissal was for capability reasons. The claimant ought to have been well aware, from the invitation letters, that he was being put through a capability process. We accept that the genuine reason for the claimant's dismissal was capability of the ill-health variety.

Did the respondent act reasonably in treating the reason as sufficient?

80. Section 98(4) ERA provides that where the employer has fulfilled the requirements of subsection (1), the question whether the dismissal is fair or unfair depends on whether, in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal. This is to be determined in accordance with equity and the substantial merits of the case.

81. In capability dismissals for long term absence, the Tribunal must consider whether the employer can be expected to wait longer for the employee to return by reference to all the circumstances of the case, including the nature of the illness and the likely length of the continuing absence. The Tribunal must also consider whether a fair procedure has been followed, which requires consultation with the employee and obtaining medical reports to ascertain the employee's medical condition and likely prognosis as well as the consideration of other options open to the employer (*BS v Dundee CC* 2014 IRLR 131).

82. We thus first considered whether the respondent should have been expected to wait longer before dismissing the claimant.

83. On the matter of the nature of the illness, the respondent had very little to inform their decision, beyond what the claimant told them and the fit notes supplied. It was a matter of agreement that all fit-notes stated that the claimant was not fit for work (at all) by reason of stress/anxiety.

84. The claimant was asked about his likely return to work on numerous occasions. He said that he did not know when he could return, specifically "how long is a piece of string" and there was "no light at the end of the tunnel".

85. Thus, in regard to the likely length of the continuing absence, after three years, there were no indications when the claimant might be able to return nor indeed that he was making any progress towards recovery.

86. The Tribunal then considered whether a fair procedure had been followed.

87. The respondent conducted “care calls” and absence review meetings prior to invoking the capability procedure. The papers record that the respondent was in touch with the claimant over 150 times during the course of his absence to March 2022.

88. During these meetings the claimant was encouraged to undertake a referral to occupational health. This was a matter which was revisited on many occasions, to the extent that the claimant expressed concern being continually asked when he had already given an answer. The claimant was encouraged to take up counselling services offered by the respondent, but he chose not to. Attempts were made to encourage the claimant to obtain reports regarding prognosis from his GP but without success. Consequently, the respondent had no information about either the nature of the illness nor likely prognosis.

89. The claimant remained in employment for two years before the capability procedure was invoked. The time frame for the taking place of the capability meetings was protracted, which was, in large part, due the availability of the respondent’s personnel. But in terms of the progress made at the meetings themselves, they were effectively sabotaged by the claimant focusing on concerns about procedure rather than substance.

90. For non-health related capability proceedings, dismissal after a first hearing, rather than a warning to improve performance, might be challengeable. However, in this case the issue related to health. The protracted nature of the process only served to underline the fact that there was no return date in sight, such that dismissal after the first hearing could fall into the category of exceptional circumstances, as we accept it did here.

91. In regard to the question of other options open to the employer, the claimant argued that alternatives to dismissal were ignored. The claimant in the hearing advised that he was fit for part time work, working from home. However, this was not information which the respondent had during the absence management or capability process. The only independent medical advice was the fit notes completed by the claimant’s GP which indicated that the claimant was unfit for any work, part-time or full-time, at home or in the office.

92. Mr Kennedy suggested that the respondent should not have taken the fit notes at face value. He suggested they had a discretion not to accept them and should have accepted the claimant's request for homeworking as indicative of his fitness for work. They should, he argued, have undertaken a thorough investigation into his mental health and whether the claimant could work part time from home.

93. We did not accept that was a realistic proposition. We did not accept, in this situation at least, that there was any obligation on the respondent to look behind the information provided in the fit notes. In any event, the respondent made every effort to investigate the claimant's health by seeking a referral to occupational health, and by seeking further information from his GP.

94. Mr Kennedy suggested that the respondent should have taken steps to undertake a mental health assessment, but that is exactly what the respondent by referring him to occupational health. The claimant had concerns about a telephone consultation and that he did not know whether those examining him would be medical professionals. Notwithstanding, his failure to obtain reports from his own GP is rather inexplicable.

95. We agreed that while the claimant could not be forced to supply such information, nor can he rely on the respondent's failures to obtain further medical information to support an argument that they should have waited longer or that they should have considered alternatives.

96. The claimant argued that dismissal was procedurally unfair in certain specific respects.

97. In particular, the claimant asserted that the respondent had breached its policies by permitting three employees to attend the capability meeting on 2 February 2023, whereas he thought it would only be fair if each side had two parties each. This was the subject of lengthy discussion at that capability meeting. We accepted that there was no breach of their policy in permitting three people to attend. We were of the view that in any event, this would not take the procedure outwith the range of reasonable responses, because taking notes might well assist the claimant.

98. The claimant also argued that he ought not to have been dismissed in his absence, having provided good reasons for not attending on 8 February. The respondent pointed out that this meeting was convened to issue the outcome to the claimant in person, beyond what was required and to his benefit, so could not be a procedural failing. The claimant had in any event exercised his right of appeal, which could have cured any alleged procedural defect.

99. We did not accept that the fact that the claimant did not attend a meeting to be advised of the outcome of his capability hearing was in the circumstances of this case a procedural unfairness.

100. The claimant also argued that he was not advised of a reason for dismissal. As discussed above, although the reason for dismissal was not as clear as it might have been, it is evident that the claimant was dismissed for capability and not misconduct. It is important that he understands that he was dismissed for ill-health capability and this had nothing to do with his performance in the job.

101. The focus of the claimant's arguments in submissions was that he was dismissed despite being disabled; and that his engagement with the respondent or lack of it could be explained by reference to his mental health. The respondent argued that this was not a procedural failing in and of itself, but more properly considered as a discrimination claim.

102. We accept that the focus on the claimant's disabilities to explain his lack of engagement with the capability process would properly be classified as a discrimination claim. Although perhaps counter-intuitive, dismissal could be fair even where there was a breach of the disability discrimination provisions of the Equality Act, because the legal tests are different. We entirely accept that if an employee is disabled within the meaning of the Equality Act an employer may require to make reasonable adjustments before dismissing an employee on capability grounds. The claimant's claims of disability discrimination are therefore considered separately.

103. The claimant had been absent almost three years by the time of his dismissal. We find that decision was made following a fair procedure. Given the

claimant's repeated refusal to take up the offer of counselling, the referral to occupational health, or provide a report from his own GP or even give the respondent permission to contact him, with no indication even when they could expect further information let alone whether or when he was likely to recover or any return to work plan, we find that dismissal in all these circumstances was fair.

Breach of contract

104. The respondent submitted that there had been no breach of contract, relying on the basic contractual principles of interpretation. In particular, relying on *Arnold v Britton* 2015 AC 1619, the respondent submitted that the correct approach to the interpretation of contracts in Scotland is to seek to objectively determine what a reasonable person would have understood the parties to have meant. The respondent submitted that it would have been extremely dangerous to conclude that a reasonable person would consider the contract entered into on 30 October 2017 could have envisaged the Covid-19 pandemic and the CJRS which followed.

105. The respondent relies on the CJRS government guidance and directions first published on 26 March 2020 and last updated on 15 October 2021. That guidance states that "it's up to the individual employer to decide if a furlough agreement will be offered to someone".

106. Under the heading "If you're self-isolating or on sick leave" it is stated: "The CJRS is not intended for short term absences from work due to sickness. Short term illness or self-isolation should not be a consideration when deciding if you'll be furloughed. If your employer wants to furlough you for business reasons and you are currently off sick, they are eligible to do so as with other employees. In these cases you should no longer receive sick pay and would be considered a furloughed employee."

107. The respondent relies on The Coronavirus Act 2020 Functions of HMRC (CJRS) Direction, which states at paragraph 6.1 that an employee is a furloughed employee if: (a) the employee has been instructed by the employer to cease all work in relation to their employment; (b) the period for which the

employee has ceased (or will have ceased) all work for the employer is 21 calendar days or more, and (c) the instructions is given by reason of circumstances arising as a result of coronavirus or coronavirus disease; and at 6.3 that: "Where Statutory Sick Pay is payable or liable to be payable in respect of an employee…at the time when the instruction in paragraph 6.1(a) is given (original SSP), the period described in 6.1(b) in respect of the employee does not begin until the original SSP has ended….".

108. The respondent accepts that agreement was reached to furlough the claimant. However applying the contractual principles of interpretation Mr Milne argued that there was a clear condition precedent: the claimant would be furloughed on the basis that he was eligible for CJRS.

109. He argued that the respondent could not have claimed for the claimant in relation to either the original or extended CJRS. This was because the original CJRS required the instruction to furlough the claimant to be made after the period of SSP ended. The claimant's SSP did not end until 10 September 2020, therefore the respondent could not claim. While the extended scheme removed the SSP requirement, the fundamental difficulty for the claimant was that he continued providing fit notes and was not paid any salary, so the respondent was not incurring "costs" under either the original or the extended scheme. Consequently, any arguments that the claimant was shielding or living with someone who is shielding are a non-sequitur.

110. We accept that the claimant's contract entered into in October 2017 could not have envisaged the pandemic. However, we were of the view that the payment of furlough while remaining at home without work required agreement between the parties, and to that extent we accepted that the contract of employment had been varied. We accept that the respondent's approach to obtain agreement from all affected employees, even those on sick-leave, was appropriate. Here we accept that the claimant's contract was amended to allow for the payment of furlough in terms of the scheme operated by the respondent. We accept that while the CJRS may well have applied to

the claimant, on the terms of the scheme, the claimant was not eligible for furlough.

111. The claimant claimed to be entitled to furlough because he was living with his elderly mother who was shielding. He seemed to suggest that the respondent required him to produce a letter confirming that he was shielding but that due to an error on the part of the NHS he did not get that letter until December 2020. We came to the view that the matter of the shielding letter was, for these purposes, a red herring. The claimant was not eligible for furlough because of his continuing absence on sick leave; and that was made clear to him in the documentation and outcome of the grievance.

112. We do not therefore accept that the claimant was eligible to be paid furlough on the terms of the agreed variation to his contract.

113. Nor do we accept that the failure to allow the claimant to work from home was a breach of his contract. His contract did not include an entitlement to work from home and we did not accept that the contract was varied to that effect. Any agreement to furlough would in any event have involved him being available for work.

114. Further, we do not accept that dismissal was in breach of the respondent's capability and procedure policy. It did not escape our notice that the claimant on the one hand had sought, while he was employed, to justify his failure to co-operate with the capability policy by reference to the fact that it was not contractual, and on the other hand to seek to argue that the respondent had failed to follow it, in breach of his contract. We accept that it did not form part of the claimant's contract, but in any event, we did not accept that there had been any unreasonable failure to follow the terms of the policy.

115. Accordingly, the claimant's claim for breach of contract is dismissed.

Disability status

116. We then came to consider the claimant's disability discrimination claim, and in the first instance the question of disability status. The respondent, following

evidence, conceded that the claimant was a disabled person by reason of anxiety at the time of the dismissal, namely February 2023.

117. The outstanding matter was whether the claimant was a disabled person within the meaning of s.6 EqA at other relevant times. After some discussion it was apparent that the claimant's claims related to the period between March and December 2020, with a focus on refusal of homeworking on 23 June 2020 (and again around November/December 2020) and a focus on refusal of furlough, specifically on 8 July 2020, when the claimant was advised he had been paid furlough in error.

118. Section 6 EqA states that "A person has a disability if (a) they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on [their] ability to carry out day to day activities". That is supplemented by schedule 1 of the EqA and guidance on matters to take into account in deciding any question in relation to disability, published by the ODI in 2011.

119. That guidance sets out at section A the four elements of the definition which the Tribunal must consider, namely : (i) did the claimant have a mental and/or physical impairment? (ii) did the impairment have an adverse effect on the claimant's ability to carry out normal day to-day activities? (iii) was the adverse effect substantial? and (iv) was the adverse effect long term?

120. To assist in answering these questions, we had the benefit of a report from Professor Taylor, consultant psychiatrist, who had assessed the claimant for the purpose only of providing a report for this Tribunal. He had seen the claimant only once, and prepared his report on the basis of that interview and the claimant's medical records. He spoke to the report in oral evidence.

121. The respondent submitted that the claimant was not disabled at the material times. Relying on *Cruikshank v VAW Motorcast Ltd* [2002] ICR 7291, Mr Milne argued that the claimant's reaction to the pandemic was one consistent with many at that time and that his fear of the pandemic was legitimate. He relied

on Professor Taylor's evidence that the claimant's views became irrational about a year after the pandemic started.

122. On the matter of whether the claimant had an impairment, Professor Taylor concluded in his written report that: "In my professional opinion Mr Wright has a relevant pre-existing condition. In particular, he has a Specific Health Anxiety (ICD-10 F40) that over the years has manifest with various physical concerns …. the COVID pandemic and attendant health concerns have led to an exacerbation or aggravation of Mr Wright's underlying Health Anxiety….complicated by his underlying autistic spectrum traits and cluster A personality vulnerabilities. Since the COVID pandemic Mr Wright's behaviour has become markedly avoidant and withdrawn as well as contributing to his atypical appearance…. given the presentation currently, in my opinion Mr Wright is only able to work part time but strictly from the home environment away from contact with potential COVID infection. This reflects his abnormal health beliefs".

123. We accept relying on Professor Taylor's evidence that the claimant has a mental impairment, namely health anxiety focussed on contracting covid.

124. We turned to consider the second question, namely, did the impairment have an adverse effect on the claimant's ability to carry out day to day activities?

125. Professor Taylor in his report said "Mr Wright informs he can manage all activities of daily living such as cooking, cleaning, washing and shopping". However he said that this "include[s] being nervous, anxious, and worried every single day about Covid, having trouble managing his anxiety, sometimes has trouble relaxing" and that he is "isolated with limited social interaction".

126. The focus of course is on what the claimant cannot do as opposed to what he can do. In his oral evidence Professor Taylor stated that the claimant would not go to bars or on trains or to shops (with the exception of one supermarket which he considered sufficiently well ventilated). While in many respects the

claimant can undertake day to day tasks, we accepted Professor Taylor's evidence that his impairment impacted on his normal day to day activities.

127. The focus in the report was on the claimant's condition as at the date of examination but we required to consider the position in 2020. While we were aware that everyone's movements were restricted at that time, those restrictions were not necessarily attributable to a health anxiety.

128. Professor Taylor said the claimant had a mild underlying condition, and that covid is the major cause but not the only cause. On the question of how he presented prior to lockdown and for the period in 2020, Professor Taylor, asserted that he had to be cautious about making an assessment from GP records because "retrospective diagnosis is fraught with difficulties". However he found these to be persuasive, noting that the claimant was a regular attender because of his anxieties. He said that on a balance of probabilities his best guess was that the claimant had a health related anxiety which although this was specifically covid related, it was a pre-existing condition which became much worse after covid. Notwithstanding Professor Taylor's reference to when the claimant's fears became irrational, we accepted his evidence that the claimant had suffered a health anxiety before the pandemic in a mild form but that was exacerbated from the start of the pandemic.

129. On the matter whether that adverse effect was "substantial", s.212(1) of the EqA states that "substantial" means "more than minor or trivial". This is relatively low standard. We conclude that the effect was substantial during the relevant period in the sense that what the claimant could not do because of his impairment was not minor or trivial.

130. Any adverse effect must also be long term. Schedule 1 of the EqA includes supplementary provisions relating to disability and part 1 to the determination of disability, specifically at paragraph 2(1) that the effect is long-term if a) it has lasted for at least 12 months, or b) it is likely to last for at least 12 months. In the ODI Guidance on determining disability, it is stated, at C3, that "likely" means "could well happen". At C4 it is stated that "in assessing the likelihood of an effect lasting for 12 months, account should be taken of the

circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood".

131. The claimant is very firmly of the view that it was apparent in mid to late 2020 that the pandemic was likely to last for more than 12 months. To support his view he referenced the previous pandemic in 1918/19 and television programmes confirming the position. The claimant was however referring to the pandemic and not to his own condition as such. We have of course concluded that the claimant does have the mental impairment of anxiety focussing on the effects of covid. The question is whether it could be said at that point in time, and without taking account of what we now know, that any adverse impact caused by the claimant's condition was likely to last 12 months or more.

132. Although we could not say that the matter was clear cut, we accepted that the indications were that the pandemic could well last more than a year. Given the link between the claimant's impairment and the pandemic, we concluded, on the balance of probabilities, at the relevant times in 2020, that his impairment was likely to last 12 months or more.

133. We conclude therefore that the claimant was disabled between March and December 2020, which was the relevant time when the claimant claims that he has suffered breaches of the EqA. We now turn to consider those claims.

Indirect disability discrimination

134. The claimant relies on section 19 which states that an employer will discriminate against an employee where they apply a PCP equally to those who do not share that employee's protected characteristic; which puts or would put those who share the employee's protected characteristic at a particular disadvantage; which puts that employee at that disadvantage; and which the employer cannot show is a proportionate means of achieving a legitimate aim.

The first PCP – payment of furlough

135. The claimant asserts that the respondent applied a PCP of failing to offer a place on the furlough scheme to all employees.

136. The respondent argued that the failure to offer a place on the furlough scheme to all employees was not a PCP because it was presented as a general complaint; it was a one-off decision, particular to the requirements of the CJRS, and given there should be no material difference for the purposes of the comparison exercise, it is not possible to work out who the disadvantaged group should be, given that the respondent has 2000 employees across UK and South Africa.

137. As discussed during the hearing, it appears that this PCP may not have been formulated as it ought to have been. It is understood that the point being made is that the claimant was not offered furlough while others were. Specifically, given the claimant's concerns about the failure to place him on the furlough scheme, and his complaint that all others (on the same campaign as him) were placed on furlough, on the evidence heard, it may be that this PCP would have been properly formulated as a policy to refuse to pay furlough to those who were on sick leave (or other forms of leave).

138. We agreed with the respondent that the claimant had in any event failed to present any evidence to establish group disadvantage, and thus that he had failed to prove disparate impact.

139. The respondent argued in any event that any PCP properly articulated was a proportionate means of achieving a legitimate aim. Relying on the evidence of Ms McIntosh and Mr Weir, they were pursuing the legitimate aim of complying with the government's CJRS scheme, which they achieved through proportionate means. In particular the purpose of the CJRS scheme was to protect jobs for those that were able to work. Offering furlough to those people who were off sick would potentially have led to enhanced payments, paid for by the Government, as compared to sick pay, paid for by the company. In addition, the claimant's role was not at risk of redundancy due to Covid and so not covered by the aims of the Covid scheme. The respondent, had it done otherwise, would have been guilty or at least at risk of defrauding HMRC.

140. While we agreed that the claimant has failed to establish disparate impact in respect of the PCP as formulated, we accept in any event that these are

legitimate aims. Ms McIntosh gave very clear evidence about the company policy, and the importance of complying with the scheme which was intended to ensure that those who could not work retained their jobs and had an income. She explained this was important in respect not only of financial damage but also reputational damage.

141. We accept too that to refuse to pay furlough to those on sick leave (and other related absence) where they were not available for work and had another source of income, given the terms and rationale of the Government scheme, was proportionate.

Second PCP – working from home

142. The claimant also relied on the PCP of failing to allow working from home at any time to all employees on 23 June 2020. Again the respondent does not accept that this is a PCP. Relying on section 23 which requires no material difference in the pool for comparison, they argued that this PCP includes employees in another country and at a variety of levels. In any event, Mr Milne argued that PCP had not been proved because no evidence had been heard that the respondent failed to allow working from home for all employees, in fact the opposite had been proved. Some clients permitted working from home earlier than Esure. Ms McIntosh said that 10-15% at adviser level were furloughed, whereas management and support worked from home.

143. Again it would appear that this PCP was not properly formulated, but on the evidence heard we had to agree with Mr Milne that the claimant has not proved this PCP was applied. The evidence was that a large number of employees worked from home, and it was the minority who were furloughed. To the extent that the claimant complains that he was not permitted to work from home, that may be more appropriately articulated as unfavourable treatment, discussed later.

144. However, and in any event the respondent argued, and we accepted, that any such PCP properly articulated would have been objectively justified.

145. In particular, we accepted that the respondent's aim, of ensuring that the respondent had the technological capability to offer working from home for

employees, which it did not have at the start of the pandemic, was a legitimate one. Likewise, the aim of complying with its clients requirements as to service level and data security which had meant that some clients would not allow working from home at the start of the pandemic, was accepted to be legitimate. We also accepted the respondent's submission that their conduct was proportionate as it did not require employees to attend work at the start of the pandemic whilst it organised its technology and equipment to allow working from home where permitted by its clients and employees who were fit for work were paid during this time.

146. We find for all these reasons that the claimant has failed to show that he was subjected to unjustifiable indirect discrimination, so that claim must be dismissed.

Discrimination arising from disability

147. Section 15 of the EqA states that a person discriminates against a disabled person if they treat the disabled person unfavourably because of something arising in consequence of that person's disability; unless it can be shown that the treatment was a proportionate means of achieving a legitimate aim. A disabled person will not be treated unfavourably simply because they could have been treated more favourably (*Williams v Swansea University* 2019 IRLR 306). A claimant cannot succeed unless it is shown that the respondent knew or reasonably ought to have known that the claimant was a disabled person.

148. The question for determination by the Tribunal is first, whether the respondent treated the claimant unfavourably by: dismissing him; and/or failing to allow the him to work from home; and/or failing to apply the furlough scheme to him.

149. As the respondent submitted, the threshold to establish unfavourable treatment is low. Although the respondent argued that there had been no unfavourable treatment, following discussion, Mr Milne accepted that his point was that there was no causal link between the unfavourable treatment and the disability in respect of both the failure to allow the claimant to work from

home and the failure to apply the furlough scheme. He accepted that dismissal was linked to the claimant's disability.

150. We were of the view that such treatment, in regard not only to dismissal but also to other failures to allow the claimant to work from home and to refuse furlough, which self-evidently operate as a disadvantage to the claimant, should be categorised as unfavourable treatment.

151. We therefore asked ourselves whether that unfavourable treatment was because of something arising in consequence of the claimant's disability?

152. We were aware that section 15 requires an investigation of two distinct causative issues, first did the respondent treat the claimant unfavourably because of an identified something, and secondly did that something arise in consequence of the claimant's disability. In this case we understood the "something" as identified in the list of issues was the claimant's fear of infection and alarm for his own safety and that of his mother.

153. The first issue involves an examination of the putative discriminator's state of mind – did the unfavourable treatment occur because of the respondent's attitude to that "something". The second issue is an objective matter – whether there is a causal link between the claimant's disability and the identified something (*Paisner v NHS England* 2016 IRLR 170 EAT).

154. We had no difficulty accepting that there is a link between the claimant's disability and the claimant's fear of infection and his concern for his own safety and that of his mother arose because of his anxiety about his health with a focus on Covid 19.

155. The question then is in regard to the first issue, whether the treatment was because of the identified something, that is was the unfavourable treatment casually linked to the claimant's "fear of infection", etc.

156. On the matter of refusing to allow the claimant to work from home, as at 23 June 2020 in particular, the evidence was clear. The initial reason the claimant was not permitted to work from home was because the campaign that he was working on, the Esure campaign, the client (Esure) did not permit (initially at

least) homeworking. We heard evidence that it was not introduced until around September 2020.

157. It was rather odd and unfortunate that the respondent, who otherwise appeared to have very good records, did not have a record on the meeting of 23 June. Although the witnesses who gave evidence were not aware of it, no evidence was led to suggest that meeting did not take place or to challenge what the claimant said happened at that meeting.

158. Reference was made in that meeting to the stress the claimant was suffering and the sick lines he was submitting which indicated that he was not fit for work at all due to stress/anxiety. However, even if he had not been off sick, Esure would not at that time have allowed homeworking, so any unfavourable treatment was not linked to his disability, at that point in time at least.

159. Regarding the claimant's subsequent requests to work from home, it appears from the evidence that the claimant was contemplating returning to work in November/December of that year. We heard evidence that in order to work from home employees had to have an appropriate internet connection. The claimant did not have such a connection. His position was that in order to get such a connection an engineer would require to come into his house. While this may or may not be an accurate assumption, the claimant's position is that he could not risk an engineer coming into his home because of his concerns about Covid, at that time, just before another lock down. While the absence of internet access was a barrier to working from home, the insurmountable barrier at that time was of course the fact that he was signed off by his GP as unfit to do any work, at home or elsewhere. To the extent that the claimant seeks to argue that, subsequent to 23 June and specifically after September 2020, any unfavourable treatment of not being permitted to work from home was linked to his disability, the reason he could not work from home was because he was on sick leave, which we accept was because of his disability.

160. With regard to the non-payment of furlough, any unfavourable treatment could be said to be because of his absence and he was absent because of the something which he had identified, namely his fear of catching covid, which

resulted in him being on sick leave, which was the cause of his ineligibility for furlough.

161. However, even if it could be said that any unfavourable treatment was because of something arising in consequence of disability, there will only be liability under this section if the respondent knew, or reasonably ought to have known, that the claimant had the disability.

162. The claimant argued that if the respondent claimed that they did not know that the claimant was disabled, then they ought to have known, that is they had constructive knowledge. Mr Kennedy stressed in submissions that it was or should have been palpably obvious to anyone interacting with the claimant that he was suffering from some form of mental disorder that warranted further investigation.

163. The respondent argued that they did not have knowledge or constructive knowledge of the claimant's disability in 2020. In particular, the respondent could not have known then what effect his impairment was having on the claimant's day to day activities. The claimant himself accepted in evidence that he had no idea of his potential disability. It was entirely reasonable for the respondent to assume that the claimant had a genuine anxiety about coronavirus. It was a reaction to real and legitimately dangerous events. Further the actual diagnosis is very specific and has underlying complications of autistic traits and cluster A personalities. This was especially given the description of the claimant as "eccentric", which is not a medical diagnosis as confirmed by Professor Taylor. In any event the respondent should not have to look further into the reason why the claimant might be eccentric.

164. We accepted that, between March and November 2020, the respondent did not and could not have known that the claimant was disabled, for the following reasons. The claimant himself did not know. It was described as an invisible or undiagnosed disability. The respondent would have been well aware that the claimant was ill, that he was suffering stress/anxiety, and might even have concluded that his behaviour around that time was odd or "eccentric". It is not however apparent, especially when they did not meet him then, and when

others were similarly concerned about the pandemic, that he was disabled for the purposes of the EqA.

165. With regard to the position as at February 2023, the claimant's contention is that the respondent knew of a number of symptoms, including the reason for his absence which suggested an underlying health condition; his change in physical appearance, presence and demeanour; his repeated reports of stress and anxiety confirmed in the sick-lines; his conduct during the grievance and capability procedures; and what was said at the absence review meetings. The claimant argued that the respondent should have been aware, members of staff having met him at reception on a number of occasions, that he had transformed from a sharply attired man with short hair to one with an unkempt appearance. They should therefore have known that the claimant was disabled when he was dismissed.

166. The respondent's position was that they made numerous enquiries to establish whether the claimant may have been disabled; but the claimant refused referrals or any form of assistance. The respondent having taken steps to establish the position should not be held to have knowledge with the limited evidence relied on. The claimant could not refuse referrals to occupational health and then claim the respondent ought to know he was disabled.

167. We accept that the claimant's actions and demeanour ought to have raised suspicions that the claimant may have a disability, but the requirement in such circumstances is for an employer to do all it reasonably can to find out whether the claimant had a disability or not. The EHRC code suggests that this would require an employer to explore with the worker the reason for his behaviour and whether these are because of something arising in consequence of disability. Here the respondent had taken steps to become more informed about the claimant's symptoms, but the claimant had not co-operated with them.

168. We accept that it is irrelevant that no formal diagnosis was yet made, that the respondent was aware of the claimant's unusual behaviour, but knowledge of

some symptoms is not sufficient. Further we accept that it does not matter whether on the facts known that these might amount as a matter of law to a disability. The claimant's problems are clearly complex and we accept that it would be difficult for non-medical people to have concluded that his symptoms amounted to a disability. He himself said in evidence that he did not know until it was confirmed by Professor Taylor. Professor Taylor did say that his staff were aware that the claimant had some sort of condition but that is not to say that they could conclude that the claimant had a disability which might fit the definition in the Equality Act. The position may of course have been different if the claimant had taken up the referral to occupational health, but the respondent had no such information to inform them otherwise, and we accept that they made extensive efforts to become better informed.

169. Thus we accepted that the respondent could not have known that the claimant was disabled either in 2020 or in February 2023. The respondent relied in any event on objective justification, and the arguments which pertain to the claim for indirect discrimination, pertain to the question of unfavourable treatment. We would conclude that the respondent had objective justification for its actions.

Reasonable adjustments

170. The claimant argues that there has been a failure to make reasonable adjustments in this case contrary to sections 20 and 21 of the EqA.

171. Section 20 sets out the employer's positive duty to make reasonable adjustments to address disadvantages suffered by disabled people. The relevant requirement is set out at section 20(3) which states that "the first requirement is a requirement, where a PCP [of the employer] 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". A failure to comply with the duty amounts to discrimination under section 21(2).

172. The duty will be triggered however only where the employer knows or ought to know that any potential applicant is disabled, and where the employer

knows or ought to know that they are likely to be placed at a substantial disadvantage by the PCP (schedule 8 (work: reasonable adjustments), part 3 (limitation on the duty), paragraph 20 (lack of knowledge of disability), subparagraph (1)(b)).

173. In this case the claimant argued that the respondent had applied the PCPs of not offering a place on the furlough scheme to all employees; and of failing to allow working from home to all employees on 23 June 2020 (and up to November/December 2020). It should be noted that the claimant did not allege any failure in regard to the absence management/capability procedure leading to dismissal. On the matter of these PCPs, it would appear that this too would be better articulated as a policy not to furlough or allow to work from home those who were on sick leave.

174. The claimant argued that the provision of fitnotes did not override the respondent's duty to make reasonable adjustments, which was readily accepted. However as discussed the respondent was not in any event able to establish what adjustments might be reasonable because the claimant did not co-operate with the respondent's attempts to be informed about his disability and what those adjustments might be.

175. In any event however, in order for this duty to be triggered, it must be established that the respondent knew not only that the claimant was disabled, but also that he would be placed at a substantial disadvantage by the PCP.

176. As we have found above that the respondent could not have been expected to know that the claimant was disabled, it cannot be said that they could have known that he would be placed at a substantial disadvantage by any policy not to furlough or allow to work from home those who were on sick leave.

177. We find therefore that the reasonable adjustments duty was not triggered. It cannot therefore be said that the respondent has failed to take such steps as it was reasonable to have taken to avoid any disadvantage.

178. Notwithstanding the claimant's insistence at this hearing that he could have worked part-time at home had such adjustments been offered, the fact is that

the respondent could not have known the claimant was disabled and could not have known that he could have worked part-time from home because of the limited information which the respondent had about the claimant's condition.

Arrears of pay

179. The claim for arrears of pay was apparently linked to the claim relating to the failure to pay furlough. We have determined above that the failure to pay furlough is explained by the fact that the claimant was not eligible, and that it is neither a breach of contract nor does it amount to disability discrimination. In the circumstances, and no arrears of pay being due, that claim must also be dismissed.

Jurisdiction – Timing

180. The respondent argued that while the claim for unfair dismissal was in time, the claimant's claims for breach of contract, disability discrimination and arrears of pay were out of time. We have found above that these claims are not in any event well-founded, so there was no reason for us to consider this question.

M Robison

Employment Judge

10 January 2024

Date

Date sent to parties **16 January 2024**