Case Number 1307469/2019
Type V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr J Adams		**Rajja Limited t/a MW Phillips Chemists**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
(RESERVED JUDGMENT)

HELD AT Birmingham **ON** 13, 14, 16 & 17 November 2023 17 & 18 January 2024 & 12 February 2024 (Panel Only)

EMPLOYMENT JUDGE GASKELL **MEMBERS: Mr J Reeves, Mr DR Spencer**

Representation
For the Claimant: **Mr Julius Adams (Claimant's Father)**
For the Respondent: **Mr D Brown (Counsel)**

JUDGMENT

The unanimous Judgement of the tribunal is that:

1 The claimant's application for permission to amend his claim to include a claim for victimisation is refused.

2 Pursuant to Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013, the claimant's claims for indirect disability discrimination, a failure to make adjustments and disability related harassment based on the application of a requirement for the claimant to work alone in the pharmacy for long periods of time are dismissed as having no reasonable prospect of success.

3 The claimant was fairly dismissed by the respondent. His claim of unfair dismissal is not well-founded and is dismissed.

4 The respondent did not, at any time material to this claim, act towards the claimant in contravention of Section 39 of the Equality Act 2010. The claimant's complaints of indirect disability discrimination and failure to make adjustments, pursuant to Section 120 of that Act, are dismissed.

5 The respondent did not, at any time material to this claim, act towards the claimant in contravention of Section 40 of the Equality Act 2010. The claimant's complaint of disability related harassment, pursuant to Section 120 of that Act, is dismissed.

REASONS

Introduction

1. The claimant in this case is Mr Jake Adams who was employed by the respondent, Rajja Limited, as a Trainee Pharmacy Dispenser from 17 July 2017 until 10 August 2019 when he was dismissed. The reason given by the respondent at the time of the claimant's dismissal was incapacity by reason of ill-health.

2 The claimant commenced ACAS Early Conciliation on 15 August 2019 and his Early Conciliation Certificate is dated 27 August 2019. On 29 September 2019, the claimant presented a claim form in which he brings claims for unfair dismissal, disability discrimination, unpaid holiday pay, and unpaid wages.

3 On 8 June 2020, the claims for unpaid holiday pay and unpaid wages were dismissed upon being withdrawn by the claimant. Preliminary hearings for the purpose of case management were conducted by Employment Judge Woffenden on 9 March 2020, and by Employment Judge Coghlin KC on 17 January 2023.

4 Judge Coghlin prepared a definitive List of Issues. The strands of disability discrimination in play are - indirect discrimination; a failure to make adjustments; and disability-related harassment.

5 The respondent concedes that at all times material to this claim the claimant was a disabled person by reason of suffering from Asperger's syndrome. The respondent does not admit that it had, or ought to have had, sufficient knowledge of the claimant's condition or of its impact on his ability to carry out normal day to day activities at any time material to the claims. The respondent denies any form of discrimination. The respondent admits that the claimant was dismissed. The respondent's case is that the claimant was dismissed for a reason relating to his capability and that the dismissal was fair.

The Hearing

6 With a small departure from the norm, the hearing was conducted face-to-face at the tribunal hearing centre in Birmingham. The claimant was represented by his father, Mr Julius Adams. For ease of reference in this judgement the

claimant will be referred to as "*the claimant*". References to "*Mr Adams*" are references to Mr Julius Adams the claimant's representative. The respondent was represented by Mr Daniel Brown of Counsel. During the hearing, with his consent, the claimant was addressed as "*Jake*" - and his father/representative as "*Mr Adams*".

7 The modest departure from the norm to which we have referred is that whilst the claimant was comfortable sitting in the tribunal hearing room during the evidence and cross-examination of other witnesses and during submissions, he asked to be remote from the hearing room during his own and cross-examination. Arrangements were therefore made for him to give his evidence from another hearing room using video.

8 On the second day of the hearing (14 November 2023), during the claimant's cross-examination, Mr Adams became concerned that the answers the claimant was giving were "*incorrect*". He asked that the claimant be allowed a break and that he be allowed to speak to the claimant in private during the break. Initially, the claimant indicated that he did not require a break; but shortly afterwards he became quite distressed. The tribunal therefore took a break for approximately 20 minutes but forbade Mr Adams from speaking to the claimant. Arrangements had been made for a member of tribunal staff to be present in the adjoining hearing room with the claimant throughout the entirety of his evidence and during the break. He was also offered the opportunity to leave the hearing room to use the toilets or to obtain fresh air or refreshments.

9 The claimant had his laptop with him whilst giving evidence. He referred to it on a number of occasions with permission from the panel.

10 Judge Coghlin originally listed the final hearing with a time allocation of five days. Judicial Administration later noticed that this included Wednesday, 15 November 2023 which was a training day for all Employment Judges in the Midlands West Region. Accordingly, we were left with only four days. Within this time, we concluded hearing the evidence and submissions with deliberation and judgement being reserved.

Preliminary Issues

Amendment Application

11 At the hearing before Judge Coghlin, the claimant indicated that he wished to pursue a claim for victimisation. It was the claimant's case that he did not require permission to amend as such a claim could be discerned from the claim form. We observe that Judge Coghlin had painstakingly constructed a draft List

of Issues and it is evident that he did not discern a claim for victimisation. The respondent's case is that there was no such claim before the tribunal.

12 Judge Coghlin therefore gave directions for the claimant to set out his claim of victimisation including the identification of any protected acts relied upon and any detriments which the claimant claims were visited upon him by reason thereof. The respondent was directed to indicate a whether, in its view, an amendment application was required – and if so, whether such application would be opposed.

13 On 6 February 2023, in purported compliance with Judge Coghlin's directions, the claimant lodged a document giving details of his victimisation claim. He provided information in that document and also made reference to information already provided in the original claim form and in amended particulars which he had provided in April 2020. On 23 March 2023, on the direction of Employment Judge Woffenden, tribunal staff wrote to the claimant indicating that in the information provided there was no clearly identified protected act and requesting the claimant to provide such information - setting out in simple terms what was required.

14 On 24 March 2023, the claimant responded - but gave no further information as to protected acts. Instead, giving further details of alleged detriments.

15 On 5 May 2023, the respondent indicated firstly, that in its view an amendment was clearly required for victimisation claim to be permitted; and secondly, that any such application was opposed.

16 We accept Mr Adams criticism that it would have been preferable for the amendment application to have been listed for determination at a preliminary hearing. We are in no position to explain why this was not done; and so, it is now for us to determine that application.

The Law on Amendments

17 The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a Case Management Order: Rule 29 Employment Tribunals Rules of Procedure 2013. Although there is no specific reference to amendment in the Rules, no doubt such an order may include one for the amendment of a claim or response.

18 ***Harvey v Port of Tilbury (London) Limited*** **[1999] ICR 1030 (EAT)**

Where an amendment is sought, it behoves the applicant for such an amendment clearly to set out verbatim the terms and explain the intended effect if the amendment which he seeks.

19 ***Selkent Bus Co Limited v Moore*** **[1996] ICR 836 (EAT)**

The EAT gave the following general guidance as to the exercise of the Employment Tribunal's discretion and the factors which might be taken into account: -

(a) The nature of the amendment. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.
(b) The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that application is out of time, and, if so, whether the time limit should be extended under the applicable statutory provisions.
(c) The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down … for the making of amendments. The amendments may be made at any time – before, at, or even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery.

20 The paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.

21 Time limits arise as a factor only in cases where the amendment sought would add a new cause of action. If a new claim form were presented to the tribunal out of time, the tribunal would consider whether time should be extended, either on the basis of the "not reasonably practicable" test (for example, for unfair dismissal) or on the basis of the "just and equitable" test (for example, for unlawful discrimination). If time were not so extended, the tribunal would lack

jurisdiction to entertain the complaint, and it would fail. However, this does not mean that the mere fact that a claim would be out of time should automatically prevent it being added by amendment. The relevant time limits are an important factor in the exercise of discretion, but they are not decisive.

22 ***Vaughan v Modality Partnership*** **UKEAT/0147/20/BA (EAT)**
The practical consequences of allowing an amendment which should underpin the balancing exercise a tribunal needs to conduct in weighing the prejudice to each party.

23 In considering whether or not to permit an amendment, the tribunal may take into account the merits of a claim. There is no point in allowing an amendment to add an utterly hopeless case. (***Woodhouse v Hampshire Hospitals NHS Trust*** **UKEAT/0132.12/DM (EAT)** Similarly: "nothing is lost in not being able to pursue a claim which cannot succeed on the merits" (***Herry -v- Dudley MBC and anor*** **EAT 0170/17**).

The Law on Victimisation

24 The essential starting point in any victimisation claim is whether or not the claimant can establish a protected act as defined in Section 27 of the Equality Act 2010. If there is no protected act, there clearly cannot be victimisation. It may be that the conduct of the respondent can be impugned in some other way; it may be that other types of discrimination have taken place; but there can be no viable claim for victimisation.

Discussion

25 We have heard no evidence before determining this application. We have taken the claimant's case at its height by reference to the various statements of his statements of case:

(a) The claim form - 29 September 2019
(b) The amended particulars of claim - April 2020
(c) The application to amend - 6 February 2023
(d) The further particulars provided in response to Judge Woffenden's correspondence - 24 March 2023
(e) The claimant's witness statement – undated

There is simply no pleaded protected act.

26 The nearest that the claimant comes to alleging a protected act is the claim that on 12 June 2018 he requested a transfer to the respondent's warehouse or internet departments rather than to work alone at branch outlets as

he has Asperger's syndrome and cannot cope (we make clear that the respondent denies that any request was ever made - but as stated above we have considered the claimant's claim as pleaded at its height). In our judgment, the simple request for such a change of role because of a disabling medical condition cannot of itself amount to a protected act. A protected act involves the making of an allegation that the provisions of EqA have been breached. Even on the claimant's account, and taking his case at its height, there is no such allegation here.

27 Accordingly, in our judgement, there is no prospect of a successful victimisation claim. Accordingly no purpose could be served in allowing an amendment for such a claim to be pursued. We therefore refuse the application.

Strike-Out Application

28 Two of the central allegation in the claimant's case are that the respondent organised its business in such a way that employees were required to do the following:

(a) To work alone in the pharmacy for long periods of time.
(b) To work at other locations at the drop of a hat.

These allegations feature as alleged PCPs in the claimant's claims for indirect discrimination and for the failure to make adjustments. These requirements are also pleaded as acts of harassment.

29 At the outset of the hearing, the respondent made an application pursuant to Rule 37 of the Employment Tribunals Rules of Procedure 2013 for claims based on these two allegations to be struck-out as having no reasonable prospect of success. The respondent's case is that the claimant simply has not set out details of any occasions where he has been required to work alone in the pharmacy for long periods of time and nor has he set out more than one occasion where he was asked at short notice to move to another location.

30 In each case, the claims cannot succeed unless we have evidence from which could conclude that discrimination had taken place. It is for the claimant to adduce evidence to establish this. If the claimant by his pleaded case or his witness statement adduces no evidence, then clearly the claim can have no reasonable prospect of success. Again, without hearing evidence we have taken the claimant's case at its height.

Lone Working

31 The claim form contains the bare assertion that the claimant was asked to work alone in the pharmacy for long periods - it provides no detail of dates or locations. A similar bare assertion appears in the claimant's amended particulars with no details as to dates or locations. The claimant's witness statement makes no reference at all to lone working.

32 The respondent has always been clear: it's case is that there has never been any occasion that the claimant (or anyone other than a qualified pharmacist) has ever been left working alone in a pharmacy. To do so would be unlawful; there must always be a qualified pharmacist present when the pharmacy is open.

33 During oral submissions, Mr Adams sought to modify the proposition: stating that the claimant was the sole employee present *other than* the qualified pharmacist. Of course, the inevitable conclusion is that this is a concession that the claimant was never asked to work *alone* in the pharmacy, because there was always a qualified pharmacist in attendance.

34 In our judgement therefore, there is no reasonable prospect that the claimant can establish the basis of his pleaded case - namely that he was asked to work alone. Accordingly, those parts of his claim which depend upon him establishing such allegation have no reasonable prospect of success. On this basis we strike them out.

Moving to different locations at the drop of a hat

35 The claim form and the amended particulars of claim similarly contain a bare assertion to the effect that the claimant and other employees were required to move location at very short notice. However, unlike the allegation regarding lone working, the claimant's witness statement does deal with this albeit very briefly. In his witness statement, the claimant gives one specific example of being asked to move at short notice on 12 November 2018 - but he does state that there were earlier examples and that such requests were increasing in regularity.

36 We have some sympathy with the respondent's position because, with the exception of 12 November 2018, the claimant has not provided any detail and therefore there have been no occasions which they could properly investigate. If we had been considering this application at a preliminary hearing, we may have considered ordering a deposit pursuant to Rule 39 of the Employment tribunals Rules of Procedure 2013, but it would be impractical to make such an order now as the final hearing has commenced.

37 As the claimant has at least alluded to this allegation in his witness statement, our judgement is that it should not be struck-out. Whether the claimant can establish such a practice will depend on our findings having heard his evidence and cross-examination. Accordingly, in this regard the application is refused.

The Evidence

38 We heard evidence from the claimant and from a single witness on behalf of the respondent - Mr Sandeep Dhami: Superintendent Pharmacist. Mr Dhami's specific role in the events with which we are concerned was that he conducted the claimant's appeal against dismissal.

39 We had an agreed hearing bundle running to some 358 pages; a supplementary bundle comprising medical evidence running to some 38 pages; and a second supplementary bundle of additional documents provided by the claimant running to some 77 pages. We have considered those documents from within the bundles to which we were referred by the parties during the course of the hearing.

40 We found Mr Dhami's evidence to be clear, compelling, and consistent. We have no doubt as to the truth and accuracy of what he told us. We are however acutely conscious that we did not hear evidence from Ms Natallie Pettitt - Human Resources Lead. She was the respondent's manager with the greatest involvement with the claimant in the events with which we are concerned - Ms Pettitt was the dismissing officer.

41 We found the claimant's evidence to be less reliable. In particular his assertion that he told Ms Pettitt about his condition of Asperger's Syndrome. We accept Mr Dhami's evidence that if the claimant had been as clear as he claims regarding this then Ms Pettitt's working practices were such that she would undoubtedly have recorded this in writing. Furthermore, we find that the appellant was well able and often did state things in writing: and yet, there is no document from him informing Ms Pettitt or anyone else about Asperger's Syndrome until after the commencement of his final period of sickness absence. In addition, it is the claimant's case that he made clear to Ms Pettitt and to Mr Dhami that because of Asperger's Syndrome he could not change routines and locations at short notice - but when cross-examined he confirmed that there were locations other than his base location that he was quite happy to go to; others that he was not; he agreed that this was unrelated to Asperger's Syndrome but more related to his personal relationship with the pharmacist based at the other locations. He also confirmed Mr Dhami respected his wishes wherever possible and that he was only asked to move when it was genuinely necessary.

42 In assessing what the claimant told us about his exchanges with Ms Pettitt, we have had to consider whether we would have expected such communication to be confirmed in writing and whether the claimant's evidence now is consistent with other evidence including the medical evidence and that given by Mr Dhami.

43 Where there is a factual dispute between the evidence given by Mr Dhami and that given by the claimant, we prefer the evidence of Mr Dhami. And we have made our findings of fact accordingly.

The Facts

44 The respondent is a pharmacy business with 12 retail outlets together with a warehouse and an Internet business. The respondent employs approximately 200 people including qualified pharmacists; pharmacy dispensers; trainees and apprentices; HR staff and others.

45 The claimant was first employed by the respondent from 14 December 2012 - 4 May 2016 during which time he completed an apprenticeship. The claimant then left the respondent's employment but returned again on the 17 July 2017 as a trainee pharmacist. It emerged during the course of the hearing that for reasons which were unclear the claimant may never have actually commenced the training programme - although clearly this was the intention and it was Mr Dhami' understanding that the claimant was a trainee pharmacist and that he was always treated as such.

46 Apart from the claimant's assertions that he verbally advised Ms Pettitt of his mental health condition and suffering from Asperger's syndrome, there is no record of anyone in the respondent being advised of this. In the hearing bundle there is a medical questionnaire purporting to have been completed by the claimant at the outset of his employment which discloses no medical history. Although the claimant had been in possession of the bundle for some time prior to the hearing, and prior to the preparation of his witness statement, it was only during the course of the hearing that the claimant informed us that he did not complete the medical questionnaire and had never seen it until it was in the bundle. The claimant accepted that he had never informed the respondent in writing of his medical condition at any time before he went off sick in November 2018.

47 As we have stated during reference to the strike-out application, it was strongly asserted by the claimant at the outset of this case that he was often left working alone for long periods. We accept Mr Dhami's evidence that he was never aware of any such circumstances and nor was any other manager to whom he made enquiries including Mr Kapil Rajja – Director of the respondent;

and Ms Pettitt. As we have previously indicated during the course of argument on this point, the claimant confirmed that in fact he was never left alone - because there was always a qualified pharmacist and attendance.

48 The claimant's base location was at Chester Road, New Oscott. The claimant's statement of particulars of employment provides that he may be required to work at any of the respondent's trading locations. It is common ground that on occasion, due to a lack of employees being available to conduct work, he was asked to work at alternative locations. These included: Old Oscott, Dyas Road, and Twickenham Road. The locations are within walking distance of each other. The duration of time in which the claimant remained in an alternative location was varied, sometimes it was one day but more often than not it was for two weeks at a time.

49 When the claimant was asked to work in an alternative location, he never refused. Mr Dhami has checked the respondent's records and the first record of the claimant expressing concern about changes of location is in January 2019 when was absent from work.

50 When the claimant arrived at the alternative locations, no employees ever reported him as showing signs of discomfort, stress or out of character behaviour. He was always able to carry out his job role, interact with employees and customers with ease and no issues were ever raised over his conduct during the course of his employment. The claimant worked in this manner since 2017 and never raised any concerns.

51 When the claimant was cross-examined, Mr Brown put to him just four occasions where the respondent had records of last-minute changes of location: these were on 22 February 2018; 15 May 2018; 5 June 2018; and 12 November 2018. The claimant was insistent that there were many more occasions but could provide no details. He further confirmed that he was happy to work at Old Oscott and Dyas Road. He confirmed that the respondent always attempted to accommodate him in only sending him to locations to which he did not object and which were within easy walking distance.

52 On 12 November 2018 at around midday, the claimant was asked to move to an alternative location for the afternoon. His case is that he explained to Mr Rajja that he was uncomfortable about going to that branch. However, even on the claimant's account this discomfort was nothing to do with his condition but due to a previous bad experience. The claimant's account is that he was reassured on the basis that the branch would be quiet that afternoon and at the pharmacist there was "really nice". The claimant left work ostensibly go to the other branch. He went to his car where he describes having a serious panic attack with the result that he did not go to the alternative location as requested

but instead went home. The claimant's mother contacted Ms Pettitt to advise as to the situation. The claimant has confirmed before us that Ms Pettitt was very understanding: the claimant was told to take some time off to recover. A few days later he went to see his GP who signed him as unfit for work.

53 The claimant remained unfit for work until his eventual dismissal. He submitted regular fit notes from his GP advising that he was unfit for work. The fit notes stated that the diagnosis was variously depression and/or anxiety and/or stress. There was no mention of Asperger's Syndrome. Although there is capacity on the fit note form to do so, the GP never indicated that the claimant may be fit for work if adjustments were made in particular there was never any recommendation for a phased return.

54 During the claimant's sickness absence, his point of contact with the respondent was Ms Pettitt who in our judgement made considerable efforts to establish the position with a view to securing the claimant's return to work. The steps taken can be summarised by reference to documents as follows:

(a) 11 January 2019 – Requested the claimant's consent to get medical reports.
(b) 25 January 2019 – absent any response from the claimant, consent asked for again.
(c) 8 March 2019 – A meeting arranged to discuss the claimant's absence. He was offered a family member to attend.
(d) 29 April 2019 – Still no contact from the claimant. He failed to attend the meeting. Ms Pettitt tried to contact him again to offer support and to request further information from him.
(e) 2 May 2019 – The claimant advised that he did not wish the company to access his medical records as he deems it not necessary.
(f) 3 May 2019 – Ms Pettitt requested medical consent again and explained why it would be helpful.
(g) 13 May 2019 – The claimant advised again he did not consent to the respondent making contact with his GP.
(h) 17 May 2019 – Ms Pettitt asked for medical consent again.
(i) 20 May 2019 – Ms Pettitt arranged a medical capability hearing to discuss the claimant's current absence, scheduled for the 3rd June 2019.
(j) 3 June 2019 – The claimant advised due to his medical conditions he would be unable to attend the hearing.

55 On 27 January 2019, the appellant wrote to the respondent (in response to Ms Pettitt's letter of 11 January 2019 in which she had requested permission to obtain a medical report from the claimant's GP) suggesting that he would like a phased return to work and for temporary or permanent adjustments to be made

to his role in the light of his mental health condition. This letter is the first reference which the claimant makes to Asperger's Syndrome.

56 Ms Pettitt responded and consistently stated that the respondent was willing to consider a phased return and/or temporary and/or permanent adjustments but could do nothing in the face of the claimant's continued absence from work and fit notes certifying him as "unfit". Ms Pettitt made clear that the respondent would hope to receive a fit-note from the GP certifying that the claimant was fit for work if some adjustments were made and giving an indication of what was required. Alternatively she made clear that this was the very reason she was seeking the claimant's consent to her contacting the GP for a report.

57 During the early weeks of 2019, there was extensive correspondence from the claimant querying what he described as underpayments/delays in paying SSP and his outstanding holidays. These letters were detailed, articulate and had been thoroughly researched using government websites. By reference to the documentation, we accept that the only delays in paying SSP arose when at the cut-off date for the respondent's payroll, a current fit-note anticipated the claimant's return to work and only later were the respondents informed that the sickness period would continue.

58 It is very easy to understand why as the period of absence lengthened, Ms Pettitt wished to meet the claimant to discuss a way forward. To facilitate such a meeting, Ms Pettitt offered a range of flexibility from what might be regarded as the norm. She offered to meet at work premises; away from work premises; in public places or private places; and she offered the claimant the opportunity to be accompanied by a family member. The claimant responded stating that due to medical conditions he was unable to attend a meeting he never produced any medical evidence to support this suggestion and neither is there any such medical evidence to this effect in the bundle before us.

59 When the claimant failed to attend the meeting scheduled for 3 June 2019, Ms Pettitt rearranged the meeting for 17 June 2019 and offered the claimant three options as to how that meeting might proceed if he was unable to attend:

(a) Option 1 - by telephone.
(b) Option 2 - by written submissions (the respondent would submit to the claimant a list of questions and he should return his written answers).
(c) Option 3 - by the appointment of a trade union representative to attend the meeting in place of the claimant.

In response, the claimant requested Option 2 – written submissions.

60 The written questions were submitted to the claimant on 25 June 2019. He was asked to provide his responses by 28 June 2019. The meeting was rescheduled for 1 July 2019. The claimant did not provide his answers to the questions.

61 On 28 June 2019, the claimant gave permission for his father to communicate directly with the respondent on his behalf. Following this permission, the respondent still sent communications to the claimant with copies to his father. Our finding is that the respondent did this in good faith - it was communicating with the claimant's father as requested, but felt it appropriate to ensure that the claimant was copied in. The respondent had not been advised, and there is no medical evidence to support the proposition, that it was injurious to the claimant's health for him to be copied into the communications.

62 The meeting on 1 July 2019 went ahead. It was conducted by Ms Pettitt with a note-taker in attendance. Ms Pettitt waited for half an hour after the appointed time in the hope that the claimant might attend or might email through the answers to the questions which had been submitted to him. When she received nothing, she went on to formally consider the claimant's position. The claimant had been absent from work since 12 November 2018; fit-notes had been produced stating that he was unfit for work; the respondent had no information as to when he might be fit; the claimant had refused to give consent for them to ask questions of his GP; the claimant had failed to answer written questions; and had not attended the meeting. Ms Pettitt considered whether there were alternative vacancies available in the respondent's business which might be suggested (although it is clear that she would not have pursued these further without medical support) but there were no such vacancies. Accordingly, she concluded that it was appropriate to terminate the claimant's employment with full contractual notice.

63 By letter dated 12 July 2019, Ms Pettitt advised the claimant of his dismissal to be effective with notice. Although, the letter states that the employment will terminate on 2 July 2019, parties are agreed that the effective date of termination was 10 August 2019. The claimant was advised of his right to appeal.

64 It was suggested during the hearing that the claimant was unaware that the termination of his employment was a possible outcome from the meeting on 1 July 2019. We reject this suggestion: this possible outcome was made clear to the claimant in Ms Pettitt's letters dated 11 January 2019; 25 January 2019; and 29 April 2019. Each of these letters is contended by the claimant to be an act of harassment because he found them threatening.

65 On 13 July 2019, acting on the claimant's behalf, Mr Adams gave notice of an appeal and set out the grounds for the appeal. The appeal was acknowledged by letter dated 19 July 2019 and an appeal meeting was fixed to be conducted by Mr Dhami on 29 July 2019. Following Mr Adams suggestion that insufficient time had been allowed the appeal meeting was rescheduled for 5 August 2019.

66 The claimant attended the appeal meeting on 5 August 2019 accompanied by Mr Adams. The meeting was conducted by Mr Dhami with a note-taker in attendance. The meeting did not go well. We accept Mr Dhami's evidence that Mr Adams' behaviour was unacceptable. Mr Adams did not wish to allow Mr Dhami to conduct the meeting: his position was that as it was his appeal he should decide how it was to proceed; he tried to prevent the claimant from speaking if he was not satisfied as to what the claimant was going to say; and Mr Dhami's recollection is that he was racially abusive towards him. We accept that this extreme allegation of racial abuse is not recorded in the notes of the meeting: to an extent we can understand this; the note-taker would have been extremely shocked. In any event, it is unnecessary for us to make a formal finding with regard to the extent of Mr Adams' behaviour. It is sufficient for us to find that we are satisfied that it was because of Mr Adams' behaviour that the meeting was then adjourned until 19 August 2019. And that it was made clear to the claimant that at the reconvened meeting he could be accompanied by a work colleague or an accredited trade union representative only.

67 Prior to the reconvened meeting on 19 August 2019, the claimant indicated that he did not wish to attend. The claimant was invited to submit any further submissions which he wished to make in writing. No written submissions were received. Mr Dhami then considered the whole position including all of the communications between the claimant and Ms Pettitt together with Ms Pettitt's reasoning for the dismissal and the correspondence received from Mr Adams from 28 June 2019 onwards. Mr Dhami concluded that Ms Pettitt been extremely reasonable and accommodating; that her decision to terminate the claimant's employment was the correct decision. He therefore upheld that decision and dismissed the appeal.

68 The outcome of the appeal was communicated to the claimant in writing by letter dated 23 August 2019.

The Law

69 **The Equality Act 2010 (EqA)**

Section 19: Indirect discrimination

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

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if

(*a*) A applies, or would apply, it to persons with whom B does not share the characteristic,
(*b*) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(*c*) it puts, or would put, B at that disadvantage, and
(*d*) A cannot show it to be a proportionate means of achieving a legitimate aim.

Section 20: Duty to make adjustments

(3) ……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.

Section 21: Failure to comply with duty

(1) A failure to comply ….. 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.

Section 26: Harassment

(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.

(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.

Section 39: Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—

(*a*) as to B's terms of employment.
(*b*) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service.
(*c*) by dismissing B.
(*d*) by subjecting B to any other detriment.

(5) A duty to make reasonable adjustments applies to an employer.

Section 40: Employees and applicants: harassment

(1) An employer (A) must not, in relation to employment by A, harass a person (B) who is an employee of A's.

Section 123: Time limits

(1) proceedings on a complaint within Section 120 may not be brought after the end of—

(*a*) the period of 3 months starting with the date of the act to which the complaint relates, or
(*b*) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(*a*) conduct extending over a period is to be treated as done at the end of the period.
(*b*) failure to do something is to be treated as occurring when the person in question decided on it.

Section 136: Burden of proof

(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.

Schedule 8 – Part 3: Limitations of the Duty to make adjustments
Paragraph 20: Lack of knowledge of disability etc.

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(*b*) that an *employee* has a disability and is likely to be placed at the disadvantage referred to.

70 **The Employment Rights Act 1996 (ERA)**

Section 94: The Right not to be unfairly Dismissed

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 98: General Fairness

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

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

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

71 **Decided Cases**

Richmond Pharmacology Limited v Dhaliwa **[2009] IRLR 336 (EAT)**
Grant –v- HM Land Registry **[2011] IRLR 748 (CA)**

The necessary elements of liability for harassment are threefold: (1) Did the respondent engage in unwanted conduct? (2) Did the conduct in question either (a) have the purpose or (b) the effect of either (i) violating the claimant's dignity or (ii) creating an adverse environment for him. (3) Was the conduct on a prohibited ground? There is substantial overlap between these questions. Whether conduct was "unwanted" will overlap with whether it creates an adverse environment.

It may be material to consider whether it should reasonably have been apparent whether the conduct was or was not intended to produce the proscribed consequences: the same remark may have a very different weight if it was evidently innocently intended rather than if it was evidently intended to hurt.

Where harassment is said to result from the effect of the conduct - that effect must actually be achieved. However, the question of whether or not conduct had that adverse effect is an objective one - it must reasonably be considered to have that effect, although the alleged victim's perception of the effect is a relevant factor.

Igen Limited –v- Wong **[2005] IRLR 258 (CA)**

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

Madarassy v Nomura International Plc **[2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination.

Laing –v- Manchester City Council **[2006] IRLR 748**

In reaching its conclusion as to whether or not the claimant has established facts from which the tribunal *could* conclude that there had been unlawful discrimination the tribunal is entitled to take into account evidence adduced by the respondent. A tribunal should have regard to all facts at the first stage to see what proper inferences can be drawn.

Morse –v- Wiltshire County Council **[1999] IRLR 352 (EAT)**

A tribunal hearing an allegation of failure to make reasonable adjustments must go through a number of sequential steps: It must decide whether the provisions of [EqA] impose a duty on the employer in the circumstances of the particular case. If such a duty is imposed it must next decide whether the employer has taken such steps as it is reasonable all the circumstances of the case for him to have to take.

Smith –v- Churchills Stairlifts plc **[2006] IRLR 41 (CA)**

The test is an objective test; the employer must take "such steps as it is reasonable to take in all the circumstances of the case". What matters is the employment tribunal's view of what is reasonable.

Tarbuck –v- Sainsbury's Supermarkets Limited **[2006] IRLR 664 (EAT)**

There is no separate and distinct duty of reasonable adjustment on an employer to consult the disabled employee about what adjustments might be made. The only question is objectively whether the employer has complied with his obligations or not. If the employer does what is required of him then the fact that he failed to consult about it, or did not appreciate that the obligation even existed, is irrelevant. It may be entirely fortuitous and

unconsidered compliance but that is enough. Conversely if he fails to do what is reasonably required it avails him nothing that he has consulted the employee.

Project Management Institute –v- Latif **[2007] IRLR 579 (EAT)**

In order for the burden of proof to shift to the respondent, the claimant must not only establish that the duty to make reasonable adjustments has arisen but also that there are facts from which it can reasonably be inferred that it has been breached.

Environment Agency –v- Rowan **[2008] IRLR 20 (EAT)**

An employment tribunal considering a claim that an employer has discriminated against an employee by failing to comply with the duty to make reasonable adjustments must identify:

(a) the provision criterion or practice apply by or on behalf of the employer, or
(b) the physical feature of the premises occupied by the employer, and
(c) the identity of non-disabled comparators, and
(d) the nature and extent of a substantial disadvantage suffered by the claimant.

Unless the tribunal has gone through that process it cannot go on to judge if any proposed adjustment is reasonable.

DWP –v- Alam **[2010] ICR 665 (EAT)**
Wilcox –v- Birmingham CAB Services Limited **[2011] EqLR 810 (EAT)**

The duty to make adjustments is not engaged unless the employer knows (or ought to know) of both the disability and the substantial disadvantage.

Royal Bank of Scotland –v- Ashton **[2011] ICR 632 (EAT)**

Before there can be a finding that there has been a breach of the duty to make reasonable adjustments an Employment Tribunal must be satisfied that there was a provision criterion or practice that placed the disabled person, not merely at some disadvantage viewed generally but, at a disadvantage that was substantial viewed in comparison with persons who are not disabled. In this case an attendance policy which applied equally to all employees but which provided for a degree of *"flexing"* in the case of an employee who was disabled or suffered from a chronic or long-term underlying condition could not be said of itself to be a provision criterion or practice which placed the disabled person at a substantial disadvantage.

RLCH –v- Dunsby **[2006] IRLR 351 (EAT)**

There is no absolute rule that an employer must ignore "disability related" absence.

Wilson –v- Post Office **[2000] IRLR 834 (CA)**

Categorisation of the true reason for a dismissal under Section 98(1) and (2) ERA is a question of legal analysis and a matter for the tribunal to determine.

Taylor –v- Alidair Limited **[1978] IRLR 82 (CA)**

In a capability dismissal the correct test of fairness is whether the employer honestly and reasonably held the belief that the employee was not competent and whether there was a reasonable ground for that belief.

Lynock –v- Cereal Packaging Limited **[1988] IRLR 510 (EAT)**

in determining whether to dismiss an employee with a poor record of sickness absence, an employers approach should be based on sympathy understanding and compassion. Factors which may prove important include: the nature of the illness; the likelihood of the illness recurring; or of some other illness arising; the length of the various absences and the periods of good health between them; the need of the employer to have its work done; the impact of the absences on those who work with the employee; the adoption and exercise of a policy in connection with absence due to sickness; the importance of a personal assessment in the ultimate decision; and the extent to which the difficulty of the situation and the position of the employer have been explained to the employee. A disciplinary approach, involving warnings, is not appropriate in a case of intermittent sickness absence - but the employee should be cautioned that the stage has been reached when it has become impossible to continue with the employment.

Polkey –v- AE Dayton Services Ltd. **[1987] IRLR 503 (HL)**

In a case of incapacity, an employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to improve and show that she can do the job.

Iceland Frozen Foods v Jones **[1982] IRLR 439 (EAT)**
Post Office –v- Foley & HSBC Bank plc –v- Madden **[2000] IRLR 827 (CA)**

It is not for the tribunal to substitute its own view but to consider whether the respondent's decision came within a range of reasonable responses by a reasonable employer acting reasonably.

Sainsbury's Supermarkets Limited –v- Hitt **[2003] IRLR 23 (CA)**

The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed.

The Claimant's Case

Indirect Discrimination

72 It is the claimant's case that the respondent applied a PCP of "*sending employees to work at other locations at the drop of a hat*". The claimant contends that the application of this PCP placed him as a disabled person suffering from Asperger's Syndrome at a disadvantage compared with non-disabled employees. The disadvantage he claims to have suffered is that "*due to his disability he felt discomfort at having to change locations at short notice, and felt unable to refuse to move to other sites which he found disturbing*".

Failure to make adjustments

73 The claimant's case is that the respondent applied the following PCPs:

(a) Sending employees to work at other locations at the drop of a hat.
(b) A requirement to attend meetings.
(c) Corresponding/dealing with the claimant directly rather than via his father.

74 He claims that the application of these PCPs caused him disadvantage in comparison with those who are not disabled: he claims that he felt discomfort at having to change locations at short notice and felt unable to refuse; he found it difficult to attend meetings particularly when unwell; and he found it difficult dealing with correspondence from, or communicating with, the respondent about difficult matters.

75 The claimant contends that the following adjustments would have been reasonable:

(a) If there was a requirement for the claimant to work in a different location, giving the claimant adequate notice of the same.
(b) Discussing matters by correspondence, or failing that by telephone, rather than requiring the claimant to attend face-to-face meetings.

(c) Corresponding with the claimant via his father.
(d) Engaging with the claimant's proposals for his return to work, including an effective phased return to work.

Harassment

76 It is the claimant's case that the following were acts of disability related harassment:

(a) Requiring the claimant to work at other locations at the drop of a hat.
(b) The letter dated 11 January 2019 (the claimant relies on the request for him to give medical consent and suggests the letter 'threatens' him with dismissal).
(c) The letter dated 25 January 2019 (the claimant contends the letter was threatening).
(d) Putting inappropriate pressure on the claimant to return to work through correspondence between January 2019 and February 2019.
(e) On or around 8 March 2019 inviting the claimant (by letter) to attend a meeting in person at a work venue or coffee shop, and at short notice changing the date and location of that meeting.
(f) Sending correspondence on 29 April 2019 which the claimant contends changed the nature of the process which by that point was underway, and which the claimant says was threatening, and which imposed requirements on him with which the respondent knew that he could not comply.
(g) Correspondence of 17 May 2019 (the claimant contends the correspondence was threatening).
(h) His dismissal.
(i) The conduct of the meeting on 19 August 2019 at which the claimant's appeal against dismissal was discussed.

Unfair Dismissal

77 The claimant does not challenge that the respondents reason for his dismissal was a belief that he was unable to continue with his job - evidenced by his lengthy absence from work with no anticipated date for return. The claimant's case is that this conclusion was premature in the absence of an OH assessment which had not been requested. The claimant also asserts that the procedure adopted was unfair.

The Respondent's Case

Indirect Discrimination

78 The respondent denies that the PCP contended for by the claimant was ever applied. At its height, the respondent would accept that it had a requirement for employees *occasionally* to change location at short notice. The respondent does not accept on the evidence available that such a requirement placed the claimant at a disadvantage; and certainly denies that it was ever made aware of such a disadvantage. In any event, the requirement was a proportionate means of achieving the legitimate aim of ensuring that its various branches were properly staffed to meet public need.

Failure to Make Adjustments

79 For the reasons stated in the previous Paragraph, the respondent does not accept that the first of the PCPs contended for was ever applied. And further, whenever an employee was required to change location as much notice as possible was given.

80 The respondent further denies that the claimant was ever required to attend a meeting (there was no occasion for example where he was told that he would be disciplined if he failed to attend).The respondent certainly believed that a face-to-face meeting would be most beneficial to all concerned: and the respondent's case is that it went to considerable lengths to try and accommodate the claimant's needs in arranging meetings. The respondent was flexible as to time and location and postponed meetings in the hope that the claimant's ability to attend would improve. Further, the respondent was willing to conduct the meeting using written communication but when questions were sent to the claimant he failed to provide the answers. Put simply, the respondent's case is that the claimant failed to engage with the process.

81 The respondent's case is that it is entirely legitimate to expect to deal personally with its employee. And that it was right to be cautious when asked to deal with the claimant's father. This request came by email only: the respondent had no opportunity to discuss the request, or the claimant requirements with him face-to-face.

82 With regard to the claimant's request for a phased return to work, the respondent's case is that it continually attempted to engage with the claimant over this. That is why they wish to consult his GP - to ensure that a phased return if it was appropriate was properly structured. And that of course is why they wanted to meet the claimant. But the claimant refused to engage. Finally they sent a list of written questions but he declined to answer them.

Harassment

83 The respondent's case is that none of the conduct set out in Paragraph 76(b) – (g) above was *intended* to have the prescribed effect. To the contrary, the respondent believes that its communications were positive in nature intended to encourage the claimant's engagement. As to whether the respondent's conduct had the prescribed effect, the respondent's case is that having regard to all of the circumstances of the case it was manifestly unreasonable for its conduct to have the required effect when all that was required was a basic level of engagement from the claimant.

84 The respondent denies that dismissal for a legitimate reason could ever amount to an act of harassment.

85 Finally, the respondent's case is that its conduct of the appeal hearing was entirely professional. The hearing did not achieve its purpose because of the behaviour of Mr Adams.

Unfair Dismissal

86 The respondent maintains its position that this was a fair dismissal for reasons relating to the claimant's capability. By the time of his dismissal, the claimant had been continuously absent from work for nearly 8 months and there was no prospect of a return. The respondent had requested permission to contact the claimant's GP firstly for the purpose of fully understanding the reasons for his absence and secondly to investigate what could be done to promote his return. The claimant had failed to engage. The respondent had requested meetings - the claimant had refused to attend. The respondent submitted written questions - the claimant failed to answer them.

87 The claimant had made a request for a phased return but had refused to meet the respondent to discuss the precise requirements and had refused to allow his GP to provide any information.

88 The suggestion that the respondent should have sought an OH report before proceeding to dismissal is something of an afterthought from the claimant - certainly no such suggestion was made at any time prior to the hearing. But the respondent's case is that having sought medical evidence through the GP without any cooperation at all from the claimant it was not obliged to look at an exhaustive list of alternatives. If, for example, the claimant had responded with good reason why they should not approach his GP, then it may have been relevant to consider alternatives. This did not happen.

Discussion & Conclusions

Medical Evidence

89 That the claimant was a disabled person is something which the respondent conceded and it was therefore unnecessary for us to consider the entirety of the medical evidence in this context. The medical evidence which was placed before us confirmed the claimant's diagnoses by reference to documents and reports which were more than 10 years old. There was more recent evidence in the form of a report intended for an assessment centre suggesting that the claimant would benefit from a home visit - but nothing which supported the suggested disadvantages which the claimant claims to have suffered within the context of his employment with the respondent.

90 Mr Adams' approach was largely that once the claimant had established a diagnosis of Asperger's Syndrome, the tribunal and the respondent should then simply accept his assertions as to the limitations created by this diagnosis and the disadvantages claimed. Indeed on several occasions during the course of the hearing Mr Adams expressed concern at what he claimed was this panel's lack of knowledge relating to Asperger's Syndrome.

91 Mr Adams' approach was misconceived: it would be wholly unreasonable to expect every panel in an Employment Tribunal to have expertise in every type of medical condition/disability which it is likely to encounter. Indeed, if any one of us did have such expertise it would have been inappropriate to apply it - we must decide the case based on the evidence. In this case, the claimant chose to adduce no direct evidence as to how his medical condition affected the particular circumstances of his working environment and indeed save for the fit notes which were available, there was no medical evidence with regard to his lengthy absence from work or what steps from the respondent might have assisted his return.

Indirect Discrimination

92 We find that the PCP asserted by the claimant was never applied. At most he was occasionally requested to work elsewhere and always with as much notice given as possible. Although the claimant alleges that changes of location were regular and at short notice he has provided us with no information which supports this assertion. The requirement for a degree of flexibility amongst the workforce was an entirely proportionate requirement by this respondent in pursuit of the legitimate aim of the proper running of its business which fulfilled a necessary public need.

93 Accordingly the claim for indirect discrimination is dismissed.

Failure to Make Adjustments

94 Again, we find that none of the PCPs asserted by the claimant were ever applied. As stated above, the claimant was not required to change location at "the drop of a hat": it was an occasional and reasonable request. He was never *required* to attend a meeting: he was invited to a number of meetings in the hope of some positive engagement with regard to his return to work. It was reasonable for an employer to wish to deal with its employee: and the respondent was entitled to be cautious about the email request to deal instead with the claimant's father. However, once this request had been properly understood the respondent respected it.

95 The duty to make adjustments arises only where an employer is aware both of the disability and of the disadvantage said to have been created by it. In this case it was not until January 2019 that the respondent was even told of Asperger's Syndrome and it was never told of the disadvantages claimed. The respondent's attempts to investigate by meeting the claimant and obtaining information from his GP were thwarted by the claimant who refused to engage.

96 In any event, on the evidence before, us the claimant has not established that he did suffer from significant disadvantage by reason of the PCPs which he contends for.

97 Accordingly, the claim for a failure to make adjustments is dismissed.

Harassment

98 The claimant was not required to change location at the drop of a hat. He has provided evidence to us of only a single occasion where he was asked to change location at short notice - that being on 12 November 2018. On his own account, the claimant was reluctant to make the change that day but his reluctance was not because of his Asperger's Syndrome but because of a previous bad experience. Having been given reassurance, the claimant agreed to change. The respondent could not have predicted that in fact the claimant would experience a panic attack and go home. In our judgement, it is quite impossible to characterise this incident as an act of harassment.

99 The respondent's correspondence with the claimant once his absence from work became prolonged appears to us to be entirely reasonable. It was entirely correct that the respondent should point out to the claimant that if a satisfactory solution to getting him back to work could not be found then dismissal was a possibility. In our judgement, none of the correspondence was in

any way threatening: it was constructive and clearly designed to encourage the claimant's engagement.

100 There was no inappropriate pressure applied to get the claimant to return to work. Quite properly, the respondent wished him to return to work but the correspondence and communication was positive and constructive. Most of all, the respondent wished to understand the reasons for the claimant's absence and what it could do to encourage his return. This was the reason for the request for information from the claimant's GP. However the claimant simply failed without any explanation to engage.

101 In its requests for meetings with the claimant the respondent demonstrated flexibility and a willingness to accommodate the claimant's requirements. The respondent was willing to meet the claimant in the workplace, at his home, or in a neutral environment such as a coffee shop.

103 The nature of the process did not change. The respondent needed to understand the reasons for the claimant's absence and what could be done to promote his return. But the respondent also made it clear throughout that if there was no solution to his return then the termination of the claimant's employment was a possibility. Having considered all of the correspondence, we do not agree that any of this was threatening.

104 We agree with the respondent's submission that if the claimant's employment was properly terminated for a fair reason, this cannot amount to an act of harassment.

105 So far as the conduct of the meeting of 19 August 2019 is concerned, we accept the evidence of Mr Dhami. We accept that he attempted to conduct that meeting highly professional manner: but it was his meeting to conduct - it was not for Mr Adams to control the meeting. It is unnecessary for us to make a specific finding as to whether Mr Adams made racially abusive comments as alleged: we are satisfied that his conduct was such that the meeting could not proceed as intended and further that Mr Adams' conduct on that day made it reasonable for the respondent to insist that if the meeting was to proceed on another day, the claimant was accompanied by someone else.

106 Accordingly, and for these reasons we dismiss the claim of harassment.

Unfair Dismissal

107 We are satisfied that the sole reason for the claimant's dismissal was the respondent's belief that, following a prolonged absence from work with no

prospect of a return, the claimant was not capable of attending work and carrying out his duties. This is a potentially fair reason for dismissal.

108 The claimant's absence from work was a matter of record. We are satisfied that the respondent attempted to investigate both the reasons for the absence and the prospects of return. It did this both by seeking meetings with the claimant and seeking permission to obtain medical information from his GP. The claimant refused to meet, and refused to consent to the respondent obtaining the medical information which it clearly needed.

109 The procedure adopted by the respondent was conspicuously fair. The claimant was given several opportunities to cooperate and he failed to do so. The claimant had been given adequate notice that the termination of his employment was a possibility and the respondent was left with the ongoing absence and no opportunity to explain it investigate the reasons for it or what could be done to promote the claimant's return.

110 The claimant had suggested a phased return: but the claimant is not best placed to determine how a phased return should operate - this is for the respondent to consider in the light of medical guidance. The respondent attempted to obtain such guidance but the claimant would not cooperate. The respondent was left having to make its decision with very little information available. When the claimant was provided with written questions he declined to answer.

111 The absence of an OH report does not in our judgement undermine the respondent's decision. The respondent had to take such steps as are reasonable in the circumstances presented to it. The respondent attempted to obtain medical information with no help from the claimant. There is no reason whatsoever to suppose that the claimant would have cooperated with an OH report. He had given no indication as to why he was obstructing the obtaining of a GP report.

112 The claimant was afforded a right of appeal. The first appeal meeting had to be abandoned because of Mr Adams' conduct. The claimant chose not to attend the reconvened meeting.

113 In our judgement this was a fair dismissal. The claim for unfair dismissal is not well-founded and is accordingly dismissed.

114 In the circumstances the claims are dismissed in their entirety.

Employment Judge Gaskell
12 February 2024