EMPLOYMENT TRIBUNALS

Claimant: Mr Jamshid Aslam

Respondent: Metroline Limited

Heard at: Watford Employment Tribunal
On: 6-9 November 2023, 10 & 21 November 2023 (deliberations in chambers)

Before: Employment Judge Young
Members: Ms S Johnstone
Mr T P Maclean

Representation
Claimant: Self representation (litigant in person)
Respondent: Mr McPhail (Counsel)

RESERVED JUDGMENT

It is the unanimous judgment of this Tribunal:

(1) The Claimant's complaint that the Respondent pre drafted the letter of dismissal was dismissed upon withdrawal.
(2) The Claimant's complaint of unfair dismissal is well founded and succeeds.
(3) The Claimant's complaint of victimisation is well founded and succeeds.
(4) The Claimant's complaint of harassment related to the Claimant's disability is well founded and succeeds.
(5) All the Claimant's other complaints are not well founded and are dismissed.
(6) Parties to be sent a listing stencil in respect of a remedies hearing.

REASONS

Introduction

1. The Claimant was employed first at MTL and then the Respondent from 14 October 2002 until his dismissal on 30 January 2019. The Claimant contacted ACAS on 29 November 2018 and was issued with an ACAS early conciliation certificate on 29 December 2018. The Claimant was still

employed by the Respondent when he presented his first claim form on 25 January 2019 complaining of disability related harassment and reasonable adjustments. However, the Claimant was dismissed on 30 January 2019 and the Claimant contacted ACAS again on 7 February 2019 and was issued with an ACAS early conciliation certificate on the same day. The Claimant presented his second claim form on 23 April 2019 complaining of unfair dismissal, discrimination arising from disability and victimisation.

The Hearing

2. The Claimant represented himself. The Respondent was represented by counsel Mr McPhail.

3. On Day 1, 6 November 2023. The Claimant requested that reasonable adjustments be made in the form of regular breaks for the hearing and asked that he may require the Respondent to repeat questions due to his hearing impairment. The Claimant indicated that when he required a question repeated he would put his hand up. The Respondent agreed. The Claimant's hearing impairment made it difficult for the Claimant to hear the witnesses on the other side of the room. The Respondent and Claimant agreed to swap places in order for the Claimant to be able to hear more clearly. The Claimant did not raise any further issues about his hearing during the entirety of the hearing.

4. By email dated 28 October 2023, the Claimant made an application for an additional 27 pages to be added to the bundle. On the first day of the hearing the Tribunal asked the Claimant if he was still pursuing the application to add the 27 pages to the bundle. The Claimant explained that on 11 May 2023 his application to amend his claim to include a claim dealing with post employment victimisation in respect of a request for a reference was rejected [75]. The Claimant still wanted to rely upon the additional 27 pages that dealt with the Respondent's alleged refusal to provide a reference. The Claimant accepted that the 27 pages were only relevant to matters raised in his witness statement that addressed the issue of post termination victimisation. The Respondent opposed the application saying the 27 pages were not relevant. The Claimant referred to pages that the Respondent had included in the bundle that he had not raised an issue about. The Claimant said that now he was not agreeing to include these pages, but he was prepared to waive adding the 27 pages as he wanted to get things moving. The Respondent accepted that the Claimant was referring to pages at p388-398 which the Respondent said were offensive emails that the Claimant had sent to the Respondent's solicitor earlier in 2023 concerning another legal matter that was not before this Tribunal. The Respondent said that the pages 388-398 were relevant to Polkey. The Respondent said that it demonstrated that the employment relationship was doomed. The Respondent also said it went to the issue of costs because the Respondent was required to use external counsel because of the Claimant's behaviour as demonstrated by the offensive emails. The Claimant said the pages 388-398 were sent to a different law firm than the one instructed by the Respondent in respect of the Employment Tribunal claim. The Claimant said that his 27 pages were relevant pursuant to remedies in respect of his aggravated injury claim.

5. The Respondent made further submissions on the issue of disclosure requesting that the Employment Tribunal ignore everything from the paragraph on page 7 of the Claimant's witness statement that starts "*There is always talk…*" until page 8 of the Claimant's witness statement ending with the paragraph that ends with *"…the most sickening of all and alarming abusing a British citizen with disabilities*." The Claimant informed the Tribunal that he was on bail in relation to the emails at pages 388-398 and therefore could not talk about those pages. The pages related to matters that happened 4-5 years after the dismissal. The Respondent accepted that they could not ask the Claimant about those pages.

6. After deliberation, the Tribunals' decision was that the 27 pages were not relevant to the issues the Tribunal had to decide as the Employment Tribunal was not dealing with a post employment victimisation claim. The Employment Tribunal considered that pages 388-398 were not relevant to any issues either as the matters took place 4-5 years after the dismissal. There was a limitation to the compensation of 1 year in respect of the dismissal claim and so there was little to no chance that matters that happened 4-5 years later were going to be relevant to the ending of the relationship or compensation. In light of the Tribunal's conclusion, we did not need to consider the Claimant's right against self incrimination.

7. The Claimant made an application to amend the claim to add that the Respondent's dismissal letter was drafted before the decision to dismiss was made. The Claimant said that this was an act of victimisation because the Respondent knew about the Claimant's Tribunal claim and the grievance dated 15 November 2018. The Respondent did not object to the amendment but said that there was talk of the Employment Tribunal claim but the Respondent had not seen the claim form before dismissing the Claimant. The Employment Tribunal considered the balance of prejudice to the parties. The Tribunal considered that there was prejudice to the Claimant of not adding the issue and decided to add the issue to the agreed list of issues as issue 23.1 as an act of victimisation. The detriment was that the Respondent had prejudged the dismissal by drafting the letter of dismissal before making the dismissal decision.

8. On day 2, 7 November 2023 we were provided with an additional email trail between Mr Hunter to Mr Delaney from 6 November 2018. The Claimant had no objection adding these documents to the bundle and the pages were relevant to the issues the Tribunal had to decide. These pages were added to the bundle as pages 407-408. The Tribunal asked the Respondent to provide a list of the agreed dates of sickness of the Claimant. The Respondent provided a list agreed with the Claimant on the morning of day 3, 8 November 2023.

9. At the end of day 2 the Claimant asked for disclosure on the issue of what were the available jobs that Mr Hill was aware of. The Tribunal asked the Claimant if he was challenging the evidence of the Respondent witnesses. The Claimant said that he was not. After brief deliberation, the Tribunal told the Claimant they would not order disclosure of the documents in those circumstances.

10. On day 3, 8 November 2023 the Claimant withdrew the allegation that the Respondent pre drafted the letter of dismissal. The Tribunal dismissed that claim upon the Claimant's withdrawal. Following Employment Judge's McNeill's decision 29 May 2023 to not allow the Claimant's post employment victimisation to claim on providing the Claimant with a reference, the Tribunal told the Claimant we would ignore any mentioned of employment references in the Claimant's witness statement. The Respondent produced the following dates of sickness in an email from Mr McPhail which were agreed by the Claimant:

- 19.06.18 – During the working day, Claimant left work.
- 08.08.18 – This appears to be the date on which Claimant returned to work [see pages 202 and 206]. Claimant returned at this time on a phased return basis. By 19.09.18 (see below) a return to full time work had not been achieved [see pages 217-218].
- 19.09.18 – Claimant was off work hereafter [243].

11. During the Claimant giving evidence on day 3, following a question about events of 19 June 2018 recorded in an incident report by Mr Phil Matten on pages 187-188 of the bundle, the Claimant started to get visibly upset and said that he was finding the questions upsetting and it was traumatic like reliving the experience of what had happened. He asked if Counsel could ask the questions in a softer way. Employment Judge Young explained that Counsel had not been asking questions in a harsh way. Employment Judge Young explained that we as the Employment Tribunal could not do our jobs in terms of hearing the case if we did not go over the past events which (most if not all) the Claimant was likely to find distressing. The Tribunal took a break from 10:57- 11:15 for the Claimant to gather himself.

12. On day 3 an issue arose during the Claimant's evidence as to what grievances had an outcome. This was relevant to what Mr Hill had said to the Claimant during the final capability meeting on 30 January 2019. The Employment Tribunal asked the Respondent to find out whether there was a written outcome to the Claimant's 20 September 2019 grievances. The Respondent provided a letter dated 9 January 2019 by Mr Nick Faichey. The Claimant accepted that this was a letter that he had received, and it was admitted into evidence as pages 409-414.

Evidence

13. The Employment Tribunal received a bundle of 413 pages. Additional pages were added to that bundle and are referred to in the above section titled the hearing. The Tribunal heard oral evidence from the Claimant and received a typed written witness statement from the Claimant. The Tribunal also heard from three Respondent witnesses: Mr. Hunter (the group performance and commercial development director), Mr Darren Hill (Head of HR for all ComfortDelGro subsidiaries in the UK including the Respondent), and Mr Craig Delaney, (Service Delivery Manager for Metroline's Holloway and Willesden garages).

Claims & Issues

14. The claims that the Tribunal were considering were discrimination arising as a consequence of the Claimant's disability (section 15, Equality Act 20210 (EqA), failure of the Respondent to make reasonable adjustments (section 20 & 21 EqA), direct disability discrimination (section 13, EqA), harassment related to the Claimant's disability (section 26 EqA), victimisation (section 27 EqA) and ordinary unfair dismissal (section 84 & 98 Employment Rights Act 1996, (ERA)). The agreed issues to be determined were contained in the order of Employment Judge McNeill's dated 29 May 2022. Those issues are contained in the annex to the judgment titled the agreed list of issues and are issues the Tribunal considered.

Findings of Facts

15. The Tribunal had careful regard to all the evidence that was heard and read about concerning the Claimant's personal circumstances. It was not necessary for the Tribunal to rehearse everything that was told in the course of this case in this judgment, but the Tribunal has considered all the evidence in the round in coming to make the Tribunal's decision. All numbers in square bracket are page references to the bundle. Reference to the initials of the witness@ followed by a number is a reference to the paragraph number of the witness statement of the witness quoted.

16. The Tribunal makes the following findings of fact on the balance of probabilities.

17. The Respondent is a large company providing a bus service. The Respondent had in 2018-2019 approximately 4-4,500 employees. On 8 May 2018, the Claimant a Senior Service Controller was regraded to a driver and given a final written warning for 12 months following a disciplinary hearing by Mr Dave Stone a senior supervisor [168-169]. On appeal, Mr Andrew Hunter, Director upheld the Claimant's final written warning but upgraded the Claimant's demotion from driver to the role of Service Controller. [182]

18. We take judicial notice of Employment Judge Tynan's judgment dated 17 August 2020. Employment Judge Tynan found that the Claimant was disabled between 10 September 2018-30 January 2019 by reason of depression and anxiety disorder.

19. At the appeal meeting with Mr Hunter on 21 May 2018, the Claimant told the Respondent that he had been receiving counselling but no longer required it. The Claimant said he had been taking sleeping tablets but was no longer taking them or any other treatment. [179] The Claimant was asked where he would like to be located and the Claimant stated the Brentford Garage [181], which the Respondent accommodated.

20. Following the Claimant's upgrade to the role of Service Controller, the Claimant worked at the Brentford garage. Mr Dave Stone was a Service Delivery Manager and his line manger. Mr Phil Matten was a Senior Supervisor who worked at the Brentford Garage. There was another senior supervisor called Andy Stroud. Mr Keith Ali was the senior service delivery manager and was the line manager of Mr Stone.

21. Following the Claimant's successful appeal against demotion, the Claimant was referred to Occupational Health. The Claimant attended a consultation with Dr Fernandez on 22 May 2018 who produced her report dated 30 May 2018. [184-185]. In the report Dr Fernandez explained that the Claimant had been diagnosed with depression in 2015 and that the Claimant had told her 4 months prior to the consultation the Claimant had began to experience a recurrence of his depressive symptoms. Dr Fernandez advised that an adjustment of a risk assessment on the basis of the Claimant's problematic memory and concentration be made for the Claimant over a period of 6 weeks. The Claimant said that he was able to get up and go to work. It was Dr Fernandez's opinion that the Claimant was fit to return to work [185]. Dr Fernandez did not comment on whether the Claimant was disabled or not.

18 June 2018 incident

22. On 18 June 2018, an incident took place which resulted in the Claimant walking out of work before the end of his shift. The Claimant says it was because he was unwell and that after telling Mr Stone that he was unwell, Mr Phil Matten another senior supervisor controller reacted in an aggressive manner that resulted in the Claimant suffering a panic attack [191]. The Respondent relies upon a contemporaneous incident report by Mr Matten dated 21 June 2018 where he says the Claimant told him he was leaving to get some water, even though there was a water fountain on the premises [187]. Mr Matten later denied in an interview that he was aggressive towards the Claimant [229]. This is not a dispute we need to resolve as what happened does not go to any issue we need to decide. However, what is relevant is that the Claimant did not return to work the next day.

23. The Claimant said in evidence that he called Mr Ali as soon as he left the garage. The Respondent says that the Claimant did not follow the sickness reporting procedure and call the absence line on 18 June 2019, but called the absence line the following day on 19 June 2018 [188]. As the Claimant did not mention calling the absence line we accept Mr Matten's contemporaneous incident report as evidence that the Claimant did not follow process and call the absence line on the day of his absence. On 25 June 2018, the Claimant visited his GP and obtained a sick note that said he would be absent from work due to stress related symptoms from 25 June 2018 to 8 July 2018 [189]. The Claimant accepted in evidence that he must have self certified from 19 June 2018 until 24 June 2018. The Claimant's contract of employment under paragraph 9 explains that the Claimant was entitled to SSP [128]. Under paragraph 9.2, the Claimant's contract of employment states company sick pay was discretionary, and the Claimant was in a 12 month rolling period contractually entitled to 26 months of full pay and 26 months of half pay if the discretion was exercised in his favour [128]. Accordingly, at the date of his dismissal, the Claimant was still being paid full pay and the Claimant had not exhausted his discretionary company sick pay.

Claimant's attempt to return to work

24. Following the Claimant's period of sickness from 19 June 2018, the Claimant was due to return to work on 9 July 2018. However, prior to the Claimant's return, Mr Stone called the Claimant in for a sickness review meeting [192].

The Respondent's sickness absence review procedure stated that after a short term absence, a manager may have a meeting with the sick employee following an invitation to the employee setting out the concerns regarding the sick employee's absences [100]. Long term absence in the procedure is defined as 4 weeks or more. [100] The Claimant attended a sickness review meeting on 5 July 2018 at West Perivale garage. At that meeting the Claimant says that Mr Stone accused him of committing gross misconduct when he walked out of the garage on 18 June 2018. [192]. There were no notes of this meeting in the bundle.

25. The Claimant then says that he was sent a text by Mr Stone asking him to report for duty at 1pm on 9 July 2018. When the Claimant attended work on 9 July 2018, he was told by Mr Matten that he was not supposed to attend work on 9 July but on 10 July for a meeting that Mr Stone was organizing for him. Mr Hunter later accepted that there was a mistake regarding work allocation [275]. Mr Matten asked the Claimant to call Mr Stone and when the Claimant did, he got no answer. The Claimant says that as it was agreed there was no work for him, he left the garage. However, the Respondent did not agree that it was agreed that the Claimant was permitted to leave the garage. Mr Stone called the Claimant back the same day and told the Claimant that he should have stayed at work. The Claimant says that Mr Stone's comments caused him anxiety and so he asked to end the conversation. The following day the Claimant was asked to attend a meeting at Cricklewood garage with Jim Deasy. However, the following day the Claimant received a call from Mr Ali who had been given conduct of the process regarding the Claimant's sickness absence. The Claimant reported to Mr Ali that he was unwell and could not attend any meeting until he had seen his GP. The Claimant then submitted a written grievance addressed to Mr Hunter, dated 12 July 2018 complaining about Mr Matten's comments about work on 9 July and the comments Mr Stone made to him on 9 July 2018 [191-193]. The Claimant titled his grievance "formal grievance under the Equality Act 2018 Harassment at work".

26. Although the Claimant reported sick on 10 July 2018, the next sick note that was contained in the bundle indicated that the Claimant visited his GP on 16 July 2019 and obtained a sick note covering the period of 09/07/18-05/08/18 absence by reason of stress at work [194].

<u>Grievance Letter dated 12 July 2018</u>

27. In a grievance dated 12 July 2018 "12 July grievance", the Claimant alleged that on 18 June 2018 Mr Matten was aggressive towards the Claimant and on 5 July 2018 Mr Stone made the comment to the Claimant *you can't just walk out of the garage this is considered as gross misconduct behaviour*. The Claimant also complained that 9 July 2018 he had previously been told by Mr Stone to attend work on 9 July 2018 Brentford Garage, however when he turned up on 9 July 2018, Mr Matten told him he didn't have any work for him and told him to call Mr Stone. [191-193]. The Claimant sent this grievance to Mr Hunter. The "12 July grievance was investigated by Mr Ali who gave an outcome. Mr Ali interviewed the Claimant on 6 September 2018 [218-22]. At that interview, the Claimant said that he did not want any one disciplined, he

just wanted them to understand and show some compassion when someone says they are not well. [222]

28. Mr Ali then interviewed both Mr Matten and Mr Stone. Mr Ali interviewed Mr Matten [225- 229] on 10 September 2018. The handwritten notes of the interview with Mr Stone [230- 232] say the meeting took place on 18 September 2018. However, the interview notes say it happened on 10 September 2018. Although there were handwritten notes that said that the interview with Mr Stone happened on 18 September 2018, we find on a balance of probabilities that the meeting probably took place on 10 September 2018 which is consistent with the typed notes of the interview. The typed notes of the meeting with Mr Stone [233-235] record that Mr Stone said "*"Both Phil and myself were unaware of any conditions of an illness, and were unprepared"* [234]. *"Had I known he had medical issues then I would not have taken [him] at Brentford?"* [234]. Later in the meeting Mr Stone also said *"I spoke to Phil Matten about the case and how we are to deal with the situation going forward, but it appears we were having to walk on egg shells and watch whatever we say to Mr Aslam".* [235]

29. By letter dated 29 October 2018 [249-251] Mr Ali dismissed the Claimant's grievances against Mr Matten and Mr Stone set out in the 12 July grievance. The Claimant was sent the notes of the meetings with Mr Matten & Mr Stone with Mr Ali's 29 October 2018 outcome letter. Mr Hill confirmed in evidence that it was not the Respondent's practice to send interview notes to aggrieved employees, we accept this evidence. The Claimant confirmed that he has not received typed interview notes in respect of any other grievance. We find that the Claimant did not get the handwritten interview notes of Mr Stone and Mr Matten nor see them. We find that Mr Ali made a mistake sending the typed interview notes to the Claimant. There was no reason for Mr Stone to believe that Mr Ali would send the Claimant the typed interview notes.

30. We find that Mr Stone did say "*Had I known he had medical issues then I would not have taken at Brentford.'* We accept the Claimant's evidence that he felt the words used by Mr Stone caused him to feel belittled and made him feel small. We do not accept the Claimant's evidence that Mr Ali sent to the typed interview notes to him to send a message that the Claimant had medical issues and to belittle him and make him feel small.

31. We find that it is the case that Mr Stone did say *"I spoke to Phil Matten about the case. ...it appears we were having to walk on eggshells and watch whatever we say to Mr Aslam."* ("eggshell comment"). We accept the Claimant's evidence that he felt betrayed by Mr Stone's eggshell comment as he had worked with him for years and Mr Stone's words suggested that the Claimant was unapproachable, but Mr Stone had not said anything like that to him in the years that they had known each other. In the handwritten notes of Mr Stone's interview he says [232] "*I was informed that there was an issue with Mr Aslam and he had gone sick again. I rang my SSDM to say I cannot be dealing with his issues…"* We find that this quote indicates that when referring to having *to walk on eggshells and watch whatever we say to Mr Aslam,* Mr Stone was not prepared to deal with the Claimant's disability.

32. Mr Ali's grievance outcome letter dated 29 October 2018 also dealt with the Claimant's 13 August grievance (which concerned unpaid salary because the Claimant walked off site on 18 June 2018, we will refer to later), and found that the grievance was unfounded and that the deduction from salary would stand.

33. By letter dated 4 November 2018 the Claimant appealed Mr Ali's outcome letter [258]. By letter dated 9 November 2018 the Claimant was invited to attend an appeal meeting with Mr Hunter on 19 November 2018 [264]. The Claimant attended the appeal meeting on 19 November 2018 [265-269, 270-276]. At the appeal meeting, Mr Hunter adjourned before giving the Claimant the outcome of his appeal. Mr Hunter upheld the Claimant's appeal in respect of his deduction from salary on 18 June 2018, but did not uphold anything else. The appeal outcome was confirmed in writing by letter dated 22 November 2018 [277]. In accordance with the Respondent's grievance policy the Claimant was given a right to request a Director's Review if the Claimant believed there was a serious breach of procedure resulting in an unjust outcome. The Claimant did not request a Director's review.

<u>24 July 2018-Sickness Review Meeting</u>

34. The Claimant was then invited to attend another sickness review meeting with Mr Ali and Mr Jim Deasy (Business Support Manager) for 24 July 2018 whilst he was off sick. The Claimant attended that meeting and told Mr Ali that he was suffering from stress and anxiety. [195-196] Mr Ali told the Claimant he was booked to attend an Occupational Health appointment on 3 August 2018. The Claimant's appointment with Occupational Health was confirmed in writing by letter dated 24 July 2018 [197-198]. The Claimant said that in the sickness review meeting on 24 July 2018, Mr Deasey said "*comments to the effect of I can see you are recovering and doing well"* [207] and *"to the effect of he has not seen the contents of the grievance, but he will go and have a peak at it*" [207].

<u>Claimant's Occupational Health appointment with Dr Weadick on 3 August 2018</u>

35. The Claimant did attend an Occupational Health appointment with a doctor Weadick on 3 August 2018. It was agreed that the Claimant would return to work on a phased return. The details of the phased return were confirmed to the Claimant in an email dated 6 August 2018 from Mr Stroud to Mr Delaney. The Claimant says that he never received details of the phased return but initially his evidence was he did not say one way or the other whether he did receive the 24 July 2018 letter. Yet when the Tribunal asked him how he learned of the Occupational Health appointment, the Claimant referred to the 24 July 2018 letter. We therefore accept Mr Delaney's evidence on this point [CD@9] that the Claimant was told about the details of the phased return. The 24 July 2018 letter clearly refers to a phased return. The letter states the Claimant will have a "*phased return on a 3 week progression. Where you will return working two days on the first week, three on the second week and the four days on the third week leading into a week's holiday starting on the 27th of August"* [197]

36. The Claimant also complains in his 3 August 2018 email that Jim Deasey said in the 24 July 2018 meeting "*he can see I am getting better/recovering and that he will have a quick peak at the grievance". It was recommended that this matter is clarified in our meeting to ensure the grievance is held fairly. I would prefer if Jim Deasey is kept out of any further meetings and confidentially in this matter is respected."* [201] Although we note there are notes of the meeting and there is no reference to Mr Deasy making comments that suggest the words as stated by the Claimant, we accept the Claimant's evidence that Jim Deasey did tell the Claimant that he would have a quick peak at his grievance. The Respondent did not contest at any point that Mr Deasey did not say those words.

37. Dr Weadick produced an Occupational Health report dated 10 August 2018. In that report, Dr Weadick reported that:

"I understand that. Mr Aslam is due to return to work on a phased basis, but that ho plan for this has been raised. He is fit to do. so, but given the nature of his underlying condition, he would benefit from a detailed structure being agreed before any return is attempted." [204]

38. The Respondent says that this was the Claimant misleading Dr Weadick to think that there was no phased return to work plan. The Tribunal finds that the Claimant did know there was a phased return to work plan and so did mislead Dr Weadick by not telling Dr Weadick that there was a phased return to work plan agreed on 24 July 2018. The Tribunal finds that this was because the Claimant did not want to return to work at that point.

39. Dr Weadick also comments in his 10 August 2018 report on whether he considers the Claimant was disabled. He says: *"This matter does appear likely to be long term in nature and to cause him substantial impairment of his day to day activities. I would suspect therefore that, if so assessed at Tribunal, he would be found to be covered by the Disability Provisions of the Equality Act 2010." [205]*

40. The Claimant said that once the Respondent received Dr Weadick's report dated 10 August 2018 advising the Respondent that the Claimant fell within the disability provisions of the Equality Act 2010 the Respondent knew of his disability. We find that the Respondent was put on notice from the date of receipt of the report of Dr Weadick's medical view that the Claimant was disabled.

<u>Sickness review meeting 6 August 2018</u>

41. Following the Claimant's attendance at Occupational Health on 3 August 2018 the Claimant contacted Mr Ali for an update on the next steps, however, Mr Ali was on annual leave. On 3 August 2018, the Claimant emailed a Mr Stroud for an update as to when the Claimant could return to work [200]. The Respondent then arranged another sickness review meeting with Mr Delaney on 6 August 2018 to take over dealing with the Claimant's sickness absence and to review the proposed phased return to work plan.

42. By letter dated 6 August 2018 [202-203], Mr Delaney confirmed what was discussed in the meeting that day. In the meeting, the Claimant said that he was feeling much better and was happy to remain at Brentford garage even though he had raised grievances against senior staff. It was only if the grievances were not resolved that the Claimant would be asking for a transfer to another location. It was agreed that Mr Delaney would be the Claimant's single point of contact as requested. It was agreed that the Claimant and Mr Delaney would meet on a regular basis to review the phased return to work.

Claimant's 13 August 2018 grievance letters

43. By two letters, both dated 13 August 2018, the Claimant raised 2 grievances. The first concerned suffering a deduction of £48.91 for not attending work for the whole of 18 June 2018 [206] "13 August grievance". The second letter was in respect of the alleged comments of Mr Deasy in the meeting on 24 July 2018.

44. The Claimant also complained in his second grievance letter dated 13 August 2018 that the comments made the Claimant believe his 12 July grievance was compromised and the Claimant wanted to know the basis upon which Mr Deasey had allegedly told the Claimant that he was recovering and doing well [207-208].

Claimant's request to move location

45. At one of the Claimant's sickness review meetings with Mr Delaney on 20 August 2018, the Claimant requested relocation to a garage closer to his home because the Claimant had sold his car and was struggling with public transport. The Claimant was not improving and was not ready to come off the phased return to work plan or increase his hours [209- 211]. The Claimant had another sickness review meeting on 5 September 2018, where it was confirmed that he would be relocated to Cricklewood garage with immediate effect [216-217]

Jim Deasey grievance

46. By letter dated 23 August 2018, Ms Yesufu had written to the Claimant to advise him that his complaint against Ms Deasey would not be treated as a grievance. [215] However, the Claimant was not happy with this decision and wanted his complaint to be treated as a grievance. By email dated 10 September 2018 [224] the Claimant was told that he would be permitted to resubmit his grievance against Mr Deasey. On 20 September 2018, the Claimant resubmitted his grievance against Mr Deasey with further detail [238-239] "Jim Deasey Grievance".

18 September 2018 incident with Delroy Johnson

47. The Claimant did return to work from 8 August 2018 and remained at work until 18 September 2018. However, on 19 September 2018, the Claimant told Mr Delaney at a sickness review meeting that during his shift the previous day, a particular colleague within IBus, Mr Johnson had used inappropriate language which although wasn't directed at the Claimant made the Claimant

feel uncomfortable. The Claimant said that he felt this was particularly inappropriate due to the number of live transmissions taking place and the fact that a trainee controller was present. At that sickness review meeting, the Claimant was told that he would be asked to attend another Occupational Health appointment. [236-237]

48. By letter dated 20 September 2018 to HR, the Claimant submitted a written grievance against the colleague, Mr Johnson mentioned to Mr Delaney in the sickness review meeting on 19 September 2018, “20 September grievance” [240-241]. In that grievance letter the Claimant complained that at approximately 16:55 on 19 September 2018, the Claimant was supposed to be handing over to Delroy Johnson Ibus supervisor. However, there was a delay and Mr Johnson looked at the screen and walked away sitting down by the spare desk and stated comments to the effect of "carry on I’ll give some more time to sort your stuff, out". The Claimant then informed Mr Johnson at 17:05 he was ready to handover; however, Mr Johnson approached the workstation and when the Claimant attempted to inform him of the service, Mr Johnson using a raised voice, belittling demeanor and humiliating behaviour including hand gesture pointing his finger towards the Claimant stated in these words 'YOU DON'T TALK TO ME'. The Claimant said that those comment sent him into a state of shock causing him worsened stress and anxiety. Then when the Claimant left a trainee to finish the handover, Mr Johnson said to the trainee “fucking sort out your stuff.”

Claimant’s sickness absence from 19 September 2018

49. Although due to finish his shift at 18:06, the Claimant then left his shift at approximately 17:10 on 19 September 2018 and subsequently completed a self certification form of sickness [243] stating that he was unfit to work due to stress on 1 October 2018.

50. The Claimant next attended the GP on 24 September 2018 and obtained a sick note covering the period of absence as 24/09/18- 24/10/18 by reason of stress at work [242].

51. By letter dated 15 October 2018 [244] Mr Delaney wrote to the Claimant requesting that he attend an Occupational Health appointment on 25 October 2018. The letter did not state what Occupational Health advisor that the Claimant would see at that appointment. The Claimant’s sick note was to expire on 24 October 2018 and so the letter directed the Claimant to return to work on 25 October 2018.

52. By letter dated 19 October 2018, Mr Faichney was allocated the Claimant’s 20 September grievance. However, as the Claimant was off work, Mr Faichney stated in his letter that the Claimant should contact him when he returned to work as at that point it was expected that the Claimant would return to work on 25 October 2018.

53. However, the Claimant next attended the GP on 22 October 2018 and obtained a sick note covering the period of absence as 22/10/18- 22/11/18 by reason of stress of work [247].

Claimant's Occupational Health appointment 25 October 2018

54. The Claimant attended the Occupational Health appointment with Dr Weadick on 25 October 2018. Dr Weadick signed the Claimant as unfit for work [248]. Following the Claimant's 25 October 20218 Occupational health appointment, Dr Weadick produced a report dated 31 October 2018. In that report Dr Weadick says *"Mr Aslam does not appear fit to return to work at present, as his resilience has been reduced by his perceptions regarding work"* [253]

Dr Weadick's 8 November 2018 report [262-263]

55. Following receipt of Dr Weadick's report dated 31 October 2018, Mr Delaney said that he wanted further clarification of Dr Weadick's advice because whilst Dr Weadick's 10 August 2018 report made a recommendation that the Respondent put in place a single point of contact for the Claimant, and that had appeared to work well, there was little detail other than to talk about Mr Aslam's perceived stresses in the workplace. Mr Delaney said that the 31 October 2018 report added very little detail to the 10 August 2018 report to help him take action to return the Claimant to work. On the other hand, Mr Delaney said that he regarded the OH report by Dr Fernandez was very informative and included solid recommendations.

56. Mr Delaney contacted Dr Weadick through Medigold, the organisation that provided the Occupational Health advisors to the Respondent. Mr Delaney confirmed that he had a phone call to Dr Weadick, but there were no notes of what was discussed in that phone call. Mr Delaney gave evidence that what was discussed was his query. Mr Delaney said the query was contained in his email dated 6 November 2018 to Medigold [407-408]. In that email Mr Delaney asked *"we do not feel that elements discussed during the conference call have been acted upon and sufficient information provided in relation to the employee's condition or how we can progress things effectively regards the management of his circumstances. It would have been beneficial to us if we could of established relevant considerations in respect of the handling of grievances the individual has submitted as these seem to be directly affecting the employees ability to return to normal working as well as the expectations we can have in respect of his full time return.*" [407] It was as a result of this email that the Respondent received another Occupational Health report from Dr Weadick dated 8 November 2018. Dr Weadick's 8 November 2018 report provided further detail in relation to the Claimant's return to work. Dr Weadick stated "*This matter appears to relate almost entirely upon Mr Aslam's perceptions of having been poorly and unfairly treated, rather than being a mental health issue as such. He raises grievances as a defensive action. Unless and until such are acknowledged, I cannot see any change in the matter being possible" [262].*

57. Dr Weadick's recommendation was "*I do have concerns' regarding the ability of such faith to be rebuilt; hence, the frequent raising of grievances, but in order to attempt to support him some better understanding of his perceived ills is required,. It may be that his wishes and needs are impractical and unviable for the company; however, I believe that, if possible, they should be heard in a situation from which he feels able to unburden himself of such,*

allowing (hopefully) some traction regarding the matter may prove possible." [262] We find that Dr Weadick was recommending the Respondent deal with the Claimant's grievances in order to assist the Claimant returning to work.

58. We accept there was a lack of clarity in respect of the Claimant returning to work in the 31 October 2018 report and so it was perfectly proper for Mr Delaney to have asked further questions in respect of this issue. However, there was no evidence that Mr Delaney asked any further questions as to whether the Claimant was disabled.

Springhouse Solicitors letter dated 15 November 2018

59. In or around November 2018, the Claimant instructed solicitors, Springhouse Solicitors to write to Mr Hunter and Mr Hill to lodge a formal grievance. The grievance was contained in a letter dated 15 November 2018 [259-261] "15 November grievance". The letter was titled *"formal grievance"* and the Claimant's solicitors requested *"Please treat this letter as our client's formal grievance."* [259]. The 15 November 2018 grievance was sent to Head Office, Mr Hill and Mr Hunter.

60. In the letter the Claimant complained of "unlawful discrimination on the grounds of disability" [260] and referred to comments by Mr Stone contained in the interview notes dated 10 September 2018 that were sent to the Claimant. The comments referred to were *"Both Phil and myself were unaware of any conditions of an Illness, and were unprepared"[260]*, and also Mr Stone added: "*Had I known he [our client] had medical issues then I would not have taken [him] at Brentford" [260]*. It was also alleged that Mr Stone commented: *"I spoke to Phil Matten about the case and how we are to deal with the situation going forward, but it appears we were having to walk on egg shells and watch whatever we say to Mr Aslam".* [260] Springhouse solicitors alleged that the Claimant regarded Mr Stone's comments as amounting to harassment related to the Claimant's disability.

61. The letter also alleged that the Claimant had suffered an unlawful deduction of wages and that the Claimant's 13 August grievance had not been heard. The claim for 18 June 2018 day's pay was later resolved in the Claimant's favour by Mr Hunter. Also, that the Claimant regarded the treatment metered out to him calculated to force him to leave his employment and labelled this a potential constructive unfair dismissal and discrimination. The letter stated, *"We look forward to hearing from you confirming the arrangements to hear our client's grievance."* [261]

62. The 15 November grievance also indicated that all the actions of employees that the Claimant had already complained about in his grievances up until that date amounted to a repudiatory breach and that it was calculated in order to force the Claimant to leave his employment.

63. By email dated 27 November 2018, the Respondent's in house solicitor, Ms Hilary Norris [278-280] responded to the 15 November grievance. Ms Norris' response was lengthy and appears to deal with all the issues raised in the 15 November grievance but starts by saying *"…my client does not manage capability or disciplinary issues through solicitors. While you purport to raise*

a grievance on your client's behalf, it is unclear exactly what that grievance is, or what outcome he is seeking to resolve it. If your client does wish to raise a further grievance, he should do so in the usual way (via the HR department) and of course it will be investigated. However, please note the intents of this letter before encouraging him to do so."

64. Mr Hill gave evidence that he considered that the 15 November grievance was not a valid grievance because it had not been brought by the Claimant himself. Mr Hill considered the complaints that were made were effectively a grievance about a grievance, but in any case, it was something to be dealt with between legal advisers and therefore the Respondent treated it as a "letter before action" not a grievance. We find that this was not a reasonable interpretation when the letter said treat the letter as the Claimant's formal grievance.

65. The Respondent's grievance policy [90-99] includes in its appendices a bullying and harassment policy [96]. The Respondent's grievance policy says that *"The following procedure will apply to all staff in Metroline Travel Limited and Metroline West Limited (referred to collectively as "Metroline" in this document) and is designed to ensure that employees have the means of discussing and settling grievances relating to their employment as near as possible to the point of origin, without fear of retribution, informally wherever possible."*

66. The grievance policy does not define what a grievance is or how a grievance should be submitted. We find there was nothing in the Respondent's grievance policy prohibiting the Claimant submitting a grievance (whether it included a complaint of bullying and or harassment) to the Respondent via his solicitors or bringing a grievance about a grievance or preventing the Respondent from considering the Claimant's grievance submitted via his solicitors. We find the Claimant's 15 November grievance fell within the Respondent's grievance procedure.

The Claimant's request to see Dr Weadick

67. By letter dated 28 November 2018 [281] Mr Delaney recorded the discussion at the Claimant's sickness review meeting on 22 November 2018. In that meeting Mr Delaney refers to receiving a sick note from the Claimant covering the period of 19 November- 24 December 2018. The Claimant also requested that he have further referral to see the Occupational Health clinician Paul Weadick. The Claimant's explanation as to why he wanted to see Dr Weadick was that he found the consultation with him helpful and beneficial [281]. Mr Delaney told the Claimant that such a consultation should be sorted through the Claimant's GP. Mr Delaney explained in evidence that he considered at this point the Claimant's explanation for why he needed to see Dr Weadick was for therapeutic reasons. We find that the Claimant's request was a request to see Dr Weadick as a form of counselling which Mr Delaney did not agree with.

68. Mr Delaney raised for the first time at that meeting that it might be time to refer the Claimant to a specialist, *"In order that we may gain a further understanding of your condition which could enable us to offer improved*

support in accordance with your return to work" [281]. Mr Delaney explained in the letter that that details of the specialist would be confirmed when organised.

69. However, the Claimant wrote back on 28 November 2018 [290] asking who the specialist was going to be and what questions would be put to the specialist. Mr Delaney's response dated 29 November 2018 [289] was to suggest as an alternative to a specialist referral, that the Claimant be referred again to Occupational Health, but it may be to a different doctor. The Claimant was not happy about this and in his email response dated 29 November 2018 [288] said that Mr Delaney had stated that the company insisted on consistency of Occupational Health doctors which he agreed with [288]. Mr Delaney responded on the same day disagreeing, saying the organisation could ask for another OH appointment but it might be with a different clinician [289]. Mr Delaney said that he was not proposing to seek the Claimant's agreement to any referral, because he would not wish to put a limit on the questions that could be asked to obtain a full picture [289]. We find that it was not the Respondent's company policy to insist on consistent Occupational Health advisors.

Grievance about Mr Delaney - 4 December 2018 [291]

70. On 4 December 2018, the Claimant submitted another grievance against Mr Delaney to Mr Hill. "4 December grievance". The Claimant complained that Mr Delaney had made a comment in an email dated 3 December 2018 [291]. *"I think it would be helpful if you did not rely on people who where not at the meeting to draft your correspondence for you because it seems to be causing confusion."* The Claimant believed that Mr Delaney was trying to isolate him with that comment.

71. The Claimant complained that he was not allowed to see Dr Weadick by Mr Delaney in his grievance dated 4 December, "4 December grievance". and that having to go back and forth was exacerbating his condition [291]. The Claimant also said that he was aggrieved by the lack of empathy, compassion and understanding shown by Mr Delaney by not allowing a further Occupational Health referral with Dr Weadick.

72. We accept the Claimant's evidence that having to repeat the whole story and go over issues already discussed aggravated his fragile condition [see Claimant@18] and that that reliving the experiences with the Respondent caused him difficulty. We accept the Claimant's explanation that when he changed doctors from Dr Fernandez to Dr Weadick, he did not think at that stage it was necessary to have consistency of doctors and he did not think about it. But when the Claimant saw Dr Weadick, he had to give an in depth account of his condition. Mr Delaney's explanation of why the Claimant may not see Dr Weadick again was because he had not found Dr Weadick's advice helpful as it had not assisted getting the Claimant back to work. [Delaney@33]. We find that this was not the case, that Dr Weadick's report was not helpful. Following the appointment with Dr Weadick on 3 August 2018 [204-205], the Claimant had returned to work between 5 August-18 September 2018.

73. After the Claimant complained about Mr Delaney, Mr Hill took over the Claimant's sickness absence process. Mr Hill informed the Claimant he was taking over management of the sickness absence process in his 21 December 2018 email [322]. In the Claimant's email dated 21 December 2018 in response to Mr Hill, the Claimant asked Mr Hill to confirm his appointment with the same Occupational Health doctor, Dr Weadick because *"explaining 6 months worth of issues over and over again has a negative effect on my Health, and especially after my recent visit to the hospital (Northwick Park Hospital) yesterday 20th December 2018, it was advised that I am not stressed or pressured to ensure positive recovery to my ongoing condition"* [322]. We accept Mr Hill's evidence that the Claimant did not complain about explaining his story to Mr Hill or object about speaking to another person about his sickness absence process. We find the Claimant had to tell the story and the issues to the different managers who heard his grievances and dealt with the sickness absence process and change in solicitors. We find the Claimant did not complain about the stress that was being added to him in respect of telling his story to these different parties.

74. Mr Hill's evidence was that the Respondent did not request a specific doctor for the Claimant to see, but he wanted the Claimant to see someone he had not seen before, and he wanted an independent view of the Claimant's medical situation on taking over the Claimant's sickness absence process. We accept Mr Hunter's evidence was that the Respondent did not have control over what Occupational Health advisor their employees would specifically see. It was up to the Occupational Health advisor provider as to who was available. We find that the managing sickness policy required the Respondent to obtain up to date medical information where there was continuing long term sickness [102]. However, the policy did not mention what doctor should provide that up to date information. We do not accept Mr Hill's explanation for why he required an independent view of the Claimant's medical situation. Dr Weadick's first report had got the Claimant back to work, admittedly for a limited period of time but it was overstating the position for Mr Delaney to say that Dr Weadick's Occupational Health report did not assist in getting the Claimant back to work. [392] Mr Hill gave evidence that he considered that it was appropriate for the Claimant to see a different doctor but did not explain why. He explained that if Medigold had allocated him Dr Fernandez he would have asked them to find him another Occupational Health advisor who had not been involved. We find that Mr Hill wanted the Claimant to see a doctor of his choosing following 21 December 2018 and made a decision to ensure that the Claimant did not have consistent Occupational Health advisors.

75. Mr Hill's evidence was that he agreed with Mr Delaney that the Claimant should see another Doctor and sent the Claimant an invitation on 21 December 2018 to see an Occupational Health advisor on 27 December 2018 [323]. At that stage, the Claimant did not know who the Occupational Health advisor was going to be but knew it would be someone he had not seen before. The Claimant wrote back to Mr Hill to say that the appointment was at too short notice [322]. The appointment was rearranged immediately for 31 December 2018 [300], this time the Occupational Health report advisor was named as Dr Kahtan. The Claimant wrote that he wanted the appointment to be rescheduled with Dr Weadick [300]. The Claimant was told

that it could not be guaranteed that the appointment would be with Dr Weadick [298]. The Claimant responded that he wanted the appointment rescheduled and rearranged with Dr Weadick [298]. On 3 January 2019, Ms Yesefu, HR advisor emailed the Claimant to inform the Claimant of the rearranged appointment for 7 January 20219. [307-308]. Again, this appointment was with Dr Kahtan [308-309]. The Claimant responded that he would not be attending the appointment [305]. When Mr Hill was asked in evidence as to why he did not refer the Claimant to a specialist as suggested by Mr Delaney, Mr Hill said he did not take up the matter as he knew there was to and fro over what questions would be asked. Mr Hill's position was that Dr Kahtan had not advised the Claimant should see a specialist, so he did not see a need to pursue it. Mr Delaney explained in evidence that Mr Hill did not speak to him about why he wanted a specialist. We do not accept Mr Hill's explanation, without speaking to Mr Delaney he could not have known why Mr Delaney considered a specialist a way forward. There was no evidence that Mr Hill had asked Dr Kahtan about referring the Claimant to a specialist so it is therefore unlikely that she would have mentioned it. We find that Mr Hill did not want to refer the Claimant to a specialist as he would not have sole control over the questions that the specialist would be asked as the Claimant had indicated that he had questions he wanted to ask the specialist.

76. We find that Mr Hill's insistence on independence did not make any sense. There was no requirement of an independent Occupational Health advisor and Mr Hill did not explain why an independent Occupational Health advisor was necessary. We find that Mr Hill wanted another medical opinion which would be different to Dr Weadick's view of the Claimant's disability, which is why he wanted another Occupational Health advisor who had not seen the Claimant. Mr Hill did not want to accept Dr Weadick's medical opinion that the Claimant was likely to be considered disabled which is why he got another OH report rather than refer the Claimant to a specialist.

77. The Claimant's 4 December grievance was heard on 4 January 2018 [403-405] by Mr Hill. By letter dated 11 January 2019, Mr Hill wrote to the Claimant with an outcome to his grievance against Mr Delaney. [311- 314] Mr Hill found there had been no harassment by Mr Delaney and the grievance was unfounded. The Claimant was given a right to appeal. However, the Claimant did not appeal the outcome of that decision. The Claimant said in oral evidence that he did not appeal as he had lost faith in the Respondent.

<u>Outcome of Jim Deasey grievance & 20 September grievance</u>

78. Although the Claimant was off work, the Claimant did contact Mr Faichney to attend a grievance hearing whilst off sick. The 20 September grievance was heard with the 13 August grievance on 5 December 2018 by Mr Faichney which the Claimant attended. Mr Faichney's outcome letter dated 9 January 2019 partially upheld the 20 September grievance in respect of Mr Johnson's foul language but did not uphold the rest of the 20 September grievance or the 13 August grievance.

Sickness review meeting- 4 January 2019

79. On 4 January 2019, the Claimant attended a sickness review meeting where he was told that the 7 January 2019 appointment with Dr Kahtan would not be cancelled, and an absence review meeting was arranged for 15 January 2019 [310]. The Claimant says that in this meeting he mentioned his outstanding 15 November grievance. Mr Hill denies that this was mentioned. The notes of the meeting record that *"It was discovered that the ongoing issues and outstanding, grievances have not been concluded and is preventing JA from returning back to work."* The Tribunal accept the Claimant's evidence that he raised with Mr Hill on 4 January 2019 his outstanding 15 November grievance.

80. The Claimant did not attend the 7 January 2019 appointment with Dr Kahtan. On 11 January 2019 [316] Mr Hill warned the Claimant that failure to attend the appointment was a breach of the Respondent's procedure and that normally the Claimant's sick pay would be withdrawn, and the cost of appointment deducted from the Claimant's pay.

81. The Occupational Health appointment was rearranged for the third time for 16 January 2019 with Dr Kahtan [316-317]. The Claimant was warned in an email from Mr Hill dated 11 January 2019 that failure to attend the 16 January appointment *"could mean that any decisions that are made will be based on out of date medical advice which may hamper the company's ability to support you. I must also advise you that if you fail to attend this appointment without a valid reason you will be in breach of the company's procedure which may result in the withdrawal of your company sick pay."* [317].

82. However, the Respondent's sickness policy does not mention pay being withdrawn for not attending Occupational Health appointments. It says "*Where the employee refuses to attend Occupational Health or to give permission for the Company to contact their medical practitioner, the employee will- be informed that a decision relating to, their employment may be made without the benefit of access to medical records. The same procedure will be followed, where- an. employee delays in, giving consent"* [103]

83. We find that the words "*I must also advise you that if you fail to attend this appointment without a valid reason you will be in breach of the company's procedure which may result in the withdrawal of your company sick pay."* "are a threat to the Claimant's income. Mr Hill's reference to requiring the Claimant to attend Occupational Health in order to get up to date information is consistent with the sickness absence policy. We find Mr Hill wanted the Claimant to attend the appointment so he could get the most up to date information.

84. Following the 11 January 2019 email, Mr Hill wrote to the Claimant to reschedule the sickness review meeting from 15 January 2019 to 22 January 2019. In the email inviting the Claimant, Mr Hill wrote "*It is essential that you attend this appointment because an up to date medical opinion will help to ensure that the company can make informed decisions"* [317] By email dated

15 January 2019, the Claimant specifically requested a reasonable adjustment that would enable the Claimant to speak to a medical advisor who would not make the Claimant's condition worse [316]. Mr Hill's response was *"I am aware of your previous objections regarding this appointment which you raised during our meeting and in which I also made the Company's position clear on your need to attend and that failure' to do so would be a considered a breach of procedure"* [316]. We find that by this email Mr Hill was insisting that the Claimant attend the medical appointment with Dr Kahtan. No other Occupational Health advisor was mentioned that Mr Hill insisted that the Claimant see.

85. However, the Claimant failed to attend the sickness review meeting on 22 January 2019. The Claimant explained that it was an error [324]. By email dated 22 January 2019 Mr Hill rescheduled the sickness review meeting and invited the Claimant to attend a sickness review meeting for 25 January 2018. In Mr Hill's 22 January 20219 email, Mr Hill repeated the warning *"Failure to attend this meeting could be considered a breach of procedure and may result in the withdrawal of company sick pay."* [324]

86. The Respondent's sickness policy states "*Where the employee refuses to attend Occupational Health or to give permission for the Company to contact their medical practitioner, the employee will- be informed that a decision relating to, their employment may be made without the benefit of access to medical records. The same procedure will be followed, where an employee delays in giving consent"* [103]

87. The Claimant complained that this warning was a threat to his income. We find that this warning was a threat to the Claimant's income. We found no other wording, and neither were we referred to any other wording that could amount to the Respondent considering not paying the Claimant any some of money.

Dr Kahtan's 17 January 2019 report [319-320]

88. The Claimant attended the appointment on 16 January 2019. Dr Kahtan completed an Occupational Health fitness status certificate which ticks the box under fitness status "fit for immediate return to work with no adjustments" [318]. The certificate stated that the Claimant told Dr Kahtan that *"he will be able to resume once all his grievances are settled"* [318].

89. Dr Kahtan produced an Occupational Health report dated 17 January 2019 [319-320]. In that report, Dr Kahtan says *"[the Claimant's] absence is not primarily due to any medical or mental illness on his part, purely [due] to distress caused by a workplace conflict situation - and therefore it is absence determined by workplace conflict and not sickness absence per se.* [320]. Dr Kahtan also stated *"Mr Aslam concurs he has no inherent mental health infirmity and states he would be able to resume work as soon as all his grievances have been resolved, though he would prefer a phased return."* [320]

90. The Claimant did not accept Dr Kahtan's Occupational Health report. The Claimant said that the appointment was only 5-10 minutes maximum and

said that the time spent with her was not adequate, so she didn't have sufficient information to form the medical opinion set out in the report. There is an underlining of the word week and written next to it the word month on the first page of Dr Kahtan's Occupational Health report dated 17 January 2018 [319]. The Claimant did not say that the experience of attending the appointment with Dr Kahtan was difficult for him or that he experienced exacerbated stress as a result of attendance. We find that the Claimant did tell Dr Kahtan some of the background to his medical situation though we accept it was shorter than he had done previously with other Occupational Health advisors. We find that the Claimant did not experience exacerbated stress of his disability as a result of his attendance.

Dismissal

91. The Claimant attended his GP on 21 January 2019 and obtained a sick note covering the period of absence as 21/01/19-18/02/19, by reason of work related stress and anxiety [321].

92. At the sickness review meeting on 25 January 2019 notes were taken by Mr Hill, though not agreed with the Claimant [327-328]. At the sickness review meeting the Claimant said that Dr Kahtan's 17 January 2019 report was not accurate [327] and that Dr Weadick had an in depth understanding of his condition. The Claimant raised the issue of his outstanding 15 November grievance. The Claimant said he had instructed his solicitors to raise the grievance because he felt aggrieved and believed that this was a serious issue that he could not raise a grievance in accordance with the Metroline grievance procedure. Mr Hill told the Claimant that the grievance from Springhouse was deemed not to be a grievance and instead was considered as the Claimant taking legal action against the Respondent. We find Mr Hill made and communicated the decision not to investigate the Claimant's 15 November grievance to the Claimant on 25 January 2019.

93. Mr Hill decided to adjourn the meeting as the Claimant had not received the response from Ms Norris to his solicitors. The Claimant was provided with Ms Norris' response in the meantime. The meeting was then reconvened. Mr Hill noted in the minutes of the meeting that the Claimant said he would only return once his grievances had been concluded [327]. Mr Hill gave evidence that he did not know the Claimant did not know about Ms Norris' response and expected the Claimant's solicitors to have told him. The Claimant told him that the only outstanding grievance was the one against Mr Stone; all others had been concluded. We find that the Claimant told Mr Hill that the 15 November grievance was outstanding in the 25 January 2019 sickness review meeting. We find that the Respondent could not have known that the Claimant did not know about Ms Norris' response to the 15 November grievance, and it was reasonable for the Respondent to have expected the Claimant to know that they were not going to deal with the Claimant's grievance because his solicitors would have informed him.

94. The Claimant sought to argue that by Mr Hill saying in the 25 January 2019 absence review meeting that *"DH wanted to establish the reasons this particular grievance is preventing J A from returning back to work and it was suggested that this issue should be discussed at the capability hearing."* We

find that this was not the case, in the previous sentence to that Mr Hill states "*it was reiterated that there is no grievance to be addressed.*" [328] We find that the Respondent did not at any time accept the Claimant's 15 November grievance.

95. In the meeting on 25 January 2019, the Claimant told Mr Hill in the meeting that he had brought an Employment Tribunal claim against the Respondent, of his grievance against Dave Stone of discrimination and injury to feelings [374]. The Claimant did not provide any further detail of what was in the ET1. The Respondent had not received a copy of the ET1 at that stage.

96. By this time, the Claimant had been off work for over 3 ½ months. The Respondent's managing sickness policy identified long term sickness as "Continuous sickness absence of 4 weeks or more (with no likely early return to work)" [100]. Mr Hill said that he considered that at that stage there was no potential resumption date for the Claimant to return to work and so by letter dated 28 January 2019, invited the Claimant to a capability meeting for 30 January 2019. [329]

97. The invitation to the capability meeting stated it was being convened because of the Claimant's "*Continuous absence from work due to ill health since 20 June 2018."* [329] The invitation told the Claimant *"If you are unable to undertake the job for which you are employed (and if there is no other suitable, work that you can do), your employment with Metroline may be terminated with notice, on the grounds of capability due to ill health."* [329]. However, we find that the Claimant was not continuously absent from work since 20 June 2018, the Claimant had returned to work from 8 August-19 September 2018.

98. Prior to the capability meeting, on 29 January 2019 Mr Hill made enquires within the business as to other work that the Claimant could do, including light duties [331]. All the responses received by Mr Hill were negative regarding the availability of alternative duties for the Claimant. [333-370]

99. At the sickness review meeting on 30 January 2019 [371-375], when the Claimant was asked what was preventing him from returning to work, he said that it was the outstanding grievance against Mr Stone submitted by his solicitor which he reminded Mr Hill about on 4 January 2019. In the meeting the Claimant explained that the comments were causing him injury to feelings [372]. The Respondent said that the Claimant said that he was not prepared to return to work as there was no guarantee that he would not see Mr Stone even though he was at another garage. The Claimant said that all grievances needed to be addressed as advised by Dr Weadick. Mr Hill asked the Claimant what would happen if his Employment Tribunal claim was not upheld. The Claimant said that he would take the case all the way to the European Court as a last resort. Mr Hill adjourned the hearing in order to consider his decision. After approximately 10 minutes the Claimant was dismissed. Mr Hill said in the meeting that he was dismissing the Claimant because he did not believe that the Claimant was capable of fulfilling his contractual obligations due to his current ill health. Mr Hill said in the meeting that *"I asked you if we did hear the grievance would you come back to. work if we did not find in your favour? You stated if that was the case you would*

then have the right of appeal, Director's review, ACAS; Tribunal, Employment Appeals Tribunal, Supreme Court and the 'European court of Human rights if we are still in the EU. You told me that if then they told you that you had hot been discriminated against then you would have to move on. I asked you what did a resolution to this issue look like to you to which you replied compensation and that I should discuss this with your newly appointed solicitors. I asked you to forget the legalities of this issue and what were you looking for in terms of a -resolution to the hurt and pain that you say this has caused you to which you told me that you wanted justice. You had also advised me that because of the seriousness of this issue you had already raised this issue with ACAS and now lodged a case with the tribunal. I confirmed that we had not received any communication from your solicitor, ACAS or Employment Tribunal at this time." [374]

100. Mr Hill's evidence was that *"it was clear to me that Mr Aslam would only be prepared to return if the grievance was resolved in his favour"* [DH@paragraph 49].

101. Mr Hill considered that it was clear that the Claimant was not able to work and would not be able to return within a reasonable timeframe. By letter dated 5 February 2019, Mr Hill set out the basis of his decision to dismiss the Claimant. Mr Hill wrote "*At our meeting today you stated that the only issue preventing you from returning was an outstanding grievance which was submitted via your solicitor. I explained that this was submitted outside of the grievance policy and that we had already stated our position on this issue to your solicitor, a copy of which I had provided to you at our last meeting and to which you had informed me that they had failed to inform you about. I again confirmed that we were not prepared to reopen this issue going' forward. Through discussing this issue further it became clear that you were not prepared to return to work unless the grievance was heard and found in your favour. On exploring what you would do if we did hear the grievance and did not find in your favour to which you listed the various appeal processes and courts that you would exhaust before a possible return to work."* [376]

102. Mr Hill's conclusions set out in the dismissal letter stated *"Reviewing this it is clear that from your own volition that you are not fit to return to work, and you have given us a clear ultimatum that you will not be able to return to work unless we hear this grievance and that we find in your favour. Whilst it is expected that we would consider making reasonable adjustments to support your return to work, however such an expectation in regard to your grievance and the expected outcome I do not consider reasonable. It is clear that you are not able to return to work and will not be able to within a reasonable timeframe, therefore my decision is to dismiss you with notice on the grounds of capability due to your ill health."* [374]. The Claimant was given a right of appeal to his dismissal and was paid in lieu of notice.

103. The Claimant's evidence was that all he wanted was to come back to work and for his grievance to be heard, he did not require Mr Stone to be removed from the Respondent's employment, he wanted the grievance to be fast tracked. The Claimant said that it was possible for the Respondent to deal with any outcome to the grievance in house without going to the Employment Tribunal. The Claimant did not accept the accuracy of the meeting minutes

after page 372. In evidence the Claimant denied that he would not return to work unless Mr Stone was removed. The Claimant maintained that he only wanted his grievance to be heard on a fast track. We find that the Claimant did not say that he would not return to work if the Respondent could not guarantee that he would not see Mr Stone. We find that the Claimant did not at any time ask that Mr Stone be disciplined for his comments. We find that the Claimant did not say that he would not return to work if the grievance was not found in his favour. When it was put to the Claimant that unless his 15 November grievance was found in his favour he would not return to work, the Claimant's evidence was that he only wanted his grievance to be considered. We find that the Claimant did not make a connection with returning to work and the grievance being found in his favour, only that he would not return to work without the Respondent hearing his grievance.

104. We find that by this stage the Claimant had raised six grievances and only one had been upheld yet the Claimant had returned to work on 19 September when none of his grievances (at that stage the Claimant had raised 3 grievances) had been resolved. We find there was no reason for Mr Hill to believe on 30 January 2019 that the Claimant would not return to work if his grievances were resolved.

105. Mr Hill referred to the Claimant indicating that he would not return to work if the Respondent could not guarantee that the Claimant would not see Mr Stone. However, we find that what the Claimant said was when it was put to him if the Respondent could guarantee that he would not have to see Mr Stone would he return to work, the Claimant said that he would not return to work unless his 15 November grievance was resolved. We find that this was not the same as saying that the Claimant would not come back to work if the Respondent could not guarantee he would not have to see Mr Stone, but actually, the Claimant was prioritising the resolution of his 15 November grievance.

106. We considered all the Occupational Health evidence in the bundle of what the Occupational Health doctors' view of why the Claimant was off work during the periods of 19 June 2018- 8 August 2018 and again 20 September-30 January 2019. We noted that Dr Kahtan's Occupational Health report dated 16 December 2018 [379-383] specifically stated that the Claimant was fit to return.

107. Mr Hill's evidence was that "*We cannot let ourselves be instructed as to the outcome that must be found in order to resolve the matter and we cannot be held over a barrel unless we find in a particular employee's favour*."

108. When Mr Hill was asked in evidence when the Claimant said that he would not return to work unless the outstanding grievance set out in the 15 November grievance was found in his favour, he said the sentence on page 374 which said *"you told me that if then they told you that you had not been discriminated against then you would have to move on"* were the words the Mr Hill interpreted as the Claimant saying that he would not come back to work unless the grievance was resolved in his favour. Mr Hill stated that it *"For these reasons I concluded that Mr Aslam was unfit to carry out his contractual duties"* [paragraph 50]. We find that Mr Hill could not point to

anything in the capability hearing notes where the Claimant said that he would not attend work unless the 15 November grievance was found in his favour. Mr Hill pointed to words that he recorded in his summary of the decision not in the record of what the Claimant said, *"You told me that if then they told you that you had hot been discriminated against then you would have to move on."* [374]. Mr Hill interpreted those words as meaning that the Claimant would not attend work until and unless the 15 November grievance was found in his favour. We find those words on any sensible analysis do not say what Mr Hill says they say. We accept the Claimant's evidence that when he used the words move on he meant as was clear from what he had previously been talking about that he would have to accept the legal judgments and he had come to the end of the legal road.

109. Furthermore, Ms Norris in her response to the 15 November grievance said *"It is understood that your client continues to undertake treatment. In the meantime, It appears (again according to another OH report) that his perception of colleagues' conduct may be altered as a result of his condition. That does not mean that his perception is correct, nor that that conduct would amount to harassment"* [278]. We find that the Respondent did accept that the Claimant's perception of his colleagues conduct in the context of grievances was as a result of the Claimant's disability.

110. We find that contrary to what the Respondent stated in the dismissal letter, the Respondent had lost patience with the Claimant and did not want to deal with the Claimant continually raising grievances. It made no sense that the Respondent refused to deal with the Claimant's 15 November grievance which had always been put forward as the Claimant's grievance not a letter before action, especially when the Respondent dealt with the Claimant's 4 December 2018 grievance which came after the 15 November grievance.

111. We find Mr Hill's actions clearly demonstrated that he wished to avoid an Occupational Health advisor whose opinion was that the Claimant was disabled. Mr Hill did not want to hear the Claimant's grievance which asserted that Mr Stone had harassed the Claimant pursuant to his disability. We find that Mr Hill was motivated to dismiss the Claimant because the Claimant had asserted disability discrimination in his 15 November grievance so that the Respondent would not have to deal with it.

112. None of the Occupational Health reports contradict the Claimant's evidence and so, we accept the Claimant's evidence that the workplace frustrations that led to grievances which exacerbated the Claimant's depression and that is why the Claimant was off work. The Claimant's disability affected his perception of workplace frustrations and magnified them, and this led to the worsening of the Claimant's depression.

113. The Claimant did not appeal his dismissal. The Claimant's evidence was that he had by that time lost trust in his employer.

114. We find that in light of the Claimant's disability and the lack of trust that the Claimant said that he had by that time for the Respondent, it is unlikely that even if the Claimant's 15 November grievance was heard, that the Claimant would have returned to work. On a balance of probabilities, we find that Mr

Hill would have been likely the person to hear the Claimant's grievance and he made it clear in his oral evidence that he would not have upheld the Claimant's grievance, he considered that there had been no harassment by Mr Stone. We consider that based upon the time period it took for the Respondent to deal with the Claimant's other grievances it would have taken 3 months to deal with the Claimant's 15 November grievance. Furthermore, to complete the capability procedure it would have taken another month after the grievance was completed. The Claimant would not have appealed either process as by that time the Claimant had lost trust in the Respondent.

The Relevant Law

Burden of Proof

115. Proving and finding discrimination is always difficult because it involves making a finding about a person's state of mind and why he has acted in a certain way towards another, in circumstances where he may not even be conscious of the underlying reason and will in any event be determined to explain his motives or reasons for what he has done in a way which does not involve discrimination.

116. The burden of proof is set out at Section 136 Equality Act 2010 ("EqA"). Section 136 EQA 201 says: -

> *"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."*

117. It is for the Claimant to prove the primary facts from which a reasonable Tribunal could properly conclude from all the evidence before it, in the absence of any other explanation, that there has been a contravention of the Equality Act. If a Claimant does not prove such facts he will fail – a mere feeling that there has been unlawful discrimination, harassment or victimisation is not enough.

118. Once the Claimant has shown these primary facts then the burden shifts to the Respondent and discrimination is presumed unless the Respondent can show otherwise. Could conclude means "a reasonable Tribunal could properly conclude from all the evidence."

119. As set out above at the first stage the Claimant must prove "a prima facie case." Each case is fact specific, and it is necessary to have regard to the totality of the evidence when drawing inferences. Once the burden of proof has shifted, it is the second stage and is for the Respondent to show that the relevant protected characteristic played no part whatsoever in its motivation for doing the act complained of.

120. It is, however, not necessary in every case for the tribunal to specifically identify a two-stage process. There is nothing wrong in principle in the tribunal focusing on the issue of the reason why. As the Employment Appeal Tribunal pointed out in Laing v Manchester City Council [2006] IRLR 748 "If the tribunal acts on the principle that the burden of proof may have shifted and has considered the explanation put forward by the employer, then there is no prejudice to the employee whatsoever".

121. This approach to the burden of proof has been confirmed by the Court of Appeal in Ayodele v City Link and another [2017] EWCA Civ 1913.

Harassment

122. Section 26 Equality Act 2010 ("EqA") sets out the legislative framework for harassment.

"(1) A person (A) harasses another (B) if—

(1) A engages in unwanted conduct related to a relevant protected characteristic, and
(2) the conduct has the purpose or effect of—
(i) violating B's dignity, or
i. (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—
(3) the perception of B;
(4) the other circumstances of the case;
(5) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are— disability;"

123. In Richmond Pharmacology v Dhaliwal [2009] ICR 724 the EAT stressed that the Tribunal should identify the three elements that must be satisfied to find and employer liable for harassment: a. Did the employer engage in unwanted conduct, b. Did the conduct in question have the purpose or effect of violating the employee's dignity or creating an adverse environment for him/her, c. Was that conduct on the grounds of the employee's protected characteristic?

124. In a case of harassment, a decision of fact must be sensitive to all the circumstances. Context is all-important. The fact the conduct is not directed at the Claimant himself is a relevant consideration, although this does not necessarily prevent conduct amounting to harassment and will not do so many cases.

125. Not every comment that is slanted towards a person's disability constitutes violation of a person's dignity etc. Tribunals must not encourage a culture of hypersensitivity by imposing liability on every unfortunate phrase (Richmond Pharmacology v Dhaliwal).

126. Tribunals must not devalue the significance of the meaning of the words used in the statute (i.e., intimidating, hostile, degrading etc.). They are an important control to prevent trivial acts causing minor upset being caught in

the concept of harassment. Being upset is far from attracting the epithets required to constitute harassment. It is not enough for an individual to feel uncomfortable to be said to have had their dignity violated or the necessary environment created. (Grant v Land Registry [2011] IRLR 748).

127. Although isolated acts may be regarded as harassment, they must reach a degree of seriousness before doing so.

128. An action that is complained of must be either direct discrimination or harassment, but it cannot be both. Equally such an action cannot be both harassment and victimisation. It must be one or the other. (Section 212 EqA). This is because the definition of detriment excludes conduct which amounts to harassment.

129. Considering whether there has been harassment includes both a subjective and objective element. Underhill J in Pemberton v Inwood [2018] EWCA Civ 564 summarised the position as follows: *"In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))"*

Direct Discrimination

130. Section 13 EqA sets out the statutory position in respect of claims for direct discrimination because of disability.

> *"(1) person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
>
> *(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.*
>
> *(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B."*

131. The comments of the Court of Appeal in Madarassy v Nomura International plc [2007] EWCA 33, albeit a sex discrimination case under the pre Equality Act 2010, Sex Discrimination Act 1975, are still very much applicable to direct discrimination claims. Mummery LJ giving judgment says at paragraph 56, *"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

132. It can be appropriate for a Tribunal to consider in a direct discrimination case, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the Claimant was treated as he was. (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285)

Knowledge of Disability

133. The question of whether an employer could reasonably be expected to know of a person's disability is a question of fact for the Tribunal (Jennings v Barts and The London NHS Trust UKEAT/0056/12). In that case the Employment Appeal Tribunal suggested that an employer should concentrate on the impact of the impairment, not on any particular diagnosis.

134. In Gallop v Newport City Council [2013] EWCA Civ 1583, the Court of Appeal highlighted that it is vital for a reasonable employer to consider whether an employee is disabled and form their own judgment on this issue.

135. Langstaff P in Donelien v Liberata UK Ltd UKEAT/0297/14 (affirmed by the Court of Appeal 2018 IRLR 535) warned that when considering whether a Respondent 'could reasonably be expected to know' of a disability, it is best practice to use the statutory words rather than a shorthand such as 'constructive knowledge' as this might imply an erroneous test. The burden is on the employer to show it was unreasonable to have the required knowledge.

Unfavourable treatment because of something arising in consequence of disability

136. Section 15 of EqA states: -

(1) "A person (A) discriminates against a disabled person (B) if –
A treats B unfavourably because of something arising in consequence of B's disability and
A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

The correct approach when determining section 15 EqA claims is set out in the EAT decision of Pnaiser v NHS England and others UKEAT/0137/15/LA at paragraph 31.

137. The approach is summarised as follows:

(1) The Tribunal must identify whether there was unfavourable treatment and by whom – no question of comparison arises;

(2) The Tribunal must determine the cause of the treatment, which involves examination of conscious or unconscious thought processes. There may be more than one reason but the "something" must have a significant or more than trivial influence so as to amount to an effective reason for the unfavourable treatment;

(3) Motive is irrelevant when considering the reason for treatment;

(4) The Tribunal must determine whether the reason is "something arising in consequence of disability;" the causal link between the something that causes unfavourable treatment and disability may include more than one link – a question of fact to be assessed robustly;

(5) The more links in the chain between disability and the reason for treatment, the harder it is likely to be able to establish the requisite connection as a matter of fact;

(6) This stage of the causation test involves objective questions and does not depend on thought processes of the alleged discriminator;

(7) Knowledge is required of the disability only, section 15 (2) EqA does not extend to requirement of knowledge that the "something" leading to unfavourable treatment is a consequence of disability;

138. *In the EAT case of Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305,* Langstaff P, summarises the approach as, *"[t]he current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something," and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages."*

Reasonable adjustments

139. The duty to make reasonable adjustments is set out in sections 20 – 21 EqA, and in Schedule 8 (dealing with reasonable adjustments in the workplace).

140. The pertinent parts of Section 20 say: -

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

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not

disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

141. Section 21 EqA establishes that a failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

142. Therefore, the duty does not apply if the employer did not know, and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the disadvantage in question by the PCP (Schedule 8 paragraph 20) (see Wilcox v Birmingham CAB 2011 EqLR 810)

143. In the case of Secretary of State for Work and Pensions (Job Centre Plus) v Higgins [2013]UKEAT/0579/12 the EAT held at paragraphs 29 and 31 of the HHJ David Richardson's judgment that the Tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, (3) the nature and extent of the substantial disadvantage suffered by the employee, and (4) identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage.

144. The statutory duty is for the Respondent to take such steps as are reasonable, in all the circumstances of the case, for it to have to take in order to avoid the disadvantage. The test of "reasonableness" therefore imports an objective standard (see Smith v Churchills Stairlifts plc [2005] EWCA 1220.)

145. The Equality and Human Rights Commission's Code of Practice on Employment ("EHRC Code") further supports our conclusion that it was capable of being a PCP. It states that the term PCP "should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications, or provisions. A [PCP] may also include decisions to do something in the future — such as a policy or criterion that has not yet been applied — as well as a "one-off" or discretionary decision" (see paragraph 4.5).

146. In the EAT decision of Gan Menachem Hendon Ltd v De Groen [2019] ICR 1023, Swift J observed that when assessing whether there is a PCP, '"practice" must have something of the element of repetition about it. If it relates to a procedure, it must be something that is applicable to others than the person suffering the disability.

147. Ishola v Transport for London [2020] ICR 1204, CA provides some guidance as to what is likely to be perceived as a one off act rather than a practice. In that case a decision requiring the Claimant to return to work without a proper investigation into his grievances was not a PCP. Simler J (giving judgment) agreed however that a one of decision can be a practice, although it is not necessarily one.

Victimisation

148. Section 27 EqA sets out the relevant statutory provisions in respect of claims for victimisation.

> *(2) A person (A) victimises another person (B) if A subjects B to a detriment because—*
>
> *(a) B does a protected act, or*
> *(b) A believes that B has done, or may do, a protected act.*
>
> *(3) Each of the following is a protected act—*
>
> *(a) bringing proceedings under this Act;*
> *(b) giving evidence or information in connection with proceedings under this Act;*
> *(c) doing any other thing for the purposes of or in connection with this Act;*
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act.*
>
> *(4) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*
>
> *(5) This section applies only where the person subjected to a detriment is an individual."*

149. Section 27(2)(d) EqA covers allegations made by the Claimant that the employer or another person has contravened the EqA, whether or not they are express. It is not necessary that the EqA be mentioned, but the asserted facts must, if verified, be capable of amounting to a breach of the EqA.

150. The issue of causation is fundamental to proving victimisation. The detriment relied upon cannot be because of a protected act in circumstances where there is no evidence that the person who allegedly inflicted the detriment knew about the protected act. In the absence of clear circumstances from which such knowledge can be inferred, the claim for victimisation will fail.

151. In the seminal case of *Nagarajan v London Regional Transport 1999 ICR 877, HL:* The House of Lords ruled that victimisation will be made out, even if the discriminator did not consciously realise that he or she was prejudiced against the complainant because the latter had done a protected act.

152. Lord Nicholls put it like this in Nagarajan *"Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on [protected] grounds will seldom be forthcoming. Usually the*

grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances."

153. The EHRC Code explains that at paragraph 9.11- 9.12.

> *"9.11 Victimisation does not require a comparator. The worker need only show that they have experienced a detriment because they have done a protected act or because the employer believes (rightly or wrongly) that they have done or intend to do a protected act.*
>
> *9.12 There is no time limit within which victimisation must occur after a person has done a protected act. However, a complainant will need to show a link between the detriment and the protected act."*

154. The EAT in Chalmers v Airpoint Ltd UKEATS/0031/19/SS (unreported 2020) upheld the Tribunal's decision that a reference to actions which 'may be discriminatory' in a grievance was not sufficient to amount to a protected act.

155. In Durrani v London Borough of Ealing EAT 0454/12 the EAT upheld the Tribunal's decision that references to 'being discriminated against' referred to general unfairness rather than detrimental action based on the Claimant's protected characteristic (which in this case was race). Although the EAT emphasised that the case should not be taken as 'any general endorsement for the view that where an employee complains of "discrimination" he has not yet said enough to bring himself within the scope of s.27 EQA'. All will depend on the circumstances of the particular case.

156. The Tribunal must determine whether the relevant decision was materially influenced by the doing of a protected act. This is not a 'but for' test, it is a subjective test. The focus is on the 'reason why' the alleged discriminator acted as he did (See West Yorkshire Police v Khan [2001] IRLR 830)

Unfair Dismissal

157. An unfair dismissal claim brought under Part X of the Employment Rights Act 1996. Section 98(1) places the burden on the employer to show the reason or principal reason for the dismissal and that it is one of the potentially fair reasons identified within Section 98(2) or failing that some other substantial reason.

158. The potentially fair reasons in Section 98(2) include a reason which: -

> *"relates to the capability or qualifications of the employee for performing work of a kind which he was employed by the employer to do."*
>
> .
>
> Section 98(3) goes on to provide that "capability" means capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

159. Where the Respondent shows that dismissal was for a potentially fair reason, the general test of fairness appears in Section 98(4):

> *"…the determination of the question whether the dismissal is fair or unfair (having regard to the reasons 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."*

160. From the EAT decision of UPS Ltd v Harrison EAT 0038/11, the following approach in relation to whether a dismissal is a capability or misconduct can be extrapolated. A tribunal is not bound by the label the employer puts on its reasons, it is the Tribunal's job to characterise the employer's reasons rather than make findings of its own about the employee's conduct or capability.

161. It has been clear ever since the decision of the Employment Appeal Tribunal ("EAT") in Iceland Frozen Foods Limited -v- Jones 1982 IRLR 439 that the starting points should be always the wording of Section 98(4) and that in judging the reasonableness of the employer's conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In most cases there is a band of reasonable responses to the situation and a Tribunal must ask itself whether the employer's decision falls within or without that band. This approach was endorsed by the Court of Appeal in Post Office –v- Foley; HSBC Bank Plc –v- Madden 2000 IRLR 827.

162. The application of this test in cases of dismissal due to ill health and absence was considered by the EAT in Spencer –v- Paragon Wallpapers Limited 1976 IRLR 373 and in East Lindsey District Council –v- Daubney 1977 IRLR 181. The Spencer case establishes that the basic question to be determined when looking at the fairness of the dismissal is whether, in all the circumstances, the employer can be expected to wait any longer, and if so how much longer. Matters to be taken into account are the nature of the illness, the likely length of the continuing absence, and the overall circumstances of the case. In Daubney, the Employment Appeal Tribunal made clear that unless there were wholly exceptional circumstances, it is necessary to consult the employee and to take steps to discover the true medical position before a decision on whether to dismiss can properly be taken. Notwithstanding, in general terms where an employer has taken steps to ascertain the true medical position and to consult the employee before a decision is taken, a dismissal is likely to be fair.

163. In Employment Appeal Tribunal case of DB Shenker Rail (UK) Limited –v- Doolan UKEATS/0053/09/BI). Lady Smith indicated that the three stage analysis appropriate in cases of misconduct dismissals (which is derived from British Home Stores Limited –v- Burchell 1978 IRLR 379) is applicable in capability cases.

164. The Scottish decision of BS v Dundee City Council 2014 IRLR 131 reviewed the earlier authorities and Lord Drummond Young giving judgment said this at paragraph 27:

"Three important themes emerge from the decisions in Spencer and Daubney. First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasize, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered."

165. Where the dismissal is unfair on procedural grounds, the tribunal must also consider whether, by virtue of Polkey v AE Dayton Services [1987] IRLR 503 HL, there should be any reduction in compensation to reflect the chance that the claimant would still have been dismissed had fair procedures been followed.

Submissions

166. The parties were provided with 15 minutes each for oral submissions. Both parties indicated that that they would submit written submissions as well. Both parties provided their written submissions by 10 am on 10 November in time for the Tribunal to consider them. The parties were told on 9 November they had an opportunity to comment on each others written submissions by 2pm on 10 November 2023. The Tribunal did not receive any further submissions after 10am. The Tribunal took both the parties oral and written submissions into account in coming to their decisions in respect of the Claimant's claim.

167. The Respondent's oral submissions were in summary pursuant to Mr McPhail's written submissions. The Claimant had suggested in evidence that it was Mr Ali who harassed the Claimant by sending him the notes of the interview with Mr Stone which contained comments that the Claimant regarded as harassment related to his disability. The Respondent said that not only was this not the case, but the comments also recorded in the notes could not amount to harassment. The Claimant's reasonable adjustments claim must fail as the PCPs and substantial disadvantage as framed does not work. Mr McPhail questioned whether all the Claimant's victimisation claims were in time. The Tribunal needed to consider what was going on in Mr Hill's head during the adjournment of the capability hearing as that is when the decision to dismiss was made. Reason for dismissal was pressures on business of Claimant's role and the evidence

of the pressures was not challenged. In respect of the disability arising claim the Claimant accepted that absence was part of the reason why the Claimant was dismissed. As for the Respondent's knowledge of disability, the Respondent was faced with contradictory medical opinion and therefore entitled to seek a third opinion from a senior medical practitioner. The Respondent said it was credible that the Respondent did not know the Claimant had a disability. Furthermore, if there was discrimination it was justified on the basis of the Respondent's pleaded legitimate aims. In respect of the Polkey argument pursuant to the unfair dismissal claim, the Claimant said that he had lost faith in the Respondent so would not have come back to work.

168. The Claimant's submissions in summary was he was a dedicated team member, he took every step to improve his health and return to work, and he believed there was a race issue with the Respondent's managers which he only realized over the years. The Claimant needed help and support which is why used a solicitor to make his 15 November grievance, but he was penalised for this.

Analysis/ Conclusions

Respondent's Knowledge of disability

169. We considered Mr McPhail's argument that because the Respondent had received conflicting advice as to whether the Claimant was disabled, then the Respondent could not be fixed with knowledge of the Claimant's disability. We do not accept this argument. The Respondent did not receive conflicting medical opinions on whether the Claimant was disabled Dr Kathan's report on 17 January 2019. Until then, they had Dr Weadick's report dated 10 August 2018 in which he said that he suspected that the Claimant would be covered by the disability provisions of the Equality Act 2010. [205]. It was only after receiving this advice that they sought another opinion on whether the Claimant was disabled under the EqA. Whilst there was a lack of clarity in respect of the Claimant returning to work, there was no lack of clarity over Dr Weadick's opinion on whether the Claimant was disabled.

170. We conclude that Dr Weadick's report put the Respondent on notice from the date of receipt of the report that the Claimant was disabled. Therefore, we conclude that the Respondent knew the Claimant was disabled during the period of 10 September 2018 -31 January 2019.

Reasonable Adjustments

171. It was at an absence review meeting on 22 November 2018, that the Claimant first requested to see Dr Weadick again because he felt that it would be helpful and beneficial to him [281]. Although the Respondent could not guarantee an Occupational Health advisor as it was not within their control, Counsel's suggestion in submissions that as there was no general arrangement at any time where employees could not see the same OH clinicians on different visits is not supported by the evidence. The remarks of Swift J in Gan Menachem Hendon Ltd holds true. It is

clear that on the specific occasions with the Claimant the Respondent sought to arrange that the Claimant could not see the same OH on different visits. EHRC Code further supports our conclusion that it was capable of being a PCP as the term PCP should be construed widely and could include a discretionary decision such as this.

172. We have found that the Respondent did apply the PCP to the Claimant. However, we would conclude that the Claimant was not substantially disadvantaged because of this PCP. We accept that the Claimant being required to explain himself repeatedly had an accumulative effect of stress on the Claimant and was a disadvantage. However, the Claimant did see the other doctor, Dr Kahtan and the Claimant did not point to any evidence that it caused him substantial stress. The key issue here is whether any disadvantage was substantial. The Claimant did not point to any medical evidence that suggest that the effect of seeing a different doctor actually substantially aggravated his condition after it happened and was therefore a substantial disadvantage. The Claimant's claim for reasonable adjustments is unfounded and fails.

Discrimination arising from disability

173. The Claimant relied upon the "something" as his sickness absence. The Respondent provided the Tribunal with an agreed schedule of dates of the Claimant's absence from work. The Claimant was absent from late afternoon 19 June 2018 until 7 August 2018. The Claimant returned to work for a short period of time on 8 August 2018 until 19 September 2018. The Claimant went off work again from 20 September 2018 and did not return before his dismissal on 30 January 2018, except to attend a grievance meeting on 5 December 2018.

174. Whilst we have accepted that the Respondent did not believe that the Claimant would return to work within a reasonable period, this was not the same as the Claimant's sickness absence. The Claimant's sickness absence did arise as a consequence of the Claimant's disability. Mr McPhail's submissions is that the Claimant's absence flowed from his perception which meant that the Claimant absence did not flow from his disability. We do not accept this submission. It is as we have found in our findings of fact that because of the Claimant's disability that his perception of workplace frustrations was magnified and that was actually why the Claimant was off work.

175. However, we do not consider that the reason the Claimant was dismissed was because of his sickness absence. The reason for the dismissal was not the Claimant's sickness absence. For these reasons, the Claimant's complaint of discrimination arising from something in consequence of the Claimant's disability is unfounded and fails.

Harassment

176. The Claimant alleged that the phrase used by Mr Stone *"Had I known he had medical issues then I would not have taken at Brentford"* was unwanted conduct. We find that it was unwanted conduct. The Claimant

felt belittled and small by the words and raised a grievance about Mr Stone's words. We conclude that the words used by Mr Stone "*"Had I known he had medical issues then I would not have taken at Brentford"* refers the Claimant's medical issues which formed the basis of the Claimant's disability. In those circumstances we conclude that the words used related to the Claimant's disability. However, we do not consider that either the purpose or the effect of the phrase was to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment. The comment was not supposed to be communicated to the Claimant. It was mistake that the Claimant received the notes of the interview with Mr Stone. Furthermore, objectively having regard to the circumstances of this case, objectively this comment should not have had the effect of either violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. The Claimant he said did not want Mr Stone disciplined and he did not say that he would not return to work if he would see Mr Stone. The comment was not so serious as to affect the Claimant in terms of its effect on the Claimant's working environment.

177. We conclude that the eggshell comments were unwanted conduct because the Claimant was being regarded in those comments as someone who Mr Stone regarded as unapproachable which is not how any employee would want their manager to see them, particularly after a long working relationship. We consider that the eggshell comment was related to the Claimant's disability because Mr Stone was not prepared to deal with the Claimant's disability. We conclude that the purpose of the eggshell comment was not to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment as the eggshell comment was not directed at the Claimant. However, we consider that the unwanted conduct did have the effect of create an intimidating, hostile, degrading, humiliating environment. In those circumstances the Claimant's claim for harassment is well founded and succeeds.

Direct Discrimination

178. As we considered that the comment by Mr Stone *"Had I known he had medical issues then I would not have taken [him] at Brentford" did not* amount to harassment, we consider whether the comment amounted to direct discrimination. Whilst we consider that the comment amounts to a detriment, not least because the Claimant raised a grievance, considering a hypothetical comparator who did not have the Claimant's disability but had medical issues we consider that Mr Stone would have treated the hypothetical comparator in the same way. Mr Stone was talking about his position when he was dealing with the Claimant. There was no evidence to suggest that Mr Stone treated the Claimant differently at that time because of his medical issues. We consider whether there were any findings of fact from which we could infer discrimination on the grounds of disability. We considered the fact Mr Stone made the comment relating to the Claimant's medical issues, but medical issues do not automatically mean that Mr Stone considered the Claimant had a disability. Furthermore, the comment was in respect of Mr Stone's own unpreparedness to deal with the

Claimant's medical issues, not necessarily the medical issues themselves. We also considered the eggshell comment whether we could draw an inference of discrimination from that comment in relation to the comment about the Claimant's medical issues. We consider that the eggshell comment was about how Mr Stone was going to treat the Claimant not how he had treated the Claimant and so was not related to the comment about Mr Stone being unprepared to deal with the Claimant's medical issues. The comment was later in the meeting and on a different point. Mr Stone did not say the comments because of the Claimant's disability. In the circumstances, the Claimant's claim for direct discrimination fails.

Victimisation

Protected Acts

179. The Respondent accepted that 15 November grievance was a protected act. We determine that it falls under section 27(2) (d) EqA, that the Claimant made an allegation (whether or not express) that the Respondent had contravened the Equality Act 2010.

180. Under issues 22(a) (i)-(vi), (viii) & (ix) the Claimant's repeated references to his 15 November grievance on 4 January, 25 January or 30 January 2019 did not create any further protected acts as they did not refer to any further allegations of a contravention of the Equality Act 2010.

181. Issue 22(a) (vii) -provision of a copy of Ms Norris email response and the content of that response. We conclude that this was not something done by the Claimant and so does not fall within the definition of a protected act under section 27 EqA.

182. The Respondent also accepted that the Claimant's employment tribunal claim dated 25 January 2019 constitutes a protected act for the purposes of section 27(2) EqA. We conclude that the same was a protected act under section 27(2) (a) EqA.

183. We considered whether the acts under Issues 22(b) (i) – (iv), (vi), (viii), (ix) & (xi) were protected acts. We concluded that all these matters were not something done by the Claimant and so do not fall within the definition of a protected act under section 27 EqA.

184. Issue 22(b) (v), (vii), (x), (xii) & (xiii) were all acts done by the Claimant. However, we conclude that the Claimant did not make repeated requests for reasonable adjustments to the Respondent's policy, the Claimant made one request to speak to a medical advisor who would not increase the Claimant's stress or make his condition worse on 15 January 2018. The reference to reasonable adjustments was not a reference to the contravention of the Equality Act 2010 but a request for an accommodation. Therefore, the request on the aforementioned occasion did not change the nature of the original request. We conclude that the request does not fall within the definition of a protected act under section 27 EqA.

Alleged Acts of detriment- Victimisation

a) Failing to investigate the letter of 15 November 2018

185. Failing to investigate the letter of 15 November 2018 as a grievance was a detriment, this was a grievance that would have fallen within the Respondent's grievance policy. There was nothing in the Respondent's grievance policy that indicated that this letter was not a grievance. We considered that the fact that the letter came from the solicitors was not excluded by the grievance policy. The letter was labelled formal grievance. We conclude that Mr Hill did not want to deal with the Claimant's grievance because the Claimant was saying he had been discriminated against on the grounds of disability. Mr Hill did not want to treat the Claimant as disabled. Considering Mr Hill's motivation, we conclude that the Respondent victimized the Claimant by refusing to investigate his 15 November grievance.

b) Causing confusion by not until January 2019 accepting the letter of 15 November 2018 as a grievance.

186. The Respondent did not accept the 15 November grievance as a grievance at any point. The Respondent did not know that the Claimant had not been told by his solicitors about the Respondent's response to the grievance from Ms Norris. There was no confusion caused to the Claimant by the Respondent accepting the Claimant's 15 November grievance, because they never accepted the Claimant's solicitors' letter dated 15 November 2018 as a grievance. We conclude there was no detriment. This complaint is unfounded and is dismissed.

c) Deliberately prolonging the grievance process in order to force the Claimant to resign or medically dismiss the Claimant?

187. There was no evidence that the Respondent deliberately prolonged the grievance process in order to force the Claimant to resign or medically dismiss the Claimant. There were no significant delays in the grievances that the Respondent did deal with. We conclude there was no detriment. This complaint is unfounded and is dismissed.

d) Insisting that the Claimant attended Occupational Health assessments with different advisers on more than one occasion

188. Whilst it is the case that on 11 January 2019 Mr Hill did insist that the Claimant attend an Occupational Health appointment with Dr Kahtan, this is the only instance of an insistence by the Respondent. Mr Hill was asking the Claimant to see one Occupational Health advisor not different advisors on more than one occasion. There was only one instance of insistence of a single Occupational Health advisor on a single occasion. We conclude that there was no detriment here. This complaint is unfounded and is dismissed.

e) Refusing to discipline Mr Stone.

189. The Claimant admitted in evidence that he did not ask for Mr Stone to be disciplined. There was therefore no refusal by the Respondent. to discipline Mr Stone. We conclude that this does not amount to a detriment. This complaint is unfounded and is dismissed

f) Threats to the Claimant's income

190. In Mr Hill's email 11 January 2019 [316], the Respondent does make a threat to the Claimant's income. However, the Respondent's sickness policy does mention pay being withdrawn for not attending Occupational Health appointments. Mr Hill's reference to requiring the Claimant to attend Occupational Health in order to get up to date information is consistent with the sickness absence policy. We found Mr Hill wanted the Claimant to attend the appointment so he could get the most up to date information. The Claimant relies upon referring to the 15 November grievance in the capability meeting on 30 January 2019 as a protected act. We consider that the 15 November grievance is the protected act. We find that the reason why the Claimant's income was threatened was not because of the 15 November grievance protected act but because Mr Hill wanted the Claimant to attend the appointment so he could get the most up to date information. This complaint is unfounded and is dismissed.

g) Acknowledging a grievance raised on the 4 December 2018 and completing the investigation by 4th January 2019, however, refusing to hear a more serious grievance raised on the 15 November 2018 approximately 3 weeks prior to the one heard on the 4th January 2019?

191. We have concluded that the Respondent's failure to investigate the Claimant's 15 November grievance was an act of victimisation. The Claimant was entitled to a grievance hearing in respect of his 15 November grievance, and there was no attempt to resolve the Claimant's 15 November grievance without a hearing. We therefore conclude Mr Hill's refusal to hear the 15 November grievance was a detriment. We consider that the 4 December 2018 grievance did not make any reference to allegations of disability discrimination, whilst that 15 November grievance did. Again, taking into account Mr Hill's motivation that he did not want to deal with a disability discrimination complaint by the Claimant we conclude that the Claimant was subjected to the detriment of failing to hear his 15 November grievance because the Claimant had alleged disability discrimination. The complaint is therefore well founded and succeeds.

<u>Victimisation - dismissal on 30 January 2019</u>

192. Based upon our findings that the Respondent did not dismiss the Claimant because of capability, but the reason for the Claimant's dismissal was because the Claimant had raised a disability discrimination claim and the Respondent did not want to deal with the Claimant's grievance because of it. We conclude that the Claimant's protected act of 15 November grievance materially influenced Mr Hill's decision to dismiss the Claimant. We therefore conclude that the Claimant was dismissed because he alleged that the Respondent had contravened the Equality Act 2010 in his

15 November grievance. The complaint is well founded and succeeds.

Unfair dismissal

193. The Respondent's reason for dismissal is labelled as capability on the grounds of ill health. However, the reason put forward by Mr Hill did not go to the Claimant's ability to return to work in a reasonable period of time because of capability. Mr McPhail asserted in his submissions that the Respondent could not wait any longer for the Claimant to return to work, but the Claimant had not exhausted his discretionary company sick pay, so it made no sense to dismiss the Claimant on 30 January 2019.

194. The rationale of Mr Hill's decision to dismiss does not add up. Mr Hill said on the one hand that the Claimant was choosing not to attend work. Mr Hill had an Occupational Health fitness status certificate which ticks the box under fitness status "fit for immediate return to work with no adjustments". Furthermore, the Claimant said he was ready to return to work once his grievances were resolved.

195. But then Mr Hill concluded that the Claimant was unfit to carry out his contractual duties, this completely contradicted his earlier aforementioned rationale. Either the Claimant was not fit to attend work, or he was.

196. It made no sense that the Respondent refused to deal with the Claimant's 15 November grievance which had always been put forward as the Claimant's grievance, not a letter before action, unless the Respondent did not want to deal with the Claimant's grievance, and we found the motivation for this was the fact that the Claimant had made a protected act. It is for those reasons we conclude the reason for the Claimant's dismissal was because the Respondent did not want to deal with the Claimant's 15 November grievance because the Claimant had raised a disability discrimination claim in that grievance.

197. We determine that this reason does not fall within the health or mental quality of the Claimant and therefore does not fall within the reason of capability. We conclude that the reason the Respondent dismissed the Claimant does not fall within a fair reason under section 94 ERA. Even if we had accepted the Respondent's reason for dismissal as set out in Mr Hill's letter of dismissal, it would not have amounted to a fair reason for dismissal in any event. The Claimant's dismissal was unfair.

198. Notwithstanding, even if we are wrong about that reason for dismissal and it was a fair reason we consider the procedure that the Respondent used in dismissing the Claimant was not within the range of reasonable responses. The Respondent had no reasonable basis for not investigating the Claimant's 15 November grievance. Just because the grievance came from the Claimant's solicitors did not mean it amounted to legal action. The 15 November grievance clearly stated that it was a formal grievance on behalf of the Claimant and the Respondent should have treated it as a grievance from the Claimant. Furthermore, the Respondent did not have the medical evidence to support their reason for dismissal as the Claimant not returning to work because his grievance would not be resolve in his

favour. Neither Dr Weadick nor Dr Kahtan made any comments about the Claimant not returning to work because his grievance would not be resolved in his favour. There was no evidence upon which Mr Hill could have concluded that the Claimant would not return to work within a reasonable period of time. In fact, the evidence suggested the contrary, the Claimant had returned to work in August 2018 – 18 September 2018 when grievances had not been resolved at all. The Respondent would not have been in a position to conclude that the Claimant would not return to work within a reasonable period of time until they had dealt with the Claimant's grievance. The Claimant had not been in the workplace for 3 months the Respondent did not even enquire as to whether the Claimant's company sick pay had expired, the Claimant's sick pay had not yet expired. The Respondent did not ascertain the medical position in respect of their reason for dismissal before dismissing the Claimant, in those circumstances we conclude that the Respondent's conduct in dismissing the Claimant did not fall within the range of reasonable responses. The Claimant's dismissal was unfair.

199. We considered Polkey and whether the Claimant would have been dismissed in any event. We think it probable that the Claimant would have been dismissed within 4 months of January 2019 fairly, having regard to the 3 months it would have taken to hear the Claimant's grievance and the 1 month to complete the dismissal process.

200. The Respondent argued that the Claimant had contributed to his dismissal. However, the reason the Claimant was off work was inextricably linked to his disability in affecting his perception of workplace frustrations and magnifying them. The Claimant's position was supported by Dr Weadick's report dated 10 August 2018 that recommended that the Claimant's grievance be completed as rapidly as possible to enable the Claimant to get back to work. There was no contributory conduct by the Claimant.

201. The Claimant's complaint of unfair dismissal is therefore well founded and succeeds.

202. The Tribunal apologizes to the parties for the late promulgation of this reserved judgment. Unfortunately, the delay was unavoidable and due to a combination of factors including sickness and annual leave.

_____

Employment Judge Young

_____

Dated 15 February 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
23 February 2024

.....

.....
FOR EMPLOYMENT TRIBUNALS

Agreed List of Issues

(the paragraph numbers at the end of the issue are the paragraph numbers in Employment Judge McNeill's Order dated 29 May 2022)

Knowledge of disability

13. In relation to the Claimant's claims of direct discrimination (section 13 EqA), discrimination arising from disability (section 15 EqA), failure to make reasonable adjustments (section 20 EqA) and harassment related to disability (section 26 EqA) did the Respondent know, or ought the Respondent reasonably to have known, at the material time, that the Claimant was a disabled person?

Direct Discrimination/Harassment

14. Did Mr D Stone make the following comments about the Claimant in a grievance investigation meeting on 10 September 2018:

    (i) "Had I known he had medical issues then I would not have taken [sic] at Brentford'; and

    (ii) "spoke to Phil Matten about the case. ...it appears we were having to walk on eggshells and watch whatever we say to Mr Aslam"?

15. If so, did either or both comments constitute direct discrimination because of disability contrary to section 13 EqA?

16. In the alternative, if they were made, did either or both comments constitute unlawful harassment related to disability contrary to section 26 EqA, i.e.:

    a) Did Mr Stone engage in "unwanted conduct" and if so, when?

    b) If so, did such conduct have the purpose or effect of:

    i. Violating the Claimant's dignity, or
    ii. Creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, taking into account the Claimant's perception, the other circumstances of the case and whether it was reasonable for any proven conduct to have had that effect?

Failure to make reasonable adjustments

17. The Claimant relies on the provision, criterion, or practice ("PCP") of not maintaining consistency between Occupational Health advisers to whom an employee was referred. Did the Respondent apply that PCP? (17)

18. If that PCP was applied to the Claimant, did it put the Claimant at a substantial disadvantage compared to a non-disabled person? If so, what was that substantial disadvantage? The Claimant claims that the disadvantage was not seeing the same Occupational Health adviser

consistently who was familiar with the Claimant's condition (Dr Weadick) and the Claimant having to re-tell his story to different Occupational Health advisers. (18)

19. If the Claimant was placed at a substantial disadvantage in the application of the PCP, did the Respondent take such steps as were reasonable to avoid that disadvantage? In particular, would it have been a reasonable adjustment to allow the Claimant to continue to see only clinicians of his choice (Dr Weadick, in particular when appointments were available with Dr Weadick in December 2018/January 2019) in circumstances where the Respondent says it did not find the Occupational Health Clinicians' advice helpful in returning the Claimant to work? (19)

Victimisation pre-dismissal

20. Did the letter sent by the Claimant's solicitors to the Respondent on 15 November 2018 constitute a protected act for the purposes of section 27(2) EqA? (20)

21. If so, did the Respondent subject the Claimant to the following **detriments** (21):

a) Failing to investigate the letter of 15 November 2018 as a grievance?

b) Causing confusion by not until January 2019 accepting the letter of 15 November 2018 as a grievance?

c) Deliberately prolonging the grievance process in order to force the Claimant to
resign or medically dismiss the Claimant?

d) Insisting that the Claimant attended Occupational Health assessments with
different advisers on more than one occasion?

e) Refusing to discipline Mr Stone?

f) Threats to the Claimant's income?

g) Acknowledging a grievance raised on the 4th December 2018 and completing the investigation by 4th January 2019, however, refusing to hear a more serious grievance raised on the 15th November 2018 approximately 3 weeks prior to the one heard on the 4th January 2019?

If so, did the Respondent subject the Claimant to any proven detriment because the Claimant had done a protected act?

Victimisation - dismissal on 30 January 2019

22. It is accepted that the Claimant's employment tribunal claim dated 25 January 2019 constitutes a protected act for the purposes of section 27(2) EqA (although the Respondent was notified of the Claimant's claim before

the Claimant was dismissed, the Respondent contends that it did not know that the claim was a discrimination claim: the Claimant disputes this).

Did the following occur and if so, did one or more of the following also constitute protected acts (22):

a) The Claimant's "repeated requests" for the Respondent to deal with the Claimant's solicitor's letter as a grievance. The Claimant says he made "repeated requests" on the following occasions:

(i) 15th November 2018 a formal letter of grievance issued to Metroline Head office via post and via email to DHill@Metroline.co.uk and Ahunter@metroline.co.uk

(ii) 4th January 2019 sickness review meeting Darren Hill minutes "It was discovered that ongoing issues and outstanding grievances have not been concluded and is preventing JA from returning back to work. DH (Head of HR) reassured JA that the grievances will be addressed".

(iii) Friday 25th January 2019 sickness review meeting Darren Hill minutes "The meeting discussed the possibility of JA returning back to work and JA will only return back to work once the grievances have been concluded." JA believed that the grievance against Dave Stone is the only outstanding grievance that should be dealt with, and it was agreed that all the other grievances has been concluded.

(iv) Friday 25th January 2019 sickness review meeting Darren Hill minutes" JA had instructed the solicitors to raise the grievance because he felt aggrieved and believed this was a serious issue that he could not raise a grievance in accordance with Metroline grievance procedure. DH explained the grievance from springhouse was not deemed to be a grievance and instead was considered as JA taking legal action against Metroline.

(v) Friday 25th January 2019 sickness review meeting Darren Hill minutes "that Metroline has not been contacted by JA new solicitor and JA was advised that the grievance against Dave stone will not be re-opened again as Metroline has responded, therefore there are no outstanding grievances. JA stated that he will request his new solicitor to contact Metroline and had to remind DH about the grievance again on 4th January 2019.

(vi) Friday 25th January 2019 sickness review Darren Hill minutes "The purpose of the capability hearing was explained, and JA strongly believes that the grievance against Dave stone should be heard as per Metroline response to the solicitor.

(vii) A copy of Ms Norris email response was provided to JA. This read at one paragraph "My apologies for the delay in responding. However, my client does not manage capability or disciplinary issues through solicitors. While you purport to raise a grievance on

your client behalf, it is unclear exactly what that grievance is, or what outcome he is seeking to resolve it. If you client does wish to raise a further grievance, he should do so in the usual way (via the HR department) and of course it will be investigated.

(viii) JA Re-raised the grievance to the head of HR department Darren Hill on 4th 25th, 28th, and 30th January 2019. Head of HR Darren hill reassured JA on the 4th January 2019 the grievances will be addressed. Email from Hillary also stated re-raise the grievance, but Darren Hill won't even comply with the in house company solicitors' instructions all the while kept reassuring JA he will address it.

(ix) 30th January 2019 the grievance was discussed again numerously, and instead of actually investigating the grievance they spent more time asking questions on outcome, so again one min excepting as grievance and then as JA taking legal action.

b) The Claimant's "repeated requests" to the Respondent to make reasonable adjustments to its "Occupational Health policy". The Claimant's repeated requests were:

(i) 03rd December email from Craig Delaney giving his explanation on JA discussing about consistency to see Dr Weadick.

(ii) Sickness review meeting held on the 22nd November 2018, with Craig Delaney discussed about further counselling support which Metroline confirmed will not be funded. Discussed about seeing Dr Paul Weadick to which JA was informed such requests should be made via my GP. We also discussed the submission of the grievance of 15th November 2018, indicating this was about discrimination. Also consent to discuss matters with my G.P and solicitors was not contested.

(iii) Email of 3rd December 2018 Craig Delaney makes comment "The consistency to which I referred in my message was using your own G.P, who is already familiar with your full medical history and not just work-related issues, and to refer you for further counselling if you require it. So far as a change is concerned, in fact Dr Weadick's advice has unfortunately not assisted in getting you back to work, so it would be my clear preference (If we do refer you back to Medigold) to have a different clinician.

(iv) Grievance outcome letter dated the 11th January 2019, referred to the following; "Metroline's Occupational Health provider Medigold operate from multiply clinics across London and the UK and employs numerous doctors in their clinics, providing services to a number of clients. Therefore, there is no guarantees that an employee will always be seen by the same doctor, so it is standard practise for employees to see whatever doctor is available for the appointment they have been provided. Metroline is also not

obligated to solely use a specific doctor requested by an employee, however a request will be considered.

(v) Email 4th December 2018 to Darren hill explained my difficulties with Craig Delaney for JA's reasonable request.

(vi) Email received 21st December 2018 from Darren Hill to inform JA a further appointment has been arranged for the 27th December 2018 to see a third Occupational Health advisor.

(vii) Email 28th December 2018 to Irene Yusufu and Darren Hill requesting the OH appointment is rescheduled so it is with same Doctor (Paul Weadick)

(viii) Email 28th December 2018 response from Irene Yusufu to the effect of "when arranging medical appointments, it is subject to availably and it may not be guaranteed that you will necessarily see the same doctor. Although you will seeing a different doctor, she is very qualified, and I am sure she will be able to assist you.

(ix) 3rd January 2019 email response from Darren hill explaining the same thing about attending OH.

(x) 3rd January 2019 JA responding to email requesting clarity on JA's reasonable request.

(xi) 15th January 2019 email from Darren Hill making threatens to withdraw JA company sick Pay-

(xii) 15th January 2019 email sent to Darren hill and Irene Yusufu confirming there was availability to see Dr Weadick on the 20th and 21st January 2019. JA asked a further time for a reasonable request to their policy which would enable JA to speak with a medical advisor.

(xiii) JA attended appointment on the 16th January 2019 which lasted about 5 mins, with a doctor who does not even know the correct basis to determine disability under the Equality Act 2010.

23. If so, was the Claimant dismissed because he had done a protected act, or more than one, (including, if found to be a protected act, the letter sent by the Claimant's solicitors to the Respondent on 15 November 2018)? (23)

<u>Discrimination arising from disability</u>

24. What was the "something" that arose in consequence of the Claimant's disability for the purposes of section 15(1)(a) EqA? The Claimant contends that it was his sickness absence. (24)

25. Was the Claimant's dismissal because of the "something?" (25)

26. If so, was the Claimant's dismissal a proportionate means of achieving a legitimate aim (or more than one)? The Respondent will say what its legitimate aim was now that the "something arising" has been clarified. The Respondent's legitimate aims are:

(i) To have employees attend work to carry out the role for which they are employed (in line with OH advice as to suitable adjustments);

(ii) To maintain to the extent it is possible a harmonious work environment; and

(iii) To deal with grievances appropriately where they are raised in accordance with the grievance policy (including not to be persuaded to a particular outcome by perceived overreaction or intransigence on the part of a complainant, not to incur unnecessary legal costs or to litigate over matters that are better addressed internally or by mediation, to keep employees' health conditions on a "need to know" basis and not to penalise through the disciplinary process managers who act in good faith).

Unfair dismissal

27. What was the reason, or principal reason, for the Claimant's dismissal? The Respondent asserts that the Claimant was dismissed for capability pursuant to section 98(2)(a) of the Employment Rights Act (ERA). (27)

28. If the Claimant was dismissed for capability, did the Respondent, in the circumstances, act reasonably or unreasonably in treating capability as a sufficient reason for dismissing the Claimant, having regard to the following allegations of unfairness (28):

a) Failing to resolve the Claimant's complaints about Mr Stone, knowing that the Claimant would not return to work unless the grievance was resolved; and/or

b) Failing to act upon the advice of one of its Occupational Health advisors, Dr Weadick (this is not admitted by the Respondent)?

29. If the decision was substantively unfair, what is the likelihood (expressed in percentage terms) that the Claimant would have been dismissed (and when) for a) misconduct and/or b) some other substantial reason? (29)

30. To what extent, if at all, did the Claimant contribute to his dismissal? (30)

31. Did the Respondent adopt a fair procedure in dismissing the Claimant? (31)

32. If not, what is the likelihood (expressed in percentage terms) that, absent any unfair procedure, he would have been dismissed in any event, and when?