Case Number**: 1305136/2021**

EMPLOYMENT TRIBUNALS

Claimant Respondent

Mr P Muzaffar **v** **Birmingham City Council**

Heard at: **Birmingham** On: **17, 18, 19, 20, 21 July 2023**

Before: **Employment Judge Kenward**
Ms S Outwin
Mr T Liburd

Appearances
For the Claimant: **In person**
For the Respondent **Mr P Starcevic, Counsel**

WRITTEN REASONS

JUDGMENT and oral reasons having been given at the hearing on 21 July 2023, with Judgment having been sent to the parties on 31 July 2023, and written reasons having been requested on 31 July 2023 in accordance with rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

Judgment

1. The Judgment of the Tribunal was that (1) the complaint of unfair dismissal is not well-founded and is dismissed; (2) the complaint of discrimination arising from disability is not well-founded and is dismissed; (3) the complaint of breach of the duty to make reasonable adjustments is not well-founded and is dismissed; and (4) the complaint of harassment related to disability is not well-founded and is dismissed.

Introduction

2. The Claimant was employed by the Respondent from 28 March 1994 until his dismissal on 26 July 2021. At the time of his dismissal, he was employed as a Senior Practitioner within Adult Social Care. His dismissal was on ill health capability grounds as a result of a long-term sickness absence which had commenced on 19 October 2020 and was still ongoing at the time of his dismissal.

Proceedings

3. An ACAS certificate was issued on 28 November 2021 in respect of early conciliation which began with ACAS being notified of the prospective Claim on 18 October 2021. This means that complaints about matters which occurred on or before 18 July 2021 would potentially be outside the time limit of three months for taking the first step for bringing proceedings, namely notifying ACAS of the prospective Claim. Proceedings were commenced on 13 December 2021 by an ET1 Form of Claim in which the complaints which remain as live complaints are those of unfair dismissal, discrimination arising from disability contrary to Equality Act 2010 section 15, an alleged breach of the duty to make reasonable adjustments contrary to Equality Act 2010 sections 20 and 21 and harassment related to disability contrary to Equality Act 2010 section 26.

4. The details of the Claim were set out in a typed document which the Claimant filed with the ET1 Form of Claim.

5. The live complaints and issues to be determined by the Tribunal were considered in a Preliminary Hearing on 28 June 2022 as confirmed in the Case Management Order made by Employment Judge McCluggage which provided for an Agreed List of Issues to be filed.

6. At the beginning of the final hearing, it was identified that the reasonable adjustments that the Claimant was contending should have been made were as set out at paragraph 22 of the details of Claim as set out below.

   "*In particular they failed to allow me to return to my previous role as a Senior Practitioner Workforce. They also failed to provide me with a phased return, a stress risk assessment, an option of reduced hours, reduced case load for a period and allowing me to take paid/unpaid leave to attend medical appointments and counselling*".

7. Clarification was provided by the Claimant as to the reasonable adjustments which the Claimant was contending should have been made. He also clarified his case by contending that the adjustments which should have been made included the provision of mandatory induction for new staff, the provision of supervision, having a meeting before any return to work date and offering a career break.

8. The complaints of harassment related to the treatment of the Claimant during his sickness absence with the specific complaints being identified paragraph 1.10 of the list of issues as set out below.

9. "*(1) Made telephone calls to C on Sunday, in particular by Ronke Akinrinola calling C on 4.7.21; (2) Made contact visits by telephone to C without prior arrangement by Ronke Akinrinola on the following dates: 26.10.20; 3.11.20; 9.12.20; 15.1.21; 11.2.21 (C says this visit did not take place); 22.3.21; 12.4.21 (C says this visit did not take place); 12.5.21; 16.6.21; and 18.6.21; and also on one occasion, 27.4.21, by Asana Sabouri; (3) Put pressure on C to take annual*

leave, in particular by Ronke Akinrinola from December 2020 to April 2021; (4) Arranged for (oppressively) 3 managers to be present at a meeting on 12.5.21 - Shantina Morgan, Afsana Sabouri and Ronke Akinrinola; (5) Displayed hostility by Ronke Akinrinola on 25.10.20 in refusing further compassionate leave".

10. It was also established at the outset of the hearing that, as set out above, the time issue needed to be considered on the basis that complaints about matters which occurred on or before 18 July 2021 would potentially be outside the primary time limit of three months, subject to giving consideration as to whether any act was part of an act extending over a period and whether it was just and equitable to extend time.

11. The final hearing had been listed to deal with the issues of liability only, so that any issues of remedy would be dealt with at a separate remedy hearing, if necessary. At the beginning of the final hearing it was also decided that any issue as to causation of loss and whether the Claimant might have been fairly dismissed in any event would be dealt with, if it arose, at any separate remedy hearing.

12. Whilst the decision with oral reasons was given at the end of the hearing, the Employment Judge apologises for the time taken to provide these written reasons.

Evidence

13. The Tribunal was provided with a bundle of documents consisting of 1296 pages with some additional pages inserted.

14. In terms of witness evidence, the Tribunal had a detailed Statement of Evidence from the Claimant which was 54 pages in length which also dealt with the issue of disability (in addition to a separate Statement dealing with remedy issues) and Statements from the Respondent's witnesses, namely Ronke Akinrinola, who was the Claimant's line manager and managed his sickness absence, Shantina Morgan, who made the decision to dismiss, and Glen Knott, in relation to the appeal hearing and decision. The Claimant had obtained a Witness Order for the attendance of Elaine Ricketts, who had been the notetaker at the Full Case Hearing ("FCH") at which the decision to dismiss was made, but ultimately the Claimant decided not to call her as a witness.

15. The Tribunal found the Claimant to be an intelligent and articulate witness. However, at times during his evidence he was evasive. The impression was given of a witness who was seeking to answer questions in a way which suited the narrative of his case, even where this involved re-interpretation the evidence to suit that narrative. An example was in relation to the level of support provided by his line manager, Ronke Akinrinola, where his evidence in his Statement and to the Tribunal as to a lack of support contrasted with his answers at the FCH in relation to the support which had been provided. At times, the Claimant's

evidence involved a degree of exaggeration, an example of which was the extent to which the Claimant's Statement of Evidence painted a picture of his mental health symptoms from the time when he went off sick in October 2019, which seemed inconsistent with the extent of the symptoms being described in the history given to his doctors over the same period. The Tribunal found Ronke Akinrinrole, at times, to be a little vague in the evidence which she gave to the Tribunal, but she was having to describe events from over two years ago in respect of which the contemporaneous written documentation was limited. Shantina Morgan and Glen Knott were impressive witnesses in describing the parts of the process in which they were involved.

Findings of fact as to relevant history

16. Prior to 7 September 2020, the Claimant was employed by the Respondent in Adult Social Care as a Senior Practitioner Workforce (SPW) and had been in this role since 2010.

17. The Respondent undertook an organisational review of the Adult Social Care service, which resulted in the approval of a restructuring under which the Respondent merged the two roles of SPW (dealing with personnel management) and Senior Practitioner Delivery (dealing with the caseloads). The Claimant's role title changed to Multi-disciplinary Senior Practitioner and he Claimant was provided with a new job description. His line manager became Ronke Akinrinola. In this role, the Claimant's duties and responsibilities involved supporting the Edgbaston constituency team in the assessment, support planning and care co-ordination processes for vulnerable adults with complex needs. He had supervisory responsibilities for the day-to-day practice of social workers, helping to develop the skills and knowledge they require to deliver adult social care services.

18. On 9 September 2020, the Claimant e-mailed RA making a request in relation to induction which he was suggesting "*will reduce some anxiety*". He also emailed Ronke Akinrinola on 9 September 2020 listing five areas of work in respect of which he was seeking guidance. The evidence of Ronke Akinrinola is that the Claimant was offered shadowing and guidance from a number of colleagues. This is consistent with a reply to the e-mail of 9 September 2020 which indicated that arrangements were already in place for guidance to be provided by a colleague (Anne Hunt) on 11 September 2020.

19. On 17 September 2020, the Claimant called the Respondent's HR Services. The contemporaneous record of this call is to the effect that he explained that he was finding his role challenging and that this was affecting his mental health, in that he had become tearful and was not sleeping at night. He referred to having been on anti-depressants in the past. He said that he had already spoken to the Employee Assistance Programme ("EAP") who had advised him to go to his doctor. He said that it was about his dignity in that his team were more

knowledgeable than he was. He was wanting to know the options open to him. He said he did not want to go off sick if he could do another role. He was given advice around redeployment. The HR officer said that he would phone back after speaking to his own manager. This resulted in it being confirmed that correct advice had been given and that a stress risk assessment could also be sought. The HR officer phoned back and offered to speak to the Claimant's manager, but the Claimant declined and said that he would do so himself.

20. However, the Claimant does not seem to have taken up the advice given and explained in his Statement that he did not want to jeopardise his working relationship with Ronke Akinrinola as he believed that a good working relationship would achieve a better outcome for the team and Directorate.

21. The evidence of Ronke Akinrinola also detailed the training and shadowing offered to all Multi-disciplinary Senior Practitioners as part of the restructuring. This included drop-in sessions arranged for 23 September and 28 September 2020 to provide further support for staff.

22. The Claimant's father died on 10 October 2020. Prior to this, as he highlighted his Statement, his attendance record at work had been excellent.

23. On 12 October 2020 the Claimant advised Ronke Akinrinola that he had suffered a bereavement and that he might be travelling abroad because of this. The Claimant was granted five days of compassionate leave by RA which she believed was in accordance with the Council's compassionate leave policy. Ronke Akinrinola also states that she had been a telephone conversation with him on 16 October 2020 to see how he was.

24. The Claimant was absent from work from 19 October 2020 due to bereavement stress reaction. He called Ronke Akinrinola on 26 October 2020 stating that he was not able to work that week due to feeling low. They discussed how he wanted to record the week and the Claimant informed Ronke Akinrinola that he wanted it to be recorded as sickness absence from 19 October 2020. He had thought he would be on compassionate leave for ten days, but Ronke Akinrinola had to inform him that, following consultation with the Head of Service, Afsaneh Sabouri, this was authorised for five days in line with the policy.

25. Ronke Akinrinola then had a first contact meeting with the Claimant on 3 November 2020 by telephone. There was an outcome letter recording that the Claimant would be contacting his GP to chase up a sick note and would then provide a copy of it. He had now decided not to travel abroad due to the current pandemic. He did not have a date for returning to work as of yet. He stated that he was not sleeping and was continuing to lack motivation. He also seems to have stated that he had been prescribed anti-depressants, although this would seem to be inconsistent with the GP records which suggest that the Claimant had come off anti-depressants in July 2020, and was only prescribed them again from 18 November 2020. The possibility of making an occupational health referral was

discussed but seems to have been left on the basis that it would be discussed with the Claimant the following week "*to give you time to consider whether you feel you want me to make a referral*".

26. On 18 November 2020 the Claimant made contact with his GP surgery seeking to be prescribed Sertraline. The note of the pharmacist in the GP records is to the effect that the GP had stopped his prescription for Sertraline in July 2020. He was sent a text message which pointed out that "*as you have not had the medication for several months*" this "*needs to be reviewed*". The Claimant ultimately had a telephone appointment with his GP on the same day. The GP notes record that he was seeking an extension to his sickness certificate. He reported that his mood "has been low since sertraline stopped and not managing any more especially with bereavement". However, the GP notes also noted that the Claimant was "*ok overall, utilising yoga and meditation*". The Tribunal notes that this description of the Claimant's situation as at November 2020, over a month after his father's death, is in stark contrast to the impression given by the description of his situation in the paragraphs following paragraph 22 of his Statement of Evidence.

27. In the meantime, an occupational health referral had subsequently been made. This gave the reason for the absence as bereavement stress reaction. The completed online referral form sought advice as to what support could be put in place to aid a return to work and whether the Claimant required any reasonable adjustments to support an early return to work. The template also allowed the manager to complete the form to indicate whether advice was being sought as to whether there was a significant underlying health problem and whether the employee's condition was likely to be covered by the Equality Act 2010. In relation to both of these areas for possible advice, the form had been completed to indicate that such advice was not being sought. This was understandable and reasonable in the light of the understanding that Ronke Akinrinola would have had at the time regarding the Claimant's absence having been prompted by the death of his father and bereavement stress reaction.

28. The subsequent occupational health consultation generated a report from 8 December 2020. The report indicated that the Claimant was still very upset following the death of his father. He was having appropriate support and treatment from his GP. Counselling had been discussed but it was likely to be too early to pursue this. He was expected to recover fully so as to be able to return to his post, but it was not possible at this stage to give a precise timescale of recovery. The report contained a number of recommendations. The first was that a phased return to work over a standard four-week period would be appropriate when the Claimant felt well enough to return to work. The second was that the Respondent should consider reducing his workload to about 80% for a month or two after he returned to work. The third was that gentle contact should be maintained. The answer to the specific questions as to the support which could

be put in place to aid a return to work, it was stated that a phased return and a reduced workload would help the Claimant. In answer to the question whether any reasonable adjustments would support an early return, it was stated that the answer was in the negative in that he just needed time to recover. There was no clinical need to obtain a medical report.

29. On 9 December 2020, a second telephone contact meeting took place between Ronke Akinrinola and the Claimant. The Claimant complains that this was not arranged in advance. However, the explanation of Ronke Akinrinola is that, early in his absence, the Claimant told her that she could call him any time and she felt that they had the sort of relationship where he would have been able to tell her if a call was not convenient or he did not want to be contacted. Certainly, this is consistent with the lack of any issue being raised at the time regarding Ronke Akinrinola making contact by telephone without prior arrangement. Effectively, her practice seems to have been to call the Claimant to make the arrangements, but it seems that at least some of the contact meetings effectively then took place when she made the call to make the arrangements. It was only after his dismissal that the Claimant complained about the timing and lack of notice of such calls.

30. The matters discussed in the contact meeting on 9 December 2020 were recorded in an outcome letter dated 14 December 2020. Reference was made in the letter to Ronke Akinrinola having now received the occupational health report. Although there was no specific reference to the recommendations made in the report, further referral would be made if the Claimant was still off sick after a further two months. It would appear that the Claimant was not suggesting that there was any underlying problem in that it was noted that he apologised for being away from work and stated that he had not been off sick for many years. There was also a discussion regarding his annual leave entitlement with the letter noting that the Claimant would "*consider how you want to utilise this before end of March 2021*".

31. On the same date Ronke Akinrinola also wrote a letter to the Claimant to confirm that "*I will be carrying out a case review of your absence*". The Council's Managing Absence Policy requires managers to conduct a case review if an employee has been absent for more than nine weeks. The letter set out the purposes of the case review, including checking whether all practicable support had been put in place, but also deciding whether the case should proceed to a full case hearing. A full case hearing was a meeting at which a decision to dismiss could potentially be made. The case review was described as being a desk-based exercise carried out by RA and signed off by more senior manager.

32. The case review took place on 17 December 2020. The decision of the case review was recorded as being to allow the Claimant more time to recover. In terms of whether a full case hearing should be arranged, the decision was stated to be not "*at this time*". The evidence of Ronke Akinrinola is that she took the decision in consultation with the Head of Service. The case review summary did

note that the occupational health recommendations were to the effect that there should be "*a phased return when you return to work and 80% caseload for two months*". This suggests a generous interpretation of the recommendations report in that the reduced caseload had been recommended by the report "*for a month or two*". The action to be taken was recorded as maintaining contact with the Claimant "*as per the absent management policy*", making an occupational health referral if he was still unwell in February 2021, and chasing up the Claimant's annual leave decision.

33. The Claimant continued to be signed off sick and his sickness certificate dated 21 December 2020 continued to give the reason for his sickness absence as bereavement stress reaction.

34. The Claimant had a further consultation with his GP on 15 January 2021 when he was seeking an extension to his sickness certificate. The attendance note records that the Claimant had reported that he was "*becoming upset easily and can cry*". He was seeking an increase in the dose of medication. He was struggling with motivation levels during lockdown. However, despite the note recording that grief reaction features were persisting, the attendance note also records that the Claimant was looking "*after self with meals and showers, wife good support and encouraging him*". Again, this is in stark contrast to the impression given in the Claimant's Statement of Evidence from paragraph 23 onwards.

35. On 15 January 2021 another contact meeting took place by telephone. The Claimant similarly complains that he unexpectedly received a telephone call on the day whereas the applicable procedure suggests arranging a date and time in advance and provides a template letter for confirming the arrangements. The matters discussed were confirmed in a letter dated 19 January 2021. The Claimant had reported that he remained unwell. He stated that he was feeling worse with low motivation and a loss of appetite. He further stated that his doctor had discussed increasing his medication with him. There was no return to work date. The letter indicated that it was hoped "*you feel better soon*" but if "*this was not the case, I will contact you soon to arrange another contact meeting*". In the meantime, it was stressed that, if "*you wish to discuss the position further, please feel free to contact me by telephone*".

36. On 19 January 2021, the Claimant's absence was subject to another managing absence panel review. Ronke Akinrinola sent a separate letter to the Claimant regarding the outcome of this review with the letter being sent out at the same time as the letter regarding the outcome of the contact meeting on 15 January 2021. In sending both letters to the Claimant, Ronke Akinrinola stated that "*I attended the Managing Absence Panel and they have requested that I begin preparing an FCH*". In fact, the Statement of Ron A suggests that she was in no rush to move to a full case hearing. At this stage, she hoped that more time would

assist the Claimant. Certainly, the subsequent chronology suggests that there was no rush to arrange the FCH.

37. Following the case review, Ronke Akinrinola made a further occupational health referral. Although the referral gave the continuing reason for the absence as bereavement stress reaction, it also reported that the Claimant "*states he is feeling much worse*" and indicated that a full case hearing was being prepared. On this occasion, the template referral form was completed so that the standard questions on the form were all asked, namely as to whether there was a significant underlying health problem, whether the employee will give reliable and consistent attendance in the future, whether the employee's condition is likely to be covered by the Equality Act 2010, and whether medical redeployment was appropriate and whether ill-health retirement should be considered. These were reasonable enquiries to be making in the light of the Claimant's indication that he was getting worse.

38. In fact, by the time of the occupational health consultation which took place on 15 February 2021, the Claimant had actually improved, not just from his condition at the point in time of the contact meeting on 15 January 2021, but from the time of the last occupational health consultation on 8 December 2020. Notwithstanding noting this improvement, the resultant report stated that the Claimant was not well enough to plan a return to work. The report stated that it was not possible, at this stage, to give an accurate timescale. His sickness certificate was due to expire on 19 February 2021, and it was anticipated that a further sickness certificate would be issued. Similar recommendations were made to the last report, namely that, when the Claimant was ready, a phased return to work with a reduction in caseload would be appropriate, increasing gradually back to his usual hours over a four week period. In relation to the questions asked by the referral, the report stated that, in "*my opinion the Equality Act is NOT likely to apply in this case*". This opinion was set out in the report despite some standard explanatory wording to the effect that "*occupational health will not normally give an opinion and management must make a decision based on their knowledge of the case taking the following into consideration*" with the key elements of the definition of disability under the Equality Act 2010 then being set out. However, immediately above the question in respect of the Equality Act 2010, the report stated that "*given time and treatment, Mr Muzaffar is expected to recover enough to return to his usual activities, including work*". This was in answer to a question as to whether the employee would be able to give reliable and consistent attendance in the future. In relation to the issue as to whether there was a significant underlying health problem, the question was answered by referring to comments below. The comments below simply referred to bereavement and stress-related illness..

39. In relation to the question in respect of medical redeployment, the report answered that medical redeployment was not appropriate as the Claimant was

currently not fit for any work. In relation to the question as to ill-health retirement, the report answered that ill-health retirement was not appropriate as recovery was expected.

40. When Ronke Akinrinola later prepared a management case report for July 2021, she set out a list of the contact meetings which had taken place. This included a reference to a fourth contact meeting by telephone on 11 February 2021. The management case report suggests that, at a meeting on this date, the outcome of the occupational health referral was discussed. The Statement of Evidence of Ronke Akinrinola effectively repeats the details in the report about this meeting. The Tribunal notes that there is no outcome letter similar to those which had been sent out after the first three contact meetings. The Claimant has also pointed this out in his Statement which states that no such meeting took place on 11 February. The Tribunal was satisfied that there was no meeting on 11 February 2021, as it would not have been possible on this date to discuss an occupational health report which was only dated 15 February 2021. It is possible that the entry in the management case report is simply an error as to the date, and the Tribunal suspects that Ronke Akinrinola may have been seeking to reconstruct the sequence of contact meetings in a situation where she was writing a report and there was a gap in the documentation. She may have honestly thought that there had been a contact meeting in February, but in the absence of such a meeting being otherwise documented, the Tribunal was not satisfied, on the balance of probabilities, that such a meeting had taken place.

41. Further sickness certificates were issued on the 17 February 2021 and 19 March 2021.

42. The next contact meeting was on 22 March 2021. Again, there is no outcome letter recording what was discussed at this meeting. There clearly was a meeting on this date, but the area of dispute is over whether it was a contact meeting or simply a discussion, as the Claimant suggests in his Statement, regarding an offer of a temporary redeployment back to his former role. The Tribunal thinks that is more likely than not that there would have been some discussion about the Claimant's present position. Indeed, in setting out his arguments, later in his Statement, that there had been no contact meeting in April 2021, the Claimant actually makes reference to the "*last contact meeting took place on 22 March 2021 and the following meeting was not due until 22 April 2021*". The management case report suggests that the information provided at the meeting was that the Claimant had improved a little but there was still no return to work date. This would be consistent with the fact that the Claimant had just seen his GP and been signed off work for a further month which was repeating the pattern of previous sickness certificates being issued . The Claimant is recorded in the management case report as having informed Ronke Akinrinola that he was able to consider counselling. The report also refers to the Claimant being reminded that he would be going on to half pay from 18 April 2021. The management case

report also confirmed that there was a discussion about the Claimant considering "*using his annual leave to assist a RTW as he has an additional 20 days*". This issue being raised would be consistent with the fact that a previous contact meeting discussed the issue of considering how to utilise any annual leave entitlement before the end of March 2021. As far as the possibility of temporary redeployment was concerned, the management case report records that the Claimant wanted further discussion around this with the Head of Service, Afsaneh Sabouri, which would appear to be consistent with the Claimant's description of the discussion save that he suggests that it was Ronke Akinrinola suggesting that he discussed this further with the Head of Service.

43. The next contact meeting to take place, according to the management case report, was a sixth contact meeting on 12 April 2021. It is noteworthy that this was almost three months after the review decision to proceed to a full case hearing with no steps had been taken to progress the matter further in this direction. Again, this is consistent with the evidence of Ronke Akinrinola to the effect that she was not seeking to rush into a full case hearing, and was allowing the Claimant to take his time to recover.

44. The management case report describes a contact meeting on 12 April 2021 in terms of the Claimant having "*felt he would now return to work in three weeks*" and he was reminded about the issue regarding his annual leave. It was also stated that he was made aware that he would be going on to half pay. Again, there is no outcome letter confirming the matters discussed in this meeting. The Claimant states that no such meeting took place. Again, there is an impression of Ronke Akinrinola seeking to reconstruct the sequence of events in the management case report in the face of the history of the matter being incompletely documented. In fact, in setting out the detail of this meeting, reference is made in the management case report to a document as appendix A(d) but this document is simply an e-mail from the Claimant to the Head of Service, copied to Ronke Akinrinola, seeking an update following the issue of temporary redeployment having been raised. The e-mail states that during "*contact discussion with Ronkie, I was advised by her that* (you) *will phone to discuss the plan to RTW*", but it "*has been some weeks now and I am still awaiting to hear from you*". In reconstructing the sequence of meetings, the management case report is essentially relying upon this e-mail as evidence for there having been a meeting on 12 April 2021. However, as the Claimant points out, the reference to a previous contact discussion and to it having been "*some weeks now*" would be just as consistent with the Claimant referring to a contact meeting in March 2021 (although, if so, the use of the word "*contact*" would seem to suggest that any meeting or discussion in March 2021 was a contact meeting rather than some other kind of meeting or discussion, contrary to the Claimant's argument in respect of that meeting).

45. There is an entry in the GP records recording a further GP appointment on 19 April 2021 which again records the Claimant being given a further fit note but also records that he "*feels not ready to get back to work, was thinking about phased return but not ready, agreed to go back phased return in 3 weeks*". It is also to be noted that the attendance note refers to poor compliance with Sertraline, poor appetite and a lack of focus although the Claimant had good support from his wife. The entry in the GP records to the Claimant having "*agreed to go back phased return in 3 weeks*" is consistent with the entry in the management case report that "*felt he would now return to work in 3 weeks*". The Tribunal was concerned that the Claimant's denials in respect of meetings having taken place were possibly based on the absence of the documentation which one would have expected to exist confirming that such meetings had taken place, such as outcome letters, whereas documents do possibly suggest that contact meetings had taken place which were otherwise undocumented, which may have been as a result of poor record-keeping or pressures of work on the part of Ronke Akinrinola (which she effectively admitted in the FCH when she suggested that she had not got around to writing up the contact meeting in April 2021 as she believed from that meeting that the Claimant would be returning to work.

46. In any event, the Claimant did not return to work after three weeks. A further GP consultation took place on 11 May 2021 with the Claimant requesting a further sickness certificate. The GP attendance notes record that there were no new or worsening symptoms since the last appointment, but the Claimant did not feel ready to return to work yet. Other entries were "*e+d well*" but difficulty sleeping. He was specifically recorded as being "(w)*ell in self*", "*very well supported*" by his wife and with "*no problems at home or work as per patient*". He was recorded as having bereavement counselling which was helping him.

47. A further contact meeting took place on 12 May 2021 as a video meeting, with Afsaneh Sabouri also in attendance. This was to discuss supporting a return to work in a temporary Senior Practitioner Workforce role. The management case report states at the Claimant having accepted this role and stated that he would return to work on 7 June 2021. On this basis, a return to work interview was arranged with Ronke Akinrinola for that date. Again, a little bizarrely, in terms of evidence of this meeting, the management case report refers to appendix A(d) which is the same e-mail from the Claimant sent on 28 April 2021 requesting a discussion with Afsaneh Sabouri The Claimant's statement of case for his internal appeal also refers to Shantina Morgan having attended the meeting on the basis that she would be the team manager for the temporary SPW role.

48. The Statement of Evidence of Ronke Akinrinola states that all preparation for the Claimant's return was undertaken with him during the meeting on 12 May 2021 so that the Claimant was aware of the support that would be provided to him as per the occupational health recommendations, and that the details of the phased return would be agreed during the return to work meeting. A stress risk

assessment was not being considered at this stage as this was not being recommended by the occupational health advisor and Ronke Akinrinola was primarily considering the absence as being due to bereavement, rather than stress. The Claimant's Statement of Evidence describes the contact meeting in terms of he was on his own and felt "*overwhelmed, intimidated, bullied, and harassed in this meeting*" but there is a lack of meaningful detail to support such allegations. The Claimant states that he was "*pressurised by the managers asking me when I am returning to work*". Because of the pressure that he was under, he states that he gave a return to work date which was 7 June 2021. Strictly speaking, this is true, but the Claimant had also previously indicated that he would be returning to work after three weeks. Moreover, the notes of the FCH record the Claimant saying that "*when I met with Afsaneh I wanted to return in June*". The Tribunal had the impression of serious allegations being lightly made.

49. Moreover, the fact that the meeting took place with three managers present made sense, given that Ronke Akinrinola was the Claimant's line manager who was responsible for conducting contact meetings, and this was a contact meeting, the Claimant had specifically requested a discussion with Afsaneh Sabouri, and Shantina Morgan with the line manager in respect of the temporary position.

50. The Claimant did not ultimately return to work on 7 June 2021. The Claimant obtained a further sickness certificate from his GP on 1 June 2021 (which was a Tuesday) although it was only on Friday 4 June 2021 that he e-mailed Ronke Akinrinola stating that his GP had signed him off work until the end of the month. The e-mail referred to the return to work meeting which had been booked for 7 June 2021 and stated that "*I think we need to cancel and book another meeting at the end of this month*". Ronke Akinrinola replied by e-mail indicating that "*I have been putting off FCH but not sure I can now*". Ronke Akinrinola discussed the position with Afsaneh Sabouri and was instructed to take steps to arrange the FCH meeting.

51. In his Statement of Evidence, the Claimant complains of a lack of support in relation to his provisional return to work. However, this was at odds with the FCH where the Claimant said that quote "*Ronke tried to support me, she asked how she could help me back to work whenever she called….I had said that I could return, however, as it got nearer to the time of me returning to work, I was having sleepless nights, I wasn't opening my mail*". He further said that, at "*the meeting I had with Afsaneh and Ronke I said that I would get support but nearer the time I became fretful and tearful, I knew this was for the new role that I wanted and discussed that I was panicking and having sleepless nights*". When Shantina Morgan asked him if "*would have been given support to return*" the Claimant answered in the affirmative saying that he "*knew support would be there but if your mind is not there how are you going to work*".

52. The reality is that, even when the Claimant was offered the opportunity of returning to his former role, albeit on a temporary basis, ultimately he could not face doing so and / or did not feel well enough to do so.

53. The Claimant refers to a contact meeting having taken place with Ronke Akinrinola on 16 June 2021. He states that he was informed that the temporary post which had been identified was no longer available. He suggests that there was a lack of an explanation for this. It is clear that there was a telephone discussion on 16 June 2021 as it is referred to in the outcome letter which the Claimant was sent on 29 June 2021 following a separate contact meeting which took place on 18 June 2021. The letter was seemingly being written to confirm the discussions which had taken place on the two occasions, but there is no specific reference to redeployment. The actual purpose of the call on 16 June 2021 seems to have been to complete or confirm an occupational health referral in that the subsequent occupational health referral gave this as the date that the referral was discussed with the Claimant. .

54. From the GP records, the position in respect of any temporary redeployment had clearly been overtaken by a deterioration in the Claimant's condition. An entry in the GP records for 18 June 2021 was in the terms set out below.

    "*Telephone encounter father became ill last year in October was very close to him was not able to travel now since he has passed away has become very depressed not even able to open letters re finances mend his car, has poor self-care poor sleep crying all the time and unable to face going back to work, not suicidal but cannot motivate himself, wife is supportive but if she did not look after him he would not eat, shower or do anything, all he wants to do is read his father's poetry, all his family are in India has discouraged local friends from making contact, tearful on phone cannot motivate to change*".

55. It is noteworthy that this is essentially describing the same situation as the Claimant was describing in his Statement of Evidence, but it is the only point in time when the medical records suggest that his condition had actually got this bad.

56. The evidence before the Tribunal is that, in the absence of the Claimant returning to work to fill the temporary post, it had now been deleted, so that it no longer existed as a potential temporary position. The vacancy had existed as a result of a delay in deleting a Senior Practitioner Workforce post which was due to be deleted as part of the restructuring which had resulted in the Claimant's previous substantive post having ceased to exist. The delay seems to have been as a result of the absence of the post-holder so that the post-holder had not been assigned to new post in the restructuring. However, the vacancy ceased to exist as a result of the post-holder taking ill health retirement which had enabled the post to be deleted in accordance with the approved restructuring proposals. This decision had been made by Afsaneh Sabouri as the post was due to be deleted

as part of the restructuring which had resulted in the claimant's substantive post been changed.

57. On the same date as the GP appointment described above, namely 18 June 2021, the Claimant had a contact meeting with Ronke Akinrinola. The Claimant complains of the meeting took place by telephone without any prior arrangement. The meeting resulted in the outcome letter dated 29 June 2021 recording that the Claimant remained unwell, "*still tearful and irritable and … in the process of sorting out counselling sessions*". A further occupational health appointment was being requested. In terms of any return to work, the letter noted that a meeting had taken place on 12 May 2021 to discuss options to support a return to work but the Claimant had unfortunately been not able to return and did not have a return to work date at present, although he had previously thought that he might be returning in May and then on 7 June 2021. It was confirmed that a full case hearing would now be arranged as part of the managing absence procedures. Ronke Akinrinola did not rearrange the return to work meeting for the end of June, as this would only be arranged once there was confirmation that the Claimant was well enough to return to work.

58. On 22 June 2021, following the contact meeting, Shantina Morgan wrote to the Claimant regarding arrangements for a full case hearing to take place on 26 July 2021. She would be conducting the hearing. Ronke Akinrinola would be attending to present the management case.

59. On 4 July 2021, which was a Sunday, Ronke Akinrinola telephoned the Claimant and explained that she had been hoping to arrange a contact meeting with him in the following week and had not had a chance to check whether this would work for him. At the time, he was happy to take the call and to discuss the contact meeting. Indeed, a screenshot showing the telephone calls on this date shows that there was both an incoming call and an outgoing call less than half an hour apart with each call being a little over one minute in length.

60. In the meantime, an occupational health referral was made. The completed referral form provided the background information that a further occupational health assessment was now required as a full case hearing was due to be conducted. The referral referred to the Claimant having been due to return to work twice, once in May, and later in June, but not having felt well enough to do so. Again, the referral sought answers to all of the standard questions on the template, including whether there was a significant underlying health problem, whether the Claimant would be able to give reliable and consistent attendance in the future, whether his condition was likely to be covered by the Equality Act 2010, whether medical redeployment would be appropriate, and whether ill health retirement should be considered.

61. On 19 July 2021, a further occupational health consultation took place. The resultant report suggested that the occupational health advisor thought the

Claimant "*was a little better today*", with the Claimant agreeing. He had been spending more time in the garden and was trying to eat more now. His medication had been increased about a month ago, and he had started counselling. In relation to the referral having mentioned a full case hearing, the Claimant was quote "*expecting this*" and would be able to attend any such meeting. His sickness certificate was due to expire on 27 July 2021 which was too early for him to plan a return to work, so the occupational health advisor expected that a further sickness certificate would be issued. The report stated that "*I do hope you will be well enough to return to work after another month or so*". In terms of any return to work, the report recommended a phased return over a four-week period, with a reduced caseload of 60% for the first month back and 80% for the second month, rising to his usual caseload for the third month. In terms of any other reasonable adjustments to support an earlier return to work, it was suggested that the Claimant just needed time to recover. Thus, in terms of the question asked as to any likely return to work date, the answer given was that the Claimant possibly might be able to return to work at the end of August 2021. In terms of the Equality Act 2010 applying, the report stated that, in the opinion of the occupational health advisor, the Equality Act 2010 was likely to apply. Medical redeployment was not appropriate as the Claimant was expected to return to his role. For the same reason, ill-health retirement was not appropriate.

62. The FCH eventually took place on 26 July 2021. The Claimant had been informed that a decision had been taken to proceed to a full case hearing as long ago as 19 January 2021. As such, by taking the decision not to arrange the FCH until 26 July 2021, the Claimant had effectively been allowed further time to recover.

63. At the meeting, the Claimant was accompanied by assisted by a representative> Ronke Akinrinola presented the management case including that the Claimant had been absent from work since 19 October 2020, for a total of 181 working days as of 4 July 2021. She explained the impact of the Claimant's absence on service delivery. Adult Social Care was a service which had challenges in terms of workload and funding. Any long-term absence would have a negative impact on the delivery of this service for citizens. The Claimant's role as a Senior Practitioner in Adult Social Care was stated to be a business critical role so that his absence had significantly impacted on service delivery. He was responsible for a cluster of staff who required regular supervision and case management. They also required support with any HR issues such as managing any absences. A practical example was given of renewing 25 DBS certificates for the team where the support of the Claimant would have been relied upon to complete this task but, in his absence, the task fell solely on one Senior Practitioner in relation to this, which had severely impacted on her ability to do her other work. His role was also to support with the allocation and authorisation of social workers' caseloads and any safeguarding issues that needed to be addressed. In addition to this, he supported with the team's data quality needs and key performance indicator expectations. The Claimant's team had taken on new recruits who

required extra support during their probationary period, for example with probationary reviews and the direct observations needed for these purposes. His absence was also stated to have caused a delay in managing the capability process of a social worker who required performance management. It was stated that the situation was further compounded where other senior practitioners were absent, for example on maternity leave. It was stated that there had been pressure put on other team members through their workload having increased with the remaining Senior Practitioners having to complete all of their tasks and responsibilities, not only for their own clusters, but for his as well.

64. In terms of the financial implications, it was stated that a "*temporary resource has been employed to cover this role*" with an agency worker filling the Senior Practitioner role starting from 4 May 2021 which had resulted in a cost being incurred of £11,469 in the period to 9 July 2021, whilst at the same time the Claimant was still entitled to half pay as sick pay so there was an additional burden on the staffing budget in that his post would not normally have been backfilled until he had fully exhausted his sick pay, but this had not been feasible as the team could not continue to function safely without the additional resource to support the remaining Senior Practitioners. It was suggested that the situation was no longer tenable in that the remaining Senior Practitioners had struggled to complete authorisation of caseloads for social workers in a timely manner and this had caused delays in meeting the need of citizens.

65. Ronke Akinrinola confirmed during the FCH that, in the event that the Claimant returned to work, she would be supportive of the occupational health recommendation of a phased return with a time limited 60-80% reduction in caseload and that this would be discussed with the Claimant in a return to work interview. She also confirmed that a stress risk assessment could be conducted on the Claimant's return to work or at a contact meeting.

66. In the FCH the Claimant is recorded as having said that "*I will try my best to return at the end of August / beginning of September and prepare myself*" but this was effectively qualified by him in the terms set out below.

    "*I am not fit enough I don't want to make any mistakes as I'm working with the public, I do not want to rush, I will try but I need to take my time. I've had a discussion with Occupational Health and the doctor and I would like more support to explore more options and for a risk assessment to be done*".

67. The Claimant sought to suggest that, as a result of an increase in medication, and having undertaken counselling, he had "*felt psychologically ready*" to return to work and had felt this way since June. However, when this was explored with him by Shantina Morgan, by asking as to when his last counselling session would be, which would be in early August, with the Claimant then being asked as to the reason for not being able to return to work earlier than the end of August / beginning of September, he replied "*Dr Ian* (Derbyshire, the occupational health

advisor) *and my professional counsellor have said that I'm not ready to return to work until after 31/08/2021*". Shantina Morgan asked whether, if the counselling sessions were extended, he would not return to work in September with his answer being that if "*I come back and something else happens, I would become stressed*" and the "*counsellor has given me prompts but it is up to her to say what I should do*". He confirmed that, because the two professions had advised him that he would not be fit to return to work until after 31 August 2021, he would not return to work before that date. He was asked about returning to his substantive role and stated that quote "*I'd be in a fragile position, so I may be scared, but in six months time I would be worse*".

68. The Claimant's representative, similarly sought to qualify any aspirations in respect of putting a date on any potential return to work stating that "*Parvez is on medication, which has increased … and he has not opened his post for some months…* (he) *needs time to mourn and heal from the loss of his father, however, the process does not mean that Parviz needs to be at home, there is no timeline for this process to take place*". The decision outcome letter refers to the Claimant having "*shown a pile of letters… which you advised you were not motivated to open*".

69. In terms of the impact of the counselling, the decision outcome letter recorded that the Claimant had advised the meeting "*that you were working on increasing your engagement in daily tasks especially within your garden, however you reported you were not working on any type of strategies directly supporting your return to work*".

70. Throughout the FCH, the Claimant confirmed that his line manager, Ronke Akinrinola, had been supportive, which is at odds with the impression given by much of the Claimant's Statement of Evidence. In her closing remarks, Shantina Morgan noted that "*your contact assessments were not adequately recorded by your manager* "but "*you reported your overall well supported by your manager*".

71. One issue which was raised in the FCH was that of a career break, but it was only raised through the HR adviser asking Ronke Akinrinola if it had been discussed in relation to the Claimant's absence, and she confirmed that it had not been. The Claimant did not then say that he would like to be considered. Moreover, the evidence of Ronke Akinrinola was that it had not been raised with her by the Claimant. The HR evidence given to the Tribunal by Glen Knott was that the Respondent's provisions in respect of taking a career break involved resigning from the employment of the Council and only returning to work after a period of six months to three years (at the end of the career break) when there would be no guarantee of a post being found, although the returning employee would be treated as a "*priority mover*". As such, there was no entitlement to return to a former post. It did not involve the Respondent keeping a post open for an employee on an indefinite basis.

72. N not, The minutes of the FCH record the decision made at the end of the meeting which was to the effect that the Claimant had been "*offered support to return to work with no success to date*" and the conclusion of Shantina Morgan was that "*you will be unable to sustain regular attendance for this service and it was understood the service can no longer sustain this level of absence*". As such, she confirmed that the Claimant's contract of employment would be terminated on the grounds of long-term absence impacting on service delivery.

73. The day after the FCH, the Claimant e-mailed Shantina Morgan asking if "*I return to work earlier than end of August then can you reconsider your decision*". He said that if "*there is a possibility then please reconsider your decision and I can return to work in the second week of August or even earlier if possible*".

74. Shantina Morgan wrote to the Claimant confirming the termination of his employment by letter dated 30 July 2021. The letter confirmed that his employment had been terminated with immediate effect on 26 July 2021 with 12 weeks' pay in lieu of notice.

75. In the meantime, the Claimant had had a further appointment with his GP on 29 July 2021 with the attendance note noting that the Claimant's employment had been terminated and that he was seeking a supportive letter for an appeal. The GP noted that the Claimant "*obviously feels worse sertraline not helping*".

76. The GP did provide a letter addressed to whom it may concern and dated 1 September 2021 which described the Claimant as suffering from depression since October 2020 which had been triggered by the death of his father. The report stated that he had been started on Sertraline which he was beginning to find effective and he was "*gradually beginning to get better and I would very much support as part of his rehabilitation a return to work gradually when he feels able*". On the basis of this report, the Claimant was not fit to return to work at the end of August 2021. Although the Claimant's dismissal may have been a factor in his lack of recovery, there was no reference to this in the letter from GP.

77. The Claimant had a further appointment with his GP on 20 September 2021 with the attendance note recording that the Claimant "*does not feel himself at the moment… feels overwhelmed and is struggling with sleep*". At this point he was recorded as feeling that the anniversary of the death of his father was also making him depressed and he was neglecting his physical and mental health as a result. He was recorded as wanting quote "*a high dose of sertraline to help take the edge off*" with the GP agreeing to increase Sertraline to 200 mg daily and review it after six weeks. Again, whilst this attendance note does refer to the Claimant's dismissal as part of the relevant history, it also raises doubts as to whether a return to work at the end of August 2021 would have been capable of being realised.

78. The Claimant submitted three grievances following his dismissal. One grievance complained that there had been "*ill intention*" on the part of Afsaneh Sabouri,

Ronke Akinrinola and Shantina Morgan who had "*met together regularly and plan to terminate me prior to the hearing*", The other grievance complained that the HR adviser in the FCH had acted in a way which was not neutral. A further grievance was submitted complaining of harassment, intimidation and bullying part of his manager, Ronke Akinrinola, which would appear to be at direct odds with the support which the Claimant attributed to Ronke Akinrinola in the FCH. These complaints were dealt with in a decision letter dated 24 December 2021 with the outcome decision being that there would be no further action.

79. The Claimant had also appealed against his dismissal. For the purposes the appeal hearing, the Claimant provided a further letter, addressed to whom it may concern, from his GP. This referred to a long-standing history of depression and the impact of the death of the Claimant's father, but suggested that "*prior to July 2021 his mental health did not impact on his ability or performance at work*" which would seem to need to be clarified on the basis of referring specifically to when the Claimant was at work. The letter did not provide an updated report as to the Claimant's present condition.

80. The management statement of case for the appeal hearing calculated that the Claimant had been off work due to sickness for a total of 194 working days and 281 calendar days at a cost of £37,556.62 excluding the cost of resources to cover the role in his absence. The Claimant also submitted a statement of case dated 4 October 2021.

81. The appeal hearing took place on 25 April 2022 with the Claimant again represented by his union. The decision of the Personnel Appeals (Dismissals) Sub-committee which heard the appeal was to uphold the dismissal. The decision was confirmed in a letter dated 4 May 2022.

Summary of law

Unfair Dismissal

82. By virtue of section 94 of the Employment Rights Act 1996 ("ERA 1996") an employee has a right not to be unfairly dismissed by his or her employer.

83. Under ERA 1996 section 98(1), it is for the employer to show the reason for the dismissal, and that it is a reason falling within ERA 1996 section 98(2), which includes capability (by reference to health or qualifications) of the employee as being a potentially fair reason for dismissal.

84. Under ERA 1996 section 98(4), "*where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) — (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the*

employee, and (b) shall be determined in accordance with equity and the substantial merits of the case".

85. The Tribunal was referred to the guidance provided by the Employment Appeal Tribunal ("EAT") in relation to ill-health capability dismissals in the case of East Lindsey District Council v Daubney [1977] ICR 566, IRLR 181, EAT, as set out below.

"*We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done*".

86. The Tribunal was also referred to the guidance provided by the EAT in relation to ill-health capability dismissals in Spencer v. Paragon Wallpapers Ltd [1977] ICR 301, EAT, as set out below.

"*What is required will vary very much indeed according to the circumstances of the case. Usually what is needed is a discussion of the position between the employer and the employee. Obviously, what must be avoided is dismissal out of hand. There should be a discussion so that the situation can be weighed up, bearing in mind the employers' need for the work to be done and the employee's need for time in which to recover his health*".

"*The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer? Every case will be different, depending upon the circumstances*".

87. Further guidance was provided by the EAT in DB Schenker Rail (UK) Ltd v. Doolan [2011] UKEATS/0053/09, EAT, as set out below.

"*The tribunal is also required to bear in mind that the decision to dismiss is, properly, a managerial one, not a medical one. Whilst medical or other expert reports may assist an employer to make an informed decision on the issue of capability, the decision to allow someone to return to work or to dismiss for reasons relating to capability is, ultimately, one which the employer has to make. It is not a decision that is to be dictated by the author of a report*" *(paragraph 35)*

"*Finally, it follows from the above that it is not for a tribunal to substitute its own view for that of the reasonable employer whether in considering whether or not the employer had reasonable grounds for its belief in the reason for dismissal or whether or not dismissal was within the range of responses open to an employer where a potentially fair reason existed: Iceland Frozen Foods Ltd v Jones [1982] IRLR 439. The Court of Appeal gave consideration to the risks of a tribunal doing*

so in the case of London Ambulance Service NHS Trust v Small [2009] IRLR 563. At paragraphs 42 and 43, Mummery LJ said:

42. ….

43. It is all too easy, even for an experienced ET, to slip into the substitution mindset…" (paragraph 36).

88. In Whitbread plc v. Hall [2001] EWCA Civ 268, CA, it was confirmed that the "*band of reasonable responses test*" applied to the issue of procedural fairness, as set out below.

"*Section 98(4) of the 1996 Act requires the Tribunal to determine whether the employer 'acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee' and further to determine this in accordance with the 'equity and the substantial merits of the case'. This suggests that there are both substantive and procedural elements to the decision to both of which the 'band of reasonable responses' test should be applied" (paragraph 16 per Hale LJ).ERA 1996 section 98(4) provides that where an employer has proven that the dismissal was for a potentially fair reason, then the determination of whether the dismissal is fair or unfair depends on whether in the circumstances the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee. Such questions shall be determined by the Tribunal in accordance with equity and the substantial merits of the case. A Tribunal is to consider the reasons shown by the employer and the size and administrative resources of the employer's undertaking*".

Time limits for complaints of discrimination

89. In relation to discrimination complaints, section 123(1)(a) of the Equality Act 2010 ("EA 2010") provides that "*a complaint … may not be brought after the end" of … "the period of 3 months starting with the date of the act to which the complaint relates*" or "*such other period as the employment Tribunal thinks just and equitable*". EA 2010 section 123(3)(a) provides that "*conduct extending over a period is to be treated as done at the end of the period*" and section 123(3)(b) provides that "*failure to do something is to be treated as occurring when the person in question decided on it*".

90. In Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, [2021] ICR D5, Underhill LJ indicated concern that Tribunals had tended to use the factors relevant in dealing with any discretion to extend time in personal injury cases, as set out in Limitation Act 1980 section 33 as a checklist and advised that they should not do so. He went on to give the guidance set out below.

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

particular (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.
The following is a non-exhaustive list of factors which may prove helpful in assessing individual cases:
— the presence or absence of any prejudice to the Respondent if the claim is allowed to proceed (other than the prejudice involved in having to defend proceedings);
— the presence or absence of any other remedy for the Claimant if the claim is not allowed to proceed;
— the conduct of the Respondent subsequent to the act of which complaint is made, up to the date of the application;
— the conduct of the Claimant over the same period;
— the length of time by which the application is out of time;
— the medical condition of the Claimant, taking into account, in particular, any reason why this should have prevented or inhibited the making of a claim;
— the extent to which professional advice on making a claim was sought and, if it was sought, the content of any advice given".

91. In Bexley Community Centre v Robertson [2003] IRLR 434, CA, the Court of Appeal provided the guidance set out below.

"*It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they* should *do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule*" (Auld LJ at paragraph 25).

92. Thus, the burden of proof is on a Claimant to satisfy the Tribunal that any complaint was either made within the applicable time limit for doing so, or that it would be just and equitable to extend time.

Disability

93. As far as disability is concerned, a person is disabled within the meaning of EA 2010 section 6(1) if he or she has "*a physical or mental impairment*" which has a "*substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities*".

94. Substantial is defined as meaning "*more than minor or trivial*" in Equality Act 2010 section 212(1).

95. Equality Act 2010 Schedule 1 paragraph 5 provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person

concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect.

96. Paragraph 2(2) of Schedule 1 to the Equality Act 2010 provides that if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is treated as continuing to have that effect if the effect is "*likely to recur*". In this legal context, "*likely to recur*" means that "*it could well happen*" — see paragraph C3 of the Guidance on the meaning of disability issued by the Secretary of State under section 6(5) of the Equality Act 2010 and see also Boyle v SCA Packaging Limited (Equality and Human Rights Commission intervening) [2009] ICR 1056, HL.

97. In Swift v Chief Constable of Wiltshire Constabulary [2004] ICR 909, EAT (noting the consideration of this case by the House of Lords in Boyle v SCA Packaging Limited [2009] (above)), the EAT emphasised that the question for the Tribunal is not whether the impairment itself is likely to recur but whether the substantial adverse effect of the impairment is likely to recur. The Tribunal must therefore identify the effect of the impairment with a degree of precision, since a substantial adverse effect resulting from a different impairment that was not the consequence of the condition initially diagnosed would not qualify as a recurrence.

98. Equality Act 2010 Schedule 1 paragraph 2(1) provides that the effect of an impairment is long-term if it has lasted or is likely to last for at least twelve months or is likely to last for the rest of the life of the person affected. Likely means "*could well happen*" (see the case of SCA Packaging Limited v Boyle [2009] ICR 1056, as well as paragraph C3 of the Guidance on Matters to be taken in account in Determining Questions relating to the definition of Disability 2011 (the "Guidance").

99. In the case of Cruickshank v VAW Motorcast Limited [2002] ICR 729, EAT the Employment Appeal Tribunal held that the time at which to assess the issue of disability (whether there is an impairment which has a substantial adverse effect on normal day-to-day activities) is the date of the alleged discriminatory act. Moreover, the case of All Answers Limited v W [2021] EWCA Civ 606, CA, confirms that the date of the discriminatory act is also the material time when determining whether the impairment has or is likely to have a long-term effect. Paragraph C4 of the Guidance stresses that anything that occurs after the date of the discriminatory act will not be relevant.

100. The burden of proof is on a Claimant to satisfy the Tribunal that he or she has a relevant disability for the purposes of EA 2010.

Knowledge of disability

101. Under EA 2010 section 15(2) an employer (A) cannot be liable for discrimination arising from disability if "*A shows that A did not know, and could not reasonably have been expected to know, that B had the disability*".

102. EA 2010 Schedule 8 paragraph 20 provides that the duty to make adjustments does not arise if the employer "*does not know, and could not reasonably be expected to know*" that the employee has a relevant disability and "*is likely to be placed*" at the disadvantage in issue.

103. In respect of knowledge of disability, these provisions "*do not require knowledge (whether actual or constructive) of the precise diagnosis of the disability in question*" but do "*require knowledge (actual or constructive) of the facts constituting the disability*" namely that "*the individual is suffering from a physical or mental impairment which has substantial and long-term adverse effects on his or her ability to carry out normal day-to-day activities*", and the "*question what a Respondent knew or should reasonably have been expected to know is one for the factual assessment of a Tribunal*" (see Pnaiser v NHS England [2016] IRLR 170, EAT).

104. The Equality and Human Rights Commission's statutory Code of Practice on Employment states that employers must "*do all they can reasonably be expected to do*" to find out whether a Claimant has a disability.

105. In Gallop v Newport City Council [2014] IRLR 211 CA, the Court of Appeal cautioned against the "*unquestioning adoption*" of the "*unreasoned opinions*" of occupational health advisers. It was stressed that "*the responsible employer has to make his own judgment as to whether the employee is or is not disabled*", although in "*making that judgment, the employer will rightly want assistance and guidance from occupational health or other medical advisers*". Further guidance was given as below.

"*That assistance and guidance may be to the effect that the employee is a disabled person; and, unless the employer has good reason to disagree with the basis of such advice, he will ordinarily respect it in his dealings with the employee. In other cases, the guidance may be that the opinion of the adviser is that the employee is not a disabled person. In such cases, the employer must not forget that it is still he, the employer, who has to make the factual judgment as to whether the employee is or is not disabled: he cannot simply rubber stamp the adviser's opinion that he is not*".

Discrimination arising from disability

106. Discrimination arising from disability is defined by EA 2010 section 15(1) on the basis that "*person (A) discriminates against another (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".

107. Accordingly, the Claimant must have been treated unfavourably. Moreover, the unfavourable treatment must also be "*because of something arising as a consequence of*" the Claimant's disability.

108. If the unfavourable treatment was because of something arising as a consequence of the Claimant's disability, the question then becomes that of whether it was justified as a proportionate means of achieving a legitimate aim

109. In determining whether the Respondent can justify the alleged unfavourable treatment, the Tribunal should have regard to the principles set out in MacCulloch v ICI [2008] IRLR 846, EAT, as approved in Lockwood v DWP [2013] EWCA Civ 1195, [2013] IRLR 941, [2014] ICR 1257, as set out below.

"(1) The burden of proof is on the Respondent to establish justification: see Starmer v British Airways [2005] IRLR 862 at [31].

(2) The classic test was set out in Bilka-Kaufhaus GmbH v Weber Von Hartz (case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30–31.

(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardy & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].

(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test in this context: Hardy & Hansons plc v Lax [2005] IRLR 726, CA".

Duty to make reasonable adjustments

110. Under EA 2010 section 20(3) the duty to make adjustments "is a "*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*".

111. Guidance was given by the EAT in Environment Agency v. Rowan [2008] ICR 218, IRLR 20, EAT, as set out below.

"*In our opinion an employment tribunal … must identify: (a) the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer, (c) the identity of non-disabled comparators (where appropriate) and (d) the nature and extent of the substantial disadvantage suffered by the Claimant…. Unless the employment tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage*".

112. Further guidance was provided by EAT in Project Management Institute v Latif [2007[IRLR 579, EAT, as set out below.

"*The … Claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. We do not suggest that in every case the Claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the Respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not*" (Elias P).

113. Further guidance was given by the EAT in Royal Bank of Scotland v Ashton [2011[ICR 632, EAT, as set out below.

"*It is not — and it is an error — for the focus to be upon the process of reasoning by which a possible adjustment was considered… [I]t is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment.' This essentially brings us back to the fact that the duty to make reasonable adjustments is cast in terms of 'steps' that would have an efficacious practical benefit in terms of relieving the substantial disadvantage to which the Claimant is subjected by the PCP*".

Harassment

114. Harassment, contrary to Equality Act 2010 section 26, is defined as being where a person (a) engages in unwanted conduct related to a relevant protected characteristic (in this case, disability), and (b) the conduct has the purpose or effect of violating the other person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the other person.

115. In deciding whether the conduct has the effect referred to at (b) immediately above, Equality Act 2010 section 26(4) states that each of the following must be taken into account: (a) the perception of the person alleged to have been harassed; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect.

116. Guidance as to the approach to be adopted by the Tribunal to considering whether the conduct complained of was related to the relevant protected characteristic (namely disability in the present case) was provided by the EAT in the case of Tees, Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495, EAT, at paragraphs 24 and 25, as below.

"*However … the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question….*

Nevertheless, there must … still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be".

Burden of proof

117. In relation to any proceedings in respect of an alleged breach of EA 2010, section 136 of EA 2010 provides that 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*" but this "*does not apply if A shows that A did not contravene the provision*".

Disability: further findings of fact and conclusions

118. The case management discussion from the preliminary hearing had identified the disability being relied upon by the Claimant as that of both depression / anxiety and diabetes. In fact, the disability relied upon in the details of Claim was that of depression / stress only.

119. The Claimant's diabetes clearly amounted to an impairment. However, his diabetes was mostly controlled, and there was insufficient evidence put before the Tribunal in order for the Tribunal to conclude that the Claimant's diabetes had

a substantial adverse effect on the Claimant's ability to carry out day-to-day activities, even when the diabetes was not under control. In any event, the Claimant's diabetes was not relevant. It was not the cause of his absence from work or relevant to his difficulties at work.

120. Accordingly, the main focus of any consideration as to disability was on the Claimant's mental health symptoms.

121. The submissions of the Respondent's counsel were to the effect that the GP records tend to show consultations reactive to various life and work events and medication was prescribed for substantial periods of time. Thus, the Tribunal would have to decide whether episodes of low mood or anxiety before October 2020 amounted to an impairment or were natural reactions to life events and variations in mood falling short of an impairment. It was accepted that the depression, as later diagnosed and starting in October 2020, was an impairment but the Tribunal would need to decide whether, as at the date of the alleged discriminatory acts, it was long term in the sense of having lasted for twelve months or being liable to recur.

122. The Tribunal noted that the medical records show that the Claimant had a history of depression and anxiety, as well as panic attacks, which went back at least to 1999 when references to mixed anxiety and depression disorder first appear in his medical records. The Claimant would be prescribed medication for his mental health symptoms and often remained on the medication for long periods. Equally, there were long periods when he was managing without being on medication for his mental health symptoms. Effectively there were significant periods of remission and good health.

123. Although there had been some significant absences from work in 1999 and 2000, there was limited evidence in the medical records regarding any mental health impairment having a substantial adverse effect on the Claimant's ability to carry out day-to-day activities prior to the Claimant's sickness absence in October 2020. The Claimant's Statement was fairly vague about the effect of any mental health impairment on his ability to carry out normal day-to-day activities. He referenced some of the causes or triggers which elevate his anxiety. He said that he finds it difficult to drive in the night or long distance driving alone with fears of a traffic jam. There is no reference to any difficulties driving in the medical records, and it would not be unusual for anyone to feel anxious in difficult driving conditions. He referred to a record of a supervision session from November 2016 which referred to feeling anxiety when he is in large groups. It was noted that he would see his GP about this. It is noteworthy that he was also offered an occupational health referral and a stress risk assessment at this supervision meeting, but declined both. However, he does seem to have seen his GP in December 2016 and gave a history of feeling low for three to four months with appetite down, restless sleep and being more withdrawn. A referral was made resulting in CBT sessions (cognitive behavioural therapy) and the

Claimant's Statement referred to a resultant report from 30 August 2017 following the CBT sessions which refers to the Claimant having presented, in January 2017 with "*elements of social anxiety and mild panic*". Again, it is not unusual to experience anxiety, particularly in large social gatherings.

124. When the Claimant was seen by his GP on 22 May 2018 he was also complaining about low mood and gave a history regarding issues at home and in relation to his job role over the past year, with his low mood and anxiety symptoms causing him to be snappy, disinterested, poor sleep and anxious. It was leading to arguments with work colleagues and his wife. He was "*worried* (about) *the impact it is having on his life*". He was prescribed Sertraline. In November 2019, he was still on the Sertraline and doing well with it. He continued on Sertraline and then it was stopped on clinical grounds on 10 July 2020. The timing of this may have been unfortunate as the Respondent was in the process of introducing its new service model in Adult Services which would involve a significant change in the Claimant's job role with effect from 7 September 2020, and it seems clear that he became anxious about this. He phoned the Respondent's Employee Interaction Centre (part of HR) on 17 September 2020 and explained that the new role was affecting his mental health as he had become tearful and could not sleep at night and "*does not eat during the day when he has to carry out the 'duty' side of the role*". He explained that his manager and team were supportive. He explained that he had talked to EAP who had advised him to go to his doctor although there is no evidence that the Claimant did so at this stage (although there appears to be a gap in the GP records for this period). He was advised to keep his manager informed as to how he was feeling as his manager would need to know he could not cope with the role and how it was affecting him mentally and physically. HR offered to talk to his manager, but the Claimant said that he would do it himself. In fact, a conversation to this effect does not seem to have taken place. The Claimant seeks to be critical of his manager, Ronke Akinrinrole, for this, but the e-mail evidence shows that she was putting in place arrangements for supervision to take place after her return from leave, and it appears that the death of the Claimant's father took place before this could happen.

125. Although the evidence as to substantial adverse effects before October 2020 is limited, the Tribunal notes that the Claimant's evidence regarding this has not been meaningfully challenged by the Respondent. Moreover, the Tribunal notes that the threshold for establishing that a substantial adverse effect existed is relatively low in that "*substantial*" is defined in Equality Act 2010 section 212(1) as meaning "*more than minor or trivial*". Although some of his evidence regarding his mental state after October 2020 appeared to be exaggerated, in so far as it was inconsistent with the medical records, the Tribunal was prepared to accept, on the evidence from the medical documentation and the Claimant's Statement regarding the position prior to October 2020, that when the Claimant's condition relapsed, it was likely to result in a substantial adverse effect on normal day-to-

day activities, as seen by the references to the effect being that the Claimant was withdrawn or restless or not sleeping or not eating or struggling with social interaction.

126. As such, the Tribunal was satisfied that the Claimant's mental health impairment of depression and anxiety amounted to a relevant disability, at all material times for his Claim.

Knowledge of disability: further findings of fact and conclusions

127. However, did not follow that the Respondent had the requisite knowledge applying the statutory test set out above. Although the medical records show that there had been some significant absences from work, this had been many years ago, and had been in the context of events, such as an assault in 1998, which could be expected to impact upon an employee's mental well-being. In the course of the Tribunal hearing, the Claimant emphasised how good his recent sickness absence record was, with this being a positive factor which should have been taken into account on his case.

128. The Claimant has referred to a supervision record from November 2016 where the notes in respect of the well-being check recorded the reference to the Claimant feeling anxious when he was in large groups and the actions noted were that the Claimant would see his GP. However, it is significant that an occupational health referral and a stress risk assessment were declined by him at this point. There is no evidence to show that this resulted in further information being provided to the Respondent.

129. There was a telephone call to HR on 17 September 2020 which did refer to the Claimant having been on anti-depressants, but specifically stated that this was in the past. Moreover, it was clear from the record of the call that the Claimant was being advised to take the steps of speaking to his manager regarding any mental health issues and had already been advised to see a doctor.

130. When he did, ultimately, speak in a meaningful way with his manager, following the death of his father, this resulted in the occupational health referral being made following a discussion with the Claimant on 3 November 2020. This was as a result of the Claimant being signed off work with the reason for the sickness absence being given as bereavement stress reaction. This was also the reason given on the initial sickness certificates. The referral specifically refers to the lack of any previous sickness absence in the previous two years. Thus, it was understandable (and reasonable) that this referral was not seeking advice as to whether the Claimant's condition was covered by the Equality Act 2010.

131. When the Claimant remained off work, a further discussion between the Claimant and his line manager resulted in another occupational health referral which specifically asked the question as to whether there was a significant underlying health problem and whether the employee's condition was likely to be

covered by the Equality Act 2010. The comments made in the subsequent report did not suggest that there was a significant underlying health problem and the report specifically provided the opinion that the Equality Act 2010 was not likely to apply in the case. Based on the information which the Respondent had, the Tribunal is satisfied that it was reasonable to proceed on the basis of this advice.

132. In the period after this, the contact between the Claimant and his line manager gave rise to the possibility that return to work arrangements could be made. This was when he was still signed off with bereavement stress reaction. Thus, it was reasonable that the Respondent did not seek further occupational health advice until the return to work arrangements fell through. Based on the information provided by the Claimant, as set out in the letter of 29 June 2021, it was reasonable that the Claimant's line manager did not specifically ask for further advice on whether the Claimant was covered by the Equality Act 2010. In any event, the resultant report dated 19 July 2021 gave the opinion that it was likely that he was covered by the Equality Act.

133. In the circumstances, the Tribunal is satisfied that the Respondent had actual or constructive knowledge of the Claimant's disability (within the statutory sense of the wording on EA 2010 section 15(2) and EA 2010 Schedule 8 paragraph 20 on receipt of the report dated 19 July 2021.

Harassment: further findings of fact and conclusions

134. The Tribunal's decision as to the date of knowledge is an important consideration when considering the various complaints of harassment related to disability, all of which predate the advice given by occupational health to the effect that the Claimant was likely to be disabled for the purposes of the Equality Act. Thus, the Respondent, and in particular the Claimant's line manager, were dealing with the Claimant over a period of time before 19 July 2021, when it would not have been appreciated that the Claimant had a relevant disability for the purposes of the Equality Act 2010.

135. The Tribunal also notes that whilst much of the conduct complained of occurred in the context of the Claimant being absent from work because of his disability, this does not in itself establish that the conduct was related to his disability. For example, whilst the reason for any contact call may have been because the Claimant was off sick and his sickness related to his disability, the Tribunal accepted the Respondent's submission that this did not cause any conduct in the course of phoning him to be related to his disability, as this would involve applying a "*but for*" test for causation which is not the appropriate test for the purposes of establishing that conduct is related to a protected characteristic.

136. The Tribunal also notes the lack of any complaint made by the Claimant at the time of the various alleged acts of harassment. If he had seriously considered that this was conduct which had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive

environment for him, the Tribunal would have expected issues regarding his treatment would been raised earlier.

137. The first alleged act of harassment (in chronological order) was the allegation that the Claimant's line manager showed hostility towards him, on or about 25 October 2020 when refusing to extend his compassionate leave from five to ten days. It is noted that the management case report gives the date of this discussion as 26 October 2020. The Tribunal notes that the Respondent's policy provides for up to five days compassionate leave which was granted to the Claimant. However, the Claimant did not return to work on 19 October 2020 and told his line manager on or about 26 October 2020 that he was not able to return to work due to feeling low. There was a discussion as to how his time off work since 19 October 2020 should be treated. The Claimant had thought that he would be entitled to compassionate leave for ten days. His line manager had to inform him that only five days was to be authorised. This reflected the Respondent's policy which allows the manager to approve up to ten days paid leave in exceptional circumstances. It was explained at the FCH hearing that there might have been exceptional circumstances if it had been necessary to travel abroad. However, extending paid compassionate leave was not appropriate in relation to an absence due to sickness. The Tribunal can see that the Claimant would have been unhappy with this decision, and that his unhappiness may have caused any conversation in which his line manager was having to communicate the decision to be an awkward one. However, the Tribunal was not satisfied that there was any hostility on the part of the Claimant's line manager. The decision, and the manner of its communication, was not related to the Claimant's disability. At that stage, the Claimant had only been absent for five days and the decision was not influenced by any perception of disability.

138. The next act of alleged harassment was that of making contact visits by telephone to the Claimant without any prior arrangement on various dates between October 2020 and June 2021. In fact, the evidence was unclear as to the extent of any prior arrangement. The evidence of the Claimant's line manager was that she believed she had arranged all of the contact visits with the Claimant beforehand either by text or by calling. The Respondent's submissions seemed to accept the possibility that, when making telephone contact, Ronke Akinrinola would have been either trying to arrange the contact for another occasion or to actually undertake the contact if it turned out that it was possible to do so when she phoned. In fact, this seems to be what happened in that there is no evidence of the Claimant having objected to any of the meetings proceeding by telephone, and the telephone calls, once answered, then turned into a contact visit. The Tribunal was not satisfied that this was conduct which had the purpose or effect required by Equality Act 2010 section 26.

139. The next alleged act of harassment was that of putting pressure on the Claimant to take annual leave, with the Claimant suggesting that this had occurred on various occasions between December 2020 and April 2021. The Tribunal accepts the point being made by the Claimant that an employee off sick should not be required to take part of his annual leave entitlement whilst he is off sick. However, the Tribunal is satisfied that, in raising the issue, the Claimant's line manager was doing so in the Claimant's own interests, and the utilisation of his outstanding annual leave was something which a manager legitimately needed to discuss with him. It was in his interests for the manager to establish whether he wanted to carry over any annual leave or whether he wanted to use it to avoid any loss of salary at the point in time when his sick pay either went to half pay or was exhausted altogether, or whether he wanted to use it immediately prior to any return to work in conjunction with any phased return to work arrangements. In any event, the Tribunal did not consider this was conduct related to his disability or that it was conduct which had the purpose or effect required by Equality Act 2010 section 26.

140. The next alleged act of harassment was arranging for a Microsoft Teams meeting to take place on 12 May 2021 at which three managers were present, namely the head of service, the Claimant's line manager, and the manager who would be managing him in the event that he returned to work in the temporary workforce role which had been identified. There was a good reason for all three managers to be present given that this was a return to work from a sickness absence which was being managed by the Claimant's line manager, and would involve him taking up a temporary post which had been identified by the head of service, where he would be managed by a new line manager. He claims that he was simply intimidated by the presence of three managers. However, the Claimant himself was a senior employee with some 27 years' experience. On being questioned, the Claimant did not really identify anything about the conduct of the meeting which could be said to have caused it to be intimidating. There was no conduct identified which could be said to be related to his disability. This was not conduct which had the purpose or effect required by Equality Act 2010 section 26.

141. The final alleged act of harassment was that of the Claimant's line manager telephoning him on a Sunday, on 4 July 2021. The Tribunal agrees that it may have been better not to have made the call on a Sunday. Indeed, Ronke Akinrinola states that she apologised to the Claimant for calling on a Sunday at the appeal hearing, when the Claimant raised the matter. Her Statement suggests that the purpose was simply to arrange a contact meeting. It is clear from the document recording a screenshot of the calls on 4 July 2021, that the Claimant would have known that the caller was Ronke Akinrinola before he answered the phone, so need not have answered if he did not want to talk to her on a Sunday. He also phoned her back. He could easily have not answered the phone or answered and suggested that she ring back later or that he would phone

her later. In any event, this was not conduct related to the Claimant's disability. The Tribunal is satisfied that it did not have the purpose or effect required by Equality Act 2010 section 26.

142. In conclusion, the Tribunal has concluded that none of the conduct complained of as harassment had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Breach of duty to make reasonable adjustments: further findings of fact and conclusions

143. The List of Issues identifies that the relevant provision, criterion or practice (PCP) was that of requiring satisfactory attendance at work, which it was accepted, if the Claimant was disabled, placed him at a substantial disadvantage in comparison to non-disabled employees. Whilst no specific comparator was identified, viewed simply, in comparison with, say, a non-disabled Senior Practitioner, the Claimant was at a disadvantage in that his disability made it more difficult for him to meet the requirement of satisfactory attendance at work. The nature of the disadvantage was that he would potentially be absent from work, his pay would be impacted subject to the contractual provisions in respect of sick pay, and he would be at risk of dismissal in relation to any extensive absence or absences.

144. The Tribunal, has accepted, as set out above, that prior to 19 July 2021 the Respondent did not have the requisite knowledge in relation to the Claimant's disability, and so, also, would not have had the requisite knowledge in relation to the Claimant being placed at a substantial disadvantage by reason of his disability.

145. Thus, the Respondent would only have been put on notice as to the duty to make adjustments from 19 July 2021. As such, the Tribunal is satisfied that any issue raised by the Claimant regarding adjustments which might have been made in September 2020, at the point in time when he was taking up the new position as a Senior Practitioner with both workforce and delivery responsibilities, for his absence from work, whether in terms of arrangements for supervision or in June 2021 when arrangements were originally made for a possible return to work in a temporary workforce only role, do not give rise to any duty or breach of duty.

146. Indeed, this is similarly the position in relation to any other reasonable adjustments it is alleged that the Respondent should have taken prior to receipt of the occupational health report dated 19 July 2020.

147. Moreover, in relation to the issue of any adjustments being made in September 2020, the PCP requiring satisfactory attendance at work was not placing the Claimant at a disadvantage at that time, because he was at work, and

remained at work until his father's death. Further, in so far as his absence from work

148. In any event, the Tribunal accepts that the arrangements put in place by the Respondent for the purposes of employees transitioning to their new roles in September 2020, and as set out in the findings of fact above, were reasonable.

149. Thereafter, the Respondent made occupational health referrals which resulted in two reports being made, with both reports making recommendations for the Respondent to consider implementing in relation to any return to work. The Tribunal accepted the evidence of the Claimant's line manager to the effect that the occupational health reports were discussed with the Claimant in the course of contact meetings. The Tribunal found any suggestion to the contrary to be very unlikely. The Claimant was an employee of many years' service who was familiar with the procedures in respect of sickness absences. It seems inconceivable that he would not have discussed any recommendations being made with the occupational health advisor, and that the contents of the resultant report would then have been discussed in the course of a contact visit. Had this not been raised by his line manager, the Tribunal would have expected the Claimant himself to be asking as to the recommendations. There is no evidence of any indication being given to the effect that the occupational health recommendations would not be implemented in the event of the Claimant's return to work, so that, for example, he would be provided with a phased return to work, both in terms of reduced hours and reduced caseload for a limited period.. In any event, in so far as there was a duty to implement any recommendations as adjustments, that was a duty which would have arisen at the point in time of the Claimant's return to work. Prior to then, it cannot be said that putting in place arrangements for a phased return to work in terms of reduced hours or reduced caseload would have removed any disadvantage, as the Claimant was not at work.

150. As far as the occupational health report of 19 July 2021 was concerned, there had been insufficient time to discuss any recommendations before the full case hearing took place on 26 July 2021. However, the recommendations were, in essence, the same recommendations as had previously been made in respect of a phased return to work both in terms of working hours and caseload. Clearly the implementation of any recommendations depended upon the outcome of the FCH and the Claimant returning to work in the event that the outcome was not that of his dismissal. However, it was essentially made clear that the Respondent accepted the recommendations and that these could be implemented on his return to work, with the detail being discussed at any return to work meeting. Prior to then, the adjustments would not have removed any disadvantage as the claimant was not at work.

151. At the outset of the hearing, the Claimant seem to put forward, as a potential reasonable adjustment, having a meeting prior to any return to work.

The basis for putting forward this potential adjustment was not entirely clear. However, one of the criticisms made by the Claimant in his Statement of Evidence related to a perceived lack of support prior to his potential return to work on 7 June 2021 with the implied suggestion that, insofar as arrangements were due to be discussed at a return to work meeting arranged for 7 June 2021, this might have occurred earlier. However, it was not unreasonable for the Respondent to make arrangements for any return to work meeting to happen at the point when the Claimant was return to work. This was tacitly acknowledged by the Claimant in his e-mail of 4 June 2021, informing the Respondent that he had been signed off work until the end of the month, and noting that a return to work meeting had been booked for 7 June 2021. The e-mail stated that "*I think we need to cancel and book another meeting at the end of the month*". It made sense for arrangements in respect of a return to work to be discussed at a return to work meeting, since any earlier discussion as to arrangements ran the risk of the arrangements ceasing to be appropriate based on any changes in respect of the Claimant's situation between the date of any meeting and the date of his actual return to work. On the other hand, it was clear that the Respondent was open to return to work arrangements been discussed at contact meetings and in other meetings. This was effectively the purpose of the meeting on 12 May 2021. At the FCH, Ronke Akinrinola made it clear that such matters could be discussed in a contact meeting (see the comments below in relation to the issue of a stress risk assessment). She had also made it plain, throughout the history of the Claimant's sickness absence, that if there were matters which he needs discussed with her, then he was at liberty to telephone her. This was at a point in time when the coronavirus pandemic was still causing a significant amount of communication to take place by telephone rather than in person.

152. The Tribunal is satisfied that the time to undertake any stress risk assessment would have been at the point in time of the Claimant actually being in work, following any return to work. Otherwise, any assessment of the risks would have been based on circumstances which may well have changed by the time that the Claimant was actually in work. In fact, at the FCH, Ronke Akinrinola did indicate that a stress risk assessment could take place at a return to work meeting or in a contact meeting. However, the Tribunal also accepts the point that the purpose of a stress risk assessment is that it potentially identifies controls or measures or adjustments to be put in place. As such, undertaking a stress risk assessment will not normally be an adjustment in itself, but a means of identifying adjustments.

153. In terms of redeployment, there was no suggestion that the Claimant might be fit to return to any other post, besides the post which had become his substantive post from 7 September 2020, other than the temporary workforce post which had been identified for his proposed return to work from 7 June 2021. In the event, this adjustment could not be put in place because he was not fit to return on that date, as clearly indicated by the medical evidence.

154. The possibility of undertaking this temporary post had arisen because the post holder was absent from work. However, by 26 July 2021 the post had ceased to exist in that the post-holder had taken ill health retirement and the post had been deleted. The deletion of the post was consistent with the Respondent putting in place its new service model for the customer journey by which Adult Services were being delivered. That service model had been identified as the most appropriate way of delivering the service to citizens or service users. The Tribunal does not accept that it would have been a reasonable adjustment effectively to have required the Respondent to create a new post which was inconsistent with the service model which was now being operated.

155. In any event, from the Claimant's replies in the course of the FCH, as confirmed by the evidence of Shantina Morgan, the Respondent was entitled to conclude that the prospect of any return to work to any post remained uncertain, so that it was not clear that making any adjustment in respect of the Claimant's role would have resulted in his return to work. Similarly, on the same basis, it was not clear that any other possible working arrangements, such as flexible working, or flexible retirement, or reduced hours, would have resulted in a return to work.

156. In the course of the hearing, other possible adjustments were raised which, when analysed, did not actually involve a return to work. Ill health retirement involved the Claimant's employment ending so was not an adjustment which would have removed the substantial disadvantage in issue. In any event, the availability of ill health retirement subject to the provisions of the applicable pension scheme so that the Claimant could have sought ill-health retirement at any time, but this would be dependent upon meeting the criteria of the applicable scheme for ill-health retirement to be granted, there was no evidence that he did so.

157. Similar conceptual difficulties applied in relation to the possible adjustment of a career break. Such an adjustment was not sought by the claimant. It would have involved him resigning. The terms of the career break involved no guarantee that the Claimant would be able to return to employment at the end of any career break. It was not a device by which the respondent effectively allowed him to take an extended or indefinite absence from work post being left open or made available for him to which he could return. Thus, it could not be said that the potential adjustment would remove the disadvantage. It would not have been a reasonable adjustment for the Respondent to offer a career break on the basis that a post would be available for the Claimant as and when he was in a position to take up any such post. On the basis that, immediately before such a point in time, the Respondent would need to have in place a staffing establishment which met its business requirements, this would effectively involve the Respondent having to employ the Claimant when there was no business need to do so. This would not amount to a reasonable adjustment.

158. The Details of Claim also alleged that there was a failure to make reasonable adjustments to enable the Claimant to take paid or unpaid leave to attend medical appointments and counselling. It was not clear that this was a problem which had arisen. This was not an adjustment which would need to be made unless the Claimant was actually back in work. The claimant had not been in work since October 2020. At the time of the FCH it was being envisaged that he would have his last counselling session before he returned to work. There was no indication in the GP records suggesting that the Claimant would need to be attending medical appointments in respect of his disability once he had been signed fit to return to work. This part of the Claimant's pleaded case appeared to be anticipating a problem which had not arisen. The Tribunal was not satisfied that there was any breach of the duty to make reasonable adjustments in this respect.

159. In the circumstances, the Tribunal was satisfied that there was no breach of any duty to make reasonable adjustments.

Unfair dismissal: further findings of fact and conclusions

160. As stated above, the case law in relation to capability dismissals is well established. A reasonable employer will take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position (see East Lindsey District Council v Daubney [1977] ICR 566, EAT).

161. Effectively, that was the purpose of the full case hearing which took place in this case. It involved consulting the Claimant as to the position, on the basis of the matters set out in the management case report, and considering his representations. For the purposes of that meeting, the Respondent had obtained an up-to-date occupational health report. Prior to that meeting, the Claimant had been consulted through the regular contact meetings that had taken place.

162. As also stated above, in terms of the reasonableness of the decision to dismiss, every case depends on its own circumstances and will be different, but the basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer (see Spencer v. Paragon Wallpapers Limited [1977] ICR 301, EAT).

163. It follows that this is not a decision for the Tribunal to take afresh by substituting its decision for that of the employer. The Tribunal has to decide the matter by applying the band of reasonable responses.

164. By 26 July 2021, the Claimant had been absent from work for over nine months. He had previously indicated the possibility of a return to work. Whilst the Claimant takes issue with the suggestion that there was a contact meeting on 12 April 2021 in respect of which his line manager states that the Claimant "*felt he would now return to work in 3 weeks*", the Tribunal considered that it is likely that

this was communicated to the Claimant's line manager, whether on this date, or around this time, given that it is consistent with a note in the Claimant's medical records to the effect that he "*agreed to go back phased return in 3 weeks*". Clearly this hoped for return did not happen. There was then the return to work arranged for 7 June 2021, which also fell through. Whilst the possibility of a return to work at the end of August was being raised at the 26 July 2021 meeting, the Respondent was entitled to treat this with a degree of scepticism.

165. The Claimant's condition, as recorded in the medical records for 18 June 2021, which was the same date as his last contact visit with his line manager, suggested that he would have been as far away from a return to work as he had been throughout the history of his absence. Indeed, this deterioration in his mental health seems to have been prompted by the prospect of a return to work in June 2021.

166. The Claimant's replies in the full case hearing on 26 July, as confirmed by Shantina Morgan, suggested that the possibility of the Claimant returning to work at the end of August was a very qualified possibility. Thus, he stated that "*I'm not fit enough I don't want to make any mistakes as I'm working with the public I do not want to rush I will try but I need to take my time*". He was asked, if his counselling sessions were extended, "*will you not return to work in September*" and his reply was to the effect that it was up to the counsellor. In relation to the possibility of going back to his substantive role, he suggested that he would be in a fragile position and may be scared.

167. The Respondent was entitled to conclude, as a result of the position at the full case hearing, that the prospects for the Claimant's return to work in the foreseeable future remained uncertain.

168. The Respondent was also entitled to take into account its assessment as to the continuing impact of the Claimant's continuing absence, both in terms of cost, and in terms of the impact on other members of staff and service users. It was still paying the Claimant, albeit on half pay, and it was also incurring the cost of agency staff who were not in a position to undertake all of the aspects of the Claimant's role, so that an additional burden would have fallen upon the Claimant's colleagues.

169. In the circumstances, the Tribunal has concluded that the decision which the Respondent took was a decision which was reasonably open to them to take. It was within the band of reasonable responses and, on that basis, it was not unfair.

Discrimination arising from disability: further findings of fact and conclusions

170. The final complaint involves considering whether the dismissal amounted to discrimination arising from disability. It is not disputed that the dismissal amounted to unfavourable treatment and that this arose from the Claimant's

disability. Accordingly, the issue for the Tribunal is whether the dismissal was justified having regard to the test for justification, namely whether the dismissal was a proportionate means of achieving a legitimate aim.

171. The Respondent relies upon the aim of requiring satisfactory attendance at work and providing a well-functioning service. The Tribunal accepts that this amounted to a legitimate aim.

172. The next question is whether the treatment was an appropriate and reasonably necessary way to achieve those aims. This involves considering whether something less discriminatory could have been done instead, and balancing the needs of the Claimant and the Respondent.

173. Clearly, the Respondent undertook a balancing exercise and took into account the effect on the Claimant and the impact upon service delivery, cost and burden on colleagues. In terms of any objective analysis of that balancing exercise, and whether the Respondent should have waited longer before dismissing, the Tribunal accepts that the Respondent's decision was made by managers (and, at the appeal stage, by Councillors), with first-hand knowledge with regard to service delivery and the impact of ongoing absence. Moreover, it was reasonable for the Respondent to conclude that the prospects for the Claimant returning to work were uncertain and in the circumstances it could not be said with any confidence that the less discriminatory measure of delaying dismissal would have achieved the Respondent's legitimate objective of requiring satisfactory attendance at work and providing a well-functioning service.

174. As such, the Tribunal is satisfied that the Respondent's justification defence succeeds and the complaint of discrimination arising from disability fails.

Time limits

175. For the sake of completeness, on the basis of its findings in relation to the complaints of discrimination, the Tribunal is not satisfied that any complaints regarding matters which pre-date 18 July 2021 were part of an act extending over a period so as to be in time. The Tribunal has not found there to have been any acts of discrimination which occurred in the period of three months before the Claimant notified ACAS of any prospective Claim. It follows that any earlier alleged acts of discrimination cannot be in time as forming part of a continuing act of discrimination which continued until a date which was less than three months before the Claimant notified ACAS.

176. As such, any complaints which predate 18 July 2021 fall outside the primary three-month time limit for bringing proceedings. No real explanation has been put forward for any delay in bringing proceedings other than that it is clear from the chronology of events to the Claimant thought to notify ACAS very shortly before the three-month time limit expired in relation to his dismissal. This indicates that the Claimant was aware of time limits. Moreover, he had been

assisted by his union both in relation to the FCH and the subsequent appeal. Although the Claimant had mental health symptoms he was able to submit detailed grounds for his grievances and appeals. He did not complain about the alleged acts which are outside the primary time limit until his dismissal. A number of these complaints relate to incidents which were not documented. As such, it is inevitable that there would be prejudice through the adverse impact of the passage of time on the cogency of evidence. By contrast, in terms of any prejudice to the Claimant through not extending time, the Claimant would still have been able to have pursued those complaints which were in time, namely complaints relating to his dismissal. It follows that the Tribunal would not have exercised any discretion to extend time in respect of the complaints which are out of time by reason of having arisen on or before 18 July 2021.

Outcome

177. Accordingly, the judgment of the Tribunal is that all of the complaints are dismissed.

Employment Judge Kenward
Dated 30 May 2024