EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr C Tibby	**Women's Pioneer Housing Ltd**

Heard at: London Central **On**: 5 - 7, 10 - 12 June 2024
In chambers: 13 – 14 June 2024

Before: Employment Judge Lewis
Ms G Carpenter
Dr V Weerasinghe

Representation

For the claimant: Represented himself.

For the respondent: Miss R Owusu-Agyei, Counsel

RESERVED JUDGMENT ON LIABILITY

The unanimous decision of the tribunal is that:

1. The claimant's dismissal was discrimination arising from disability contrary to section 15 of the Equality Act 2010.
2. The other claims are not upheld.
3. The claimant was not unfairly dismissed.
4. The respondent did not fail to make the reasonable adjustments of (1) following the recommendations in the OH report of 20 May 2022 substantially or in full and (2) not dismissing the claimant.
5. The respondent did not directly discriminate against the claimant by (1) managing him differently be making him report directly to Mr Scott-Douglas (2) requiring him to discuss high rent arrears cases with Mr Scott-Douglas before taking them to court (3) dismissing the claimant.
6. The claim that the respondent told the claimant that he must work under Mr Scott-Douglas for court related work or that he was required to discuss high rent arrears cases with Mr Scott-Douglas before taking them to court and that this was discrimination arising from disability is not upheld.
7. The claim for race discrimination is dismissed on withdrawal.

Remedy hearing

The remedy hearing will be held on **14 October 2024**.

A preliminary hearing to make arrangements for the remedy hearing will take place on **29 July 2024**.

REASONS

Claims and issues

1. The claimant made claims for unfair dismissal, direct disability discrimination, discrimination arising from disability under section 15 of the Equality Act 2010 and failure to make reasonable adjustments.

2. When we went through the issues at the start of the hearing, the claimant withdrew his claim for race discrimination. We were careful to check with the claimant that he did wish to do so.

3. The issues at the start of the hearing were slightly modified from those agreed directly between the parties and agreed as follows (subject to our comments below about the PCPs for the reasonable adjustments claim):

Time-limits

3.1. Were the discrimination complaints made within the time-limit in section 123 of The Equality Act 2010. The tribunal will decide:
  3.1.1. Was the claim made within 3 months (plus early conciliation extension) of the act to which the complaint relates?
  3.1.2. If not, was there conduct extending over a period?
  3.1.3. If so, was the claim made to the tribunal within 3 months (plus early conciliation) of the end of that period?
  3.1.4. If not, was the claim made within such further period as is just and equitable?

Unfair dismissal

3.2. Has the respondent shown the reason or the principal reason for the dismissal? The respondent says the reason was capability ie long-term sickness absence or some other substantial reason, ie its inability to sustain the claimant's high absence record. The claimant says he was dismissed because he was an 'expensive' employee, ie because when contracts were changed in 2013 to introduce lower pay rates, he remained on a higher pay rate.

3.3. Was the dismissal fair or unfair, applying the band of reasonable responses? Relevant factors might be in particular:
  3.3.1. Did the respondent adequately warn the claimant and give him a chance to improve?

3.3.2. Did the respondent genuinely believe the claimant was no longer capable of performing his duties?
3.3.3. Did the respondent adequately consult the claimant?
3.3.4. Did the respondent carry out a reasonable investigation, including finding out the up-to-date medical position?
3.3.5. Could the respondent reasonably be expected to wait longer before dismissing the claimant?

3.4. Was there a breach of the ACAS Code on Disciplinary and Grievance Procedures?

3.5. If the dismissal was unfair on procedural grounds, what is the chance that the respondent would have dismissed the claimant even if it had followed fair procedures and on what date?

Direct disability discrimination

3.6. The respondent accepts that the claimant had the disability of epilepsy at the relevant time.

3.7. Did the respondent treat the claimant less favourably because of disability than it treated or would have treated others by:
3.7.1. Managing him differently by making him report directly to Mr Scott-Douglas. (The comparator is hypothetical or Mr Scott-Douglas)
3.7.2. Being required to discuss high rent arrears cases with Mr Scott-Douglas before taking them to court. (This issue was previously said to be not being allowed to take cases to court, but the claimant narrowed it down to this at the start of the hearing.)
3.7.3. Dismissing the claimant?

Discrimination arising from disability

3.8. The respondent accepts it knew the claimant had epilepsy at the relevant time.

3.9. Did the respondent treat the claimant unfavourably by:
3.9.1. Telling him to work under Mr Scott-Douglas for court-related work or (as reformulated at the start of the hearing) requiring him to discuss high rent-arrears cases with Mr Scott-Douglas before taking them to court?
3.9.2. Dismissing the claimant?

3.10. Was the unfavourable treatment because of the claimant's sickness absence?

3.11. Did the claimant's sickness absence arise in consequence of his disability?

3.12. If so, was the treatment a proportionate means of achieving a legitimate aim? The respondent says its aims were:

3.12.1. Providing a consistent and reliable service of a high standard to its vulnerable residents and service users;
3.12.2. Maintaining staff wellbeing, namely taking measures to support the welfare of colleagues through manageable workloads and working practices;
3.12.3. Managing the claimant's absence in line with the respondent's sickness absence policy, including considering and offering support to employees with disabilities and health conditions such as considering reasonable adjustments; and
3.12.4. Ensuring consistent, proportionate and lawful treatment of staff who are absent from work.

3.13. The tribunal will decide in particular:
3.13.1. Was the treatment an appropriate and reasonably necessary way to achieve those aims?
3.13.2. Could something less discriminatory have been done instead?
3.13.3. How should the needs of the claimant and respondent be balanced?

Failure to make reasonable adjustments

3.14. The respondent accepts that it knew at the relevant time that the claimant had epilepsy.

3.15. Did the respondent apply the following provisions, criteria and practices ('PCPs')
3.15.1. The capability process
3.15.2. A practice of ignoring reasonable adjustments recommended in OH reports
3.15.3. A requirement to work full contractual hours of 7 hours/day (after a 4 week phased period)
3.15.4. A requirement to carry out the claimant's full role (after a 4 week phased period)

3.16. Did each PCP put the claimant at a substantial disadvantage compared with someone without his disability? The alleged disadvantage is that, if adjustments were not made, the claimant was unable to sustain his attendance at work and more likely to go through the capability process and be dismissed.

3.17. Did the respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at that disadvantage?

3.18. What steps could have been taken to avoid the disadvantage? The claimant suggests:
3.18.1. Applying the OH recommendations substantially or in full, ie recommendations 1a – 1e in the OH report dated 20 May 2022
3.18.2. Amending the capability process and not dismissing him. (The claimant clarified at the outset that the amendment he meant was 'not dismissing him'.)

3.19. Was it reasonable for the respondent to take those steps?

3.20. Did the respondent fail to take those steps?

Remedy

3.21. If the claimant was successful on any claims, there would be a separate hearing to decide compensation and remedy.

Procedure

4. The tribunal heard from the claimant, and for the respondent from Aidan McCarthy, Justine Hart, Jessica Page and Susan Bernard. There was an agreed trial bundle of 601 pages plus, supplied separately by the respondent during the hearing: the Capability Policy and Procedure approved 24 September 2020; and two sets of Housing Officer payslips, taking us up to page 617 of the bundle. The respondent also provided written closing submissions. At the end of the hearing, after the respondent's closing submissions and prior to his own closing submissions, the claimant supplied a letter from his consultant Neurologist dated 9 September 2023.

Formulation of the issues

5. At the case management hearing, the Employment Judge had identified a 'first draft' list of issues. These identified the reasonable adjustments as (i) applying OH recommendations substantially or in full and (ii) amending the capability process and not dismissing the claimant. The provisions, criteria and practices were identified as (a) the capability process and (b) a practice of ignoring reasonable adjustments recommended in OH reports.

6. It was left to the parties to liaise and agree the final issues. The finalised list of issues prior to this hearing repeated the wording in the first draft regarding the reasonable adjustments claim.

7. This tribunal found the formulation of the reasonable adjustments claim to be imprecise and unsuitable. After discussion with the claimant at the outset, who found it difficult to be precise, it was established that the OH recommendations which he was referring to were recommendations 1a – 1d and the outcome of 1e in the May 2022 OH report.

8. Regarding the appropriate 'provision, criterion or practice' ('PCP'), the tribunal suggested to the parties that a PCP of 'ignoring reasonable adjustments recommended in OH reports' did not get to the underlying issue and it would be better, for example, if in relation to the OH recommendation of reduced hours for 6 months, the PCP was identified as, 'working full contractual hours (subject to the phased return)'. Due to the claimant's anxiety and Ms Owusu-Agyei's reluctance to provide any concrete suggestion, it was difficult for the tribunal at the start of the hearing to identify

the precise PCP without losing a lot of tribunal time. The tribunal then suggested we add the 'working full hours' PCP and identify the other PCPs as we went along, when it became necessary, since everyone understood what the issues were. Ms Owusu-Agyei said she was content to respond to the claimant's submissions.

9. The matter did not become a problem during the case because everyone understood and discussed the various permutations, what the relevant OH recommendations were, what adjustments the claimant had asked for, why he said he needed them and was at a disadvantage otherwise, whether in fact he needed them because of his disability, what the respondent had required and said it would agree to, and the respondent's reasons. During final submissions, the tribunal reminded Miss Owusu-Agyei about this and suggested that the following PCPs were added: 'the requirement to work his full contractual hours of 7 hours/day (after the 4 week phase)' and 'the requirement to carry out his full role (after the 4 week phase)'. Miss Owusu-Agyei was given further time to think about her submissions and offered the opportunity of recalling any of her witnesses or asking the claimant any questions which she felt had been omitted. Ms Owusu-Agyei did not in the event seek to call or explore any further evidence, and she addressed those alternative PCPs in her submissions.

Documents and trial bundle

10. The claimant was concerned that the respondent's solicitors had created the trial bundle which was weighted against him. We told him that he was entitled to have any relevant documents included in the trial bundle. If he told us what was excluded, we could make an Order. In the event, the claimant did not ask for any specific document.

Exchange of witness statements

11. The claimant raised that he had sent his witness statement to the respondent's solicitors two weeks before he received the respondent's witness statements. He was worried that the respondent's witnesses would have been able to alter their witness statements in the light of what he had written. We were concerned about this. The respondent's solicitor, Ms Clot, offered to give sworn evidence regarding what had happened. We accepted this offer. What happened was that the respondent solicitors had agreed an exchange date, though had not confirmed a time on that date. The claimant sent over his witness statement first, but the respondent did not send theirs because the solicitors had asked their client to find additional relevant documents. The respondent's solicitors did not look at the claimant's witness statement or save it on their computer or send it to the respondent's witnesses at any time before they had completed and provided the claimant with their witness statements. They explained all this to the claimant at the time. They also offered him the chance to update his witness statement since the additional documents had been found, though he did not take up that offer.

12. During the tribunal hearing, the claimant suggested to each of the respondent's witnesses that they had had an unfair advantage because they had seen his witness statement before completing their own. Each witness stated that they had not seen the claimant's witness statement until after they had completed and provided their own witness statement.

13. It is unfortunate that the respondent's solicitors allowed this situation to happen, as it can undermine a claimant's confidence. However, we accept the evidence of Ms Clot and the respondent's witnesses that neither the respondent's witnesses nor their legal advisers looked at the claimant's witness statement prior to completing and exchanging their own.

Consultant's letter dated 9 September 2023

14. During closing submissions, Miss Owusu-Agyei made the point that the claimant had not proved that either his dizziness/nausea nor his memory loss were connected with his epilepsy. There was then a lunch break. Prior to the break, the tribunal reminded the claimant that he would have a chance to make his own final comments after lunch. One matter for him to address would be what evidence we had been given to show that (1) his dizziness and nausea and (2) his memory loss was caused by or related to his epilepsy. The claimant immediately stated he had a letter in August this year where his consultant said that the auras were caused by epilepsy. The tribunal asked why he had not produced the letter previously. The claimant said he had not produced it because it was written after the end of his employment. He said he could retrieve the email off his laptop over lunch. The tribunal said we would look at the letter if he was able to produce it by the time we returned from lunch, which he did. The letter was in fact dated 9 September 2023. The tribunal allowed the claimant to produce the letter at this late stage because of its potential importance. The respondent had also been allowed to produce extra documents during the course of the hearing, albeit at not such a late stage. Miss Owusu-Agyei was given the opportunity to comment or cross-examine on the letter, which she did. We make further comments in relation to the letter in our decision below.

Reasonable adjustments for the tribunal hearing

15. The tribunal started at 11 am each day at the claimant's request to accommodate the effects of his disability. On nearly every day, the tribunal also finished at 4 pm. This was not at the claimant's specific request but the tribunal bore in mind that the claimant might get tired. The tribunal asked whether it would be helpful to have a 5 – 10 minute break every half hour. The claimant agreed that it would be helpful and this was also put into effect. Any time the break was delayed, the tribunal had checked with the claimant that he was happy to continue. In addition, although the hearing was held over CVP video, the claimant asked to have a private space in the tribunal building so he would not need to be alone at home through the stresses of a hearing. The tribunal arranged for a private conference room to be allocated to the claimant so that he could each day attend via CVP from that base.

Fact findings

Background

16. The respondent is one of two specialised Housing Associations for women in the UK. It works with women's refuges, women's organisations and homelessness agencies to provide long-term secure and affordable homes. Most of the respondent's tenants are women, many of whom are vulnerable. The respondent is considered to be a small Housing Association. It has approximately 1000 properties, of which roughly 200 are sheltered housing. 800 properties are occupied by single women or women with families.

17. At the time of the claimant's employment, the respondent employed about 40 members of staff. The Housing Management Team consisted of 8 members of staff, including the Director of Housing (latterly, Jessica Page) who led the team. There were two Housing Managers, three Housing Officers, one Housing Assistant and 1 Housing Administrator.

18. The claimant was one of the three Housing Officers managed by the Housing Managers. Each Housing Officer managed a patch of about 330 properties. A Housing Officer's role was to provide support and assistance to the tenants and act as the main regular point of contact. The role covered everything related to the tenancy, dealing with matters such as rent arrears, access to benefits, and calls about maintenance and repairs, anti-social behaviour ('ASB'), neighbour disputes, domestic violence and safeguarding concerns.

19. The claimant's line manager was Matthew Wicks from 28 July 2014 until he went on a sabbatical from 15 April 2019 – 19 April 2020.He briefly managed the claimant again on his return, but he left the respondent on 17 July 2020. Aidian McCarthy took over as the claimant's line manager. He had already managed the claimant during some of Mr Wicks' sabbatical from October 2019 – April 2020. Mr McCarthy left on 3 December 2021. Justine Hart took over as the claimant's line manager on 23 November 2021. She left the respondent on 8 September 2023.

20. The claimant believes he was dismissed because he was too expensive. At the start of the tribunal hearing, he said what he meant by this was that his salary was higher than his colleagues. Later in the hearing, after the respondent produced evidence of the salary of his colleagues, he suggested it was because he was expensive as a disabled employee.

21. At the time of his dismissal, the claimant was paid marginally more than the other Housing Officers. He was paid £33,544 and the other Housing Officers were paid £32,725. The claimant believed that they were paid notably less than him, but we were shown payslips which supported the respondent's contentions. The claimant's colleagues were also entitled to bonuses, which the claimant was not. The reason for the pay difference was that the claimant remained on his old contract, which had been entered into

prior to a 2013 restructure. Moreover, Eadoin, was paid less because she was seconded from Estates Services while the claimant was absent and was acting up as a Housing Officer.

22. The claimant's employment started on 15 August 2005. His normal working week was 35 hours, Monday – Friday. The claimant was expected to work from 9.30 am – 5.30 pm. There was a flexible working policy with core hours from 10 am – 12.30 pm and 2.30 pm - 4.30 pm.

23. The claimant's sick pay entitlement was full pay for 6 months and half pay for a further 6 months. A period of sickness which started within 56 days of another period ending counted as one period of sickness for these purposes.

The claimant's epilepsy

24. The respondent was aware that the claimant had long-standing tonic-clonic epilepsy. He disclosed this when he joined the respondent. An Occupational Health ('OH') report was obtained in June 2017 after a 6-week absence due to epileptic seizures. The report confirmed that the claimant was fit to work.

25. The claimant was first diagnosed at the age of 16 in 1983. He has been prescribed Epilim Chrono since then, with occasional increases in dosage to manage the seizures. He is currently on 1300 mg / day.

26. The claimant has not had a seizure since 2018. When he did have seizures in the past, they would be preceded by auras, which had various effects including dizziness, nausea, sometimes vomiting, fluttering eyelids and an urgent need to empty his bowels. The claimant's concentration would be affected but not his memory as such. The claimant told the tribunal that he experienced these same symptoms (though not followed by a seizure), often on a daily basis, in the periods when he was certified off sick with 'epilepsy' or 'dizziness/nausea' or 'auras' from February 2020 onwards. For this reason, he has always believed those were epilepsy-related symptoms and auras. We accept the claimant genuinely experienced symptoms consistent with his previous aura.

27. The reason the claimant believes his memory loss was also epilepsy-related is by process of elimination. It was ruled out that it was any sign of dementia or old age. He therefore believes it must have been related to his epilepsy and/or the Epilim.

28. On 9 September 2023, the claimant's Consultant Neurologist wrote a 'to whom it may concern' letter. The claimant had asked for the letter for the purpose of the tribunal proceedings. The letter referred to 2 December 2021 as the clinic date, which was the last time the claimant had spoken to him. The letter stated that the claimant had a long history of epilepsy associated with (1) occasional generalised tonic-clonic (grand mal) seizures and (2) daily minor seizures in which he often awakes with eyelid flickering, nausea, dizziness and poor concentration. He takes sodium valproate MR (Epilim

Chrono) 1300 mg OD for seizure control but this does not prevent his minor seizures, and is associated with a tremor of both arms''

29. Miss Owusu-Agyei questioned whether the clinic date should read 2 December 2022 rather than 2021, because the GP notes for 21 February 2022 state the claimant had not had an appointment with his Consultant Neurologist since 2020. On the other hand, the 20 May 2022 OH report states that the claimant's last neurology appointment was in December 2021. Also, Dr David's letter of 1 December 2021, after mentioning epilepsy and auras states 'he is currently being seen by neurology (most recent appointment 2 Dec 2021)'. We therefore accept that the Consultant Neurologist did not make an error when he gave 2 December 2021 as the clinic date.

30. Miss Owusu-Agyei questioned why the letter was disclosed so late despite the claimant being questioned during the tribunal hearing on what his Neurologist's view was. Moreover, the claimant had said in evidence that his Consultant had always said he did not know if the dizziness and nausea was caused by epilepsy. The claimant said he had not disclosed the letter because it was not written during his employment and at one stage he had forgotten about it. The claimant also could not remember whether there were any other letters from his Consultant which he had not disclosed.

31. We have weighed this up. We understand Miss Owusu-Agyei's points. But at the end of the day, we have the letter. There is no reason to believe it is not genuine. The letter is clear. It does not call the dizziness/nausea etc 'auras' as the claimant does, but it says the symptoms are epilepsy-related and refers to daily minor seizures. This makes sense to us, and it is also consistent with the claimant's own genuine belief that it was the same type of symptom as when he had obvious seizures. It is also consistent with many of the GP's fit notes throughout the relevant periods saying 'epilepsy' or 'aura' or 'epilepsy with aura'.

32. We therefore find what is described as 'auras' and dizziness / nausea in the claimant's fit notes was related to his disability of epilepsy.

33. For the purposes of this decision, we will continue to call the daily minor seizures or effects of those 'auras'.

34. The question whether the claimant's perceived memory loss arose out of his epilepsy or epilepsy medication is more difficult. The doctors clearly were not completely certain.

35. As far as we are aware, there was only one fit note during the relevant periods where the GP had put 'memory loss' as opposed to epilepsy / aura / dizziness and nausea. This was the fit note dated 3 February 2021. In his letter dated 1 December 2021, Dr David from the memory clinic said the results did not reflect a dementia profile. Tests showed relative weakness on tasks involving attention, executive functions, memory and language tasks, and he had a relatively slow processing speed in completing tasks which appeared to reflect a cautious approach. Dr David said that cognitive

difficulties might be influenced by the claimant's worries about his mother who had dementia 'and the stressful circumstances of the past two years including work stresses, the covid situation and epilepsy. Epilepsy auras and symptoms might be contributing to reported cognitive and functioning difficulties'.

36. The May 2022 OH report refers to some of the side effects of anticonvulsant medication being 'possible cognitive impairment' but it is unclear whether this is OH's view or whether OH is simply reporting in this section the claimant's view.

37. Dr David only says epilepsy 'might' be a contributing factor and suggests a number of possible causes other than dementia, eg anxiety and stress. Although the claimant told the tribunal that he had asked for repeated training because his memory of processes would fade, the May 2022 OH report only recommends training 'due to his long period of sickness absence'. Going back to 26 February 2020, the claimant wrote to Susan Bernard (Head of HR and Corporate Services) saying that as well as the auras, he was feeling highly stressed at work. He listed stress symptoms including a physical fear of coming into the office, chest palpitations, physical pain at the base of his spine and, when experiencing confrontation by management or abusive tenants, memory loss and lack of concentration'.

38. We have found this difficult, but the problem is that Dr David only says epilepsy auras and symptoms 'might' be contributing to cognitive difficulties. He does not say 'on balance' or 'they are 'probably' contributing. He lists other possible explanations as does the claimant in his letter to Ms Bernard. Therefore the claimant has not proved on the balance of probabilities that the specific symptoms of memory loss were connected with or arose from his epilepsy.

<u>Performance issues and start of long-term sickness</u>

39. When Mr McCarthy took over as the claimant's line manager in October 2019, he was told by his own manager, the Director of Housing, Jessica Page, that there were some concerns around the claimant's performance. Over the next few months, Mr McCarthy identified various concerns himself. Mr McCarthy was concerned about effective and timely communication with tenants, not following-up on work and leading to complaints, and the claimant's general interaction and approach with tenants.

40. On 5 February 2020, Mr McCarthy spoke to the claimant about an incident the previous day when the Chief Executive had overheard the claimant dealing with a tenant query and had intervened because she felt the claimant was dealing with it without empathy. Mr McCarthy then raised his wider concerns about the claimant's performance and said he wanted to have a performance meeting the next week to discuss the issues in detail. The claimant informed Mr McCarthy that he had epilepsy, which was a protected characteristic under the Equality Act 2010. Mr McCarthy followed up with a letter and itemised the incidents he would be raising.

41. Mr McCarthy did not at that point do any research into epilepsy or into whether stress could be a trigger.

42. The meeting was fixed for 11 February 2020. The claimant called in sick that morning. He remained off sick until his return on 14 August 2020 with dizziness, nausea and other aura associated with epilepsy.

43. Mr McCarthy postponed the performance meeting while the claimant was off sick.

44. By way of context, the first national COVID lockdown in the UK started on 23 March 2020.

OH report: 28 April 2020

45. As mentioned above, on 26 February 2020, the claimant wrote to Ms Bernard to explain that as well as the current episode of tonic-clonic epilepsy aruras he was experiencing, he was also feeling highly stressed at work which was causing tremors, chest palpitations, pain, memory loss and lack of concentration. He said that he felt his effective communication levels had at times become affected by lack of confidence by his feeling that his line manager and the CEO might not respect the contribution he had made over 15 years as a Housing Officer.

46. As a result of this, Ms Bernard suggested a referral to Occupational Health ('OH') which the claimant agreed. OH (Dr Basu) supplied a report dated 28 April 2020, which Ms Bernard received on 14 May 2020. The report noted that the claimant had told them he had been experiencing nausea, dizziness and increased bowel frequency most mornings in recent times. The claimant said these symptoms were consistent with the aura he experiences prior to a seizure. However, he was on a stable dose of medication and had not had a seizure since 2018.

47. Dr Basu thought it possible the symptoms might be due to work factors as opposed to instability with his epilepsy management. Dr Basu thought it would be useful for him to 'reflect on this' for about 4 weeks before planning a sustained return to work. Dr Basu said part of a successful return to work process would be to resolve performance concerns to mutual satisfaction. He said that the claimant would be able to attend meetings, but he might be reluctant to attend rather than unfit to do so. Dr Basu said that the respondent might want to consider a review appointment with OH in 4 weeks' time to see if any progress had been made. No recommendations for reasonable adjustments were made at this stage because 'any such suggestions may be skewed by the issues described and may be better judged once he has reflected on the issues described'.

48. The claimant remained off sick. He supplied a fit note that he was unfit for work from 21 April to 25 May 2020 because of 'epilepsy'.

49. Mr Wicks was keen to discuss the OH report with the claimant. He emailed him on 21 May 2020 to suggest they have a conference call on 27 May 2020. The claimant replied that he did not feel well enough to have the call. On 26 May 2020 he was signed off for a further month because of 'epilepsy with aura'. Mr Wicks rescheduled their meeting for 2 June 2020. Mr Wicks wrote again on 27 May 2020 to say it was really important that they discussed the OH report. OH had recommended they have that discussion within 4 weeks, and 6 weeks had now passed. Mr Wicks and Ms Bernard were in communication regarding how to frame this correspondence.

50. On 1 June 2020, the claimant emailed Mr Wicks to say he still did not feel well enough to have the conversation, and he would contact Mr Wicks 'as soon as my circumstances change'. Mr Wicks wrote again on 4 June 2020 to ask what it was about his illness which prevented him talking to Mr Wicks about the report and making various suggestions as to what might help. He set another date of 11 June 2020. The claimant replied that he was reluctant to attend because he experienced general malaise aura including nausea and dizziness for most of the day and he did not wish to elevate his stress levels which could directly or indirectly contribute to an epileptic seizure.

Stage 2 formal sickness review meeting

51. On 19 June 2020, Mr Wicks sent the claimant a copy of what was then the respondent's Attendance Policy referring to section 5. Mr Wicks said the policy stated that the claimant must regularly keep him informed of progress of his recovery and prospective return date. Section 5 set out the procedure for managing long-term absence.

52. Stage 1 of the original Attendance Policy provided for informal review. It stated that where absence is likely to continue for an uncertain period of time, the line manager may arrange to meet periodically with the employee to discuss the employee's state of health, likely duration of absence and any barriers to early return. It stated that the outcome of those meetings would be confirmed in writing.

53. Stage 2 was a formal review. This would be undertaken where the line manager considered that the duration of the expected absence could not be sustained. This would usually take the form of a formal meeting where the claimant could be accompanied. If the line manager believed that a satisfactory return was unlikely to be achieved or sustained within the foreseeable future, they could consider a number of options including alternative employment or part-time work. Dismissal would be the last option after other alternatives had been considered.

54. On 25 June 2020, the claimant's GP provided another fit note stating the claimant was unfit for work from 25 June 2020 – 25 July 2020 because of 'tonic-clonic epilepsy'.

55. As we have said, Mr Wicks left the respondent on 17 July 2020 and Mr McCarthy took over permanently as the claimant's line manager. He had

already managed him to some extent during Mr Wicks' sabbatical. As the respondent had been unable to hold an informal meeting with the claimant to discuss his absence and the OH report, on 17 July 2020, Mr McCarthy emailed the claimant inviting him to a formal long-term absence meeting under Stage 2 of the Absence Management Policy, which was attached together with a copy of the OH report. The letter noted that the claimant had been absent from work since 11 February 2020 and the respondent wanted to discuss progress and if there was any support it could offer. The letter said that as a small not-for-profit provider of social housing, the respondent could not sustain the claimant's absence from work indefinitely.

56. The meeting was fixed for 30 July 2020 on Teams and the claimant was told he could be accompanied by a trade union representative of work colleague. Ms Bernard would be present to take notes. A potential outcome under Stage 2 was dismissal, but they would consider all potential alternatives first.

57. The claimant confirmed that he would take part in the meeting and that he was starting to feel better.

58. On 28 July 2020, the claimant's GP signed him off from 26 July 2020 – 14 August 2020 because of 'tonic-clonic epilepsy'.

59. The Stage 2 formal review meeting took place on 30 July 2020 on Teams. Ms McCarthy and Ms Bernard attended. The claimant was accompanied by his trade union representative, Ms Sen. The purpose of the meeting was to understand the reasons for the claimant's absence and ascertain what support the claimant needed to enable his return to work and sustain an acceptable level of attendance.

60. The claimant said that he was now able to concentrate, his memory was coming back and he wanted to return and get back to his role as Housing Officer. Mr McCarthy said that the job and the role had not changed. The only change was adjustments for the pandemic and that work was being done remotely. He said OH had not recommended any adjustments.

61. Ms Sen said the claimant would benefit from a gradual return to work as was common in cases of long-term absence. Mr McCarthy agreed to this and said he would incorporate training on any new processes and refresher training. The claimant said that his GP was very supportive and could make recommendations as well.

62. The claimant said his concentration and memory was not at its best first thing in the morning when he got dizzy and nauseous and could not function. Typically after 11 – 11.30 am he was able to function.

63. Ms Sen asked that any formal processes prior to the absence be paused, so progress was not undermined. In terms of performance, Mr McCarthy said the concerns he had in February remained concerns, and he still planned to address them, but in an appropriate and supportive way.

64. The claimant's fit note expired on 17 August 2020, when it was agreed the claimant would return to work. On 10 August 2020, Mr McCarthy emailed the claimant asking whether he felt he would benefit from any of a phased return; altered hours; amended duties; or workplace adaptations. The claimant replied the next day saying he believed he would benefit from altered hours ie 11 am – 4 pm for the first month; amended duties to enable him to avoid stressful situations which might bring about his medical condition/aura; refresher training in various aspects of the housing officer role, particularly since Covid; and workplace adaptations to work from home laptop, iPad, iPhone, ergonomic office chair.

65. Mr McCarthy wanted to know what the claimant meant by 'amended duties'. The claimant said that for the first few months at least, he would need to feel his way through to his job to see which aspects of the role caused high stress.

66. On 13 August 2020, Mr McCarthy emailed to say he was happy for the claimant to work between 11 am and 4 pm for the first two weeks of his return. They would review how that was working towards the end of those two weeks and consider any extra medical advice received during that time.

67. Regarding amended duties, Mr McCarthy said, 'Our expectation is that the role is delivered as set out in the job description. However we will make available to you resources around stress management..' They would also provide refresher training and Mr McCarthy would provide regular additional managerial support during the early stages of the claimant's return.

68. Mr McCarthy said they would provide the workplace adaptation tools which the claimant had asked for.

69. The claimant regards Mr McCarthy's response as a tick-box exercise.

<u>Return to work: 17 August 2020</u>

70. The claimant returned to work on 17 August 2020. He was given refresher training in rent arrears, ASB and domestic abuse.

71. The delayed performance meeting took place on 25 August 2020 between the claimant and Mr McCarthy. After their discussion, Mr McCarthy said he felt there had been repeated and significant failure to follow correct procedures across a number of examples. He said it was now likely that a performance management programme would be put in place.

72. The claimant was admitted to hospital on 6 September 2020 with chest pain and he was absent through sickness from 7 – 18 September 2020. He then returned to work.

<u>Capability policy</u>

73. Under the new Capability Policy and Procedure issued on 24 July 2020 and approved by the Board on 24 September 2020, there are three formal stages following informal discussions with the line manager. Formal meetings include the right to be accompanies. After Stage 1, 'if the line manager decides that your performance is unsatisfactory, we will give you a first written warning setting out: (a) the areas in which you have not met the required standards; (b) targets for improvement; any measures such as additional training or supervision …; (d) a period for review: the consequences of failing to improve within the review period or of further unsatisfactory performance'.

74. If performance does not improve within the review period or there is further evidence of poor performance or other serious cases, a Stage 2 capability hearing will be held. The wording of Stage 2 is essentially the same as Stage 1 save that a final written warning will be given. Stage 3 is where dismissal can be the outcome.

75. At clause 2.4, it is stated that the procedure is not contractual 'and we may depart from it depending on the circumstances of any case'.

76. There is section on disability at clause 5 where it says consideration will be given to whether poor performance may be related to a disability and if so, whether there are reasonable adjustments that can be made.

Stage 1: Performance meeting: 15 October 2020

77. On 15 October 2020, Mr McCarthy held a formal capability and assessment meeting with the claimant regarding his performance. The claimant was represented by Ms Sen. The reason for the meeting was Mr McCarthy's concern that the claimant had not been meeting performance standards since his return to work on 17 August 2020.

78. Mr McCarthy said at the start of the meeting that it was under Stage 1 of the new capability policy and that potential outcomes were a further written warning, a final written warning or dismissal because there had been meetings under the previous policy. Ms Sen expressed concern about working from two different policies and whether it was fair to escalate beyond Stage 1.

79. The claimant said he had a lifelong condition of epilepsy which results in memory issues. He was unable to complete logs due to memory issues and had been very stressed about asking Mr McCarthy for support and he was worried about mentioning his memory issues because he feared it would jeopardise his job. He said he had only had 6 hours 15 minutes of refresher training since returning to work. He said he had been off for 6 months and felt he needed further training in all areas. Mr McCarthy said he was happy to arrange that but the claimant must ask. The claimant also mentioned that he was working excessive hours to keep up.

80. The claimant went off sick on 19 October 2020. At that point, the outcome of the capability meeting had not yet been provided.

OH report 8 December 2020

81. The claimant was absent with sickness from 19 October 2020. He provided a fit note covering 26 October – 9 November 2020 with 'epilepsy'. On 4 November 2020, Ms Bernard made another OH referral.

82. OH provided a report dated 8 December 2020. Dr Basu reported that the claimant had found his return to work in August 2020 very challenging. The claimant had said he felt his hospital attendance in September, which had found nothing wrong, may have been associated with these difficulties. The claimant had said his Neurologist started him on a new medication two weeks previously which had helped with his nausea and dizziness. But he cited his memory difficulties which had lasted over a year. He said he was due further tests with his Neurologist in April 2021. On examination, Dr Basu found the claimant had impaired short-term recall and was slower than expected with calculation and concentration, although there were no errors.

83. One of the standard questions on the referral form was whether the claimant was medically fit to work in the role and whether his illness was caused or exacerbated by his work. Dr Basu said 'No, I do not believe so. Scrutiny of his performance may exacerbate his difficulties but from today's discussion, I suspect there may be more significant causes'.

84. Regarding a return to work, Dr Basu said that if he was to return to work, he would benefit from reduced workload with increased support and supervision. The main support would be additional time for tasks (as well as the reduced workload) and reminders or a checklist to ensure activities were completed. A reasonable estimate would be working roughly half to two-thirds of his usual workload. This level of adjustment would be needed at least until the claimant's memory difficulties were fully assessed which may not be until Spring 2021 when he was due to see his Neurologist. It was hard to place a timescale for improvement and these may be permanent difficulties.

Updated Sickness Absence Policy & Procedure

85. A new Sickness Absence Policy & Procedure was issued on 24 July 2020 and approved on 24 September 2020.

86. There is a small section on Disability which says that at each stage of the sickness absence meetings procedure, particular consideration will be given to whether there are reasonable adjustments which could be made to the job requirements or other aspects of working arrangements that will assist a return to work.

87. Under the new Policy, there are three Stages. Stage 3 states, 'Where you have been warned that you are at risk of dismissal, we may invite you to a meeting under the third stage of the sickness absence procedure. This may be after a single absence meeting'. Termination is possible at Stage 3.

Stage 3 meeting under Absence Policy: 27 January 2021

88. On 5 January 2021, the claimant informed Mr McCarthy that he was ready to return to work. Mr McCarthy told him that they first needed to hold a meeting under Stage 3 of the Sickness Absence Policy and Procedure to discuss his absence and the OH report and to establish what reasonable adjustments were needed before he could return. He would be put on paid leave until such a meeting had taken place. The claimant was therefore regarded as on paid leave, not sickness absence, from 9 January 2021.

89. On 27 January 2021, Mr McCarthy conducted the Stage 3 formal meeting. The claimant was again represented by his trade union. Mr McCarthy introduced the meeting by saying that they would be considering whether there was a possibility of the claimant returning to work or achieving the desired level of attendance in a reasonable time and they would consider the possible termination of his employment.

90. The claimant said he was feeling much better: the nausea and dizziness had gone due to the medication he was taking. He said the nausea and dizziness was caused by the epilepsy aura and was the main cause for his absence. He still had issues with memory loss and would increase calendar reminders in Outlook.

91. The claimant was asked what else would help support him. He felt he would like training on everything, almost as if he was a new staff member starting from scratch.

92. Regarding the workload issue, Mr McCarthy asked whether he felt one half or two thirds would support him. The claimant said he thought working full-time 35 hours/week at a reduced workload of 50% would be best. He would look to increase that over time but could not say what time-scale. The claimant said workload was a trigger for a relapse but he thought the new medication would stop that. There was some discussion regarding whether the claimant would want to work part-time or job-share. The claimant said he would consider it, but the workload still needed reducing pro rata.

93. The claimant's fit note for 3 February – 20 April 2021 stated that he was off because of memory impairment and that he may be fit to return if he was given additional time to or, a reduction of workload and checklist reminders as OH recommended until the spring when he was due to be seen by a Neurologist.

94. On 10 February 2021, Mr McCarthy wrote to the claimant with the outcome of the meeting. He said the respondent would accommodate the requested adjustments until the neurological appointment on 30 April 2021. This allowed for the neurological appointment on 3 April 2021. After 30 April 2021, if adjustments were still needed, they would have to review whether they could be accommodated and the appropriate pay rate. The relevant adjustments were returning on full pay on a 50% workload across the claimant's contractual hours of 35/week.

Return to work: 22 February 2021- October 2021

95. The claimant returned to work on 22 February 2021. Prior to returning, he stopped taking the second medication because he felt better, He had been taking Epilim for much of his life and it caused side-effects. He was keen not to overload on another medication with side-effects. Mr McCarthy also set out a programme of full training.

96. The claimant was provided with the training as if he was a new starter and was given increased supervision.

97. The claimant was on 50% workload up until 30 April 2021. Then at the start of May 2021, the claimant carried out 75% of his workload for two weeks. Then the claimant felt able to return to a 100% workload from 17 May 2021.

98. During the claimant's sickness absence, Mr McCarthy had divided his high priority work amongst the remaining team. For the period that the claimant was working 50%, his patch was divided into two: the other half of his patch was shared between the other two Housing Officers, Ms Din and Mr Scott-Douglas. Mr Scott-Douglas and Ms Din were unhappy when they were told about this extra workload and we accept Mr McCarthy's evidence that it reduced Ms Din to tears. To assist them, Mr McCarthy met them individually every week and took ownership of their more complex cases.

99. On 18 August 2021 the claimant went off sick for 9 days with Covid. He returned on 27 August 2021.

100. Ms Din left at the start of August 2021. In her exit interview form, she gave two reasons for leaving. The first was that her new role was entirely remote working and she did not have to go into people's houses, which was a massive benefit due to Covid. She then said that due to there being only two Housing Officers for a long period of time, it had created a lot of pressure and more work than had been possible to achieve. That had led to struggling to switch off from work and continuous work load pressures causing unnecessary additional stress. The claimant told the tribunal that Ms Din's new job was in marketing, which matched what she had studied at university, and where she felt she could have career progression.

101. Later in the form, Ms Din said that the team had dealt with not having enough Housing Officers because of the claimant's sickness absence for far too long. No cover had been provided, leaving two Housing Officers to do the work of three. Housing is a front line service and not hiring temp staff had impacted morale and caused additional stress. She said she had been working as a 'Housing Officer and a half' during the claimant's absence.

102. In September 2021, Mr Scott-Douglas left his full-time role to go to university. However, he was appointed on a part-time basis until the end of the year to support the two new Housing Officers during their first few months

with the respondent, and specifically to focus on high level rent arrears. This included setting up payment agreements, monitoring and enforcing the agreements and taking legal action if required. This was an important area for the respondent because its income was down as a result of the pandemic which had caused more tenants to get into rent arrears.

Was the claimant told he had to report to Mr Scott-Douglas

103. The claimant says that the respondent made him report to Mr Scott-Douglas, who was less experienced than him; that he was told to work under Mr Scott-Douglas for court-related work and that he was required to discuss high rent arrears with Mr Scott-Douglas before taking them to court.

104. Originally the claimant had claimed that the respondent did not allow him to take cases to court, but he amended this at the start of the hearing to confine it to discussion of high rent arrears cases.

105. Mr Scott-Douglas was not disabled, as far as we know. He was less experienced than the claimant. He had worked for the respondent for far less time than the claimant.

106. The respondent denies that the claimant was ever made to report to Mr Scott-Douglas or that he was required to discuss high rent arrears cases with him before going to court.

107. The claimant's evidence on these allegations was weak to the point of non-existent. He did not deal with them in his witness statement. In his evidence to the tribunal, when he was asked when he received the instruction to report to Mr Scott-Douglas, the most he could say was that he 'may' have received an oral instruction from Mr McCarthy to report to Mr Scott-Douglas in relation to high rent arrears and any court action when he returned to work in February 2021. He gave no further detail.

108. The documentary request for permission to appoint Mr Scott-Douglas as a part-time housing officer refers to him assisting a team containing two new Housing Officers during their first few months with the respondent and specifically to focus on high level rent arrears. These would have been the replacement Housing Officers for himself and Ms Din. The form does not say anything about supervising or assisting the claimant.

109. An email from the claimant to Ms Page dated 27 September 2021 shows that the claimant was attending court for one of his own cases involving high rent arrears (as well as other maters) on that date.

110. We accept the respondent's evidence that Mr Scott-Douglas was simply performing the admin work for court cases with high rent arrears for the whole team for a 3 month period. This would have involved liaising with the relevant Housing Officer. The claimant was not singled out and he was never required to report to him prior to taking high rent arrears cases to court or on any other matter, either during this three month period or previously when he was

employed as a permanent Housing Officer. Nor was he required to discuss the cases with Mr Scott-Douglas before taking them to court.

Performance meeting: 22 October 2021

111. A further formal performance meeting was held with Mr McCarthy on 22 October 2021. The claimant was represented by Ms Sen.

112. Ms Sen said the claimant had an appointment with the memory clinic on 9 November and the clinic may give guidance. Ms Sen said she had encouraged the claimant to apply to Access to Work, who might make useful recommendations. She said the way it normally worked was for the claimant to approach them and give a named person at the respondent for them to contact. The way the process worked was for the claimant to approach them and give a named person at the respondent for them to contact. That process would take some time. She said they should wait for a full assessment before having a formal performance meeting.

113. Mr McCarthy did not agree. He said one of the key things they were concerned with was not using their systems properly and the systems were designed so that it was not necessary to remember things. There were tools so that someone did not need to hold everything in their memory. He was frustrated that the claimant did not tell him when he could not do things because of health issues. The claimant said he was happy to talk to Mr McCarthy but he found him unapproachable. He felt he had regular OH appointments and they never came up with any concrete adjustments. He felt like he was being set up to fail.

114. Regarding training, the claimant said he felt happy in the area of rent arrears. He needed monthly refreshers on ASB and three monthly on everything else. He did not need the new starter induction again. The claimant needed these regular refreshers to remind him of what he had been taught and how to use the systems.

115. The claimant said he would prefer to keep working at 50% over 35 hours, at least until OH in conjunction with the memory clinic and his Neurological Consultant could come up with a plan of working that was long-term rather than short-term.

116. Mr McCarthy wrote later the same day attaching the minutes for agreement. He said he did not find the health issues mitigated the significant service failures, and he felt a warning was appropriate, particularly as the claimant had not raised health issues with him at any stage since returning to a 100% workload. However, he wanted a meeting to talk this briefly through.

117. This further meeting appears to have been overtaken by events.

Sickness absence from 3 November 2021 and OH report 18 November 2021

118. On 3 November 2021, the claimant went off sick and a further referral was made to OH.

119. OH provided a report dated 18 November 2021. Dr Giridhar noted that the claimant had had a long wait to obtain a memory assessment. He had initially been seen by a psychologist from the memory clinic on 9 and 16 November 2021 and he had been advised to undergo further tests as no definitive diagnosis had been made, Dr Giridhar recommended that the claimant stay off work until he had had a full assessment from the memory specialist, and a treatment plan formulated. At this stage, he was not fit to return to work. A reduction in workload had benefitted him to some extent but had not helped his capability to a large extent. Dr Giridhar suggested he supply OH with the assessment reports once done and then be reviewed again by OH.

120. The OH report did not recommend any reasonable adjustments as such.

Stage 1 Absence meeting 21 April 2022 and OH report 20 May 2022

121. Mr McCarthy left on 3 December 2021. Justine Hart then took over as the claimant's line manager. The claimant had been off sick since 3 November 2021.

122. Ms Hart held a Stage 1 absence meeting with the claimant on 21 April 2022. The claimant's fit notes from November 2021 until April 2022 had all stated the claimant was off either with dizziness/ nausea or epilepsy.

123. Ms Bernard attended from HR. The claimant was represented by Ms Sen. The claimant said he was feeling better and would be fit to return on the expiry of his current fit note on 13 May 2022. Ms Hart asked whether the claimant had yet had a full assessment from a memory specialist. The claimant said that he had a full report. He had not yet provided it to the respondent as he preferred to share it with OH.

124. The claimant was put on paid leave while the OH report was obtained and its recommendations discussed.

125. The respondent made an OH referral. They told the claimant that he could not return until they had an OH report confirming he was well enough to do so and they could make any necessary reasonable adjustments. Meanwhile the claimant was on paid leave.

126. The OH report was carried out on 20 May 2022.

127. Dr Fernandes summarised the health issues. He noted that 'this employee is compliant with long-term anticonvulsant medication, and some of the side effects of this treatment are minor hand tremors and possibly cognitive impairment'. In the context, it is unclear whether he is reporting what the claimant has told him or it is his own observation about the side-effects – probably the former. The report went on, 'Furthermore, Mr Tibby states that any stressful situation within the work environment can exacerbate

neurological symptoms, including hand tremors, speech disturbance and memory impairment'.

128. Dr Fernandes said he had looked at the report of the local memory clinic in December 2021 and there was currently no evidence of a dementia process. He said the claimant was experiencing distressing auras on a daily basis from early morning until up to 5 hours. Dr Fernandes said the claimant was fit to return to work from 30 May 2022 with the stipulated recommendations, ie
    128.1. Due to auras experienced in the mornings, working from 12 am – 4 pm for the next 6 months as the symptoms were investigated and appropriately treated.
    128.2. Training to support his return to work.
    128.3. The avoidance of dealing with challenging scenarios for the next 6 months as this exacerbates his neurological symptoms, ie antisocial problems, aggressive tenants and visiting tenants.
    128.4. Home working predominantly for the next 6 months, but he was able to attend the office for meetings and to support other junior employees.

129. Dr Fernandes recommended a review by OH in 2 months to confirm progress and address any new or continuing concerns.

130. Ms Hart met the claimant on 14 June 2022 to discuss the OH report's contents and recommendations. Regarding working hours, the claimant said he was unable to work more than 4 hours/day for the next 6 months and the earliest he could start was 11.30 am. He ruled out the suggestion of 1.30 – 5.30 pm. This was more difficult for the respondent because it means there would have to be cover for two separate periods, ie until 11.30 am and then from 4 to 5.30 pm.

131. Regarding training, the claimant felt he would need monthly refresher training.

132. Regarding homeworking, he said he was able to attend the office for staff-meetings but he was unsure if he could come to the office to manage appointments with residents. He said he would play that by ear.

133. The claimant said he was currently unable to perform most aspects of the role and could only manage rent arrears. In respect of rent arrears, if a tenant became aggressive (as opposed to merely angry) he would need to pass on the call. He could not manage ASB cases, neighbour nuisance, visit tenants, respond to tenants attending the office with queries and was unsure whether he could cover the phones during the phased 6 month period. Ms Hart said she believed that pay would be on a part-time basis through the period. The claimant insisted that he would want full pay.

134. We note here that time taken on rent arrears is on average about 30% of the role.

135. The claimant also confirmed that he had made an Access to Work application on 10 May 2022 and they had said that applications were taking approximately 12 weeks to process. Ms Hart asked what support he had requested. The claimant said he had not asked for anything specific.

136. Ms Hart summarised her understanding and provided her decision in a letter dated 5 July 2022. She said they were unable to accommodate the requested adjustments for 6 months whilst also paying the claimant his full salary due to the ongoing impact on the rest of the team in relation to their morale and well-being, and the cost of covering the additional duties. Instead, the respondent would accommodate the recommendations for a phased return over 4 weeks: week 1 at 4 hours/day; week 2 at 5 hours/day; week 3 at 5 hours/day and week 4 at 6 hours/day. On week 5, the claimant would resume his contractual 7 hours/day. The claimant's return would include a programme of familiarisation and learning. and there would be a review after 2 months as OH recommended. The letter stated:

Staffing in the team at this time

137. When Ms Hart started, the team had (apart from the claimant) two full-time Housing Officers (Shaima and Jason) and Mr Scott-Douglas on his short-term contract. They covered the claimant's work between them and Ms Hart covered some of the high level ASB work. Jason, left in December 2021 and was covered by a temp, Eric. He stayed until Hanna, a permanent replacement for Jason was recruited and trained. In February 2022, a further temp was recruited to help with the claimant's work. She only stayed 1 or 2 weeks. Then in mid-March 2022, Eadoin was seconded from another team to act-up and help cover the claimant's patch. The team was then Hanna, Shaima and, covering the claimant, Eadoin. Shaima left in July or August 2022. This did leave Eadoin's own team short and the uncertainty unsettled her.

Service delivery

138. The claimant's patch was the worst performing in the independent quarterly resident satisfaction surveys in 2021 and 2022. As at April 2022, for example, rent arrears on the claimant's patch were nearly 6% compared with a total of 4.10%.

The claimant's return to work: 15 August 2022 (after annual leave)

139. The claimant then took approved annual leave, returning to the office on 15 August 2022. As Ms Hart was not in the office, his return to work meeting was conducted by Jessica Page, Ms Hart's line manager. The claimant said he did not feel 4 weeks adjustment time was realistic when he had been given 4 months on the previous occasion. He felt he would relapse at this pace. Ms Page said the organisation could not sustain a longer period like last time, but she suggested he keep talking to Ms Hart through his phased return.

140. The claimant said he could be doing a specialist role such as rent arrears, thus avoiding stressful work arrears, and someone else could have another specialism. In her evidence to the tribunal, Ms Hart said that it was not feasible to have the claimant work purely on rent arrears, partly because that job also involved going out to tenants and to court and potentially stressful situations, and partly because it would go against the respondent's fundamental model which was that each tenant had a single point of contact or all issues.

141. On 18 August 2022, Ms Hart had a discussion with the claimant to help him organise himself. The key points of the meeting were put in a letter of the same day. The claimant said he needed training from scratch, but it became clear that certain procedures he remembered well. Ms Hart said it was therefore really important for him to lead on his training requirements and they could tailor the training accordingly.

142. Regarding sickness, Ms Hart said there was a target and expectation of no sickness absence for the next 6 months. The claimant said it was unlikely that he would be able to meet that target. Ms Hart said she completely understood that he had a long-term condition and they would have to see how things went.

143. The claimant mentioned that he was entitled to sick pay after 56 working days. Ms Hart says she took that as a 'veiled threat' and that he was planning to go off sick again as soon as he was entitled to sick pay. We do not see the claimant's observation as any kind of threat or that the claimant had any 'plans' to go off sick again. He was simply stating that he thought the target of no absence at all in 6 months was unrealistic, especially as the OH adjustments had been refused.

<u>Access to Work</u>

144. During the formal performance meeting on 22 October 2021, Ms Sen had suggested that Access to Work may be able to help and she had encouraged the claimant to apply. The claimant did not apply until 10 May 2022. He told Ms Hart in their 14 June 2022 discussion that he had made the application on 10 May 2022 and they advised it would take 12 weeks.

145. On 30 September 2022, Access to Work contacted the claimant and asked him to provide 3 taxi quotes. Regarding a support worker, it said Access to Work could consider paying up to 100% if the support worker would provide enabling support, but if the support worker was required to do the whole task, it could only consider paying up to 20% of the contracted hours. Access to Work attached a record of tasks to breakdown the required support and asked him to provide hourly rates quotes for 3 support workers. The attached form had four tables in which the claimant had to note (table 1) tasks he could perform independently; (table 2) tasks he needed a support worker for to enable him to do his job, eg note-taking, photocopying, filing, proof-reading etc; (table 3) duties which were less frequent or ad hoc in respect of which he needed support, eg monthly meetings, annual reviews, training

days; (table 4) and reasonable adjustments which the respondent had already made.

146. The claimant forwarded the email that day to Ms Hart and Ms Bernard.

147. The claimant never identified at the time or in his witness statement which tasks he believes a support worker could have carried out for him. In his evidence to the tribunal, the claimant simply suggested he could do some parts of his job and the support worker could do some parts of his job. For example, the support worker would deal with some categories of query and might be on hand to take over a call if a tenant became aggressive. As we understand it, the claimant was suggesting that a support worker actually carry out elements of the Housing Officer job.

Dismissal

148. From 31 August 2022 – 2 September 2022, the claimant was off sick for three and a half days with a virus he had caught from his grandson. As a result of this, Ms Hart invited the claimant to a meeting under Stage 3 of the Sickness Absence Policy and Procedure. The invitation letter said this was based on the statement in the letter of 5 July 2022 that: 'If this short period of further accommodation does not result in you being able to return to your full role, we will need to move to the final stage of the relevant formal policy and procedure and consider whether or not we can continue to employ you'.

149. The purpose of the meeting was 'to consider whether there is a reasonable likelihood of you returning to work and you achieving and sustaining the required level of attendance'. The letter stated that under Stage 3 of the Sickness Absence Policy, they may consider outcomes up to and including the termination of the claimant's employment.

150. The Stage 3 meeting took place on 12 September 2022 in front of Ms Hart. Ms Bernard was present too. The claimant was represented by Ms Sen. At the end of the meeting, Ms Hart said she would inform the claimant of the outcome in writing by 20 September 2022. This was then deferred while confidential settlement negotiations took place. We have not considered the content of those negotiations as they were 'without prejudice' and the respondent did not waive privilege.

151. A few days after the Stage 3 meeting, Ms Hart, in discussion with Ms Bernard, had reached the decision to dismiss the claimant. However, the decision was held back because settlement discussions were taking place.

152. On 30 September 2022, the claimant emailed Ms Hart and Ms Bernard to say that Access to Work had just called him and would be in touch with Ms Bernard shortly regarding the financial support package which they could provide.

153. On 3 October 2022, Ms Hart was told that the negotiations had come to an end and that she could give the claimant the decision to dismiss. Ms Hart and

Ms Bernard wanted to give the claimant the decision face-to-face. They decided that they would do so on the next day.

154. In the morning of 4 October 2022, the claimant asked Ms Hart for her assistance to complete the Access to Work application form. Ms Hart said the claimant should put something in her diary for the following day. The claimant believes this proves that at this point, no decision to dismiss him had been made, and that the motivation for dismissal was the Access to Work application. Ms Hart says the decision had been made but she did not want to reveal to the claimant in this way that a decision had been taken to dismiss the claimant.

155. The claimant then bumped into Ms Bernard at about 1.30 pm when he went outside the building to smoke a cigarette. He asked her to join the meeting about Access to Work the next day. Ms Bernard said she did not need to be present at that meeting.

156. We accept the respondent's evidence on this. Ms Hart and Ms Bernard did not have to give the claimant the outcome of the Stage 3 meeting verbally. They could have written to him. They thought it would be kinder to tell him in person. They had decided they would do so on 4 October 2022. When the claimant earlier that day asked to meet Ms Hart to complete the Access to Work form, she could hardly at that point have said to him, 'I am not going to meet you about that because we have decided to dismiss you'. That would have been a terrible way to deliver the news. So we can understand why she just said they would meet the following day.

157. At around 2.30 pm on 4 October 2022, Ms Hart approached the claimant when he was working at his desk and asked whether he had time for a quick meeting downstairs. The claimant agreed. He was taken into a meeting room where Ms Bernard was also present. They gave him the dismissal letter to read. They then told him his employment was terminated with immediate effect and he would be paid in lieu of notice.

158. The claimant is upset that he was not invited to bring his trade union representative to this meeting.

159. The claimant was then told to collect his belongings and was discreetly escorted out of the building by Ms Hart. We accept the claimant's evidence that Ms Hart also told him not to say anything to anyone. There appears to have been an incident at the same time with a woman making a fuss in reception, and Ms Hart advised the claimant to steer clear.

<u>Reasons for dismissal</u>

160. Ms Hart confirmed the reason for dismissal in a letter dated 4 October 2022. The letter noted that in 2020, the claimant was absent for 192 out of 246 working days with a 22% attendance record; in 2021, he was absent for 55 out of 252 working days with an attendance record of 78%; and since the start of 2022, he had been absent 95 out of 180 working days with an

attendance record of 47%. She said the respondent had obtained OH advice on four occasions during that period and apart from the last report, had implemented the reasonable adjustments, but this had not resulted in the claimant attending work on a regular basis. In a return to work meeting with Ms Page (in Ms Hart's absence) on 15 August 2022 and in a 1:1 with Ms Hart on 18 August 2022, the respondent had explained the need to improve the claimant's attendance record. On the latter occasion, Ms Hart had set a target of no sick days over the next 6 months. She had asked the claimant what action he would take to meet this target and he had said it was unlikely he would be able to do so. Then on 31 August 2022, the claimant was absent again.

161. Ms Hart said they had concerns about the effect of the claimant's absence on service delivery and on his colleagues. His role was a front-facing critical link to residents and his patch had seen a decline in some aspects of the service and resident satisfaction levels. In terms of cover, the respondent had either been unable to do so, with impact on the claimant's colleagues, or had redistributed limited resources from elsewhere, which had a knock on effect on service-delivery elsewhere.

162. Ms Hart said that the claimant was warned in their letter of 5 July 2022 that the respondent would need to consider dismissal 'under the relevant policy and procedure, in this instance, the Sickness Absence Policy and Procedure'. The situation currently suggested that the claimant's attendance now or for the foreseeable future would not improve. The claimant was therefore dismissed with 12 weeks' pay in lieu of notice. The claimant was told of his right of appeal.

Alternative employment

163. The respondent had previously considered whether there were any other roles in the organisation which the claimant could carry out, but they did not think that there were any. The majority of the roles, including even the role of the Chief Executive, were front-facing. There was only one administrative role and it was not vacant. There was no existing role for a dedicated rent arrears person, but anyway any such role would involve going out and visiting residents and attending court, which were all matters the claimant now had concerns about. It would also go against the model of tenants having a single point of contact.

Access to Work

164. As regards the outstanding Access to Work application, Ms Hart and Ms Bernard did not see how it would help. The claimant had never articulated to them exactly what he thought Access to Work could provide and how it would solve the issues. Moreover, as we have said, the respondent's business model was that tenants had a single-point of contact for all their concerns. It was not consistent with that model to divide up the claimant's tasks or to have him hand over calls when they became difficult.

The respondent's finances

165. The respondent owns quite valuable assets in that it has properties in high value areas. But that is different from having available cash to spend. Ms Page explained that the respondent's finances are tight. Its income is entirely from rents. The rental income was about £7 million in the year of the claimant's dismissal. The rental income does not cover all expenditure, eg on kitchen and bathroom refurbishment. In the last few years, the respondent has taken out over £1 million in loans to cover this. Under the loan financing, the annual surplus must be at least 120% of the loan interest. The respondent had a surplus of roughly £280,000 in 2022. But it did not feel it could take money out of that surplus to recruit an extra staff member, for example, because it could not risk breaching the loan covenants. The figures were very tight and the respondent looked at them every month. In addition to all this, rent arrears had increased as a result of the pandemic across the sector. Housing Associations are tightly regulated and the respondent has to be careful to meet the viability standards.

166. Compared with other Housing Associations in the sector, the respondent is extremely small. It does not have the resources that others do. Its properties are more expensive to maintain than many others because many of them are old mansion blocks and even listed buildings.

167. The claimant referred to some developments which had cost the respondent a great deal of money. Ms Page explained that these had not been funded out of rental income. They had been funded from loans and government grants or other special arrangements.

168. We accepted Ms Page's evidence regarding the respondent's financial position. We found the way she expressed herself and the detail she gave to be credible.

The claimant's appeal

169. The claimant appealed by letter dated 10 October 2022. He said it would have been reasonable to wait for the Access to Work assessment, and to have set a further review period after his last period of absence. He said he had been at work since 15 August 2022 and prior to that, he had been on authorised leave from 12 May 2022 even though he was fit to return for that whole period. Procedurally, he felt it was an error to hold the sickness meeting at Stage 3 because he had 3.5 absence days which were unrelated to his disability, whereas his long-term absences in the past were mainly related to his disability. He had also found it upsetting to be escorted out the building.

170. The appeal was heard by Ms Page on 18 November 2022. Ms Bernard was present. The claimant was accompanied by his union representative.

171. Ms Page wrote to the claimant on 18 November 2022, rejecting the appeal.

172. Regarding the contention that the hearing should not have been held at Stage 3, Ms Page said that the claimant had been told in writing on 5 July 2022, following the sickness absence meeting on 14 June 2022, that any further absence would be dealt with under Stage 3. Ms Page cited the part of the Procedure which said that the employer could go to Stage 3 even after a single absence meeting where an employee had been warned they were at risk of dismissal.

173. Ms Page said that she accepted that it had been distressing for the claimant to be escorted from the premises, but this is not unusual when a person is told verbally of their dismissal. Part of the reason was also because of the incident happening in reception.

Law

Unfair dismissal

174. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), eg capability.

175. Under s98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.'

176. The question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for the tribunal to substitute its own decision.

177. Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health, it is necessary that he should be consulted and the matter discussed with her and that, one way or another, steps should be taken by the employer to discover the true medical position. The basic question then is whether, in all the circumstances, the employer can be expected to wait any longer and if so, how much longer? (East Lindsey District Council v Daubney [1977] IRLR 181, EAT; K Spencer v Paragon Wallpapers Ltd [1976] IRLR 373, EAT.)

Direct disability discrimination

178. Under s13(1) of the Equality Act 2010 direct discrimination takes place where, because of disability, a person treats the claimant less favourably than that person treats or would treat others. Under s23(1), when a comparison is

made, there must be no material difference between the circumstances relating to each case. Under s23(2), where the protected characteristic is disability, the circumstances relating to a case include a person's abilities.

Discrimination arising from disability

179. Section 15 of the Equality Act 2010 prohibits discrimination arising from disability. This occurs if the respondent treated the claimant unfavourably because of something arising in consequence of the claimant's disability. The respondent has a defence if it can show such treatment was a proportionate means of achieving a legitimate aim.

180. The tribunal must decide (1) whether the claimant was treated unfavourably and by whom; (2) what caused that treatment — focusing on the reason in the mind of the alleged discriminator (consciously or unconsciously); (3) whether the reason was 'something arising in consequence of the claimant's disability'. This only needs to be a loose connection and might involve a number of causal links. At this stage, it is an objective question which does not depend on the thought processes of the alleged discriminator. (Pnaiser v NHS England and anor [2016] IRLR 170)

181. The 'something', must be more than a trivial part of the reason for the unfavourable treatment. (Sheikholeslami v University of Edinburgh [2018] IRLR 1090, EAT.)

182. The respondent will not be liable under section 15 if it shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability.

Multiple reasons for the respondent's actions

183. Where the protected characteristic is not the only reason for the respondents' actions, the House of Lords in Nagarajan v London Regional Transport [1999] IRLR 572, said this:

> Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. ……If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.

Failure to make reasonable adjustments

184. The duty to make reasonable adjustments is set out in sections 20 – 21 of the Equality Act 2010 and in Schedule 8. Where a provision, criterion or practice applied by the employer or a physical feature of the premises or a lack of an auxiliary aid puts a disabled person at a substantial disadvantage in comparison with people who are not disabled, the employer must take such steps as it is reasonable to have to take to avoid the disadvantage or provide the auxiliary aid. Substantial' means more than minor or trivial (EqA s212(1)).

185. Not all one-off acts and decisions necessarily qualify as PCPs. In order to so qualify, they must be capable of being applied in future to similarly situated employees. The function of a PCP is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The act of discrimination that must be justified is not the disadvantage that a claimant suffers but the practice, process, rule or other PCP in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not, it must be capable of being applied to others. It is not necessary for it to have been applied to anyone else in fact. (Ishola v Transport for London [2020] IRLR 368, EAT.)

186. Formulating a PCP as a policy or procedure, for example, the Sickness Absence Policy itself, fails to encapsulate why the Policy may in certain circumstances adversely affect disabled workers – or at least those whose disability leads to absences at work. If special allowance can be made under the Policy for a disabled person, even if in the particular instance the employer does not exercise that discretion, then the Policy will not be discriminatory. The appropriate formulation of the PCP [in a case like this] is that the employee had to maintain a certain level of attendance at work in order not to be at the risk of disciplinary sanctions. That is the provision, breach of which might end in warnings and ultimately dismissal. A disabled employee whose disability increases the likelihood of absence from work on ill-health grounds would be disadvantaged. While no doubt both disabled and able-bodied employees would suffer stress and anxiety if they were ill in circumstances which might lead to disciplinary sanctions, the risk of this occurring is obviously greater for that group of disabled people whose disability results in more frequent and perhaps longer absences, They would find it more difficult to comply with the requirement relating to absenteeism and therefore would be disadvantaged by it. [General Dynamics Information Technology Ltd v Carranza [2015] IRLR 43, EAT; Griffiths v Secretary of State for work and Pensions [2016] IRLR 216, CA.)

187. In cases for failure to make reasonable adjustments for the claimant's disability, by the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made. The claimant must establish that the duty has arisen and there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. It is not enough to show there was a provision, criterion or practice which caused substantial disadvantage. There must be evidence of some apparently reasonable adjustment which could be made. That is not to say that in every case the claimant would have to provide the detailed adjustment that would need to be made before the burden would shift. It would, however, 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. (Project Management Institute v Latif [2007] IRLR 579, EAT.)

188. There is no reason in principle why a requirement to protect an employee's pay in conjunction with other measures to counter the employee's disadvantage cannot be a reasonable adjustment. It will not be an every day

event for a tribunal to conclude that an employer is required to make up an employee's pay long-term to any significant extent, but it is possible to envisage cases where that might be part of a package of reasonable adjustments. The question will always be whether it is reasonable for the employer to have taken that step. (G4S Cash Solutions (UK) Ltd v Powell [2016] IRLR 820.)

Discrimination burden of proof

189. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that the respondent has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless the respondent can show that it did not contravene the provision.

190. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. Once the burden of proof has shifted, it is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

191. The tribunal can take into account the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

The relationship between s15 discrimination and unfair dismissal

192. Although it might seem strange to a non-lawyer, the fact that a dismissal is discriminatory does not necessarily mean it is unfair (and vice versa). That is because there are different legal tests for discrimination and unfair dismissal. For unfair dismissal law, the tribunal must not substitute its own opinion for that of the employer. The tribunal might not agree with the employer or might think another employer would have not dismissed the claimant, but if the tribunal thinks that dismissal was a reasonable option, the dismissal will not be unfair. Unfair dismissal law gives a significant latitude of judgment to an employer. On the other hand, the test under s15 of the Equality Act is an objective one according to which the tribunal must make its own judgment. (City of York Council v Grosset [2018] IRLR 746, CA; Knightly v Chelsea & Westminster Hospital NHS Foundation Trust [2022] EAT 63]

Conclusions

193. We now apply the law to the facts to decide the issues. If we do not repeat every single fact, it is in the interests of keeping these reasons to a manageable length.

Failure to make reasonable adjustments: not dismissing the claimant (Issues 3.14 – 3.20)

(i) The capability process (Issue 3.15.1)

194. The first question is whether the respondent applied a PCP of 'the capability process'.

195. The PCP of 'the capability process' and the suggested reasonable adjustment of amending the process by not dismissing the claimant was not clearly argued before us. The claimant did not identify which aspects of the 'process' he meant.

196. The respondent did follow its Capability Policy and Procedure issued on 24 July 2020. A Stage 1 performance meeting was held on 15 October 2020. A further formal performance meeting was held on 22 October 2021. There were also less formal meetings in between. We therefore find that the respondent did apply the capability process to the claimant and the capability process was a PCP.

197. The next question is whether applying the capability process put the claimant at a substantial disadvantage compared with someone without his disability.

198. The claimant says that taking up performance issues with him in this way put him at a substantial disadvantage compared with someone who is not disabled because the formality of the process caused him stress which aggravated his epilepsy-related auras, which in turn made him more liable to dismissal because he was less able to attend work and perform his job.

199. The evidence as to what extent the claimant was put at a disadvantage by the capability process because of his disability (epilepsy and related aura) is problematic. The OH report of 8 December 2020 says that scrutiny of the claimant's performance may exacerbate the claimant's difficulties but OH suspects there may be more significant causes. The OH report of 18 November 2021 says the issue at that point is the memory problems and the underlying condition is unlikely to be exacerbated by work. OH in the May 2022 report cites the claimant saying that stressful situations can exacerbate his neurological symptoms and OH does recommend that the claimant avoid challenging scenarios for 6 months, albeit the examples given involve dealing with tenants, not the effect of capability procedures.

200. There is then the comparison with the effect on non-disabled employees. In our experience, following capability processes tends to make all employees stressed and anxious, which in turn often affects their attendance record and ongoing performance.

201. Putting these things together, we are therefore not satisfied that 'the capability process' put the claimant at a substantial disadvantage compared with people who are not disabled. Therefore the claim that a reasonable adjustment should be made because of the capability process PCP fails.

202. We add that the Capability Policy and Procedure has a section on disability where it says consideration will be given to whether poor performance may be related to a disability and if so, whether reasonable adjustments can be made. In this respect, the claimant would be better off than a non-disabled person who was subjected to the capability procedure.

203. In any event, the suggested reasonable adjustment of amending the capability process by not dismissing the claimant makes no sense because he was not the reasonable adjustment which the claimant suggested was amending the capability process by not dismissing him. He was not in fact dismissed under the capability process. He was dismissed because of his attendance record.

204. The claimant did not suggest the adjustment should be not applying a capability process at all, and we would not have said that was reasonable. The respondent had concerns about the claimant's performance and these had to be addressed in some way.

205. For these reasons too, this claim for failing to make reasonable adjustments is not upheld.

206. We have dealt elsewhere with whether the claimant's dismissal was discriminatory under section 15, which is a different legal test with different factual elements which need proving.

<u>Failure to make reasonable adjustments: applying OH recommendations substantially or in full</u>
<u>(Issues 3.14 – 3.20)</u>

PCP: Ignoring reasonable adjustments recommended in the OH reports – was this PCP applied and did it put the claimant at a comparative disadvantage?

207. The respondent did not follow a PCP of ignoring reasonable adjustments recommended in OH reports. The respondent followed many of the adjustments recommended in the earlier OH reports, as the claimant acknowledged at the outset of this hearing. For example, the respondent followed the recommendations in the 8 December 2020 OH report that he be given a reduced workload until Spring 2021.

208. As regards recommendations 1a – 1e in the May 2022 report, the respondent did not follow all of these. But we would not say the respondent 'ignored' the recommendations, which suggests they disregarded them without consideration. The respondent discussed them with the claimant and

gave reasons for deciding not to follow them for 6 months. The respondent did agree to follow the recommendations for a phased 4 week period.

209. If the allegation is simply that the respondent did not follow (as opposed to 'ignored') the recommendations in the May 2022 report, that is true of recommendations 1a, 1c, 1d and 1e. Regarding recommendation 1b, the respondent did offer a programme of familiarisation to support the claimant's return to work, so that step was taken.

(i) Recommendation 1a

210. The failure to follow recommendation 1a put the claimant at a substantial disadvantage because, as a result of his epilepsy and related auras, he was unlikely to be able to sustain attendance at work, which would make him more like to be dismissed. The claimant was unable to start work prior to 11.30 am or 12 noon because of the auras which he experienced on an almost daily basis during the early morning.

211. The OH recommendation was that the claimant work only 4 hours/day. The claimant said the earliest he could start was 11.30 am. He ruled out working from 1.30 pm – 5.30 pm, which would better align with services to tenants and which, as a solid half day would have meant a simpler hand over of tasks.

(ii) Recommendation 1c

212. The recommendation was that the claimant avoid dealing with challenging scenarios because these would exacerbate his neurological symptoms. When the claimant talked this through with the respondent, he ruled out most aspects of his role. He said he could only manage rent arrears. That was about 30% of the role, and even then, if a tenant became aggressive, he would need to pass on the call. He could not manage ASB cases, neighbour nuisance, visit tenants, respond to tenants attending the office with queries and was unsure whether he could cover the phones during the phased 6 month period.

213. The failure to follow recommendation 1a put the claimant at a substantial disadvantage because, as a result of his epilepsy and related auras, without this adjustment, he was unlikely to be able to sustain attendance at work, which would make him more like to be dismissed.

(iii) Recommendation 1d

214. The recommendation was home working predominantly for 6 months, although the claimant would be able to attend the office for meetings and to support other junior employees. During the 14 June 2022 meeting, Ms Hart said that office-based staff were expected to attend collectively 1/week and individually an additional day during the week. The claimant said he would come in for staff meetings. Regarding meetings with residents, he was unsure and would need to play this by ear. From the respondent's point of view, that

would mean other Housing Officers might have to cover appointments at the last minute.

215. OH did not give a reason for this particular recommendation, but the general context of the recommendations in the report was due to the claimant's neurological symptoms arising from his epilepsy. We therefore find on the balance of probabilities that the failure to agree to this adjustment meant the claimant would be put at a substantial disadvantage compared with someone without his disability.

Was it reasonable for the respondent to have made these adjustments

216. The respondent knew or ought to have known from the OH report that the claimant would be at a disadvantage if they did not implement the recommendations.

217. The respondent refused to agree to these adjustments except for a four week phased return during which the claimant's hours would gradually increase. The question is whether it would have been reasonable for the respondent to agree fully or substantially to the adjustments for the rest of the 6 months. We do not think that it would have been, for the following reasons.

218. Not only did the claimant ask to work just over half his hours for 6 months, but in that time, he was saying he could not carry out a large majority of his duties.

219. Moreover, the claimant told the respondent that he expected to be paid in full for this period.

220. This was not a period in isolation. The claimant had already received long periods of paid sick leave. He had also been paid in full in the period 22 February 2021 until 16 May 2021 when he was carrying out only 50% of his workload, apart from 75% in the last two weeks of that period.

221. Meanwhile, the claimant's sickness absences and reduced hours had a significant impact on his colleagues who largely had to cover. Ms Din had been reduced to tears by the extra workload and cited it in her exit interview as one of the reasons why she left. For the most part the respondent had been unable to spare funds for temps. A more junior person had been seconded across in March 2022, but that removed resources from elsewhere and left her unsettled. The Housing Officer team was small and there were not a large number of colleagues amongst whom duties could be shared out. In Housing Association terms, the respondent was relatively very small. It did not have much cash surplus each year and tended to hold onto it tightly because of the risk of falling short of loan and regulatory requirements.

222. All this had additionally impacted the service to the tenants, many of whom were vulnerable. It also impacted the model of one point of contact for each tenant. The claimant's patch was the worst performing in the independent quarterly resident satisfaction surveys in 2021 and 2022. As at

April 2022, for example, rent arrears on the claimant's patch were nearly 6% compared with a total of 4.10%.

223. We are not saying any of this was the claimant's fault. He was trying his best. But the law requires us also to take into account the impact on the respondent when we consider if an adjustment is 'reasonable', albeit bearing in mind the very positive duties on employers under the Equality Act 2010 in relation to disabled employees.

224. For the reasons we have explained, we do not find it reasonable for the employer to have followed the OH recommendations 1a, 1c and 1d substantially or in full.

225. As far as recommendation 1e is concerned, OH was suggesting that it would be worth contacting Access to Work to see whether it could provide any support. We would not characterise this as a reasonable adjustment in itself. It was an investigation of what was possible.

226. In any event, it was for the claimant to make the first contact to Access to Work, which he did. If the suggestion is that the respondent ought to have awaited the claimant completing the application and Access to Work making a decision, that was overtaken by events (the claimant's dismissal). We would also not say it was failure to make a reasonable adjustment to have failed to wait because the claimant did not identify at the time or to the tribunal exactly what support Access to Work was realistically likely to provide. The idea that Access to Work would fund or part-fund an entirely new Housing Officer to do substantive duties which the claimant could no longer do, or to stand by to take over phone calls if a tenant became aggressive, seems highly unlikely. It also seems unworkable and contrary to the respondent's model of one point of contact, even if a support worker could be trained up.

227. For these reasons we do not find it a failure to make reasonable adjustments that the respondent failed to follow recommendation 1e substantially or in full.

(ii) PCP: Requiring the claimant to work full contractual hours of 7/day

228. The respondent did in June / July 2022 apply a requirement that (after a 4 week phased return), the claimant work his full contractual hours of 7 / day. This was a PCP. It was capable of being applied in future to the claimant and to similarly situated employees.

229. The PCP of working his contractual hours of 7/day put the claimant at a substantial disadvantage compared with someone without his disability because of the epilepsy-related symptoms which he regularly experienced for up to 5 hours starting early morning, when he felt dizzy and nauseous in particular. The OH report of May 2022 had recognised this and made the recommendation on that basis that the claimant work from 12 am – 4pm, and the claimant stated that he could start at 11.30 am but no earlier.

230. It was not reasonable to make this adjustment because the claimant was seeking to work not much more than half his hours for full-pay, in a context where he had already had a considerable amount of paid time off, the service was suffering and the morale of his colleagues was impacted.

231. For these reasons alone, which we have set out in more detail above, we consider it would not have been a reasonable adjustment.

232. Moreover, it is not realistic to look at this requested adjustment separately from the other evidence regarding what the claimant said he was capable of in the 6 month period. For the same reasons we have set out above, we do not find this would have been a reasonable adjustment.

Did the respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at that disadvantage?

233. The respondent did know, or should have known, that the claimant was likely to be placed at a disadvantage if they did not follow the OH recommendations in the May 2022 report and if the claimant had to work his full hours and undertake his full contractual duties once the 4 week phase was over. The OH report was very clear and confirmed by the claimant in the meeting to discuss the report. The respondent's grounds for refusing the adjustments was not that they did not believe the claimant needed them, but that they could not accommodate them beyond the 4 week phased return.

(iii) PCP: Requiring the claimant to carry out his full role

234. The respondent did in June / July 2022 apply a requirement that (after a 4 week phased return), the claimant carry out his full role. This was a PCP. It was capable of being applied in future to the claimant and to similarly situated employees.

235. The PCP of working his full contractual duties put the claimant at a substantial disadvantage compared with someone without his disability. The respondent knew or should have known this. OH report of May 2022 said that dealing with challenging scenarios (antisocial problems/aggressive tenants / visiting tenants exacerbated the claimant's neurological symptoms. This in turn, would mean the claimant was unable to sustain attendance at work and was therefore more likely to go through the capability process and be dismissed.

236. Even if the claimant had been willing or able to work his full hours, he was still asking only to do a small fraction of his duties. There still would have been major difficulties in covering those duties, with impact on the service and on the morale and well-being of colleagues who had to cover.

237. For these reasons alone, which we have set out in more detail above, we consider it would not have been a reasonable adjustment.

238. Moreover, it is not realistic to look at this requested adjustment separately from the other evidence regarding what the claimant said he was capable of in the 6 month period. For the same reasons we have set out above, we do not find this would have been a reasonable adjustment.

Direct disability discrimination (Issues 3.6 – 3.7)

239. The respondent accepts that the claimant had the disability of epilepsy at the relevant time.

Issues 3.7.1 – 3.7.2: Direct discrimination: *Managing him differently by making him report directly to Mr Scott- Douglas; Being required to discuss high rent arrears cases with Mr Scott-Douglas before taking them to court.*

240. For reasons we stated in our fact-findings, we have found that the respondent did not require the claimant to report directly to Mr Scott-Douglas and did not require him to discuss high rent arrears cases with Mr Scott-Douglas before taking them to court. These claims for direct disability discrimination therefore fail.

Issue 3.7.3: Direct discrimination: dismissal

241. The respondent did dismiss the claimant. However, the respondent did not dismiss the claimant because of his disability. We were shown no evidence at all that a non-disabled Housing Officer or a Housing Officer with a different disability, who had a similar sickness record and performance record would not have been dismissed in the same circumstances. There is nothing that even starts to shift the burden of proof.

242. The claim that the dismissal was direct disability discrimination therefore fails.

243. The suggestion that dismissal was direct discrimination does not get off the ground in terms of evidence. The evidence in the case was really about whether the claimant was dismissed because of something arising from his disability, ie his sickness record.

Discrimination arising from disability: telling the claimant to work under Mr Scott-Douglas
(Issues 3.8 – 3.13 – in relation to 3.9.1)

244. The respondent accepts it knew the claimant had epilepsy at the relevant time.

245. For reasons we have explained in our fact-finding section, we have concluded that the respondent did not tell the claimant to work under Mr Scott-Douglas or require the claimant to discuss high-rent arrears cases with Mr Scott-Douglas before taking them to court. The claim that telling him to do so was discrimination arising from disability therefore fails.

Discrimination arising from disability: telling the claimant to work under Mr Scott-Douglas: dismissal
(Issues 3.8 – 3.13 – in relation to 3.9.2)

246. The respondent dismissed the claimant because of his sickness absence record and their view that his attendance would not improve in the foreseeable future.

Did the claimant's sickness absence arise in consequence of his disability?

247. Overwhelmingly yes. There were a few periods attributable to other matters including the final absence which triggered the dismissal, but the reason for dismissal was the entire record. The respondent would not have dismissed if one took out the epilepsy and epilepsy/aura related absences.

Was the dismissal a proportionate means of achieving a legitimate aim?

248. The respondent's aims were providing a consistent and reliable service of a high standard to vulnerable residents and service-users and maintaining staff well-being by not overloading other staff for a prolonged period.

249. We find that these were legitimate aims.

250. However, we consider dismissal at this point in time was disproportionate for the following reasons.

251. The impact of the treatment on the claimant was severe. He lost his job. This was a job which he had held for 17 years and which he had really enjoyed until 2020. Given the claimant's age (55 at dismissal) and disability, it is likely to be difficult for him to find a new job, at least for a while.

252. In terms of the respondent's needs, we recognise that it had an employee who had worked very little over the previous two and a half years and who did not appear to be getting better. There was impact on the quality of service. The claimant's patch was low on user satisfaction and high on rent arrears compared with the other patches. His inconsistent attendance disrupted the respondent's model of one point of contact for its vulnerable tenants.

253. There was also a heavy impact on the morale and well-being of colleagues. Ms Din had been reduced to tears and it had been one reason leading her to find another job. Latterly, an employee had been taken out of another team and seconded over on an unsettled basis.

254. We also recognise that the respondent had held numerous meetings with the claimant under both Attendance and Capability procedures and had carried out certain reasonable adjustments including extensive refresher training, allowing the claimant to work 50% of his workload from 22 February 2021 – 2 May 2021 and then a further two weeks at 75: and that at the time of dismissal, the claimant was in the middle of a four week staged return which was being taken very gently.

255. Where we find the dismissal is disproportionate is that it was triggered by an absence of only three and a half days due to a virus which the claimant had probably caught from his grandson. It is true this occurred only 2 weeks after the claimant's return to work, but this three and a half day absence was not representative of the issue with which the parties were dealing. This was not an employee who was repeatedly off for different types of short-term reason, eg 'flu, food poisoning etc. The claimant had very rarely been off for any reason unrelated to his epilepsy. Three and a half days was not a very long period to be off with a virus. We do not find it proportionate to trigger to dismissal on this occasion.

256. The respondent mentions the 1:1 on 18 August 2022 where Ms Hart set a target of no sickness absences for the next 6 months. However, this was not put in absolute terms. When the claimant said that it was unlikely that he would be able to meet that target. Ms Hart said she completely understood that he had a long-term condition and they would have to see how things went. This suggests she envisaged a level of flexibility was still possible.

257. In any event, regardless of whether she did mean to convey that, as we have said, we find it disproportionate to go to dismissal on an untypical and unrepresentative small period of absence of a one-off nature. A very short period of absence for a virus was not the problem which the respondent was trying to address.

258. Applying the appropriate threshold under the Equality Act 2010, we find the dismissal was because of something arising in consequence of the claimant's dismissal contrary to section 15 of the Equality Act 2010.

259. Having said that, we believe that the claimant would have been off sick again due to his underlying conditions within the next 6 months in circumstances where it would have been proportionate to dismiss him. We will listen to what each party has to say at the remedy hearing as to when this would have happened as it will be relevant to the period for which we award compensation for loss of earnings.

260. This dismissal claim was brought in time. The termination date was 4 October 2022. ACAS was notified on 22 November 2022 and issued its certificate by email on 3 January 2023. The claim form was presented on 30 January 2023.

<u>Unfair dismissal (Issues 3.2 – 3.5)</u>

261. The respondent has shown that the principal reason for dismissal was capability, ie the claimant's attendance record and likelihood that it would continue.

262. We do not believe that any part of the reason was the fact that the claimant was on a higher salary than other Housing Officers. The difference

was only marginal and indeed, if they were awarded a bonus, the claimant's colleagues might even have been paid more than him.

263. The next question is whether dismissal was within the band of reasonable responses.

264. In procedural terms, the respondent acted reasonably. The claimant was invited to a Stage 3 meeting with the stated purpose of considering the likelihood of the claimant achieving and sustaining the required level of attendance. The invitation warned the claimant that dismissal was a possibility. He was allowed to be represented by his union. We do not consider the dismissal was procedurally unfair simply because the claimant was invited without forewarning to the meeting where he was told of his dismissal and was not invited to bring his union representative. That meeting was simply to convey the decision, which would normally have been done by purely letter. The claimant was given the written decision and told he had the right of appeal where he could make further representations. The claimant did appeal and an appeal hearing was held, again where the claimant was represented. The appeal outcome was provided in writing.

265. The respondent had fully investigated the claimant's attendance record and the reason for the recent absence. It cited the number of days absent in the dismissal letter. The respondent was well informed of the medical position. It had obtained OH reports on 28 April 2020, 8 December 2020, 8 November 2021 and 20 May 2022 and it had discussed these with the claimant. The respondent held formal review meetings under the Attendance policies on 30 July 2020 and 27 January 2021 as well as 12 September 2022. The claimant was represented by his union on each occasion.

266. The claimant had been given a number of warnings that his sickness could lead to dismissal. On 17 July 2020, when inviting the claimant to a Stage 2 meeting, Mr McCarthy said that the respondent could not sustain the claimant's absence from work indefinitely. At the meeting itself on 30 July 2020, he was told a potential outcome was dismissal. At the Stage 3 meeting on 27 January 2021, he was again warned of the risk of dismissal. On 5 July 2022, in her letter responding to the May 2022 OH report and when offering instead a 4 week staged return, Ms Hart said 'If this short period of further accommodation does not result in you being able to return to your full role, we will need to move to the final stage of the relevant formal policy and procedure and consider whether or not we can continue to employ you'.

267. As for whether it was substantively fair to dismiss the claimant, the respondent did genuinely believe that the claimant's attendance record was not going to improve in the foreseeable future. There were grounds for that belief in terms of the claimant's sickness record and what the claimant was saying. OH had in mind that there would be the result of further medical investigations in 6 months, but there was no clear indication that anything would improve. By the time of the 30 September 2022 Stage 3 hearing, the claimant had been off sick for substantial amounts of time since February 2020 with no sustained improvement.

268. The respondent made reasonable adjustments in so far as it was able to, to assist the claimant in returning to work and sustaining his attendance. It had provided substantial and repeated training, including in February 2021 as if he was a new starter. The respondent had allowed the claimant to carry out 50% of his workload from 22 February 2021 – 30 April 2021 and then a further two weeks at 75%. The claimant had returned to 100% on 17 May 2021, when he said he felt able to do so. The claimant was paid in full throughout this period. Unfortunately, as OH observed in the May 2022 report, the reduction in workload had benefited the claimant to some extent, but had not in fact helped his capability to a large extent. Ms Hart therefore had a reasonable basis for her view that the claimant's attendance was unlikely to improve for the foreseeable future.

269. As for whether it was reasonable to dismiss the claimant, we remind ourselves that for unfair dismissal law it is not what the tribunal might have done. It is different from the objective test for a discriminatory dismissal under s15 of the Equality Act 2022. Although we think that some reasonable employers would not have dismissed the claimant because of the three and a half days sickness at that point, for reasons we have given in relation to the s15 claim, we do think it is possible that other reasonable employers might have reasonably taken the decision to dismiss because of their concern about the entirety of the claimant's attendance record, the impact on the organisation's staff and the service it provided, and the reasonable view that the claimant's attendance was unlikely to substantially improve in the foreseeable future.

270. A reasonable employer could decide not to wait for the outcome of the Access to Work application, The claimant had still not identified realistically what Access to Work could offer. A reasonable employer could also take the view that Ms Sen had encouraged the claimant to apply in October 2021, but he did not do so until 10 May 2022.

271. We do not believe that there was a sudden decision to dismiss the claimant because the template had come through and the claimant was asking Ms Hart and Ms Bernard to meet to discuss it. The respondent had already decided to call the claimant to a Stage 3 meeting on the basis of his three and a half days' absence. We also accept that the decision to dismiss had already been taken a few days after the Stage 3 meeting and had only been put on hold because there were without prejudice negotiations.

272. There was no existing suitable vacancy. It was not realistic for matters to be reorganised so that the claimant only worked on rent arrears, because that would go against the model of one point of contact and anyway, the claimant was unable to do all aspects of rent arrears because of his need to avoid confrontation.

273. For all these reasons, we find that the dismissal was not unfair.

274. We are conscious that readers of this decision might find it puzzling that the dismissal was not unfair, when we have found that it was discrimination arising out of disability contrary to section 15 of the Equality Act 2010. The reason is that these two pieces of law have different legal definitions. Unfair dismissal law says a dismissal will not be unfair if a reasonable employer could have decided to dismiss. Discrimination law is different and the tribunal had to decide whether, on an objective standard, dismissal was proportionate.

Remedy

275. The hearing for remedy will take place on **14 October 2024** on CVP. It will start at 11 am. If the claimant wishes to bring his laptop into the tribunal building, he should contact a tribunal clerk the week before and ask whether he can be provided with a private conference room as was arranged for this liability hearing.

276. A preliminary hearing will be arranged on CVP to discuss arrangements for the remedy hearing. This will take place at 11 am on **29 July 2024** for 2 hours.

277. Bearing in mind what we have said regarding the likely length of our award for loss of earnings, the parties may think it is a good idea to reach a negotiated agreement for compensation rather than go through the stress and expense of further tribunal hearings. However, that is entirely up to the parties.

Employment Judge Lewis

Dated: ……21 June 2024…..……..

Judgment and Reasons sent to the parties on:

27 June 2024

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For the Tribunal Office