EMPLOYMENT TRIBUNALS

Claimant: Mr D Gangar
Respondent: DPD Group UK Ltd
Heard at: Birmingham
On: 24, 25, 26, 29, 30 April 2024 and 1, 2, 3 May 2024
Before: Employment Judge Meichen, Mrs RJ Pelter, Dr GC Hammersley
Appearances
For the claimant: in person
For the respondent: Mr P Bownes, solicitor

JUDGMENT was sent to the parties dated 10 May 2024. The Tribunal found that the claimant was subjected to discrimination arising from disability by not being allowed to take annual leave and having to take unpaid leave in July 2021. The other claims and allegations brought by the claimant failed and were dismissed. The claimant was awarded compensation totalling £8085.14. Written reasons for the liability decision were subsequently requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013. The following reasons are provided. Oral reasons were given at the end of hearing and so the findings of fact and conclusions sections below are based on the record of the reasons given orally.

LIABILITY REASONS

The issues

1. The issues for us to determine were set out in the case management order of Employment Judge Kelly dated 9 November 2022. The liability issues were as follows.

2. **Time limits**

   2.1 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

      2.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
      2.1.2 If not, was there conduct extending over a period?
      2.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
      2.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

2.1.4.1 Why were the complaints not made to the Tribunal in time?

2.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

3. **Unfair dismissal**

3.1 What was the reason or principal reason for dismissal? The respondent says the reason was capability (long term absence).

3.2 If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide whether:

3.2.1 The respondent genuinely believed the claimant was no longer capable of performing their duties;

3.2.2 The respondent adequately consulted the claimant;

3.2.3 The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

3.2.4 Whether the respondent could reasonably be expected to wait longer before dismissing the claimant;

3.2.5 Dismissal was within the range of reasonable responses.

3.3 The claimant says that the dismissal was unfair for the following reasons in particular:

3.3.1 The claimant says the respondent used his medical condition as an excuse to dismiss him for other reasons.

3.3.2 The claimant says he was not notified of requests for information and invites to meetings and was dismissed in his absence.

3.3.3 The claimant says his medical condition was improving.

3.3.4 The claimant says he said he would cooperate with an occupational health process but he wanted to action a grievance against Mr Salim at the same time. The respondent did not deal with this and instead dismissed him.

4. **Direct disability discrimination (Equality Act 2010 section 13)**

4.1 Did the respondent do the following things:

4.1.1 In March 2021 the respondent gave the claimant a different job on his return from sickness absence and gave his job to a contractor. This was a job which the claimant was not accustomed to and he did not have the skills for.

4.1.2 After returning to work in March 2021 the claimant had to submit his hours each week and was only paid for the hours he worked and so he got less pay.

4.1.3 The claimant was not allowed to take annual leave. He said he verbally asked Omar Salim in June 2021 if he could take leave

and he did not get a response. The claimant had to take unpaid leave in July 2021 to get a break.

4.1.4 Using the claimant's medical condition as an excuse to dismiss him for other reasons.

4.1.5 Not dealing with the claimant's appeal against dismissal positively.

4.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

4.3 If so, was it because of disability?

4.4 Did the respondent's treatment amount to a detriment?

5. **Discrimination arising from disability (Equality Act 2010 section 15)**

5.1 Did the respondent treat the claimant unfavourably by:

5.1.1 In March 2021 the respondent gave the claimant a different job on his return from sickness absence and gave his job to a contractor. This was a job which the claimant was not accustomed to and he did not have the skills for.

5.1.2 After returning to work in March 2021 the claimant had to submit his hours each week and was only paid for the hours he worked and so he got less pay.

5.1.3 The claimant was not allowed to take annual leave. He said he verbally asked Omar Salim in June 2021 if he could take leave and he did not get a response. The claimant had to take unpaid leave in July 2021 to get a break.

5.1.4 Using the claimant's medical condition as an excuse to dismiss him for other reasons.

5.1.5 Not dealing with the claimant's appeal against dismissal positively.

5.2 Did the following things arise in consequence of the claimant's disability:

5.2.1 The claimant's absence for three months in 2020 and then from June 2020 to March 2021.

5.3 Was the unfavourable treatment because of any of that sickness absence?

5.4 Was the treatment a proportionate means of achieving a legitimate aim?

5.5 The Tribunal will decide in particular:

5.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.5.2 could something less discriminatory have been done instead;

5.5.3 how should the needs of the claimant and the respondent be balanced?

5.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

6. **Breach of Contract**

6.1 Was the claimant entitled to be paid for 48-hour's work in the end of July and first week of August 2021 for which he was not paid?

Law

7. Here is a summary of the relevant law which we considered and applied.

Direct discrimination

8. Section 13 Equality Act 2010 ("EqA") provides that: *"a person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others".* Section 23 EqA provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

9. The statutory comparator must not share the claimant's protected characteristic. The status of the comparator was made clear by Lord Scott in Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL*,* when he observed: *'[T]he comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class'.*

10. In Nagarajan v London Regional Transport [1999] IRLR 572, the House of Lords held that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case is, *'why the complainant received less favourable treatment…Was it on the grounds of [the protected characteristic]? Or was it for some other reason..?'.*

11. In Shamoon Lord Nicholls said *'… employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was*

treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others. The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant …'.

12. As was confirmed in Martin v Devonshire's Solicitors [2011] ICR 352 since Shamoon, the recommended approach from the higher courts has generally been to address both stages of the statutory test by considering the single 'reason why' question: was the treatment on the proscribed ground, or was it for some other reason? Considering the hypothetical or actual treatment of comparators may be of evidential value in that exercise.

Discrimination arising from disability (section 15 of the Equality Act)

13. Section 15 EqA states as follows:

> *(1) A person (A) discriminates against a disabled person (B) if—*
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

14. The unfavourable treatment must be shown by the claimant to be "because of something arising in consequence of [his] disability". The tribunal must therefore ask what the reason for the alleged treatment was. If this is not obvious then the tribunal must enquire about mental processes - conscious or subconscious - of the alleged discriminator see R (on the application of El v Governing Body of JFS and The Admissions Appeal Panel of JFS and Ors [2010] IRLR, 136, SC).

15. In Pnaiser v NHS England [2016] IRLR 170 the EAT set out the following guidance for section 15 claims:

a. A tribunal must first identify whether there was unfavourable treatment and by whom.
b. The tribunal must determine the reason for or cause of the impugned treatment. This will require an examination of the conscious or unconscious thought processes of the putative discriminator. The something that causes

the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment and amount to an effective reason for or because of it. Motive is irrelevant.

c. The focus of this part of the enquiry is on the reason for or cause of the impugned treatment.
d. The tribunal must determine whether the reason or cause is something arising in consequence of the claimant's disability. The causal link between the something that causes the unfavourable treatment, and the disability may include more than one link. The more links in the chain the harder it is likely to be to establish the requisite connection as a matter of fact. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

16. The 'because of' enquiry therefore involves two stages: firstly, A's explanation for the treatment (and conscious or unconscious reasons for it) and secondly, whether (as a matter of fact rather than belief) the "something" was a consequence of the disability. It does not matter precisely in which order these questions are addressed.

17. The employer will escape liability if it is able to objectively justify the unfavourable treatment that has been found to arise in consequence of the disability. The aim pursued by the employer must be legal, it should not be discriminatory in itself and it must represent a real, and objective consideration. As to proportionality, the EHRC Code on Employment notes that the measure adopted by the employer does not have to be the only way of achieving the aim being relied on, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (4.31).

The burden of proof

18. Section 136 EqA sets out the burden of proof provisions which apply to claims under the EqA. Section 136(2) states: "*if there are facts from which the court could decide in the absence of any other explanation that a person (A) contravened the provision concerned the court must hold that the contravention occurred".* Section 136(3) then states: *"but subsection (2) does not apply if A shows that A did not contravene the provision".*

19. These provisions enable the employment tribunal to go through a two-stage process in respect of the evidence. The first stage requires the claimant to prove facts from which the tribunal could conclude in the absence of any other explanation that the respondent has committed an unlawful act of discrimination. This is known as the "prima facie case".

20. The second stage, which only comes into effect if the claimant has proved those facts, requires the respondent to prove that he did not commit the unlawful act. That approach was set out in Igen Ltd v Wong [2005] IRLR 258 and it was reaffirmed in Efobi v Royal Mail Group Limited [2019] IRLR 352

21. The Supreme Court has emphasised that it is for the Claimant to prove the prima facie case. In Hewage v Grampian Health Board [2012] IRLR 87 Lord Hope summarised the first stage as follows: *"The complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the complainant which is unlawful. So the prima facie case must be proved, and it is for the claimant to discharge that burden".*

22. Before the burden can shift there must be something to suggest that the treatment was discriminatory (see B and C v A [2010] IRLR 400). Mere proof that an employer has behaved unreasonably or unfairly would not by itself trigger the transfer of the burden of proof, let alone prove discrimination (see in particular Bahl v The Law Society and others [2004] IRLR 799). Therefore inadequately explained unreasonable conduct and/or incompetence is not sufficient to infer unlawful discrimination (Quereshi v London Borough of Newham [1991] IRLR 264; Glasgow City Council v Zafar [1998] ICR 120 HL; Igen, Madarassy v Nomura International plc 2007 [IRLR] 246).

23. There is also a well-established principle that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. Those facts only indicate the possibility of discrimination. They are not, without something more, sufficient material from which the tribunal could conclude that the respondent had committed an unlawful act of discrimination. This principle is most clearly expressed in Madarassy.

24. The issue of what the 'something more' is and whether the burden shifts is not subject to hard and fast rules and the answer will vary depending on the nature of the case and the evidence given before the Tribunal. It is important to bear in mind that in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. The outcome at this stage of the analysis will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal (see paragraph 4 of Appendix to Judgment of Court of Appeal in Igen). Further, we should note the word "could" in s 136(2). The tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them (see paragraph 5 of Appendix to Judgment of Court of Appeal in Igen).

25. The Court of Appeal in Brown v LB Croydon [2007] EWCA Civ 32 in referring to the judgment of the EAT below in that case, quoted the following comments by Elias J as he then was with approval:

25. In other circumstances, where there is no actual comparator, the employee must rely on a hypothetical comparator. Again in some cases it may be relatively plain to a tribunal that the burden switches to the employer. That is likely to occur for example where the employer acts in a way which would be quite atypical for employers. Conversely if the employer acts in a way which would appear perfectly sensible, and does the kind of thing which most

employers would do, then the burden is unlikely to transfer. For example if an employer warns an employee for drunkenness at work, and it is not disputed that the employee was drunk, it is not likely in those circumstances in the absence of particular evidence demonstrating otherwise that that would create an inference of less favourable treatment so as to require some explanation for the employer.

26. In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts (see paragraph 6 of Appendix to Judgment of Court of Appeal in Igen). However, the Employment Tribunal is entitled to take into account the fact it disbelieves the employer's explanation (even though the employer's case is primarily relevant at the second stage): Birmingham City Council v Millwood [2012] EqLR 910, EAT. The tribunal may also draw inferences from the fact that there are inconsistencies in the employer's explanation: Veolia Environmental Services UK v Gumbs [2014] EqLR 364, EAT.

27. In Denman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279, CA, Lord Justice Sedley made the point that 'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred. The Court of Appeal approved such an approach in Base Childrenswear Ltd v Otshudi 2020 IRLR 118, CA. It was open to the tribunal to take into account when drawing inferences a false explanation given for the treatment complained of and the fact that the explanation given had changed, even though it had been argued that this had been done so as to spare the employee's feelings. Lord Justice Underhill observed: *'Giving a wholly untruthful response when discrimination is alleged is well-recognised as the type of conduct that may indicate that the allegation is well-founded.'*

28. An employer's failure to call evidence from key witnesses may result in adverse inferences being drawn. In Efobi v Royal Mail Group Ltd 2021 ICR 1263 the Supreme Court held that tribunals should be free to draw, or decline to draw, inferences in the case before them using common sense. Whether any significance should be attached to the fact that a person had not given evidence depended entirely on the context and particular circumstances. Relevant considerations would include whether the witness was available to give evidence, what evidence the witness could have given, what other evidence there was bearing on the points on which the witness could have given evidence, and the significance of those points in the context of the case as whole.

29. If the burden of proof shifts the last three paragraphs of the Appendix in Igen v Wong should be considered. They state:

    To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense

whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge that burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully the explanations for failure to deal with questionnaire procedure and/or code of practice.

30. If the burden of proof shifts the need for the respondent to set out 'cogent evidence' explaining a non-discriminatory reason for its conduct is particularly relevant. In Bennett v Mitac Europe Ltd 2022 IRLR 25 the EAT observed that the requirement for 'cogent evidence' does not apply a standard of proof beyond that of the balance of probabilities. Nonetheless, it is the respondent that generally is in a position to provide evidence about the reason for the claimant's treatment.

Time limits

31. Section 123 EqA states:

123 Time limits
(1) Subject to sections 140A and 140B, Proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.
. . .
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

32. If any allegation made under the EqA is out of time and not part of conduct extending over a period bringing it in time then we only have jurisdiction to hear it if it was brought within such other period as we think just and equitable. We should remind ourselves that the just and equitable test is a broader test than

the reasonably practicable test found in the Employment Rights Act 1996. We should take into account any relevant factor. We should consider the balance of prejudice. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit. The tribunal has a wide discretion but there is no presumption that the Tribunal should exercise that discretion in favour of the claimant. It is the exception rather than the rule - see Robertson v Bexley Community Centre 2003 IRLR 434. There is no requirement that a tribunal must be satisfied that there is good reason for a delay in bringing proceedings - see Abertawe Bro Morgannwa University Local Health Board v Morgan [2018] IRLR 1050 CA.

33. Relevant factors which may be taken into account are set out in British Coal Corporation v Keeble [1997] IRLR 336 derived from section 33(3) of the Limitation Act 1980, which deals with discretionary exclusion of the time limit for actions in respect of personal injuries or death. Those factors are: the length and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by it; the extent to which the respondent had cooperated with requests for information; the promptness with which a claimant acted once aware of facts giving rise to the cause of action; and steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

34. Having referred to Keeble however the important point to bear in mind is that the Tribunal has a very broad general discretion and therefore we should assess all the factors which are relevant to whether it is just and equitable to extend time without necessarily rigidly adhering to a checklist. The factors which are almost always likely to be relevant are the length of and reasons for the delay and whether the delay has prejudiced the respondent (for example by preventing or inhibiting it from investigating the claim while matters were fresh). This was clearly explained by Lord Justice Underhill in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.

35. In Miller v Ministry of Justice UKEAT/0003/15 (15 March 2016, unreported), Laing J observed that there are two types of prejudice which a respondent may suffer if the limitation period is extended: firstly, the obvious prejudice of having to defend the claim which would otherwise have been defeated by a limitation period; and secondly the “forensic prejudice” caused by fading memories, loss of documents, and losing touch with witnesses. Forensic prejudice is “crucially relevant” in the exercise of discretion and may well be decisive. However, the converse does not follow: if there is no forensic prejudice to the respondent that is not decisive in favour of an extension.

36. The EAT has explained the extent to which the potential merits of a proposed complaint can be taken into account when considering whether it is just and equitable to extend time, in Kumari v Greater Manchester Mental Health NHS Foundation Trust 2022 EAT 132. The EAT held that the potential merits are not necessarily an irrelevant consideration even if the proposed complaint is not plainly so weak that it would fall to be struck out. However, the EAT advocated a careful approach. It said:

"It is permissible, in an appropriate case, to take account of its assessment of the merits at large, provided that it [the tribunal] does so with appropriate care, and that it identifies sound particular reasons or features that properly support its assessment, based on the information and material that is before it. It must always keep in mind that it does not have all the evidence, particularly where the claim is of discrimination. The points relied upon by the tribunal should also be reasonably identifiable and apparent from the available material, as it cannot carry out a mini-trial, or become drawn in to a complex analysis which it is not equipped to perform.

So, the tribunal needs to consider the matter with care, identify if there are readily apparent features that point to potential weakness or obstacles, and consider whether it can safely regard them as having some bearing on the merits. If the tribunal is not in a position to do that, then it should not count an assessment of the merits as weighing against the claimant. But if it is, and even though it may not be a position to say there is no reasonable prospect of success, it may put its assessment of the merits in the scales. In such a case the appellate court will not interfere unless the tribunal's approach to assessing the merits, or to the weight attached to them, is, in the legal sense, perverse."

Findings of fact

37. The respondent is a parcel delivery business.

38. The claimant was employed by the respondent from 5 December 2011 to around 1 February 2022. There is a lack of clarity over the claimant's precise termination date but we do not think that matters for the decisions that we have to make.

39. The claimant was a senior IT operations support analyst working in the computer operations team. The claimant worked full-time and his contracted hours were 42 hours per week. The claimant worked a shift pattern of "four on four off", completing 12-hour shifts on the days that he was working.

40. Until March 2020 the claimant had little absence and there do not appear to have been any issues in his employment.

41. The claimant was signed off sick for approximately two weeks in March 2020 with suspected covid. He returned to work but was signed off again in June 2020. This became a long-term absence. It transpired that the claimant had long covid and the impact of that condition on him has been significant. In a judgment dated 3 May 2023 Employment Judge Manley determined that the claimant was disabled within the meaning of the Equality Act between June 2020 and February 2022 by virtue of having long covid. The claimant has not alleged he was disabled by reason of any other condition.

42. During his absence with covid the claimant engaged with occupational health and attended a number of catch up/employee health review meetings. A phased return to work was agreed to commence on 29 March 2021 with the

claimant initially working two hours per day and gradually building up to his full-time hours.

43. The claimant had a final review meeting on 22 March 2021. During this meeting the respondent proposed that the claimant would return to work supporting a different team called customer automation. Derek Hammond informed the claimant of this. Mr Hammond was the general manager for IT Infrastructure and IT Operations. The claimant was also advised that his line manager, Omar Saleem, had been involved in the decision.

44. The claimant raised concerns about this new role with Mr Saleem in an online meeting and also by email. Mr Saleem sent the claimant an email on 29 March 2021 at 1738 in which he explained that the claimant's role within IT operations was very demanding and included 12-hour shift patterns. The proposal to place the claimant in the automation team was made to assist the claimant with adjusting back to working full-time as it was a less stressful environment. Mr Saleem made it clear that this was a temporary solution whilst the claimant was getting better.

45. Notwithstanding the explanation he received the claimant continued to raise concerns. Mr Saleem by email dated 30 March 2021 sent at 1509 confirmed that if the claimant would feel better and more comfortable remaining within the IT operations team that he could do that and the choice was completely the claimant's. The claimant then returned to work in the IT operations team and the proposed move to the automation team did not materialise.

46. Despite the fact that the proposed move to the automation team did not materialise the claimant appears to have become highly aggrieved and mistrustful of the respondent as a result of the proposal to move him to the automation team. He raised concerns with Mr Saleem that the proposal to move him had come about because of a possible restructure and that he may lose his job. The claimant was also concerned that a contractor had been recruited to cover his position and he saw this as further evidence that his job may be at risk.

47. Mr Saleem answered these concerns in an email dated 31 March 2021 sent at 1608. He explained that there was no restructure planned and the claimant was still a member of the same team. He reiterated that the suggestion to move the claimant to the automation team was a temporary proposal so that the claimant could work without any added stress or pressure. The contractor had been recruited to cover the claimant's position but this was temporary until such time as the claimant was able to resume his full-time role at which point his job would still be there for him.

48. Even with these clear explanations and reassurances from Mr Saleem it appears that the claimant's suspicions were not laid to rest and from this point onward he appears to us to have remained highly suspicious of the respondent. In our judgement the claimant's suspicions were without rational foundation.

49. The reality that the claimant's suspicions were not well founded is demonstrated by the fact that his phased return to work progressed as intended to support the claimant back to his full time role. He slowly but surely built up his hours and there was never any suggestion that his role or his continued employment with the respondent was at risk.

50. As had been agreed during his phased return the claimant submitted the hours he had worked each week to Mr Saleem and he was paid for the hours that he worked.

51. The claimant's progress on his phased return was very gradual. It was not until the end of July 2021 that the claimant began working the equivalent of his full-time hours and he was not able at any stage to work the 12-hour shifts that he had been doing previously. The tribunal considers that this demonstrates that the claimant found his return to work very difficult due to the effects of long covid.

52. The respondent supported the claimant throughout his difficult return to work. They did not rush the claimant to end his phased return and they made it clear that the process was intended to be gradual to reach his full-time hours. The progress was decided based on the claimant's health and how he was feeling. The objective was to get the claimant back to his full-time hours and by the end of July that was achieved, albeit the claimant was not able to return to his previous shift pattern.

53. By around June 2021 the claimant needed a break. The claimant explained to Mr Saleem that a break would help him to work towards the goal of increasing his hours and getting back to the four on four off shift pattern. The claimant explained this in an email sent to Mr Saleem on 7 July 2021 at 1809.

54. The claimant was advised by Mr Saleem that he could not take annual leave as he was not working full-time. As a result the claimant had to take unpaid leave which he did for a week commencing 12 July 2021.

55. The claimant was refused annual leave despite the facts that:

a. Being on a phased return did not disentitle him from taking annual leave.

b. He had been advised prior to starting his phased return by Derek Hammond that he could book and take annual leave in the normal way.

c. He had accrued a large amount of annual leave which needed to be used up.

d. He was in the process of recovering from a very serious health condition i.e. long covid which amounted to a disability and he needed a break.

56. Mr Saleem's evidence was that he had been advised by HR that the claimant could not take annual leave because he was not working full-time. This is very surprising but it appears to be supported by emails which Mr Saleem sent on 26 and 28 July 2021. The HR adviser, Joanne Craig, was copied in to those

emails and within them Mr Saleem said that he was waiting for her to clarify how soon after the phased return to work the claimant could take his annual leave. It does not appear that Joanne Craig ever responded to that. Consequently the claimant was never told that he could take his annual leave and he had instead to take unpaid leave as we've explained.

57. The claimant sent an email to Mr Saleem on 4 August 2021 in which he raised concerns about the situation. The claimant said he had built up his hours so that he had now reached the point where he was working 8 to 9 hours per day. He was working his full-time hours but was not able to do the four on four off shift pattern. The claimant asked if he could use some of his annual leave for a few hours a day to top up his hours so that he could reach 12-hour days. The claimant also said that his overall annual leave situation needed clarifying so that he could book some holiday and plan for a balanced life. This was a reference to the fact that the claimant had been informed that he could not book annual leave whilst he was on a phased return. The claimant pointed out that HR had not got back to him as to when he could book annual leave and the situation was making him anxious as he doubted whether the correct procedures had been followed.

58. In our view the claimant was right to point out that the respondent had not acted correctly in telling him that he was not able to book annual leave and it was not surprising that that situation was causing him anxiety. The claimant had been back at work for in excess of four months but had not been allowed to book any annual leave at a time when plainly he needed a break as he was still recovering from long covid.

59. The claimant's email did not prompt the respondent to do anything to address the annual leave situation. The claimant went off sick due to stress from 5 August 2021. The situation remained unresolved and the claimant did not return to work following this absence. All of his sick notes simply indicated that the claimant was ill with stress. This absence was therefore not related to the claimant's disability of long covid and the claimant has not alleged that it was.

60. During his absence the claimant dutifully submitted his sick notes by email to Mr Saleem, but Mr Saleem found it very difficult to contact the claimant. In an email chain from 4 November 2021 Joanne Craig from HR contacted Mr Saleem to ask him to advise the claimant that he should undergo an occupational health assessment. Mr Saleem responded to say that the claimant had not been replying to his messages and not answering his calls. He explained that the last time he had spoken to the claimant the claimant had advised him that he did not want to have verbal conversations as he believed that his words could be used against him and therefore the claimant wanted communication to come from HR and be in writing. In his evidence to us the claimant accepted that he had given that message to Mr Saleem.

61. As a result of the claimant's request that information come from HR and be in writing Joanne Craig sent the claimant a letter dated 8 November 2021. She said that she too had tried to contact the claimant on a number of occasions by phone but she had not got through and the claimant had not returned her calls.

She said that she wanted the claimant to receive support and therefore would welcome the opportunity to discuss with him what services he may find useful. She specifically said that she would like to make a referral to the respondent's occupational health provider as their assistance had been invaluable to other people facing similar challenges. She requested that the claimant contact her by phone to discuss these matters.

62. The claimant did not contact Joanne Craig by phone as requested but he did send her an email on 19 November. The claimant said he had been unaware that Joanne Craig had been trying to contact him and as regards the other issues Joanne Craig had mentioned including the proposal to refer him to occupational health the claimant said he needed time and would respond back either the following week or when his fit note ended.

63. Joanne Craig responded to the claimant on 24 November to reiterate that she was eager to offer support but she felt they needed to speak rather than email. As such she asked for a date and time when it would be most convenient for the claimant to have a telephone conversation or an online meeting.

64. The claimant did not respond to that email, and he did not get back to Joanne Craig about arranging an occupational health assessment.

65. Joanne Craig chased the claimant again in an email dated 6 December and she again requested a time when the claimant could speak or attend an online meeting to discuss options including a referral to occupational health. The claimant was asked to respond by 10 December 2021.

66. The claimant did not respond to that email either. As a result Joanne Craig took the view that it was appropriate to instigate the respondent's capability procedure and make a judgement regarding the claimant's fitness to undertake his role without a formal medical assessment.

67. On 11 January 2022 the claimant called Mr Saleem back. Mr Saleem again raised the issue of an occupational health assessment. He suggested that it was mandatory in order for the respondent to help the claimant. The claimant again said he would like it in writing from HR and not from Mr Saleem. This was rather disingenuous as by this stage the claimant had already been informed by Joanne Craig of HR in writing on several occasions of the need for an occupational health assessment.

68. Mr Saleem said that as the claimant's line manager he was entitled to raise the issue of the occupational health assessment unless there was a grievance against him. At this juncture the claimant advised Mr Saleem that there was a grievance about the fact that Mr Saleem had not approved his annual leave in July 2021 and this had caused the claimant stress.

69. Mr Saleem informed HR about the fact that the claimant considered he had a grievance, but nothing was done to initiate a grievance procedure about the claimant's concern over annual leave.

70. On 13 January 2022 the claimant was sent an invitation to a capability hearing. This invitation was sent via email and not by any other means. There was an error in the letter because it said that a report had been received from occupational health. We accept the respondent's explanation that this error came about because a standard wording was being used. We do not read anything into this error or draw any adverse inference from it. It was just a simple mistake.

71. The claimant was invited to attend a capability hearing with Derek Hammond and Tim Popiolkowski from HR on 19 January. The claimant was warned that a possible outcome from the meeting could be the termination of his employment on grounds of capability.

72. The claimant did not respond to that letter or attend the meeting.

73. The respondent rescheduled the meeting. The claimant was sent a further letter of invitation on 19 January. Once again this letter was sent via email and not by any other means. The claimant was invited to a final meeting on 24 January and he was warned that failure to attend on this second occasion would result in the meeting going ahead in his absence. The claimant was also given the opportunity to provide written representations if he did not wish to attend the meeting.

74. Once again the claimant did not respond to that letter and he did not attend the meeting. He did not provide any written representations either.

75. Mr Hammond attempted to contact the claimant by phone on 24 January but the claimant did not answer the call. Mr Hammond therefore made his decision in the claimant's absence. His decision was that the claimant should be dismissed by reason of capability.

76. Mr Hammond explained the rationale for his decision in a letter dated 28 January. He pointed out that as a result of the claimant's failure to consent to an occupational health assessment and his failure to communicate with the respondent he was left with limited options and he had concluded that it was unlikely that the claimant would be in a position to return to work in the foreseeable future. The letter explained that the claimant had a right of appeal against Mr Hammond's decision. This letter was sent to the claimant by post as well as by email.

77. The claimant responded by letter dated 4 February. He said the letter from Mr Hammond was flawed and defaming. He said he had not been aware of any capability hearings. He acknowledged that Mr Hammond had called him on two occasions but said no message had been left. The claimant said he was appalled at the way things had been handled and he wanted an investigation.

78. The claimant's letter of 4 February was treated as an appeal, although as Mr Bownes has fairly pointed out the letter did not suggest that the decision was wrong or give any reason why the claimant should not be dismissed. The

grounds of appeal appear to have been limited to the claimant's point that he had not been made aware of the capability hearings.

79. The respondent asserts that the claimant has been dishonest in suggesting that he was not aware of the capability hearings. They point out that the claimant had been using his email for other purposes (such as forwarding his sick notes to Mr Saleem and responding to HR) on a regular basis and by tracking the emails the claimant sent they have demonstrated that he would have been in and out of his emails during the period when the two invitations were sent. In addition information from the respondent's IT department which could be seen at page 396 of the bundle indicates that one of the invitations was opened but then marked as unread.

80. The claimant does not dispute that the emails were sent and landed in his inbox. He also does not dispute that he was using his email address and sending emails in the relevant period. However he says that he did not open the relevant emails because he was off sick and he received a lot of emails.

81. It appears to the tribunal that the critical point is the way the claimant conducted his appeal. In light of what the claimant said in his letter of 4 February the respondent was very careful to ensure the invitations to the appeal hearing were properly received by the clamant.

82. The first invitation to an appeal hearing was sent on 16 February 2022. Giuliano Silvestri was appointed to hear the appeal. He was the respondent's head of PMO and client services. The claimant was invited to attend an appeal hearing with Mr Silvestri on 24 February. The claimant accepts that he received this letter. The claimant was asked to contact Mr Silvestri to confirm his attendance at the meeting.

83. The claimant failed to respond to the letter and he failed to contact Mr Silvestri. He then failed to attend the meeting.

84. Mr Silvestri sent the claimant a further letter dated 24 February. He explained that the respondent was prepared to rearrange the meeting. The claimant was asked to propose a time and a date that would be suitable for him. The claimant accepts he received this letter. However the claimant did not respond to Mr Silvestri's invitation to propose a suitable time for a rearranged appeal hearing. Instead, the claimant sent Mr Silvestri a letter dated 4 March in which he simply asked Mr Silvestri to look into and investigate his letter dated 4 February. The claimant did not acknowledge the two attempts that Mr Silvestri had made to arrange an appeal hearing.

85. Mr Silvestri then sent the claimant a letter dated 8 March in which he pointed out that an appeal hearing was the claimant's opportunity to raise any points that he felt had been dealt with unfairly but the claimant had failed to respond to the attempts made to set up a hearing. Mr Silvestri explained that he had looked into the point the claimant had raised about not being made aware of the capability hearing. He had checked with the respondent's IT team and it had been established that the invites had been delivered to the claimant's inbox

and the claimant had accessed his emails in time to attend or to respond to the invites. As a result Mr Silvestri concluded that the claimant had purposely chosen not to attend any of the meetings. He deemed the matter as closed, essentially on the basis that the claimant had not actively pursued his appeal.

86. The tribunal attempted to understand from the claimant why he had not engaged with the appeal. The claimant claims that he viewed Mr Silvestri as not impartial and he took the view that the appeal would be predetermined as he had already been sent a letter confirming the termination of his appointment and asking him to return company property. The tribunal found this explanation difficult to understand. In our view that there was no cogent or reasonable basis for the claimant to suggest that Mr Silvestri was not impartial or that his appeal was predetermined. Furthermore, the claimant did not explain any of these concerns at the time and in fact he had not given any reason for not attending the appeal.

87. We consider that the claimant had no good reason not to attend the appeal. What happened instead was the same pattern that we could see in relation to the capability hearings and indeed throughout the claimant's absence for stress. The claimant had simply decided not to engage with the respondent. If the claimant had any intention of engaging with the respondent he would have attended the appeal. We therefore consider that on the balance of probabilities the claimant was aware of the capability hearings he just decided not to engage. This is consistent with the fact that the claimant had failed to engage with Mr Saleem and with HR when they tried to arrange a meeting to discuss the situation and to obtain an occupational health assessment and it is consistent with the approach that the claimant took in relation to the appeal when on his own account he knew of the meetings but he failed to attend and failed to engage at all with the respondent about them.

88. It is very difficult in our judgement to escape the conclusion that rather than confront matters the claimant had instead stuck his head in the sand.

<u>Analysis and conclusions</u>

Breach of contract

89. The agreed list of issues stated that we had to consider whether the claimant was entitled to be paid for 48 hours work at the end of July and the first week of August 2021 for which he was not paid.

90. The claimant provided very little evidence in relation to this allegation. In his witness statement he simply said that following his return to work in March 2021 he could not understand how his rate of pay was being calculated and his payments were lower than expected.

91. As we have explained, the situation was that the claimant was required to provide a record of the hours that he had worked to Mr Saleem and he was then paid for those hours. The respondent calculated the claimant's hourly rate

based on his full-time pay and the hours which he had not worked were deducted from each month's pay packet.

92. The payslips and the emails the claimant had submitted identifying the hours he had worked were in the bundle. It therefore should have been straightforward for the claimant to calculate if he had been paid correctly. Despite that the claimant did not provide us with any information as how he had calculated that he had been underpaid.

93. In his questioning of the respondent's witnesses the claimant suggested that he had not been paid for the 42 hours that he had worked in the week commencing 26 July 2021. This was the first week following his return in March 2021 that the claimant had worked his full-time hours. As a result the respondent had not actioned any reduction from the claimant's pay in relation to that week. Therefore there had not been any shortfall in the claimant's pay for that week.

94. The tribunal asked for more information from the respondent so that we could satisfy ourselves as to whether the claimant had been paid correctly throughout the relevant period. The respondent produced a spreadsheet which showed the deductions which had been made each month according to the hours that the claimant had not worked. This showed that the claimant had been correctly paid for the hours he had worked - only the hours that he had not worked had been deducted.

95. We explained this the day before the parties were due to give closing submissions. This was a day which finished early. We advised the claimant that if he still considered he had been underpaid he would have to explain to us how he worked that out. However the claimant still did not provide us with any calculation which might suggest he had been underpaid. Instead the claimant suggested that he was simply querying whether he had been paid correctly rather than positively asserting that there had been a specific shortfall.

96. In these circumstances we concluded that the claimant had failed to substantiate any breach of contract claim. There had been no shortfall in the claimant's pay in relation to the week commencing 26 July 2021. The claimant did not do 48-hour's work in the end of July and first week of August 2021 for which he was not paid. There was no breach of contract. We shall therefore dismiss the claimant's claim for breach of contract.

Unfair dismissal

97. We should firstly mention that we are particularly alive to a point which the claimant relied upon which is relevant to the unfair dismissal claim and also the discrimination claims relating to the dismissal. The claimant has pointed out that the decision maker in respect of the dismissal, Mr Hammond, has not been called as a witness by the respondent and the tribunal has not been provided with any good reason why not. We were simply told that Mr Hammond is not available. The respondent relied instead on the evidence of the HR adviser to the dismissal who was Mr Popiolkowski.

98. The tribunal invited the claimant to identify any specific adverse inference that he invited us to draw from this matter. The claimant did not identify anything specific but as we understood it his underlying point was that we should treat the respondent's evidence with caution in particular in relation to the reason for the dismissal.

99. We carefully considered whether we should draw any adverse inference from the respondent's failure to call the decision maker in respect of the dismissal. In our view in light of the claimant's long term absence, his complete failure to engage with the respondent or agree to an OH assessment and the lack of any evidence suggesting a possible return to work Mr Hammond had been correct to identify that he was left with little choice and in fact dismissal was realistically inevitable on the grounds of capability. In these circumstances we decided that that was no adverse inference to be drawn against the respondent and the failure to call a relevant witness was not sufficient for us to draw any inference of discrimination.

100. We found that the reason for dismissal was capability. We were satisfied that the respondent and Mr Hammond specifically genuinely believed the claimant was no longer capable of performing his duties. In our judgement the evidence that the claimant was incapable of doing his job was overwhelming. He had a lengthy period of absence between June 2020 and March 2021. Following that he returned to work on a phased return in April 2021 but was only able to work for one week on his full-time hours at the end of July before being signed off sick again at the beginning of August 2021. The claimant was then continuously absent until he was dismissed in early February 2022. During this period of absence there was no indication that the claimant might be able to return to work. It was this long from August absence and the lack of any prospect of a return to work which caused Mr Hammond to dismiss. The claimant failed to engage with the respondent's requests for an occupational health assessment, he failed to engage in the capability hearings and he failed to engage in the appeal process all of which would have given him an opportunity to explain when he might be able to return to work. In the absence of any such information Mr Hammond genuinely believed that the claimant was not capable of doing his role. This was clearly explained in Mr Hammond's outcome letter.

101. We considered in detail whether the respondent acted reasonably in all the circumstances in treating capability as a sufficient reason to dismiss the claimant.

102. We bore in mind that in cases of dismissal for capability it is well established that in order to act fairly an employer would normally be expected to obtain up-to-date medical information and to consult with the employee. However the respondent could only act in response to the situation that was before it and ultimately we have to decide whether in response to that situation the respondent acted within the range of reasonable responses. The situation the respondent was faced with was that the claimant had been difficult to contact, he had failed to engage with reasonable requests for a meeting to discuss the situation and arrange an occupational health assessment and he failed to

attend the capability or appeal hearings even though we have found he knew about both the capability and appeal hearings.

103. In the above circumstances we were entirely satisfied that the respondent made reasonable attempts to consult with the claimant and to obtain up-to-date medical information but the claimant was uncooperative. The respondent was therefore left with little option but to make a decision on the information that was available and we found that that approach and the ultimate decision to dismiss fell well within the range of reasonable responses. We consider that the respondent could not reasonably have been expected to wait any longer before dismissing the claimant. The claimant's absence had already been lengthy and he was given numerous opportunities to engage with the respondent. There was no indication of a possible return to work and no basis on which the respondent could reasonably have been expected to wait any longer. As we have said the dismissal was not only reasonable but realistically inevitable.

104. We did not consider that there was any procedural unfairness to the claimant. Whilst it would have been better if the original invite letters had been posted as well as sent by email we found that in reality the claimant had been aware of what was going on but had elected not to attend the meetings. This was consistent with his overall approach. Furthermore the respondent had attempted to set up an appeal hearing with the claimant at which he could have aired any concerns about the dismissal but the claimant failed to engage with that either. It appears most likely that the claimant's failure to engage with the process was a result of his misguided sense of suspicion about the respondent arising from the proposal for him to move teams in March 2021. However, the claimant did not communicate any specific concerns to the respondent at the time and it is difficult to see what more the respondent could reasonably have done to ensure the claimant engaged. Overall our view was that the respondent took all reasonable steps to ensure a fair procedure.

105. We have considered the allegations of unfairness relied upon by the claimant as set out in the list of issues. We do not consider that any of the matters relied upon led to unfairness. Our findings on those matters are as follows.

106. We did not see any evidence that the respondent used the claimant's medical condition as an excuse to dismiss him for other reasons. We found that the claimant was not dismissed for any reason other than capability. It was not even clear what the other reasons relied upon by the claimant might be. As we have said the claimant became suspicious of the respondent after the proposal for him to move teams in March 2021 but we found his suspicions in this respect were not well founded. The proposal for the claimant to move teams was done in good faith, as an attempt to make things less stressful for the claimant. When he objected he was given the choice as to what he wanted to do. There was no restructure and the claimant was not replaced. Moreover until he went off sick in August 2021 the claimant was working towards returning to his role full time and he was supported by the respondent to do that through what was a lengthy phased return.

107. We found that the claimant was notified of requests for information and he was invited to meetings. The claimant was dismissed in his absence but this was solely as a result of the claimant's own failure to engage with the respondent.

108. There is no evidence that the claimant's medical condition was improving at the time of dismissal and he never suggested that to the respondent at the time. Moreover the assertion is contradicted by the evidence before us which includes an assessment by the social entitlement chamber in July 2023 that the claimant has limited capability for work and if the claimant were required to undertake work there would be a substantial risk of deterioration of his health and functioning. In addition the claimant's own case as summarised in his schedule of loss is that he feels he will not be able to work at any stage over the next 28 years i.e. until he reaches retirement age. We therefore do not accept that the claimant's medical condition was improving at the time he was dismissed.

109. The claimant did not say he would cooperate with an occupational health process. This was rather disingenuous because the documents clearly show that the claimant was evasive when he was asked by Mr Saleem about an occupational health assessment and when he was specifically asked about it in writing by HR as he had requested the claimant still did not agree to an assessment.

110. The claimant also makes reference to his grievance against Mr Saleem which as we have said was in relation to annual leave. As we have explained the claimant had complained in writing about the annual leave situation in his email dated 4 August. The claimant had then indicated on 11 January to Mr Saleem that he considered that he had a grievance about the annual leave situation. As the claimant correctly asserts the respondent did not deal with this grievance and they instead dismissed him.

111. We thought carefully about whether this failure had any impact on the fairness of the dismissal. We concluded that it did not. The claimant did not suggest at the time that the failure to deal with his grievance was in some way preventing him from engaging in the capability process. We have found that the claimant was not engaging because he had developed a very suspicious attitude towards the respondent following the proposal for him to move teams in March 2021. It was not because of the inaction in relation to the grievance. The claimant had done nothing to action his grievance between 4 August and 11 January. If the claimant considered that the failure to deal with his grievance was related to his inability to return to work he could have explained that to the respondent either through occupational health or through the capability meetings or through submitting written representations as he had been invited to do.

112. Similarly the claimant did not say at the time that the reason why he was not cooperating with an occupational health process was because he wanted to action a grievance against Mr Saleem. There was no link between the grievance and the claimant's failure to cooperate with occupational health. The claimant could still have cooperated with occupational health even if he was

dissatisfied about the lack of action on his grievance. Instead the claimant made the decision to almost completely disengage with the respondent.

113. As we have endeavoured to explain there was a bigger picture here with the claimant feeling quite intensely mistrustful of the respondent since the proposal for him to move teams in March 2021. He appears to have disengaged for that reason. It seems to us the claimant was guided entirely by his misplaced sense of suspicion about the respondent and he lost sight of the facts that (a) he was still under a duty to cooperate with the respondent's reasonable requests and (b) it would have been in his own interests to cooperate generally and in particular with the request to attend occupational health.

114. In these circumstances we consider that the failure to initiate a grievance process had no impact on the fairness of the dismissal.

115. In light of the above we concluded that none of the matters relied upon by the claimant rendered the dismissal unfair and the respondent had acted reasonably in all the circumstances in treating capability as a sufficient reason to dismiss the claimant. The dismissal was fair.

Disability discrimination

116. The claimant relied on five allegations which were said either to be direct discrimination because of disability or discrimination arising from disability.

117. For the purpose of his discrimination arising from disability claim the claimant relied on his absence caused by covid. As we have mentioned the claimant was found to be disabled due to long covid from June 2020. He had an absence caused by long covid from June 2020 to March 2021. That absence arose in consequence of disability.

118. The claimant was absent because of stress from August 2021. That absence was not caused by long covid. It was not therefore something arising in consequence of disability and the claimant has not argued that it was.

119. The allegations of discrimination were all denied and in relation to the discrimination arising from disability claim the respondent further relied on a defence of justification. A legitimate aim had been pleaded, namely "the effective control and management of the Respondent's workforce, business operation, finances and resources, in compliance with the Respondent's rules, policies and procedures". We find this aim was legitimate.

120. In relation to the first allegation we find that this fails on the facts. The respondent did not give the claimant a different job on his return from sickness absence and it did not give his job to a contractor. As we have explained there was a proposal to move the claimant to a different team. This was proposed because the automation team was thought to be less stressful than the operations team and therefore it was proposed to try and make things easier for the claimant. This was a proposal which was designed to support the claimant and it has been wrongly interpreted by him as something negative.

Furthermore, it was a temporary proposal and in the event the claimant did not take it up. The contractor was brought in to cover because the claimant was unable to fulfil his full-time role. This was an innocuous matter. The claimant's job was still there and it was made clear that he would perform it in full once he was able to. There was no evidence that the claimant did not have the skills for the job in the automation team or that he was not accustomed to it. We find the claimant could have done that job but he refused the move because of his unfounded suspicions about the respondent's motives.

121. In the above circumstances we concluded that the claimant had not been subjected to less favourable treatment because of disability. There was no comparator in materially the same circumstances and a hypothetical comparator would have been treated the same way. The claimant had not been subjected to unfavourable treatment because of his disability related absence. The proposal to move the claimant to the automation team was made to try and support the claimant because of the difficulties he may face in returning to his demanding role. The contractor was brought in on a temporary basis to cover because the claimant was not well enough to do his full time hours. The claimant was not treated unfavourably at all or subjected to any detriment in relation to this allegation. The claimant had failed to prove facts from which we could decide that direct disability discrimination or discrimination arising from disability had taken place.

122. If we were wrong about this allegation not being unfavourable treatment because of the claimant's disability related absence we consider the respondent has shown it was a proportionate means of achieving the legitimate aim. We think the respondent acted proportionately to achieve that legitimate aim. The treatment was an appropriate and reasonably necessary way to achieve that aim. Realistically something less discriminatory could not have been done instead. In particular it would not be reasonable to expect the respondent not to cover the claimant's role while he was not able to perform his full time hours. Overall, the needs of the claimant and the respondent had been appropriately balanced – the treatment was part of a process where the respondent was supporting the claimant to be able to return to his role and his full time hours. The claimant was not unduly rushed or pressurised in that process and the claimant had the option to reject the move to the automation team, which he did.

123. The second allegation relates to the period when the claimant was on a phased return following his return from sickness absence in March 2021. It is correct that in that period the claimant had to submit his hours each week, he was paid for the hours he worked and he therefore got less pay compared to when he had been working full-time. We do not see how there can be anything discriminatory about that. The context was that the claimant was being supported by the respondent to come back to work full time through what was a lengthy phased return. The pace of the phased return was dictated by the claimant's health and how he was feeling and he was not being unduly rushed back by the respondent. In this context there is no detriment to the claimant in being paid for the hours that he worked and no reasonable worker would take the view that there was a detriment. It cannot be said to be unfavourable

treatment. In our view it was a neutral and fair act to pay the claimant correctly for the hours he was doing. The claimant had been informed prior to his phased return that he would be paid for the hours he worked and he agreed to return on that basis. Any other person who was working fewer hours would have been treated in the same way.

124. In the above circumstances we concluded that the claimant had not been subjected to less favourable treatment because of disability. There was no comparator in materially the same circumstances and a hypothetical comparator would have been treated the same way. The claimant had not been subjected to unfavourable treatment because of his disability related absence. The claimant had to submit his hours and be paid for the hours he worked because he was working fewer hours. The claimant was not treated unfavourably at all or subjected to any detriment in relation to this allegation. The claimant had failed to prove facts from which we could decide that direct disability discrimination or discrimination arising from disability had taken place.

125. If we were wrong about this allegation not being unfavourable treatment because of the claimant's disability related absence we consider the respondent has shown it was a proportionate means of achieving the legitimate aim. The treatment was an appropriate and reasonably necessary way to achieve that aim. Realistically something less discriminatory could not have been done instead. In particular it would not be reasonable to expect the respondent to pay the claimant for his full time hours when he was only working part time hours for a long period. Overall, the needs of the claimant and the respondent had been appropriately balanced – the treatment was part of a process where the respondent was supporting the claimant to be able to return to his full time hours and he was not unduly rushed or pressurised in that process.

126. In relation to the third allegation we found that the claimant had been refused permission to take annual leave and had to take unpaid leave in July 2021 in order to get a break.

127. We should note that at paragraph 19.3 of the amended response the respondent had denied this allegation but when Mr Saleem gave his evidence - in what we can only describe as a frank and unguarded manner - he readily accepted that he had refused the claimant's request for annual leave and that the reason was because the claimant was not working full-time i.e. because he was on a phased return. Mr Saleem plainly knew about the claimant's disability because he knew that the claimant had been off for a long time with long covid and he had needed a lot of support and a lengthy phased return when he returned to work. We reject the respondent's case, as set out at paragraph 17 of the amended response, that it did not know, and could not reasonably have been expected to know, that long covid had a substantial and long-term adverse effect on the claimant's ability to carry out normal day to day activities. The respondent, and Mr Saleem specifically, knew that the claimant had been off sick for about 9 months with long covid and even when he returned to work he was unable to perform his full time duties for about another 5 months.

128. The tribunal indicated our disquiet about the fact that a disabled employee who was going through a difficult return to work after a challenging illness was refused the opportunity to take annual leave. We find that refusing the claimant's request for annual leave and requiring him to instead take unpaid leave in the circumstances we have described was clearly unfavourable treatment.

129. We consider that refusing the claimant's request for annual leave and requiring him to instead take unpaid leave was done because of something arising in consequence of disability. As Mr Saleem candidly explained the reason why he had refused the claimant's request to take annual leave and instead required him to take unpaid leave was because he was not working full-time i.e. because he was on a phased return. The phased return was something arising in consequence of the claimant's disability of long covid because it was long covid that was preventing the claimant from being able to return to work full-time.

130. The list of issues formulated by EJ Kelly only referred to consideration of whether the unfavourable treatment was because of the disability related sickness absence between June 2020 and March 2021. However, there was no prejudice to the respondent in considering the complaint on the basis that the unfavourable treatment was because of the phased return. This was clearly more apt in light of Mr Saleem's evidence.

131. In any event, the phased return was itself closely linked to the claimant's absence from June 2020 to March 2021. As we have said that absence was caused by long covid and was something arising in consequence of disability. The whole point of the phased return was because the claimant needed support to come back to work because of the lengthy sickness absence he had been through. Whichever way we looked at it the unfavourable treatment had been done because of something arising in consequence of disability.

132. Sensibly, Mr Bownes on behalf of the respondent did not attempt to mount any argument against these conclusions and he acknowledged that the treatment could not possibly be justified. We would unequivocally find that the respondent did not act proportionately in refusing the claimant's request for annual leave and requiring him to instead take unpaid leave. Obviously something less discriminatory could have been done, namely allowing the claimant to take annual leave. The treatment was inappropriate and unnecessary and the claimant's needs, in particular his need for annual leave during a challenging time, had not been adequately taken into account. We therefore uphold this as an allegation of discrimination arising from disability, subject to our findings on jurisdiction.

133. The fourth allegation of discrimination was that the respondent used the claimant's medical condition as an excuse to dismiss him for other reasons. We have already found that the claimant was dismissed for capability and there was no alternative underlying reason for dismissal. This allegation therefore fails on the facts.

134. In relation to the dismissal generally the claimant had not been subjected to less favourable treatment because of disability. There was no comparator in materially the same circumstances and a hypothetical comparator would have been treated the same way. The claimant had not been subjected to unfavourable treatment because of something arising in consequence of disability. The claimant was dismissed not because of his disability related absence from June 2020 to March 2021 but because of capability assessed by reference to the claimant's continuous absence since August 2021 and the fact that there was no likely return to work date as the claimant had not engaged with the respondent or occupational health. The decision was plainly reasonably open to Mr Hammond and indeed we viewed it as realistically inevitable in the circumstances. The claimant had failed to prove facts from which we could decide that direct disability discrimination or discrimination arising from disability had taken place.

135. If we were wrong about this allegation not being unfavourable treatment because of the claimant's disability related absence we consider the respondent has shown it was a proportionate means of achieving the legitimate aim. We think the respondent acted proportionately to achieve that legitimate aim. The treatment was an appropriate and reasonably necessary way to achieve that aim. Realistically something less discriminatory could not have been done instead. In particular it would not be reasonable to expect the respondent not to dismiss the claimant when he had been given ample opportunity to cooperate with the respondent and with occupational health but had failed to engage and there was no indication of any improvement or a possible return to work after nearly 6 months absence. Overall, the needs of the claimant and the respondent had been appropriately balanced – the claimant was given every opportunity to engage with the respondent and with occupational health before the decision to dismiss was made.

136. The fifth allegation of discrimination was that the respondent did not deal with the claimant's appeal against dismissal positively. It is correct that the claimant's appeal was effectively dismissed. The plain and obvious reason for that was that the claimant chose not to engage with the appeal process and he did not attend the appeal meeting to explain what his appeal was about. The respondent nevertheless dealt with the claimant's suggestion that he had not received the invitations to the capability meetings. Mr Silvestri did not accept that point for the reasons explained in the outcome letter and accordingly the appeal was dismissed. There was no evidence to suggest that Mr Silvestri's approach was influenced by disability or by the claimant's disability related absence between June 2020 and March 2021. The same approach would have been taken in relation to any other employee who had failed to actively pursue his appeal.

137. In the above circumstances we concluded that the claimant had not been subjected to less favourable treatment because of disability. There was no comparator in materially the same circumstances and a hypothetical comparator would have been treated the same way. The claimant had not been subjected to unfavourable treatment because of his disability related absence. The appeal was dismissed because the claimant declined to engage with the

appeal process and would not attend a meeting to explain what his appeal was about. Mr Silvestri made a decision on the only ground of appeal he was aware of based on the evidence that was available. That decision was plainly reasonably open to him and his decision was not influenced to any extent by disability or the claimant's disability related absence between June 2020 and March 2021. The claimant had failed to prove facts from which we could decide that direct disability discrimination or discrimination arising from disability had taken place.

138. If we were wrong about this allegation not being unfavourable treatment because of the claimant's disability related absence we consider the respondent had shown it was a proportionate means of achieving the legitimate aim. We think the respondent acted proportionately to achieve that legitimate aim. The treatment was an appropriate and reasonably necessary way to achieve that aim. Realistically something less discriminatory could not have been done instead. In particular it would not be reasonable to expect the respondent not to make a decision on the claimant's appeal when the claimant was refusing to engage with the appeal. It would not be reasonable to expect the respondent to uphold the appeal in circumstances where the claimant was not actively pursuing it and the rationale for dismissal remained sound. Overall, the needs of the claimant and the respondent had been appropriately balanced – the claimant was given ample opportunity to engage in the appeal process.

139. Our conclusion is therefore that all the allegations of discrimination are dismissed, save for the allegation concerning not being allowed to take annual leave which we would uphold as an allegation of discrimination arising from disability subject to our findings on jurisdiction.

Jurisdiction

140. It seems to us that the date from which time began to run for the allegation about not being allowed to take annual leave would be 12 July 2021 that being the date on which the claimant was forced to take unpaid leave. The claimant should therefore have initiated proceedings by way of contacting acas by no later than 12 October 2021. The claimant did not contact acas until 29 April 2022 and he did not bring his claim until 9 July 2022. We have only upheld this one allegation of discrimination and it was a one off decision; there was no conduct extending over a period later than 12 July 2021. The claim was not therefore made to the tribunal within three months (plus early conciliation extension) of the act to which the complaint relates.

141. Applying section 123 Equality Act we only have jurisdiction to uphold this claim if we consider that the claim was brought within such other period as we think just and equitable.

142. We considered this issue carefully and at length. We reminded ourselves of the leading authorities. We looked at why the complaint had not been made in time and whether it was just and equitable in all the circumstances to extend time. The decision in this case was in our view finely balanced and multifactorial. The key parts of our analysis were as follows.

142.1 The claimant's main explanation for the delay was that he had been attempting to deal with matters internally but the respondent had failed to action his grievance. The claimant referred in particular to his email of 4 August when he raised his concerns in writing and his conversation with Mr Saleem on 11 January when he clearly said that he had a grievance about the matter. We regarded the respondent's failure to deal with the claimant's complaint as significant because there had been a wholesale failure to initiate any sort of grievance procedure and the claimant had both in August 2021 and in January 2022 linked his complaint with his anxiety and stress. Our sense of prejudice to the claimant was heightened by the fact that the respondent had failed to deal with his complaint internally when he had a reasonable expectation that they would do so. We accepted that the claimant had not progressed his claim in time mainly for that reason.

142.2 The delay by the claimant was significant.

142.3 But there was no evidence of any forensic prejudice to the respondent. On the contrary the relevant witness Mr Saleem had come to the tribunal and given us a very full account of what had taken place (which was in direct contradiction to the respondent's pleaded case).

142.4 In effect Mr Saleem had openly and honestly admitted the discriminatory conduct which had been flatly and we now have to say dishonestly denied in the amended response.

142.5 Although we acknowledge that there is a type of prejudice in accepting a claim against the respondent out of time that prejudice was in our view outweighed by the prejudice that the claimant would experience if we declined jurisdiction when the key witness who could clearly remember the matter had come to the tribunal and had openly admitted the discriminatory conduct which had been falsely denied in the respondent's pleaded case. This was a fairly blatant example of discriminatory conduct and it does not reflect well on the respondent that it took until Mr Saleem's oral evidence for the truth to be revealed.

142.6 The claimant had been aware from around August 2021 that he had a complaint about the annual leave issue and that he had taken some steps to look into what could be done about it (in particular he said that he had contacted a trade union). However the claimant had not done anything to actively progress a claim until after he was dismissed. However we accepted the main reason the claimant gave for not progressing his claim earlier. We accept that he was expecting the respondent to deal with the matter internally, and we think that was quite reasonable in light of the clear complaints he made in August 2021 and January 2022.

142.7 We also took into account that at the time the claimant should have been progressing his claim he was seriously ill. This was the claimant's other

explanation for the delay. We accepted that at the relevant time the clamant was continuing to experience the effects of long covid which has affected him very severely and he was also experiencing stress and anxiety which was so serious as to keep him signed off for at least seven months. As we have mentioned there was evidence in the bundle to suggest that the claimant has remained in poor health even after he was dismissed. Although the claimant did not go as far as to suggest that his medical condition would have prevented him from bringing a claim we accepted that the claimant was not capable of dealing with things as robustly as he otherwise might by virtue of his medical situation. We therefore found that the reasons why the claim had not been brought in time was because of the claimant's poor health and his expectation that the respondent would deal with matters internally.

143. Balancing these factors together we concluded that in the particular circumstances of this case it was just and equitable to extend time so that we could uphold the allegation. We find that the claim was brought within such other period as we think just and equitable.

Overall conclusion

144. The claimant was subjected to discrimination arising from disability by not being allowed to take annual leave and having to take unpaid leave in July 2021. The other claims and allegations brought by the claimant fail and they are dismissed.

Employment Judge Meichen

18 July 2024