



EMPLOYMENT TRIBUNALS

Claimant: F McLaughlin & M Walsh-Pammen
(Personal representatives of the estate of Mr B Walsh, deceased)

Respondent: Morrison Data Services Limited

Heard at: East London Hearing Centre (via CVP)

On: 10, 11, 12 July 2024

Before: Employment Judge Bennett
Members: Ms J Isherwood
Ms S Harwood

Representation:

For the Claimant: Mr O Winters, paralegal
For the Respondent: Mr S Davis, unregistered barrister

JUDGMENT

1. The Claimant's condition of depression and anxiety did not constitute a disability for the purposes of section 6 of the Equality Act 2010 between 5 August 2021 and 8 March 2022 and so the complaint of failure to make reasonable adjustments in relation to a change to the Claimant's route during this time, fails and is dismissed;
2. The Claimant's condition of depression and anxiety did constitute a disability for the purposes of section 6 of the Equality Act 2010 at 19 July 2022;
3. The Claimant's complaint of failure to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010, in relation to limiting or stopping the capability procedure, fails and is dismissed;
4. The Claimant's complaint of failure to make reasonable adjustments on 30 June 2022 as set out at para 34(b) of the particulars of claim, is dismissed upon withdrawal by the Claimant;
5. The Claimant's complaint of discrimination arising from disability under section 15 of the Equality Act 2010 fails and is dismissed;
6. The Claimant was not unfairly dismissed. His complaint of unfair dismissal is not well-founded.

REASONS

Claim and Issues

1. By a claim form presented on 24 December 2022 the Claimant brought complaints of unfair dismissal and disability discrimination, more specifically discrimination arising from disability under s15 EqA and a failure to make reasonable adjustments under s20 and 21 EqA. Complaints relating to unpaid holiday pay and failure to provide a statement of employment particulars were withdrawn prior to the start of this hearing.
2. Despite Judge Gardiner in a preliminary hearing in January 2024 having ordered the parties to agree and provide a final list of issues, this had not been done prior to the start of this hearing. At the outset it was therefore necessary to spend some time clarifying the issues in the case with the parties' representatives. The resulting list of issues is attached as an Appendix to these reasons. In particular, one of the changes that was agreed to the draft list of issues that is included in the bundle, is the Claimant's withdrawal of the claim of a failure to make reasonable adjustments to the Claimant's working hours, job role or location of work on 30 June 2022, as set out at para 34(b) of the particulars of claim. Issues relating to remedy were excluded as this hearing dealt only with those relating to remedy.

Hearing

3. This has been a remote hearing with all persons attending via remote video CVP. The hearing was recorded and such recording stands as the official record of the hearing.
4. The parties provided an agreed bundle of 471 pages. There were also skeleton arguments from each party, and a list of key documents and a chronology/cast list from the Respondent. We read any documents referred to in the skeleton arguments, witness statements and key documents list as well as a couple of other documents identified by the representatives at the outset. The Claimant sought to add two additional documents to the bundle on the morning of the hearing. These added clarity to items included in the chronology and were clearly relevant to the issues in the case and as the Respondent did not object to their inclusion they were accepted into evidence.
5. We read witness statements and heard oral evidence from Fiona Mclaughlin (Claimant's sister, 'FM'), Mary Walsh-Pammen (Claimant's sister, 'MWP') on behalf of the Claimant. On the Respondent's side we heard from Nurul Islam (Assistant Field Manager), Paul Webb (Senior Field Manager), David Wall (Regional Performance Manager), and Mark Williams (Field Delivery Manager).
6. We consider all witnesses were truthful and gave evidence to the best of their ability. In relation to FM we find that she was clear about the extent of her own involvement in the details of the Claimant's situation and that she was only meaningfully involved from 13 April 2022. In relation to the Claimant's health and account of work events prior to this we unfortunately had little first-hand evidence on the Claimant's side and we find that FM was guided, as we are, primarily by the contemporaneous documentation.

7. At the end of the evidence the representatives gave brief oral submissions which were followed by written submissions the next day. We have considered these when making our decision.

Findings of fact

8. Our findings of fact follow below and in the conclusion section, made on the balance of probabilities where there was a dispute between the parties. Page numbers refer to the agreed bundle.

Background

9. We start by recognising that this is a very sad case. The Claimant was an ill man and he died less than three months after submitting his claim form in these proceedings, approximately 8 months after his employment was terminated. The claim is now continued by two of his sisters on behalf of his estate.
10. The Claimant started working for the Respondent on 17 October 2018 as a gas and electric meter reader. This was an 'entry level' position in the Respondent's organisation and involved the Claimant visiting private homes in order to take readings from gas/electricity meters. The Claimant would be given routes in a particular area and would be allocated properties to visit along the route.
11. The Respondent is a large employer and there were around 100 people in the Claimant's team doing the same job as him.

III – health history

12. The Claimant was the victim of a violent assault in 1997 and he was assaulted and robbed in a further incident in around 2009. Understandably these incidents had a significant impact on the Claimant's mental health at the time. He had counselling to help him to deal with the effects of the assaults but nonetheless found himself prone to anxiety when finding himself in situations where he felt vulnerable.
13. There are references in the Claimant's medical reports to a 'depressive disorder NEC' on 27 April 2016, to 'Anxiety with depression' on 8 June 2016 and '[x] Depression NOS' on 10 June 2016. These reports are consistent with the medical reports at pages 98 and 99, 101 and 103 (dated April, May and June 2016) which refer to his depression. Much of the Claimant's medical record is redacted, even in sections which appear to relate to the issues of depression and anxiety, and in some places this reduces the weight that can be placed on the reports slightly. A further episode/diagnosis of depression is disclosed on 9 March 2022 almost 6 years later.
14. In between 2016 and 2022 there was a report made by the Claimant's family on 26 August 2020 on a 'Newham Community Health Services Referral Form' which states, amongst other things, that the Claimant 'drinks a lot and has mental health issues. He is depressed about life.' The 'Reason for Referral' in the report states 'Deteriorating patient. Needs care assessment'. There are also NHS records which appear to show the Claimant's scores in assessments for generalised anxiety disorder and a general health questionnaire (page 258) and we infer from these that the Claimant was suffering from poor mental health at this time, 21 October 2021.

15. There appear to have been several crisis points for the Claimant prior to entering employment with Respondent. In particular we note the NHS 111 report on 26 April 2016 (page 96) and the referral via A&E to the Rapid Assessment Interface and Discharge Team on 10 June 2016 (page 103) which refers to 'Suicidal thoughts due to alcohol consumption'.
16. As well as the instances of depression referred to, the Claimant's medical records disclose that the Claimant underwent cognitive behavioural therapy in October 2015 'due to current alcohol intake'. On 24 October 2016 his notes refer to 'Alcohol detoxification' and the letter at page 106 from Newham Rise Drug & Alcohol Services states that the Claimant 'reports a 30 year history of harmful use of alcohol'. There is extensive evidence before us that the Claimant had a serious and longstanding alcohol dependence.
17. It is FM's evidence in her witness statement (para 6) that the Claimant's problems with alcohol resulted from the mental health difficulties he suffered in connection with the 1997/2009 attacks. In view of the reference to a '30 year history' above, and the note in the April 2022 GP referral form at page 215 that alcohol has been a problem for the Claimant for 'around 40 years on and off' we find that his problems with alcohol started before the attacks and so were not caused by any mental health issues arising at that time.

September 2018 to 2 August 2021

18. Upon entering into employment with the Respondent in September 2018 the Claimant completed an equal opportunities monitoring form on which he ticked 'no' to the question 'Do you consider yourself to have a disability'. (page 125).
19. In June 2019 the Claimant encountered a verbally abusive customer who threatened him when he visited his property to read his meter. The Claimant reported this to the Respondent and the incident was investigated. A further episode of verbal abuse occurred in around August 2019 which the Claimant also reported to the Respondent.
20. Following a complaint by a customer that the Claimant had been drinking and had mentioned that he had problems with alcohol, the Respondent on 28 February 2020 carried out an unannounced alcohol test on the Claimant which the Claimant passed.
21. During a formal meeting with the Respondent on 11 March 2020 the Claimant told the Respondent that he was very tired and was not sleeping properly. He said that this was because his mum had died recently.
22. On 29 May 2021 the Claimant was approached by members of the public on a train and shown video footage of the Claimant wearing his high vis vest and 'snooping' around a property. The Claimant understood this to be a video of himself trying to locate the relevant meter. Four days after this incident (on 2 June 2021) the Claimant believed that he was recognised by a member of the public in the same area, and identified as the 'high vis pervert'. The Claimant reported this incident to the police and to the Respondent.
23. The Claimant went on sick leave on grounds of stress from 7 June 2021 until 2 August 2021. During this time the Respondent referred the Claimant to Occupational Health

(OH) and a report was produced on 8 July 2021. The Respondent did not see the OH Report as the Claimant withheld consent for it to be shown to the Respondent.

24. We find as a fact that the Claimant was a very private man who did not want to be seen as a bother or a problem to people. His family were unaware of the extent of his health and work difficulties until early 2022. Similarly the Claimant played down any difficulties he was experiencing when discussing with the Respondent both generally, when he was asked by his manager or others how he was, and in meetings designed specifically to understand what was causing the Claimant's ill-health or work difficulties.

OH report 8 July 2021

25. The report details the Claimant's anxiety as a result of the incidents at work involving the video footage and also refers to the historical assaults that the Claimant suffered, saying that 'these recent incidents have resulted in flashbacks to those previous incidents' and 'I have suggested he accesses counselling support via the Company's EAP service'. The Claimant is described as having problems related to 'anxiety and feeling vulnerable' in his work role but in the opinion of the author he does not 'have a long-term condition resulting in impairment'.
26. The Report considered that 'There is a possibility that he might have further problems of anxiety in future...'

3 August 2021 to 8 March 2022

27. The Claimant returned to work on 3 August 2021 after 41 days absence. In his Return to Work (RTW) interview (page 167) he said there was no underlying/reoccurring medical problem that the Respondent should be aware of. He says that 'the contributory factor of the absence was due to an individual posting offence material on social media' and he 'is more cautious with certain people and more nervous than before' and states that he 'contacted EAP and had a counselling session'. It is recorded that the Claimant 'spoke to GP by phone but no offer of external counselling suggested'.
28. The Claimant also had an Attendance Review Meeting on the same day and the record of this is consistent with the RTW interview. The Respondent recorded that the absence was due to the incident with the video footage and that the Claimant is 'very wary' and 'anxious' about being out and walking around. We find that the Claimant's period of sick leave from 7 June 2021 to 3 August 2021 was a direct result of the video-footage encounters that occurred immediately prior.
29. In the RTW interview the Claimant asks if he can work in a different area and avoid the E7 area, where the previous incident took place. There is no evidence that this was done and, indeed, MWP's evidence was that, in a phone call with Sandra Wood, the Respondent said the Claimant's request 'could not be guaranteed'. We have taken into account the oral evidence from the Respondent's witnesses that certain properties and roads – albeit not whole postcodes - could and would have been excluded upon request and the evidence that this was readily contemplated by the Respondent when discussing 'reasonable adjustments' with the Claimant during his later sick leave. During the remaining period of the Claimant's employment we note that although the Claimant frequently referred to feeling vulnerable and anxious because of the prior

abuse, he made no further reference or request regarding the exclusion of areas/properties. From this we conclude that the Claimant was not required to go into the 'problem' areas during this period, although we do not find that any area was deliberately carved out of his route. We are satisfied that, had a road, property, or particular area been allocated to the Claimant which he was uncomfortable with, this would have been removed from his route once brought to the attention of his manager. We nonetheless find that the Claimant would not have raised this with his manager due to his fear of being difficult or a nuisance.

30. On 6 August 2021 the Claimant encountered another abusive customer who verbally abused the Claimant and physically manhandled him out of the property. The Claimant called the police and reported the incident to the Respondent.
31. The Claimant worked without further incident until December 2021/January 2022 when the Respondent became aware that there was a shortfall in the monthly hours being worked by the Claimant. The Claimant was, on occasion, starting work late, being absent from work without prior notice and taking longer than would be expected to complete journeys during shifts. In total the Claimant was more than 100 hours under his total contractual hours in both December and January.
32. The Claimant also had problems working his work phone handset during January 2022. The Claimant told the Respondent on two occasions that he was unable to charge his phone. It was the Claimant's field manager, Mr Islam's, evidence that each time this happened the solution was simple and that it was strange for the Claimant to be struggling with such a basic function. Upon visiting the Claimant's home Mr Islam said that he 'didn't notice anything that sticks in the mind' regarding the state of the house.
33. Following a written invite, an investigation meeting took place between the Claimant and his line manager, Mark Williams, on 10 February 2022 regarding the Claimant's short hours. The Claimant attended the meeting on his own and failed to provide any explanation for the short hours. The record of the meeting (page 190) shows that the Claimant repeatedly replied 'I don't know', 'I can't remember' and 'I didn't plan the work'. He shows disbelief that his hours are as low as the Respondent states and is unable to shed any light on why it has happened.
34. On 25 February 2022 the Respondent wrote to the Claimant inviting him to a disciplinary hearing on 10 March 2022.

9 March 2022 – 19 July 2022

35. On 9 March 2022 the Claimant was signed off sick with a sick note citing 'depression'. The scheduled disciplinary hearing for the following day was cancelled and on 10 March 2022 the Claimant was referred to OH.

OH Report 21 March 2022

36. The OH assessment was carried out and the report was sent to the Respondent with the Claimant's consent on 21 March 2022. The report refers to sleep apnoea and alcohol related problems and states that these could be factors linked to the Claimant's depression. It also refers to the Claimant's cough/acid reflux. The report

states that Claimant is not currently fit for work and 'it is possible that with good support and treatment that he might be fit to resume work within the next 2-3 months, although this depends on his progress.' The report sets out suggested steps for the Claimant to take and suggests that 'if management is to continue with meetings and discussions about his work, I would suggest that the areas of his health are discussed to determine if he has had treatment and support'.

37. The opinion of the OH report author is that the Claimant 'does not have an impairment which is likely to have a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.' The report also states 'At present, I would advise that Brian is fit for welfare support meetings only. At this time I do not think he is fit to attend a disciplinary meeting.'
38. The OH report refers at the outset to the Claimant's previous OH referral and the July 2021 OH report that was produced. It states 'It would be helpful to refer to that report in conjunction with this'. We find that the Respondent took no steps to ask the Claimant for consent to see the previous report, or to even establish in the first instance whether the report was already available to the Respondent.
39. The Claimant's sick leave continued for approximately 4 months until the termination date. His sick notes over this period cite, in order, 1) depression, 2) abdominal pain, 3) and 4) anxiety and 5) mental health breakdown.
40. There is a letter from one of the Claimant's sisters, who did not give evidence before the tribunal, which appears at page 253 of the bundle. This letter is undated and there was some confusion during the hearing about when it was sent. One of the documents disclosed on the morning of the first day of the hearing was stated to contain this letter in an email from the sister to the Claimant's doctor, sent on 25 March 2022. We note that there are slight differences between the email letter and the letter at page 253. We consider that there may have been two different versions of this letter sent on two different occasions however we do not reach any conclusions in this regard. We accept that the email dated 25 March 2022 was sent on the date stated on its face and we have had regard to its contents, which clearly indicate that the Claimant's sister had significant concerns about her brother's health at this time.
41. The 25 March 2022 email refers to the Claimant being under 'immense stress' and 'the worry of losing his current job and not being able to pay his rent and other bills has put him in a steep downwards spiral'. The author also suggests that the Claimant is suffering from 'undiagnosed mental health problems' and 'an addiction to alcohol'. She says that for 'many years' 'something not right with Brian's behaviour' and suggests that the Claimant may have Aspergers, autism or Korsakoff syndrome, to which she attributes his problems with memory.
42. A meeting was held on 13 April 2022 to review the OH report. This is the first meeting that the Claimant's sister, FM, attended with him and followed her family becoming aware of the extent of the difficulties that the Claimant was having. The Claimant's brother also attended. We find that the content of the meeting was as set out in the record at page 205. The purpose of the meeting was primarily to discuss the Claimant's state of health and to support him in relation to a return to work. Potential adjustments to the Claimant's role upon return were discussed.

43. We note a medical referral form dated 20 April 2022 (page 210) to a mental health clinic which says 'Brian is struggling with anxiety and depression'. It then has redactions which mean that, although the form states that he 'now struggles with going out anywhere alone and relies heavily on his adult siblings to accompany him everywhere' it is not clear if this is linked to the depression or to something else. On the same date there is a referral to Newham Rise Drug and Alcohol Service which in addition to information regarding the Claimant's alcohol use also indicates in a tick box that he has the 'support issue and risk factor' of 'depression.'
44. On or around 17 May 2022 the Claimant was invited to a meeting. Both the letter invite (page 218) and the record of the meeting itself, which took place on 19 May 2022 (page 221), refer to this meeting as a 'formal capability meeting', although the body of the letter describes the upcoming meeting as a 'welfare meeting' and the follow-up letter (page 226) is headed 'Formal Welfare Outcome Letter'. In the meeting the Respondent asked and the Claimant gave an update as to his various health problems and the steps that had been taken to progress treatment. The Claimant confirmed that since the 13 April meeting he had made a GP appointment but this had been cancelled and rearranged for the previous day due to the GP's sickness; he had been referred and was waiting for an appointment in relation to sleep apnoea; the GP didn't want to prescribe anti-depressants but had proposed talking therapy which the Claimant was waiting to start; steps had been taken towards obtaining a private assessment for Aspergers or ADHD; the Claimant had also had a chest x-ray and blood tests and met with a mental health officer in his practice, and the Claimant was attending AA.
45. There was also discussion regarding a likely return to work date and the Respondent asked if the Claimant felt he would be able to return after the 2-3 months indicated in the OH report (which would take him to 25 June 2022). The Claimant indicated that he wished to return for financial reasons but the Respondent cautioned him that he would first need to be medically fit. FM questioned whether it would be better to wait until the Claimant had had 'talking therapies' and indicated that 'he won't get an appointment until mid-July 2022'. FM asked if the Claimant still needed to make contact every Monday and the Respondent confirmed that he did.
46. The Claimant continued to report in as required and remained on sick leave. On 14 June 2022 a further, 'enhanced', OH Report was conducted with the Claimant's consent and this was sent to the Respondent on the same day.

Enhanced OH Report 14 June 2022

47. The enhanced OH report sets out Claimant's current health issues as best as it is able but acknowledges that 'Brian has quite a complex medical history, and it isn't entirely clear what is going on.' It records the Claimant's accounts of the incidents of abuse at work and links these events with the assaults that the Claimant suffered in 1997/2007: 'Brian has said that he was subjected to a mugging at knifepoint a few years ago, and these recent events have triggered further intrusive symptoms.'
48. The report also states that the Claimant has 'symptoms consistent with anxiety and depression', that he 'admitted that he is drinking up to 200 units of alcohol per week', 'has been struggling with coughing fits for a number of years' 'might have emphysema' and 'also has stomach problems'. The doctor's conclusion is that the

Claimant is unfit for work. It is unclear to us whether this is because of the Claimant's alcohol problem, depression, cough or other. 'Brian appears to have quite a complex medical history which is undoubtedly the reason for his absence'. The report advises the Respondent to assume the Claimant is covered by the Equality Act 2010 and states that 'no adjustments would enable a return to work currently'. The report is unclear regarding the potential length of the absence, whether he is receiving appropriate treatment and whether this will aid his recovery/when.

49. The Claimant was then invited to a 'long term sickness absence review' meeting. This was the start of the formal capability procedure. FM spoke in cross-examination regarding how this meeting had to be re-arranged on several occasions. On one occasion (24 June 2022) this was because the Claimant had forgotten about the meeting and was out grocery shopping. FM managed to make contact with him and he joined the telephone conference meeting but the meeting was adjourned due to the Claimant being too confused and disorientated to meaningfully take part. FM says that the meeting had to be rearranged on another occasion due to a mix-up with dates by the Respondent. We note the letter at page 236 which appears to be mis-dated and we accept that this is more likely than not what happened.
50. The first capability meeting finally took place on 30 June 2022. The Claimant was present with FM. Although the meeting invite referred to the possibility of dismissal and this was highlighted at the outset of the meeting by David Wall we find that this was not fully understood by the Claimant during the meeting. In fact the thrust of the meeting concerned how the Claimant was doing and if/how he might be able to return to work. As in the previous meeting, the Claimant was asked to explain what progress had been made with his various health issues. This is recorded in the minutes at page 249. These are not disputed by either party and we accept that they are an accurate record. Progress reported by the Claimant included that he was waiting for the results of his sleep apnoea tests, that he was waiting to hear back from RISE (an alcohol recovery service) with a date having spoken to them the previous day, that he had an MRI scan and was waiting for his Aspergers test. The Claimant further confirmed that he had not used the employee assistance programme, and that he was on medication for the acid reflux. He said that he had not seen his GP because he had been off sick and then on holiday.
51. In summarising the progress that the Claimant had made it appeared to the Respondent that phone calls, appointments and actions had only taken place in the last few days running up to the capability meeting. This was not the case. The Claimant explained that this was not the case and that he had actioned everything promptly and had been chasing but the systems were slow.
52. When discussing potential return to work dates the Respondent highlighted that the recent OH report said that the Claimant should not return until his conditions were diagnosed and plans put in place to ensure he was fit to work. The Claimant was asked whether he thought he would have things in place over the next few weeks and the Claimant replied that 'I am perfectly happy to go back to work'. Discussion then turned to the adjustments that could assist the Claimant if he was signed as fit to work after the existing two week sick note but the meeting ended without specifying a proposed return to work date in order to allow the Claimant more time to contact his GP and try and obtain clarity as to his fitness to work and potential adjustments. FM said in her oral evidence that it was in this meeting that the Respondent started

applying pressure on the Claimant regarding when he would be fit to return to work. We do not find that this is the case. We understand that FM and the Claimant may have felt pressured by the prospect of a return to work, and by knowing that the Respondent wanted to know, but we find that no pressure was applied by the Respondent beyond turning the Claimant's mind to the question. This conclusion is supported by the Respondent's position that the Claimant must be fit to work before he returned.

53. A further/reconvened capability meeting was held on 4 July 2022. Again, there is no dispute that what is set out in the minutes (at page 250) is what happened in the meeting. The focus in this meeting was on getting the Claimant back to work when his existing two-week sick note expired. The Respondent explained that the Claimant needed to get clarity from his GP as to what adjustments the Respondent could make and stated that if the Claimant was not fit to return by 18 July another meeting would be held and 'we cannot go on for months'.

7 July GP letter

54. On 7 July 2022 the Claimant's GP issued a letter (page 255) stating that the Claimant 'is suffering with a mental health breakdown'. It states 'I have issued a sick note for 3 months and he may need it for longer' and requests that the 'weekly call from work and routine disciplinary meetings' stop until the Claimant is better as they 'are very stressful and increase his anxiety significantly further'.
55. It was submitted on behalf of the Respondent that this letter had been written as a direct result of the Claimant's sister's letter to the GP setting out the family's concerns, and was a reflection of those concerns rather than being a reflection of the GP's own assessment. FM was unable to clarify in cross-examination whether this GP letter followed an examination of the Claimant by the GP. We find that it is more likely than not that the 7 July GP letter was written in response to an expression of concern and a request by the Claimant's family. However we also accept the Claimant's case that his circumstances were well known to his GP. We bear in mind that a GP has professional obligations and it cannot be presumed that they would issue a letter/sick note of this kind without a genuine and considered belief in its accuracy. As such we place significant weight on the 7 July 2022 as an indication of the Claimant's mental health at the time.
56. The Respondent was sent the 7 July 2022 GP letter by email on 11 July 2022.
57. On 14 July 2022 the Respondent sent a letter inviting the Claimant to a further / reconvened capability hearing (page 262). This acknowledged the 7 July 2022 GP letter and confirmed that a possible outcome of the meeting could be dismissal. As with the previous meetings the Claimant was allowed to bring a family member to accompany him. The Respondent also emailed FM directly on 15 July 2022 to inform her of the reconvened meeting. FM responded on 17 July 2022, copying in the Claimant's doctor, and stating that by reconvening the meeting the Respondent was going against the doctor's advice. FM asked the Respondent not to proceed with the meeting the following day in order to 'give him the time he requires to recover to good health'.

58. On 18th July, the following day, David Wall of the Respondent replied to FM's email to confirm that the meeting that day would be going ahead and asking her to attend with the Claimant. FM replied confirming that the Claimant would not be joining the meeting, that he had also emailed confirming this, and that 'I will not be asking Brian to email or call you again this morning'.
59. The capability meeting went ahead in the Claimant's absence and the Claimant's employment was terminated the following day, 19 July 2022, by way of the letter at page 268. At the time of his dismissal the Claimant was continuing to actively pursue various treatments including talking therapies and the RISE alcohol recovery programme (page 266) and we find that progress was being made in terms of confirming dates and moving forwards with these.
60. An appeal against the dismissal decision was lodged by the Claimant on 28 July 2022 and the appeal hearing took place on 12 August 2022. In a letter dated 18 August 2022 the decision to terminate employment was upheld.

Law

Disability

61. Section 6(1) of the EqA provides that:
- (1) A person (P) has a disability if—*
- (a) P has a physical or mental impairment, and*
- (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*
62. The foundation of a proper analysis is the identification of the day-to-day activities, including work activities, that the claimant could not do, or could only do with difficulty - Elliott v Dorset County Council UKEAT/0197/20/LA(V) at [82].
63. The Equality Act 2010 Secretary of State 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' ("the Guidance") should be considered by the Tribunal insofar as it appears to it to be relevant – see paragraph 12 of Schedule 1 to the EqA."
64. We found the Northern Irish Court of Appeal case of Veitch v Red Sky Group Limited [2010]NICA 39 and in particular s19 instructive and of assistance in this case:
- "From the way in which it did express itself it appears that the Tribunal elevated the production of medical evidence on the issues at each stage of the Goodwin inquiry to the status of a necessary proof. This is to overstate the position. Although it heard submissions on the question of the extent of the appellant's difficulties the Tribunal did not set out what evidence it had heard on those issues and it did not set out its findings of fact on those issues. It appears to have concluded that it should make no findings in respect of the claimed difficulties because of the absence of medical evidence. The presence or absence of medical evidence may be a matter of relevance to be taken into consideration in deciding what weight to put on evidence of claimed difficulties causing alleged disability but its absence does not of itself*

preclude a finding of fact that a person suffers from an impairment that has substantial long-term adverse effect. The absence of medical evidence may become of central importance in considering whether there is evidence of long-term adverse effect from an impairment. Frequently in the absence of such evidence a Tribunal would have insufficient material from which it could draw the conclusion that long-term effects had been demonstrated”

65. We reminded ourselves that we should consider the cumulative effects of the impairment and that the focus of the test is on the things that the claimant cannot do, or can only do with difficulty, rather than on the things that the person can do - Goodwin at p309. It is wrong to conduct an exercise balancing what the person cannot do against the things that he can do - Ahmed v Metroline Travel Limited UKEAT/0400/10 at [46].

Actual and constructive knowledge of disability

66. A respondent must know 3 things for actual knowledge, firstly the nature of the impairment; secondly that the impairment has a substantial adverse effect on day-to-day activities; and thirdly it is long-term or likely to be long-term.

67. The EHRC Code provides guidance on the issue of knowledge:

s6.21 “If an employer's agent or employee ... knows, in that capacity, of a worker's disability, the employer will not usually be able to claim that they do not know of the disability.”

68. See also s5.14 and s5.15 of the Code reproduced in the extract from A v Z Ltd [2019] IRLR 952 below.

69. The Supreme Court in A v Z laid down the following guidance at s23, per Lady Hale:

'23. In determining whether the employer had requisite knowledge for s 15(2) purposes, the following principles are uncontroversial between the parties in this appeal:

(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see... [2018] ICR 1492 CA at para 39.

(2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of s 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect, see Donelien v Liberata UK Ltd (2014) UKEAT/0297/14, [2014] All ER (D) 253 (Dec) at para 5, per Langstaff P, and also see Pnaiser v NHS England (2016) UKEAT/0137/15/LA, [2016] IRLR 170 EAT at para 69 per Simler J.

(3) The question of reasonableness is one of fact and evaluation, see [2018] EWCA Civ 129, [2018] IRLR 535 CA at para [27]; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

(4) *When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: (i) because, in asking whether the employee has suffered a substantial adverse effect, a reaction to life events may fall short of the definition of disability for EqA purposes (see Herry v Dudley Metropolitan Council [2017] ICR 1610 per His Honour Judge Richardson, citing J v DLA Piper UK LLP ... [2010] ICR 1052, and (ii) because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it is not [already done so]", per Langstaff P in Donelien EAT at para 31.*

(5) *The approach adopted to answering the question thus posed by s 15(2) is to be informed by the Code, which (as relevant) provides:*

"5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.

5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making inquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

(6) *It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (Ridout v T C Group... [1998] IRLR] 628; Alam v Secretary of State for the Department for Work and Pensions.... [2010] ICR 665.*

(7) *Reasonableness, for the purposes of s 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code'*

Discrimination arising from disability (s15 EqA)

70. Section 15 of the EqA 2010 provides:

(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.

71. No comparator is required. Section 15 discrimination requires only that the disabled person shows that they have experienced unfavourable treatment because of something connected with a disability.

72. The EAT in Pnaiser v NHS England and another [2016] IRLR 170 summarised the correct approach at s31:
- (a) *A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*
 - (b) *The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s. 15 case. 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 so amount to an effective reason for or cause of it.*
 - (c) *Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).*
 - (d) *The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*
 - (e) *For example, in Land Registry v Houghton UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding Case Number:1304246/2021 26 that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.*
 - (f) *This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.*

- (g) *Miss Jeram argued that 'a subjective approach infects the whole of section 15' by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.*
- (h) *Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.*
- (i) *As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."*

73. As regards unfavourable treatment, s5.7 of the Equality and Human Rights Commission's Code of Practice on Employment states that it means that the disabled person 'must have been put at a disadvantage'.

74. The Tribunal also noted s5.20 and s5.21 of the EHRC Code:

"5.20 Employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments (see Chapter 6).

5.21 If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified. ..."

Objective Justification/Legitimate aim/Proportionality

75. The test for objective justification is unlike the band of reasonable responses test - *Hardy & Hansons plc v Lax* [2005] EWCA Civ 846, [2005] IRLR 726.

76. The EHRC code provides:

s4.28 “The concept of ‘legitimate aim’ is taken from European Union (EU) law and relevant decisions of the Court of Justice of the European Union (CJEU) – formerly the European Court of Justice (ECJ). However, it is not defined by the Act. The aim of the provision, criterion or practice should be legal, should not be discriminatory in itself, and must represent a real, objective consideration. The health, welfare and safety of individuals may qualify as legitimate aims provided that risks are clearly specified and supported by evidence.”

s4.29 “Although not defined by the Act, the term ‘proportionate’ is taken from EU Directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an ‘appropriate and necessary’ means of achieving a legitimate aim. But ‘necessary’ does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.”

s4.30 “Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer’s reasons for applying it, taking into account all the relevant facts’

77. Hampson v Department of Education and Science [1989] ICR 179 identifies 3 elements that a respondent must establish, namely:

- i. the policy alleged to be discriminatory corresponds to a real need on the part of the employer;
- ii. that the policy is appropriate with a view to achieving the employer’s objective; and
- iii. that the policy is ‘necessary’ for this purpose.

78. The respondent who successfully negotiates the “Hampson” test must also objectively justify the legitimate aim and show that the reasons for its imposition are sufficient to overcome any indirectly discriminatory impact. Is the PCP a proportionate means of achieving a legitimate aim?

79. In MacCulloch v ICI [2008] IRLR 846, the EAT stated:

(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it...

(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no “range of reasonable response” test in this context...

Reasonable adjustments – s20 and s21 EqA

80. Section 20 EqA 2010 provides insofar as is material:

“Duty to make adjustments

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

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

81. Paragraph 20 of Schedule 8 of the EqA 2010 provides

“20(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know— ...

(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.”

82. In a reasonable adjustments claim the burden of proof is on the Respondent to prove that it did not have knowledge.

83. According to Section 212(1) EqA ‘substantial’ means ‘more than minor or trivial’.

84. s6.19 of the EHRC Employment Code states:

“For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment.”

Burden of Proof

85. s136 EqA states:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

86. In *Martin v Devonshires Solicitors* 2011 ICR 352, EAT Mr Justice Underhill stressed that while

‘the burden of proof provisions in discrimination cases... are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination — generally, that is, facts about the respondent’s motivation... they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent’s motivation and what is in issue is its correct characterisation in law’.

Unfair Dismissal

87. Section 98 ERA says:

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

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) [which includes a reason which relates to capability] or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. ...

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

88. If the Respondent shows the reason and establishes that it was a reason falling within section 98 (and, in this case, the Claimant accepts that the reason was capability), the Tribunal must then go on to consider section 98(4) ERA in order to determine whether the dismissal was fair. The burden is no longer on the Respondent at this point. Rather, having regard to the reason or principal reason for dismissal, whether the dismissal is fair or unfair requires an overall assessment by the Tribunal, and depends on whether in the circumstances, including the size and administrative resources of the business, the Respondent acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the Claimant. This is something which is to be determined in accordance with equity and the substantial merits of the case. This overall assessment is in part concerned with the steps taken by the Respondent to effect dismissal and requires an assessment of the reasonableness of the decision to dismiss. In all respects, the question is whether what the employer did was within the band of reasonable responses of a reasonable employer.

89. The essential framework for considering whether dismissal on account of ill-health absence falls within the band of reasonable responses open to an employer was set out by the EAT in Monmouthshire County Council v Harris EAT 0332/14. There, Her Honour Judge Eady observed:

'Given that this was an absence-related capability case, the employment tribunal's reasoning needed to demonstrate that it had considered whether the respondent could have been expected to wait longer, as well as the question of the adequacy of any consultation with the claimant and the obtaining of proper medical advice'.

90. The EAT stressed the importance of consultation and discovering the true medical position in the leading case of East Lindsey District Council v Daubney 1977 ICR 566, EAT, where Mr Justice Phillips stated:

'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 him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employers' medical advisers, will cause them to change their opinion. There are many possibilities. Only one thing is certain, and that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done.'

91. In Taylorplan Catering (Scotland) Ltd v McInally 1980 IRLR 53, EAT the EAT stated that consultation is also necessary to balance the employer's need for the work to be done against the employee's need for time to recover.

Conclusions

Was the Claimant disabled by reason of depression and anxiety between 5 August 2021 – 8 March 2022?

92. As this time period concerns the time in which Claimant says it would have been reasonable to make the adjustment to his work route, we consider that the relevant time period refers to that period during which he was actively working prior to the second sickness absence (which commenced on 9 March 2022). So the relevant period ends on 8 March and not 9 March 2022 as set out in the List of Issues.
93. It is for the Claimant to prove on balance of probabilities that he met all four pre-requisites of the legal definition of 'disability' during this period, namely the impairment condition, the adverse effect condition, the substantial condition and the long-term condition.
94. We start with the impairment condition. The Claimant relies on the mental impairment of depression and anxiety. The ET1 refers to him having been formally diagnosed with depression on 10 June 2016. Whilst we accept that he did suffer from depression in 2016 we do not accept the implication that this was a continuing or ongoing diagnosis of depression. Poor mental health can be inferred from the 26 August 2020 referral form and the completion of health questionnaires on 21 October 2021

but there is a notable absence of any further medical confirmation that the Claimant was suffering from depression prior to his sick leave for 'stress' in June/July/August 2021. He was not taking medication or treatment for depression.

95. The June-August 2021 period of sick leave followed at least two unpleasant incidents in which the Claimant was accosted/abused by members of the public. As described in the OH Report of 14 July 2021 we conclude that these incidents made him anxious and triggered the sick leave. We consider that the OH Report is consistent with the Claimant's medical history in that it appears to view the immediate episode of anxiety as an 'episode' which occurred in response to a particular event, rather than part of an ongoing problem.
96. We have taken into account the information in the Return to Work Form and the Attendance Review Form to the effect that the Claimant's sickness absences were not regular, not erratic, nor part of a general pattern. We factor in that the Claimant himself said that he had no underlying or recurring medical problems of which the Respondent should be aware, and that he did not declare any disability upon starting to work for the Respondent. We consider it relevant and suggestive of no impairment of depression/anxiety that the Claimant said his GP had not offered him counselling, or seemingly any other treatment, during the sickness absence that preceded this period in question.
97. Against this we take into account the Claimant's description of himself as 'vulnerable, distraught and very stressed' in the Attendance Review Meeting and his apparent disorientation during the investigative interview regarding his short hours and when struggling with routine tasks such as using his work mobile phone.
98. The Claimant was clearly struggling to perform his job normally during the period in question. It is not clear whether the difficulties were a result of depression and anxiety or other factors such as his alcohol dependency or sleep apnoea, all of which he was suffering from during the relevant period.
99. It is a finely balanced question but we conclude that the Claimant has established on a balance of probabilities that during this period he had the mental impairment of depression and anxiety.
100. Did this impairment have a substantial adverse effect on the Claimant's abilities to carry out day-to-day activities? In his RTW meeting on 5 August 2021 (167) the Claimant stated that he was 'more cautious with certain people and more nervous than before'. Despite requesting a change to one of his areas of work in this meeting the Claimant apparently worked without incident from August 2021 until December 2022 and no substantial adverse effect is apparent during this time.
101. In December 2021 the Respondent noticed that the Claimant was working short hours and failing to turn up to work. In January 2022 the Claimant told the Respondent on two occasions that he was unable to charge his phone. It was NI's evidence that each time this happened the solution was simple and that it was strange for the Claimant to be struggling with such a basic function.
102. NI gave evidence that he visited the Claimant during this period to assist him when he was having problems with his phone. Although we do not put significant weight

on it we note that he said he did not notice anything amiss in the Claimant's house. From this we surmise that the Claimant was managing to look after himself and not living in chaos as MW-P described happening during periods when the Claimant 'was suffering worse mental health'.

103. There is nothing to link the Claimant's failure to attend work and to complete his contracted hours, his confusion regarding his mobile phone or his incoherence and lack of a sensible explanation when asked to give an explanation in the investigative meeting to the impairment of depression and anxiety. FM suggests at paragraph 8 of her witness statement that 'at times when Brian's mental health worsened, this impacted his performance at work' and at paragraph 18 that 'I believe any problems with his working hours, if they occurred, would likely have been caused by his poor mental health. Brian's difficulty sleeping when suffering periods of depression often made him confused and disoriented, and this may have had an impact on his ability to work his full hours or to operate the Respondent's systems effectively.' Although we accept this is plausible, we do recognise that it is speculation and FM accepted in her oral evidence that she was not closely involved with the Claimant's mental state or its impact on his work prior to stepping in to help him in April 2022.
104. As such we cannot make the leap to saying that the adverse effects suffered by the Claimant during this period were on balance of probabilities due to his depression and anxiety as opposed to one of his other impairments such as alcohol dependency or sleep apnoea. Each of these impairments would, in the absence of specific medical advice, appear to be just as likely to be the cause of the adverse effects described as affecting the Claimant during this period.
105. The Claimant has not shown that the impairment of depression and anxiety had a substantial adverse effect on his ability to carry out day to day activities during the relevant period.
106. In case we are wrong on this we go on to consider whether the effect of the impairment at this time were long-term. We find that they were not.
107. We have found that the depression and anxiety suffered by the Claimant was episodic and a reaction to specific events in his life. He had suffered episodes of depression before but on the evidence before us this was several years previously and in the interim he had not suffered from substantial adverse effects. This episode of depression had not lasted for at least 12 months and, on the evidence of the 2021 OH Report which said that 'with support, Brian should be fit to resume work at the end of his current fit note' we are satisfied that the effects were not likely to last at least 12 months or to recur.
108. In conclusion on this point we find that the Claimant was not disabled by reason of depression and anxiety between 5 August 2021 – 8 March 2022. This means that the Claimant's complaint of a failure to make reasonable adjustments in relation to the alteration of the Claimant's route between those dates, must fail.
109. Even if we had found that the Claimant did have a disability at this time we are satisfied that the Respondent has dislodged the burden of proof to show that it did not and could not reasonably have been expected to know about this. We reach this conclusion on the basis of:

- (a) The Claimant's response on the equal opportunities monitoring form;
- (b) His failure to refer to it when given the opportunity in the RTW interview;
- (c) In the absence of any disclosure on the Claimant's part, his reference to having sleep problems was insufficient even when looked at in the round with his struggles with attendance and performance in December/January to raise a duty to enquire further.

Was the Claimant disabled by reason of depression and anxiety as at 19 July 2022?

110. We now consider the question of disability, by looking at the same constituent parts of the definition, as at 19 July 2022.
111. We are satisfied that the Claimant had a mental impairment of depression and anxiety at this time. We reach this conclusion on the basis of:
- (a) The sick notes. Despite these being inconsistent in the period prior to dismissal – one citing 'abdominal pain' - the sick notes dated 9 March 2022 citing 'depression' and 6 May 2022 citing 'anxiety' both support an impairment as claimed;
 - (b) The OH Report of 21 March 2022 which records the Claimant's difficulties as sleep problems, alcohol-related problems, depression and cough/possible acid reflux. The symptoms reported by the Claimant as noted in this report include reduced motivation and drive, lack of interest, enthusiasm and low mood. Even without medical training we recognise that these are symptoms commonly associated with depression. The Report writer supports this: 'Brian has a low mood and symptoms of depression.' We also consider it noteworthy that the Report recommends that the Claimant attend his GP to 'discuss possible treatment with medication for depression';
 - (c) The OH Report of June 22 recognises the complexity of the Claimant's ill-health but does state that he has 'symptoms consistent with anxiety and depression';
 - (d) The email from the Claimant's sister to his GP dated 25 March 2022 and the very similar letter, undated (page 254). Although these communications do not use the words 'depression' or 'anxiety' and suggest that an 'undiagnosed mental health condition' may be accountable for the Claimant's behaviour, the reference to 'immense stress' and 'the worry of losing his current job and not being able to pay his rent and other bills has put him in a steep downwards spiral' support a finding of depression and anxiety;
 - (e) Importantly, the GP letter of 7 July 2022 says that the Claimant 'is suffering with a mental health breakdown' and we consider that this is consistent with depression and anxiety.
112. We are also satisfied that the impairment of depression and anxiety at this point had a substantial adverse effect on the Claimant's ability to carry out day to day activities. He was signed off work on this basis, the 21 March OH Report advised that he was fit for 'welfare support meetings only'. His family had by this point stepped in to advocate for him and there is evidence of him being confused and incoherent.

113. As before, it is difficult to separate out the causes of the adverse effects given that the Claimant was suffering from many ailments at this time and there is little for us to go on in terms of allocating an effect to an impairment. We conclude that, on the basis of the medical evidence that he was suffering from depression and anxiety and that these were the reason given in his sick notes/GP letter for his absence from work, it is more likely than not that at least some of the day to day difficulties he was experiencing - and which included not caring for himself properly, not eating properly and maintaining poor hygiene - were the direct result of his mental breakdown/impairment of depression.
114. By 19 July 2022 the Claimant had been off work due to (primarily) depression and anxiety for 4 months. He was signed off for a further three months and there was no certainty or even likelihood that he would then return to work, as the 7 July GP letter said 'I have issued a sick note for 3 months and he may need it longer'.
115. The Claimant's position, as set out in the ASA, is that [it is irrelevant whether the alcoholism caused the depression or vv.] we accept this however we recognise on the evidence before us that the two are clearly linked. Given the multiple interrelated problems being experienced by the Claimant, the slow progress being made to diagnose and address these by professional services, and in the context of his medical history we consider that the effects of the Claimant's depression and anxiety were likely to last at least 12 months or, if not, that they were likely to recur when considered at 19 July 2022.
116. As at 19 July 2022 the Claimant was therefore disabled by reason of depression and anxiety.

Did the Respondent know or could it reasonably have been expected to know that the Claimant had a disability at this time?

117. For largely the same reasons why we found that the Claimant had an impairment at this time we are satisfied that the Respondent had knowledge of the Claimant's disability from the 7 July 2022 when it received the GP's letter signing the Claimant off for 3 months due to a mental breakdown. The Respondent had seen all of the medical evidence that we referred to above and it was in regular communication with the Claimant's family who had made clear to them that the Claimant was not in a suitable state to either work or continue with work meetings.
118. Although it is not pivotal to our findings on this point, we consider that the reference in the March 22 OH Report to the earlier July 2021 OH Report placed a duty on the Respondent to enquire once again about access to that earlier report. We consider that the Claimant would have allowed access at this later point and that this would have made the Respondent aware of the possibility of the long-term nature of the Claimant's depression and anxiety. We nonetheless find that the long-term nature of the impairment was understood by the Respondent in the full light of the circumstances by 7 July 2022.
119. Prior to 7 July 2022 it was clear that the Respondent understood the Claimant was in poor physical and mental health which put a duty on them to make further enquiries. We have found that they did this by commissioning regular OH reports, the latest of which was inconclusive regarding the nature of the Claimant's illnesses. Faced with

the Claimant's previous reluctance to disclose details of his history of mental health difficulties, his assertion in the meeting on 30 June 2022 that he was happy to return to work and the lack of a clear medical opinion, we do not consider that the Respondent did or could have known to a reasonable degree of certainty that the Claimant's depression and anxiety amounted to a disability prior to the GP's letter of 7 July 2022.

Reasonable adjustments

120. The Respondent accepts that it had a provision criterion or practice of requiring employees to attend capability hearings and welfare meetings in accordance with its sickness absence policy.
121. In considering whether this PCP put the Claimant at a significant disadvantage in that the frequent meetings caused the Claimant significant anxiety and distress we take account of the following:
 - (a) We consider that any employee who is on long-term sickness absence would be caused anxiety and distress by the absence management meetings. The Respondent was following its own sickness absence policy but it was not clear to the Claimant what the purpose was of each meeting that he was required to attend. The Claimant's comprehension in general was impaired, he was suffering from reduced motivation and his family had stepped in due to him being unable to handle his own affairs;
 - (b) Although there were only 4 'formal' capability meetings held between 9 March 2022 and 19 July 2022 there were also OH assessments, weekly 'welfare' meetings, some meetings had to be rescheduled, postponed or changed in order to accommodate both Claimant and Respondent, and there was other communication between the parties in order to keep the Respondent updated. We accept FM's evidence at paras 20 and 21 of her WS and her oral evidence and we consider that the need for regular communication amounted to an additional weight on the Claimant's mind which was adding to his stress and not assisting his mental state.
 - (c) The 21 March 2022 OH Report advises that the Claimant is fit for 'welfare support meetings only' and 'At this time I do not think he is fit to attend a disciplinary meeting.' This is in the context of saying that the Claimant 'has a low mood and symptoms of depression...he is not coping well at present and I think is vulnerable'. From this we infer that his mental state would be impacted by formal meetings where he would be expected to 'fight his case' such as in the disciplinary process. We note that the disciplinary process regarding the Claimant's short hours had been cancelled and was not re-instated following this OH Report;
 - (d) The GP letter of 7 July 2022 which states that the 'weekly call from work' and 'disciplinary meetings' 'are very stressful and increases his anxiety significantly further' and asks the Respondent to 'stop these until he is better';

- (e) FM's email to David Wall explaining that the Claimant will not attend the meeting on 18th and reiterating that the ongoing meetings 'are only adding to Brian's stress and anxiety and detrimental to his recovery'.
122. It is clear to us that the Respondent's requirement that the Claimant attend meetings in accordance with its sickness absence policy was having a more significant effect on the Claimant and causing him significantly more anxiety than it would have done for somebody who was not already suffering from depression/anxiety. We find that the Claimant was placed at a substantial disadvantage.
123. We also conclude that the Respondent knew of the disadvantage given the clear indication in the GP letter of 7 July 2022, the 21 March OH Report and FM's communications on 18 July 2022.
124. The proposed adjustments put forward by the Claimant were:
- (a) Continuing with only welfare meetings and not 'disciplinary' meetings;
 - (b) Stopping all meetings for a period of at least three months
125. The first adjustment would have brought only limited benefit to the Claimant. On the evidence it is clear neither he nor his sisters understood the distinction between the meetings that he was having. Even if the Respondent had made very clear that it would have a period of time with only genuine welfare/check-ins, it is our view that the Claimant would have continued to feel guilt at being away from work. He was an obliging man who clearly felt that he was a burden. We consider that he would have continued to believe that his continued employment was precarious and that this would have continued to represent a stressor to him. We also consider that, regardless of the reality of the proposition, he was anxious about having to return to work in a job in which he had previously encountered abuse. This would have continued to make him anxious.
126. Implementing the first adjustment would have meant the Respondent continuing the Claimant's employment for at least a further three months but, in reality, potentially much longer than this as we agree with the Respondent that the absence was open-ended at 19 July 2022.
127. We are mindful that the Respondent had made some adjustments to its processes already by allowing the Claimant to be accompanied by his family members during meetings. It had postponed a meeting when the Claimant was not prepared and it extended its consultation with the Claimant in order to try and gain further clarity regarding his fitness to work.
128. The Respondent had discontinued the disciplinary proceedings involving the Claimant when he went off work on sick leave and these were not re-started. Although there was a lack of understanding on the Claimant's side, which we find was not helped by the Respondent's lack of a clear explanation as to the process that was being followed and as to the purpose of the ongoing meetings, we consider that the recommendation of the March OH Report that disciplinary meetings be stopped, was followed. We recognise that there is a significant difference between disciplinary hearings and capability hearings in this regard because, although the outcome of

each may be similar in that it could lead to dismissal, there is no suggestion in an ill-health capability meeting that the outcome is due to any fault of the employee and the process is more of a co-operative enquiry.

129. After receiving the March OH report the Respondent carried out only welfare meetings with the Claimant until 30 June when the 'capability' process was commenced. There was a meeting on 19 May 2022 in which the meeting record is entitled 'Formal Capability Meeting' (221) but we find that this was in fact a welfare meeting, as confirmed in the letter sent after the meeting and on the basis that the content of the meeting was supportive and focussed on adjustments that could be made upon a return to work with no mention of the possibility of employment ending.
130. The first formal capability meeting was held on 30 June 2022 (rescheduled from 24th when the Claimant was not fit to attend). This was more than three months after the Claimant's sick leave commenced, and in line with the timescale in which the March 21 OH Report had indicated that the Claimant may be 'fit to resume work'. Unfortunately this was not the case.
131. It is also fair to say that as at 19 July the medical position remained open-ended. A further 'enhanced' OH report (14 June 2022) was unable to give any estimate of when the Claimant may return to work and, after the Respondent again adjourned and reconvened the formal capability meeting from 30 June to 4 July, the position remained unclear so the Respondent scheduled a yet further capability meeting for 18 July. By the time of this meeting the GP Letter of 7 July had confirmed that the Claimant would be off for at least a further 3 months and requested no contact.
132. A further 3 month extension at this point, in circumstances where the Claimant's mental health appeared to have deteriorated by reference to the mental breakdown, meant that in our view the possible reduction in anxiety that could be gained by the Claimant in stopping the capability meetings was outweighed by the ongoing uncertainty for the Respondent and the continued costs – both financial and indirect in terms of management time – of having to recommence the process later on, given that it was unlikely that such a step would actually result in a return to work by the Claimant.
133. The suggestion of pausing all meetings and direct communication with the Claimant at this point would have represented more immediate relief for him. We consider that this would have removed stress from the Claimant and, as his sister FM said in evidence, allowed him to focus on himself. However we believe that he would always have had the prospect of a return to work hanging over him and that this would have caused him some anxiety, albeit at a lower level.
134. We bear in mind that progress with medical appointments was slow and it was not likely that the Claimant would have resolved these sufficiently to return to work within 3 months, even with reduced stress. As we have mentioned before, although his disability of depression is the only one that his claim is based on, he was in fact suffering from a combination of illnesses and problems and these were interrelated. The medical evidence was not clear and even the latest, enhanced, OH Report was unable to provide any clarity on the likely duration or recurrence of his symptoms, regardless of his attendance at meetings.

135. The focus in a capability process is weighing up the prospects of the employee's return to work against the Respondent's interests and we are satisfied that the Respondent attempted to carry out a fair balancing exercise in this regard. The second proposed adjustment would have helped the Claimant to avoid the substantial disadvantage although it would not have removed it completely, but in our view it would have been unreasonable to ask the Respondent to halt the capability process and cease all contact with its own employee in circumstances where this was far from guaranteed to result in an imminent or even foreseeable return to work. The Respondent had given the Claimant time and there came a point where it was not reasonable to demand more without a firmer prospect of return.
136. In conclusion, we are satisfied that the benefit to the Claimant in each case of making the adjustment was outweighed by the disadvantage to the Respondent.

Discrimination arising from disability

137. We consider it clear that the Respondent treated the Claimant unfavourably by dismissing him. Unfavourable treatment amounts to a detriment. We have considered the Respondent's argument that it was in the Claimant's interests to dismiss him but we do not accept this. It is relevant and important how the act is perceived in the Claimant's mind and he clearly understood the dismissal to be a detriment.
138. The 'something' that gives rise to 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 so amount to an effective reason for or cause of it. We consider that the Respondent didn't dismiss the Claimant because of his sickness absence, but rather because the sickness absence was an indication to the Respondent that the Claimant was incapable of doing his job. We are satisfied that the Respondent would not have dismissed the Claimant, in spite of his sickness absence, if he had been expected to return to work imminently.
139. Nonetheless it may be possible to say that the Claimant was dismissed because the sickness absence triggered the capability procedure, resulting in a finding that he wasn't capable of performing his role. Taking this view we consider that the sickness absence had a more than trivial influence on the unfavourable treatment and we are satisfied that the dismissal was 'because of' sickness absence.
140. We have considered the Respondent's asserted legitimate aims and we agree both that they are legitimate and that, in the circumstances and as discussed in relation to 'reasonable adjustments' above, dismissal was an appropriate and reasonably necessary way in which the Respondent might achieve those aims.
141. We have already considered the matter of reasonable adjustments. We do not consider that there were any reasonable adjustments to be made which would assist the Claimant to return to work. The potential for redeployment was considered but this was not an option until the Claimant was fit to return in some capacity and there was no indication of when that would be.
142. We have taken into account that the Respondent is a large employer with a very large workforce. In oral evidence before us it was accepted by the Respondent that there

are often people off sick. We accept this and find that sickness absence does not cause the significant difficulty to the Respondent that it might to a much smaller employer. There was no evidence before us as to the precise financial cost to the Respondent of sickness absence but we recognise the general point that having to pay agency workers or overtime in order to cover work that has not been done, represents a cost. We also recognise that with such a large workforce it is important to have consistency of approach. There are likely to be more instances of long-term sickness absence and as each such case requires careful individual management this represents a significant burden on management time. The Claimant had been off work for 4 months and was already signed off for 3 more, with return at the end of this period no more likely than not. Whilst acknowledging that dismissal was the most severe outcome that there could be for the Claimant we are satisfied that this was outweighed by the considerations on the Respondent's side by the time of the dismissal.

Unfair Dismissal

143. The Claimant accepts that the reason for dismissal was the potentially fair reason of capability. The question is whether it was fair in all the circumstances to dismiss the Claimant for this reason.
144. We have identified that there were some problems with the Respondent's procedure, specifically that it was not clear to the Claimant what the purpose of each of the meetings was after he started sick leave. However we do not find that this had a significant impact on overall fairness given that the confusion related to the heading of one of the meeting invites/records of a meeting and the content of that meeting was in fact clearly supportive.
145. We are satisfied that the Respondent considered potential adjustments that could be made to facilitate the Claimant's return to work and that these were looked at genuinely, repeatedly and at length. Adjustments were suggested/made to both the Claimant's role and to the capability process as the Respondent allowed him to be accompanied by a family member and went to some lengths to ensure that he was able to participate properly in the meetings.
146. We are satisfied that the Respondent obtained an up to date medical position so far as it was able and so far as could be reasonably required. By the time of dismissal the Claimant's health situation was still not clear, but this was despite several OH Reports and the engagement of a range of health/medical services. It is evident that further information may have been forthcoming regarding certain elements of the Claimant's health if the Respondent had waited for longer, however there was no suggested date for the resolution or clarification of any, let alone all, of these multiple individual health concerns. It was not fair to ask the Respondent to wait for further clarity in such circumstances.
147. We consider that the incidents of abuse at work caused the Appellant's stress and anxiety to flare up and triggered his first sick leave for anxiety. Although we recognise that the Claimant remained anxious and concerned in relation to his work after this, we do not consider that this was the fault of the Respondent. We are satisfied that the Respondent engaged with the Claimant satisfactorily in order to try and put steps into place to avoid the impact of this.

148. FM said in cross-examination that she felt that “*because something hadn’t been done from one meeting to another...there wasn’t the compassion or understanding. It was more tick box the way questions were being asked in meetings, in my opinion.*” We sympathise with the Claimant’s position. The Respondent could, of course, have chosen to wait longer before taking the decision to dismiss the Claimant. Its decision not to meant that the Claimant and his family felt the Respondent did not fully appreciate the Claimant’s circumstances. We recognise though that the Respondent was concerned with following its own applicable policies and processes. This is no doubt why it felt like a ‘tick box’ exercise to the Claimant. Although such an approach may be slightly dehumanising in an individual case we consider that it is a valid aim and by properly following an approved process the Respondent is less likely to arrive at a decision that is unlawful or unfair.
149. Once again we ask ourselves the question whether the Respondent could reasonably have been expected to wait longer before dismissing. We are satisfied that it could not. There comes a point when the burden of the uncertainty of an employee’s ongoing illness can be expected to swap from the Respondent to the employee. This is not due to any fault on either side. We believe that the Claimant genuinely wanted to return to work and that the Respondent was making a genuine attempt to assist him if it reasonably could. But the Respondent was also running a business. It had allowed the Claimant some time to improve and it had explored steps that might help him to return. There was no imminent or likely return to work date. Despite the Claimant having evidenced steps forward in terms of, for example, getting x-rays and medical appointments, there was no improvement in his actual health. To the contrary, the latest medical evidence indicated a worsening of the position in that it referred to a mental breakdown.
150. As we said at the outset, this is an extremely sad case. We have found no real culpable behaviour on either side. It is, in essence, a matter of balancing respective interests in a case where ultimately someone must bear the brunt of unfortunate circumstances. This started off being the Respondent and then moved to the Claimant. We consider that the Claimant’s family put his case strongly but, in all of the circumstances, we conclude that his dismissal was fair.

Employment Judge Bennett

17 July 2024

FINAL HEARING - LIST OF ISSUES

1. Time limits

- 1.1. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 15 July 2022 may not have been brought in time.
- 1.2. As the discrimination complaint at 5.4.1 below (relating to the alteration of the Claimant's route) was not made within the time limit in section 123 of the Equality Act 2010 the Tribunal will decide:
 - 1.2.1. was there conduct extending over a period?
 - 1.2.2. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
 - 1.2.3. if not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
 - 1.2.3.1. Why were the complaints not made to the Tribunal in time?
 - 1.2.3.2. In any event, is it just and equitable in all the circumstances to extend time?

2. Unfair dismissal

- 2.1. What was the reason or principal reason for dismissal? The Respondent says the reason was capability. The Claimant accepts this was the reason.
- 2.2. 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, in particular, whether:
 - 2.2.1. The Respondent genuinely believed the Claimant was no longer capable of performing their duties;
 - 2.2.2. The Respondent adequately consulted the Claimant including regarding potential adjustments to his role;
 - 2.2.3. The Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;
 - 2.2.4. The Respondent could reasonably be expected to wait longer before dismissing the Claimant;
 - 2.2.5. Dismissal was within the range of reasonable responses. The Claimant asks the Tribunal to take into account in particular:

- 2.2.5.1. Whether the Respondent failed to follow its own capability policy by not giving the Claimant a warning prior to dismissal;
- 2.2.5.2. Whether the Claimant's illness was caused in part by his work.

3. Disability

- 3.1. Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about (see 5,5 below)? The Tribunal will decide:
 - 3.1.1. Did he have a physical or mental impairment: depression and anxiety?
 - 3.1.2. Did it have a substantial adverse effect on his ability to carry out day-to-day activities?
 - 3.1.3. Were the effects of the impairment long-term? The Tribunal will decide:
 - 3.1.3.1. did they last at least 12 months, or were they likely to last at least 12 months?
 - 3.1.3.2. if not, were they likely to recur?
- 3.2. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

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

- 4.1. Did the Respondent treat the Claimant unfavourably by dismissing him?
- 4.2. Did the Claimant's two periods of sickness absence (between 7 June 2021 – 3 August 2021; and 9 March 2022 - 19 July 2022) arise in consequence of the Claimant's disability?
- 4.3. Did the Respondent dismiss the Claimant because of that sickness absence?
- 4.4. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were 'serving the real business need' of:
 - 4.4.1. Ensuring that its staff are in attendance at work to fulfil their contractual employment responsibilities;
 - 4.4.2. Ensuring that its staff are working safely with regard to themselves, their colleagues, the customers of its commercial clients and the general public;

- 4.4.3. Ensuring that its staff are not operating in a way which may bring the business into disrepute;
- 4.4.4. Ensuring that its staff are not operating in a way which may pose a risk to 'sensitive' data pertaining to either the respondent its commercial clients or their customers;
- 4.4.5. Ensuring that the staff it employs and deploys are capable of performing their contractual responsibilities in line with the contractual obligations placed on the Respondent pursuant to its commercial agreements with its clients;
- 4.4.6. Ensuring that under those agreements the Respondent does not suffer loss of profit, financial penalty or potential breach of contract as a result of being unable to deliver upon its obligations;
- 4.4.7. Ensuring that its internal processes, including its absence management policy and capability procedure are applied equally, consistently and fairly to all staff.

4.5. The Tribunal will decide in particular:

- 4.5.1. was the treatment an appropriate and reasonably necessary way to achieve those aims;
- 4.5.2. could something less discriminatory have been done instead;
- 4.5.3. how should the needs of the Claimant and the Respondent be balanced?

5. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

- 5.1. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:
 - 5.1.1. The requirement as set out in his contract of employment to work at "different locations and/or assignments within the operating areas as directed by [his] manager, in accordance with the needs of the business and its customers"
 - 5.1.2. the requirement to attend capability hearings and welfare meetings in accordance with the Respondent's sickness absence policy;
- 5.2. Did each of the PCPs above put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that:
 - 5.2.1. In relation to location to work, being near to location of previous attacks caused Claimant significant anxiety and distress;

- 5.2.2. In relation to absence management, frequent meetings also caused the Claimant significant anxiety and distress;
- 5.3. Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?
- 5.4. What steps could have been taken to avoid the disadvantage? The Claimant suggests:
 - 5.4.1. Implementing the Claimant's request that he not be required to work in the area around the E7 postcode as set out in his return to work form dated 5th August 2021;
 - 5.4.2. Failing to make adjustments to its capability procedure as requested in the OH report on 21 March 2022 (the OH report said Claimant was fit for welfare meetings only and not 'disciplinary' meetings);
 - 5.4.3. Failing to make adjustments to its capability procedure as requested in a letter from Claimant's GP on 7 July 2022 (the letter suggested that the Claimant not be required to attend capability hearings or welfare meetings for a period of at least three months);
- 5.5. Was it reasonable for the Respondent to have to take those steps, by:
 - 5.5.1. Adjustment 1 (5.4.1) between 5 August 2021 and 9 March 2022;
 - 5.5.2. Adjustment 2 (5.4.2) by 19 July 2022;
 - 5.5.3. Adjustment 3 (5.4.3) by 19 July 2022.
- 5.6. Did the Respondent fail to take those steps?