EMPLOYMENT TRIBUNALS

Claimant: **Mr L Thompson**

Respondent: **Cummins Ltd**

Heard at: **Newcastle Employment Tribunal (sitting in Middlesbrough)**

On: **22nd to 31st July and 1st to 2nd August 2024**

Before: **Employment Judge Sweeney**
Claire Hunter
Pam Wright

Appearances
For the Claimant, In person
For the Respondent, Wendy Miller, counsel

JUDGMENT having been given on **02 August 2024** and written reasons for the Judgment having been requested by the Respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

WRITTEN REASONS

1. The claims which the tribunal adjudicated on were:

    a. Direct disability discrimination: section 13 Equality Act 2010

    b. Discrimination because of something arising in consequence of disability: section 15 Equality Act 2010.

    c. Failure to make reasonable adjustments: sections 20-21 Equality Act 2010.

    d. Harassment related to disability: section 26 Equality Act 2010.

    e. Victimisation: section 27 Equality Act 2010.

f. Unfair dismissal: section 98 Employment Rights Act 1996.

g. Unlawful deduction of wages: sections 13 and 23 Employment Rights Act 1996.

Summary

2. It was the Claimant's case that he was unfairly dismissed because of his absence /time off work. This, he says, was the true and the principal reason for his dismissal. The Claimant maintained that the Respondent had invented other reasons (gross misconduct and/or a breakdown in the relationship) to disguise the true reason. As his absence was a consequence of his disability, he also contended that dismissal was an act of discrimination in contravention of section 15 Equality Act 2010. In addition, he complained of acts of harassment and direct discrimination and victimisation, a failure to make reasonable adjustments to accommodate his disability and unlawful deduction of wages. The Respondent denies all of the claims. It contended that the reason for the Claimant's dismissal was not his absence but that he failed or refused to engage and cooperate with it and in the course of doing so, demonstrated and produced – despite the Respondent's reasonable efforts – an irretrievable breakdown in relationships between employer and employee. The breakdown in relationships was, the Respondent argued, a substantial reason such as to justify dismissal of an employee holding the position that the Claimant held. In other words, it relied on the potentially fair reason of 'SOSR' in response to the unfair dismissal claim.

Preliminary matters

3. The first day of the hearing (Monday 22 July) was a reading day for the Tribunal. The parties attended on the morning of the second day. Before hearing evidence, we had to consider a number of preliminary matters:

a. An application to strike out the Respondent's response made by the Claimant in an email dated **02 July 2024** (and referred to in further emails after that date).

b. A Costs application by the Claimant (made in his email of **21 July 2024**).

c. Witness orders application by the Claimant in respect of Lucie lake, Chris Paling and Paul hardy.

d. An application by the Respondent to add to the bundle a payslip from **July 2022** and a related document relating to the Claimant's pay.

e. The issues – attached to the Claimant's email **21 July 2022**, regarding para 26b of the list of issues.

4. The Claimant withdrew his strike out application having reflected on the terms of paragraph 4 of my case management order of **25 June 2024**. On closer inspection he accepted that the Respondent was not in breach of the order – the assertion of which had led to his application to strike out the Response. Therefore, we were not required to determine it.

5. As regards the costs application, the Claimant agreed that this should be dealt with at the end of the hearing, which, he said, had been his expectation.

6. Regarding the Respondent's application to add the payslip documents, the Claimant did not in the end object to these being added to the bundle.

7. We discussed the list of issues that had been prepared since the last preliminary hearing and in particular the Claimant's concern regarding paragraph 26b of the list. The Claimant said that what was set out in paragraph 26(b) was not what had been specifically agreed. He argued that in this paragraph the Respondent was attempting to mislead the Tribunal by stating what had been agreed. His main objection was to the words which appeared after 'toilet facilities'. However, we were satisfied that there was no attempt to mislead the court/tribunal and the wording of paragraph 26b did not in any way detract from the Claimant's case. What was set out was a purported adjustment which, if the Respondent was under a duty to take steps as were reasonable to take to avoid a disadvantage occasioned by a PCP, it should reasonably have undertaken. It was not saying what had been agreed. The list of issues, we explained, is a case management tool. We stressed that it was not necessarily in the Claimant's interests to narrow the issue on reasonable adjustment. The Tribunal would look at all permutations, understanding that the Claimant's case on this point was that he should have been positioned close to toilet facilities. The list of issues is attached in the Appendix to these written reasons.

8. We then heard the application for witness orders in respect of Mr Paling, Mr Hardy and Ms Lake. We refused the application and gave reasons. In short, Mr Paling was ill and unable to attend. The Claimant had not asked Ms Lake and the Respondent, who did not employ her had tried but failed to obtain any contact information. In any event, in respect of all three individuals, the Claimant wished to witness summons them for the purposes of cross-examining them.

9. Evidence eventually got under way at 2.20pm. The Claimant was sworn in. That evening, he emailed the Tribunal 4 times (one in error) about evidence he had given that day. One of the emails contained a document which, on discussion, the Claimant said he wished to add to the bundle. Although the Respondent objected, we admitted it [the document was added as **pages 280 – 284 of SB1**]. We discussed how best to manage matters during the Claimant's evidence, explaining that it was not appropriate to receive emails during the course of a witness's evidence about that evidence. The Tribunal explained the stages of evidence. It was agreed that the Claimant could take a notebook

with him to the witness table and that he should note down any points he wished to come back on in re-examination.

10. On Monday **29 July 2024**, the Claimant informed the tribunal that he was withdrawing his complaint of unlawful deduction of wages in respect of alleged unlawful deductions in **August 2022** to which one of the Respondent's witnesses, Natalie Morton's evidence related. On that basis, he said he did not need to ask questions of her and the Respondent did not call her. That complaint had been about an overpayment of wages in August from which deductions were made in September 2022. Whilst he accepted that there had been an overpayment, the Claimant had initially contended that this was not the purpose of the deductions in September. However, he withdrew this claim during the hearing after the evidence of one of the Respondent's witnesses, Gemma Penk.

Documents

11. The parties produced three bundles:

    a. A Main Bundle ('**MB**') consisting of 1,617 pages
    b. Supplementary Bundle 1 (**'SB1'**) consisting of 271 pages
    c. Supplementary Bundle 2 (**'SB2'**) consisting of 170 pages

12. Further documents were added to the bundles, either by way of better copies or additional copies of documents including the Claimant's further and better particulars and the document referred to in paragraph 9 above. All page references are to the Main Bundle unless indicated otherwise by '**SB1**' or '**SB2**'.

Witnesses

13. The Claimant gave evidence on his own behalf. He also asked the Tribunal to read an unsigned and undated statement from his mother [**page 148 SB1**]. The Respondent called 9 witnesses: Gordon Davies, Gemma Penk, Nicole Newall, Michael Abbott, Robert Cole, Wayne Anderson, Shelly Mercer, Steven Morley and Gareth Hopkinson. We were also asked to read the statement of Chris Paling. We had also read on day one the statement of Natalie Morton. However, as indicated, her evidence related to a complaint that the Claimant withdrew after his evidence and the Respondent did not seek to rely on her statement in the end. Having heard all of the evidence, the Tribunal retired at 12.15pm on Wednesday **31 July 2024** and gave judgment with oral reasons on Friday morning, **02 August 2024**. The Tribunal had a break in the course of delivering its judgment at 11.50am due to the time taken and because the Claimant appeared upset upon hearing the findings. He left the building during the break, without informing the Tribunal or clerk that he had done so. At 12.15pm, the Tribunal resumed and continued to deliver its reasons and judgment.

Disability

14. The Respondent accepted that the Claimant is and was at all material times a disabled person in that he has a physical impairment (IBS) and a mental impairment (anxiety and depression) and that he satisfies the definition in section 6 Equality Act 2010.

Findings of fact

15. The Respondent is a substantial company that designs and manufactures a variety of engines for a range of industries, including automotive, industrial, Marine and Power Generation. It has premises in various parts of the country, one being the Darlington Engine Plant ('**DEP**') where the Claimant was employed as a Production Operator. The Claimant first commenced his employment with the Respondent on a temporary contract in **February 2018**. He worked for it until **December 2019** when his employment was terminated due to a downturn in customer demand. During that first period of employment, he worked on "Head Line", within 'Team 4' or 'T4'. He was part of a small team assembling cylinder heads. The Claimant then returned to the Respondent's employment on **04 March 2020** until he was dismissed by it on **17 February 2023**. It is the events during his second period of employment with which we are concerned in these proceedings.

16. On his return in **March 2020**, he again started under a temporary contract which was then made permanent with effect from **04 March 2021** [**pages 94 – 109]**.

17. There was a written contract of employment, paragraph 6.4 of which provided that:

"*You agree that the Company may deduct from any salary or other payment due to you any amount owed by you to the Company*." [**page 96**]

18. Paragraph 9.6 of the contract states:

"*The Company reserves the right not to pay Company sick pay if you have failed to comply with the relevant statutory and Company rules regarding the provision of evidence of illness or the absence reporting procedure*" [**page 97**]

19. The Claimant mainly worked on an area called 'Hot Test'. However, he could be asked to 'flex' or help out on T4 in line with needs of the business. The occasions on which he did help out on T4 during his second period of employment were few and far between and for on each occasion, for a short period of time.

20. On **17 June 2020**, the Claimant submitted a grievance regarding his appraisals [**page 166 – 167**]. It is clear from a reading of that grievance that the Claimant was suspicious of what he referred to as '*lower level company management'*, that they had been using performance appraisals unfairly to pick and choose who they retain. He expressed the view that his recent appraisal was a not very subtle example of this. He asserted that he

had been '*tricked into consenting'* to attend an occupational health meeting to discuss drugs and alcohol misuse by it being described as regarding his wellbeing. He expressed that despite his feelings of anger about this, he returned to work to continue his role professionally. It was, he said, obvious that certain figures in management were preparing to make him a victim of any economic downturn.

21. During the course of his second period of employment the Claimant started to suffer with a bowel condition which was later diagnosed in about **July 2022** as IBS. He also suffered poor mental health. In **July 2022**, he completed a depression and anxiety questionnaire on the NHS website, which he said scored him highly for depression and anxiety.

Sick pay September 2020

22. Following a period of sick leave taken in **June** and **July 2020**, the Respondent wrote to the Claimant on **25 September 2020** regarding an overpayment of sick pay in respect of the months of June and July. The Claimant agreed to a repayment plan [**pages 195-199**] and the money was repaid over an agreed period.

Drug and alcohol test grievance April 2021

23. On **06 April 2021**, the Claimant raised a grievance in which he alleged he was being targeted by management [**pages 213-215]**. The grievance related to the fact that he had been asked by a manager, David Pailor, to sign a 'Record of Conversation'('**ROC'**) for not working weekend overtime and that he had been asked to undertake a drugs and alcohol test. The Claimant refused to be tested and as a consequence was asked to leave the site by the shift manager, Neil McCaughtrie.

24. Gemma Penk is a Senior HR Generalist based at the Respondent's Darlington engine plant. She was assigned to cover for another HR Generalist, Kathryn Davies, as HR adviser in respect of the Claimant's grievance. On **13 April 2021**, she wrote to the Claimant, trying to set up a meeting to speak to him about the grievance [**page 227-228**] and to invite him to a meeting with Ruth Tarrant, Plant Quality Manager to take place on **16 April 2021**. She also emailed him. The Claimant responded to say that he was not well enough to attend a meeting at that time and that, in any event, Ms Penk should not be involved as she had accused him of an 'impairment' back in **2020**. This was a reference to the matters set out in paragraphs 5 to 11 of Ms Penk's witness statement. As a result, Ms Penk withdrew from any involvement in the grievance.

25. Natalie Morton, who was at the time Regional Payroll Manger – Europe and based at Darlington was appointed to investigate the grievance. She interviewed the Claimant on **11 June 2021**. The notes of that meeting were at [**pages 298-307**]. They were taken by a notetaker. As she explained when herself subsequently interviewed (when she later became the subject of a grievance from the Claimant) she was not close enough

operationally to day to day queries to necessarily know the details of any individual pay issues that might arise [**page 620]**.

The Respondent's use of Occupational Health ('OH')

26. The Respondent contracts with a third party, **BHSF**, to provide it and its employees with occupational health advice. An appointment with an Occupational Health adviser is normally made by HR by the completion of an online or digital occupational health referral form created by the OH provider (BHSF OH Form 14/1). It consists of sections A to E. Section C (the 'referral details) contains five questions, the first of which is 'what is/are the reason(s) for referral? There is a list of pre-populated answers, which the HR adviser selects by ticking the appropriate one. Section D also contains some pre-populated or pre-set questions, which the referrer ticks. If management wishes to ask additional questions these must be entered on the form by the referrer. We shall refer to these as the 'tailored questions' as they are tailored to the particular employee's circumstances.

The Claimant's sick leave

27. On **06 April 2021**, the Claimant commenced a period of sick-leave. He was absent for 6 weeks. A fit note dated **13 April 2021**, at **page 223** gave as the reason for the absence as 'stress at work' and certifying the Claimant unfit up to **10 May 2021**. A further fit-note dated **07 May 2021** states the same reason for absence up to **20 May 2021** [**page 233**]. The Claimant returned to work on **09 June 2021** [**page 267**]. He was absent again from **01 2021** with Covid. He returned to work on **12 July 2021** [**page 344**]. He was absent again on sick leave from **16 to 27 September 2021** with bowel issues. He returned to work on **27 September 2021** [**page 353-354**]. He was absent again from **03 to 13 October 2021**, returning on **13 October** with ongoing stomach/bowel issues [**pages 359-360**]. He was absent again from **04 November 2021** until **17 November 2021** with 'stress and low mood' [**page 362-363**]. He was again absent on sick-leave for one day **on 26 November 2021** and 3 days from **20 December to 22 December 2021.** The Claimant commenced a further period of sick-leave on **11 January 2022** to **25 February 2022.** Various fit-notes covered that period [**pages 371-372, page 378, 382**]. The reason for his absence as stated on the fit-notes was bowel problems. He returned to work on **28 February 2022** but was absent again on sick-leave from **10 March 2022** to **31 March 2022**, returning to work on **04 April 2022** on a phased return to work over two weeks. The fit notes recorded the reason as bowel problems [**page 406, 424**]. He was absent again on sick leave from **06 May 2022** to **11 May 2022** and then again on **26 May 2022 returning on 06 June 2022** for the same reason [**page 442, 450**]. He was absent from **13 July 2022 to 14 August 2022**. The fit note gave the reason as mixed anxiety/depression **[pages 478 and 550].** The Claimant emailed on Friday **12 August 2022** to say that he would be back at work on Monday **15 August 2022** all being well **[page 529].** The Claimant did return to work on **15 August.** He was then absent from **22**

August 2022 [page 622]. There are fit notes in **October, November and December 2022** identifying the reason for absence as mixed anxiety and depression.

28. In respect of the period **01 November to 31 December [page 626]** the fit note says '*you may be fit for work taking account of the following advice: "if available and with your employer's agreement, you may benefit from a phased return to work*". The Claimant also provided a letter from his GP dated **25 November 2022 [page 767]** saying that he could return to work with a phased return to work as per the fit note.

29. On **26 April 2021**, the Claimant was referred to Occupational Health [**pages 229-232**]. The reason for the referral selected from the drop-down list of conditions in section C was '*mental health disorders including PTSD or anxiety or stress unrelated to work or eating disorders'*. In section D, three of the 'pre-set' questions asked were: (i) whether there was an underlying medical condition, (ii) whether work or organisational factors contributed to the absence and (iii) whether the employee was fit to attend meetings or participate in dialogue with the employer. The OH adviser then asked three tailored questions regarding the Claimant's symptoms, current medical support he was receiving and whether the company could give any additional support to help him. The Claimant attended an OH appointment on **03 June 2021**, the report of which is at **pages 247-248**. The report was prepared by an occupational health physician, Dr McWhor. She referred to the Claimant being unhappy or uncomfortable in the workplace since his return to work in **2020** and that he perceives he has been treated with suspicion by management. The doctor opined that the Claimant had raised anxiety levels and that it was possible he had a long-term generalised anxiety disorder. She advised that he was not currently on medication or accessing any therapy, that he was fit to attend meetings and participate in dialogue, that his symptoms were improving and he would benefit from a short phased return perhaps over two weeks. The Claimant returned to work on **09 June 2021**.

The Respondent's handbook

30. The Respondent has an Employee Handbook (Supplementary Bundle 2 ('SB'2)). On **page 7, SB2**, a copy of which had been given to him on commencement of employment. In the introduction to the handbook it states:

"The information contained in this handbook outlines important aspects of your contract of employment and the policies of Cummins."

31. Section 3.3 of the Handbook provides:

*"Payment of Company Sick Pay (e.g. full pay or half pay) is dependent on following the Company's procedures land meeting reasonable requests during absence" [***page 49, SB2**]

32. Section 3.4 of the Handbook is concerned with 'Supportive Absence Levels' ('SAL'). It provides:

    "*SAL Meetings are not part of the disciplinary process. They are for the Company to maintain contact with employees and to gain an understanding if any additional support is needed for employees to return to work*." [**page 53**]

33. It then goes on to set out the criteria for SALs. These range from a 'Record of Conversation' ('ROC') to a SAL3 meeting.

34. The Respondent's policy and procedure regarding the management of sickness absence is clearly set out at **pages 158-159**. On **11 June 2021**, the Claimant was invited to a 'SAL 1 meeting' [**page 308**]. This is the first of three formal stages in the absence management process. The meetings are triggered when the employee hits certain levels of sick leave. After the SAL 3 meeting, depending on the circumstances, this may result in a Capability Review meeting.

    SAL 1 meeting

35. As he had exceeded the average absence criteria, the Claimant was asked to attended a SAL 1 meeting with Jenny Taylor, Operations Team Manager and Liam Warne, of HR, on **22 June 2021** [**pages 327-328**]. The SAL 1 meeting is the first of three formal meetings the Respondent undertakes when an employee's health causes them to have longer term absences. The Claimant was advised on the improvement that was expected of him over the forthcoming twelve months, namely that there should be no more than 37.5 hours or 3 occasions of absence in the 12 month period from the date he returned to work. The process and the potential consequences of a failure to improve was explained in the letter.

36. He was absent again from **01 to 12 July 2021** with Covid. He returned to work on **12 July 2021** [**page 344**]. A further referral to OH was made on **31 August 2021** [**pages 347-351]**. The Claimant failed to attend the appointment [**page 352**]. He was absent again on sick leave from **16 September 2021** with bowel issues. He returned to work on **27 September 2021** [**page 353-354**].

37. The Claimant attended a welfare meeting on **27 September 2021** with Nicola Teasdale, DEP HR leader and Hayley Kemp, as note taker. At that meeting he explained that he was being tested for IBS and how this was linked to his anxiety. He believed IBS may be genetic. The Claimant explained that things were alright at work and that his new Team Leader, Mike Ford, was spot on. He was encouraged to use occupational health and EAP if he needed any help. He confirmed that he did not want to pursue his outstanding grievance appeal. Ms Teasdale urged the Claimant to come and see her if he had anything he wanted to talk about [**pages 355-358**].

SAL 2 meeting

38. On **27 October 2021**, the Claimant was informed that he was to attend a SAL 2 meeting on **04 November 2021**, with his shift manager, Robert Cole [**page 361**]. Mr Cole was the Operations Shift Manager at Darlington. However, as he commenced another period of sick-leave that day, it could not take place and had to be rescheduled. On **18 November 2021**, the Respondent wrote again, informing him that it would take place on **24 November 2021 [page 365]**.

39. The Claimant was relatively unknown to Mr Cole. The only previous recollection Mr Cole had of the Claimant was when in **July 2021** he issued him and another employee with a 'Record of Conversation' [**page 345**]. At the SAL 2 meeting on **24 November 2021**, he was assisted by Kathryn Davies of HR. Mr Cole could see from the levels of absence that the Claimant had exceeded the levels set out in the SAL 1 outcome letter.

40. At the SAL2 meeting, the Claimant said that he suspected he may have IBS but that he was not experiencing symptoms at that time. He explained to Mr Cole that the hospital was going to take samples for the purposes of diagnosis and that he was not anticipating any further absences. Following the meeting, on **30 November 2021**, Mr Cole wrote to the Claimant explaining what had been discussed and stated that if the Claimant required any support in the future to let management know (the SAL2 outcome letter) [**369-370]**. The letter explained that the business had to manage absence levels and outlined criteria which would trigger a further meeting under the absence management procedures. The sustained improvement required was for there to be no more than 5 days or 3 occasions of absence in the 12 month period from **28 October 2021**.

41. Before that letter was sent, the Claimant had a further period of sick-leave of one day **on 26 November 2021**. He returned on **27 November 2021** [**page 368**].

42. A further referral to Occupational Health was made on **02 February 2022 [pages 373-376]**. An OH appointment was arranged for **07 February** and then rearranged for **24 February 2022 [pages 379, 381]**.

43. Occupational Health prepared a report dated **24 February 2022** [**pages 383-386**]. It recommended a phased return to work and the following:

    a. That the Claimant work close to toilet facilities
    b. That he be able to go to the toilet at short notice
    c. That he has regular short breaks
    d. That he should keep hydrated.

44. On his return to work on **28 February 2022**, an agreed phased return was put in place, whereby the Claimant would work 4 x ½ shifts followed by 4 x ¾ shifts.

SAL 3 meeting

45. In the meantime, on **09 February 2022**, the Respondent informed the Claimant that he was to attend a SAL 3 meeting with Mr Cole on **14 March 2022** [**page 380]**. He Asked if it could be rearranged for a different date. On **03 March 2022**, Mr Cole asked the Claimant if he could attend the SAL 3 meeting at short notice that very morning but he felt that this was too short notice. In the end it was held on **21 March 2022**. The Claimant subsequently asked Mr Cole to withdraw from the process as he was not comfortable with him conducting the meeting [**page 398**].

46. Ms Penk wrote on **17 March 2022**, rearranging the SAL 3 meeting for **21 March 2022** [**pages 403-405**]. The Claimant replied later that day to say that the issues he raised with Mr Cole had not been addressed and that he would tell her after his forthcoming appointment with his GP on **18 March 2022**, whether he could attend the SAL 3 meeting.

47. The Claimant attended his GP on **18 March 2022** and submitted a further fit-note for a period of 9 days [**page 406**]. That same day, the Respondent referred the Claimant to occupational health to assess his fitness to attend a SAL 3 meeting, to participate in dialogue with the employer and seeking advice on what adjustments were required to facilitate a return to work [**pages 414 – 417]**.

48. On **19 March 2022**, the Claimant emailed Ms Penk raising a number of issues and asking for a formal response [**pages 418-419**]. She treated this as a grievance. On **21 March 2022**, she asked the Claimant whether he would be able to hold the SAL 3 meeting by telephone and if he would prefer another manager, other than Mr Cole, to conduct the meeting. She said she would arrange for his grievance to be dealt with formally and separately from the SAL 3 process. The Claimant replied to say that he would not be attending the SAL 3 meeting [**pages 422 – 423**] as he had been up all night with abdomen pains. He took exception to the occupational health referral asking to assess his suitability to attend meetings when that advice had already been provided.

49. On **31 March 2022**, the Claimant attended the occupational health appointment by telephone. The report from that appointment is on **pages 425 – 428**. Occupational Health recorded that he was absent for some lower bowel problems. He had returned to work in **February 2022** and managed 9 days of a rehabilitation programme; but the return of bowel issues resulted in him returning to sick leave. OH reported that his need to use the toilet is not predictable but that the Claimant felt the morning time to be worse than later in the day. He was not confident about leaving home in case he urgently needed to use the toilet. The Report noted that he had lower bowel cholic type pain and had recently commenced new medication of a sort commonly used to control IBS. Occupational health advised that the Claimant did not yet have a definitive diagnosis and that he would have further diagnostic investigative tests. His symptoms of constipation and frequent loose stools was made worse when anxious. It recommended

that he recommence the phased return to work plan which he had started in **February 2022**. They said that he was able to attend meetings in person or by phone and that giving good notice of meetings would help his control his anxiety and attend. The recommendations were:

a. A phased return over 2 weeks consisting of ½ shifts for a week and then ¾ shifts for a week.
b. An ability to work close to the toilet facilities.
c. To be able to go to the toilet at short notice.
d. Regular short breaks to keep hydrated and take on board a snack to boost his energy levels.

50. The Claimant returned to work on **04 April 2022**.

51. Meanwhile the Claimant had been exchanging emails with another HR adviser, Amy Tiplady, regarding the handling of his grievance (the one raised on **19 March 2022** at **pages 418-419)**. He said he would like the matter to be resolved informally [**pages 430-433**].

52. On **06 April 2022**, Ms Penk emailed the Claimant about going through his grievance on **11 April 2022** with Wayne Anderson, Operations Manager. The Claimant emailed on **10 April 2022** to cancel that meeting on the basis that the company would never agree with the points he had raised regarding the SAL2 meeting and said that he would like to withdraw his grievance [**pages 434-436**]. In what we find to be a rare moment of insight, the Claimant said that perhaps raising a formal grievance regarding the SAL2 meeting was an over-reaction on his part and a way of venting his frustrations over how things had been handled. He added that if they were proceeding with the SAL escalation that Ms Penk should arrange this at her earliest convenience [**page 434**].

53. Therefore, on **29 April 2022**, Ms Penk wrote to the Claimant informing him that the SAL 3 meeting had been rescheduled to **06 May 2022** and that it would be conducted by Wayne Anderson [**page 441**]. However, the Respondent decided that because of the Claimant's complaint/grievance of **19 March 2022** about Mr Cole -– albeit now withdrawn - that it would be more appropriate for another manager to conduct the meeting.

54. On or about **02 May 2022** the Claimant commenced a further period of sick-leave.

SAL 3 meeting goes ahead

55. The SAL 3 meeting went ahead on **06 May 2022** [**pages 443 – 449**]. It was conducted by Wayne Anderson (shift manager of A shift), assisted by Gemma Penk. By this date, the Claimant had been absent on sick leave for a total period of 63 intermittent days since **26 November 2021**). Mr Anderson wrote to the Claimant on **10 May 2022** (the SAL 3 outcome letter) [**page 448**]. In that letter, Mr Anderson recorded the absences,

what they had discussed at the meeting, including the OH recommendations. He explained the nature of the process and that if he had any further information or questions he should contact Ms Penk.

56. This was the first time Mr Anderson and met the Claimant. The Claimant had explained to Mr Anderson that he was undergoing tests on his bowels, that some days were fine and some were not. He suspected that he had IBS as there was a family history and that his symptoms were consistent with those of family members and that they had worsened over the past 12 months. The Claimant and Mr Anderson discussed the effects of his medication and the prognosis/diagnosis and discussed what adjustments were in place. There is a dispute about what was agreed at this meeting. The Claimant says that he told Mr Anderson that he had been moved to work on Team 4 and that it was agreed at the SAL 3 meeting that he would not be moved from Hot Test. Mr Anderson and Ms Penk's evidence was that the Claimant did not refer to this and that he said the identified adjustments were okay in that he felt the distance to the toilet from where he worked was fine. We accept Mr Anderson's evidence and that of Ms Penk. We are satisfied that there was no agreement that the Claimant would not be moved to or asked to work on Team 4. We arrive at that finding for a number of reasons. Firstly, we considered both Ms Penk and Mr Anderson to be measured, credible and reliable witnesses. From what we could see, Ms Penk had always behaved professionally and courteously towards the Claimant and had done everything she could to encourage and assist him with his queries. Mr Anderson did not know the Claimant. He had no reason to lie to the Tribunal about what had been said or agreed or not. For him, the matter was very straightforward. The Occupational Health report made recommendations. No-one, including him, had any problems with those recommendations and they were agreed quite readily. The Claimant too was happy with the recommendations. There was simply no need to stipulate that the Claimant would not be moved to T4. That is because the Claimant worked on Hot Test and there was no expectation that he would work for any length of time elsewhere. He would only ever be asked to do any work on T4 on the odd occasion, and only then to help out for a short period of time. Secondly, the outcome letter set out what had been discussed. Mr Thompson sought to persuade the tribunal that the letter only said what had been 'discussed' and not what had been 'agreed', that it had left out what had been 'agreed'. This was a specious argument. The letter clearly set out what had been discussed with the clear implication that it was agreed. If something had been 'agreed', it must also have been discussed. The Claimant never wrote back to say that Mr Anderson had left out a reference to any discussion or agreement regarding not moving him or asking him to help out on T4. We have no doubt that, had it been discussed, Mr Thompson with his suspicious mind, would have raised its absence as being sinister. His failure to question the outcome letter was consistent with the evidence of Ms Penk and Mr Anderson, both of whom we found to be credible, that there was no omission of any discussion because there had been no such discussion.

57. Further, the first reference to being moved to Team 4 came in the Claimant's email on **12 July 2024 [page 468**], which we shall come to in due course. This was over two

months after the meeting. Had it been agreed at the SAL 3 meeting that he was not to be moved to team 4, we would have expected the Claimant to mention it in that email. However, he did not. The Claimant was making the point in the email of **12 July 2024** that the agreement was that he would work close to the toilet and that since then, he had been asked to 'flex to long block'. That is subtly different from saying that by asking him to help out this was going against what had been agreed but it is nonetheless different. We find that, as of **06 May 2022**, the Claimant said that the adjustments as set out in in the OH report and discussed – and agreed – were fine. The Clamant had also been at the SAL 3 meeting that, if he had any issues, he should speak to his team leader. That is precisely what he did on the one occasion on which there is reliable evidence that he had been asked to help out on T4 after the SAL3 meeting.

58. As regards toilet facilities, it is necessary to set out our findings on these. There is one toilet block in the part of the plant where the Claimant worked. The Claimant had no concerns about working at any of the stations within Hot Test. Although the Claimant maintained that T4 was 'as far away as you could get' from the toilet block, that is not in fact correct. This ignores the actual location where he might be working within Hot Test. Upon hearing about the debate that subsequently emerged regarding the distance of the toilets from T4 to headline, Mr Anderson, simply to satisfy his own curiosity, took it upon himself to measure the distance. He used a trundle to do so. He walked from Hot Test to the toilet block and from Headline to the toilet block along the designated walkway within the plant. From Hot Test he took his starting point at the nearest point to the toilets. He did not measure the distance from some of the upper platforms in the Hot Test area (which would make the distance longer). Nor did he measure the distance or time taken to get to the toilet blocks by taking short cuts – i.e. by stepping off the designated pathway.

59. In terms of time taken, it took him one minute sixteen seconds to get from hot test station 1 (the nearest hot test station) to the toilets and one minute thirty nine seconds from headline on T4 to the toilets. That is a difference of approximately 23 seconds. Whilst it is not scientific, it is consistent with Mr Anderson's overall evidence that the difference in distances is not very substantial. Indeed, if an employee were working on one of the upper stations on Hot Test, it would take longer to walk from there to the toilet than it would take to walk from headline to the toilet.

60. We accepted Mr Anderson's evidence. It also further demonstrated to us that there was never any need to agree at the SAL3 not to move the Claimant to T4 because, in general terms, there was no substantial difference in distance.

61. We do not accept that the 'metadata' [**page 164 SB2**] supports the Claimant's argument that the notes of the SAL 3 meeting have been tampered with (by omitting the reference to an agreement that he would not be moved from Hot Test). Insofar as he alleges 'the incriminating part had been edited out of the meeting notes', we reject this and find that this exists only in the suspicious mind of the Claimant. We accept Ms Penk's evidence

that the only editing that she made was to correct any typographical errors spotted by her prior to sending the notes to the Claimant.

62. The Claimant returned to work on **06 June 2022** [**pages 453-454**]. Mr Hardy issued the Claimant with a 'Record of Conversation' for taking too many emergency or short notice lieu days. He had, apparently, taken more than the stipulated 2 in a rolling period of 12 months [**page 452**]. Mr Hardy issued a further record of conversation on **16 June 2022** as he believed the Claimant not to be following procedures on **13 and 14 June 2022** by emailing HR after his shift had started that he would be late up for work and because he had failed to ring the lieu day or sickness line to inform the business that he would not be attending work [**page 456]**.

63. On **07 July 2022**, Paul Hardy, Team Leader, asked the Claimant to help out on T4. He agreed to go and help short term because he was not experiencing any symptoms regarding his IBS. He told Mr Hardy that he was only agreeing because he was feeling okay. He also told Mr Hardy that in his latest SAL meeting (that was the SAL 3 meeting) it was noted that he should work as close as possible to a toilet. He said to Mr Hardy that T4 was the furthest area from the toilet.

64. Mr Hardy, who appeared to be unaware of what had been agreed at the SAL meeting, emailed Mr Cole about this. Mr Cole replied that he had no information from the SAL meetings as he was not allowed to be involved following the Claimant's grievance.

65. On **12 July 2022**, the Claimant had been working, as usual on Hot Test on a shift that was to end at about 10pm. The shift manager on that occasion was Patrick McGonigle, who was not the Claimant's usual shift manager. The Claimant had left his station to go and send an email to HR, not to go to the toilet. He had not informed anyone what he was doing. The email that he sent at 9.16 pm that evening is the one on **page 461 (**duplicated at **page 468)**. It was about a lieu day that he had requested on **06 July 2022**. He said in the email that he was not making a complaint but wished to offer some input into the issue. He explained that it had been agreed that he should work close to a toilet but that on at least half a dozen occasions, he had been asked to 'flex to long block'. This was a reference to being asked to work on Team 4 'Head Line'. He explained that "this is about as far as possible from the new toilet block as it gets. This isn't a problem on asymptomatic days but it is a problem that supportive measures set as SAL meetings are being ignored, and worrying about where I'm going to be working and the anxiety of being 'caught short' as occupational health explained to you can be significant and the resulting anxiety has caused sleepless nights.' We understand this to be the Claimant explaining that the combination of IBS and associated anxiety was tiring for him and can and did cause sleepless nights, which leads to him being extremely tired, thus the reason he had asked for the lieu day.

66. Mr McGonigle noticed that there was a gap on the line, meaning that he noticed that the Claimant was away from his station. He asked others if they knew where the Clamant

was but nobody knew. After he had sent the email to HR, the Claimant then returned to the line. A team leader, Mr Cook, asked the Claimant where he had been, explaining that Patrick had noticed a gap. At the end of his shift, at 10.12pm, the Claimant emailed HR to say '*please refer Patrick, my shift manager for this week, to my last occupational health report in response to him telling me I need my team leader's permission to leave the production line'* **[page 461]**.

67. It is clear from the Claimant's evidence that his decision to leave the production line on this occasion had nothing whatsoever to do with any disability or the need to go to the toilet. He left for one reason and one reason only, which was to send an email to HR. He did so without telling anyone in advance. This was an example of the Claimant taking a very straightforward situation and using it as a means of unreasonably criticising management by attempting to link the incident to his disability and adjustments when his absence from his workstation had nothing whatsoever to do with them. The Claimant seems to us to be a naturally suspicious person, especially of management and authority. He was unhappy at being questioned, suspecting management of targeting him.

68. The Claimant did not come to work on **13 July 2022** and was on sick leave from then until **18 August 2022** (save for subsequently being treated as not on sick leave while on holiday during shutdown). On **13 and 14 July 2022**, he emailed Holly Palarm of HR regarding taking the **13 July 2022** as a holiday. Ms Palarm said that he could not take holiday to cover sick days [**pages 465 – 466**]. In his email at 13:08 that day [**page 469/477**], the Claimant said that he was fit for work and would like assurances that he is able to work close to toilet facilities at all times and that he is permitted to leave the production line without first asking his team leader, as he was told last night by the shift manager to do this. That was a reference to Patrick McGonigle regarding the Claimant having left the line to send the email to HR. The impression given to any reader of that email (such as Ms Palarm) is that the reason for him leaving the line was to access the toilet and that he was told that he needed permission in order to do this. As we have set out, that was far from the case.

69. Holly Palarm made some inquiries of Mr Cole. Mr Cole emailed her on **14 July 2022** [**page 476**] saying that he was no longer managing the Claimant. However, he answered the questions asked of him. He explained that nobody, including the Claimant, needed permission to use the toilet and as regards 'flexing to T4', this is done according to business need on occasion and there is no limitation on the Claimant going to the toilet from there. He observed that there are others on T4 with similar medical issues.

70. Having received Mr Cole's email of **14 July 2022**, Ms Parlarm emailed the Claimant within a couple of hours [**page 481**] to say that Patrick McGonigle would meet with him at the start of his shift to ensure his concerns can be resolved before he begins work. Ms Palarm asked if he would be well enough to have a meeting with her and Mr McGonigle to discuss his condition and the adjustments that were agreed [**page 480**]

The Claimant declined. He said he would prefer that the team leaders were just made aware of the recommended adjustments. By now, if they did not before, the Team Leaders were aware of the Claimant's condition and the adjustments. We find that the Clamant did not want to meet with Patrick McGonigle or others because he had no trust in them.

71. On **15 July 2022**, the Claimant emailed Ms Palarm to say that he would be back to work. He asked what time the proposed meeting was to take place [**page 480**]. However, he emailed again on **21 July 2022** to say he was experiencing significant personal problems in addition to his health problems and was to speak to his GP again on Monday [**pages 483-484**]. On **23 July 2022**, he emailed Holly Palarm about a self-assessment test on mental health which he intended to discuss with his GP at the forthcoming telephone appointment on Monday **25 July** [**page 482-483**]. He then emailed again on **25 July 2022** attaching a fit note covering the period **18 July 2022 to 14 August 2022**.

72. On **26 July 2022**, another HR adviser, Chris Paling emailed the Claimant informing him that he was to attend a Capability Review meeting on **28 July 2022** to be conducted by Wayne Anderson with Gemma Penk assisting from HR [**pages 539, 543**]. The reason for inviting him to a Capability Review meeting was that, since the SAL 3 meeting on **06 May 2022**, there had been four further occasions of absence adding up to 14 days (up to 26th July). The Claimant asked if the meeting could be rescheduled and for a further occupational health report to be obtained. The Respondent agreed.

73. On **26 July 2022**, Mr Paling referred the Claimant to occupational health. The referral form identified the current reason for absence as anxiety and depression. It identified the reason for referral as: 'mental health disorders including PTSD or anxiety or stress unrelated to work or eating disorders'. [**pages 544-548**]. That appointment was subsequently arranged to take place on **22 August 2022**. The Claimant emailed again on **26 July 2022** to ask if he could return to work in the meantime on a temporary day shift [**pages 536-538**]. Ms Penk emailed the Claimant on **28 July 2022** to say that he could return to work when he was able to do so [**pages 535-536**].

74. As is customary, the Darlington plant shut down for one week during the first week of August. **On 02 August 2022** the Claimant emailed Ms Penk to say that he would like to return to work on **08 August 2022** when the plant reopened and that night shift would be fine. However, a few days later, on **07 August 2022**, he told her that his condition had deteriorated and he was arranging an emergency appointment with his GP [**pages 530-533**]. On **08 August 2022**, the Claimant submitted a further fit note [**page 550**]. He returned to work on **15 August 2022**.

Without prejudice meeting

75. On **16 August 2022**, Wayne Anderson, Ms Penk met with the Claimant. They explained that his absence was persistently high and that rather than continuing with the absence

management process, with the stress that involved, he may prefer to discuss a severance package under which he would leave the business on agreed terms satisfactory to him. This was put to the Claimant on the understanding that there was no pressure to discuss it further if he did not wish to do so. The meeting was said to be on a 'without prejudice' basis. Both parties have waived the without prejudice in these proceedings (if indeed it did apply in the first place). The Claimant came to believe that this was a clear message that the Respondent was predetermined to 'oust him' or dismiss him from his employment. Not only did he believe this but he contended that it was, indeed, support for the fact that this was in fact the Respondent's predetermined position. In principle that is a valid argument. However, we disagree that it was in this case. The Claimant was asked to discuss a without prejudice severance arrangement. The Claimant said that he was not interested in doing so and the meeting came to an end. The Tribunal can well understand why the Respondent asked to meet with the Claimant to ask whether he might be interested in leaving the company. It is evident to us that the Claimant was unhappy with the Respondent. He did not trust management and he was finding the absence management process stressful. It is unsurprising that an employer might, in such circumstances, want to ask the employee whether they really wanted to remain in employment or whether they might prefer to leave on agreed terms. Provided that is done with no pressure it is a perfectly legitimate thing to do. In this case, we are satisfied that there was no pressure put on the Claimant. He was free to say yes or no to discussions. He said no and that was the end of the matter. It then simply remained for the Respondent to manage his employment in the normal way, which is what it did. Insofar as it is a 'negative' finding, we find that the Respondent was not predisposed to 'ousting' the Claimant or dismissing him. It was simply trying to manage the situation. The Claimant may well have, and did, suspect the Respondent of being up to no good and of looking to get rid of him as an employe, but that is a different matter.

76. In keeping with this suspicion, the Claimant says that he was being omitted from team sign off sheets and team manning sheets – the implication being that the Respondent was planning on exiting him from the business. There are two documents at **page 1611-1611A and page 170 of SB2**). The document at page **1611-1611A**, a manning sheet, was given to the Claimant by an unnamed colleague, we do not know when as he would not say who it was and could not recall when he was given it. The Claimant says that by omitting him, this was 'gaslighting behaviour' to make him feel like he wasn't an employee'. Gordon Davies gave evidence about the list. We accept his evidence as genuine and honest. The Claimant attempted to attach his credibility by accusing Mr Davies of lying about not previously having met the Claimant. He was not lying. Mr Davies simply could not remember ever having met him on the single occasion which he accepted that he must have done. The simple premise of the Claimant's assertion regarding 'gaslighting' is not one that we accept. The Claimant was not on the list because he was not at work. He had not been at work since **19 August 2022** (even then, that had been for a week, the time prior to that when he last worked, being **12 July 2022**). It is no surprise to us that he was not on the sheet. The manning sheets are put on team board prior to first shift in the week. They are normally done two weeks in

advance. However, from time to time, people phone in sick prior to the sheet going up and the sheet is subject to change. It can be changed 3 or 4 times a day. The sheet is simply for operators to see where they are and what jobs they are on. That is its only purpose. There is a sick column/row on the sheet so that if someone is expected to be in but calls in sick, their name can be entered in the 'sick' row so other operators know they are not in. There is nothing in this point whatsoever and to refer to this as gaslighting of the claimant is simply another indicator of the Claimant's deep lack of trust in all aspects of the Respondent organisation: HR, senior management, team leaders, its occupational health advisers. As regards the training sheet (something else the Claimant said his name had been deliberately omitted), the Claimant's name had been deleted because at the time it was created, the Claimant was off sick. When he returned, he attended the training and added his name by manuscript. Again, there is nothing in this point and to suggest that it points to any wider conspiracy or attempt to gaslighting him is yet another indicator of the deep lack of trust the Claimant had in the Respondent.

77. A few days later, on **22 August 2022**, the Claimant emailed Ms Penk [**pages 517 – 520]**. In the last of three emails he informed her that he was struggling with the prospect of taking part in the occupational health appointment which was to take place that day. Ms Penk emailed to say that he needed to attend the appointment before they could rearrange the Capability Review meeting and told him that if he did not attend his sick pay may be withheld [**pages 516-517**]. He asked Ms Penk if she could postpone the appointment and said that he would return to work the following day. Ms Penk sent the notes of the SAL 3 meeting. She then emailed at 14:03 to say that there may potentially be an OH appointment available at 14:15 but that they would not know until then. She asked if the Claimant would be available to speak to Dr Lucinda then. The Claimant responded about 2 and half hours later to say that he had missed her email as he had been asleep [**pages 491 / 553**].

78. Between **22 and 25 August 2022**, the Claimant sent Ms Penk a number of emails raising various concerns. It was not easy for us to discern when the Claimant raised a grievance but his concerns were, in any event, treated as amounting to a grievance. It is not in dispute that receipt of the grievance was acknowledged on **25 August 2022** and that the Claimant was invited to discuss it on **20 September 2022**. The company handbook states that: 'Within 5 working days, HR will invite the employee to a meeting to discuss the grievance." [**page 105 SB2]** It is the invite that must go out within 5 working days, not the taking place of the meeting. On **24 August 2022**, the Claimant emailed Ms Penk regarding the SAL 3 notes. He said that she had omitted or deleted his comment that the toilets were too far when he was moved to the head of line [**pages 516, and pages 540-541**]. To the extent that there was a dispute, we find that Ms Penk did not deliberately omit or change any comment by the Claimant. If the Claimant had said that the toilets were too far away (and we are not hereby finding that he did say this), she could not remember that.

79. The occupational health appointment that had been scheduled for **22 August 2022** was rearranged and a further appointment was made for **07 September 2022** [**page 555**].

80. On **26 August 2022**, the Claimant emailed Ms Penk asking for his last three payslips. This was followed shortly afterwards by another email in which he asked for the failure to provide his payslips to be added to his grievance [**pages 556-558**]. Ms Penk replied to say that her colleague, Hayley Kemp, had sent the payslips. She asked him to confirm if he had received them. She received no reply to this [**page 557**].

81. On **31 August 2022**, the Claimant emailed again about his payslip for that month and in a further email that day said that his wages for **August** were wrong. The Claimant had initially suggested that this error in his wages arose only after his email of **16 August 2022** in which he had referred to the inaccuracy of the notes of a meeting with Natalie Morton on **11 June 2021** were inaccurate. The implication was that Natalie Morton had effected a reduction in his wages because he had made this criticism [**page 560**]. However, as earlier recorded, in these proceedings the Claimant said he was not pursuing that complaint. In any event, Ms Penk emailed the Claimant to say that payroll were looking into the matter. On **02 September 2022**, the Claimant emailed Ms Penk questioning the time it was taking to do this. She replied later that day with an explanation regarding the error [**pages 559-560**].

82. The Claimant's wages were wrong as explained by Ms Penk in paragraph 199 of her witness statement and in the email to the Claimant of **02 September 2022**. This complaint about unlawful deduction of wages has been withdrawn. As she explained, and we (and eventually the Claimant) accepted, the genuine error arose because his 'e-time' had not been updated to reflect the summer shutdown (during which the Claimant would take and be paid for holiday). We refer to our finding in paragraph 74 above where the Claimant had said he intended to return from sick leave on **08 August** (but did not, in fact, return until **15 August**). The Respondent accepted that an error had been made in that he ought to have been paid holiday pay for the summer shut down and also, he should have been paid his normal pay for the period **15 to 19 August 2022** (when he had returned to work). The payroll system had not been updated to reflect the period where he would be on full pay. In looking into this, it was also discovered that the system had not been updated for **May and July 2022**. In those months his pay should have reduced to 50% sick pay, whereas in fact, he was paid in error at 100% of his full pay. The Respondent, therefore, made an adjustment to his pay in **September 2022**. Therefore, he received a payment which covered:

    a. 50% sick pay from 01 August to **14 August 2022**
    b. 1 week's normal pay from **15 to 19 August 2022**
    c. 50% sick pay from **22 August to end of August 2022**

83. On **01 September 2022**, the Claimant emailed occupational health to say that he might be unable to attend the occupational health appointment on **07 September 2022**

because of the failure to pay him. He referred to the Respondent launching a 'psychological siege'. The following day occupational health confirmed that the appointment was cancelled [**pages 583-586**].

84. On **06 September 2022**, Ms Penk emailed the Claimant informing him that back payment in respect of the error in calculating his wages was to be paid that day. She also informed him that another occupational health appointment had been booked for **07 September 2022 [pages 582-583]**. As regards the payment of wages, shortly after she had sent the email, she was informed that in fact, the payroll employee who had been looking at the wages issue had undercalculated the amount to be repaid to the Claimant. Another payroll analyst realised the error, resulting in more pay being owed to the Claimant in his September wages. The Claimant was informed that more was owing to him.

85. The Claimant replied that he would not attend the occupational health appointment as it had been arranged outside his working hours (it was at 2pm), had been arranged at too short notice and he had not yet been paid properly. He then sent a further email correcting his earlier email acknowledging that the appointment was not in fact outside his working hours but saying that he had another appointment in any event at 3pm. We find that he had no intention of attending the OH appointment and he was simply coming up with excuses. He was game-playing at this stage.

86. Ms Penk replied. She asked if he could make the 2pm appointment if it was conducted by telephone. In addition, she said the back payment of wages would hit his bank account on Friday (that would be **09 September 2022**). She said an additional payslip would be provided and they could discuss on Friday any issues he might have regarding the payments. The Claimant replied to say that, at 2pm, he would be travelling to his 3pm appointment. He asked for his timecard data for July. Ms Penk replied, attaching his timecard data. She said that the occupational health appointment had been rearranged for **22 September 2022**. She said that his enhanced sick pay may be stopped if he did not attend the appointment and that she would ask Chris Paling to send him details for a Capability Review meeting to be held during the w**/c 26 September 2022** [**pages 579-581**].

87. On **06 September 2022**, Chris Paling wrote to the Claimant informing him that he was to attend a Capability Review meeting on **29 September 2022**, to be conducted by Wayne Anderson [**page 587**]. He had now been absent on over 30 days since the SAL 3 meeting on **06 May 2022**. In his reply, the claimant said that the Respondent should wait until it had received a report from occupational health and advice as to whether he was fit to attend a Capability Review meeting. Ms Penk replied on **07 September 2022**. She told the Claimant that if OH felt he was unable to attend a meeting they could say so in its report and if so, they could rearrange the meeting [**page 591**]. We find that the Claimant had no intention of attending the Capability Review meeting as he believed this would play into the Respondent's hands which was simply intent on dismissing him.

88. On **08 September 2022**, the Claimant sent a series of emails to Ms Penk as summarized in paragraph 214 of her witness statement. In one, he described the Respondent as follows:

" …. Psychological and financial assaults the company is launching at me .." and "a callous, dishonest and unsupportive employer that has no actual regard for wellbeing, covers up malpractice at the highest level and that will inflict harm upon its employees …".

89. The level of distrust has deepened and deepened.

90. The Claimant was unhappy about errors with his pay and corresponded with Ms Penk about this. In one email, he asked for the OH appointment to be rescheduled until he had been paid what he was owed. [**pages 589-590**].

91. On **20 September 2022**, Amy Tiplady emailed the Claimant regarding his grievances [**page 588**]. On **21 September 2022**, Ms Penk emailed the Claimant. She confirmed that an additional payment would be made in his **September** wages. She asked him to attend the OH appointment which had been booked for the next day [**page 589**] The Claimant failed to attend the appointment. On **23 September 2022**, he emailed Ms Penk again regarding his payslip [**page 593**].

92. On **26 September 2022**, the Claimant emailed Ms Penk again. In this email, he accused her of doctoring the notes of the SAL 3 meeting by not referring to him being frequently moved to team 4, which is a long walk to the toilet block. He emailed again on **28 September 2022** querying the payments made and suggesting that errors were deliberate and done to target and antagonize him [**pages 600 – 611**].

93. On **27 September 2022**, occupational health wrote to the Claimant offering an appointment for **05 October 2022** [**pages 594-599**]. The Claimant did not attend the appointment. Again, he had no intention of doing so. The reason he did not attend was that he distrusted the Respondent and felt he was being targeted by reducing his pay and by planning to dismiss him. He wrote to BHSF on **27 September 2022 [page 150 SB1**] to say that he would not be attending the appointment, explaining that his continued absence was because of a hostile situation he had been placed in, continued mind-games that he was being subjected to and that his absence was in no way indicative of his capability or ability to recover from his diagnosed conditions, for which he is being treated. We read that, and so find, as meaning that the Claimant regarded his IBS as being under control. He was unwilling to attend the occupational health appointment on **05 October 2022** because, as he accepted in cross examination, he was suspicious that HR and management were trying to manage him out of the business. He was also in dispute with it about his August/September pay and wanted answers to his questions before he would attend any appointment.

The Paling letter

94. In attempting to resolve the Claimant's concerns about his pay, in her email of **28 September 2022** [**page 835**] Ms Penk attached a letter dated **07 June 2022**, from Chris Paling [**page 455**]. The letter is a standard letter in very similar terms to other letters sent to the Claimant before and after that date, such as the letter of **15 November 2021 [page 364], 24 October 2022 [page 622].** The Claimant did not receive the letter of **07 June 2022**, although he had received the other letters. This issue regarding the letter was raised by the Claimant at the time when he was querying other aspects of his pay in the context of having been invited to the Capability Review meeting. Ms Penk then did her best to answer his queries. The Claimant was very suspicious about the **07 June** letter. He asked to see the metadata which was provided to him. He has alleged that this document is a fabrication; that, if falsified for financial purposes, it would constitute fraud. He went on to state later that this was a hate-crime and that he again intends to report the matter as a criminal offence after the tribunal proceedings (having already done so).

95. The letter in question is a 'recreation'. It was recreated by Mr Paling. He admits that. It is, therefore, not simply a 'copy' of or a print-out of, a letter that was sent to the Claimant on or about **07 June 2022**. We considered the content of the letter. The Claimant did drop down to half pay on the dates set out in the letter. There is no dispute about the facts. He did not complain at the time about being on half pay. He was aware that he was on half pay. There is nothing in the content of the letter that is untruthful, false or wrong. The substance, therefore, is uncontroversial. What we have is a letter which was created after the event but which sets out accurate and wholly uncontroversial and undisputed facts. Mr Paling has accepted that he recreated the letter. He did so, at the very least, to cover his own tracks, having been asked by Ms Penk for a copy in September 2022 and being unable to find it. Nothing the Respondent can say about this will ever satisfy the Claimant. He continues to assert that Mr Paling has committed a crime, indeed has referred to it as a hate crime. To suggest that this amounts to a crime or that the recreation of a letter setting out an accurate state of affairs is in any way fraudulent is a nonsense. How that can amount to criminal activity is a mystery to the tribunal and we are satisfied that it simply an extreme example of the Claimant's antipathy towards and distrust of the Respondent. We are not for one moment condoning the fact that Mr Paling recreated or even created a letter after the event. Clearly he should not have. However, putting it into proportion is necessary. There is not the slightest disadvantage or detriment to the Claimant in Mr Paling having recreated a letter that he says he believes he sent (but may not have done) which simply states facts that are not in dispute.

96. On **17 October 2022**, the Claimant submitted a further fit note in respect of the period **17 to 31 October 2022** [**page 617**]. Then, on **01 November 2022**, he submitted a further fit-note covering the period **01 November to 31 December**. In respect of the period **01 November to 31 December [page 626]** the fit note states: '*you may be fit for work taking*

account of the following advice: "if available and with your employer's agreement, you may benefit from a phased return to work". The Claimant subsequently provided a letter from his GP dated **25 November 2022 [page 767]** saying that he could return to work with a phased return to work as per the fit note.

97. In **November 2022**, Ms Penk passed the HR responsibility for the Claimant to a colleague, Nicole Newall who is a Senior HR adviser based at Huddersfield. She did so because it had been agreed between Ms Penk and her line manager, Nicola Teasdale, that it would be better for someone fresh to take over given the Claimant's belief that he was being targeted and also because they regarded much of the Claimant's correspondence as being personal and angry in tone towards Ms Penk. It is plain to us that the Claimant's emails to Ms Penk were indeed at times rude and personal. That is a feature of much of the emails sent by the Claimant to all others who come to be involved in managing his employment. It was not just the tone of the emails that Ms Penk found difficult, it was also the volume. She has noted, in her witness statement at para 227, that in respect of the grievance raised on **22 August 2022**, the Claimant had sent her 48 emails between then and **31 August**. Part of the Claimant's complaint was that the she did not respond to his emails quickly enough. She was interviewed in respect of that grievance (registered as an 'Ethics' case) on **03 November 2022** [**pages 670-675**].

98. On **13 December 2022**, the Claimant emailed Ms Penk regarding the Paling letter she had sent on **28 September 2022 [pages 835-836]**. There is no doubt, and we so find, that Ms Penk found the Claimant very difficult to deal with and she was relieved that his case was passed to another HR adviser. She felt overwhelmed by the number of emails. If she did not respond to an email immediately, the Claimant sent further emails which she found very difficult to manage albeit she did her very best.

Nicole Newall takes over as HR contact

99. On **03 November 2022**, Nicole Newall emailed the Claimant, to introduce herself to him. She said she would be in touch shortly with a response to his concerns [**pages 668-669**]. There followed a series of emails regarding timeframes. Ms Newall said in an email at **page 662**, that before he could return, they needed to refer him to occupational health to confirm that he was fit to return and to understand what reasonable adjustments he needed. She expected the occupational health appointment to be on **11 November 2022** and that she would come back to him in due course regarding his complaints. She said that although his previous fit note expired on **01 November**, he would remain on sick leave until deemed fit to return by occupational health. She explained that his company sick pay had exhausted on **28 October 2022** and, in the meantime, he would not receive pay until he returned to work. He was not paid in **November** or **December 2022**.

100. On **04 November 2022**, the Claimant emailed Ms Newall to say that he had raised a data complaint with the Information Commission Office ('**ICO'**) and that he will be filing an ET1 form that weekend [**page 661**].

101. The Claimant queried why he was not being put on paid authorised absence and referred to an occasion the previous year where he had been paid whilst awaiting an occupational health appointment. The Respondent decided not to put him on 'paid authorised absence' in **November 2022** and to treat his leave as unpaid because it believed that he had not cooperated with its requests for OH referrals resulting in the company being unable to make a decision about his return to work [**page 660**]. That was unlike the previous year when he did not fail to cooperate and did not give any impression that he was failing to cooperate with the process. On **04 November 2022**, the Claimant replied to say that he did not attend occupational health because his wages were incorrect at the time and he could not afford any petrol and as his grievances were taking a contractually-breaching time to be addressed he did not feel safe attending site. He said he had submitted his ET1 and would be making no further comment at all on any contended issue prior to a hearing [**page 659**]. He followed this up with a further email about 15 minutes later to say that he had an anxiety and depressive disorder and that given what was occurring he was too down and anxious to attend site [**page 659**]. As on the earlier occasions, the Claimant had no intention of attending the appointment and was again coming up with excuses not to attend.

102. As the Claimant had failed to attend the OH appointment booked for **05 October 2022**, the Respondent made a further occupational health referral on **04 November 2022.** The referral document is on [**pages 670-683**]. On **10 November 2024**, Ms Newall reminded the Claimant of the forthcoming appointment, emphasising the importance of attending so that the company could obtain up to date medical advice on his health conditions and any reasonable adjustments that may be needed to support his return. She asked him to confirm that he will attend [**page 658**]. It was, of course, very much in the Claimant's interest to attend the appointment for a number of very good reasons, the most important ones being to enable the Respondent to obtain a full, up-to-date picture on his health and prognosis, to understand what steps should be taken to facilitate a return to work with support and to reinstate the Claimant's pay.

103. The Claimant did not confirm that he would attend, as he was asked to. Rather, he asked for a timeframe for the company's answers to his request for information '*regarding software and version numbers of software'* [**page 657**]. The reference to 'software' was a reference to the properties of the document prepared by Chris Paling – i.e. the letter dated **07 June 2022** at **page 455**. In a separate email he said it was unlikely he would be able to attend the appointment the next morning as due to the treatment he had been subjected to, he has been left with no fuel or money for transport [**page 655**]. If he had no money, the best way to remedy that was to attend the OH appointment and return to work with adjustments. That would ensure he was paid. He could still continue with any grievance he had regarding his pay or his alleged or perceived treatment by the Respondent. Further, he was not due to be paid until the end of the month. His last payment had been at the end of **October 2022** (company sick pay having been exhausted on **28 October**). Had the Respondent told him that he would be on paid

authorized leave from 01 November, he would not have been paid by **11 November** (payment being at the end of the month). It would make no difference to his financial position. In light of this, and the history of suspicion (and based on the Claimant's own evidence that he did not attend the October appointment because of his suspicions of being managed out) we are satisfied and so find that this was simply another excuse being put forward by the Claimant not to attend. He had no intention of attending the appointment on **11 November 2022**.

104. Ms Newall did not pick up this email until the following morning. Upon doing so, she said that the Claimant could book a taxi on the Cummins account [**page 654**]. The Claimant did not attend the 10am appointment. At 11.11am he replied to Ms Newall to say that he had just read her email but even if he had read it and acted immediately, it would have been a stretch to make the appointment in time [**page 653**].

105. In paragraph 16 of his witness statement, the Claimant complains that the Respondent failed to inform him in a timely manner that he was allowed to take a taxi to the appointment at the company's expense and that this is evidence of the victimisation he experienced. It is nothing of the sort and is another example of the Claimant taking the Respondent's reasonable approach and unreasonably turning it into a criticism. He did not notify Ms Penk of his inability to attend the appointment due to financial reasons until late in the working day before the appointment. As we have already articulated, we are satisfied that the Claimant had no intention of attending the appointment. By saying he could not afford the transport, he was, we find, making excuses. He could easily have asked for the company to pay a taxi had that been a genuine situation and certainly before 4.20pm the day before the appointment as he would have been well aware of his finances and the need to get to the appointment by some form of transport. We are far from persuaded that he was genuine about this. Indeed, we are satisfied that he was being disingenuous. The Claimant used the excuse of lack of money, then when the Respondent reasonably provided a solution to this, he converted that response into an attack, by saying that they had failed to inform him that he could get a taxi in a timely manner.

106. On **11 November 2022**, Ms Newall sent the Claimant a lengthy email covering a range of topics in respect of which there had been several previous email exchanges [**pages 648-653**].

Topic: occupational health

107. As regards occupational health, she said she would arrange for another OH appointment. Again, she emphasized the importance of attending that appointment. She said that he should pre-book a taxi there and back at the company's expense to ensure he is not prevented from attending due to financial reasons. She provided the Claimant with all necessary information to enable him to book the taxi.

Topic: Ethics Investigation

108. Ms Newall referred to the Claimant's 'ethics complaint' on or around **14 September 2022** which he made through the Ethics Point Website. She provided the Claimant with the outcome of the investigation into that complaint undertaken by Kristen Case, HR Director PSBU Engineering. Ms Newall explained that ordinarily the company does not share details of an ethics investigation, only the outcome. However, on this occasion, she wanted to share it with the Claimant given the potential overlap between some of the issues in his ethics complaint and other grievances. She outlined the outcome and reasons for rejecting two allegations made by the Claimant.

Topic: Grievance

109. Ms Newall outlined what she understood to be the outstanding remaining concerns raised by the Claimant in 12 bullet points. She asked the Claimant to confirm that those were all the concerns he has raised and whether he still wished to have them heard under the grievance procedure; that if he did, she would arrange for a grievance manager to be appointed. She noted that the Claimant had put in a tribunal claim that covered some of those matters but that the grievance procedure was still available to him.

Topic: data subject access request

110. Ms Newall said that the Respondent was under no obligation to provide him with the information he requested in his email on **08 November 2022** as it was not his personal data. She went on to give him some information regarding the letter of **07 June 2022** (that is the one created by Chris Paling – the Paling letter).

Further grievance regarding holiday pay

111. On Saturday **12 November 2022**, the Claimant emailed Ms Newall to say that he had asked on no less than half a dozen occasions about his holiday allocation and had been completely ignored. He asked her to advise. Then, late in the evening of **14 November 2022**, the Claimant again emailed Ms Newall. He said that he wished to raise as a formal grievance that no one was answering his query regarding holidays. He also wished to raise as a grievance the refusal to let him work, 'citing the reason as needing advice from occupational health on adjustments.' He said that '*regarding the other things you listed' (i.e. the 12 bullet points) 'you're welcome to address them if you so wish, but they'll be issues raised at tribunal. I wouldn't want anybody to have to perform mental gymnastics to dismiss my concerns*.' [**page 647**]

112. The Claimant did not attend the OH appointment on **11 November.** Ms Newall said she would arrange a further appointment. On **14 November 2022**, she had a 'teams' conversation with Lucie Lake, from BHSF. This 'conversation' was held over Teams and

was a 'typed' discussion. Ms Newall asked Ms Lake if she could rearrange the occupational health appointment because the Claimant had not attended the recent appointment and she had confirmation from him that he would attend the next one. Ms Lake said that she could but that it would not be until **25 November** with a nurse. However, due to the complexities with the case she recommended an appointment with an occupational health physician who would be on site on **01 December 2022**. Therefore, Ms Lake was the one who recommended that the Claimant see the physician, rather than the nurse. The Claimant had, of course, seen a physician in the past. Ms Newall told the Claimant in an email dated **15 November 2022**, that his appointment would be with the physician.

113. The string of emails continued relentlessly. One question which the Claimant wanted answering, was why he had been allowed to return to work in August without an occupational health report whereas now he was told he could not return until a report was obtained. He observed that he had previously been placed on paid authorised absence awaiting an appointment. [**page 644**, para 2]. On **16 November 2022**, he asked Ms Newall to '*forward the advice the company you claim to have received from the occupational health advisor (who claimed it was explicitly a company request that they didn't know the reason for) that prompted the switch from an occupational health nurse to a doctor*' [**page 644,** para 4]. Ms Newall replied on **17 November 2022** with answers to the Claimant's questions [**pages 638-639**]. She advised the Claimant that the OH provider recommended an appointment with the OH practitioner due to the complexities with his case and that it would help avoid further delay if a referral would be needed anyway to the OH practitioner (para 1, **page 638**). That was entirely correct. The OH practitioner had indeed recommended that the Claimant see the physician due to the complexities of the case. In paragraph 4 of her email Ms Newall reminded the Claimant that he could book a taxi at the company's expense in order to attend the new OH appointment on **01 December 2022** and that he could be chaperoned by a colleague or a trade union representative.

114. The Claimant responded that same day (**17 November 2022**) with four emails. He wanted the failure to allow him to return to work and to pay him and the failure to inform him of the right to be chaperoned at the occupational appointment of **11 November 2022** to be raised as grievances. As regards the chaperone, the Claimant said that he was only advised of the right to a chaperone in an email about an hour before the occupational health appointment on **11 November**. He said it was this failure to do so in a timely fashion that was directly responsible for him missing the **11 November 2022** appointment and that it further delayed his return to work [**page 695**]. This was nonsense and totally contradictory to his earlier position that what directly led to his missing the appointment was his lack of funds to get there. As regards Ms Newall's request about whether he wished to proceed with his grievances, he said that '*the other issues weren't dealt with in time and I won't waste my time muddying the waters before tribuna*l.' In apparent contradiction to that last statement, in the last of his four emails on **17 November 2022**, the Claimant said that he required answers to a number of

questions that he set out, in addition to his grievance [**pages 635-637**]. He stated that when 'ALL' of the above issues were satisfied he would attend the occupational health referral [**page 636].**

115. In one of his emails on **17 November 2022 [page 637]** the Claimant asked Ms Newall to forward him the correspondence from BHSF advising her of a '*recommendation to escalate'*. He said: '*please include what part of my case was deemed complex by them and why this was the case*'.

116. Ms Newall acknowledged the emails on **18 November 2022** and said she was looking into them. She got back to him on **22 November 2022**, setting out his questions and providing an answer as she had been asked to do [**pages 628-632**]. Again, by reference to topics:

Topic: OH appointment

117. She explained that the last report from OH was from **March 2022** and that it only dealt with his digestive condition. She said that it was important to receive an up to date OH report before he returned to work, so that they fully understood his current medical conditions, including any mental health conditions, and what adjustments he may need. She added that, without such a report, they may have to proceed with the absence management process without the benefit of OH input. She encouraged the Claimant to attend the appointment arranged for **01 December 2022**. She asked the Claimant to confirm that he would attend and reminded him of the taxi facility.

Topic: OH reports

118. She asked the Claimant to clarify that she had his consent to access previous OH reports. He subsequently did this.

Topic: Bank Holiday – Queen's funeral

119. She confirmed that in error, he was not allocated an additional bank holiday and that this was now rectified by crediting him with an additional day's holiday.

Topic: Response to Questions

120. She proceeded to answer the Claimant's questions in red font (some of which amounted to her saying '*I will look into this point you have raised and come back to you'*). As regards the next referral being with a doctor rather than a nurse, she cited a message she had received from the OH provider on **14 November 2022**: '*Hi Nicole, yes I can however this will not be until **25th November** with a nurse however due to the complexities with this case I would recommend an appointment is with the OH Physician who is on site **on 01 12 202**2, would this be suitable?*'

121. The Claimant replied on **22 November 2022**. He agreed that Ms Newall had accurately identified the grievances he wished to continue. He was concerned about the reference to IBS in the Occupational Health referral. He did not want the occupational health appointment to discuss his IBS as this had been dealt with in previous reports. In his email of **22 November**, among other things he said:

'*I see the company now offering to address grievances raised in September as a disingenuous attempt to look like an employer behaving reasonably when the opposite is the case. There are no additional adjustments required to those recommended in February 2022….therefore, the two reports you have in the last 12 months are up to date and I won't be harassed further on my condition. …. To ask again on the recent referral because they don't like the advice is harassment and transparent. How many appointments are required? As many until you get the answer you want? I am absent with a depressive and anxiety disorder, not IBS. This further harassment will be raised at tribunal as it's simply not acceptable. Nor is it acceptable for DEP to disclose part of my medical reports to you in the way of referral without consent. ..I will not be harassed over my IBS. I am not absent due to IBS. The reports on my IBS are up to date and the adjustments recommended weren't implemented. .. This might be an attempt to appear supportive but contextualised with other behaviour looks like an attempt to retrospectively say they can't accommodate the adjustments….I will forward the reports when all of my concerns are addressed and when an accurate referral is forwarded to me, as before. Though given DEP have disclosed half of them already in the referral, what's the point in confidentiality?*' [**page 627**].

122. The Claimant ended the email by saying that he would forward her the occupational health reports once all his concerns had been addressed and added 'a simple bundle for the tribunal will benefit all parties'. The Claimant in fact sent the reports the following day. However, he was using the reference to a tribunal as a threat, of that we have no doubt. He was not facilitating any kind of resolution to his return to work other than on his own terms.

123. On **23 November 2022**, Ms Newall asked the Claimant if he would like her to change the reason for the referral from 'mental health disorders' to 'work related stress' and to confirm if he would be attending the appointment on **01 December** [**page 728**]. She also emailed Luci Lake at the OH provider asking why she thought the case was complex and should be referred to a physician [**page 766**]. She did this because, as we have set out above, the Claimant had asked to know the reason for his referral being 'escalated' from a nurse to a physician. Ms Lake replied on **24 November 2022** [**page 230**]. Among other things, she said:

a. *… on reflection / review of questions raised fromt eh business and information provided from Gemma Penk, HRDEP questions on referral posed by the legal team, in my clinical opinion an OHP appointment would be more suitable*

particularly in the event of an employment tribunal scenario/level of clinical expertise.

b. *Complexities – as an OHA I may not be able to advise/answer all questions raised from business and there is a likely need to be escalated to OHP for assessment / an initial OHP appointment reduces the requirement for Mr Thompson to attend twice. Appointment dates 4 working days apart. Please note the business opted for the OHP assessment.*

124. This so called 'escalation' from an OH nurse to an OH physician forms part of the Claimant's complaint to this tribunal (see paragraph 16 of the Claimant's witness statement), which we shall deal with in our conclusions. However, we record our finding at this stage, that the email on **page 230** is a straightforward email from an OH provider. There is nothing in the word 'escalate' that gives us any cause for concern. It is a perfectly straightforward word that accurately describes the decision of the nurse that the Claimant should be seen by a physician (something that would be, we find, in his interests). The OH nurse added: '*in my clinical opinion an OHP appointment would be more suitable particularly in the event of an 'employment tribunal scenario'*.

125. The Claimant alleges that the Respondent (in particular, Ms Newall) was 'dishonest' about the reasons for the escalation. We reject that. She was not in any way dishonest. The OH nurse cites the 'complexities' as being the likely need to escalate to an OHP as she felt she may not be in a position to advise/answer the questions raised. An initial OHP appointment, she said, reduced the need for the Claimant to attend twice. This is perfectly rational and understandable. It is also understandable if there were to be tribunal proceedings brought by the Claimant as everyone would have the benefit of a report by a qualified OHP. We accept the evidence of Ms Newall. She was telling us the truth and she was consistent. We do not accept that she told Ms Lake that there was a tribunal claim. We do think she is wrong in assuming that Lucie Lake believed there may have been a tribunal scenario because of any reference to 'case management'. However, that was just Ms Newall trying to guess at why Ms Lake would refer to this in her email, when she knew that she had not mentioned it. Unlike us, Ms Newall does not have the benefit of seeing all the correspondence in this vast of bundle of documents. Prior to Ms Lake's email of **24 November 2022**, there was a series of emails sent by the Claimant to BHSF directly, in **SB1 pages [160 to 173**]. In particular, at **page 172, SB1,** on **16 November 2022**, the Claimant said:

'*I thought it would be courteous to forward the concerns to BHSF so that they can make their own decision, having provided 2 reports to Cummins about my IBS recently, as to whether they want to engage in potential harassment over what they advised is a protected characteristic*."

126. In his claim form [**page 19**] the Claimant stated that, suspicious of being told that he was to see a doctor, he contacted BHSF directly asking to be provided with a copy of

the referral. We are satisfied, and so find that Ms Newall did not tell OH about the Claimant's employment tribunal claim. We infer that those at BSHF drew their own conclusion from the very unusual scenario of the employee emailing occupational health directly, contending that the real reason for his absence was a hostile situation and referring to the possibility that even BSHF may be harassing him due to a protected characteristic, which is a legalistic reference. It is of no surprise to us that Lucie Lake took the view that the Claimant's case was complex, that there may be a tribunal scenario and that all may benefit from a physician seeing him rather than a nurse.

127. In any event, we can see nothing wrong with the Claimant being assessed by a doctor and not a nurse. It is no detriment to him. If anything, it is beneficial. Even if the Respondent had said expressly in the referral form that the Claimant was now in dispute having presented a claim to the employment tribunal, we would have regarded that as perfectly understandable and acceptable and certainly not extraordinary. That in itself (i.e. employment tribunal proceedings) may well be a situation that causes stress and anxiety to an employee and something an occupational health practitioner might well benefit from knowing about in facilitating a comprehensive assessment of the employee's wellbeing and needs.

128. The reality is that the Claimant believed that the company was angling to make a Capability Review about his IBS rather than the reason for his absence, being his mental health. Nothing they could say or do would appease him or shift his view. That was why he was so exercised about the inclusion of a reference to his IBS. We are satisfied that this was all in the Claimant's head. It may be that IBS had been discussed and referred to in previous reports but any employer is going to want to get an up-date and a full picture of the physical and mental health of an employee. That is perfectly understandable and reasonable. It is precisely what the Respondent in this case was trying to do. No more no less. Yet all the Claimant was seeing was a dishonest, corrupt employer bent on dismissing him. He saw this in multiple things, including by now the Paling letter, the OH referrals, the pay issues, the Record of Conversations, being questioned by Patrick as to his absence from the line, being asked to 'flex on T4'.

129. On **26 November 2022**, the Claimant emailed to say that obviously he cannot attend occupational health with a view to making adjustments without even knowing which ones are already in place. He asked when he will receive a response in full to the points and concerns he had raised [**page 726**]. We find that he had no intention of attending the OH appointment on **01 December 2022**.

130. On **29 November 2022**, the Claimant emailed Ms Newall attaching a letter from his GP dated **25 November 2022 [page 767]**. The GP said that his IBS was not the issue as it was under control presently. She said that the Claimant was generally feeling better in his mental health having been reviewed by her colleague recently. This is a surprising statement, given the Claimant's assertion that during this period, his mental health had deteriorated quite significantly. Here, his GP was saying opposite. The GP

agreed with the Claimant that he could return to work on a phased return to work as per the fit to return note that has been recently provided.

131. Ms Newall emailed the Claimant at 07.15am on **30 November 2022** covering a range of matters. As regards the GP letter she said:

"The previous OH reports you have sent me identified some reasonable adjustments for IBS:

- *Being near toilet facilities*
- *Being able to go to the toilet at short notice and*
- *Regular short breaks to keep hydrated and take snacks to boost energy levels.*

I have spoken to the team who managed your absence before my involvement. I have not received any information to suggest that these adjustments were not implemented.

As confirmed in my email, moving forward, we would like to understand the scope of any current recommendations for reasonable adjustments, so that your manager and/or team leader can implement any adjustments that you may now need. This is the reason for the more detailed questions in this referral. Further, although your GP has confirmed your digestive condition is 'in control presently', it is still important for the business to understand whether you require any reasonable adjustments for that condition and, if so, what are they and/or how they should be implemented."

[**pages 770-771**]

132. She advised the Claimant that, having reviewed his previous OH reports, she intended to remove the following question from the referral: "*Provide a comprehensive overview of both conditions as an independent HR team are going to pick up the process*". She added that the rest of the questions were still relevant and would remain as they are. That was a reference to the questions on the OH referral at pages [**680 to 682**]. She asked the Claimant to let her know if he would like her to change the reason for the referral from 'mental health disorders…' to 'work related stress' [**page 772**].

133. As regards the OH appointment on **01 December 2022** (which had been arranged following the Claimant's failure to attend the one on **11 November**), Ms Newall advised the Claimant that she had asked for the OH provider to hold this appointment; that as he had now received a response to all his outstanding queries, had been advised of his right to be chaperoned and been provided with information on how to book a taxi to and from the appointment, she asked him to confirm his attendance [**page 773**].

134. The Claimant responded by sending about 6 emails. Having read them, we agree with Ms Newall, that the Claimant's emails were becoming increasingly more confrontational. The upshot was that the Claimant made it perfectly clear that he would not be attending the appointment on **01 December 2022** [see especially **page 717-718**]. In his email on **01 December 2022 [page 711]** he wished to be abundantly clear, that

Ms Newall was not going to impose any steps on him; that they could proceed without information, without his presence and they just had to be prepared to justify it to a judge. He said he was not some spineless little production worker that was going to be victimised, harassed or bullied by a multinational that thinks it's above the law. He added that she had lost his trust when he gave her the previous IBS reports and she negated on the implied agreement to withdraw the IBS related content from the occupational health referral. He said he would prefer her to hand his case over to somebody he feels he can trust [**page 711**]. We are entirely satisfied that Ms Newall had done nothing that would warrant the Claimant losing trust in her or expressing himself as he did. As far as we can see, and we so find, like Ms Penk before her, she had done her best to assist the Claimant, to answer his questions and to encourage him to cooperate with the occupational health referrals. That is not to say that the Claimant did not lose trust in her. The reality is that he did not trust anyone in management or HR at Cummins.

135. He did not attend the appointment. Despite having being informed several times that he could not return to work until the company had received an up to date occupational health report, the Claimand emailed Ms Newall at 3.51pm that day asking what shift he should work the next day [**page 713**]. She replied as follows:

"*As explained in my emails on 3, 11, 17, 22, 29 and 30 November, we are only able to discuss your return to work and make appropriate arrangements for your return if we have an up-to-date medical report on your conditions, together with current advice on any adjustments you may need. You did not attend the OH appointment earlier today. You should therefore not return to work tomorrow*." [**page 712**]

136. The Claimant responded to say that he had lost trust in Ms Newall and expressed his preference for his case to be handed over to someone else he feels he can trust [**pages 710-711**].

137. We have no doubt that Ms Newall would have been relieved to pass the Claimant's case over to someone else because, like Ms Penk before her, Ms Newall found it very difficult to deal with the Claimant and what was unquestionably a barrage of emails many of which were confrontational in tone and unreasonable in the points and demands he was making. He was, we find, very confrontational. However, she had her job to do and responded that, as she was familiar with his case, continuity would be helpful. She said in an email dated **02 December 2022** that she would continue as the point of contact [**page 709**]. She tried to respond to some of the points he made in his emails of 01 December. However, the Claimant replied by insisting that she pass his case to someone else, saying that he hadn't been asking. He accused her of harassing him [**page 708**] and that any further contact from her will be regarded as harassment. This is we find unreasonable, threatening conduct by the Claimant.

138. In those circumstances, Ms Newall really had no option but to arrange for someone else to take over. On **02 December 2022**, she emailed the Claimant to tell him

that she would arrange an alternative contact and that they would be in touch shortly [**page 708**].

Michael Abbott takes over

139. She handed over to Michel Abbott, a Senior HR Adviser based in Milton Keynes. Mr Abbott introduced himself to the Claimant by email on **05 December 2022**. The Claimant responded shortly afterwards asking Mr Abbott to send him the 'Record of Conversation' (this was unspecified) and the SAL 1, 2 and 3 documentation, which Mr Abbott did on **07 December 2022**. Mr Abbot did not, however, send any ROC for the simple reason that there was none. The Claimant asked why not and asked whether he had been 'fast-tracked' to SAL 1 given that a ROC is, he asserted, the first stage of the absence process [**page 795**]. However, we are entirely satisfied that it is not a mandatory part of managing an employee's long-term sickness absence that he first be given a ROC, contrary to the suggestion of the Claimant.

140. Mr Abbott considered it important to invite the Claimant to a Capability Review meeting to discuss his absences and to discuss whether the business could continue to employ him. The Respondent decided that the Claimant would not be permitted to return to work as he had refused to attend OH appointments. The Respondent did not consider his GP's letter that he was fit to attend work as sufficient. Therefore, the Respondent did not pay the Claimant in **November** and **December 2022** as it deemed him to have put himself in a position of not returning to work by failing to attend OH appointments.

141. On **08 December 2022**, Mr Abbott invited the Claimant to a meeting on **14 December 2022 [page 807 – 810]**. The letter read (inter alia) as follows:

"*Following the SAL 3 meeting on **06 May 2022**, the Company has attempted to arrange further meetings and referrals to OH most recently on **01 December 2022**. However, you have been unwilling to attend, for various reasons."*

142. The Claimant was given the option of attending in person (with a paid taxi bringing him to the workplace) or by zoom. It was to be chaired by Mr Abbott with a note taker, Faye Wilkinson of HR.

143. The Claimant responded with a number of emails. In the first of the replies [**page 794**] he suggested that Mr Abbott was ignoring the facts and pursuing a pre-determined agenda. He suggested that perhaps it was time for Mr Abbott (who had just taken over the case) to pass the matter on to somebody else that wants to actually work through the issues instead of proceeding boisterously to a capability review. He said he was on the cusp of reporting this as a hate crime, something he had contemplated doing previously. In a further email later that evening, the Claimant said that Nicole Newall had, like Mr Abbott, stonewalled his concerns. He said that the recent OH referral was disingenuous as it asked more questions about different health issues and gave a fake

reason for including them [**page 793 – 794**]. In further emails on **09 December 2022**, the Claimant said that the notes of the SAL 3 meeting had conspicuously omitted his statement that he had been working at team 4, too far from the toilets and that there has been deliberate tormenting of him, a person with a mental health disorder. He stated that DEP was editing and falsifying documents to suit its agenda and cover up malpractice, that Mr Abbott could investigate or come up with a cover story, but that he would get this in front of a judge eventually [**page 800**].

144. It is clear, beyond any doubt, and we so find, that the Claimant utterly distrusted the Respondent company's management and HR, considering there to be falsification of documents, criminal conduct and that the company was deliberately tormenting him. He had lost all trust in it. As he had done to the previous HR officers who tried to manage his absence, Ms Penk and Ms Newall, he bombarded Mr Abbott with emails, contained within which were allegations of fraud, corruption and cover up.

145. As regards the request to attend the Capability Review meeting, the Claimant refused. We find that unsurprising as he had no intention of attending. The Claimant summed up his position in an email dated **08 December 2022** [**page 807**]. However, he subsequently informed Mr Abbott that he would, in fact, be attending the meeting which he would be audio-recording [**page 797**]. We very much doubt that the Claimant was genuine in saying he was going to attend. We find that he had no intention of engaging with the Respondent other than by sending emails. We have no doubt that he would have come up with another excuse not to go before that hearing was due to take place. In the period **08 to 14 December 2022**, the Claimant sent Mr Abbott more emails. On **13 December 2022**, he emailed to say that he would not be attending the Capability Review meeting scheduled for the next day, after all [**page 859].** Attached to the email was a letter from his GP **[page 834**].

146. The reasons he gave for not attending the Review Meeting were not, we find, genuine reasons and were further excuses. The first was that he had not received an assurance regarding a question he had asked about holidays (asked in one of his many emails). He said that he was contractually obliged to take his 8 hours outstanding holidays now given the absence of assurances regarding carry over and that he would not be dealing with any work-related matters whilst on annual leave. He added that all further correspondence would be answered on 4th January [**page 927**]. The second was that he was advised by his GP not to attend a 'decision meeting' at this stage in his recovery. The letter he attached at **page 834** reads as follows:

"Mr Thompson is on the whole better and under control and stable on his medication and would like to return back to work.
A return to work fit note is provided.
I agree that being subjected to a decision meeting isn't something that Mr Thompson should be exposed to at this stage of his recovery."

147. We consider that to be a carefully worded letter. It does not say that the Claimant is unfit to attend such a meeting.. With respect, it is not for a GP to say at what stage an employee should be exposed to a decision meeting. That is a management decision. The GP is there to say whether a person is fit or unfit. The doctor's letter concerns the period where the doctor has said he 'may be fit to return' on a phased return and that his mental health had improved and he was on the whole better. We infer from all of this that the doctor simply agreed with the Claimant that a 'decision meeting' was not something the Claimant had wanted to attend and thus the doctor expressed himself advisedly. We infer from the careful wording that the Claimant approached the GP and asked for a letter to get him out of attending the meeting which was a meeting he had no intention of attending. He was simply looking to arm himself with material to justify his non-attendance. Thus, he resorted to a disengenous and self-created issue regarding holidays and procuring an apparently contradictory letter from his GP. As regards taking the 8 hours holiday and saying that he would not be communicating until the new year, the Claimant was, we find, simply being difficult. He refused to take account of the reasonable attempts to facilitate his cooperation. We agree with Mr Abbott in paragraph 46 of his witness statement where he says that the Claimant was trying to instigate confusion on the part of the Respondent. He was to a very large extent now game-playing. On **14 December 2022**, the Claimant emailed Mr Abbott to say he would not be responding any more as the Respondent was not paying him any money. **[page 881].** He also emailed to say that he intended to visit the local food bank wearing his Cummins shirt and to publish a picture of him doing so [**page 855**].

148. On **23 December 2022**, Mr Abbott prepared a further referral to OH [**pages 989-993**]. This was the fifth and final iteration after toing and froing with the Claimant regarding its content. There is nothing wrong with the content of this referral from what we as a tribunal can see. Given the history of the matter, it is perfectly understandable that an employer would wish the occupational health practitioner to have a complete picture. The Respondent spent time and took care to engage with the Claimant regarding the content. Yet when Mr Abbott said that this would be the final version, the Claimant was critical of him. A line has to be drawn somewhere and the Respondent went to great lengths to seek the Claimant's agreement.

149. The Claimant was exercised by the inclusion of references to IBS. It was perfectly understandable why IBS should be referred to. It was in the Claimant's best interests that the physician be told the whole picture and make recommendations for his benefit based on the whole picture. As regards mental health, the Respondent rightly identified behaviours of the Claimant that gave it cause for concern. It rightly wanted to understand whether the behaviours could be linked to his mental health. The Respondent also asked whether the Claimant was fit to attend any capability review meetings. The Claimant took and continues to take great exception to the Respondent wishing to ask the OH physician whether his the content and tone of his correspondence and dealings with HR might be associated with his mental health.

150. The fit-note submitted by the Claimant dated **29 December 2022 [page 996]** stated that he may be fit for work with a phased return to work. Less than a week later, the Claimant submitted a further fit-note on **04 January 2023** covering the same period of time, stating he was not fit to work [**page 1017**]. Nothing had changed in the interim. The Claimant had already told the Respondent that he was not going to communicate with it until **4th January 2023**. Something had to explain why, in such a short space of time, the Claimant went from being fit to work with a phased return, to being not fit to work at all in respect of the same period. We find that the Claimant knew that by submitting a 'fit note' that said he was not fit to return, this would reset his right to full sickness pay from **03 or 04 January 2023**. It was to his advantage to do so. He was, we find, playing the system. As with those who preceded him, Mr Abbott found himself having to reply to multiple emails from the Claimant. In doing so, he did his best to collate the various concerns raised by the Claimant and to provide him with clear explanations. In one such email on **10 January 2023 [page 945 – 947]** he answered a number of queries one of which concerned the Claimant's request to be paid his salary backdated to **01 November 2022**. Mr Abbott stated at paragraph 5b of his email: "*You were informed at the time of exhausting your sick pay that you would not receive pay until you returned to work. You were also informed that the Company needed input from the OH provider before discussing your return to work. You were therefore placed on unpaid leave pending your attendance at an OH appointment. You did not attend any of the multiple appointments scheduled for you and have now commenced a new period of sickness absence on 4th January*." This was a reference to the matters referred to in paragraph 99 above. The Claimant responded to say, among other things, that he was not asking for sick pay but should be paid his normal contractual pay as he should not have been classed as absent [**page 944**]

Dismissal hearing

151. On **02 February 2023**, Shelley Mercer wrote to the Claimant [**pages 1150- 1153**] with a number of appendices [**pages 1154 – 1172**]. He was invited to a Capability Review meeting to be held on **08 February 2022** at 10am with Steve Morley the then Operations Director. Shelley Mercer is a Senior HR Generalist based in Sandwich, Kent. She was allocated to the Claimant's case because he had refused to deal with any member of HR based in Darlington. Ms Mercer provided an overview of the position, noting that the Respondent had sought to refer the Claimant to OH on around nine occasions to obtain up-to-date medical advice on his various medical conditions and adjustments and that he had been advised that this was a requirement before he could return to work. She noted that his company sick pay entitlement expired on **28 October 2022** and that he had been on unpaid leave since **01 November 2022** until **03 January 2023** (save for the period **16 to 31 December 2022** during which time he was on holiday and paid holiday pay).

152. On **03 February 2023**, the Claimant emailed Ms Mercer and Mr Morley saying, among other things that he wanted a fair hearing that he can attend in person but that

he was not well enough to attend a hearing, as his GP had told the company and that he would attend when well enough [**page 1184**]. The email is in parts dismissive and condescending and exudes a lack of trust in anything the Respondent is doing. Again, we find that the Claimant had no intention of attending any hearing and that putting the hearing off would not have achieved anything as the Claimant would simply have come up with further reasons not to attend. No matter what the Respondent might to do facilitate his attendance, he had no intention of going.

153. On **06 February 2023**, Ms Mercer emailed to say that the meeting would proceed as scheduled on Wednesday **08 February** at 10 am, that if he was not well enough to attend in person or was unable to attend via Zoom, he could submit any further representations in writing together with any relevant evidence on which he wished to rely. She offered assistance to set up Zoom on his personal device. The Claimant then emailed on **06 February 2023** to say that he would be attending the meeting after all even though it was in the face of GP advice [**page 1204**]. It is, we find, quite a belligerent email in keeping with many of his other emails. Although he said he would attend, however, we find again, that he had no genuine intention of following this through. He asked for a number of adjustments to be made including the presence of a first-aider. The Respondent agreed to the requested adjustments albeit in relation to the reference to him bringing a witness, asked to confirm the person's identity.

154. The Claimant told Ms Mercer that he would not provide any written representations as he was not well enough to make such representations, something which we do not accept. The Claimant had been doing nothing but make written representations for many months and continued to do so after **February 2023.** There was no medical evidence that he was unable to do so. We do not accept that a fit-note that says he is unfit to work is sufficient, especially given the notes that said he may be fit to work with a phased return to work. The Claimant added: '*if you wish to proceed in my absence, then that's a decision for you to justify to a judg*e."

155. He added: "*If you think I'm going to respond to an allegation that a predetermined decision that me not engaging with occupational health (despite plenty of evidence to the contrary) is insubordination in any way whatsoever given it's an issue that requires my consent then you are mistaken…. Stop posturing for the benefit of the tribunal and have the conviction to go through with what you have planned. It's transparent."* [**page 1240**]

156. To repeat, we are satisfied from the evidence and find that the Claimant had no intention of attending the Capability Review meeting. He was trying to find every excuse not to, even though the Respondent had done everything it reasonably could to encourage and facilitate his attendance or to receive written representations as an alternative.

157. The Claimant had – and still has – what we can only describe as a vitriolic dislike of and contempt for the Respondent by now. He tweeted disparagingly about the company and threatened to damage its reputation. Although tweets sent by him might have been removed shortly afterwards, they demonstrated not only his distrust of the Respondent but his antipathy towards it. The hearing went ahead in the Claimant's absence. He was dismissed by Mr Morley, the reasons for dismissal being set out in a letter dated **17 February 2023 [pages 1249-1280]**.

158. That letter is extremely comprehensive. Mr Morley took great care to consider the evidence and his reasons. The principal reason for dismissal was a breakdown in relationships. Mr Morley looked at a number of elements leading to this conclusion: the Claimant's absence levels, his failure to engage with OH, his conduct towards numerous HR professionals and managers across the business, the external tweets, the threats to damage the reputation of the Respondent. Section B consisted of a summary of his concerns and findings. He believed that the Claimant's refusal to engage and/or cooperate with the company's requests to refer him to occupational health amounted to serious insubordination and significantly delayed any return to work. He believed the company and the Claimant had reached an impasse. Given the history of matters, he believed that there were reasonable grounds to conclude that he would continue to unreasonably refuse to engage and cooperate with the OH referral process, rendering his return to work in the foreseeable future very unlikely. He believed the failure to engage amounted to gross misconduct and a breakdown in the employment relationship. The detailed reasons were set out in Appendix 1 to the letter. Mr Morley believed that, at times, the Claimant had deliberately attempted to subvert HR processes and that the cumulative effect of his overall approach and communication had led to a point where the relationship between him and the company had irretrievably broken down [**page 1645**]. He believed that the Claimant's lack of engagement and cooperation had contributed to the breakdown. He believed that some of the issues he had raised as pre-conditions to attending the OH referral had been deliberate to delay the capability management process and that the Claimant's conduct amounted to serious insubordination. He believed that the Claimant had a lack of trust in working with the company and this contributed to a significant breakdown in the employment relationship. Mr Morley believed the sheer volume of emails sent by the Claimant to be of concern and that the content of emails was accusatory. He noted that when the company sought to query whether this could be related to his mental health, that the Claimant had regarded this request as a 'wind up'. He believed that, in the absence of any medical evidence and the Claimant's refusal to accept that there was any connection between the volume and content with his mental health, he concluded that the volume was unacceptable as was the aggressive nature of the emails which had an impact on HR contacts giving him a cause for concern [**page 1266**]. All of this led Mr Morley to conclude hat there had been a fundamental breakdown in the employment relationship which was unlikely to be repaired and he went on to set out his reasoning on this [**page 1267**].

159. Mr Morley considered whether a lesser sanction might be appropriate, such as a warning. However, he concluded that he could see no way that the relationship could be repaired. He reasoned that the Respondent had done all that it reasonably could to encourage the Claimant to engage with occupational health and the respondent's processes but that he would not. He struggled to see how it was possible to reintegrate the Claimant into any level of the business in light of his views of the Respondent.

Appeal

160. The Claimant appealed the decision to terminate his employment. Although he has maintained in these proceedings that he had not been able to provide written representations for the dismissal hearing, he was able to and did produce a substantial appeal document on **14 March 2023** [**pages 1285 – 1310**]. The Respondent afforded him more time to do so following his email of **17 February 2023**. Niamh Storry, an HR adviser based in Huddersfield, was appointed to support the appeal officer, Gareth Hopkinson. She exchanged a number of emails with the Claimant regarding arrangements for the appeal. As with his previous correspondence with HR, the Claimant's emails to Ms Storry were quite rule and belligerent. The Claimant asked for the appeal to be delayed as he was to see his GP. On **22 March 2023**, Ms Storry emailed the Claimant to say that it would be helpful if his GP could address a number of matters which she listed in the email [**page 1323**]. These were the sort of things that OH could have advised on had the Claimant attended an appointment. However, the Claimant did not ask his GP to provide any answers to those questions.

161. On **21 March 2023**, Ms Storry informed the Claimant they were provisionally looking to schedule the hearing to take place in Darlington on **29 March 2023**. On **24 March 2023**, she wrote to invite him to attend a hearing on **31 March 2023 [page 1331]**. The Respondent identified and made provision for adjustments that would have facilitated his participation. The Claimant said he would attend [**page 1330**]. However, on **30 March 2023**, he emailed to ask if the hearing could be rescheduled to the following week due to his anxiety [**page 1344**]. Ms Storry agreed and asked him to let her know when he had seen his GP and what adjustments the GP recommended. Ms Storry emailed a letter dated **05 April 2023** with a new date for the appeal hearing of **12 April 2023** at 1pm, again in Darlington. She set out the adjustments that were in place and asked the Claimant to let her know by 10am on **11 April** whether he would be attending and reminded him that he could arrange a taxi at the company's expense [**pages 1339 - 1340**]. There followed an exchange of emails regarding dates. The Claimant emailed on **27 April 2023** to say that he was having an initial assessment appointment with a mental health worker on **15 May 2023** and asked for the hearing to take place after this [**page 1348**]. The Claimant has not produced anything coming out of any appointment with a mental health worker, if indeed there was one. The Respondent nevertheless agreed to postpone until after **15 May 2023**. Ms Storry suggested **18 May 2023** [**page 1356**]. The Claimant replied with what we find was another excuse not to attend the hearing, by saying it was imperative to wait for a decision from the **ICO** (this was a

reference to a further complaint the Claimant had made to the ICO). The Respondent, however, would not delay further and on **12 May 2023** wrote to the Claimant inviting him to a hearing on **18 May 2023**, again at Darlington [**page 1361 – 1362**]. She explained that the complaint to the ICO was on a narrow point and unlikely to impact the appeal outcome. At 2.39pm on **17 May 2023**, the Claimant emailed Ms Storry to say that he would not be attending as the ICO complaint was outstanding [**page 1376-1377**]. Ms Storry responded at 4.18pm that day noting the Claimant's position. As they had previously accommodated two rescheduling requests she informed the Claimant that the appeal hearing would proceed but that she and Mr Hopkinson would meet at a different location to Darlington, where they would continue to consider the appeal [**page 1376**]. Ms Storry and Mr Hopkinson agreed that they would meet at Huddersfield, where Ms Storry was based.

162. At 5.51pm that evening, the Claimant emailed to say that if she was insisting on the hearing going ahead, it should take place at 2.30pm and not the scheduled time of 1pm and that he would attend in person and that if they could not do this they should set an alternative date for next week [**page 1375**]. Ms Storry did not see that email until she logged on the next morning, the day of the appeal hearing. As far as Mr Hopkinson is concerned, he did not know about the Claimant changing his mind, as he had set off for Huddersfield. Ms Storry emailed the Claimant to say that they could accommodate the later time of 2.30pm as the Claimant requested. She explained that due to the timing of his email, she and Mr Hopkinson would not physically be on site in Darlington and that they will hold the appeal meting by Zoom. She told him that he should attend the Darlington site, where someone would ensure he had the necessary IT equipment in place to enable him to participate in the meeting [**page 1395**]. However, the Claimant objected to this saying that if they were not physically going to attend the meeting that they should set it up when they were able to. He said he was not comfortable or familiar with the software and it would make sharing evidence a problem. He said they were being antagonistic and that this was designed to stop him from attending [**page 1394**]. The truth of the matter is that the Claimant had no intention of turning up for the appeal. He had created this situation by telling Ms Storry he was not attending the appeal, resulting in the appeal officer and the HR adviser understandably rearranging where they would meet. Upon discovering the Claimant's change of mind, they provided him with a reasonable alternative arrangement and much as he has done with every other reasonable suggestion made by the Respondent, the Claimant turned it round and used it as a means of criticising Mr Hopkinson and Ms Storry, by blaming the situation on them. This was yet another excuse to avoid attending the meeting. He was, we find, never going to attend. He was frustrating the reasonable efforts of the Respondent to finalise the appeal.

163. The appeal went ahead in the Claimant's absence. His appeal was not upheld. The outcome letter was sent on **24 May 2023 [1403].** It is a comprehensive analysis of what had led to the Claimant's dismissal.

Relevant law

(1) Employment Rights Act claims

Unfair dismissal

164. S.98(1) ERA 1996 provides: "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) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held." The reference to the 'reason' or 'principal reason' in section 98(1)(a) is not a reference to the category of reasons in section 98(2)(a) - (d) or for that matter in section 98(1)(b). It is a reference to the actual reason for dismissal. The categorisation of that reason (i.e. within which of subsection 98(2)(a) - (d) or s/98(1)(b) it falls) is a matter of legal analysis: **Wilson v Post Office** [2000] IRLR 834, CA.

165. The reason for dismissal 'is the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee: **Abernethy v Mott, Hay and Anderson** [1974] ICR 323, CA. In a more recent analysis in **Croydon Health Services NHS Trust v Beatt** [2017] ICR 1240, CA, Underhill LJ said that the 'reason' for dismissal connotes the factor or factors operating on the mind of the decision maker which causes them to take the decision. It is a case of considering the decision-maker's motivation. In all cases, the 'reason' must be considered in a broad, non-technical way in order to arrive at the 'real' reason: **West Midlands Co-Operative Society v Tipton** [1986] IRLR 112, HL.

166. A dismissal for some other substantial reason is usually referred as an '**SOSR'** reason. In such a case, the reason must be sufficiently substantial. Tribunals must be careful to scrutinise whether SOSR is being used as a pretext to conceal a different and the real reason for the employee's dismissal. SOSR can include reasons containing elements of conduct: **Huggins v Micrel Semiconductor (UK) Ltd** EATS 0009/04, which held that a decision to dismiss for SOSR can be based on a breakdown of trust and confidence caused or contributed to by the conduct of an employee. However, there is a distinction between dismissing an employee for conduct in causing the breakdown of relationships and dismissing him for the fact that those relationships had broken down. There may be cases where an employee's conduct has, in the main, been responsible for the breakdown of relationships but where it is the fact of the breakdown which is the principal reason for his dismissal, with the employee's responsibility being secondary or incidental.

Reasonableness

167. If the employer has established the reason and that it is a potentially fair reason, the next question is whether the employer has acted reasonably in treating that reason as a sufficient reason for dismissal – s98(4) ERA 1996. In **West Midlands Co-operative Society v Tipton**, Lord Bridge of Harwich stated, at paragraph 24:

"A dismissal is unfair if the employer unreasonably treats his real reason as a sufficient reason to dismiss the employee, either when he makes his original decision to dismiss or when he maintains that decision at the conclusion of an internal appeal."

168. The burden here is, of course, neutral. It is not for the employer to prove that it acted reasonably in this regard or for the employee to prove unreasonableness. Further, in assessing reasonableness, the Tribunal must not put itself in the position of the employer. It is not for the tribunal simply to substitute its own opinion for that of the employer as to whether certain conduct is reasonable or not but to determine whether the employer acted as a reasonable employer might have acted.

169. The approach to be taken when considering s98(4) is the well-known band of reasonable responses, summarised by the EAT in **Iceland v Frozen Foods Ltd v Jones** [1983] I.C.R. 17. The Tribunal must take as the starting point the words of s98(4). It must determine whether in the particular circumstances the decision to dismiss was within the band of reasonable responses which a reasonable employer might have adopted.

170. Section 98(4) poses a single question namely whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant. It requires the Tribunal to apply an objective standard to the reasonableness of the investigation, the procedure adopted and the decision itself. However, they are not separate questions – they all feed into the single question under section 98(4).

171. Section 111A Employment Rights Act 1996 provides as follows:

(1) Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111. This is subject to subsections (3) to (5).

(2) In subsection (1) "pre-termination negotiations" means any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.

(3) Subsection (1) does not apply where, according to the complainant's case, the circumstances are such that a provision (whenever made) contained in, or made under, this or any other act requires the complainant to be regarded for the purposes of this Part as unfairly dismissed.

(4) *In relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just*.

172. In **Faithorn Farrell Timms LLP v Bailey** CITATION], the EAT (Eady J) held that section 111A(1) and (2) rendered inadmissible, on a claim of unfair dismissal, evidence of any offer made, or discussions held, with a view to terminating the employment on agreed terms, and that extended to the fact of the discussions not simply to their content. Eady J observed in that case that the section does not render such evidence inadmissible for all purposes. The evidence could be admissible for one claim (eg discrimination) but treated as inadmissible for another (unfair dismissal). As regards unfair dismissal claims, the EAT held that the inadmissibility extended to the fact of any discussions, not simply to their content. Eady J said in paragraph 40: "*If, for example, a claimant relies on the existence of pre-termination negotiations in support of her claim of unfair dismissal, it is hard to see how that would not fall foul of section 111A: she would be relying on evidence of the discussions as supporting her claim that she had been unfairly dismissed, which would run counter to the purpose of the provision*."

Unlawful deduction of wages

173. Section 13 ERA 1996 provides that:

(1) An employer shall not make a deduction from wages of a worker employed by him unless-

(a) The deduction is required or authorized to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) The worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract means a provision of the contract comprised-

a. In one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
b. In one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect of or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) *Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him*

to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

174. Section 13 does not apply where the purpose of the deduction is the reimbursement of the employer in respect of an overpayment of wages: section 14(1)(a) ERA. Further, any deduction will be lawful if it is authorised by a relevant provision of the worker's contract.

175. Where the contract does not authorise a deduction, and where a worker is absent from work, wages may not be properly payable if the employee is not ready and willing to work. Determining whether a worker is ready and willing to work can, in certain circumstances, be difficult to ascertain. In the case of **Beveridge v KLM** [2000] IRLR 765, the employee, B, who had been absent on sick-leave, obtained a fit-note that she was fully fit and she wished to return to work. However, the employer prevented her from returning for a period of six weeks until such time as it obtained its own medical report. By the time she submitted her fully-fit medical certificate, her contractual sick pay had expired. Therefore, the employer did not pay her wages during that six-week period. The contract was silent on the issue of waged during this period. The EAT held hat, in the absence of a contractual term to the contrary, wages were payable in that period as the employee was willing to work and could do no more, in respect of her side of the mutual contract, than proferring her services against a background of good health (para 9).

176. The position may be different where the worker offers only to carry out part of his work or partial or undetermined duties on return. In the case of **Miller v 5m (UK) Ltd** UKEAT/0359/05, the employer was presented with a medical certificate that said the employee should undertake light duties. In those circumstances, the EAT held there was a restriction on the type of duties he should undertake and it was right for the employer to undertake proper investigations before allowing the employee to return to work.

177. In its analysis of the **Beveridge** and **Miller** cases, Harvey on Industrial Relations and Employment law considers that, the employer remains under an obligation to pay the employee for periods in which the employee is prevented from working by factors beyond his control, provided he remains ready and willing to serve the employer and there is no contractual term to the contrary (Division B1.A.(2)[7]-[9])

178. The concept of 'ready and willing to work' was considered by the Court of Appeal in **North West Anglia NHS Foundation Trust v Gregg** [2019] IRLR 570. Having reviewed the authorities, Coulson LJ stated some uncontroversial principles (@ para 52) two of which are:

a. If an employee does not work, he or she has to show that they were ready, willing and able to perform that work if they wish to avoid a deduction of their pay.

b. If he or she was ready and willing to work, and the inability to work was the result of a third-party decision or external constraint, any deduction of pay may be lawful. It all depends on the circumstances.

(2) Equality Act claims

179. Section 39(2) Equality Act 2010 provides that an employer ('A') must not discriminate against an employee of A's ('B') by, among other things, dismissing B or subjecting B to any detriment. Section 39(4) EqA 2010 provides that an employer 'A' must not victimise an employee of A's (B) by dismissing B or subjecting B to any other detriment. Section 40 contains a similar provision for harassment. When considering whether an employee has been subjected to a 'detriment' Tribunals should take their steer from the judgement of the House of Lords in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] I.C.R. 337, where it was held that a detriment exists *'if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment'*.

180. These concepts of discrimination and victimisation are then defined in other provisions, for example section 13 (direct discrimination), 15 (discrimination because of something arising in consequence of disability), section 26 (harassment) and section 27 (victimisation).

Direct discrimination

181. Section 13 provides that:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

182. For there to be direct discrimination, the treatment needs to be because of a protected characteristic. It is necessary to explore the mental processes, conscious or unconscious of the alleged discriminator to discover the facts that operated on his or her mind: **Amnesty International v Ahmed** [2009] I.C.R. 1450, EAT. However, the protected characteristic need not be the only reason or even the main reason for the treatment for it to be said to be 'on grounds of' or 'because of'. It is enough that the protected characteristic is an effective cause. The protected characteristic must be a significant influence of the treatment.

Discrimination because of something arising in consequence of a person's disability

183. Section 15 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.

184. For a claim under section 15 to succeed, there must be something that led to the unfavourable treatment and this 'something' must have a connection to the claimant's disability. In **Pnaisner v NHS England and anor** [2016] IRLR 170, the EAT summarised the proper approach to section 15. The 'something' need not be the sole reason for the unfavourable treatment but it must be a significant or more than trivial reason for it. In considering whether the something arose 'in consequence of' the claimant's disability', this could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

Failure to make reasonable adjustments

185. Section 20 refers to the duty to make reasonable adjustments as comprising 'three requirements'. Section 20(3) provides:

"*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."*

186. The focus of section 20 EqA is on affirmative action: **General Dynamics Information Technology Ltd v Carranza** [2015] I.C.R. 169, EAT, para 32. It is imperative to correctly identify the 'PCP''. Without doing this, it is not possible to determine whether it has put the disabled person at a substantial disadvantage or what adjustments are required. The question that has to be asked is whether the PCP put the disabled person at a substantial disadvantage compared with a non-disabled person. In the case of **Ishola v Transport for London** [2020] ICR 1204, the Court of Appeal observed that the words 'provision, criterion or practice' are not terms of art, but are ordinary English words. They are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. In context, and having regard to the function and purpose of the PCP in the 2010 Act, all three words carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again (see Simler LJ @ para 38).

187. The employer must take such steps as it is reasonable to take to avoid the disadvantage (section 20(3)). It is well established that 'steps' are not merely the mental

processes, such as the making of an assessment but involve the practical actions which are to be taken to avoid the disadvantage: **General Dynamics Information Technology Ltd v Carranza**, @ para 35.

188. Any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP is capable of amounting to a relevant step under section 20(3). There is no requirement that the adjustment must have a good prospect of removing the disadvantage. It is enough if a tribunal finds there would have been a prospect of the disadvantage being alleviated: **Leeds Teaching Hospital NHS Trust v Foster** EAT 0552/10. The only question is whether it was reasonable for it to be taken.

Harassment related to a protected characterisic

189. Section 26 provides that:

(1) A person (A) harasses another (B) if--

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of--

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account--

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

190. Unwanted conduct is just that: conduct which is not wanted or 'welcomed' or 'invited' by the complainant: see ECHR Code of Practice on Employment, para 7.8. The intention of those engaged in the unwanted conduct is not a determinative factor although it may be part of the overall objective assessment which a tribunal must undertake. It is not enough that the alleged perpetrator has acted or failed to act in the way complained of. There must be something in the conduct of the perpetrator that is related to disability. The unwanted conduct must be related to the protected characteristic. This is wider than the phrase 'because of' used elsewhere in the legislation and requires a broader inquiry, but the necessary relationship between the

conduct complained of and the protected characteristic is not established simply by the fact that the Claimant is disabled and that the conduct has the proscribed effect.

Victimisation

191. Section 27 provides:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because:

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act

192. In complaints of direct discrimination, the less favourable treatment must be 'because' of the protected characteristic. In complaints of victimisation, the detriment must be because of the protected act.

Burden of proof

193. Section 136 Equality Act 2010 provides that:

(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

194. Section 136 EqA, otherwise known as the burden of proof provision, lays down a two-stage process for determining whether the burden shifts to the employer. However, it is not obligatory for Employment Tribunals to apply that process. Whether there is a need to resort to the burden of proof provision will vary in every given case. Where there is room for doubt as to the facts necessary to establish discrimination, the burden of proof provision will have a role to play. However, where the tribunal is in a position to make positive findings on the evidence one way or the other, there is little to be gained by otherwise reverting to the provision: **Hewage v Grampian Health Board** [2012] I.C.R. 1054.

195. In cases where the tribunal is not in a position to make positive findings, s136(2) means that if there are facts from which the tribunal could properly conclude, in the absence of any other explanation, that A had failed to make reasonable adjustments or harassed B, it must so conclude unless A satisfies it otherwise. In considering whether it could properly so conclude, the tribunal must consider all the evidence, not just that adduced by the Claimant but also that of the Respondent. That is the first stage, which is often referred to as the 'prima facie' case. The second stage is only reached if there is a prima facie case. At this stage, it is for A to show that he did not breach the statutory

provision in question. Therefore, the Tribunal must carefully consider A's explanation for the conduct or treatment in question: **Madarassy v Nomura International plc** [2007] I.C.R. 867, CA; **Igen Ltd v Wong** [2005] I.C.R. 931, CA

Submissions

196. Both the Claimant and the Respondent prepared written submissions. Neither party wished to expand on their submissions orally save to answer any questions from the tribunal.

Discussion and conclusions

The direct disability discrimination claim

197. This complaint as set out in paragraph 4 of the list of issues is about:

a. the omission from the manning sheet (rota) and training event sheet and

b. the failure by the Respondent to invite the Claimant to discuss his grievance of **24 August 2022**, within 5 working days.

198. In considering the issue of the manning sheet, the Claimant submitted that we should reject Mr Davies' evidence as being unreliable. However, we did not reject it. We accepted his evidence as truthful and reliable (see paragraph 76). He had no reason to create a false account of the manning sheet.

199. The Claimant was not omitted from the sheet because he is or was a disabled person but simply because he was not expected to be at work at the time the sheet was prepared. Insofar as other employees are identified as absent on sick leave, those were employees who were expected to work but who had since called in sick. There was insufficient evidence that would warrant any inference that there was anything sinister in the absence of the Claimant's name, given that he had been absent from work since **19 August 2022** or thereabouts and there had been no indication of him working in the week of **30 October 2022.** The Claimant has not established that anyone was motivated consciously or unconsciously by the fact that he is or was a disabled person. Indeed, we are entirely satisfied that it was a natural, understandable omission. The same applies for the training event sheet. We remind ourselves of our finding in paragraph 76 above. This was an event he was not expected to attend because it was believed he would be absent and he did, in any event attend.

200. As regards the complaint regarding delay in sending the grievance invite, we remind ourselves of our findings in paragraph 78 above, noting that it was not in dispute that receipt of the grievance was acknowledged on **25 August 2022** and that the Claimant was invited to discuss it on **20 September 2022**.

201. We can see from Ms Penks' evidence, which we accepted, and from the bundle the number of different queries and concerns that she was fielding from the Claimant during **August and September 2022** (see paras 78-94 and 98 above). Although it is right that the Claimant had not been invited within 5 working days, that is unsurprising given the number of issues and the nature of the issues regarding pay that the Claimant was raising. We were entirely satisfied and concluded that the failure to send the invite letter to discuss the grievances was wholly unrelated to the Claimant's disability and was due entirely to the fact that Ms Penk was working behind the scenes to understand the issues, collate a response so as to be able to meet with him and manage his concerns in a meaningful way. It had nothing whatsoever to do with the Claimant's disability, which did not materially influence the timing of the invitation or of the holding of any meeting.

202. Further, it was not to the Claimant's detriment that he was omitted from a manning sheet at a time when he was not able to work and that he was omitted from a training event which he in fact attended and he was not subjected to any detriment by the failure to invite him to a meeting to discuss a grievance in circumstances where he had sent to Ms Penk a large number of concerns which were not entirely easy to decipher and which had to be understand if he was to receive any meaningful response.

203. The claim of section 13 direct discrimination fails and is dismissed.

The section 15 discrimination claim

204. This complaint as set out in paragraph 8 of the list of issues is about altering a period of sick leave to one of enforced unpaid leave, not paying wages and the dismissal of the Claimant. The Claimant must establish that the Respondent did the things complained of a set out in para 8 a,b and c of the list of issues.

205. Firstly, the 'unpaid leave' and wages issue. (para 8 a and b) This relates to the period November and December 2022. We refer back to our findings in paragraphs 99 and 150 above. The Claimant accepted in his evidence that there was no significant or substantial difference in the words 'unpaid leave' or 'sick leave' as either way, the Respondent had been clear in the email of **03 November 2022** that he was not to receive pay until he returned to work [**page 662**]. He confirmed that the difference was the absence of the word 'sick' in Mr Abbott's email. When asked what was the importance to him of it being one or the other (i.e. unpaid leave or unpaid sick leave) he said that he did not know how to answer that. When asked in what way this different designation (if it was one) amounted to unfavourable treatment, he said that it was that it was unpaid.

206. We are satisfied that there was no change in substance as a result of Mr Abbott referring to the period as unpaid leave or sick leave. In either case, however described, the simple fact is that the period was unpaid. That was clearly communicated to the

Claimant. Typically, he has resorted to pedantic nitpicking of the language used, missing the substance.

207. The Claimant was, as is clear from our findings, deliberately refusing to cooperate with the Respondent because he had a fixed and unreasonable belief that the Respondent was determined to use the services of occupational health to dismiss him. In circumstances, where an employer, as this employer did, makes every reasonable accommodation for an employee to attend occupational health for the purposes of assessing his fitness, and where that employee, as the Claimant did, refuses to engage positively with the process – and indeed, frustrates it as was the case here - it is not do his detriment that he receives no pay for the period in which he continues to avoid attending. The law requires an objective analysis to the question of detriment. We considered whether a reasonable employee in such circumstances would consider that he had been subjected to a detriment. We are satisfied that no reasonable employee would because a reasonable employee would not have acted as the Claimant had by frustrating the process, thus delaying the very thing that would have resulted in payment to him, that is, a return to work.

208. In any event, the reason for the failure to pay (however described) and for Mr Abbott choosing the words 'unpaid leave' as opposed to 'the words sick leave' (words used by Ms Newall) must be because of something arising in consequence of his disability (see paragraph 184 above under the relevant law section). The Claimant's case is that his 'absence' was the 'something' – that is, that his absence was the reason for not paying him. However, that is not right. He had been paid in the previous year while absent and awaiting an occupational health assessment (see findings in paragraph 101 above). The difference between then and now was that in the previous example, he had cooperated with occupational health. Now he was demonstrably not cooperating and, on our findings, had no intention of doing so other than on his own terms. The 'something' in this case was, in fact, the Claimant's failure to cooperate with the OH process. We found that the Claimant's cooperation was down to a belief that the Respondent wanted to use what came from any OH assessment to dismiss him. He had never suggested that this belief itself arose in consequence of his anxiety or depression – that was not the case that had been advance and in any even, he adduced no evidence in support of any such suggestion. Therefore, the 'something' does not arise in consequence of his disability.

209. Considering the issues in paragraphs 8 – 10, we conclude:

a. The Claimant was not treated unfavourably by Mr Abbott in referring to his leave since November as 'unpaid leave'. In any event, Mr Abbott did not refer to his leave as such because of something arising in consequence of the Claimant's disability but simply because that is how he understood the position.

b. The Clamant was not treated unfavourably by the Respondent in not paying him in November and December 2022 in circumstances where, as we have found, the Claimant was refusing to cooperate in the OH process and the Respondent was acting in accordance with the contract of employment and handbook (paragraphs 18 and 31 above). In any event, even if unfavourable treatment, this was not because of something arising in consequence of the Claimant's disability. His refusal/failure to cooperate was not a consequence of his disability.

The dismissal of the Claimant

210. The Claimant's case was that the real reason and/or an effective cause of his dismissal was his absence. He maintained that the Respondent had invented other spurious reasons, such as gross misconduct or SOSR (referring to a breakdown in relationships, his lack of cooperation with the OH process, the tone and content of his emails and his tweets etc) to disguise the real and effective cause, i.e. his absence from work, which he says arose in consequence of his disability.

211. That was the Claimant's case as articulated at the case management hearing on **25 June 2024** (see paragraph 19 of the case management summary) as he had set out in his amended ET1 on **08 June 2023** [**page 20**] where he contended that the Respondent had not followed its own absence procedure and therefore 'swerved' to spurious conduct allegations. This 'swerving' was a reference to the matters found by Mr Morley which had, on his conclusions, led to an irretrievable breakdown in relationships.

212. During the course of the hearing, from the Claimant's questioning of some of the Respondent witnesses, it appeared to the Tribunal Judge that he may have been suggesting that his conduct (i.e. the allegedly spurious conduct of his email correspondence and tweets, referred to by Mr Morley) had been a consequence of his mental impairment. The Tribunal raised this directly with the Claimant asking whether he was maintaining or accepting that his conduct was in some way rude or confrontational (as Mr Morley had found it to be) or that his conduct in sending voluminous emails some of which were confrontational was a consequence of his disability. The Claimant said that was not his case. He did not accept that his emails were rude or confrontational. His case was, he explained, that he did not accept that Ms Penk, Ms Newall or others were affected by the content or tone of his emails, otherwise they would have warned him earlier. The following day (30 July) the Claimant appeared to suggest again that his conduct (in the shape of the emails and failure to engage in the process) arose in consequence of his disability, while maintaining that his emails were not confrontational and that he was not refusing or failing to cooperate.

213. In any event, the Claimant's disability is anxiety and depression. It by no means follows - and it is certainly not axiomatic or to be assumed - that a person with such a condition will or might engage in correspondence of the sort the Claimant engaged in.

There had been a suggestion by him, (although not the case advanced) that it was a direct consequence, which is why the Tribunal raised it. However, he provided no medical evidence to suggest any such link and as we emphasise, that was not the case he had advanced.

214. We were satisfied that the effective cause of the dismissal was the following:

a. Mr Morley's assessment that there was a total and irretrievable loss of trust by the Clamant in the Respondent,

b. This loss of trust came about through a perception of the Claimant's that the Respondent was bent on terminating his employment unfairly.

c. The Claimant's conduct towards the Respondent's HR and management, which amounted to rude, confrontational and hostile communications, again demonstrating a total loss of trust and a total breakdown in relationships

d. His conduct in threatening to damage the reputation of the Respondent by tweeting to third parties and threatening to post an image of him at a foodbank, confirming a total loss of trust in the Respondent and a total breakdown in relationships [see **pages 1425 – 1440**].

e. A firm belief by Mr Morley that relationships had irretrievably broken down and that the Claimant's conduct amounted to gross misconduct.

215. It was not the Claimant's absence from work (whether on sick leave or otherwise) which led to or caused his dismissal. The absence was certainly contextual, in that much of the breakdown in trust arose in the context of managing his absence. However, it was not the principal reason for dismissal (applicable to the unfair dismissal claim) nor was it (for the purposes of the section 15 discrimination claim) an effective cause of or a material influence or a significant reason (in the sense of being more than trivial) for his dismissal. It was the irretrievable breakdown in relationships that was the cause of and principal reason for dismissal. The Claimant did not challenge Mr Morley on the genuineness of his belief that relationships had irretrievably broken down. In a way that is unsurprising to us as this is one of the clearest cases we have ever seen of a breakdown in relationships, for which the evidence is overwhelming.

216. Therefore, considering the issues in paragraphs 8 to 10, we conclude that:

a. The Respondent did treat the Claimant unfavourably by dismissing him. However, applying the law as set out in **Pnaisner** (paragraph 184 above) that treatment was not because of something arising in consequence of his disability.

217. The section 15 complaint of discrimination arising in consequence of disability fails and is dismissed.

The section 26 claim: harassment related to disabllity

218. Referring to the list of issues in paragraph 14, there were, initially, five allegations of unwanted conduct which was said to be conduct related to disability. Having handed in his written submissions, the Claimant was asked about paragraph 14(a) – the allegation of 'tampering with holiday pay', of which we heard no evidence. The Claimant confirmed that he was not making that claim. That left the following:

a. Refusing to remove questions relating to IBS from the OH referrals.

b. Engaging in repeat referrals to OH.

c. Inviting the Claimant to a without prejudice meeting on **16th August 2022**.

d. Leaving his name off the rotas (the manning sheet) and sign off sheets (the training event sheet).

Refusing to remove questions relating to IBS from the OH referrals

219. Although there some amendments made to the OH referral it is right that the IBS references were not removed. To the extent that the Claimant objected to the inclusion of IBS in his referral form, it can be said that this was 'unwanted conduct'. The next question is whether that conduct relates to disability, which it clearly does as it directly concerned his disability (see paragraph 14 above). The key question is whether it had the purpose or effect of creating the proscribed environment under section 26. It was not, we conclude, done for the purpose of violating the Claimant's dignity or creating a hostile etc.. environment. Rather, the questions were included for the purpose of obtaining an up to date and full picture of the Claimant's health, prognosis, adjustments and to support him back to work and in the workplace (we refer back to our findings in particular to paragraphs 128 and 149 above). We then considered whether by including questions relating to his IBS, this had the effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. In considering this we applied subsection (4), which requires us to take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. We were not satisfied that the Claimant perceived this to be a violation of his dignity. He perceived it to be an underhand attempt by the Respondent to obtain a report which could be used against him. He did perceive that it created an intimidating or hostile environment for him. However, given the overall circumstances (including the fact that the Respondent and the Claimant would benefit from an OH report on all his conditions and needs) which would serve to further the interests of understanding the extent of any reasonable adjustments at the very least,

even taking account of his perception we were satisfied that it is not reasonable to conclude that the conduct in refusing to remove the questions that were framed had the effect in section 26(1)(b)(i) or (ii).

Engaging in repeat referrals to OH

220. We reach the same conclusion in relation to the repeated attempts to refer him to OH. Yes, it was unwanted (because the Claimant made that clear) in the sense that it had to be on his terms. Yes, the referral can be said to relate to disability. However, for the same reasons, the underlying rationale, purpose and effect being that the OH referrals were for the benefit ultimately of the Claimant, even though he cannot see it. It is not reasonable to regard this as creating the proscribed environment, even if that was the genuine perception of the claimant. We would add that the number of referrals was down to the Claimant refusing and and/or asking for rescheduling.

Inviting the Claimant to a without prejudice meeting on 16th August 2022

221. The same can be said regarding the invitation to the without prejudice meeting. We refer to our findings in paragraph 75 above The Respondent accepted that this related to disability as the absence management process appeared to be causing the claimant some stress and that it could be said, therefore, that the invitation 'related to disability' – in the wider sense as expressed in paragraph 190 above. This might be said to be a generous concession but a concession it is. It can be said that the invitation is 'unwanted conduct' as the Claimant did not ask for it and rejected it. The question is whether it was for the purpose of or whether it had the effect of creating the proscribed environment. We were entirely satisfied that it was not for the proscribed 'purpose'. It was a genuine invitation which, as far as the Respondent was concerned, might have been welcomed by the Claimant. Accepting the perception of the Claimant was that it had the effect of creating an intimidating or hostile environment for him, given the circumstances and the obvious unhappiness and level of distrust that the Claimant had for the Respondent, to simply ask him, without putting pressure on him, whether he was interested in discussing a severance package, it is not reasonable to regard that as creating the proscribed environment.

Leaving his name off the rotas (the manning sheet) and sign off sheets (the training event sheet).

222. As for leaving the Claimant's name off the rotas, the Respondent did not take any point in its written submissions as to whether this constituted 'unwanted conduct' or 'related to'. We are not sure that the omission from the manning sheet or training record related to disability. We understand that the test of 'related to' is wider than the test of 'because of' and that a lack of knowledge of disability is not an essential ingredient (albeit it may be relevant). Mr Davies did not know of the Claimant's disability when he drew up the mannng-sheet. It was certainly not done for the purpose of creating the proscribed

environment. We did not accept that the Claimant perceived it to have the effect of violating his dignity or creating the environment in section 26(1)(b)(ii). He merely found out after the event that his name had not appeared on a list of employees, a list that had been compiled at a time when he was absent from work and was not expected to be at work. However, it matters not, because considering the matter objectively, and having regard to those circumstances, it is not reasonable to regard this as harassment. We arrive at precisely the same conclusion in respect of the training event sign off sheet (for which see our findings in paragraph 76 above).

223. The section 26 complaint of harassment related to disability fails and is dismissed.

The section 27 complaint: victimisation

224. The issues here were set out in paragraphs 19-23 of the list of issues. It is conceded that the Claimant did a protected act by presenting his ET1. The two factual complaints were:

a. The escalation from an OH nurse to an OH physician and
b. The dismissal of the Claimant

The 'escalation'

225. We refer to our findings in paragraphs 115 to 128 above. As for the escalation, we do not accept that the Claimant was subjected to a detriment by the acceptance by the Respondent of the recommendation of Ms Lake to arrange for the OH physician to conduct the oh appointment. If anything, having an experienced, qualified doctor is very much to the benefit of the Claimant. No reasonable employee would regard this as a detriment.

226. In any event, the Respondent was not, in any way, motivated by the existence of the ET1 proceedings in accepting the recommendation to escalate the referral to a physician. The recommendation was made at a Teams meeting on **14 November 2022**, at which there was no discussion of the Claimant's ET1, which he had presented on **04 November 2022**. The natural inference from the Claimant's own communications with Ms Lake was that she had drawn her own conclusions. In any event, the reference to an employment tribunal scenario, was made in the overall context of considering that it would be generally beneficial for all concerned if a doctor were to do the assessment. Not only was he not subjected to any detriment in this respect, the 'escalation' was not significantly influenced by the fact that he had brought tribunal proceedings (in which he complained of discrimination) but was, we conclude, influenced only by the Respondent's understanding that the OH provider considered this to be in the best interests of all concerned.

The dismissal

227. Mr Morley was aware of the ET1, as he candidly accepts. However, we were satisfied that the fact that the Claimant had presented a complaint in the ET had no bearing whatsoever on Mr Morley's decision making or motivation. The Respondent had, in our judgment, managed a very difficult employee extremely well and Mr Morley applied his mind to the events commendably and thoroughly. The Respondent's attempts to reason with the Claimant and to facilitate his involvement were, in our judgement, exemplary and very much to the credit of the HR professionals and managers who must have, and did, find this a very difficult situation to manage. Although the Claimant's dismissal was a 'detriment' for the purposes of section 27 Equality Act, it was wholly unconnected with the fact that he did a protected act in the commencement of employment litigation or the presentation of his ET1.

228. The complaints of victimisation fail and are dismissed.

The claim of failure to make reasonable adjustments: sections 20-21 Equality Act 2010

229. The issues under this claim were set out in paragraphs 24 – 26 of the list of issues. The Claimant must prove the existence of the PCPs. Three PCPs were pleaded:

a. A practice of refusing to follow occupational health advice.
b. A practice of placing production staff at locations without regard to the proximity of the lavatories.
c. Requiring employees to obtain permission to leave the production line to use the toilet facilities.

230. As to the alleged PCP, far from proving such a practice, the evidence demonstrates vividly that all the Respondent ever wanted to do was to follow OH advice. There simply was no practice of refusing to follow advice. Nor was this established by the Claimant's suggestion that, in his case, the Respondent had gone against OH advice by requiring him to work at the furthest point from the toilets or at a point further from the toilets than his normal place of work. We refer to our findings in paragraphs 43, 49 and 56 -60 above. The Respondent followed the advice and on those very rare occasions when the Claimant was asked to help out on T4 for a short period, this did not amount to a refusal or even a failure to follow OH advice.

231. As regards the third alleged PCP, even on the Claimant's own evidence, and as he put to witnesses, there was no practice of requiring employees to obtain permission to leave the production line in order to use the toilet. On the one occasion of which there was any evidence about the Claimant having to leave the line for any reason, it was a single incident relating to the sending of an email to HR. It was this that led to Patrick McGonigle speaking to the Claimant and this that the Claimant referred to in his emails

about being told he needed permission to leave the line. It had nothing to do with his disability or the need to use the toilet. He has not established any such PCP.

232. However, we are prepared to accept that the Respondent had the second PCP of placing staff at locations without regard to the proximity of lavatories. By this we mean only that, as a general practice, when it came to allocating a production operative to an area of work, they did not stop to think 'how are far away are the toilets'.

233. However, we do not accept that this practice put the Claimant to the substantial disadvantage in paragraph 25b compared to a person without his disability. That is because the Claimant worked primarily on hot test, which as he accepted was close enough to the toilets and on the very odd occasion when he had been asked to work on T4 (of which the only reliable evidence was once between May 2022 to August 2022) he had the facility and the freedom to agree or disagree, depending on his condition at that moment or to say no if it wasn't. Further, the Claimant did not satisfy us on the evidence that working for a short period on rare occasions at T4 put him to any greater disadvantage than working at Hot Test on a regular basis given that at times when working on Hot Test he would be no closer to the toilet than he would be if on T4, and he had no complaint about working anywhere on Hot Test.

234. Even if wrong about all of this, the Respondent had made adjustments by ensuring that he had the ability to say no to any request to help out on T4 and to raise any issue with his team leader or HR, which he did as demonstrated by the events that led to Mr Hardy's email to Mr Cole.

235. The claim of failure to make reasonable adjustments fails and is dismissed.

Unfair dismissal

236. This complaint was set out in paragraphs 28 – 29 of the list of issues. We refer back to our findings in paragraphs 158 to 159 and our conclusions in paragraphs 210 to 216 above. The principal reason for dismissal was that the relationship had irretrievably broken down and that breakdown had come about by the Claimant's conduct. It may be that the Respondent could have terminated the Claimant's employment by reason of conduct but we agree with Ms Miller as to the principal reason in this case (applying the principles of law referred to in paragraph 166 above). In the circumstances of this case, that was a substantial reason such as to justify the dismissal of an employee holding the position which the Claimant did. We were satisfied that this was not used as a pretext to conceal a different reason for the Claimant's dismissal

237. It is abundantly clear that there was an irretrievable breakdown in relationships in this case. The Respondent had done what it could to avoid this happening but to no avail. Contrary to the Claimant's argument, he was not fast-tracked through the capability process. (paragraph 28a of the list of issues) The Respondent reasonably followed its

process and if anything amended it at the request of the Claimant by deferring hearings. It reasonably sought to obtain OH input but was frustrated in its efforts by the Claimant. It did not seek or attempt to oust him from his position but to facilitate his return (para 28b of the issues) and it tried to obtain medical advice. There was no fabrication of letters (para 28c of the issues). It reasonably proceeded to hear the dismissal meeting and the appeal meeting in his absence having given him every opportunity to attend or participate in writing or by Zoom and to obtain medical advice (para 28 d, f, g, h, I, j and k).

238. The Claimant argued that he should have been given a warning about his conduct earlier in the process, implying that he would have desisted from sending rude, aggressive, confrontational emails, and that he would have attended occupational health had he been given such a warning. We do not accept that. If anything, this would have further inflamed a situation that was, extremely difficult, if not impossible for the Respondent to manage. It had reasonably tried to manage the situation by responding to every query the Claimant raised. Queries which were set out confusingly, in multiple email threads at all hours of the day and night were answered. By attempting to reason with the Claimant and answer his questions, HR and management reasonably hoped that it would bear some success. Alas, it did not. These reasonable responses from the Respondent were interpreted by the Claimant as being antagonistic and that the Respondent was trying to make itself look like a reasonable employer, whereas in fact it was, he alleged, angling to dismiss him. In truth, all those who managed the Claimant's case were simply trying to provide him with reasonable responses to his queries and not to inflame the situation. They hoped he would see reason. To suggest that, had they warned the Claimant about his behaviour or sought to intervene in the absence management process by suggesting that disciplinary action might be taken against him that this would have changed everything is not credible. The Claimant believed the reasonable attempts and efforts of the Respondent to be sinister and corrupt. Had there been any hint of discipline if he continued to email in the same vein, that would have simply confirmed in the Claimant's mind that they were being antagonistic towards him.

239. The implication of the Claimant's submission is that the Respondent acted unreasonably in including his own emails, tweets and conduct for consideration by Mr Morley at the final hearing. We do not agree. It was his conduct, in the context of managing the absence process, that led to the obvious breakdown in trust and in the relationship.

240. In analysing the dismissal for the purposes of section 98(4) we conclude that:

a. Mr Morley genuinely held the beliefs expressed in the dismissal letter and as set out by us in the paragraphs we have referred to. His principal reason that there was an irretrievable breakdown in relationships was a substantial reason within the meaning of section 98(1((b) ERA.

b. He had reasonable grounds for concluding that there had been an irretrievable breakdown in relationships.

c. The Respondent had acted fairly and reasonably in the run up to the dismissal meeting. It provided the Claimant with the case against him, so to speak, so that he understood it. It allowed him every opportunity to present his case. It considered matters carefully and afforded him the right to appeal.

d. The dismissal was one that was open to a reasonable employer and within a reasonable band of responses. Mr Morley considered whether a lesser sanction might be appropriate but concluded not. The Claimant had, he reasoned, demonstrated that he had zero trust in the employer at all levels and that there was simply no realistic prospect of rehabilitating him into the workforce. The Claimant did not trust HR or management from any of the Respondent sites.

e. Stepping back and considering all of the circumstances, including the size and administrative resources of the Respondent, the demonstrable breakdown in the relationship which came about through no unreasonable actions of the Respondent, the process followed by the Respondent and having regard to equity and the substantial merits of this case, the Respondent acted reasonably in treating the reason as a sufficient reason for terminating the Claimant's employment.

241. We would add that (as per paragraphs 171 - 172 above) we have had to proceed on the basis that there were no communications relevant to our determination of the unfair dismissal complaint (see para 28e of the issues). Even though the parties never got into any 'negotiation' or discussion about severance terms, nevertheless, for the purposes of a claim under section 111 ERA, the fact of 'discussions' must be excluded (see para 41 **Faithorn Farrel Timms** referred to above). In this case, there was a 'discussion' about whether the Claimant was prepared to discuss terms. He said no and, as we have found, it was left at that. Nonetheless, this was still a discussion within the meaning of section 111A and we are required to deem it inadmissible. Had we not been so required, however, it would not have affected our conclusion on the reasonableness of the decision to dismiss.

242. The Claim of unfair dismissal fails and is dismissed.

The claim of unlawful deduction from wages: section 13 ERA

243. This claim was about the failure to pay the Claimant's wages in **November and December 2022**. The issue in paragraph 36 (regarding to August/September 2022) was no longer live, having been withdrawn by the Claimant. The only issue was regarding paragraph 37. The Claimant argues that there was no contractual provision entitling the Respondent to withhold his pay in November and December 2022. That is because, he

said, he had provided a fit note which said he was fit to work. That is not correct. The fit-note did not say that – see our finding in paragraph 28. The fit-note stated: '*you may be fit for work taking account of the following advice: "if available and with your employer's agreement, you may benefit from a phased return to work*".

244. The questions for the tribunal were as follows:

a. Was the failure to pay for November and December in accordance with the express terms of the contract?

b. If not, was it in accordance with an implied term of the contract?

c. If so, what was the implied term? Is it necessary to imply such a term

d. If not in accordance with express/implied terms was claimant 'ready, willing and able to work?

Express terms

245. The Respondent initially relied on clause 6.4 and 11.1 of the contract of employment. We do not agree that those clauses cover the factual situation which existed in **November and December 2022**. Ms Miller further submitted that the handbook was incorporated into the contract (para 165 of her submissions). She submitted that the Claimant had frustrated the process and thwarted OH referrals, submitting that he was in control of whether he remained absent or facilitated his own return to work.

246. Although clauses 6.4 and 11.1 did not in our judgement cover the situation in this case, provision was made in the Claimant's contract that company sick pay may not be payable in certain situations (see paragraph 18 above). Paragraph 9.6 provided:

"*The Company reserves the right not to pay Company sick pay if you have failed to comply with the relevant statutory and Company rules regarding the provision of evidence of illness or the absence reporting procedure*" [**page 97**].

247. There was no specific reference in the contract of employment to the 'handbook'. However, we concluded that the reference to Company rules is to be taken to be a reference to the handbook, which is, after all, the document in which the company rules are contained. Therefore, we concluded that the handbook was incorporated and that the terms relating to sick pay and compliance with rules regarding provision of evidence of illness were apt for incorporation.

248. Section 2.2 of the handbook contains the rules regarding absence for medical reasons. In **SB2 page 49**, the handbook states that employees may be requested to

attend an appointment with the OH department to talk through any health conditions which are preventing the employee from returning to work. On the same page, it states: '*NB company sick pay (e.g. full pay or half pay) is dependent on following the Company's procedures and meeting reasonable requests during absence*'.

249. The Claimant had contended that we were not concerned with 'company sick pay' but with his normal contractual salary. This argument was based on the fact that he had produced the fit-note in November. It is right that the Claimant had exhausted his guaranteed company sick pay by **01 November 2022**. Any further payment was discretionary. The fit-note did not certify him fit to return to work. It was conditional upon the employer having available work during a phased return to work. That begged the question what kind of work might he be fit for and what sort of phased return to work is he fit to return to. If the Respondent had decided to pay the Claimant until such matters could be determined, that pay would be pay in return for a period of sickness absence. Therefore, however one wants to describe it, the payment would amount to Company Sick Pay. Further, the parties understood and agreed that payment of Company Sick pay was dependent on meeting reasonable requests during absence, as set out in the handbook.

250. The request to an attend OH appointment was a reasonable request and one which the Claimant repeatedly and unreasonably refused to comply with.

251. We conclude that there was no express specific term of the contract covering the exact situation prevailing here: that is, where an employee has a fit-note that says he '*may be fit to return with a phased return to work*', there was an express term entitling the employer to withhold pay if he does not comply with reasonable requests to attend for an OH assessment. If the employee unreasonably refuses to attend, pay may be withheld until he attends. Therefore, the deduction/failure to pay wages in November and December 2022 was authorised by the contract.

Implied term

252. Even if wrong about incorporation (although we do not believe so), we concluded that there was an implied term to that effect, entitling the Respondent to withhold pay until the employee complied with a reasonable request to attend an occupational health appointment to determine what work he can do, in circumstances where his fit note says only that he 'may be fit' for work. This term is, we conclude, implied by virtue of the officious bystander test. Had the proverbial officious bystander suggested such a provision at the time the Claimant and Respondent entered into the contract of employment, they would both have replied of course it should be included. It is necessary to imply such a term to enable the Respondent properly to facilitate the return of the employee to work in accordance with the terms of the fit note. It was necessary to understand the nature of any restrictions and what the phased return should look like. That is why the Respondent, like many other employers, invests money in providing for

occupational health assessments: to enable it to do that very thing. Such a term would have seemed obvious to the parties at the time they entered into the contract of employment. This is all the more obvious, when one looks at the Claimant's contract of employment (see paragraph 18 above) and section 3.3 of the handbook where the Respondent draws to the Claimant's attention in writing that payment of company sick pay is dependent on complying with reasonable instructions.

Not ready and willing to work

253. In any event, even if there was no express or implied term, we conclude that the Claimant was not ready and willing to work. There was, we concluded, a good deal of game-playing by the Claimant, for example, informing the Respondent at short notice that he was going to turn up for work. We found that he had no intention of engaging with occupational health on anything other than his own, unreasonable terms. To be ready and willing to work, means to be ready and willing to work in accordance with reasonable instructions of the employer. It was a reasonable instruction or request for him to attend occupational health before doing a shift and before he was paid. As we have set out above, the fit note he provided in November did not say he was 'fit for work'. It said 'not fit for work' but 'may be' … 'if'. Relying on the case law, especially in the **Miller** case, we conclude that the Claimant was not entitled to payment of his normal pay in November and December 2022 in such circumstances.

254. On any analysis, the wages for November and December 2022 were not properly payable, which means there had been no unlawful deduction. The claim of unlawful deduction of wages therefore fails and is dismissed.

Employment Judge **Sweeney**

Date: 6 September 2024

APPENDIX

List of issues

The Claimant brings claims for direct discrimination, discrimination arising from disability, harassment, failure. to make reasonable adjustments, victimisation, unfair dismissal, and unlawful deductions. The Claimant commenced employment on the 4th of March 2020 and his employment was terminated on the 17th of February 2023. The Claimant was dismissed for some other substantial reason, due to an irretrievable breakdown in the employment relationship.

TIME LIMITATION

1. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The tribunal will decide:
   (a) Whether the claim was made within three months (allowing for any early conciliation extension) of the act complained of;
   (b) If not, whether there was conduct extending over a period;
   (c) If so, whether the claim was made within three months (allowing for any early conciliation extension) of the end of that period;
   (d) If not, whether the claims were made within such further period as the tribunal thinks is just and equitable. The tribunal will decide:

      a. Why the complaints were not made in time;
      b. In any event, whether it is just and equitable in all the circumstances to extend time.

DIRECT DISCRIMINATION (Sections 13 and 23 Equality Act 2010)

2. The Respondent accepts that the Claimant was disabled within the meaning of the Equality Act 2010 by virtue of his digestive condition and mixed anxiety and depression at all material times.

3. Did the Respondent treat the Claimant less favourably than his comparator(s) in materially similar circumstances?

4. The actions relied on as less favourable treatment are:

    a. Omitting to list the Claimant on rotas or sign off sheets including Week 4 (30th October 2022 – 5th November 2022)

    b. On or around the 24th of August 2022, the Claimant submitted a grievance. The Claimant was not invited to discuss it within 5 working days. The Respondent informally acknowledged the grievance on the 25th of August 2022 and invited the Claimant to discuss it on 20th of September 2022 which was not in a timely manner.

5. If so, was this because of the Claimant's disability?

6. Was the Claimant thereby subjected to a detriment?

    Note: the Claimant relies upon a hypothetical comparator.

DISCRIMINATION ARISING FROM DISABILITY (Section 15 Equality Act 2010)

8. Did the Respondent treat the Claimant unfavourably by:

    a On the 3/11/22 Nicole Newell informing the Claimant that he would remain on sick leave but this later being altered by Michael Abbott by the 13/1/23 to a period of enforced unpaid leave.

    b Not paying the Claimant wages in November and December 2022 despite the

Respondent insisting he remain away from work.

c On the 17th of February 2023, the Respondent dismissing the Claimant

9. Was the unfavourable treatment because of something arising in consequence of his disability?

10. The Claimant relies on the following as the "something" arising in consequence of his disability:

    a. His sick leave from work

11. Was the treatment outlined in paragraph 8, a proportionate means of achieving a legitimate aim? (NB; this is only relevant if the Tribunal finds that the Claimant was treated unfavourably because of something arising in consequence of disability. The tribunal will have to consider if the Respondent was materially influenced by the Claimants absence and the extent to which that was proportionate of the legitimate aim).

12. The Respondent states that its aims were:

    a. As to proportionality: reasonable adjustments were made as appropriate and there was no less discriminatory way of approaching the situation;

    b. The Respondent adopted the sickness absence leave policies reasonably and administered the capability review process with a view to properly and reasonably assessing the Claimant's fitness to work.

13. The Tribunal will decide in particular:
    a. Was the treatment an appropriate and reasonably necessary way to achieve those aims;
    b. Could something less discriminatory have been done instead;
    c. How should the need of the Claimant and the Respondent be

balanced?

HARRASSMENT RELATED TO DISABILITY (Section 26 Equality Act 2010)

14. Did the Respondent do the following things:

    a. Tampering with holiday pay that the Claimant had not taken deliberately;

    b. Refuse to remove questions relating to IBS from the occupational health referrals,

    c. Engage in repeat referrals to occupational health,

    d. Invite the Claimant to a without prejudice meeting on the 16th of August 2022,

    e. Leave the Claimant's name off rotas and sign off sheets.

15. Is so, was that unwanted conduct?

16. Did it relate to disability?

17. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

18. If not, did it have that effect? The Tribunal will consider the Claimant's perception, the other circumstance of the case and whether it is reasonable for the conduct to have that effect.

VICTIMISATION (Section 27 Equality Act 2010)

19. Did the Claimant do a protected act by doing the following:

    a. The bringing of these proceedings on the 4th of November 2022.
    b. The acts identified in response to paragraph 12.7 of Judge Loy's case management order and evidenced in pages166-167 of the supplementary bundle and amounts to the protected act.

20. Did the Respondent do the following things:

    a. Escalate from Occupational Health nurse to Occupational Health physician citing "an employment tribunal scenario".
    b. Dismiss the Claimant on the 17th of February 2023

21. By doing so, did it subject the Claimant to a detriment as alleged?

22. Was it because the Respondent believed the Claimant had done, or might do, a protected act?

23. Can the Respondent prove non-discriminatory reasons for the conduct?

FAILURE TO MAKE REASONABLE ADJUSTMENTS (S20/21 Equality Act 2010)

24. Did the Respondent apply any of the following provisions, criteria or practices (the PCP's) generally:

    a. A practice of refusing to follow occupational health advice
    b. A practice of placing production staff at locations without regard to the proximity of the lavatories
    c. Requiring employees to obtain permission to leave the production line in order to use the toilet facilities.

25. Did the application of any of the PCPs above put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are

not disabled? In relation to each PCP the Claimant claims as follows:

a. Reasonable adjustments for his IBS, anxiety and depressive disorder were not implemented by failing to follow occupational health advice generally;
b. He was unable to locate toilet facilities urgently whilst on the production line to respond to his IBS symptoms; and
c. He was unable to access toilet facilities urgently to respond to his IBS symptoms without asking for permission to leave the production line.

26. Did the Respondent take such steps as were reasonable to avoid the disadvantage? In relation to each PCP, the reasonable adjustment(s) contended for by the Claimant are as follows:

a. Implemented recommended adjustments as advised by Occupational Health, where possible.

b. Arranged for the Claimant to be positioned at a production line close to toilet facilities, moving him only by prior agreement (when the Claimant felt symptoms were manageable from an alternative location).

c. Allowed the Claimant to access the toilet facilities without permission.

UNFAIR DISMISSAL (Section 98 Employment Rights Act 1988)

27. What was the reason for dismissal? The Respondent asserts that the Claimant was dismissed for some other substantial reason, due to an irretrievable breakdown in the employment relationship, which is a potentially fair reason for

dismissal under s.98(2) Employment Rights Act 1996.

28. The Claimant alleges that the dismissal was unfair because:

    a. Between the 11th of June 2021 and the 6th of May 2022, the Respondent "fast tracked" him through the company's sickness absence leave procedure (SAL 1, 2 and 3), skipping the Record of Conversation stage of the absence management process, one of the Respondent's employees (Michael Abbott) falsifying such a Record of Conversation, and by failing to take occupational health advice when the Claimant was undergoing diagnostic testing;
    b. Attempting to oust him from his position on 26 July 2022 without having taken on medical advice in relation to a depressive disorder condition;
    c. Fabricating letters purporting to advise him of a change in sick pay entitlement – letter attached to an email from Gemma Penk (28 September 2022) allegedly sent by Chris Paling on 7 June 2022.
    d. On the 26th of July 2022, the Respondent invited him to a capability review without medical advice;
    e. On the 16th of August 2022, the Respondent invited the Claimant to a without prejudice meeting when he had returned to work;
    f. Escalating from Occupational Health nurse to Occupational Health physician citing "an employment tribunal scenario
    g. Refusing to adjourn the dismissal meeting on the 8th of February 2023 until he was fit to attend work [Claimant to confirm this is correct;
    h. Dismissing the Claimant for not engaging with Occupational Health when the Handbook states that the consequence of not engaging with occupational Health is to not receive sick pay;
    i. He was dismissed in absentia on the 17th of February 2023 (despite his request to wait until he was able to attend a meeting)
    j. The appeal process was held and the outcome confirmed to the Claimant in his absence
    k. On the 18th of May 2023, insisted the Claimant attended the appeal hearing

by zoom.

l. The Claimant alleges that the dismissal was pre-determined

m. The dismissal was an act of discrimination in contravention of section 15 or an act of victimisation in contravention of section 27 Equality Act and as such renders the dismissal unfair.

29. Was the Respondent's decision to dismiss for SOSR reasonable in all the circumstances (including the Respondent's size and administrative resources)?

This will be determined in accordance with equity and the substantial merits of the case.

UNLAWFUL DEDUCTIONS FROM WAGES

35. What was deducted from the Claimant's wages, by whom and when?

a. The Claimant alleges that on the 30th of August 2022, he received a cost of living payment and not his basic salary. The claimant accepts that there was previously an over payment of sick pay. The claimant understands that s14 of the ERA 1996 states that overpayment deductions are exempt. However, the Claimant does not accept that the deduction made from his wages to correct the overpayment was the genuine reason for the deduction

36. (1) What wages were properly payable to the Claimant on 30 August 2022?

(2) Was there a previous overpayment of sickpay by the Respondent to the Claimant? [The Claimant accepts that there was an overpayment].

(3) What was the amount of the overpayment?

(4) was a deduction made from the Claimant's pay on 30 August 2022? [it is accepted that there was]

(5) what was the amount of the deduction?

(6) was that deduction made by the Respondent for the purpose of reimbursing the

Respondent in respect of an overpayment of wages such that the deduction is an excepted deduction within the meaning of section 14 Employment Rights Act 1996? (7) If not, was the Respondent otherwise entitled to deduct these alleged sums?

b. The Respondent (i) does not accept that unlawful deductions have been made from the Claimant's pay in the periods or amounts alleged, or at all; and (ii) the Claimant was in fact overpaid in this period and, as a gesture of goodwill, the Respondent decided not to recoup this overpayment (despite the Claimant's employment contract containing a deductions clause entitling it to do so).

37. The Claimant states he was not paid wages in November and December 2022 despite the Respondent insisting he remain away from work;

38. The claimant provides the following calculations of monies owed:

Between 1st-30th November

i. Amount I should have been paid £2452.14
ii. Minus amount received already £1088.42
iii. Add 9% pension benefit not received £220.69
iv. Total £1674.41 normal pay

Between 1st-31st December

i. Amount should have been paid £2452.14
ii. Minus received £210.61 and 876.94
iii. Add 9% pension benefit not received £220.69
iv. Total £1585.28 – normal pay

37. Therefore, (1) On the relevant pay date at the end of November 2022 and the end of December 2022 respectively, what wages were properly payable to the Claimant? (2) Was the Claimant paid less than the amount that was properly payable to him? (3) if not, what is the amount of the deficit? (4) was the deduction authorized within section 13 Employment Rights Act 1996?