EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Martin Smith	AND	Royal Mail Group Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY **ON** 9, 10 and 11 September 2024
By CVP Video Platform

EMPLOYMENT JUDGE N J Roper **MEMBERS** Ms R Clarke
Mr A Murphy

Representation
For the Claimant: In person
For the Respondent: Mr C Howells of Counsel

JUDGMENT

The unanimous judgment of the tribunal is that:
1. The claimant's claim for unlawful deduction from wages in respect of accrued but unpaid holiday pay is well-founded, and by consent the respondent is ordered to pay the claimant the gross sum of £1,301.53; and
2. The claimant's remaining claims for disability discrimination and for unfair dismissal are not well-founded, and they are hereby dismissed.

RESERVED REASONS

1. In this case the claimant Mr Martin Smith, who was dismissed by reason of capability, claims that he has been unfairly dismissed, and that he was discriminated against because of a protected characteristic, namely disability. The claim is for direct discrimination, an alleged failure by the respondent to make reasonable adjustments, and victimisation. The claimant also brings a monetary claim for unlawful deduction of wages. The respondent concedes that the claimant is disabled, but it contends that the reason for the dismissal was capability, that the dismissal was fair, and that there was no discrimination. The unlawful deductions claim is now conceded by the respondent.

2. The Various Proceedings:
3. The claimant had already issued previous Employment Tribunal proceedings against the same respondent before these proceedings which fall to be determined at this hearing. The first set of proceedings were issued on 12 July 2020 under reference 1403529/2020 and were claims of disability discrimination. The second set of proceedings were issued on 12 November 2020 under reference 1406017/2020 and were a claim for unlawful deduction from wages in respect of arrears of pay. These two sets of proceedings were consolidated and heard together at a final hearing between 11 and 14 October 2021. They are referred to as "the First Claim" in this Judgment. The respondent conceded liability in respect of a specific amount of unauthorised deductions, but otherwise denied the remaining disability discrimination claims. These included claims of harassment against the claimant's managers. The remaining disability discrimination claims failed, and they were all dismissed.
4. The claimant has subsequently issued three more sets of Employment Tribunal proceedings which in short are claims for disability discrimination; unlawful deduction from wages in respect of holiday pay; and in respect of his subsequent dismissal. These have all been consolidated and are determined by way of this Judgment. The List of Issues to be determined is set out below. They specifically exclude matters which arose before, and have already been determined in, the First Claim.
5. This Hearing:
6. This has been a remote hearing. The form of remote hearing was by Cloud Video Platform. An in-person hearing was not held because it was not practicable, and all issues could be determined in a remote hearing, and the parties consented to a remote hearing of this nature. All parties were connected by audio and video connections, except the claimant, who was content to proceed by way of a clear audio connection only. In addition, the claimant was offered breaks if he wished to accommodate any symptoms arising from his disability.
7. We have heard from the claimant. For the respondent we have heard from Mr Jon Staddon, Mr Ashley Hart, Mr Rob Foster, Mr Stephen Davis, Mrs Jennifer Shepstone, Mr Stuart Sugden and Mr Allan Rostron.
8. There was a degree of conflict on the evidence. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
9. The Facts
10. The claimant Mr Martin Smith was employed by the respondent Royal Mail as an Operational Postal Grade at the Exeter Delivery Office. His employment commenced on 1 June 2000, and he was dismissed by reason of capability (ill-health) following extensive sickness absence on 2 June 2023. The claimant has suffered from Ankylosing Spondylitis (AS) from at least 2018. This impairment has had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities, with particular reference to mobility and associated difficulties. The claimant commenced an extended period of certified sickness absence with effect from 30 March 2020 and did not return to work. The circumstances surrounding this claim effectively relate to the management of the claimant's sickness absence after the presentation of his First Claim and up to and including his appeal against the decision to terminate his employment.
11. Mr Jon Staddon, from whom we have heard, is employed by the respondent as a Customer Operations Manager at the Exeter Delivery Office ("DO"). He had previously been the claimant's line manager between 2017 and 2019, and he resumed responsibility for managing the claimant's absence from the summer of 2020 until April 2022. This was because the claimant refused to speak to Mr Rob Foster, his line manager, against whom the claimant had earlier brought the unsuccessful claims of bullying and harassment in the First Claim. Mr Staddon and the claimant had regular discussions about the claimant's absence and Mr Staddon obtained an Occupational Health (OH) report on 22 March 2021. This OH report advised that the claimant would

meet the statutory definition of disability and that his ongoing musculoskeletal issues were preventing him from resuming his work. It suggested that he might be able to return to work if an adjustment was made whereby he could do a job which involved less walking, and that the claimant was experiencing issues with the commute from his home to the office.

12. Mr Staddon was conscientious in his efforts to explore the possibility of alternative employment. In the respondent's parlance this is known as "scoping". At the end of 2020 Mr Staddon scoped for any delivery work which required less walking which was available in the immediate vicinity and concentrating on a 10 mile radius from the claimant's home. This included the Crediton DO, a rural office in Sowton, and the Exeter Mail Centre (which is a different office from the Exeter DO where the claimant was normally assigned to work, but close to it).
13. Mr Staddon identified a number of full-time vacancies which were available at each of those three offices where the claimant could have been accommodated with the adjustments recommended by the OH report. There were also part-time vacancies available in the rural office, with later start times, which were also suitable. The claimant refused all of these offers of alternative employment. He refused to go to the Exeter DO while Mr Foster was still working there even though that office was the closest to his home. He refused to go to the Crediton DO because he said he could not afford to buy a car. He explained that his wife had had to give up her car and she drove to work with their one remaining car, and he refused to be financially disadvantaged by having to buy a second car when he felt the respondent was responsible for his financial situation. The claimant also refused to go to the Exeter Mail Centre because of the distance and the issue concerning the car.
14. Mr Staddon carried out a second scoping exercise in late 2021, by which stage the claimant had been absent on sickness leave for approximately 18 months. He again looked for vacancies which required limited walking as advised by OH. At that time there were no longer any available vacancies at the Crediton DO or in the rural office. However, the respondent had by then introduced dedicated parcel routes so there were later shifts available at the Exeter DO. This would have meant that the claimant would no longer have to be managed by Mr Foster who worked on the day shift. The claimant refused this offer of alternative employment on the basis that it did not suit him domestically because he wished to be home with his children earlier than 6 pm. Mr Staddon also identified vacancies on a late shift at the Exeter Mail Centre in a sorting role which required no walking. This shift would have started at around 6 pm. In other words, the respondent had offered the claimant an apparently suitable alternative sedentary role as a reasonable adjustment as envisaged by the OH report. The claimant declined this offer as well because he said that the hours did not suit him. At this stage therefore the claimant had repeatedly refused to accept a number of offers of alternative employment which clearly appeared suitable within the context of the OH report.
15. One of the respondent's procedures relates to the possibility of receiving benefits where an employee has to leave the business due to ill-health, referred to as "LTBIH". Where an employee is dismissed for reasons of capability following extended ill-health there are three options. The first is a dismissal without benefits. The second is a dismissal which attracts a lump sum benefit. The third is a dismissal which attracts the benefit of ongoing income. This third option of LTBIH with ongoing income is the most financially advantageous of these three options.
16. The respondent then arranged for a further OH report which Dr Kane completed following a meeting with the claimant on 27 January 2022. The report stated that the claimant had confirmed that he was "unfit for work in any capacity due to ongoing symptoms of conditions. He has discussed that ill-health retirement is required and I confirm that this has been discussed today for further management process regarding ill-health retirement." When asked to comment on possible adjustments and/or alternative roles Dr Kane advised: "He is not able to carry out the roles presented to him, and this has previously been discussed. I do not envisage a return to work in any

capacity. I recommend that further referral to OH occurs if necessary to process LTBIH (I confirm that this has been discussed and consented for further referral today)".

17. Shortly thereafter the claimant complained that he no longer had confidence in Mr Staddon as he still worked in the same office as Mr Foster, and he assumed that Mr Staddon would therefore be sharing information with Mr Foster.
18. Mr Ashley Hart, from whom we have heard, is employed by the respondent as a Weekend Shift Manager at its Midlands Super Hub. The claimant had exercised a formal grievance (for which see further below) and Mr Hart was asked to manage the claimant's absence which he did from 6 April 2022. By this stage the claimant had been absent on certified sick leave for over two years since 30 March 2020. Mr Hart had not had any dealings with the claimant before.
19. Given the length of the claimant's absence Mr Hart referred the claimant for a further OH assessment. He sought advice on the claimant's fitness for work, whether any reasonable adjustments could be made, his suitability for alternative duties, and to consider the claimant's eligibility for benefits in the event that his employment was terminated under the LTBIH process. That OH assessment took place on 20 April 2022 and Dr Miranda produced a report dated 10 May 2022. The report confirmed that the claimant was suffering from chronic AS, osteoarthritis, depression and anxiety. Dr Miranda suggested that further medical evidence ("FME") would be required from the claimant's GP to clarify the situation. Dr Miranda confirmed that he would discuss the FME with the claimant and then give further advice to the respondent's management. The claimant provided his written consent for OH to obtain the FME on 19 May 2022 and the claimant was referred for another assessment. That assessment took place in late June 2022 but shortly thereafter the claimant told Mr Hart that he withdrew his consent for the OH report to be shared with him.
20. The claimant gave a number of reasons for not sharing this subsequent OH report. He said he was concerned that the respondent would pursue LTBIH. He said that he had tried to tell OH that some details in the report were incorrect and he believed that the report was worded to ensure that he receive the minimum LTBIH benefit (that is the lump sum instead of the income benefit). He also suggested that the report had recommended a seated role and relocating to night shifts but he had highlighted that nights were not possible and that he would be unable to commute to the Exeter Mail Centre (even though he knew that was where it was more likely that a sedentary role would be available, rather than within a DO) because he only had one car available and did not believe it would be a reasonable recommendation.
21. That OH report was released to the claimant in early July 2022, but the claimant continued to refuse to give consent for it to be disclosed to the respondent.
22. Meanwhile the claimant had exercised a written grievance on 28 January 2022. Mr Stephen Davis, from whom we have heard, is a Plant Manager based in Exeter and he heard the claimant's grievance. They met on 2 March 2022 so that the claimant could clarify his concerns. A number of matters were issues which had already been determined during the course of the First Claim, and Mr Davis declined to consider these matters. He investigated the new complaints and interviewed Mr Foster and Mr Staddon. He partially upheld the grievance.
23. Mr Davis concluded that the claimant had been absent from 30 March 2020 whilst self-isolating until 20 April 2020, but that on 13 April 2020 he had told Mr Foster that the NHS had advised him to shield. The attendance record did not show this (because at that time both self-isolation and shielding absence were recorded as sickness) and while the reason was incorrect, nonetheless it was correctly recorded as a sickness absence. Mr Davis agreed that the record should be amended. Secondly, while shielding, the claimant had received a letter on 14 April 2020 suspending him from duty while on sick leave with pay. The attendance record did not accordwith the suspension letter which suggested the suspension started on 21 April 2020 (rather than 14 April 2020) and so Mr Davis recommended that the record should be amended and upheld that element. Mr Davis reviewed the dates on which the claimant had taken annual leave whilst sick and could not identify any errors. The claimant suggested that a

number of the reasons for his sickness absence had not correctly been entered as Ankylosing Spondylitis (AS) and had shown something different between 2007 and 2019. Despite the historical nature of these, Mr Davis still reviewed them, and concluded that four out of the five absences had been correctly reported as being for AS, and the remaining one was for a hip injury which was correct, and which coincided with the contemporaneous documents. He did not uphold this element. Mr Davis also investigated the respondent's recovery from the claimant of an overpayment of £154.98. Mr Davis concluded that there had been an accidental overpayment when pensionable sick pay (which is received when someone is off for more than 12 months) should change to full pay (when that person chooses to take annual leave whilst sick). This is a manual process done centrally by the respondent's HR department and not locally. Mr Davis therefore concluded that there was a genuine error in the process, and it was appropriate for the respondent to seek recovery of the same.

24. We accept Mr Davis's evidence that he did not refuse to investigate new complaints from January 2022. Indeed, some of his investigations related to the reasons for sickness absence during the period between 2007 and 2019. The matters which Mr Davis did refuse to investigate were only those which were historic complaints and concerns which had already been investigated and determined, and indeed had already been litigated and decided upon in the First Claim.
25. It seems to us extraordinary that the claimant insisted on pursuing these historical and seemingly unimportant complaints when seen in the context of the possible impending termination of his employment, his refusal to disclose the OH report, and his refusal to accept any of the adjustments to his role which had been offered. Nonetheless he continued to do so.
26. The claimant appealed against the decision made by Mr Davis, and his grievance appeal was heard by Mrs Jennifer Shepstone, an Independent Case Manager of the respondent, from whom we have heard. The issues which are relevant to this hearing are that the claimant continued to complain that: (i) it took the respondent two years to amend records which had previously been falsified and/or made in error and that they were still incorrect; (ii) when the records were amended retrospectively false information was still reapplied; (iii) that there was an ongoing delay in paying him sick pay despite that issue being conceded by the respondent in the previous tribunal claim; and (iv) that the respondent had failed to investigate new complaints which he had raised from January 2022 (specifically a claim that a union representative had told him that he was acting on behalf of the respondent).
27. Mrs Shepstone met with the claimant on 3 June 2022 and subsequently wrote to confirm that she agreed with the decision reached by Mr Davis regarding the scope of the grievance (namely that it would not be correct to re-hear issues which were either historic or had already been investigated and determined during the First Claim). Mrs Shepstone interviewed the claimant, Mr Staddon and Mr Foster, and she partially upheld the claimant's appeal. She found that the recommended changes to the claimant's absence record had not been implemented as agreed and she ensured that this was followed up and the correct entries were made. This resulted in an arrears of sick pay due to the claimant of £119.82 less SSP of £9.60 which was a total of £110.22 in extra sick pay. This was sent to the claimant in his wages on 7 November 2022. Mrs Shepstone was therefore satisfied that those errors had initially been made, the claimant's records were correct and that he had not been put to any disadvantage (indeed he had received additional sick pay). It was clear to Mrs Shepstone that these minor discrepancies were genuine errors arising from a time when there were significant absences because of the coronavirus pandemic.
28. Mrs Shepstone also concluded that in January 2022 the claimant's absence records had been altered retrospectively. He was granted retrospective annual leave during a period of sick leave so that he could receive full pay. After this had been done, because the claimant had already received sick pay at the pensionable rate for that period, it generated an overpayment, but this had been missed. This was a genuine mistake at the time and Mrs Shepstone decided to uphold this element of the claimant's grievance

appeal because she concluded that an internal error had been made which was not the claimant's fault. Nonetheless the overpayment still needed to be recovered.

29. There was then a further mistake in the respondent's system. At the same time that Mrs Shepstone decided to ensure that the relevant changes to the claimant's absence record had been made, which had generated the extra sick pay of £110.22, Mr Foster had also decided to do the same. Mr Foster mistakenly thought that he had been asked to reverse these sick pay changes, and therefore accidentally generated a claim to recoup the £110.22 from the claimant. When Mrs Shepstone realised what has happened, she remedied this further complaint, and the claimant was repaid the £110.22.
30. The claimant now claims that it had taken two years to amend his absence records. However, these amendments were only recommended following the grievance heard by Mr Davis in May 2022, and the amendments were made in November 2022. It did not therefore take two years. The claimant also seems to allege that it took two years to change his absence reasons to those of AS, but those absences were correct at the time that the claimant made his grievance.
31. Meanwhile Mr Hart's management of the claimant's sickness absence remained disadvantaged by the claimant's refusal to disclose the OH report. Mr Hart spoke with the claimant on 3 November 2022 to discuss the options open to the claimant and advising that he could consent to release the report, or alternatively to return to work. The claimant refused to return to work unless the issues which were the subject of his grievance appeal had first been resolved. He confirmed he did not wish to return to work and did not think that any adjustments could be made to accommodate his return to work. Mr Hart invited the claimant to confirm how he could best support his absence, but the claimant was unable to give a clear response. He informed Mr Hart that he thought that a tribunal hearing was the only way forward and he only seemed interested in pursuing some form of penalty for the Exeter management and a claim for compensation.
32. Mr Hart then had a meeting with the claimant on 23 November 2022. He explained that without access to the OH report he would be unable to consider any specific advice regarding the prospects of the claimant returning to work or what adjustments might be suitable. He explained how he had tried to help the claimant to overcome his objections to releasing the OH report. He confirmed he felt the options available for the claimant were to return to work; to agree a rehabilitation plan and adjustments; or to release the report to allow Mr Hart to review the available medical evidence. The claimant did not agree and stated that the parties were at a stalemate. Mr Hart therefore decided to pass the matter to Mr Stuart Sugden, the respondent's Operations Performance Leader, from whom we have heard, to review whether formal action would be appropriate.
33. Mr Sugden wrote to the claimant on 6 December 2022 inviting him to a formal meeting to discuss his refusal to consent to the release of the OH report. He informed the claimant that in the absence of this report the respondent would be unable to estimate how long his condition was likely to last, and what steps and adjustments could be taken to facilitate his return to work. Against this background serious consideration was being given to terminating the claimant's employment because he was unlikely return to work in the foreseeable future.
34. There was a formal meeting on 28 December 2022 at which Mr Sugden made an offer to the claimant to scope for alternative roles and asked him what he felt capable of doing and what hours he could work. The claimant replied that commuting would be a problem and that he could not afford to work part time and that because he was a full-time carer for a relative, he was restricted in his availability. The claimant also provided a further reason for his refusal to release the report, namely that he wanted Dr Miranda to attach a statement to the report outlining any amendments that he wanted that had not been agreed when the claimant had prior sight of the report. Mr Sugden investigated this and informed the claimant in February 2023 that because he had withdrawn his consent for the referral during the prior sight stage, the report had not

been updated and the case was closed, and thus the opportunity for adding such a statement was also closed.

35. In February 2023 the claimant then decided to share Dr Miranda's report. This report advised that the claimant was unlikely to be able to resume his full duties within the foreseeable future. He confirmed that the evidence suggested that the claimant's condition was long-term and there was no foreseeable return date. Dr Miranda confirmed that in his opinion the criteria for LTBIH with a lump sum were met, but the criteria for leaving with income support were not met because the claimant might possibly be capable of engaging in alternative employment in the future.
36. Mr Sugden then scoped for suitable alternative employment. At that time the respondent was implementing a redundancy programme in the Exeter Mail Centre and because of the reductions in headcount there were no vacancies and no suitable alternatives. Mr Sugden was also made aware that there were no sedentary roles available within any of the DOs in the region. In any event the claimant had made it clear to Mr Sugden that he could not return to the Exeter DO because of his grievances with the management there, and that travelling elsewhere (including to the Exeter Mail Centre) was not appropriate because he felt it to be financially detrimental. Mr Sugden was aware that Mr Staddon had previously scoped and identified suitable roles at the end of 2021 based on the relevant OH advice at that time, but which the claimant had declined because of either working hours or financial reasons.
37. Mr Sugden then met with the claimant on 3 May 2023 to discuss his potential dismissal on the grounds of ill-health. Mr Sugden offered the claimant the opportunity to undertake a further scoping exercise and asked him to confirm the hours he could attend and what work he was capable of doing. Following that meeting the claimant did not respond with this information to assist Mr Sugden.
38. Mr Sugden then considered all of the relevant medical information, including the report from Dr Miranda which confirmed that the claimant would be incapable of carrying out his current duties for the foreseeable future. Mr Sugden bore in mind that the claimant had been absent for over three years and that his condition had not improved since he had consented to the release of Dr Miranda's report from July 2022. In addition, the claimant had refused to accept any of the alternative job offers or adjustments which the various scoping exercises had identified. Mr Sugden agreed with Dr Miranda's opinion that the criteria for dismissal on the grounds of ill-health for the lump sum payment were met.
39. Mr Sugden therefore invited the claimant to a decision meeting on 24 May 2023. The claimant replied that he was unable to attend that meeting but just asked for the decision to be forwarded him in writing. Mr Sugden decided to terminate the claimant's employment by reason of capability (extended ill-health) and he wrote to the claimant on 2 June 2023 giving a detailed explanation for the reasons. He also confirmed that under the LTBIH process the claimant would receive a lump sum of £16,806.88, together with full payment in lieu of notice and annual leave. That letter afforded the claimant the right of appeal against that decision.
40. The claimant then appealed against Mr Sugden's decision to dismiss him. The original grounds of appeal were that (i) Mr Sugden had advised there was no suitable adjusted role at the Exeter Mail Centre and that therefore appealing for continued employment was pointless; (ii) OH had advised that the respondent should request a further referral if after prior sight the claimant had not consented to release the report, but nonetheless Mr Hart had insisted that the report was released; (iii) Ms Clace refused to discuss details of the claimant because she was not the referring manager; and that he was due a sum for accrued but untaken holiday pay.
41. Mr Allan Rostron, from whom we have heard, is employed by the respondent as an Independent Case Manager based at Bishop's Stortford. He dealt with the claimant's appeal which (in accordance with the respondent's relevant policy) was conducted as a rehearing. He arranged an appeal meeting which took place on 29 June 2023 and at which the claimant was accompanied by his CWU trade union representative. It became clear that the claimant was no longer pursuing the grounds of appeal set out

above, but rather that the claimant was now appealing because it was "fundamentally wrong to make a decision on the grounds of an OH report that was 18 months old" and "hotly contested". The claimant's CWU trade union representative requested that there should be an up-to-date OH referral in order "to make a proper determination if Martin is a candidate for lump sum over immediate pension". What this meant was that the claimant was not appealing against the decision to dismiss him, but rather he was appealing against the type of LTBIH benefits available. In short, he wished to have the (more generous) income benefit, instead of the lump sum benefit. To this end the claimant's representative confirmed: "Martin believes he's not going to work again". Mr Rostron then arranged for the claimant have another assessment by OH to determine whether he would meet the criteria for LTBIH with income benefit.

42. This referral resulted in a further OH report from Dr Stipp dated 12 October 2023. This report confirmed that evidence had been received from the claimant's own medical specialists relating to his chronic underlying condition; the claimant's conditions would worsen with physical strain on the musculoskeletal system particularly in an active role involving manual handling, walking or repetitive movement; the claimant was unlikely to return to work and there was no foreseeable return date; the claimant was unlikely to be able to undertake any gainful work in any capacity before reaching normal retirement age or within the next 10 years; and therefore the claimant did meet the criteria for LTBIH with income benefit.
43. Following consideration of this report Mr Rostron upheld the claimant's appeal. This was on the basis that the claimant was no longer appealing the decision to terminate the claimant's employment on LTBIH, but rather because his condition had continued to deteriorate and the respondent would be unable to accommodate him, he was appealing for LTBIH severance but with payment of the income benefit.
44. There was then some correspondence between the parties because the claimant was required to return the lump sum which he had received, before being in a position to receive the income benefit. The claimant subsequently repaid the lump sum, and instead received the income benefit. This was financially more generous, which is why the claimant appealed for that improved decision in the first place.
45. In short therefore the claimant did not appeal against the decision to dismiss him under LTBIH, but he did appeal that decision solely in order to receive the more generous retirement income benefit. Mr Rostron allowed the appeal and therefore the respondent accommodated the claimant's request in that respect.
46. In conclusion we have no hesitation in finding that as at the time of the decision to dismiss him, the claimant was clearly incapable of performing his substantive duties. He had been continuously absent from work from 30 March 2020 until his dismissal on 2 June 2023. The OH report dated 22 March 2021 concluded that the claimant was only fit to do a role which involved less walking. This had worsened by 27 January 2022 when a further OH report confirmed that the claimant himself stated that he was unfit to work in any capacity because of the ongoing symptoms of his conditions, and that he did not envisage a return to work in any capacity. This was consistent with the claimant's comments in his grievance appeal interview on 30 June 2022 to the effect that he was 53 and his condition was chronic and would not get any better. The OH report dated 12 October 2023 obtained during the appeals process confirmed that the claimant was unlikely return to work and that there was no foreseeable return date. This was consistent with the remarks made by the claimant's representative during the appeal hearing on 29 June 2023 to the effect that the claimant would be highly unlikely to ever find work in any office environment, manual labour environment or driving jobs. They agreed that the claimant was highly unlikely to ever find work again in any retail environment.
47. Against this background the respondent succeeded in finding a number of options of apparently suitable alternative work, but all of them were refused by the claimant. Mr Staddon had carried out two scoping exercises. The first did not identify any vacancies. The second identified vacancies which the claimant did not consider suitable and which he declined. This included a sedentary sorting role in The Exeter Mail Centre (which is

the reasonable adjustment which the claimant now says should have been offered to him). On 23 November 2022 the claimant confirmed to Mr Hart that he was not prepared to work in the Exeter Delivery Office and that he considered that redeployment would be a detriment because he would be required to travel. On 28 December 2022 at his meeting with Mr Sugden the claimant confirmed that he was in an impossible situation because he could not return to the Exeter Delivery Office and agreed that no suitable alternative location could be found. Part-time roles were also considered but the claimant was not willing to accept this option because of the potential financial impact.

48. Having established the above facts, we now apply the law.
49. The Law
50. The reason for the dismissal was capability which is a potentially fair reason for dismissal under section 98(2)(a) of the Employment Rights Act 1996 ("the Act").
51. We have considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
52. This is also a claim alleging discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct disability discrimination, failure by the respondent to comply with its duty to make reasonable adjustments, and victimisation.
53. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.
54. As for the claim for direct disability discrimination, under section 13(1) of the EqA 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.
55. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that 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, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person. However, under paragraph 20(1)(b) of Schedule 8 of the EqA A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know – (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.
56. The definition of victimisation is found in section 27 of the EqA. A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. The following are all examples of a protected act, namely bringing proceedings under the EqA; giving evidence or information in connection with proceedings under the EqA; doing any other thing for the purposes of or in connection with the EqA; and making an allegation (whether or not express) that A or another person has contravened the EqA. Giving false evidence

or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

57. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
58. We have considered the cases of: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL; Igen Ltd v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Nagarajan v London Regional Transport [2000] 1 AC 501; Amnesty International v Ahmed UKEAT/0447/08/ZT; Ayodele v Citylink Ltd [2018] ICR 748 CA; Environment Agency v Rowan [2008] IRLR 20 EAT; Newham Sixth Form College v Sanders EWCA Civ 7 May 2014; Archibald v Fife Council [2004] IRLR 651 H;L General Dynamics Information Technology Ltd v Carranza [2015] ICR 169 EAT; Project Management Institute v Latif [2007] IRLR 579 EAT; Warburton v Chief Constable of Northamptonshire Police [2022] ICR 925 EAT, applying Chief Constable of West Yorkshire v Khan [2001] 1 WLR 1947 HL; Chief Constable of Greater Manchester v Bailey [2017] EWCA Civ 425; Spencer v Paragon Wallpapers Ltd [1976] IRLR 373 EAT; GE Daubney v East Lindsey District Council [1977] IRLR 181 EAT; BS v Dundee City Council [2013] IRLR 131 CS; O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145; Elmbridge Housing Trust v O'Donoghue [2004] EWCA Civ 939; Garrick's (Caterers) Ltd v Nolan [1980] IRLR 259; First West Yorkshire Ltd v Haigh [2008] IRLR 182; Taylor v OCS Group Ltd [2006] ICR 1602 CA; McAdie v Royal Bank of Scotland [2007] IRLR 895; A v B [2013] IRLR 405 CA and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL.
59. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures (2015) ("the ACAS Code").
60. The Issues
61. The claimant's claims to be determined by this Tribunal were agreed at a case management preliminary hearing and set out in the Case Management Order of Employment Judge Smail dated 29 November 2023. The claimant's claims are for disability discrimination, (being direct discrimination, an alleged failure to make reasonable adjustments, and victimisation), for unfair dismissal, and for unlawful deduction from wages. We deal with each of these claims in turn.
62. The Claimant's Disability:
63. The disability relied upon by the claimant is Ankylosing Spondylitis (AS). For the reasons explained in findings of fact above, we find that at all material times the claimant suffered from this physical impairment which had a substantial and long-term adverse effect on his ability to carry out normal day to day activities, in particular relating to mobility. There was a substantial adverse effect because it was more than minor or trivial, and there was a long-term effect because it lasted for at least 12 months.
64. The respondent has conceded that the claimant was a disabled person by reason of the impairment relied upon at all material times. We agree with that concession, and we so find.
65. Direct Discrimination:
66. The claim for direct discrimination is limited to one act of less favourable treatment, namely the claimant's dismissal. The claimant relies on a hypothetical comparator.
67. With regard to the claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of his disability than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have been dismissed.

68. As for the correct comparator, paragraph 3.29 of the EHRC Code of Practice on Employment (2011) provides: The Comparator for direct disability discrimination is the same for other types of direct discrimination. However, for disability, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself.
69. As confirmed in Ayodele v Citylink Ltd, section 136 EqA imposes a two-stage burden of proof. Under Stage 1 the burden is on the employee to prove from all the evidence before the Tribunal facts which would, if unexplained, justify a conclusion not simply that discrimination was a possibility, but that it had in fact occurred. Under Stage 2 the burden shifts to the employer to explain subjectively why it acted as it did. The explanation need only be sufficient to satisfy the Tribunal that the reason had nothing to do with the protected characteristic.
70. For the burden of proof to shift in a direct discrimination claim, the claimant must show that he or she has been treated less favourably than a real or hypothetical comparator ("the less favourable treatment issue"). As confirmed in section 23(1) EqA there must be no material differences between the circumstances relating to the claimant and the chosen comparator. That means they are in the same position in all material respects, except that they do not hold the protected characteristic (Shamoon paragraph 110). "Material" means those characteristics the employer has taken or would take into account in deciding to treat the claimant and the comparator in a particular way (except the protected characteristic) (Shamoon paragraphs 134 to 137).
71. To fall within section 39 EqA it is also necessary to show that the less favourable treatment constituted detriment. A worker suffers detriment if they would or might take the view that they have been disadvantaged in the circumstances in which they had to work. An unjustified sense of grievance is not enough (Shamoon). Furthermore, the unfavourable treatment must be because of the protected characteristic ("the reason why issue").
72. The bare fact of less favourable treatment than a comparator only indicates a possibility of discrimination. There must be something more for the tribunal to be able to conclude that there is a probability of discrimination such that the burden of proof shifts to the respondent (Madarassy). The focus should be on the employer's conscious or subconscious reason for treating the worker as they did (Nagarajan). Whilst the test is subjective, in cases where there is not an inherently discriminatory criterion, a "but for" test can be a useful gloss on, but not substitute for, the statutory test (Amnesty International v Ahmed). The protected characteristic needs to "significantly influence" the less favourable treatment so as to be causally relevant (Nagarajan). However, sight should not be lost of the fact that the less favourable treatment and reason why issues are intertwined and essentially two parts of a single question (Shamoon).
73. In Madarassy Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v Grampian Health Board. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in Ayodele v Citylink Ltd.
74. For the reasons set out in our findings of fact above, the evidence overwhelmingly demonstrates that the claimant was unable to perform his substantive duties, which is why his employment was terminated. The claimant agreed that he was in an impossible situation which could not be resolved in any way other than dismissal. The claimant

effectively conceded this during his appeal hearing. Any non-disabled comparator who was not in a position to perform his or her substantive role, and in respect of whom there were no suitable alternatives, would not have been treated any differently and would also have been dismissed.

75. In our judgment the claimant has no grounds for arguing that he was treated less favourably than a hypothetical non-disabled comparator would have been treated in the same circumstances. The reason why he was dismissed was because he could not perform his substantive duties, and not because he was disabled.
76. In this case, we find that no facts have been established upon which the tribunal could conclude (in the absence of an adequate explanation from the respondent), that an act of discrimination has occurred. In these circumstances the claimant's claim of direct discrimination is not well founded, and it is hereby dismissed.
77. Reasonable Adjustments
78. The claimant relies on one provision criterion or practice ("PCP"), namely a requirement for him to perform the duties of an OPG grade. He asserts that this put him at a substantial disadvantage because of the mobility problems which he suffered by reason of his disability. He suggests that he should have been offered a sedentary role (as he claims had been medically suggested). The claimant confirmed at this hearing that his claim is limited to the period from April to June 2022 when he says this sedentary role should have been offered to him.
79. The constituent elements of claims in respect of an alleged failure to make reasonable adjustments are set out in Environment Agency v Rowan. Before considering whether any proposed adjustment is reasonable, the Tribunal must identify: (i) the provision, criterion or practice applied by or on behalf of the employer; (ii) the identity of the non-disabled comparators (where appropriate); and (iii) the nature and extent of the substantial disadvantage suffered by the claimant.
80. Environment Agency v Rowan has been specifically approved by the Court of Appeal in Newham Sixth Form College v Sanders - the authorities make it clear that to find a breach of the duty to make reasonable adjustments, an employment tribunal had first to be satisfied that there was a PCP which placed the disabled person at a substantial disadvantage in comparison with persons who were not disabled. The tribunal had then to consider the nature and extent of the disadvantage which the PCP created by comparison with those who were not disabled, the employer's knowledge of the disadvantage, and the reasonableness of proposed adjustments.
81. It is the essence of the duty to make reasonable adjustments that it requires the disabled person to be treated more favourably (as a result of their disability) than the non-disabled. They may need special assistance to compete on equal terms – per Lady Hale at para 47 of Archibald v Fife Council.
82. As per HHJ Richardson at para 37 of General Dynamics Information Technology Ltd v Carranza UKEAT/0107/14 KN: "The general approach to the duty to make adjustments under section 20(3) is now very well-known. The Employment Tribunal should identify (1) the employer's PCP at issue; (2) the identity of the persons who are not disabled with whom comparison is made; and (3) the nature and extent of the substantial disadvantage suffered by the employee. Without these findings the Employment Tribunal is in no position to find what, if any, step it is reasonable for the employer to have to take to avoid the disadvantage. It is then important to identify the "step". Without identifying the step, it is impossible to assess whether it is one which it is reasonable for the employer to have to take".
83. It is incumbent on a claimant to show the duty to make reasonable adjustments has arisen and there are facts from which it could be reasonably inferred, absent adequate explanation, that it has been breached. That requires (i) the showing of both substantial disadvantage (to show that the duty has arisen), and (ii) evidence of some apparently reasonable adjustment that could have been made (the issue of breach) see Project Management Institute v Latif.
84. Against this background the claimant's claim is as follows. The claimant asserts that he should have been offered an alternative sedentary position between April and June

2022 and that this was recommended by the relevant medical evidence. The PCP identified in the List of Issues is conceded by the respondent, namely that there was a requirement for the claimant to perform the duties of an OPG grade. This put the claimant at a substantial disadvantage because he was unable to perform his normal duties because of his mobility problems which were symptoms of his disability. The respondent knew that the claimant was placed at this substantial disadvantage. In these circumstances we find that the statutory duty on the respondent to make such adjustments as were reasonable had arisen.

85. As noted above, the respondent succeeded in finding a number of options of apparently suitable alternative work, but all of them were refused by the claimant. Mr Staddon had carried out two scoping exercises. The first did not identify any vacancies. The second identified vacancies which the claimant did not consider suitable and which he declined. This included a sedentary sorting role in The Exeter Mail Centre (which is the reasonable adjustment which the claimant now says should have been offered to him). On 23 November 2022 the claimant confirmed to Mr Hart that he was not prepared to work in the Exeter Delivery Office and that he considered that redeployment would be a detriment because he would be required to travel. On 28 December 2022 at his meeting with Mr Sugden the claimant confirmed that he was in an impossible situation because he could not return to the Exeter Delivery Office and agreed that no suitable alternative location could be found. Part-time roles were also considered but the claimant was not willing to accept this option because of the potential financial impact.
86. Against this background the claimant has not given any evidence that there was any reasonable adjustment available, and which could have been made, and which was not made (the issue of breach - see Project Management Institute v Latif). Mr Staddon had offered the claimant an alternative sedentary role during his second scoping exercise which was at the Exeter Mail Centre. The claimant declined this role. The claimant had also confirmed to Mr Hart that he was not in a position to commute to the Exeter Mail Centre (even though this was close to what should have been his normal workplace of the Exeter DO). The claimant was also refusing to return to the Exeter DO because of his perceived dispute with the management there. There were no alternative sedentary positions available, particularly in circumstances where the claimant had agreed that he could not return to the Exeter Delivery Office, and he had also agreed that no suitable alternative location could be found.
87. We accept that at the time relied upon by the claimant, that is between April and June 2022, the statutory duty on the respondent to make such adjustments as were reasonable had been engaged. This is the statutory requirement to take such steps as it is reasonable to have to take to avoid the substantial disadvantage caused to the claimant by his disability. However, we unanimously find that the respondent had investigated suitable alternative employment thoroughly and had offered a number of reasonable adjustments to the claimant by way of alternative full-time or part-time employment as were reasonable in those circumstances. The claimant declined these, as was his right. He now argues that he was denied one specific adjustment against this background (which was an offer of alternative sedentary employment which he had earlier refused) but that option was no longer available because of redundancies and was in an office to which the claimant refused to commute.
88. We unanimously find that the respondent did not fail to offer such adjustments as were reasonable and in our judgment the respondent's actions cannot be said to have amounted to a breach of the statutory duty. We would also add in passing that we find it extraordinary that the claimant is suggesting that the respondent failed in its duty to make reasonable adjustments when the claimant repeatedly refused to countenance any alternative full-time or part-time employment opportunities which might have preserved his employment with the respondent. Accordingly, we find that the claimant's claim that the respondent failed to make reasonable adjustments is not well founded, and it is hereby dismissed.
89. Victimisation s27 EqA:

90. Under section 27 EqA, a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. The burden of proof will shift if the worker proves that the employer has done a protected act, and that the worker has been subject to a detriment.
91. What constitutes a detriment under the victimisation provisions was recently set out by the ET in Warburton v the Chief Constable of Northamptonshire Police. The key test is encapsulated in the question "is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" That precludes an unjustified sense of grievance from amounting to a detriment. The test is not a wholly objective one given the alternatives that the reasonable worker would or might take the prescribed view. It is not necessary to establish any physical or economic consequence. Although the test is framed by reference to a reasonable worker, it is not a wholly objective test. It is enough that a reasonable worker might take such a view. This means that the answer to the question cannot be found only in the view taken by the ET itself. The ET might be of one view, and be perfectly reasonable in that view, but if a reasonable worker (although not all reasonable workers) might take the view that, in all the circumstances, it was to his detriment, the test is satisfied. It should not, therefore, be particularly difficult to establish a detriment for these purposes.
92. The test of causation is similar to that for direct discrimination. Whether a detriment is because of a protected act should be addressed by asking why A acted as they did, and not by applying a "but for" approach. The protected act must be a real reason for the treatment – see Chief Constable of Greater Manchester v Bailey. Put another way, the correct legal test to the causation or "reason why" question is whether the protected act had a significant influence on the outcome - see Warburton, applying Chief Constable of West Yorkshire v Khan; Nagarajan v London Regional Transport and Chief Constable of Greater Manchester v Bailey.
93. The claimant relies on the presentation of his two previous Employment Tribunal claims (referred to as the First Claim) as being protected acts. These raised issues of unlawful discrimination. The respondent concedes that these were protected acts for the purposes of section 27 EqA, and we so find.
94. The claimant asserts that he suffered seven detriments as a result of having done these protected acts. The alleged detriments and our findings in each case are as follows.
95. Detriment 1 is that it took two years for the respondent to amend its records which had previously been falsified or made in error. Although they were supposedly corrected in January 2023, they remained incorrect. This is linked to Detriment 2, namely that when the claimant's records were amended retrospectively on or around November 2022, the manager reapplied false information.
96. This relates to the claimant's record of attendance for April 2020 when there was confusion as to whether the claimant was self-isolating or absent because he was required to shield. This was first brought to the respondent's attention on 7 March 2022 and the matter was investigated and upheld by Mr Davis on 17 May 2022. The respondent chose not to amend the records at that stage because the claimant appealed against the findings of the grievance outcome. When this was concluded on 2 November 2022 the respondent made the relevant amendments, and the claimant was paid the £110.22 due to him. In the meantime, Mr Foster had mistakenly cancelled an earlier direction to pay that sum because he had not realised that Mrs Shepstone had already authorised that payment. The respondent sought recovery of it from the claimant, and the claimant exercised his right to pursue an appeal against his grievance. Following further investigation Mr Foster acknowledged that he had made a mistake and apologised. The error was corrected again, and the claimant was paid.
97. We find that there was no substantive or unreasonable delay to the amendment of the records, and the cancellation of the first payment to the claimant was a genuine error. We reject the allegation that the claimant has suffered any detriment in this respect. In

any event there is no evidence to suggest that even if he had suffered detriment then this was caused by his presentation of the First Claim.

98. Detriment 3 relates to the delayed payment of sick pay. Although outstanding sick pay was conceded in the previous claim in 2020, payments were delayed and not made to the claimant until 3 November 2022.
99. This claim relates to the deduction of sick pay which was conceded by the respondent during the First Claim. We do not agree that payment of this claim was delayed until 3 November 2022 as alleged by the claimant. The only arrears of pay for the claimant in November 2022 relate to the amendments and payment made under Detriments 1 and 2. The contemporaneous documents show that the claimant had conceded during his 30 June 2022 Grievance Appeal interview that he had already been paid the back payment. This allegation of detriment is factually incorrect and is rejected.
100. Detriment 4 is that the respondent failed to implement reasonable adjustments by offering the claimant alternative sedentary work. In the event, because of this failure, the claimant was forced to accept ill-health retirement.
101. For the reasons set out above in connection with the claim relating to reasonable adjustments, we have found that there was no failure on the part of the respondent to make reasonable adjustments and we therefore reject this allegation of detriment.
102. Detriment 5 is that the claimant was pressurised to consent to occupational health reports in an attempt to remove him from his post.
103. At this hearing the claimant clarified that his complaint in this respect is against Mr Foster and Mr Staddon. However, they were not involved in seeking to persuade the claimant to consent to the release of the OH report. It was Mr Hart and then Mr Sugden who sought to persuade the claimant that it was in his best interests to consent to its release. The claimant accepted in his evidence that he had no complaint about their conduct. We reject the claimant's assertion that he suffered any detriment as alleged in this respect. We also make the comment in passing that it was in the claimant's interests for the OH report to be disclosed, so that the respondent's managers could be sufficiently well informed to make the appropriate decisions to assist the claimant, and it cannot therefore be said to be a detriment for this report to be released.
104. Detriment 6 is that detrimental changes were attempted to be introduced to the claimant's contract of employment in that the respondent tried to redeploy him to another office on a part-time basis in a delivery role in or around 2021.
105. We have no hesitation in rejecting this allegation of detriment. The so-called detrimental changes referred to changes which would only have taken place in the event that the claimant had accepted any of the many offers of suitable alternative employment. The claimant refused to work night shifts and/or shifts which conflicted with his other domestic responsibilities, and he chose not to accept those roles. Changes to the claimant's contractual position would only have taken place if the claimant had consented to move to the alternative positions. He chose not to do so, as was his right, but this cannot mean that he suffered detriment when these possible changes to his terms and conditions were never implemented.
106. Finally, Detriment 7 is that the respondent refused to investigate new complaints from January 2022 onwards, and in particular with regard to the claimant's allegation that the CWU representative had told the claimant that he was acting on behalf of the employer.
107. This allegation is factually incorrect. It is true that the respondent declined to investigate allegations of bullying and/or harassment by Mr Foster because these related to events in 2020 which had already been resolved and rejected in the First Claim. To the extent that the claimant asserts that it was a detriment that these allegations were not reinvestigated, the reason for doing so was because the respondent reasonably formed the view that they should not be reopened. The respondent did not refuse to investigate them because the claimant had done the protected act relied upon, namely issued the First Claim in the first place. Other matters were raised as new complaints after January 2022 and these were investigated. These included the fact that the sickness absence had been incorrectly recorded; recorded

reasons for sickness dating back to as long ago as 2018 were investigated and amended; and the confusion over the payment of £110.22 and its incorrect deduction was also investigated and remedied. It is clear that the respondent was prepared to investigate new complaints after January 2022 and did so. What it was not prepared to do was to reinvestigate issues which had been resolved during the First Claim from 2020.

108. As for the final matter, the suggested comment from the claimant's CWU representative is a matter between the claimant and his representative, and if the claimant is dissatisfied with the conduct of his CWU representative then he presumably has the right of redress through the CWU's procedures. That comment cannot be said to have been a detriment imposed by the respondent which was caused by the claimant issuing the First Claim.

109. In these circumstances we reject the assertion that the claimant has suffered any detriment because of his presentation of the First Claim. For all of these reasons we find that the claimant's claim of victimisation is not well founded, and it is hereby dismissed.

110. Unfair Dismissal s98(4) of the Act

111. We have considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".

112. The starting point should always be the words of section 98(4) themselves. In applying the section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to a set of factual circumstances within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

113. In general terms there are two important aspects to a fair dismissal for long term illness or for injury involving long-term absence from work. In the first place, where an employee has been absent from work for some time, it is essential to consider whether the employer can be expected to wait longer for the employee to return (see Spencer v Paragon Wallpapers Ltd). In S v Dundee City Council the Court of Session held that the Tribunal must expressly address this question and balance the relevant factors in all the circumstances of the individual case. Such factors include whether other staff are available to carry out the absent employee's work; the nature of the employee's illness; the likely length of his or her absence; the cost of continuing to employ the employee; the size of the employing organisation; and, balanced against those considerations, the "unsatisfactory situation of having an employee on very lengthy sick leave".

114. The second important aspect is that a fair procedure is essential. This requires in particular consultation with the employee; a thorough medical investigation (to establish the nature of the illness or injury, and its prognosis); and consideration of other options, in particular alternative employment within the employer's business. An employee's entitlement (if any) to enhanced ill health benefits will also be highly relevant.

115. The importance of full consultation and discovering the true medical position was stressed by the EAT in East Lindsay District Council v Daubney. Mr Justice Phillips

stated: “Unless there are wholly exceptional circumstances, before an employee is dismissed on the grounds of ill-health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done … Only one thing is certain, that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done”

116. Where the employee refuses to cooperate with the employer in order to enable the employer to ascertain the true medical position, it will be reasonable for the employer to decide on the basis of the limited evidence before it, see for instance Elmbridge Housing Trust v O’Donoghue. Similarly in O’Brien the Court of Appeal recognised [at para 37] that a time comes when the employer is entitled to finality and that: “that is all the more so where the employee had not been as co-operative as the employer had been entitled to expect about providing an up-to-date prognosis …”

117. Other matters relevant to the consideration of fairness include efforts made by the employer to consider whether the claimant could be redeployed to other suitable employment (see for instance Garrick’s (Caterers) Ltd v Nolan; and entitlement to ill-health retirement (see First West Yorkshire Ltd v Haigh).

118. In the first place we repeat that the claimant’s claims for disability discrimination are not well founded, and the decision to dismiss the claimant was not therefore tainted by any unlawful discrimination.

119. For the reasons set out in our findings of fact above, the evidence overwhelmingly demonstrates that the claimant was unable to perform his substantive duties, which is why his employment was terminated. The claimant agreed that he was in an impossible situation which could not be resolved in any way other than dismissal. The claimant effectively conceded this during his appeal hearing. As at the date of his dismissal the claimant had been absent from work for over three years. The medical evidence did not provide any hope or suggestion that the claimant would be able to return to work in any capacity, and neither did the claimant when the respondent consulted with him about it. The consultation with the claimant was detailed and it included his meeting with Mr Sugden on 28 December 2022; Mr Sugden’s letter dated 7 February 2023 giving him a further opportunity to consent to the release of the latest OH report; the second meeting with Mr Sugden on 3 May 2023; and the appeal hearing of Mr Rostron on 29 June 2023.

120. The claimant asserts that there are three reasons why his dismissal was unfair. The first is that the decision was predetermined because it had already been made on 23 March 2023. This is the date of the document which provided an indication of the benefits the claimant would receive if he agreed to the proposed termination of his employment on the suggested date. We reject the assertion that the dismissal was predetermined. The information was provided so that the claimant was in a position to make an informed decision as to a possible agreed termination of employment. As was his right the claimant did not agree to that, and the formal process continued. It was clear that no decision had been taken at that stage as the claimant suggests.

121. Secondly the claimant argues that the medical evidence was not up-to-date and that therefore the decision to dismiss him was not reasonable. We reject that argument for the following reasons. The claimant had refused to provide his consent to the release of the report prepared by Dr Miranda in June 2022 and in those circumstances the respondent was entitled to rely upon the evidence which it reasonably had available to it at the time of his dismissal. In any event it is highly unlikely that if an up-to-date report had been arranged that Mr Sugden’s decision to dismiss the claimant would have been any different. By the claimant’s own admission, he was unable to perform his substantive duties because of his chronic condition and his symptoms would not

get any better. In any event the dismissal process should be looked at in the round, including the appeal, and the respondent had before it an up-to-date OH report when Mr Rostron confirmed his decision to dismiss the claimant following his appeal. To the extent that there was any defect in the dismissal procedure this was remedied on the full rehearing on appeal, (applying Taylor v OCS Group). The decision of the appeal officer was also entirely consistent with what the claimant wanted, namely dismissal but with the ongoing income benefit.

122. Thirdly the claimant asserts that he should not have been put in the position of having no option as at the time of dismissal because he was unfit to work because of the way in which he been treated by his manager. We reject that argument. To the extent that there were allegations of bullying or harassment against his manager in the First Claim, these were dismissed. In any event this allegation is wholly inconsistent with the medical evidence which confirmed that the claimant was unfit to work because of the effects of his physical impairment. Even if the claimant had been rendered incapable of performing his duties by reason of any actions of the employer this does not of itself render any dismissal unfair (applying McAdie v Royal Bank of Scotland). The relevant question remains whether it is reasonable for the employer to dismiss the claimant in all the circumstances.

123. We unanimously find in this case that as at the time of his dismissal the claimant was incapable of performing his substantive role. The respondent had before it extensive and up-to-date medical evidence to substantiate that proposition, which was not disputed by the claimant. The respondent had consulted fully with the claimant throughout. The respondent had investigated suitable alternatives to dismissal, but none were available. There was no disability discrimination. The claimant accepted that he was in an impossible position, and after three years of absence the respondent could not be expected to accommodate the claimant's absence any further.

124. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band, it is unfair. In these circumstances we unanimously find that the respondent's decision to dismiss the claimant was within the band of responses reasonably open to the respondent when faced with these facts.

125. Accordingly, we find that even bearing in mind the size and administrative resources of this employer, the claimant's dismissal was fair and reasonable in all the circumstances of the case. The claimant's claim for unfair dismissal is not well founded, and it is hereby dismissed.

126. Unlawful Deduction from Wages:

127. The respondent conceded at this hearing that it had recalculated the claimant's entitlement to accrued but unpaid holiday pay, and the parties agreed that the claimant is due the sum of £1,301.53 in this respect. Accordingly, the claimant's claim that he suffered an unlawful deduction from his wages is well founded, and the respondent is ordered to pay the claimant the gross sum of £1,301.53.

128. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1 and 61; the findings of fact made in relation to those issues are at paragraphs 9 to 47; a concise identification of the relevant law is at paragraphs 49 to 59; how that law has been applied to those findings in order to decide the issues is at paragraphs 62 to 125; and the amount of the financial award is at paragraph 127.

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Employment Judge N J Roper
Dated 11 September 2024

Judgment sent to Parties on
1 October 2024

Jade Lobb

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