EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr N Moore **Crown Prosecution Service**

Heard at: London Central (CVP) **On**: 25 – 28 February 2025
In chambers: 22 – 23 April 2025

Before: Employment Judge Lewis
Ms H Craik
Mr D Shaw

Representation

For the Claimant: Representing himself
For the Respondent: Ms C Jennings, Counsel

RESERVED JUDGMENT ON LIABILITY

The unanimous decision of the tribunal is that:

1. The claim that issuing a first written notice of expectation of attendance was discrimination arising from disability contrary to section 15 of the Equality Act 2010 is not upheld. It would in any event have been out of time.

2. The claim that refusing the appeal against this written notice of expectation of attendance was discrimination arising from disability contrary to section 15 of the Equality Act 2010 is not upheld. It would in any event also have been out of time.

3. The claim that issuing a second and final written notice of expectation of attendance was discrimination arising from disability contrary to section 15 of the Equality Act 2010 is not upheld.

4. The claim that refusing the appeal against this written notice of expectation of attendance was discrimination arising from disability contrary to section 15 of the Equality Act 2010 is not upheld.

5. The claim for indirect discrimination is not upheld.

6. The claims for failure to make reasonable adjustments are not upheld.

REASONS

Claims and issues

1. The claimant brought disability discrimination claims under s15 of the Equality Act 2010 for issuing him with a first written notice of expectation of attendance ('WNEA), then a second and final WNEA and rejecting his appeal in respect of each. He also claimed indirect disability discrimination and failure to make reasonable adjustments in respect of the delay taken to process disciplinary proceedings against him. The list of issues was agreed at a preliminary hearing and confirmed at the outset of the hearing. It is attached at the end of These Reasons.

Procedure

2. The tribunal heard from the claimant and, for the respondent, from Nicol Harlow, Katie Nicolson, Robin Weyell, Adele Kelly, Claire Palmer and Kate Alexander-Brewer. We also had witness statements from Tristan Bradshaw and Joanne Jakymec, but they were not called as the claimant did not wish to cross-examine them. We gave the respondent the option of calling Mr Bradshaw on day 4 to explain why he had not communicated with the claimant sooner. We did also ask Miss Palmer that question. The respondent decided not to call Mr Bradshaw. The claimant also did not want to cross-examine Mrs Kelly but the tribunal asked her some questions.

3. There was a witness statement bundle and an agreed trial bundle of 1587 pages, both with separate indexes. There was also an additional trial bundle of 24 pages. Ms Jennings provided a written opening statement and written closing submissions,

4. By way of adjustments, we agreed to allow the claimant to ask for and take an additional break whenever he needed to. In fact he rarely needed to do this. We also offered to finish any days early. In the event, this was not required and the claimant represented himself effectively and with skill and courtesy. Ms Jennings was also extremely helpful to the tribunal.

Fact findings

<u>Background</u>

5. It was agreed that the claimant at the material time had the disabilities of depression and fibromyalgia.

6. The claimant joined the respondent in August 2014 as a Principal Crown Advocate. Previously he had worked as a self-employed barrister. In October 2014, he successfully applied for the position of Principal Legal Advisor to the then DPP. This role was abolished in September 2018 when the then DPP left, and the claimant was told he had to return to a role as advocate. This triggered a lengthy episode of depression. The claimant is a high achiever and has always been very dedicated to his work and finds professional disappointment difficult to handle, particularly if he has a sense of injustice. There had been an earlier career set back in 2000/2001, which also triggered depression. The claimant was diagnosed with fibromyalgia in July 2019.

7. In January 2020, the claimant moved to the respondent's Central Legal Training Team ('CLTT') as he was unable at that point to conduct advocacy while adjusting to his fibromyalgia. Nicol Harlow became head of the CLTT in February 2021, and in November 2021 she became the claimant's line manager, taking over from Naheed Hussain. Ms Harlow was the same grade as the claimant. She was not a lawyer.

8. The claimant was unhappy in the CLTT due to Ms Harlow's management style, quite apart from the issues of disability discrimination in this case. This reduced the claimant's self-esteem and increased his depression.

9. In June 2024, the claimant returned to advocacy, which he describes as the love of his life, and his mental health has since improved.

<u>The Attendance Management Policy</u>

10. The Attendance Management Policy [1406] applied for managing all unsatisfactory attendance due to sickness. It covered disability related absence and non-disability related absence. The Policy principles state that high levels of sickness absence make it difficult to deliver its services. It says the CPS takes a 'work-focussed approach' to help minimise the adverse effects of ill-health on an employee's attendance. That involves a greater emphasis on the manager and employee working together to remove barriers to work. The Procedure is set out in 15 sections and four Annexes.

11. Paragraph 7.1.1 says an employer should hold a return to work discussion following every sick absence on the day the employee returns to work. Under paragraph 7.1.3, a disability related absence review can only take place after a return to work discussion has been held when the employee returns to work.

12. Section 9 is headed 'Managing Non-Disability Related Absence. In that case, 'reaching or exceeding' the trigger point will normally result in a formal attendance meeting. After that, managers will decide whether or not an Attendance Improvement Notice should be issued. Paragraph 9.3.3. says:

'For non-disability related absence, a trigger point will be reached if the employee's absence level reaches or exceeds:
9.3.3.1 Short-term / Intermittent Absence:

- 10 working days sickness absence over a 12 month rolling period;
- sickness absence on 4 occasions over a 6 month rolling period.

9.3.3.2. Long-term absence
- For the procedure for managing long term absence, please refer to section 12.'

13. Section 9 states that non-disability related absence does not count towards the Consideration Point ('CP') for managing disability related absence. Conversely, disability related absence does not count towards the trigger point.

14. Paragraph 9.2 says the procedure for managing disability related absence is in Annex A.

15. Section 10 sets out the procedure for formal action for non-disability related absence. It involves holding formal attendance meetings and potentially issuing Attendance Improvement Notices.

16. Section 11 is headed 'Managing Disability Related Absence'. Paragraph 11.1 says, 'Please refer to the Annex A:Managing Disability Related Policy for the procedure to be applied when managing short term or intermittent absence that is directly attributable to an employee's disability.'

17. Section 12 is headed 'Long Term Absence (applies to non-disability and disability related absence)'.

18. Paragraph 12.1 defines long-term absence as one which reaches 28 consecutive calendar days. Paragraph 12.2 says that during any period of long-term absence, the manager and employee should work together to explore what the employee can do, or might be capable of doing with help and support, to return to work as soon as they are able.

19. Paragraph 12.3 says that when an employee returns to work following a period of long term absence, the manager should hold a return to work discussion and discuss the agreed support in place. Paragraph 12.4 says: 'A formal attendance meeting will normally be held if the trigger point has been reached or exceeded or, if the absence is related to disability, a disability related absence review meeting if the consideration point has been reached or exceeded'.

20. Paragraph 12.6 says two types of meeting might take place during a period of long-term absence: (i) an informal review and (ii) a long term absence review meeting to explore the support needed but also to consider whether an employee is likely to return within a reasonable time frame, and therefore whether the business can continue to support the absence. This is a formal meeting where the employee has the right to be accompanied.

21. The first formal long term absence review meeting should be held when sickness absence reaches 28 days, unless the employee is about to return,

and at least every 3 months after that. If return to work is not likely within a reasonable timescale, the manager can consider whether redeployment or dismissal is appropriate. In the case of an employee with a disability, all possible reasonable adjustments must have been put in place.

22. Annex A is headed 'Managing Disability-Related Absence Policy'. Section 4.1 talks about setting a CP. Section 10 says line managers should hold a return to work discussion with the employee on their return from absence, including discussions on reasonable adjustments and whether any further support is needed.

23. Annex A, section 11 says that where disability related absence reaches a consideration point, a formal disability related absence review should be conducted. The aim of the review is to explore ways to help the employee maintain their employment whilst ensuring the business is able to deliver its services effectively. In the case that an employee may need further absence, but a return to work is foreseeable and they are likely to provide regular and effective service upon their return, a reasonable adjustment might be to review / extend the consideration point further. Where, considering all the evidence available, including OH advice, the manager determines that continued absence at the current level cannot be sustained, the manager should provide the employee with a 'written notice of expectation of attendance'. This warns that continued absence at an unsustainable level may require a second review. The notice should set out that the manager and employee will meet again in 3 months to review the progress .. or if there is deterioration which cannot be sustained after some improvement, then within 12 months.

24. Annex A, section 12 sets out a similar process for the second review and section13. covers a final review which can lead to dismissal.[1449]

25. There is a Glossary of terms which says that where it is identified that an employee's attendance might be affected by their disability, the employee and line manager will decide an appropriate 'Consideration Point', which will be the point at which, if reached, a formal disability related absence review should be conducted. The 'Trigger Point' is the level of non-disability related absence at which the employee's attendance is considered to be unsatisfactory. A 'return to work discussion' is an informal discussion between a manager and employee each time the employee returns from a period of sickness absence. The purpose is generally to ensure that the employee is well enough to return to work, review previous absences and update the employee on work issues.

<u>The claimant's first written notice of expectation of attendance (25 July 2022)</u>

26. On 28 June 2022, the claimant emailed Ms Harlow to say he could not come into work because he was so upset about the rejection of his appeal against an Attendance Improvement Notice, which had been issued for non-disability related absence. He said, 'I simply cannot go on with this endless vicious spiral downwards of me re-finding some measure of ambition and

determination for my work, only then for my employers to 'reward' me by some event which adds to my feelings of having no self worth'.

27. A 12 day Consideration Point ('CP') for disability related absence had been agreed with the claimant in 2021. This was in addition to the usual 10 day trigger point for non-disability related absence. This CP was to cover all three of the claimant's disabilities (depression, fibromyalgia and asthma). The claimant had suggested there ought to be 10 days for each disability, although he accepted a total of 30 days was too much for the business and he said he would not necessarily take all of it. However, Ms Hussain did not agree and it was left that there would be the single CP of 12 days for all three disabilities. There was also a discussion regarding the period for assessment. Ms Hussain said it was any rolling 12 month period. The claimant said that was not set out in Annex A, unlike for non-disability related absences. He understood the rolling period was a calendar year. Ms Hussain said that was not her understanding.

28. By letter dated 5 July 2022, Ms Harlow wrote to the claimant inviting him to attend a first review meeting under the Managing Disability Related Absence Policy (ie Annex A of the Attendance Management Policy). This was because he had been absent for 12 days between 29 July 2021 and 27 September 2021 and had reached his CP. The letter said that the aim was to explore whether there were any further ways to help maintain regular attendance. The claimant would have the opportunity to discuss any difficulties or changes affecting his level of attendance and whether any further help was required. That would include whether the reasonable adjustments in place were working and whether any further adjustments were required. The claimant was told he had the right to be accompanied by a trade union representative or workplace colleague.

29. The letter attached the Attendance Management Policy, an OH report of 1 March 2022 and a print out of the relevant absences: 27 September 2021 'mental disorders'; 22-26 November 2021 'stress at work'; 13 – 19 May 2022 'mental disorder' and 29 June 2022 'mental disorders'.

30. The OH report of 1 March 2022 had set out the claimant's symptoms, which were consistent with both fibromyalgia and long-term mental ill health. OH said there was no scientific or medical way to decide the right duties or pace of work for the claimant, but the claimant was an 'expert patient' and knew what helped his symptoms and what made them worse. Management might therefore wish to be guided by what the claimant said regarding his tolerance for work-related activities.

31. The disability related absence review meeting took place on 21 July 2022. The claimant did not attend, but he provided extensive written submissions instead. These included a number of submissions about the Policy including his view that action could not be taken until the CP wa exceeded as opposed to reached. In addition, the claimant said that Annex A did not specify that the 12 days should be assessed over a rolling period. He also said that the review should not have been held because there had not been return to work

meetings after each absence as required. The submissions also gave reasons for his absences and why a WNEA should not therefore be issued. The claimant now recognises that his submissions were lengthy and difficult to digest, but he wrote them because he felt he was being accused of a serious professional matter and wanted to defend himself as much as he could.

32. The claimant's mother had passed away on 4 November 2021 and her funeral was on 1 December 2021. At some point, the claimant was given four days' special leave for his bereavement. The period of 22 – 26 November 2021 was noted down simply as 'stress at work'. In his written submissions, when talking about why he was absent in November, the claimant first mentioned the stress of uncertainty regarding the reason for a change of his line management which was making him fear for his job. He then went on 'It is of the most enormous significance that my mother passed away on 4 November 2021 and her funeral was on 1 December 2021. This period of uncertainty therefore clashed with an extremely traumatic period of my life.' The claimant went on to say the stress over line management had stopped him mourning his mother properly. 'Needless to say my mood plummeted and it was for this reason that this five day period of disability related sickness was necessary.'

33. Regarding the period of absence from 13 – 19 May 2022, the claimant said this was because he had been given an Attendance Improvement Notice, and his absence on 29 June 2022 was because his appeal against that Notice had been rejected.

34. The claimant also stated that apart from in relation to his first day of absence, no return to work interview had ever been held.

35. Ms Harlow wrote to the claimant on 25 July 2022 with the outcome of the review meeting. She stated that the claimant's health and well-being was regularly discussed in their weekly meetings. These included return to work interviews as part of the discussion, but to meet the claimant's concerns, she would in future hold specific return to work interviews following any period of sickness. She noted that they had recently discussed and agreed revisions to the claimant's workplace adjustments, and the CP of 12 days in a 12-month rolling period would continue.

36. Ms Harlow concluded that the claimant's current level of absence could not be sustained. She was therefore providing the claimant with a First Written Notice of Expectation of Attendance. She stated that they would meet again within 3 months to review progress, but she may bring this date forward if his absences continued at an unsustainable level.

37. The claimant had been in the CLTT since 2020, when he was moved there while adapting to his fibromyalgia. The team created and delivered national training materials. The claimant had no line management responsibility. The claimant's main role was writing courses. He was the most senior advocate in the team and was therefore able to develop courses with a

level of specialism that others could not. He was in particular developing a course on investigatory powers. He also wrote 5 or 6 podcasts on areas of his specialism. No one else could do his projects if he was unavailable to do them because they did not have that expertise in their team. Ms Harlow was concerned about delays in production of the materials, and that local teams would be forced to supply their own training materials if not provided with the national materials. National training was planned 3 months in advance. Also a delay in the claimant producing podcasts at his end would lead to a delay in turn for those who had to do the editing. As at the tribunal hearing, the claimant's podcasts had not yet been deployed nationally because although he had finished recording them, time previously allocated for colleagues to edit them, eg taking out errs and ums, was no longer available. At the time, the CLTT's staffing levels were reduced, so they had less flexibility to accommodate delays in planned steps.

38. The claimant was also involved with colleagues in quality assurance of case studies used for national recruitment. Because of his seniority, the claimant could be involved in producing materials for any level of crown advocate recruitment. The claimant was two levels above the other crown advocates in the CLTT. Intermittent absences also meant meetings could be missed and created uncertainty for the team.

39. The claimant appealed on 25 July 2022 on grounds that:
    39.1. Procedurally the review should not have been held because (i) the CP had not been reached and (ii) a return to work interview had not been held on the day of return from each period of absence.
    39.2. Anyway, in all the circumstances, Ms Harlow should have exercised her discretion not to hold a review.
    39.3. The WNEA should not have been imposed..

40. The appeal attached two sets of written submissions setting out further details of his arguments.

41. The appeal was decided by Katie Nicolson, Deputy Chief Crown Prosecutor. An appeal meeting was held on 25 August 2022. Ms Nicolson wrote to the claimant on 1 September 2022 rejecting his appeal.

42. Ms Nicolson said that it was reasonable for Ms Harlow to adopt a 12-month rolling period in relation to the CP, even though the Attendance Management Policy did not explicitly refer to it for CPs, because such a rolling-period was applied consistently across the business including in other aspects of the Attendance Management Policy and also because when the CP was agreed between the claimant and his former line manager, Mr Hussain, in August 2021, Ms Hussain explained that a 12-month rolling period would apply.

43. We note here that the claimant accepts he was told this when the CP was set.

44. Regarding return to work interviews, the claimant accepted that one had been held with Ms Hussain in relation to the first of his four periods of absence. In regards to the other three occasions while Ms Harlow was his line manager, Ms Nicolson decided that Ms Harlow had contacted the claimant by email and arranged to meet with him within a reasonable timescale of his return to work. While these meetings were not called 'return to work discussions', they had centred on the claimant's wellbeing and what support the organisation could offer, There was therefore no procedural error and it was reasonable to hold a formal review once the claimant reached his CP.

45. Ms Nicolson said Ms Harlow correctly held a meeting when the claimant had reached his CP and, having looked at the claimant's written submissions, listened to what he said, and read the emails from Ms Harlow, she did not think the decision to issue a First WNEA was unreasonable.

<u>The claimant's final written notice of expectation of attendance (24 July 2023)</u>

46. On 9 June 2023, Ms Harlow wrote to the claimant to invite him to a second disability related absence review meeting. She said that the First WNEA had advised that continued absence at an unsustainable level might require a second review and the expected standard of attendance was to attend in line with the CP of 12 days within a 12 month period. She said that the claimant's attendance had initially been satisfactory but he had since had a further 76 working days absence within 12 months of the First WNEA. A second review was therefore required.

47. The letter invited the claimant to a meeting on 20 June 2023 at which he could be accompanied, The stated aim was to explore whether there were any additional ways to help the claimant restore regular and effective service and at the meeting, the claimant would have the opportunity to discuss any difficulties or change in circumstances affect his attendance. Ms Harlow would assess this along with any OH advice to see whether continued absence at this level could be sustained, If not, she would issue a Final WNEA.

48. Ms Harlow took the opportunity to remind the claimant of the availability of the respondent's confidential counselling and support service.

49. The letter listed the following days of disability related absence which were relied on: 1 day 7 November 2022; 2 days 11 November 2022; 1 day 28 November 2022; 2 days 1 December 2022; and 70 days from 17 February 2023 – 25 May 2023. All except 28 November 2022 (musculoskeletal system) were listed under the heading 'mental disorders'.

50. The claimant sent in written submissions. He set out his views that the wrong process was being used.

51. The meeting in fact took place on 19 July 2023. The claimant read out a statement which he had prepared. In essence, the claimant's points were:

51.1. The Attendance Management Procedure did not provide for such a second formal review meeting. He argued that the 70 days qualified as long term absence, which is dealt with under section 12 of the Policy. His manager should not be counting the 70 days under the procedure in Annex A. He said the procedure excluded that by implication. Having subjected an employee to the rigours of a section 12 process with the risk of dismissal, it would be quite wrong to then subject them to the further rigours of Annex A. That would amount to double jeopardy.

51.2. He had tried for a month to ascertain on what basis his employer said there was jurisdiction for this second review and he had been given two contradictory reasons: Ms Harlow said authority derived from section 12 of the Policy and Claire Palmer in HR said it derived from paragraph 12.1 of Annex A of the Policy.

51.3. In an OH report dated 17 July 2023, Dr Essan recommended discussing the claimant's concerns about the reason for the meeting prior to the meeting.

52. The claimant said in the meeting that he was going to exercise his right not to actively participate in the meeting. He read out a pre-prepared statement. Ms Harlow asked him what steps he was taking to help return to a satisfactory level of attendance. He would not answer. She asked whether the adjustments implemented the previous year were still effective or necessary and whether anything else should be considered. He would not answer. The claimant said in closing comments that the primary cause of his absence had been due to bullying and discrimination at the hands of the CLTT and he saw the best adjustment as moving away from the team.

53. By letter dated 24 July 2023, Ms Harlow issued the claimant with a Final WNEA. She said the CP for disability related absence would remain unchanged at 12 days in a rolling 12 month period, but she would consider the claimant's attendance unsustainable if his disability related absences reached 3 days within a 3 month period or, for non-disability related absence, 2.5 days within a 3 month period. They would meet again in 3 months or sooner if absences continued at an unsustainable level. If a final review stage became necessary, the claimant's overall attendance record, ie all non-disability related and all disability related absences would be considered when deciding whether the business could sustain the absence. The other reasonable adjustments which had been put in place previously would remain ie (in summary) flexibility in working times and structuring the working day; management being sympathetic to requests to miss meetings scheduled on short notice; overnight accommodation on the night before a work-related event and during any multi-day event.

54. The claimant appealed. Again he provided written submissions. In short summary, his grounds of appeal were:

54.1. There was no authority / jurisdiction under the Attendance Management Policy and Procedure to hold the second formal review

meeting in the first place. This was the same point he had previously made.

54.2. Various other procedural matters.

54.3. The decision letter did not give reasons for the decision as the Policy and Procedure requires.

54.4. The Policy and Procedure does not allow, where a Final WNEA is imposed for disability related absence, for conditions regarding future attendance to be imposed in regard to future non-disability related absence.

55. Robin Weyell, a Deputy Chief Crown Prosecutor, heard the appeal.

56. By letter dated 31 August 2023, Mr Weyell confirmed he felt the decision to issue a Final WNEA was reasonable. He said that a decision maker could reasonably conclude that the claimant's level of absence since the First WNEA could no longer be supported by the business. Although he identified a few procedural errors, he did not think they impacted on the reasonableness of the decision to issue a Final WNEA.

57. Mr Weyell rejected the claimant's argument that his 70 day long term absence could not be included in the calculation of whether he had met or exceeded his CP because paragraph 11.1 of the Policy means that Annex A only applies to short and intermediate term absences. Mr Wyell said that while the argument was superficially attractive, it would create an anomalous position in that a short period of disability related absence would be subject to the Annex A processes but a longer period would not. Moreover, the Policy precluded the use of Attendance Improvement Notices for disability related absences, and they were the only other formal resource for sustained non-attendance. Mr Weyell also cited paragraph 12.4 of the Policy. He also pointed out that the definition of disability related absence review in the glossary talked about 'a' disability related review and was not confined to short or intermittent absence in paragraph 11.1.

58. Mr Weyell said the decision maker did have to give reasons but did not have to negate every point the claimant had made. He felt Ms Harlow had given reasons, notably outlining what material she had considered. He agreed she could have gone further and explained why the absence levels could not be sustained, and he would cover that by a recommendation.

59. Mr Weyell agreed there was no provision to include a non disability related absence threshold at the stage of a second review meeting, and the effect of both disability related and non disability related absences could only be considered at the final stage of the process. He upheld this part of the appeal and he said he would reissue an amended WNEA, which he did.

60. Mr Weyell said he would recommend that the line manager receive some additional feedback and guidance on a few points as mentioned.

<u>The Disciplinary Policy</u>

61. The Disciplinary Policy says at section 4 that when a disciplinary matter comes to light, the first step will be for the line manager to undertake a simple fact-finding exercise to help establish whether the matter should be dealt with formally or informally; whether it is likely to be minor, serious or gross misconduct and who is best placed to deal with the matter. This is called an 'initial assessment'.

62. Under section 8, if the matter is to be dealt with formally, it will be dealt with by a decision manager. The decision manager is usually a line manager or someone in the line management chain. They must always be at least one grade higher than the employee concerned. If the employee has a reasonable concern about the impartiality of the appointed decision manager, they should raise this at the earliest opportunity.

63. Under section 10, the decision manager needs to be satisfied with the initial assessment of the likely level of misconduct and that the matter should be dealt with formally. If in doubt, they should contact HR for advice. Decision managers must be able to justify the course of action. When the decision manager is satisfied that formal action is appropriate, they mut decide how best to gather relevant evidence.

<u>The first disciplinary process</u>

64. The parties agreed that it was not necessary to go into any substantial detail about the reason for the disciplinary process and whether it was justified. The issue which is relevant in this case concerns the alleged delays.

65. In a 1 to 1 catch up on 30 June 2023, Ms Harlow said she was concerned about the claimant's tone and comments about her treatment of him. She reminded hm of the Respect policy and said they would discuss the points in more detail when she returned from leave. This was not the first time Ms Harlow had complained in meetings about the claimant's tone. Ms Harlow returned from leave on 18 July 2023. The claimant was absent for one day on 18 July 2023. In their 1 to 1 catch up on 20 July 2023, Ms Harlow referred back to the concerns she had raised in her last email about the claimant's tone. She said that as the behaviours were continuing, they would need to be dealt with more formally under the Disciplinary Policy. This was the first mention of formal disciplinary action in relation to this issue.

66. She said that as she was the same grade as the claimant, she did not have authority to deal with the matter. The Disciplinary Policy required the decision manager to be at least one grade higher. Ms Harlow said she was seeking advice and once a suitable person had been identified, she would discuss it further with the claimant.

67. The claimant said this had ruined his weekend and plummeted his mood. He said she did not understand mental health and she had undone all his good feelings about the possibility of a return to advocacy, which was gradually being arranged.

68. The claimant emailed Ms Harlow on 24 July 2023 stating that he was unfit to work because of mixed depressive-anxiety disorder and stress at work. He said the stress was caused by Ms Harlow's indication that she would be seeking advice with a view to starting disciplinary proceedings and what he feared would be a forthcoming Final WNEA.

69. Ms Harlow took HR advice. It was decided that the decision maker should be Tristan Bradshaw, the Director of Operational Change and Delivery. Ms Harlow reported to Ms Hussain, who in turn reported to Mr Bradshaw. However, as the claimant had also made complaints about Mr Hussain, she thought it best to approach Mr Bradshaw to deal with the matter.

70. Ms Harlow was also dealing with the Final WNEA at the same time. The review meeting for that had taken place on 19 July 2023 and she had sent the outcome letter on 24 July 2023.

71. The claimant sent Ms Harlow further emails on 20, 23 and 25 July 2023 which she believed were relevant. She collated extensive documents. On 31 July 2023, she emailed Mr Bradshaw attaching about 40 pages of notes and emails containing the comments of concern.

72. Mr Bradshaw was on annual leave from 4 – 7 August 2023. On 8 August 2023, Ms Harlow emailed Mr Bradshaw again with copies of further documents where she had raised her concerns with the claimant. On return from holiday, Mr Bradshaw had a high number of his usual meetings and some of his direct reports were on leave. He looked at the copious documents in between his other work. He decided that he needed to meet Ms Harlow informally to discuss the impact on her, as this was not clear from the documents. He could not meet her until 31 August 2023 because Ms Harlow was on leave from 14 – 21 August 2023 and then he was on leave from 21 – 25 August 2023, returning to work on 29 August 2023 after the Bank Holiday. Meanwhile he had requested and obtained a chronology from Miss Palmer in HR.

73. On 31 August 2023, Ms Harlow met with Mr Bradshaw and HR to discuss the matter. Mr Bradshaw then considered the matter and on 12 September 2023, he emailed the claimant inviting him to a disciplinary hearing. Regarding the gap between 1 and 12 September 2023, Mr Bradshaw can only say that the week starting 4 September 2023 was particularly busy as he had a meeting in London on 5 September 2023 and in Birmingham on 6 September 2023 – he is based in Newcastle.

74. The claimant did not know what was going on behind the scenes and had heard nothing further about disciplinary action since Ms Harlow had told him on 20 July 2023 that she was referring the matter for disciplinary action. He had allowed himself to hope that maybe she had decided not to go ahead with the matter.

75. On 12 September 2023, Mr Bradshaw emailed the claimant saying the matter had been referred to him under the Disciplinary Policy. He set out the

allegations and said that the claimant was required to attend a formal disciplinary hearing on Tuesday 19 September 2023. He had the right to be accompanied.

76. The claimant responded by sending seven written submissions on different aspects of the disciplinary process. He sent these over the next few days. He subsequently sent updates of the submission on delay on a couple of occasions.

77. One of the claimant's submissions on 12 September 2023 asked to reschedule the meeting for three separate reasons (1) that the claimant had a long-standing prior appointment on 19 September 2023, (2) that 5 working days' notice of the hearing had not been given as required by paragraph 16.3 of the Disciplinary Procedure and (3) anyway, only the bare minimum notice had been given, which contrasted with the delay in notifying the claimant of the disciplinary hearing.

78. The claimant called the Islington Mental health Crisis Line on 12 September 2023.

79. On 13 September 2023, the claimant asked for Mr Bradshaw to be replaced as decision maker because Mr Bradshaw was aware of a personal matter which, together with some other matters, might give the impression of perceived impartiality.

80. On 15 September 2023, Mr Bradshaw emailed the claimant agreeing to move the meeting date to 28 September 2023. The claimant emailed back on the same day to say he was grateful to Mr Bradshaw for moving the hearing back, but this was in breach of paragraph 12.3 of the disciplinary procedure which says the postponed date can be no more than five days after the original date.

81. We interject here to say that paragraph 12.3 is a reference to the statutory right to be accompanied to a disciplinary hearing. Section 10 of the Employment Relations Act 1999 is about an employee's right to have a hearing postponed because his chosen companion is unavailable, provided the employee proposes an alternative date which is reasonable and within 5 days of the original date.

82. The claimant asked for an earlier new date as he did not want the matter hanging over him as long as until 28 September 2023 as his mental health would suffer. On 19 September 2023, Mr Bradshaw emailed to say he would move the meeting forward to 26 September 2023 and he had taken account of two days of shadowing which the claimant had planned.

83. Subsequent to this there were further emails regarding the unavailability of the claimant's union representative and a date of 2 October 2023 was mooted. The claimant did not want to wait that long and in any event, the trade union subsequently said it could not help the claimant because he had

joined after the start of the current issues. The date then reverted back to 28 September 2023.

84. On 17 September 2023, the claimant sent Mr Bradshaw a further 20 page written submission containing his substantive defence.

85. On 27 September 2023, the day before the disciplinary hearing, Mr Bradshaw emailed the claimant to say he had now had the opportunity to consider the detail of all the claimant's written submissions. While he personally felt he could make an impartial decision, it was clear that the claimant was concerned about his knowledge of prior HR matters. He said he had taken further advice and had decided it would be better if someone else dealt with the disciplinary. Once a new decision manager was identified, the related papers would be passed over to them (apart from the submission about impartiality). This would inevitably cause a delay for which he apologised, but the matter would be moved forward as quickly as possible and he had emphasised the need for that to happen to the HR team. The new decision manager would contact the claimant separately to arrange a meeting.

86. The claimant responded that he was grateful and that ideally the new decision-maker might best be a lawyer, because he had made quasi-legal submissions.

87. From 27 September to 4 October 2023, Miss Palmer looked for a new decision maker. The first two people she approached did not have capacity. She spoke to Adele Kelly on 28 September 2023 who said she would not have capacity until early November. Miss Palmer then spoke to two more people who could not help. Miss Palmer then decided that there would be even more delay if she did not stick with Mrs Kelly.

88. On 11 October 2023, Ms Harlow emailed the claimant to say she had been told Mrs Kelly had been appointed as the new decision maker and she would be in touch. Mrs Kelly was a lawyer and two grades above the claimant. The same day, HR emailed the claimant to confirm he was content for all the submissions (bar the one on impartiality) to be forwarded to Mrs Kelly.

89. On 12 October 2023, Ms Harlow emailed Mrs Kelly to brief her and send the documents, On 19 October 2023, the claimant emailed Mrs Kelly to say he had not heard of a new hearing date. Therefore he would now send his amended submission on delay. He asked for a decision as soon as possible and signalled that he would be going to an employment tribunal.

90. On 19 October 2023, Mrs Kelly telephoned the claimant and told him that she could not look at anything before 3 November 2023 due to other commitments. She said she had explained this to HR when she was instructed to take on the role. She said she would put 14 November 2023 as a provisional hearing date in her diary in case needed. If she did decide that it needed to go to a disciplinary hearing, she would be unable to send the

invitation until after 3 November 2023 when she had had a chance to consider the documents. Mrs Kelly followed this up with an email the same day. She hoped this gave the claimant an insight into the time scales.

91. The claimant responded, saying he was grateful for the insight into time scales. That said, it did not mean that he felt the respondent was procedure-compliant in terms of timescales and could be 'excused' the delay.

92. On 1 November 2023, the claimant emailed an updated submission on delay as he now knew the projected hearing date.

93. On 3 November 2023, Mrs Kelly emailed the claimant to update him that she had now read everything but needed the weekend to process it. She would come back early next week with her decision on the way forward. On 6 November 2023, Mrs Kelly called the claimant to tell him there would be a disciplinary hearing. She followed that up with an email on the same day.

94. The disciplinary hearing took place on 14 November 2023. The outcome letter was sent out on 21 November 2023. Having taken into account the mitigating circumstances, primarily the claimant's mental health issues and the delay in relation to this process, the claimant was given a written warning.

95. The claimant does not say there was any unfair delay in the appeal process.

<u>The second disciplinary process</u>

96. On 9 May 2024, at a CLTT Deep Dive meeting at which Ms Harlow was present, the claimant made a number of comments which Ms Harlow felt were targeted at her about inept management and being victimised and excluded, Ms Harlow felt the comments were embarrassing and unprofessional.

97. During a 1 to 1 meeting with Ms Harlow on 16 May 2024, Ms Harlow raised concerns about a conversation which the claimant had had with a Ms Adoniadis the previous Tuesday. She said that Ms Adoniadis felt the claimant had been rude and angry and had talked over her and questioned her integrity. Ms Harlow said she wanted the claimant to tell her his view of the conversation. The claimant said he had been angry because he was frustrated, but that he had apologised to Ms Adoniadis immediately afterwards for losing his temper.

98. Ms Harlow emailed her manager, Kate Alexander-Brewer, on 20 May 2024 about concerns regarding the claimant's behaviour which Ms Adoniadis had complained about and which Ms Harlow had witnessed herself. She said she was raising it with Ms Alexander-Brewer to decide whether it should be taken forward formally under the disciplinary policy. She attached a note of her meeting with Ms Adoniadis; an email from Ms Adoniadis; the apology email from the claimant; and a note of her meeting with the claimant to discuss this matter and other instances she had witnessed.

99. On 22 May 2024, Ms Alexander-Brewer asked HR for advice. On 24 May 2024, HR told Ms Alexander-Brewer that she should undertake a fact find under the Disciplinary Process and that she should speak to the claimant, Ms Harlow and Ms Adionadis. HR said she only needed a few paragraphs from each witness. She should then decide with HR help whether the misconduct fell under minor or serious. If the fact-finding became too broad, then HR could commission an independent Investigating officer.

100. Ms Alexander-Brewer conducted the initial assessment because she felt that Ms Harlow had not made an assessment as such, since her referral email had not indicated the level of formality to be adopted. Ms Alexander-Brewer assumed this was because Ms Harlow may have felt she was a victim herself. In any event, Ms Alexander-Brewer felt the initial assessment needed to be done and she immediately emailed Ms Haywood, Mr Baker, Ms Adoniadis and Ms Harlow to speak to them.

101. The same day, Ms Alexander-Brewer emailed the claimant to say that Ms Harlow had made her aware of concerns regarding a number of conversations which the claimant had had in the previous few weeks, ie with Ms Adoniadis on 14 May and comments during a CLTT Deep Dive Meeting on 9 May. She said she would be undertaking an initial assessment to decide whether or not she could make a decision that there was a conduct issue which needed addressing under the disciplinary process. She said she was away the next week but she would arrange to speak to people on her return.

102. On 3 June 2024, the claimant emailed Ms Alexander-Brewer to state his view that the initial fact-finding under section 4 of the Procedure had already been carried out and he had had such a meeting with Ms Harlow. He attached the apology email he had sent to Ms Hayward immediately after the Deep Dive meeting and her reply which said an apology was not needed.

103. The claimant did go ahead with the fact-finding meeting with Ms Alexander-Brewer on 3 June 2024.

104. On 5 June 2024, Ms Alexander-Brewer gave the claimant another progress update. She had to wait to speak to Nicola Haywood, who was on annual leave that week. Ms Haywood had been present at the Deep Dive meeting. On 7 June 2024, Ms Alexander-Brewer told the claimant she would be speaking to Ms Haywood on 17 June 2024.

105. On 18 June 2024, Ms Alexander-Brewer emailed the claimant to invite him to a formal hearing to discuss the allegations on 1 July 2024. She had decided that, because the claimant already had a written warning, the matter was alleged serious misconduct. The same day, the claimant sent Ms Alexander-Brewer submissions regarding her lack of impartiality and flaws in the process. He asked that she recuse herself as decision maker.

106. Ms Alexander-Brewer spoke to HR and replied to the claimant on 24 June 2024. She explained why as a decision maker she had reviewed the initial assessment to be satisfied how it was appropriate to move forward. She did

not consider there was a problem regarding her impartiality. She felt the claimant would need time to digest her response and she rescheduled the disciplinary hearing to 8 July 2024 to give the claimant time to prepare.

107. On 29 June 2024, the claimant attached further submissions on another matter which he said required a prior decision before the hearing could take place. He did not complain about delays.

108. On 3 July 2024, Ms Alexander-Brewer confirmed the meeting would go ahead on 8 July 2024.

109. The disciplinary hearing took place on 8 July 2024. The disciplinary outcome was provided on 12 July 2024. The claimant appealed. There is no complaint about the time taken for the appeal process.

Law

Discrimination arising from disability

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

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

112. The causal connection between the something that causes unfavourable treatment and the disability may involve several links, depending on the facts of a particular case. (Sheikholeslami v University of Edinburgh [2018] IRLR 1090.)

113. A tribunal must carry out a critical evaluation on the question of objective justification. This involves weighing the needs of the employer against the discriminatory impact on the employee. The tribunal must carry out its own assessment on this matter, as opposed to simply asking what may fall within the band of reasonable responses. . (Gray v University of Portsmouth; Hardy & Hansons plc v Lax [2005] ICR 1565.)

The duty to make reasonable adjustments

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

115. '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. However, it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words 'act' or 'decision' in addition or instead. As a matter of ordinary language, it was difficult to see what the word 'practice' added to the words if all one-off decisions and acts necessarily qualify as PCPs. 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. … the act of discrimination that must be justified is not the disadvantage that a claimant suffers but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. However widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief that the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP. 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. 'Practice' connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises.' (Ishola v Transport for London [2020] IRLR 368, CA.)

116. The EAT had previously made this point in the context of a flawed disciplinary process particular to an individual in Nottingham City Transport Ltd v Harvey UKEAT/0032/12. It said that it is not enough to identify that an employee has been disadvantaged, in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered. That

leaves out the requirement to identify a PCP. The disadvantage has to come from the PCP.

117. The line between a PCP on the one hand and a simple response to events in hand, on the other, can be difficult to draw. It is possible for a PCP to emerge from what happened on a single occasion, but there needs to be either direct evidence that it is indicative of a practice of more general application or there must be some evidence from which the existence of such a practice can be inferred. (Gan Menachem Hendon Ltd v de Groen [2019] IRLR 410.)

118. The House of Lords in Archibald v Fife Council [2004] IRLR 652 said this about the duty to make reasonable adjustments:

'The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination.' The Equality and Human Rights Commission's Employment Code addresses reasonable adjustments particularly in chapter 6. The Code does not impose legal obligations and it does not purport to be an authoritative statement of the law. Nevertheless, it can be used in evidence in tribunal proceedings and tribunals must take into account any part of the Code which appears relevant to any question arising in the proceedings.

119. At para 6.28, the EHRC Employment Code says the following factors may be relevant to whether an adjustment would have been reasonable: whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of the step; the financial and other costs of making the adjustment and the extent of any disruption caused; the extent of the employer's financial and other resources; the availability to the employer of financial or other assistance to make adjustments eg advice through Access to Work; and the type and size of the employer.

Indirect discrimination

120. Under s19 of the Equality Act 2010, indirect discrimination occurs if the respondent applies to the claimant a provision, criterion or practice which (a) the respondent applies or would apply to those who do not share the claimant's protected characteristic, (b) puts, or would put those who share the claimant's protected characteristic at a particular disadvantage when compared with those who do not, (c) puts, or would put the claimant at that disadvantage, and (d) the respondent cannot show it to be a proportionate means of achieving a legitimate aim.

Burden of proof under Equality Act 2010

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

122. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can take into account the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

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

Discrimination: relevant time-limits

124. The relevant time-limit is at section 123(1) Equality Act 2010. Under s123(1)(a), the tribunal has jurisdiction if the claim is presented within three months of the act of which complaint is made. By subsection (3), conduct extending over a period is to be treated as done at the end of the period. A series of different acts, especially where done by different people, does not (without some assertion of link or connection), constitute conduct extending over a period. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96, the CA held that 'an act extending over a period' can comprise a 'continuing state of affairs' as opposed to a succession of isolated or unconnected acts.

Conclusions

125. The claimant was very concerned at the time his issues arose and again in front of the tribunal with interpretation of the Attendance Management Policy and whether correct procedures had been followed to the letter in his case. We explained to him that the legal issues relevant to his claims are different and more nuanced. Although a breach of the Policy could potentially be a relevant factor, it needs to be examined in the overall context. Nevertheless, we have considered the meaning of the Policy in relation to the points raised by the claimant.

126. We do not repeat every one of the claimant's extensive arguments because this would make these Reasons too long. However, we have given them full consideration and noted in these Reasons the points which stand out to us and which are potentially relevant to the issues in the legislation we have to consider for this case.

127. Our general view is as follows:

127.1. A Consideration Point ('CP') of 12 days does not mean 12 days are 'safe' and can be taken as disability related absence before a formal disability related absence review can take place under paragraph 11.1 of Annex A. The wording of paragraph 11.1 says 'where disability related absence reaches the consideration point'. The word 'reaches' is unambiguous, ie when the claimant took his 12th day of disability related absence, the CP had been hit. Moreover, this interpretation is consistent with the position in regard to the trigger point for non-disability related absence under section 9 of the Policy. It is also consistent with how HR interpreted it in the workplace and with how, in our experience, trigger points and CPs are usually operated. Finally, it is consistent with the definition of Consideration Point in the Glossary of Terms in the Policy.

127.2. We accept that the Attendance Management Policy and Annex A do not define over what period a CP is counted. That contrasts with paragraph 9.3.3.1 in relation to trigger points, which are said to be assessed over a 12 month rolling period. This might be an omission or it might be deliberate in that the whole purpose of CPs is that they are tailored to meet a disabled employee's circumstances. The important thing is that both management and the employee in question are aware of what the CP is. The claimant was clear because, as he accepts, in the meeting in 2021 when the 12 day CP was set, it was explicitly stated to be over a 12 month rolling period. It would have been better practice had the respondent provided a letter confirming the CP or put it in the claimant's reasonable adjustment passport. We are surprised this was overlooked. Nevertheless, in this case, the claimant and the employer did both know, and the position was recorded in the meeting minutes.

127.3. Our interpretation of the Attendance Management Policy is that long-term absence, whether disability related or not, is covered by section 12 (because it says so in the heading of section 12 and because long term absence is not mentioned in paragraph 11.1). Short-term and intermittent absence which is disability related is dealt with by Annex A (because it says so explicitly in paragraph 11.1). By process of elimination, we would say that short-term and intermittent absence which is non disability related is dealt with by section 10. After an employee returns to work following a period of long-term absence, a disability related absence review meeting will normally be held if the CP has been reached or exceeded. We take this from a reading of paragraph 12.4 and its position following 12.3 which contemplates having returned to work. By contrast, paragraph 12.6 talks about the type of meeting while someone is still off

on long-term absence. The latter is called 'long term absence review meeting'. The former is the normal 'disability related review meeting'.

127.4. The claimant argues that days taken in a period of long-term absence (defined as over 28 days) cannot be counted towards the CP. His reasoning is that would be double jeopardy because action can be taken in a long term absence review meeting.

127.5. We disagree. It makes no sense for a CP to apply at 12 days disability related absence, but not when there has been a longer disability related absence. If the claimant is right, he could have taken 11 intermittent days of disability related absence and then on the 12th day, instead of taking a single day which would mean the CP was met, he could take 28 days to avoid it being met, so that it would be classified as long term absence.

127.6. We also do not accept the claimant's argument that section 12.4 only covers a first disability related absence review meeting. While we accept that it does not explicitly mention a second review or cross refer to Annex A on that, it would again make no sense in practical terms if a second review could be held when an employee had only just reached the consideration point regarding the target after a first WNEA, but not if they had considerably exceeded it.

127.7. We have to say that a route map through this sometimes inconsistent Attendance Management Policy would be helpful. However in practical terms, we accept that HR interpreted it consistently across the board and that, read as a whole, the basic principles made sense and would make sense to an employee reading the Policy. If employees exceeded a CP, they could be invited to a meeting, given a WNEA with a new target period. If they went off long-term sick, there could be meetings held during the period they were off and action taken if necessary. Whether or not that happened, when they came back, there could be a discussion looking at targets going forward.

Discrimination arising from disability

First WNEA: 2.2.1

128. The respondent treated the claimant unfavourably by issuing him with a First WNEA on 25 July 2022. This unfavourable treatment was because of something arising from the claimant's disability, ie his disability related sickness absences on 27 September 2021, 22 – 26 November 2021, 13 – 19 May 2022 and 29 June 2022. It is therefore for the respondent to justify issuing the first WNEA.

129. The respondent's aims were to ensure efficient delivery of their service and to make good use of public funds. These were legitimate aims. The question is whether issuing the first WNEA was a proportionate means of achieving those aims

130. Looking first at the impact on the claimant, on the one hand, this was not a dismissal or even a final warning. In practical terms, it was the lowest level of statement of expectation. It also had the benefit of alerting the claimant at an early stage about expectations, rather than leaving him potentially to build up a lengthy sickness absence record and suddenly take more severe action.

131. On the other hand, the claimant became very upset because it fed into his depression and anxiety. Work is everything to the claimant and he was concerned about the effect on his professional reputation, as well as a future risk to his job.

132. In terms of the respondent's needs, a key difficulty was that because of the claimant's seniority and unique expertise on certain topics, only he could write materials on certain specialist topics. This entailed making training podcasts on such subjects and working on a course on investigatory powers, which only he could do. The claimant admitted that if he was not there, production of those materials was delayed. There were then knock on effects in terms of when colleagues had time to do the editing of podcasts. National courses were planned only 3 months in advance and if materials were not provided, local teams had to create their own. The claimant was two levels above other crown advocates in the CLTT, which meant that, unlike his colleagues, he could be involved in quality assuring and developing recruitment case studies for all levels. The recruitment exercises were collaborative efforts, but if the claimant was intermittently absent, it could affect colleagues.

133. Had this been anything other than a first WNEA, we would have said that it was disproportionate and that the respondent should have allowed the claimant at least a further 5 days before issuing a WNEA. That is because 6 of the 12 days' disability related absence had been triggered by the issue of the Attendance Improvement Notice in relation to non-disability related absence and the claimant had explained in his email of 28 June 2022 that such actions by his employer dented his self-worth and put him into a vicious cycle downwards. We also say this because a further block of 5 days was the week before his mother's funeral. While the claimant's main emphasis in his written submissions to the respondent at the time was on the stress of line management uncertainty, he did talk about an 'extremely traumatic' period of his life because of the bereavement and the effect of the two issues coming together.

134. We also say this because, although the claimant's 12 days' of absence had an effect in slowing down his projects and the output of the CLTT, this was not akin to, for example, an advocate not being available the next day for court, or even a trainer not being available at the last minute to deliver a training session.

135. However, crucially, it was only a first WNEA. The claimant had already been given a CP which he had essentially agreed. He had been arguing for a separate CP for each disability at the level of 10 days each. The absences on

this occasion were all due to a single disability, ie mental health, so the 12 day CP in fact exceeded what the claimant had been asking for.

136. We are not saying that an employer should rigidly apply a CP. The respondent still needed to think whether a WNEA was appropriate and necessary. The Policy itself allowed for an extension of CPs. But we come back to the fact that this was only a first level WNEA.

137. As the claimant himself explained, his depression ran along at a certain level, but could plummet because of certain triggering events. The difficulty for the respondent was that if it was not events such as having received the Attendance Improvement Notice or bereavement, there was likely to be another triggering event. There were a number of home and work stresses in the claimant's life. The respondent needed to flag up its expectation levels regarding attendance. Work did fall behind if the claimant was not there and no one else covered his particular specialisms.

138. The respondent had made a number of other adjustments regarding flexibility at work to assist the claimant. There was nothing else which the claimant asked them to do, other than not take action when the CP was reached.

139. The claimant raised as a procedural point that Ms Harlow had not correctly held return to work meetings so it was not permitted to issue him a WNEA under the Policy. He did not say how the failure affected the proportionality of issuing a WNEA. Although Ms Harlow did not hold separately labelled return to work meetings, on the day of the claimant's return to work, she did cover the ground as part of their weekly discussions. We do not think this was ideal, but the ground was covered. In terms of whether the first WNEA was proportionate, it does not change our view, because there was ample opportunity for the claimant to discuss with Ms Harlow issues arising from his absences and whether any adjustments were needed. Indeed the claimant was able to communicate his feelings at the time and in his written submissions for the review meeting.

140. The claimant also mentioned, as evidence of his commitment to work, that he often worked extra hours and did not take his full holiday entitlement. The respondent's view was that he should take holiday entitlement and working excessive hours might not be good for his health, but in any event, to the extent those were not the same hours as colleagues, this did not completely make up for days taken off sick. Moreover, everyone works extra hours to some extent.

141. We have no doubt about the claimant's commitment to work and professionalism. Indeed, he wanted to work. It was good for his mental health. When he was off sick, it was because he really could not manage to attend work. However, we do not think untaken holiday should be set off against sickness absences. Holiday is supposed to be taken as holiday, not when someone is unwell. As for working extra hours, this also is not necessarily a

healthy working pattern and anyway is too unstructured to compensate for days off sick.

142. Therefore weighing up the impact on the claimant of a first level WNEA and respondent's reasonable needs, we find the issue of the first WNEA was proportionate. The claim that the issue of the first WNEA was section 15 discrimination is therefore not upheld.

Refusal of appeal against first WNEA: 2.2.2

143. The respondent treated the claimant unfavourably by Ms Nicolson refusing his appeal on 1 September 2022.

144. This unfavourable treatment was because of something arising from the claimant's disability. Ms Nicolson said the decision to issue the first WNEA was not unreasonable. She took into account all the available evidence. The decision to refuse the appeal was because Ms Nicolson considered it appropriate and within procedure to issue a WNEA for the claimant's level of disability-related absence. Ms Nicolson did not look exclusively at whether correct procedures had been followed. She also looked at whether the decision was reasonable and took account of such factors as that other reasonable adjustments had been put in place. We believe this was a further decision based on the claimant's level of disability-related absence, but even if it was simply confirmation that Ms Harlow was entitled to issue the WNEA, it was just an extra step in the chain of causation compared with the original decision to issue the first WNEA. Although there are more links in the chain, the refusal of the appeal was still closely related to the original disability-related sickness.

145. It is therefore for the respondent to justify refusing the appeal.

146. Ms Nicolson's aim was to consider whether the issue of the first WNEA was appropriate bearing in mind the procedures followed and in the context of the need to ensure efficient delivery of the respondent's service and to make good use of public funds. She also checked whether she felt appropriate procedures had been followed.

147. The respondent is able to show that refusal of the appeal was a proportionate means of achieving a legitimate aim for the same reason that issuing the first WNEA was. The correct procedures had been followed, reasonable adjustments had been put in place including the CP and it was proportionate for the line manager to set out expectations of future attendance by means of a first WNEA.

Second WNEA: 2.2.3

148. The respondent treated the claimant unfavourably by issuing him with a second and Final WNEA on 24 July 2023.

149. This unfavourable treatment was because of something arising from the claimant's disability, ie the following disability related sickness absences: 1 day 7 November 2022; 2 days 11 November 2022; 1 day 28 November 2022; 2 days 1 December 2022; and 70 days from 17 February 2023 – 25 May 2023.

150. It is therefore for the respondent to justify issuing the Final WNEA.

151. The impact on the claimant was serious as before, and we imagine it was more severe than previously, because he would fear that he was closer to the risk of dismissal.

152. On the other hand, in terms of the respondent's needs, the same difficulties applied regarding his absence from CLTT that we have previously mentioned, although now lasting cumulatively back to the period covered by the first WNEA. Also the claimant had been away for a much longer period of time (76 days) and the respondent needed to indicate, both for his benefit and its own, that continuing inadequate attendance would not be sustainable.

153. In procedural terms we believe that the respondent did have jurisdiction (to use the claimant' word) under the Policy to hold this disability absence review meeting and to issue a Final WNEA. In any event, regardless of the strict interpretation of the wording of the Policy, the process followed was fair and proportionate. In essence, the respondent reviewed the claimant's attendance record; was open to discussing it with him; took into account his First WNEA and made a decision, giving him also a right of appeal. This procedure was the one usually adopted within the respondent's workplace and is in line with what the tribunal panel regularly sees with other employers. We do not see that the claimant was subjected to any problematic double jeopardy. The respondent could have held formal meetings with him during his long term absence, but it chose not to do so. Even if it had, such meetings would have been about how much longer the employer was prepared to wait for the claimant to return. After the claimant returned, it was then fair and appropriate to have a discussion with him about future expectations of attendance and to issue a Final WNEA. Discussion about future attendance levels is a different discussion from that with an employee who is still on leave regarding whether and when they might be able to come back at all.

154. Unfortunately a disproportionate amount of time was spent discussing process, rather than whether or not it was appropriate and necessary to issue a further WNEA. But this was at the claimant's instigation. The claimant focused on technical arguments about the construction of the Policy rather than the substantive fairness of the process. We would be the first to accept that if an employer completely disregards important parts of their Policy, this should be taken into account and could potentially make the issue of a sanction under the Policy discriminatory. However, in this case, as we have said, the overall process was logical and appropriate.

155. Getting back to the substantive point, again, this was not a dismissal. We appreciate the claimant was vulnerable to stress because of his mental

health. There is a delicate balance when managing mental health related absence because there is always the risk that invoking procedures will make matters worse. The problem is that the alternative of doing nothing is unsustainable. An employer cannot be expected to allow long periods of absence due to mental ill health without attempting to manage it. If an employer does not issue any warnings about future attendance levels in such circumstances, the risk is that it does nothing until an employee's attendance becomes so unsustainable that the employer goes straight to dismissal. The employee then has had no prior warning that this is how matters may end.

156. In this case, the claimant had been absent for 76 days, and we find that the issue of the Final WNEA was a proportionate means of achieving a legitimate aim.

157. The claim that the issue of the second and Final WNEA was section 15 discrimination is therefore not upheld.

Refusal pf appeal against second and Final WNEA: 2.2.4

158. The respondent treated the claimant unfavourably by refusing his appeal on 31 August 2023.

159. The refusal of the claimant's appeal was something arising from disability. Mr Weyell felt that over 70 days disability related absence in the period between the First and Final WNEA could not be sustained by the respondent, particularly given the claimant's seniority and the respondent's limited resources. Mr Weyell told the claimant that he felt the decision to issue the WNEA was reasonable. He said that a decision maker could reasonably conclude that the claimant's level of absence since the First WNEA could no longer be supported by the business. The procedural matters he identified did not impact on the reasonableness.

160. The respondent argued that the rejection of the appeal by Mr Weyell and the rejection of the previous appeal by Ms Nicolson were not something arising from the claimant's disability, but were simply a 'but for' consequence. We do not agree. In both cases, the appeal decision-makers, as well as addressing the procedural arguments, addressed their mind to whether the WNEAs were reasonable given the level of disability related absence in question.

161. The aim in rejecting the appeal was the same as Ms Harlow's in issuing the Final WNEA, and the rejection of the appeal was proportionate for the same reasons. We add that Mr Weyell did make the correction regarding Ms Harlow's reference to non disability related absence, and he told the claimant that certain recommendations had been made about process.

162. We therefore find that the rejection of the appeal against the Final WNEA was a proportionate means of achieving a legitimate aim and this claim fails.

Failure to make reasonable adjustments

The first disciplinary process

163. This is the essential chronology in the claimant's own situation on the first disciplinary process. Ms Harlow told him on 20 July 2023 for the first time that her concerns would have to be dealt with under the Disciplinary Policy and that once a suitable person had been identified at one grade higher than herself, she would discuss the matter further with the claimant. The next the claimant heard was when Mr Bradshaw emailed him on 12 September 2023. We consider that a delay of nearly 8 weeks from notifying an individual that they are being referred for disciplinary action to communicating any further about it let alone fixing a disciplinary hearing is a 'significant delay'.

164. However, there is no evidence that the respondent ever did this to anyone else or that they would do it to anyone else or that they would do it again to the claimant. There are no time-scales in the Disciplinary Policy which suggests an 8 week gap between first intimation of disciplinary hearing and invitation to the hearing is normal. and we were given no evidence or statistics regarding normal time taken at this stage. Indeed paragraph 3,2 of the Disciplinary Policy says that parties have a responsibility to 'work together to ensure timely progression'. This eight week period was due to a unique combination of the number of documents involved, a succession of holidays, the line manager dealing with another formal process in relation to the claimant at the same time, and the need to find and brief a decision-maker other than the line manager. In particular, the element that most made the delay 'significant' was the failure to keep the claimant informed in any way. This was not replicated at the appeal stage or in regard to the second disciplinary process and there was no evidence that it was in any way normal for the respondent.

165. The disciplinary hearing was set for 19 September 2023. It was rescheduled at the claimant's request to 28 September 2023. It was further delayed because the claimant wanted a different decision-maker and finally took place on 14 November 2023 with an outcome on 21 November 2023. Setting aside the question of who was responsible and whether there were good reasons, this was another 'significant delay'. Again, however, there was no evidence that this level of delay was the respondent's practice. Indeed, it seems that it was not, because had there not been a change of decision-maker at the claimant's request, the disciplinary hearing would have gone ahead on 19 September 2023 or even 28 September 2023, neither of which would have constituted a 'significant delay'.

166. Overall, the delay from 20 July 2023 to 14 November 2023 was 'significant', but it was unique to the claimant, arising from a unique set of combined circumstances. Therefore we cannot identify a PCP of 'significant delay' or even a PCP of failing to communicate (which was not pleaded anyway). The claim for failure to make reasonable adjustments must therefore fail.

167. Had we not rejected this claim because there was no PCP, we would have said that the delay did put the claimant at a substantial disadvantage compared with someone without his disability because it exacerbated his depression and anxiety. It is true that the idea of disciplinary action was what was causing the claimant most distress, but it is impossible to separate that from anxiety over whether it would happen and the threat hanging over his head for an uncertain and delayed period.

168. We would also have said that the respondent knew, because he told them repeatedly, and certainly ought to have known, that delays would put the claimant at that disadvantage.

169. To alleviate the disadvantage, the respondent could have sped up the process between 20 July 2023 and 12 September 2023 to some extent, at least avoiding the delay from 1 – 12 September 2023. Prior to that, not being the line manager himself, Mr Bradshaw did have to go through a number of steps. Most importantly, the respondent could have mitigated the significance of the delay by keeping the claimant informed regarding what was happening. We appreciate the claim was not placed squarely on the non-communication in the list of issues, but it is part of the significant delay and was fully explored in the tribunal hearing.

170. As for the delay between 19 September and 14 November 2023, this was the result in particular of the claimant wanting a different decision-maker. However, Mr Bradshaw had raised with HR at the outset that he might not be an appropriate decision-maker because he had been involved in previous HR issues with the claimant. At that stage, HR advised, and Mr Bradshaw accepted the advice, that he could deal with it. However, had they both recognised that this might later become a problem, the delay for finding a different decision maker at the claimant's request could have been avoided. The claimant asked on 13 September, as soon as he was contacted on 12 September 2023.

171. Although we have had to reject this claim because there was no PCP of 'significant delay', we would also like to record that we consider the failure to inform the claimant as to what was happening between 20 July 2023 and 12 September 2023 would have been insensitive and discourteous for any employee, and all the more so for an employee who, like the claimant, had mental health difficulties with anxiety and depression, and indeed one who had just received a Final WNEA regarding his attendance. At the very least, we would have expected HR to have had oversight of the process and to have ensured that the claimant was kept informed. However, in terms of this claim, as we have said, 'failing to keep employees informed' was not identified as the potential PCP, but even if it was, there would be the same difficulty: there was no evidence that the respondent followed or would follow a practice of not keeping employees informed.

The second disciplinary process

172. On 24 May 2024, Ms Alexander-Brewer informed the claimant that she would be carrying out an initial assessment in regard to incidents on 9 and 14 May 2024. On 18 June 2024, the claimant was invited to a disciplinary hearing on 1 July 2024. The hearing eventually took place on 8 July 2024 and the outcome was provided on 12 July 2024.

173. It was three and a half weeks from when the claimant was first notified of an initial assessment until when he was invited to a disciplinary hearing. The hearing was fixed for two weeks after that with a 1 week delay. The outcome was 4 days after the hearing. We understand that the claimant because of his mental health found any delay agonising. However, the whole process took 7 weeks. This is not in our view 'significant delay'.

174. Therefore no PCP of 'significant delay' was applied. This reasonable adjustment claim is therefore not upheld.

175. As we have said, while this was a normal timescale, we understand that any period at all made the claimant anxious because of his mental health difficulties. The duration of a disciplinary process is extremely difficult for everyone, regardless of whether they have a disability, but we accept that the claimant was particularly vulnerable because of his mental health. The respondent also knew this.

176. However, even if we had found a PCP of 'significant delay', we would have said this timescale was entirely reasonable. We do not see how it could practically have been compressed. The claimant's main argument was that delays were caused because Ms Alexander-Brewer unnecessarily re-interviewed certain witnesses when Ms Harlow had already spoken to the claimant and Ms Adoniadis, and had supplied the relevant emails. We do not agree with this. Even if what Ms Harlow had done could count as an 'initial assessment' under section 4, Ms Alexander-Brewer was responsible under section 10 for satisfying herself that it was appropriate to go ahead with a disciplinary hearing and at what level of alleged misconduct. This was particularly important because Ms Harlow was not an independent party, not least as the claimant had submitted a grievance against her. Moreover, Ms Alexander-Brewer wanted to interview a couple more witnesses. Ms Alexander-Brewer was not carrying out irrelevant interviews. At one stage or another, these enquiries had to be made. She did not delay the process by seeking a full independent investigation. Had she not made these enquiries herself, the claimant may have complained that it was an unfair process because Ms Harlow had controlled too much of the evidence.

177. This reasonable adjustment claim therefore also fails.

<u>Indirect discrimination</u>

178. As set out in our section on reasonable adjustments, the respondent did not have a PCP of allowing significant delays within a disciplinary process. The respondent did not apply such a PCP to the claimant and did not and would not have applied it to others.

179. The claim for indirect discrimination therefore fails.

Time-limits

180. ACAS was notified on 26 September 2023. Any discriminatory actions prior to 27 June 2023 would be out of time. The First WNEA was issued on 25 July 2022. ACAS should have been notified by 24 October 2022. It was not. The ET1 was presented on 13 November 2023, ie nearly 16 months from the incident and nearly 13 months out of time. The rejection of the claimant's appeal was on 1 September 2022. ACAS should have been notified by 30 November 2022. It was not. The claim was therefore 11.5 months out of time.

181. The other claims were brought in time.

182. We will initially consider the claims on the basis that they were 11.5 months out of time, since it could be just and equitable to take the time for both as running from the rejection of the appeal. Even on that basis, we would not consider it just and equitable to allow either or both of these claims. We have weighed up that the claimant was suffering from severe mental health problems which may have made it difficult for him to decide upon and run a tribunal case. However, they did not prevent him writing extensive written submissions for the internal processes. Also, the claimant is a lawyer and although not an employment lawyer or even a civil lawyer, would still be aware of the concept of time-limits and know how to look them up. Indeed in an email dated 15 July 2022, he said 'I want to get onto the tribunal'.

183. The claims were well out of time. In terms of the balance of prejudice in allowing or not allowing such late claims, the prejudice for the respondent was in remembering the detail of the impact of the claimant's absences on the work of his department. The prejudice for the claimant would be losing the possibility of bringing these claims, but it was not a case concerning dismissal, and the claimant did still have some claims in time.

184. Weighing all these matters together, on balance we would not consider it just and equitable to allow these claims out of the time.

_____
Employment Judge Lewis

Dated: 25 April 2025

Judgment and Reasons sent to the parties on:

……..1 May 2025….....

…….....
For the Tribunal Office

List of Issues

1. Time limits

1.1 Any complaint in the first claim about something that happened before 27 June 2023 may not have been brought in time. Therefore, were the discrimination complaints relating to the Claimant's warning on 25 July 2022 and the appeal outcome of 1 September 2022 made within the time limit in s.123 of the Equality Act 2010? The Tribunal will decide:

1.2

1.2.1 Was the claim made to the Tribunal within three months (plus the early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaint not made to the Tribunal in time?
1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

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

2.1 The Respondent has conceded that the Claimant is disabled.

2.2 Did the Respondent treat the Claimant unfavourably by:

2.2.1 Issuing the Claimant with a first written notice of expectation of attendance on 25 July 2022?

2.2.2 Refusing the Claimant's appeal against the first written notice of expectation of attendance on 1 September 2022?

2.2.3 Issuing the Claimant with a second written notice of expectation of attendance on 24 July 2023?

2.2.4 Refusing the Claimant's appeal against the second written notice of expectation of attendance (in terms of issuing the warning) on 31 August 2022?

2.2.5 [Removed]

2.2.6 Did the following things arise in consequence of the Claimant's disability:

2.2.6.1 The Claimant's sickness absence on 27 September 2021, 22 to 26 November 2021, 13 to 19 May 2022 and 29 June 2022 (see para 6 ET3).
2.2.6.2 The Claimant's sickness absence between 17 February 2023 and 25 May 2023?

2.2.7 Was the unfavourable treatment because of such sickness absence?

2.2.8 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

2.2.8.1 Ensuring that public funds are applied efficiently;
2.2.8.2 Having an effective and functioning workforce;
2.2.8.3 Having acceptable standards of behavior and conduct in the workplace;
2.2.8.4 Appropriately conducting disciplinary proceedings in all the circumstances.

2.2.9 The Tribunal will decide in particular:
2.2.9.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;
2.2.9.2 could something less discriminatory have been done instead; 2.2.9.3 how should the needs of the Claimant and the Respondent be balanced?

3. Indirect discrimination

3.1 Did the Respondent have the following PCP: a practice of allowing significant delays within a disciplinary process?

3.2 Did the Respondent apply the PCP to the Claimant?

3.3 Did the Respondent apply the PCP to people who did not have the Claimant's disability or would it have done so?

3.4 Did the PCP put persons with the Claimant's disability at a particular disadvantage when compared with people who did not have the Claimant's disability in that it exacerbated his depression and fibromyalgia?

3.5 Did the PCP put the Claimant at that disadvantage?

3.6 Was the PCP a proportionate means of achieving a legitimate aim? The Respondent says its aims were accommodating the needs of the business in managing the disciplinary process and accommodating the absences of any party involved in the proceedings.

3.7 The Tribunal will decide in particular:

3.7.1 was the PCP an appropriate and reasonable necessary way to achieve those aims;
3.7.2 could something less discriminatory have been done instead; and
3.7.3 how should the needs of the Claimant and the Respondent be balanced?

4. Reasonable adjustments (Equality Act 2010 sections 20 and 21)

4.1 Did the Respondent have the following PCP: a practice of allowing significant delays within a disciplinary process?

4.2 Did the PCP put the Claimant at a substantial disadvantage when compared with someone without the Claimant's disability in that it exacerbated his depression and fibromyalgia?
4.3 Did the Respondent know or could it reasonable have been expected to know that the Claimant was likely to be placed at the disadvantage?

4.4 What steps could have been taken to avoid the disadvantage? The Claimant suggests that the Respondent should have sped up the disciplinary process and/or ought to have put in place appropriate measures to ensure that the overriding objective of the process was properly fulfilled. In particular, the Claimant says that if delays were caused by the Respondent having to find a new hearing manager, mechanisms ought to be put in place to avoid such delay.

4.5 Was it reasonable for the Respondent to have to take those steps and when?

4.6 Did the Respondent fail to take those steps?