



EMPLOYMENT TRIBUNALS

Claimant: Christopher Pugh

Respondent: Swindon Borough Council

Heard at: Bristol

On: 7, 8, 9, 10 & 11 April 2025

Before: Employment Judge Oliver
Mr Peter English
Mr Mark Richardson

Representation

Claimant: Mr D Plotkin, employment consultant

Respondent: Ms I Ferber, King's Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.

REASONS

1. This is a claim for discrimination arising from disability.
2. The hearing was conducted by the parties attending by video conference. It was held in public with the Tribunal sitting in open court in accordance with the Employment Tribunal Rules. It was conducted in that manner because the parties had consented to such a hearing and it was in accordance with rule 46, the *Presidential Guidance on remote hearings and open justice* and the overriding objective to do so.
3. Reasonable adjustments for the Claimant were to allow him to be accompanied by a companion on video for support and to assist with locating

documents in the bundle, and ensuring regular breaks roughly every half hour.

Issues

4. There have been three Case Management Preliminary Hearings in total. A number of the original claims were found to be out of time. Liability and remedy are to be dealt with at separate hearings. The Respondent now accepts that the Claimant is disabled by reason of symptoms similar to Epstein-Barr virus, including chronic fatigue, and that it had knowledge of the disability at the relevant time. The liability and remedy issues to be dealt with in the first part of the hearing were agreed as follows (based on the list from the second Case Management Preliminary Hearing and the amended Grounds of Resistance):

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

- 1.1 The Respondent accepts that it treated the Claimant unfavourably by:
 - 1.1.1 applying the absence management policy to him (the "Policy"); and
 - 1.1.2 dismissing him
- 1.2 Did the following things arise in consequence of the Claimant's disability? The Claimant's case is that his sickness absence arose in consequence of his disability, and that this resulted in the Respondent's application of the Policy to him and his ultimate dismissal. This is accepted by the Respondent.
- 1.3 Was the unfavourable treatment because of any of these things which are said to have arisen from the Claimant's disability? The Respondent accepts that the application of the Policy to the Claimant, and his dismissal, resulted from his sickness absence.
- 1.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:
 - 1.4.1 To manage individual employee absence (for application of the Policy only);
 - 1.4.2 To have employees undertake the work they are employed to do;
 - 1.4.3 To encourage good attendance in the Respondent's workforce;
 - 1.4.4 To manage team attendance, thereby supporting other members of the team whose workload increases when a colleague is absent; and
 - 1.4.5 To improve and maintain customer service by having a fully-staffed customer service team.

The Claimant does not dispute that these are potentially legitimate aims, but does dispute that the treatment was proportionate.

- 1.5 The Tribunal will decide in particular:

- 1.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;
 - 1.5.2 Could something less discriminatory have been done instead;
 - 1.5.3 How should the needs of the Claimant and the Respondent be balanced?
- 1.6 Is there a chance that the Claimant's employment would have ended in any event? Should his compensation be reduced as a result?

Evidence

5. We had an agreed bundle of documents of 354 numbered pages, which we have read where referred to in the agreed reading list, witness statements and evidence at the hearing.

6. We had written statements from all witnesses and took them as read. For the Claimant we heard evidence from Nova Spreckley (ex-colleague) and the Claimant. For the Respondent we heard evidence from Dean Hall (Customer Services Team Leader), Abigail Ayre (Customer Operations Manager), and Christine Power (Head of Customer Strategy and Operations).

7. We had written legal summaries from both parties, written submissions from the Claimant's representatives, and oral submissions from both parties.

Facts

8. We have considered all of the evidence and submissions, and find the facts necessary to decide the issues in the case.

9. The Claimant started employment with the Respondent in February 2008. He was a Customer Information Guide, part of the Customer Services Department of the Respondent. His role involved responding to queries from the public on a range of topics, liaising with the appropriate department and escalating the enquiry as needed. He was front-facing, meaning he did this in person at the Respondent's offices, Wat Tyler House, and over the telephone. The Claimant worked as part of a team of up to 17 people.

10. The information guides dealt with a wide range of different Council services, and the Claimant was trained on all of them. These included some urgent and sensitive issues where customers might be angry or upset. For example: adult social care, where someone might be needing urgent help with personal care or equipment; financial hardship, where someone had no money and was unable to complete an application online; rent issues, where someone was unable to pay rent owed on a council property; and homelessness, where someone was imminently without a home. There would also be customers with complaints about matters such as waste collection, parking fines and noisy neighbours. During the Covid-19 pandemic the team also handled calls from vulnerable customers who needed help with issues such as collecting prescriptions.

11. We heard evidence from Mrs Spreckley about how this was a very busy job with a high volume of calls, and customers would often be waiting a long time in the telephone queue. She also said that a lot of the callers would be vulnerable and so unable to deal with things online, which is why they were calling instead – including as elderly or disabled people, or customers with learning difficulties. We heard evidence from the Respondent that, when busy, the team would handle around 1,000 calls a day. Each individual team member had a target of at least 40 calls a day. There was a telephone system called “Ignite” which put calls through to the team. In a team of only 17 people, the prolonged absence of one employee (particularly the experienced and fully trained Claimant) would increase the workload of colleagues, and mean that more customers would not have their calls dealt with effectively or at all.

12. On 16 March 2020 the Respondent closed Wat Tyler House due to the Covid-19 pandemic. Most staff worked from home. Four members of staff remained working at the office to deal with people who needed help in person, including the Claimant as he preferred not to work from home. Between 16 March 2020 and 26 April 2021, the Claimant was off work sick for a total of 22 days on 4 occasions, with a mixture of illnesses (gastroenteritis, chest pain and chest infection). In April 2021 the Claimant began to work from home, following a positive Covid-19 test of a colleague at Wat Tyler House which meant all on-site staff had to self-isolate. The Claimant decided he liked working from home after having done so for a brief period (having previously said he did not want to work from home), and so it was agreed he did not need to return to the office - although the other three employees did.

13. On 5 June 2020 the Claimant had a Covid-19 vaccination. He went off sick on 10 June for an extended period of 115 working days with symptoms of what was subsequently diagnosed as Epstein Barr Virus (“EBV”).

14. The Claimant had not previously been off sick for a long period while working for the Respondent. He had taken shorter periods of sick leave relatively often for a variety of reasons, some 104 days between 2014 and 2018, and a further 17 days in 2019 and January 2020 (taken from the Respondent’s management case at page 221 in the bundle). The Claimant’s line manager Miss Ayre gave evidence that he had reached the first stage of the sickness absence management procedure more than once.

15. The Claimant’s disability impact statement sets out the effects of EBV on him. He says that the effects are severe and ever present, but made worse by stress or when his immune system is particularly low, such as when he is tired. The symptoms cannot be controlled or cured by medication, and the greatest positive impact is by reducing stress wherever possible. He has a number of symptoms. A major symptom is extreme fatigue, which makes even basic tasks such as taking the bus or getting dressed exhausting. He says that this has a substantial effect on his ability to acquire or retain new information, and he was only able to do his job effectively because he had done that role for a number of years. He also has brain fog, which frequently prevents him from thinking clearly and makes concentration extremely difficult, particularly in relation to new information or tasks. As submitted by the Respondent, we accept that this may have (understandably) affected his ability to recall events accurately at the hearing.

16. We have seen the Respondent's sickness absence process. The process starts when an employee has four separate episodes of sickness and/or four weeks or more off sick in a 12-month period. This triggers stage 1, and a sickness meeting is held. A review period of between two and four months is set. If long term sickness continues, or another sickness episode has occurred during the review period, then a stage 2 sickness meeting is held. A further review period of between two and four months is set. The policy also gives an option of a review period of up to 12 months. If long term sickness continues, or another sickness episode has occurred during the review period, then a stage 3 sickness meeting is held (or another stage 2 meeting can also be held). During the stage 3 meeting, the possible outcomes are to extend timescales (for a maximum of another two months) for further monitoring, and/or for OH to provide recommendations to support improvement or dismissal. There is also the option of dismissal for capability and ill health retirement.

17. The Respondent's policy provides for ill health retirement where an employee is permanently unable to do their role. This can only be based on advice from occupational health, it is not a decision than can be taken by an employee's manager. The wording from the policy is:

"Occupational Health will advise that an employee is unable to undertake their local government employment on the grounds that their ill-health or infirmity of mind or body renders them:

- permanently incapable of discharging efficiently the duties of their current employment; and that they have a reduced likelihood of obtaining gainful employment (whether in local government or otherwise) before their normal retirement age;*
- or permanently incapable of discharging efficiently the duties of their current employment but may be able to obtain alternative gainful employment before normal retirement age;*
- or permanently incapable of discharging efficiently the duties of their current local authority employment but capable of gainful employment within three years of leaving that employment."*

18. The Claimant remained off sick until 8 December 2021, a total of 115 working days. The Respondent obtained Occupational Health ("OH") reports on 24 August (which said the Claimant was unfit for work) and 11 November (which said he would be fit for work when the most recent fit note expired). The Claimant's line manager at this time was Abigail Ayre. She held a stage 2 sickness management review meeting with the Claimant on 8 November, and a stage 2 phased return meeting on 16 November. The 11 November OH report recommended, *"I would advise management to continue to allow Mr Pugh to work from home if operationally feasible, due to the symptoms of fatigue"*. The Claimant returned to work from 8 December on a phased basis, working fully at home and returning to full hours by week five.

19. Between February and May 2022 the Claimant was off sick on three occasions for a total of 11 working days, once with gastroenteritis and twice with symptoms of EBV. He was awarded "employee of the month" in March 2022. In June, Miss

Ayre was promoted and Dean Hall became the Claimant's line manager. On 16 June he held a stage 1 sickness management meeting with the Claimant which set a three month review period. On 22 June the Claimant was off sick with EBV symptoms for a total of 24 working days. Miss Ayre then dealt with the Claimant's sickness absence as Mr Hall did not have previous experience. She held a stage 2 sickness management meeting with the Claimant on 21 July which set a four month review period. The Claimant returned to work on 27 July. Throughout this time, he had been working from home. He had therefore been working in accordance with OH advice, but had been unable to attend work consistently and had reached stage 2 of the sickness absence process.

20. In August 2022 the national lockdown restrictions were lifted, and the Respondent implemented a policy of working one day per week in the office. This included the Claimant. We have seen an exchange of messages on 12 August 2022 between the Claimant and Miss Ayre in which he says he is not strong enough to come into the office today. Miss Ayre thanks him for letting her know, says she will wait to get his OH report, and says *"but I do think you will need to come in once a week – will see what the report says"*.

21. The Respondent obtained a further OH report on 12 August 2022. This report confirms the Claimant's diagnosis with EBV. The symptoms included extreme fatigue. The report confirms that EBV can be inactive, but is reactivated by triggers, which can be stress and low immune system. It could reactivate at any time, and the condition is characterised by periods of flare up and remission. The report says the Claimant is fit for work. In answer to a question about adjustments to the role the report says, *"In my opinion, it would be easier if Mr Pugh is able to work from home, however, this is a management decision. He is concerned as previously it was mandatory to attend the office once a month, however, he tells me this has been increased to once a week. As he does not drive, this adds two hours to his day which he says will feel too tired and add to his stress. I am unable to indicate timescales due to flare up of Epstein Barr"*. The Claimant continued to work in the office one day a week. Miss Ayre said that he could be flexible about which day, and we have seen messages that show the Claimant was able to swap his day in the office if he was feeling unwell.

22. The Claimant was off sick for four days with EBV symptoms from 26 August. Ms Ayre held a stage 2 sickness management meeting with the Claimant on 20 September which set a further four month review period. The meeting confirmed that the outcome of the OH referral was that he was fit to work but the virus could flare up at any time when triggered by many different things. The confirmation letter says, *"You advised that you would prefer to work from home but we have agreed that you will come into work one day a week in the office. I advised it would be a good idea to have annual leave booked in when you have events coming up to ensure you have time to rest."* The Claimant's statement says he felt he really had no choice about this.

23. The Claimant was off sick with a sore throat from 7 November 2022 for five days. He returned to work between 14 and 16 November.

24. On 11 November, Christine Power met with the Respondent's director of customer services, and it was decided that all customer service front-line staff

would be required to return to full time office working. This was a board-level decision. As explained by Miss Power, this was to support the amount of customer demand they were receiving, and in particular to reduce the amount of technical phone issues.

25. We heard evidence from all witnesses about the extent of the technical problems caused by staff working from home. Miss Ayre explained the arrangements. The Respondent's telephone system is Microlab. This can be accessed through a desk phone connected directly to the Council's network, or a "softphone" which uses software on a laptop. The Ignite software manages calls and is a web-based system. Staff log into this system, and it connects with Microlab and the Council's voice recognition system (which gives a menu for customers to select from when they first dial in), and this allows customer calls to be put through to staff. When working from home, staff also need to use a VPN secure network connection, which is logged into separately. This is not needed for work in the office as the Council's network is secure. Communications within the team while working from home took place using Teams.

26. If Microlab is not working, the phones will not work. If Ignite is not working, no calls will be put through from customers. If the VPN is not working, Ignite will not work. Miss Ayre's evidence was that there were a lot of technical issues with the phone systems while staff were working from home during the Covid-19 pandemic. Although some were to do with individuals' home broadband, the main issue was the software itself, particularly the softphone system. She said that the issues were constant throughout this time, and they were constantly working with the external contractors and internal IT to try and resolve them. She was aware of two people trialing desk phones, but this did not solve all the problems as they needed to plug directly into the individual's router and still did not work well if the connection was unstable. It was also not possible to record or monitor calls when staff worked from home, making it more difficult to check and manage the service being provided to customers.

27. We have seen some example phone issue logs prepared by Miss Ayre. These relied on staff to report issues as they arose, so we accept they are not a complete picture of the extent of the problems. The logs show the types of problems. These include a call suddenly being cut, a call having no sound for the staff member, a loud buzzing noise or "robot" voice, and being unable to answer a call/Ignite freezing. All of these issues would prevent a call from being dealt with effectively. Mrs Spreckley explained that she had these problems at times, and as an experienced member of the team she would try to call the customer back immediately if she had their number, as otherwise they would go back to the start of the queue. We accept the Respondent's evidence that these technical issues were causing longer wait times for customers, complaints, and frustration for staff. Miss Ayre referred to this period of dealing with IT issues as "traumatic".

28. The Claimant's evidence in the hearing was that he could not recall having many technical problems when working from home, and he thought people had as many problems when in the office. He went so far as to say he had more problems in the office. His witness statement says that problems he experienced were infrequent and resolved quickly. He accepts in his witness statement that he did have some IT issues, based on records in the bundle of him reporting problems to

Miss Ayre, but says these were over a year or so. We note that Miss Ayre's evidence on the extent of the problems and effect on both customers and staff was very clear, and the Claimant's own witness Mrs Spreckley confirmed she had various IT problems when working at home. We prefer the Respondent's evidence that there were significant IT problems when working at home which did not happen in the office. We find that the Claimant does not have an accurate recollection of the problems caused by working from home.

29. On 11 November, Miss Ayre first spoke with the Claimant and his colleague Mrs Spreckley about returning to the office full time. On 15 November Miss Ayre verbally communicated this instruction to the customer services department. The Claimant had a 1-2-1 conversation with Miss Ayre when he said he could not return to the office five days a week due to his illness and he would have a breakdown. Miss Ayre arranged for him to meet with Miss Power to discuss his concerns.

30. On 16 November the Claimant met Miss Power. The Claimant says that he explained he believed a return to the office would make his chronic fatigue much worse, and it was likely it would cause his levels of sickness absence to increase. He says that Miss Power replied something to the effect that 'if you are not well enough to be in the office you should not be at work'. This was not challenged in cross-examination of the Claimant. Miss Power said in evidence that she could not recall exactly what she said, she thinks she did not say it this harshly, but she did say he should not be at work if he was not well enough. Her witness statement explains that he did not look at all well at this meeting and was not himself at all.

31. After this meeting the Claimant went off sick with symptoms of EBV on 16 November 2022 for a total of 67 working days. He obtained a GP fit note on 23 November which says, "*patient feels he cannot work in the office more than 1 day a week due to his condition*".

32. The Respondent obtained a further OH report on 6 December 2022. The report gives the clinical opinion that the Claimant is fit to return to work once his current fitness certificate expires. In response to the question on adjustments, the report says, "*I would recommend that Mr Pugh be able to work from home to allow him to manage his symptoms, if this is operationally feasible. He is concerned, as previously it was mandatory to attend the office once a month, however, he tells me this has been increased to five days a week. As he does not drive, this adds two hours to his day which he says he will feel too tired and add to his stress...I am unable to indicate timescales as to whether this is likely to be a temporary or permanent adjustment as I cannot advise on the frequency of him experiencing flare ups of his condition*".

33. There was a follow-up report on 20 January 2023 which answered some further questions from the Respondent. Unlike the other OH reports, this hadn't involved the Claimant. The OH adviser was asked whether the Claimant could work from the office on a full-time basis as this was now a requirement for the team, and gave the same recommendation as above that the Claimant be able to work from home.

34. On 8 February 2023 Miss Ayre held a stage 3 sickness absence management meeting with the Claimant, who was accompanied by his union representative. The

confirmation letter says, *"We also agreed that as a reasonable adjustment you will work in the office 3 days a week and at home 2 days a week, so you can manage your fatigue by working at home Mondays and Fridays. This will be recorded on the Reasonable Adjustments Form."* This set a further four month review period. Other adjustments included ensuring a cleaning regime was in place, a desk away from a crowded room, and weekly catch ups with Mr Hall to review how he was doing and whether additional support was needed.

35. The Claimant gave evidence that, before the meeting, his union representative had told him that he had been told two days a week at home was what management wanted and they would not go back from this decision. Miss Ayre and Miss Power both gave evidence that they had no knowledge of this. Miss Ayre gave very clear evidence that the suggestion of three days in the office and two days at home was brought to the meeting by the Claimant and his representative, it was not the Respondent's suggestion. We prefer the Respondent's evidence on this point. We accept the evidence of the Respondent's witnesses that they did not have a prior discussion with the Claimant's union representative, and that the suggestion of two days a week at home was made by the Claimant and his representative at the meeting. We do not know whether there was a discussion with the union representative that the witnesses were unaware of. However, we accept that Miss Ayre was open at this meeting to any suggestions about adjustments from the Claimant and she had not made a prior decision about how many days from home could be accommodated.

36. The Claimant returned to work on a phased return on 21 February 2023, returning to full hours by week five. As arranged, he worked from home on Mondays and Fridays. Miss Ayre completed a risk assessment with the Claimant on 22 February. The Claimant completed the section on control measures which says the new arrangement *"will be far less Stress for me"*, and Miss Ayre completed the action plan which says, *"Chris to report any concerns or issues with working arrangements and set up"*. The Claimant did have regular weekly meetings with Mr Hall rather than just monthly 1-2-1 meetings. Mr Hall's evidence is that the Claimant did not report any concerns or issues with his new working arrangements at any of these meetings, and this is consistent with the records of those meetings.

37. The Claimant was off sick with EBV symptoms on 28 February and 17 April. He was off sick again with EBV symptoms from 23 April for 10 days.

38. The Claimant provided evidence of the effect on him of working in the office. His statement says various things. He says he needed to get up at 5am due to his chronic fatigue in order to be in work for 8.50. He is unable to drive due to being blind in one eye, meaning he had to use public transport. His statement also says he was *"frightened of being around people and catching a virus"*, due to a compromised immune system. At the hearing he gave evidence that he found going to the office three days a week so exhausting that he could find it difficult to get up the stairs when he got home, and would sometimes lie down straight away and not wake up until 2am. He said that at home he could get into a routine and rest if he needed to.

39. We have considered the credibility of some of this evidence. We accept that

the Claimant needed to take public transport to work, and that he chose to get up at 5am. He confirmed during cross-examination that he liked to arrive at work early, so although we accept his EBV could make it difficult to do basic tasks, we do not accept that all of the early start was due to EBV. The Claimant did some work as a clairvoyant, which he continued to do during this time when he was well enough. This involved public meetings with 20 or more people, and also paid-for one-to-one meetings with individuals. We have also seen evidence from messages with Miss Ayre that he was going out to the theatre, meeting friends for dinner, and going on trips to London to see shows. There is no criticism of the Claimant for doing this – as he said, he needed to get out and have a life even though he had EBV. However, this does significantly undermine his position that he was frightened of being around people. We do accept that three days a week in the office would have been more tiring than working at home all the time because of his EBV.

40. The Claimant's absences triggered the sickness policy again and Ms Ayre held a further stage 3 sickness management review meeting with the Claimant on 17 May 2023. The Claimant was again accompanied by his union representative. It appears that there was no discussion at this meeting of the OH recommendation that the Claimant should work from home if operationally feasible. Miss Ayre says that the Claimant did not ask for this at the meeting, and this is reflected in the outcome letter which says *"You do not know what causes the virus to flare up and cannot think of any further adjustments that may help to improve your attendance at work"*.

41. On 18 May 2023 the Claimant was dismissed with payment in lieu of notice. The dismissal letter says, *"I confirmed in the Stage 3 Sickness Management Review Meeting that during the previous 12 months you have been absent from work for 125 days out of a possible 260 working days for that period. For the previous 12 months, you were absent from work for 130 days as well...In view of the medical advice received, the amount of sickness absence that you have taken, the update from you and Occupational Health on your on-going ill health symptoms and the impact of your continuing absence on the service, we advised you that we have come to the decision to formally bring your employment with Swindon Borough Council to an end."*

42. The Claimant appealed against his dismissal on 1 June 2023. We have seen his appeal and a management submission from Ms Ayre. The main ground of the appeal is that the Claimant would have been able to return to work and provide a reliable service if he had been permitted to work from home. The management case is that the Respondent had put in place the reasonable adjustment that was requested by the Claimant, and he had not asked to work from home five days a week.

43. Miss Power held an appeal meeting with the Claimant on 22 June 2023. The Claimant was again accompanied by his union representative. The appeal was dismissed. Miss Ayre's letter of 22 June 2023 says the following in relation to the Claimant's request to work five days a week from home: *"Having considered your request, I am unable to grant this and do not see this as a reasonable adjustment in light of the service we have to deliver. The office provides a better environment for the service we deliver especially in terms of communication and collaboration"*

and our call stats since colleagues have returned to the office demonstrate this with customer wait times being significantly improved. In addition, our telephone system has also been shown to be unreliable for full time home working. As such, I do not view working from home for 5 days a week as a reasonable adjustment. I should also remind you that we have agreed to your working from home for 3 days a week in the past as a reasonable adjustment but this did not contribute to a decrease in your sickness absence.” Miss Power mistakenly thought that the Claimant was working at home three rather than two days a week, as reflected in the outcome letter. She confirmed in evidence that she made this mistake as part of her thinking in deciding the appeal.

44. The letter went on to say, *“I note that you asked in your Stage 3 final sickness meeting on the 15th February 2023 if you could drop 1 day a week, working a 4 day week as a reasonable adjustment. However, at this time, though you were already working from home for 3 days a week and 2 days in the office as a reasonable adjustment, you continued to have high levels of sickness absence so it did not seem that this, as a reasonable adjustment, was helping in any way to reduce your sickness absence.”*

45. Miss Power’s witness statement provides some additional reasoning that was not in her outcome letter. She says that she was concerned the Claimant would not be able to perform the essential duties of his role wherever he was working, as pushing himself to work in an inevitably stressful role was having a detrimental impact on his symptoms, and this would be worse with the ongoing telephone problems when working from home. The Claimant’s failure to mention working at home five days a week previously, including in all the meetings with Miss Ayre and Mr Hall, strongly suggested that he did not see this as a solution to his ongoing symptoms. These issues/concerns were not discussed with the Claimant at the meeting, and Miss Power did not obtain any further advice from OH.

46. Contact Centre staff (including customer information guides) do now have the option of working from home four days a week. Miss Ayre explained the circumstances in her witness statement and oral evidence. This began in January 2025, because overall service levels were consistently high, and the previous telephone issues when working from home had mostly been resolved, including the ability to record calls. Staff can choose to work from home up to four days a week, but have to attend the office on a Tuesday. If they have IT issues when working from home, they are then expected to come into the office that day. This is a trial and will be reviewed.

Applicable law

47. Under section 15(1) of the Equality Act 2010, discrimination arising from disability is defined as follows:

- (1) A person (A) discriminates against a disabled person (B) if—
 - (a) A treats B unfavourably because of something arising in consequence of B’s disability, and
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

48. The legal issue for the Tribunal to decide in this case is whether the Claimant's treatment was a proportionate means of achieving a legitimate aim, and in particular the proportionality issue.

49. The Tribunal needs to assess whether the specific unfavourable treatment that was applied to the employee was proportionate, rather than whether an employer's policy as a whole (such as an absence management policy) was proportionate (**Buchanan v Commissioner of Police of the Metropolis** [2016] IRLR 918).

50. HHJ Auerbach considered justification in the context of discrimination because of something arising in consequence of disability in **Stott v Ralli Ltd** [2022] IRLR 148 (paragraphs 78 to 80). Formulation of the defence is identical to the defence to a complaint of indirect discrimination under section 19 of the Equality Act, and so draws on those authorities. The test "*is an objective one for the appreciation of the Tribunal and not a 'band of reasonable responses' test*", and involves weighing the employer's justification against the discriminatory impact – whether the means correspond to a real need of the undertaking, are appropriate with a view to achieving the aim in question, and are necessary to that end. The employer does not need to show this was the only course open to it to achieve its aims, the test is what was "reasonably" necessary as judged by the Tribunal.

51. This is an objective balancing exercise between the discriminatory effect of the treatment and the reasonable needs of the employer, and "*the more serious the impact, the more cogent must be the justification for it*" (**Department for Work and Pensions v Boyers** [2022] EAT 76), paragraph 22).

52. A failure to make reasonable adjustments is to be considered as part of the proportionality analysis (**Griffiths v Secretary of State for Work and Pensions** [2015] EWCA Civ 1265). This is the case even where a claim for reasonable adjustments itself is out of time, as considered in the recent authority of **South Gloucestershire Council v Hundal** [2024] EAT 140 in the context of termination of a placement due to disability related absences:

*"If an Employment Tribunal has found that, at the time of the asserted discriminatory treatment, the employer failed to make a reasonable adjustment, justification generally cannot be made out. If a failure to make a reasonable adjustment has been asserted and the complaint has failed, the failure to make the specific adjustment is highly unlikely to be relevant to the analysis of justification. However, it does not follow that a complaint of failure to make reasonable adjustments must have been made out for the possibility of an adjustment to be relevant to the assessment of justification. A claim of failure to make reasonable adjustments might be out of time, but the possibility of the adjustment being made might still be relevant to justification. An adjustment that would only be available in the future, that would reduce the likelihood of further absences, could be relevant to justification. HHJ Auerbach [in **Stott**] did not hold that the possibility of an adjustment could only be considered if there has been a successful claim of failure to make reasonable adjustments, but that "the question of alternatives to the measures adopted is to be approached by reference to the principles deriving from the general authorities". In other words, the possibility of steps to assist the claimant improve her attendance is relevant to the question of whether the respondent*

has established that the termination of the claimant's engagement was a proportionate, in the sense of being appropriate and reasonably necessary, means of achieving the asserted legitimate aim; the efficient management of the service." (paragraph 26).

53. Compensation for discrimination is based on the loss caused to the claimant, assessed in the same way as any other claim in tort. This means that, where an employee has been dismissed for a discriminatory reason, the Tribunal must consider the likelihood that they would have been dismissed in a non-discriminatory way. The Tribunal should assess the chance of the employee being dismissed and make a percentage reduction to loss of earnings compensation accordingly (**Abbey National Plc v Chagger**, [2009] EWCA Civ 1202, paragraphs 57 to 60).

Conclusions

54. ***Was the treatment a proportionate means of achieving a legitimate aim?***

The Respondent says that its aims were:

- a. To manage individual employee absence (for application of the Policy only);
- b. To have employees undertake the work they are employed to do;
- c. To encourage good attendance in the Respondent's workforce;
- d. To manage team attendance, thereby supporting other members of the team whose workload increases when a colleague is absent; and
- e. To improve and maintain customer service by having a fully-staffed customer service team.

55. The Claimant does not challenge the aims put forward by the Respondent, and we find that these aims are all legitimate ones related to application of the absence management policy and the ultimate dismissal of the Claimant.

56. The Claimant says that the treatment was not a proportionate way of achieving these aims. The Respondent's amended Grounds of Resistance rely on the following points to show proportionality:

- a. The policy operates using absence triggers, and is applied in stages. At each stage, the policy was applied proportionately to the Claimant taking into account the length of current absence, the frequency of absences, symptoms, prognosis, and all other relevant matters.

We accept that the Respondent followed its usual sickness absence policy, and this included keeping the Claimant at stage 3 more than once rather than moving straight to dismissal, in order to allow further time to obtain OH reports and consider adjustments. The Respondent followed the triggers in the policy at all times. We find that it was applied proportionately to the Claimant, particularly taking into account the length and number of sickness absences.

- b. The Claimant had a high sickness record throughout his entire time working for the Respondent, long before his disability began.

As set out in paragraph 14, the Claimant did consistently have significant sickness absences before he was diagnosed with EBV (104 days between 2014 and 2018, a further 17 days to January 2020, and a further 22 days to April 2021). Under the Respondent's policy, this did not reach the point where dismissal would be considered. However, this is relevant to our assessment of whether working from home five days a week would have significantly improved the Claimant's sickness absences.

- c. At various stages of the application of the policy, occupational health reports were obtained; in total, the Respondent obtained 4 occupational health reports, none of which identified significant improvements in the Claimant's very serious and chronic condition.

The Respondent did obtain four OH reports in total (plus a follow-up report in January 2023). All except one said he was fit to return to work. It is correct that none of the OH reports identified significant improvements in the Claimant's condition, or suggested that it would improve – EBV has no treatment and is characterised by recurring flare ups. We do note that the majority of the reports recommended working from home as an adjustment.

- d. Repeated and serious attempts were made by the Respondent to resolve the IT problems which the Claimant (in common with other employees) found they had, in using the Respondent's telephone system from home. The Respondent found (after time-consuming, resource-heavy IT investigations) that the only way to provide its customers with a reliable telephone service was for its employees to work at the Respondent's office.

Based on our factual findings, we accept that there were significant IT problems when all employees including the Claimant worked from home, and the Respondent was constantly attempting to resolve these problems. This was frustrating for both customers and staff, and generated complaints due to the problems with the telephone service.

- e. In light of those assessments and investigations, there was no IT or telephony technology that would have enabled the Claimant to provide consistent customer service, while playing a full part in his team of colleagues, while he was working full time from home.

Based on our factual findings, we accept that the Claimant would have been impacted by the IT problems along with others in the team. These problems persisted throughout the Claimant's employment. Although staff are now permitted to work from home up to four days a week, we accept the Respondent's evidence that this is a recent development as the IT/telephone issues have now mainly been resolved. The Respondent provided no evidence of specific problems experienced by the Claimant when he worked at home which affected customer service, but we note that it was not possible to record or monitor calls at home during this time.

- f. Overall in the teams working for the Respondent, morale was low amongst individuals when they worked from home, whereas morale in each team as a whole, and for individuals within each team, significantly increased once all individuals in the team returned to working in the office.

We did not hear much evidence on this from the Respondent, and do not accept that it was a significant factor. All staff can now work from home four days a week, which indicates that any issues with morale are limited and can be addressed by one day a week in the office.

- g. Even if the Claimant's ability to provide a reliable telephone customer service was only sometimes compromised while he was working from home, each of those occasions would be a frustrating, low quality and unacceptable customer service experience for a council tax-paying user of the Respondent's services, and therefore an important customer service failure by the Respondent.

We accept that even intermittent telephone issues are a significant problem for the Respondent, particularly in light of the elderly and vulnerable customers that tended to telephone rather than using online services, and the urgency of some issues such as adult social care and homelessness. Even a few calls a day which experienced IT problems would be an important customer service failure – especially where lines were so busy and someone who was cut off would potentially face another long wait in a queue. Although the Respondent does now allow staff to work from home, this is only because the IT instability problems have largely been resolved.

- h. The Claimant's own performance in the provision of customer service was measurably better, when he was working in the office rather than from his home.

The Respondent has no statistics to show this and did not, in fact, measure the Claimant's individual performance when working at home compared to working in the office. The Respondent sought to amend this to "measurable" in closing submissions. We agree that the Claimant's performance was not measurable in the same way when he worked from home. In the office it was possible to monitor calls, and managers would be more aware of IT issues such as calls being cut off as they were in the office with the team.

- i. Despite its concerns, the Respondent did agree to the Claimant working from home 2 days a week.

The Respondent did do this. It is not what OH had recommended, which was five days a week at home. However, we have found that this is what the Claimant himself and his union representative asked for at the meeting on 8 February 2023.

- j. The impact on the Claimant's own performance and/or on his own morale and/or on customer service more generally, would have been too great if

he had worked from home full time, with no regular office attendance.

We are satisfied that working from home had an impact on customer service due to the IT issues. It is not clear from the evidence that this had an impact on the Claimant's own performance (apart from issues caused by the IT problems), or on his morale.

- k. There were no suitable roles into which the Claimant could have been redeployed.

We had no evidence from the parties on whether any other suitable roles were available for redeployment. This was not considered by the Respondent before they dismissed the Claimant. However, we have taken into account the impact of EBV on the Claimant. As set out in his impact statement, his fatigue has a substantial effect on his ability to acquire or retain new information, and he says that he was only able to do his job effectively because he had done that role for a number of years. He also has brain fog which prevents him from thinking clearly and makes concentration extremely difficult, particularly in relation to new information or tasks. This evidence indicates that the Claimant would have found it extremely difficult to move successfully to a new role.

- l. Whatever assistance might reasonably have been provided to the Claimant, his chronic, ongoing and very serious symptoms, including his chronic fatigue, meant that he could not give consistent or effective service (relevant to dismissal only).

The Claimant's serious symptoms caused him to be off sick for significant periods of time after he contracted EBV – a total of 255 days in two years. He was not able to provide a consistent or effective service to the Respondent, as he was off sick so much. We consider below whether any assistance provided to the Claimant might have changed this and avoided his dismissal.

57. Was the treatment an appropriate and reasonably necessary way to achieve those aims? We are satisfied that the treatment of the Claimant (application of the absence management policy and dismissal) corresponded to a real need of the Respondent. The legitimate aims relied on are based on employees attending work and doing the work they are employed to do, in order to support other members of the team and customer service. The Claimant worked in a small and very busy team of 17 people, and the absence of just one member of staff would have an impact on the team and its workload. The customers were often elderly or vulnerable, and calls covered sensitive and urgent issues. Application of the absence management policy to the Claimant was an appropriate way to try and improve his sickness absences and ensure consistent attendance, which included obtaining OH advice. Dismissal after following this policy was an appropriate way to support both the team and customer service, on the basis that ongoing levels of absence were so high that they could not be sustained any further.

58. Was this treatment reasonably necessary? This requires the Tribunal to

consider proportionality. This is an objective question for the Tribunal, looking at the outcome of the process rather than the process/procedure followed by the employer. As set out in the list of issues, we have looked at - ***Could something less discriminatory have been done instead, and how should the needs of the Claimant and the Respondent be balanced?*** We have considered these points together.

59. On one side of the balance, we have an employee who has been taken through an absence management process and dismissed. This is because of sickness absence caused by a disability. The Claimant has lost his job for a reason that is not his fault, and this is a very significant disadvantage. On the other side of the balance, we have a Respondent who is running a busy and important council telephone service for members of the public, with many users who are elderly, disabled, homeless or vulnerable. This is a critical public service that needs to be provided as effectively as possible. It is run by a small team, and very high levels of sickness absence affecting an experienced member of the team has a major impact on the rest of the team as well as the effectiveness of the service. The Respondent cannot retain indefinitely an employee who is absent from work so often.

60. The key issue in this case is whether there is anything the Respondent could have done to improve the Claimant's sickness absence so that his continued employment would be sustainable. The Claimant says that this would have been achieved if he had been permitted to work from home five days a week as a reasonable adjustment. The Claimant's submissions also suggest that the Respondent should have arranged a trial period. The Respondent says that it would not have made a difference.

61. We have considered this issue very carefully. This issue is critical to whether the Respondent acted proportionately. In accordance with the caselaw, if the Respondent has failed to make a reasonable adjustment that would have assisted the Claimant to improve his attendance, it is unlikely to be able to justify discriminatory treatment (even though the reasonable adjustments claim itself is out of time). An adjustment will only be reasonable if it will actually alleviate the disadvantage in question, but there only needs to be a chance that it will succeed (see ***Griffiths*** cited above).

62. In this case, there were a number of OH reports which recommended the adjustment of working from home five days a week. The Respondent did not make this adjustment when the Claimant was first asked to come back to the office one day a week, when he was asked to attend the office full time along with all other staff, or when the adjustment of two days a week at home was agreed. As the Claimant submits, it is for the employer to make the adjustment, not for the employee to ask for it. If there was a chance that this adjustment would have improved the Claimant's attendance sufficiently that any absences caused by EBV were sustainable, the Claimant's dismissal would not be proportionate. The Claimant would win his discrimination claim, and the chance that he would still have been dismissed in any event would be reflected in a reduction to compensation for loss of earnings.

63. However, if this adjustment would not have made a difference and alleviated

the disadvantage, we consider that the Respondent will have acted proportionately even if they failed to try that step. This is not a claim for unfair dismissal, where a failure to take required procedural steps will make a dismissal unfair even if those steps would have made no difference to the outcome.

64. Our finding on the balance of probabilities is that the adjustment of working from home five days a week would not have alleviated the disadvantage. We find that working from home might have improved the Claimant's symptoms slightly, as he would generally be less tired. However, the evidence indicates that he would still have had very high levels of sickness absence. Any improvement would be from a very low base. The Claimant did not have a good sickness record even before contracting EBV. His EBV is an ongoing condition that is characterised by regular unpredictable flare ups, often triggered by stress or a low immune system. The Claimant would still have been subject to stress (whether from work or personal matters) if he worked from home, and still vulnerable to catching infections if he left the house for social reasons or for clairvoyancy work.

65. We have also looked at the evidence of what happened when the Claimant was working from home all the time between February and July 2022. He was off sick for 35 working days, which is almost 30% of the time he was due to be at work. He was asked what had caused these EBV flare ups and was unable to give any examples. This is direct evidence that working from home full time had been tried and did not help the Claimant to attend work consistently.

66. The Claimant submitted there was a chance that, if the adjustment to work from home was made, he would have improved his level of absence sufficiently to avoid the later stages of the absence management process - for example by reaching stage 1 but then completing a successful review period which would reverse the process. We have considered this argument, but we do not agree. Based on the evidence, our assessment is that the Claimant would have continued to have such high levels of sickness absence that he would keep triggering the stages in the absence process and again reach the point of dismissal.

67. We therefore find that the Respondent's failure to implement the OH recommendations that the Claimant should work from home does not prevent the Respondent from showing that his dismissal was proportionate. It would not be proportionate to expect the Respondent to have tried an adjustment that would not work - particularly where the adjustment of working from home also involved unreliable customer service due to the IT/telephone problems at the time.

68. The Claimant submitted that the Tribunal can weigh in the balance the procedure by which the outcome was achieved, with reference to **DWP V Boyers** (cited above). The argument is that it will be more difficult for a respondent to show that it acted proportionately in the absence of evidence that other less discriminatory alternatives to dismissal were considered. We do find that it was somewhat surprising that consistent OH recommendations about a particular adjustment were not considered or discussed with the Claimant at any point during his sickness absence meetings. We do not consider that this was good practice. The Respondent obtained regular OH advice, but did not seem to act on these recommendations. However, in this case, our findings mean that the Respondent's treatment of the Claimant was nevertheless justified. This adjustment would not

have changed the situation, and instead would have disadvantaged the Respondent due to the IT problems with working at home.

69. The Claimant raised two further options that the Respondent should have considered. Firstly, the possibility of ill health retirement. We do not agree that this is an option that the Respondent could or should have considered. Apart from the very first OH report when the Claimant was first unwell with EBV, the OH reports all said that the Claimant was fit for work. Ill health retirement requires an OH opinion that the employee is permanently incapable of discharging their duties. The Claimant was intermittently absent, but he was capable of working when he was well enough. This was not an option that would have avoided dismissal.

70. Secondly, the possibility of redeployment. The Claimant submits that this was not considered, despite being in the Respondent's policy. We heard no evidence from the Respondent that this was considered. However, as discussed above at paragraph 57(k), we find that this was not an option that the Respondent needed to consider in order to act proportionately because the Claimant's symptoms meant that he could not realistically move successfully to a new role. It was not a viable option for the Claimant.

71. We therefore find that the application of the absence management policy to the Claimant and his dismissal were a proportionate means of achieving a legitimate aim. Although the Claimant suffered the significant disadvantage of losing his job, this was justified in all the circumstances due to his very high levels of sickness absence, the effect on the Respondent's ability to run its important public service, and the absence of any adjustments that would have improved the situation. There was no lesser measure that would have achieved the Respondent's legitimate aims, and these aims outweigh the discriminatory effect of the treatment in this case.

72. We have no doubt that the Claimant was, and continues to be, unwell with a very unpleasant virus. We have every sympathy for him and the fact he was dismissed for something that was not his fault. However, our findings mean that his treatment was not disability discrimination.

73. The unfavourable treatment of the Claimant was justified and his claim for discrimination arising from disability does not succeed. This means that the remedy hearing that was provisionally listed will no longer go ahead.

Employment Judge Oliver
Date 23 April 2025

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON
07 May 2025 By Mr J McCormick

FOR THE TRIBUNAL OFFICE