EMPLOYMENT TRIBUNALS

Claimant: Mr L Jurczykowski

Respondent: Amazon UK Services Limited

Heard at: Watford **On:** 2 – 5 September 2024, 26 -28 February 2025

Before: Employment Judge Cowen
Mr S Bury
Ms M Harris

Appearances
For the claimant: Mr Jurczykowski (in person) with a Polish Interpreter
For the respondent: Mr Sangha (counsel)

RESERVED JUDGMENT

1. The claim for unfair dismissal was issued out of time and the Tribunal has no jurisdiction to hear the claim.

2. The Claimant's claims for discrimination arising from a disability
   a. UT5: First Letter of Concern (19.08.2020)
   b. UT15: issuing final Letter of Concern under the absence procedure (12.10.2021)
   are successful.

3. All of the Claimant's other discrimination and victimisation claims are dismissed.

4. A remedy hearing for the claims listed at 2 above, will be heard on **30 May 2025,** as previously listed.

REASONS

Introduction

1. This Judgment comes with the sincere apology of the Tribunal for the delay in providing the outcome of the hearing. Due to unforeseen circumstances it was not possible to complete the writing of this judgment more promptly.

2. This case was listed for 7 days, unfortunately, due to the illness of a panel member and the Claimant's hospital appointment, we were unable to sit for all the days. This resulted in a further listing in February 2025, where the case was completed.

3. At the start of the hearing, a Polish interpreter was not available and therefore there was a delay in commencing the discussion of a list of issues for use during the hearing. Once the list had been finalised, the evidence was heard by the Tribunal.

4. A joint bundle of documents was provided and witness statements were received from the Claimant and from the Respondent's witnesses, Juliet Bury, Sandy Williamson, Tony Harris, Adriana Verholeac- Genes and Courtney Evans, all of whom attended and gave live evidence to the Tribunal.

5. Closing submissions, including written submissions were provided by both parties.

List of Issues

6. The list of issues agreed by the parties and considered by the Tribunal was as follows:

DISABILITY DISCRIMINATION

DISABILITY

1. Did the C have a disability as defined in section 6 of the Equality Act 2010?
2. The C is a disabled person by reason of:
    a. Scoliosis from September 2018
    b. degenerative changes of L4/L5 and L5/S1 vertebrae from September 2018
    c. chronic back pain from September 2018
    d. and the condition of discopathy from September 2018
    e. Sciatica from 01.03.2019 (the C says this was diagnosed in an OH report on 17.12.2017 and an AXA report on 07.09.2018)
    f. Spondylolisthesis from 01.03.2019 (the C says this was diagnosed in an AXA report on 07.09.2018) and
    g. Hypertension from November 2019.

FAILURE TO MAKE REASONABLE ADJUSTMENTS (ss.20-21 EqA 2010)

3. Did the R know or could it reasonably have been expected to know that the C had the disability? From what date?
4. A "PCP" is a provision, criterion or practice. Did the R have the following PCP: the requirement to work.
5. Did the PCPs put the C at a substantial disadvantage compared to someone without the C's disability?
6. Did the R know or could it reasonably have been expected to know that the C was likely to be placed at the disadvantage?
7. Did the R fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage?
8. The C says that the following adjustments to the PCP would have been reasonable:
    a. Redeployed to a different department;

b. Working for reduced hours;
c. Provision of a chair;
d. varying work between different departments;
e. reducing heavy lifting to maximum of 5kg;
f. not having to stand up for more than 5 hours at a time; and
g. not having target figures to meet.

DISCRIMINATION ARISING FROM DISABILITY (s.15 EqA 2010)

9. Did the R know or could it reasonably have been expected to know that the C had the disability? From what date?
10. If so, did the R treat the claimant unfavourably in any of the following alleged respects:
    a. UT1: The manager Martin Ogiogwa contacting C by telephone asking him when the C was returning to work (Apr to May 2020);
    b. UT2: letter (09.06.2020) from R to C re: inviting to Informal Health Review meeting;
    c. UT3: initiating formal absence procedure (07.08.2020) by inviting C to Formal Health Review meeting;
    d. UT4: Issuing a warning under the absence procedure (18.08.2020);
    e. UT5: First Letter of Concern (19.08.2020)
    f. UT6: Appeal Hearing against issuing of First Letter of Concern (13.10.2020);
    g. UT7: Outcome of Appeal Hearing (26.10.2020)
    h. UT8: e-mail exchange, pressure regarding review meeting (02-23.12.2020);
    i. UT9: Second formal Health Review meeting (06.01.2021)
    j. UT10: issuing second Letter of Concern (13.01.2021)
    k. UT11: issuing meeting notes from 3rd formal health review meeting (29.03.2021);
    l. UT12: Issuing a 3rd letter of concern (29.03.2021)
    m. UT13: 3rd formal health review meeting notes (30.08.2021)
    n. UT14: 3rd formal health review meeting (reconvened) (27.09.2021)
    o. UT15: issuing final Letter of Concern under the absence procedure (12.10.2021)
    p. UT16: invite (11.05.2022) to 3rd and final Formal Health Review meeting
    q. UT17: R's reply to grievance (18.05.2022)
    r. UT18: invite (18.05.2022) to 3rd and final Formal Health Review meeting
    s. UT19 Invite (26.07.2022) to 3rd and Final Formal Health Review Meeting
    t. UT20: invite (01.08.2022) to 3rd and Final Formal Health Review Meeting
    u. and
    v. UT21: Dismissal on 27.09.2022.

11. Did the C's sickness absence from 17.02.2020 arise in consequence of the C's disability?
12. Has the C proven facts from which the ET could conclude that the unfavourable treatment was because of the C's sickness absence from 17.02.2020?
13. If so, can the R show that there was no unfavourable treatment because of something arising in consequence of disability?
14. If not, was the treatment a proportionate means of achieving a legitimate aim?

15. The R's aims include: reducing employee absence, supporting an employee's return to work, maintaining stability of the workforce and ensuring consistent business delivery (see para 4.3(c) Amended Grounds of Resistance [230]).

VICTIMISATION

16. The Protected Act asserted is: commencing these ET proceedings on 15.02.2022.
17. The Detriment asserted is: dismissal on 27.09.2022.
18. Did the R dismiss the C on 27.09.2022 because of the fact that he commenced ET proceedings on 15.02.2022?

TIME-LIMIT/JURISDICTION (in respect of dismissal allegations – s.15 EA 2010 and s.27 EA 201)

19. Are the C's dismissal allegations under s.15 EA 2010 and s.27 EA 2010 in time such that the ET has jurisdiction to consider it? This will involve considering:
20. Was the claim presented within three months of the acts complained of in accordance with section 123(1) EA 2010 (taking into account the EC period)?
21. If the act took place more than three months less one day of the date on which the claim was presented to the Tribunal, does it form part of conduct extending over a period within the meaning of section 123(3) EA 2010?
22. If the ET finds that any act complained of was not part of conduct extending over a period (and was brought outside the primary limitation period), is it just and equitable for the ET to exercise its discretion and extend the time limit for submission of those claims, in accordance with section 123(1)(b) EA 2010?

UNFAIR DISMISSAL

Time-limit/Jurisdiction

23. Was the claim for unfair dismissal made within the time limit in s. 111 ERA 1996?
24. If not, was it reasonably practicable for the claim to be made to the ET within the time limit?
25. If it was not reasonably practicable for the claim to be made to the ET within the time limit, was it made within a reasonable period?

Substantive decision to dismiss

26. Was the C dismissed for a potentially fair reason pursuant to section 98(2)(a) of the Employment Rights Act 1996 (ERA), namely capability?
27. If the reason was capability, did the R act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the C?
28. The ET will usually decide, in particular, whether:
    a. The R adequately consulted the C;

b. The R carried out a reasonable investigation, including finding out about the up-to-date medical position;
c. The R could reasonably be expected to wait longer before dismissing the C;
d. Dismissal was within the range of reasonable responses.

29. Did the R follow a fair procedure when dismissing the C?
30. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the C would still have been dismissed had a fair and reasonable procedure been followed/have been dismissed in time anyway?

The Facts

7. Having considered all the evidence, we found the following facts on a balance of probabilities.

8. The parties will note that not all the matters that they told us about are recorded in our findings of fact. That is because we limited them to points that were relevant to the legal issues

9. The Claimant was employed by the Respondent as a Fulfilment Centre Associate between 25 July 2016 and 27 September 2022. The Claimant commenced sickness absence on 17 February 2020 until the end of his employment.

10. The Claimant worked in 'stowing', which involved stocking the shelves in the warehouse with items, that were then picked by other staff to complete orders for customers.The Claimant worked 10 hour shifts, which was altered to involve 5 hours of stowing items on shelves and 5 hours of moving trolleys from the lifts to the positions in the warehouse for others to complete the stowing tasks.

11. The Claimant first experienced problems with his back in 2017. On examination in Poland, it was discovered that the Claimant had a dislocated vertebrae in his spine. Upon his return to the UK he told his manager, David Miller about his back pain and was seen by an Occupational Health nurse. At a subsequent meeting on 20 November 2017 it was agreed that the Claimant's work would be split into 5 hours of stowing and 5 hours of trolley-pushing.

12. The Claimant was a member of the Respondent's AXA private healthcare policy for a period, which entitled him to private appointments to assist with any injury/illness. However, the policy lapsed and the Claimant did not renew and was therefore no longer entitled to receive these services.

13. In approximately 2019 the Claimant was suspended for approximately 9 months due to a disciplinary issue. The Claimant felt that from that time forward the Respondent was looking for a reason to dismiss him.

14. At the point where he was reinstated to work, the Claimant took 6 weeks of paternity leave, followed by his accrued annual leave, which he would have

lost if he had not taken it. Shortly after this the Claimant became unwell and experienced panic attacks and suffered from high blood pressure. He became so unwell that he could not walk far and was very incapacitated. His absence from work started on 17 February 2020.He received GP certificates at regular intervals which all referred to back pain. Some also referred to hypertension.

15. In May 2020 the Claimant's manager, Martin Ogiogwa sent the Claimant messages to encourage him to return to work and to keep in touch. He telephoned the Claimant once in April and once in May 2020 to try to maintain contact. The Claimant saw these as pressure and felt stressed as a result. He made a complaint that Mr Ogiogwa was harassing him by sending 'continuous text messages'. As a consequence of this complaint, Mr Ogiogwa stopped contacting the Claimant.

16. A letter was sent on 9 June 2020 inviting the Claimant to the start of the informal Health Review Process. The meeting was convened on 17 June 2020 by telephone. The Claimant once again saw this as oppressive and described a 'deluge of invitations to formal meetings'. This was the first such invitation.

17. At the meeting the Claimant told Mr Ogiogwa that he had slipped discs and that he required another MRI scan, which, due to the Covid 19 pandemic, was to take place at Harpenden hospital. Mr Ogiogwa asked the Claimant to keep them updated about his progress and his scan. When asked by the Claimant if they could help to speed up the process of obtaining an MRI, Mr Ogiogwa said that the company were not able to assist. Mr Ogiogwa also encouraged the Claimant to re-register with AXA. This was raised again at the meeting on 30 August 2021 where the Claimant was recommended to contact AXA.

18. Following a first formal meeting on 18 August 2020, the Respondent sent the Claimant a 'First Letter of Concern'. This was an outcome letter from a formal health review meeting. The letter was received by the Claimant and understood as a sanction/punishment. The wording of the letter said "This Letter of Concern will remain 'current' for a period of 6 months from 19/8/2020 and will then be disregarded for the purposes of any future Health Review Meetings and Letters of Concern". The reason for the letter was because Mr Ogiogwa considered that there had "not been enough ownership on your behalf in booking an MRI scan and getting a diagnosis for your back pain. The reason for my decision is also due to length of absence and unclear treatment plan". The letter continued " I understand that during this current pandemic that it may have been hard to obtain an appointment for your MRI scan but we have provided you with reasonable time to schedule an appointment". The letter indicated that that the Claimant was not eligible to transfer during the first 3 months of this letter and the Claimant could not apply for any promotion during the 6 months of this letter.

19. The Claimant appealed the first Letter of Concern and presented his point of view. Tony Harris who heard the appeal concluded that Mr Ogiogwa had ' badly worded' the letter and apologised for the upset this caused, but still upheld the Letter of Concern. The appeal outcome referred to it as a disciplinary meeting on 19 August 2020.

20. At the end of November 2020 Ms Tinsley an HR Manager, emailed the Claimant asking for contact with him. She received a reply from the Claimant's partner on 2 December 2020 indicating that she would reply by email to the Respondent, on behalf of the Claimant. The Claimant's physical and mental health was not good at this time as he had "completely switched off" and didn't think he would ever "come out of it". He described himself as a "bundle of nerves". There was no request that the Claimant not be contacted at all.

21. On 16 December 2020 the Claimant was sent an email inviting him to participate in a second Health Review meeting by way of answering questions in writing. The Claimant objected to questions being asked by Mr Ogiogwa at this time and therefore the handling of the Claimant's absence was passed to Ms Evans.

22. A meeting was held on 6 January 2021 but the Claimant did not attend. Ms Evans considered the Claimant's answers to the questions. As a result of this meeting a second Letter of Concern was sent to the Claimant. The letter dated 13 January 2021 said that a second concern was issued due to " the length of you absence and uncertainty around your likely return to work date as per shared in the meeting". It noted that the Claimant told Ms Evans that he was in regular contact with his GP and that " no treatment plan (is) set". The letter also referenced an MRI appointment on 28 January 2021. It concluded by saying that the letter will remain 'current' for 9 months from 6/1/2021.

23. On 1 March 2021 the Claimant did not return the form to enable an income protection claim to be made on his behalf. The Claimant said that he did not want to claim this as he was receiving universal credit and disability benefit and was worried that he may lose these benefits.

24. On 29 March 2021 there was a third Health Review meeting at which Ms Evans reviewed the Claimant's responses to her written questions. In response to the request for medical information, the Claimant indicated that the Respondent should contact his GP and gave authority to do so. The Claimant also said that he had been diagnosed with "degenerative lesions on the anterior and posterior edges of the vertebral body towards the front at levels L5/S1 and frontal spondylolisthesis". The Claimant was unable to give a date for his return to work.

25. Following on from this meeting, the Respondent referred the Claimant to Occupational Health once again and asked for authority to contact his GP. The Claimant had become suspicious and concerned about the Respondent's request to contact his GP so suggested that OH should make the request of him. The Respondent replied that this was not possible. This was the start of a decline in the relationship between the parties, where trust and respect were eroded.

26. The resultant Occupational Health letter of Dr Khan stated that the Claimant had not responded to physiotherapy and that there did not seem to be any likely surgical solution. He therefore could give no opinion on when the Claimant might be fit to return to work.

27. On 12 October 2021, the Respondent sent the Claimant a Final Letter of

Concern after a meeting on 27 September 2021. In this meeting the Claimant told Mr Unaaegbu, Operations Manager that he had an MRI scan and the results of it. He stated that he had a 16 week treatment plan. It was stated that the Claimant could not give a date by which he could return to work. The letter said that if he could return to work after the current period of sickness, the Letter of Concern would remain for 12 months from 27/9/2021.The letter concluded by saying that the Claimant was not eligible to transfer during the first 3 months of this letter, nor could he apply for any promotion during the 12 months of this letter. The Claimant understood this to be a penalty/sanction for being absent and considered it to be a disciplinary measure and viewed it as making his life more difficult.

28. On 11 May 2022 Mr Unaegbu wrote again to the Claimant saying that they had not received any response from a request for GP records. It also stated that having requested a further authority from the Claimant in April 20222, they had received no response. The Claimant was therefore invited to a Final Formal Health Review Meeting on 18 May 2022. The letter contained the warning that the Claimant's employment may be terminated.

29. On 15 May 2022 the Claimant raised a grievance about the way in which he had been treated, citing the constant pressure to meet which he had felt as harassment. He also referred to his claim in the Tribunal. The letter indicated a return to work date of 11 July 2022, but then said that the ultimate date of return would be dependent on his physiotherapy which was ongoing.

30. The Claimant was then invited to a Final Formal Health Review meeting on 23 May 2022 and was told that transport would be provided for him.

31. On 23 May 2022 an HR partner indicated that they would raise a further OH referral and reminded the Claimant to sign up with AXA.

32. On 27 May Mr Unaegbu indicated that the Claimant's grievance would be addressed at the Final Health Review meeting, The letter also said that the Claimant's suggested adjustments would be considered at the meeting, in line with the medical evidence, particularly the OH report.

33. A further OH report was complied on 9 June 2022 which was not disclosed to the Respondent. The Claimant exercised his right not to disclose this to them. However, this left the Respondent without the most up to date information. This report stated that the Claimant would be fit to return to work on 12 July 2022 with adjustments and that he required a 4 week phased return. It described the Claimant not being able to walk for more than 10- 25 minutes and requiring help from his wife to wash and dress. The report suggested that he should avoid lifting more than 10kg for a 4 week period.

34. The Claimant was then invited to a remote Final Formal Health Review meeting on 28 July. The letter indicated that one of the matters to be considered was whether to terminate the Claimant's employment.

35. In response to this the Claimant wrote to the Respondent, indicating that he would not attend the meeting on 28 July and wanted to raise a further grievance. The letter said that his health did not allow him to return to work at that time. He said that there was a risk that an earlier return to work may cause an accident.

36. The Claimant then set out his requirements for adjustments including a reduction in hours, a preference to work nights and to transfer to the prep department, together with short breaks, a chair and a phased return. He also then said that he would not communicated face to face, due to his opiod use, but would only respond in written communication.

37. As a result of this further grievance, the meeting was rearranged for 3 August 2022. On that date the Claimant the Claimant wrote to the Respondent that he considered that his request for adjustments had been disregarded and that he was being pushed to a meeting. His letter ends with " Unfortunately, I have left no other choice than discuss the matter of return to work in court of law…… I will not attend the meeting on 4 August 2022. I will however, attend the court hearing scheduled in August 2022. After the court hearing we could arrange a meeting".

38. The Respondent entered into further correspondence with the Claimant as they would not agree to await the outcome of the Tribunal hearing in order to advance the absence management process. Further questions were therefore asked but not responded to. The Respondent informed the Claimant they would make a decision based on the information available.

39. On 27 September 2022 Ms Williamson took the decision to terminate the Claimant's employment, setting out the evidence available, the history of the communication difficulties and the Claimant's reluctance to co-operate with the Respondent, or to provide the most recent OH report. The letter concluded that reasonable adjustments had been considered and that none could be offered which would enable the Claimant to return to work. The conclusion also referred to the fact that a date for return cannot currently be provided and therefore the contract must end.

40. The Claimant appealed his dismissal by a letter dated 7 November 2022. In it he accused the Respondent of trying to prolong his sickness absence and to force his resignation. The letter was 45 pages long. The Claimant asserted that " My disabilities do not prevent my return to work rather your inactions that block my return to work.. Presented adjustments are in accordance with OH Report adjustments that also were presented in the OH report, dated 11 December 2017".

41. An appeal was heard by Adriana Verholeac-Genes. In the meeting the Claimant was given the opportunity to go over the points he wished to raise. The meeting was carried out face to face and the Claimant did attend. In that meeting the Claimant said that he was proposing a trial return to work for 4

weeks. When asked what would happen after that he said " If you were to offer 4 weeks, adjustments, meet up and sit down if it works for me, extended to extend for 6 months, I would have tried to recover, we would discuss this".

42. The outcome of the appeal was sent to the Claimant in a letter dated 9 January 2023, upholding the original decision on the basis that there was no reason to overturn it and that " I do not consider that there is any reasonable prospect of you returning to work in a realistic time frame based on the medical evidence provided to date and the information you have disclosed as part of the ongoing formal health review process and this appeal process".

43. The parties agree and the Tribunal finds as a fact that the Claimant suffered from the following conditions;
    a. Scoliosis from September 2018
    b. Degenerative changes of L4/5 and L5/S1 vertebrae from September 2018,
    c. Chronic back pain from September 2018
    d. And the condition of discopathy from September 2018
    e. Sciatica from 1/3/2019
    f. Spondylolisthesis from 1/3/2019
    g. Hypertension from November 2019

44. The Claimant's date of termination was 27 September 2022. He initiated early conciliation on 10 December 2021 and the certificate was issued on 20 January 2022. The Claimant's claim to the Tribunal was made on 15 February 2022. That was a claim only for disability discrimination.

45. The Claimant applied on 4 January 2023 to amend his claim to include unfair dismissal and also claims under s.15 and s.27 Equality Act 2010.

The Law

Time Limits

46. For a claim of Unfair Dismissal to be considered by the Tribunal, it must comply with section 111 Employment Rights Act 1996;

" (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2) Subject to the following provisions of this section , an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three

months."

47. The Tribunal must consider whether it was 'reasonably practicable' for the Claimant to have brought the claim within the time limit (as extended by EC). Recent guidance was given by Underhill LJ in Lowri Beck Services Ltd v Brophy [2019] EWCA Civ 2490, CA which indicated that issues such as whether the Claimant was aware of the time limit and whether it was reasonable for them to have been ignorant of it. Likewise that a mistake by an adviser is attributable to the Claimant themselves, Dedman v British Building and Engineering Appliances :td [1974] ICR 53, CA

48. Furthermore the CA in Palmer v Southend on Sea Borough Council [1984] ICR 372 said that the existence of a pending internal appeal was not of itself sufficient to justify a finding that it was not reasonably practicable to have issued a Tribunal claim.

49. Only if the Tribunal concludes on an objective basis that it was not reasonably practicable to have brought the claim in time, should they consider when the first reasonable time would have been for the Claimant to have issued the claim.

49. The relevant time-limit is at section 123 Equality Act 2010. According to section 123(1)(a) the tribunal has jurisdiction where a claim is presented within three months of the act to which the complaint relates.

50. The normal three-month time limit needs to be adjusted to take into account the early conciliation process and any extensions provided for in section 140B Equality Act.

51. By subsection 123(3)(b), a failure to do something is treated as occurring when the person in question decided on it. In the absence of evidence to the contrary. A person is taken to decide on a failure to do something when that person does an act which is inconsistent with doing it or, in the absence of such an inconsistent act, on the expiry of the period on which that person might reasonably have been expected to do it.

52. In claims for reasonable adjustments, this means time will start to run when an employer decides not to make the reasonable adjustment relied upon (Humphries v Chevler Packaging Ltd [2006] EAT0224/06). Alternatively, in a claim when an adjustment has not been actively refused time runs from the date on which an employer might reasonably have been expected to do the omitted act (Kingston upon Hull City Council v Matuszowicz [2009] ICR 1170 CA). This should be determined having regard to the facts as they would reasonably have appeared to the employee, including what the employee was told by his or her employer (Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194, CA).

53. By subsection 123(3)(a), conduct extending over a period is to be treated as done at the end of the period.

54. In Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686, the Court of Appeal stated that the test to determine whether a complaint was part of an act extending over a period was whether there was an ongoing

situation or a continuing state of affairs in which the Claimant was treated less favourably. An example is found in the case of Hale v Brighton and Sussex University Hospitals NHS Trust UKEAT/0342/17 where it was determined that the Respondent's decision to instigate disciplinary proceedings against the Claimant created a state of affairs that continued until the conclusion of the disciplinary process.

55. Alternatively, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable as provided for in section 123(1)(b).

56. The tribunal has a wide discretion to extend time on a just and equitable basis. As confirmed by the Court of Appeal in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, the best approach is for the tribunal to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. This will include the length of and reasons for the delay, but might, depending on the circumstances, include some or all of the suggested list from the case of British Coal Corporation v Keeble [1997] IRLR 36.

57. It is for the Claimant to show that it would be just and equitable to extend time. The exercise of discretion should be the exception, not the rule (Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576).

Reasonable Adjustment

58. Section 20 of the Equality Act 2010 provides;

> "(1)Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2)The duty comprises the following three requirements.
>
> (3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

59. The duty to make a reasonable adjustment generally arises when the person is placed at a substantial disadvantage. However, where the Claimant has had a period of absence, the duty does not arise until the employee stated that they will be returning to work; NCH Scotland v McHugh UKEAT/0010/06/MT. This was supported in Doran v Department for Work and Pensions EAT 0017/14 where the duty to make reasonable adjustments was not triggered as the Claimant had not indicated a date for their return to work.

60. An adjustment is only reasonable where it will make a difference to alleviate the disadvantage suffered by the employee in relation to the PCP. Where that adjustment will not have any practical effect on the atmosphere in which the person works, there is no breach of duty to make a reasonable adjustment;

Discrimination arising from a disability

61. Section 15 of the Equality Act 2010 provides;

"(1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

62. The unfavourable treatment is what the alleged discriminator does or says, or omits to do or say, which then places the disabled person at a disadvantage. T-Systems Ltd v Lewis EAT 0042/15.

63. An employer who admonishes an employee for their attitude during their illness may be found to have been unfavourably treated. In Evans v GE Capital Funding Services Ltd ET Case No.1600139/18: in August 2017 G Ltd decided to instigate formal capability proceedings against E following a prolonged period of sick leave on account of her disability (depression). E's team leader, L, commented that E 'needed to cope better with her anxiety and think of the impact she was having on the rest of the team' and described E in her appraisal as demonstrating 'resistance and anxiety to changes'. In addition to upholding other claims, an employment tribunal upheld E's S.15 claim on the basis that being described as demonstrating 'resistance and anxiety to changes' was capable of amounting to unfavourable treatment.

64. No comparator is required in respect of a s.15 claim. The claim does require the Respondent to have knowledge of the disability and is subject to the defence of a proportionate means of achieving a legitimate aim.

65. Examples of legitimate aims include health and safety issues, reputational damage and business maintenance. The test for proportionality should include consideration of whether the action was a reasonable and proportionate way of achieving the aim as well as consideration of whether something less discriminatory could have been done instead.

66. In Kelly v Royal Mail Group Ltd EAT 0262/18 an employment tribunal addressed the issue of whether some lesser outcome might have been appropriate where the Claimant was dismissed after a history of sickness absences that arose due to his disability. The Tribunal there found that a satisfactory attendance record was a legitimate aim and concluded that the claimant's dismissal was a proportionate means of achieving that aim in circumstances where the employer had lost confidence in the claimant's ability to return to a satisfactory attendance pattern in the future.

Victimisation

67. Section 27 of the Equality Act provides
"(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

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

(2) Each of the following is a protected act:
a) Bringing proceedings under this Act;
b) Giving evidence or information in connection with proceedings under this Act;
c) Doing any other thing for the purposes of or in connection with this Act; and
d) Making an allegation (whether or not express) that A or another person has contravened this Act.

68. The detriment will not be due to a protected act if the person who put the individual to the detriment did not know about the protected act (Essex County Council v Jarrett EAT 0045/15, and Deer v Walford and anor EAT 0283/10 where awareness of "some sort of legal case" was insufficient to establish knowledge).

69. The detriment must be because of the protected act. It does not need to be solely because of the protected act to amount to victimisation, but it does need to have a significant influence (Nagarajan v London Regional Transport 1999 ICR 877, HL). This means an influence which is "more than trivial"

70. The focus should be on the motivation of the person who submitted the individual to the detriment. If a third party provided "tainted information" to influence the decision maker, that would need to be raised as a separate allegation, otherwise an innocent party could find themselves liable for an act for which they were personally innocent (Reynolds v CLFIS (UK) Ltd and ors 2015 ICR 1010, CA).

Burden of Proof

71. Section 136 of the Equality Act (burden of proof) states that:
"(1) This section applies to any proceedings relating to a contravention of this Act. If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provision".

72. The claimant must show facts from which the Tribunal could infer that discrimination took place, in the absence of other explanation. If the claimant cannot do that, the claim fails. If the claimant does show such facts, then the burden shifts to the respondent to show that discrimination did not take place (Igen v Wong, , Royal Mail Group v Efobi [2021] UKSC 33). In deciding whether the burden has shifted, the Tribunal should consider all of the factual evidence provided by both parties (although not the explanation for those facts).

73. In Madarrassy v Nomura International [2007] ICR 867 CA, Mummery LJ stated that "the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

74. Something more than a finding of less favourable treatment is required in order to shift the burden of proof to the respondent, however the "something" need not be considerable (Deman v Commission for Equality and Human Rights and

others [2010] EWCA Civ 1276). Unreasonable behaviour alone is not evidence of discrimination (Bahl v The Law Society [2004] IRLR 799) but can be relevant to considering what inferences can be drawn (Anya v University of Oxford & anor [2001] ICR 847)

75. Where the burden has shifted to the respondent, it is then for the respondent to prove on the balance of probabilities that the less favourable treatment was not because of race.

76. Although the burden of proof is a two stage test, there are cases where an Employment Tribunal can legitimately proceed directly to the second stage of the test (see, for example, Laing v Manchester City Council and anor 2006 ICR 1519, EAT).

DECISION

Time Limits

77. The Claimant made an application to amend his claim on 4 January 2023 in order to add unfair dismissal, and claims under the Equality Act 2010 s.15 and s.27, in relation to his dismissal. The Claimant had been dismissed on 27 September 2022 and could not have therefore made these claims in his original ET1. The 3 month time limit to issue the claims would have expired on 26 December 2022, as this is a public holiday, the date would be extended to 27 December 2022.

78. By making his application to amend the claim on 4 January 2023, the Claimant was 6 days out of time (1 January 2023 was also a bank holiday and therefore does not count). The Tribunal considered whether it was reasonably practicable for the Claimant to have issued his amendment in relation to the unfair dismissal claim by 27 December 2022.

79. The Tribunal noted that the Claimant included these claims in his updated Particulars of Claim dated 22 December 2022 and therefore he was able to articulate these claims within the time limit period. The Claimant's evidence was that he was aware of the time limits. The Tribunal also noted that by that time he had also dealt with an internal appeal of his dismissal in October and prepared a list of documents for the Tribunal. The Claimant was therefore able to cope with making his claims.

80. The Tribunal also took into account the fact that the Claimant was served with a s.21 Notice to Quit on his home at that time and therefore had to move his family to different accommodation.

81. The Tribunal concluded that the Claimant was able to provide his amendment application within the time limit and there was no reason to consider that it was not reasonably practicable to have done so. The unfair dismissal claim was therefore out of time and that Tribunal had no jurisdiction to consider it.

82. In relation to claims under s.15 and s.27 Equality Act 2010 the relevant test for extending time was set out in s.123 Equality Act 2010. The Tribunal

considered whether it was just and equitable to extend time to use its discretion to accept the Claimant's additional claims out of time.

83. The Tribunal took into account all the circumstances between September 2022 and January 2023. It noted that the Claimant had been dealing with an internal appeal process and the orders of the Tribunal in relation to his claim. It also noted that the Claimant was a litigant in person with no legal assistance. Finally the Tribunal noted that the Claimant was also dealing with a no fault eviction from his home and therefore had other priorities at that time.

84. The Tribunal also acknowledged that the Tribunal had some days of closure over the Christmas break. The Claimant filed his amendment application on 4 January 2023, within the first working week after the Christmas break.

85. Taking into account all these reasons, the Tribunal considered that it would be appropriate to extend its discretion on a just and equitable basis to allow the discrimination claims to proceed.

Disability Status

86. The Tribunal noted that the Claimant asserted a number of disabilities over a period of years. Each of them could lead to effects on the Claimant's ability to do day to day activities. The Tribunal lacked specific evidence as to which condition led to which restriction on day to day activities. However, as the Respondent accepted that the Claimant had disabilities, the Tribunal were satisfied that the disabilities asserted by the Claimant could be considered together as degenerative back pain.

87. The Tribunal then considered when the Respondent was aware, or ought reasonably to have been aware of the Claimant's disability.

88. The Tribunal noted that in July 2017 the OH report referred to leg pain and recommended limiting work to 5 hours per day. On 20 November 2017 the Claimant met with David Miller, who sent him for another OH report which recommended reasonable adjustments of 5 hours stowing and 5 hours moving carts per shift.

89. A further OH report on 11 December 2017 indicated spondylolisthesis and recommended that he should not lift more than 10kg for 10 weeks and should avoid standing for more than 5 hours.

90. By March/April 2018 the physiotherapy report indicated that the Claimant still needed adaptation. In August 2018 the Claimant was once again sick with back issues (scoliosis and degenerative changes).

91. In September 2018 a GP medical letter said that the Claimant had disc protrusion, spondylolisthesis and sciatica. In February 2019 the Claimant had a further 3 weeks off with back pain. This led to more physiotherapy in March

2019.

92. The Tribunal also noted that between November 2019 and February 2020 the Claimant was absent due to high blood pressure.

93. The Tribunal acknowledged that by 24 April 2020 the Respondent admitted knowledge of the Claimant's chronic back pain. However, given that the Claimant had informed his manager about his back problems in 2017 and adjustments were made to his work practices as a result of his back pain in November 2017, the Tribunal concluded that the Respondent was aware, or ought reasonably to have been aware of the Claimant as a disabled person, from September 2018. The Tribunal therefore accept the Claimant's disability from this date.

Reasonable Adjustments

94. The Tribunal were satisfied that the Respondent was aware from late 2017 about the Claimant's back pain. Adjustments to working practices had been made in late 2017 and this continued until the Claimant went off sick in November 2019. As set out above, the Tribunal were satisfied that from September 2018 the Respondent knew that the Claimant was disabled by way of degenerative back pain.

95. The Tribunal were satisfied that the requirement to work was a provision, criterion or practice of the Respondent. The 'work' involved standing for long periods, moving heavy items and repeated movements, with no opportunity to vary them, or to rest.

96. The Tribunal were also satisfied by considering the absence record of the Claimant that due to his disability he was placed at a disadvantage in complying with the requirement to work. The Claimant's disability meant that it was difficult for him to comply with the work of 10 hours on his feet, moving heavy items

97. It was noted that there was no evidence to suggest that prior to November 2019, the Claimant was asking for any other adjustment to be made, but the Respondent was aware of his difficulty in being able to comply with the 10 hour shift requirement.

98. In relation to the specific adjustments asserted by the Claimant, the Tribunal considered as follows;

Redeployment to different department

99. The Tribunal found no evidence that the Claimant ever asked during his absence, to be redeployed to another department, until 30 August 2022 when faced with dismissal and after 2 years off sick.

100. The Claimant did suggest in evidence that he thought he would have been able to work in a different department, but recognised that he would need training. He was not able to specify what work he would be able to do. The Tribunal noted that there was no evidence to support the suggestion that the

Claimant was capable of other work.

101. During his absence the Claimant did not engage fully with management/HR to discuss potential ways in which he could return to work. He chose to refuse to communicate with his manager directly and requested that communication was limited to emails, which his partner answered on his behalf. This did not lead to useful co-operation, communication or discussion of other possible outcomes. Furthermore, it was noted in the dismissal letter that the Respondent said they had not been able to identify any other suitable work for him.

102. The Tribunal therefore concluded that it would not have been reasonable to have redeployed the Claimant to a different department, as there was no evidence that this would have alleviated the disadvantage to the Claimant.

Working reduced hours

103. The Tribunal noted that in August 2022 the Claimant said he could work for 20 hours, preferably at night. There was no evidence to suggest why night work would have been more achievable for the Claimant, or why this would alleviate the disadvantage of his disability. bf

104. The Tribunal also noted that the Claimant had discussed this type of work with David Miller in 2017 and had turned down the offer of working 5 hours/5 days, as he said he could not afford to do so. The Tribunal therefore found there was no failure by the Respondent between 2017 and August 2022 to place the Claimant on reduced hours. The Tribunal also concluded that by the point where the Claimant suggested it, he had been absent for such a long period, that the Respondent reasonably considered him not to be capable of return to work. The Tribunal therefore concluded that there was no lack of reasonable adjustment.

Provision of a chair

105. The Tribunal was satisfied that the Respondent had a policy of not allowing chairs on the warehouse floor, where they may amount to a health and safety hazard. The Respondent did make a chair available in a safe location and allowed disabled employees to take breaks. However, this was not what the Claimant was asking for and there is no evidence to suggest this would have alleviated the disadvantage. The Tribunal therefore concluded that the provision of a chair in order to work was not a reasonable adjustment.

Varying work between different departments

106. The Tribunal considered the points raised above in relation to redeploying to a different department and considered these all applied in relation to varying work between departments.

107. In addition, the Tribunal noted that the Claimant failed to make any suggestion of reasonable adjustments during his absence, until his appeal on dismissal. At that time he didn't give a return to work date. The Tribunal based its decision on the cases of Doran and NCH Scotland and found that the duty to make reasonable adjustment had not been triggered. The Claimant had failed to engage with the Occupational Health and Health management procedure

during his absence, almost to the point of being obstructive and therefore he did not suggest any reasonable adjustment during his absence. The Tribunal concluded that the Respondent therefore did not fail to make a reasonable adjustment during the period March 2020 to September 2022.

Reducing Heavy Lifting to a Maximum of 5kg
Not having to stand for more than 5 hours at a time,
Not having target figures to meet

108. The Tribunal were satisfied that there was no evidence to support the contention that these adjustments would allow the Claimant to be able to work his shifts. The Claimant had indicated that he could not work at all. The medical evidence suggested a weight limit of 10kg and therefore there was no evidence to support a lighter limit.

109. Furthermore, there was no evidence that the Claimant would not be able to meet a target. This was never discussed between the Claimant and Respondent as a problem and not raised by the Claimant as a requirement.

110. The Tribunal considered that these are not adjustments for which the Claimant has provided any evidence that they would alleviate his disadvantage and allow him to work. The Tribunal therefore considered that there has not been any breach of the duty to make reasonable adjustments.

DISCRIMINATION ARISING FROM DISABILITY

111. The Tribunal were satisfied that the Respondent had knowledge of the disability (see above) and that the 'something arising' from that disability was the Claimant's sickness absence from 17 February 2020.

112. The Tribunal considered each of the Claimant's allegations in respect of discrimination;

113. UT1 – Mr Ogiogwa did contact the Claimant by phone in April and May 2020 to ask when he would return to work. The Claimant accepted that there were two calls. The Tribunal were satisfied this did not amount to 'bombardment' as the Claimant perceived it. These were part of care calls and in line with the Respondent's health policy to ensure the Claimant was provided with the support of his manager. The Claimant had been absent since February 2020 at the time the calls made. The Tribunal considered that it was reasonable and proportionate for Mr Ogiogwa to make the calls as he did.

114. The Tribunal also took into account the fact that when the Claimant said he didn't want contact by phone, the manager obeyed. It was also noted that the policy required the employee to keep in contact when off sick. The Claimant had not done so, except by sending sick certificates. The Tribunal considered that although the actions of Mr Ogiogwa were clearly due to the Claimant's absence, they did not amount to less favourable treatment.

115. UT2 – The letter of 9 June 2020 was sent to invite the Claimant to a Health Review Meeting. This was the start of the process. This is referred to in the Process as an informal one-to-one meeting. The Health Policy said that the manager and employee can agree a communication plan. In order to do so, the Tribunal considered it reasonable for Mr Ogiogwa to contact the Claimant.

116. The Tribunal did not consider that following their own process was the Respondent treating the Claimant less favourably due to his absence. Alternatively, the Tribunal were satisfied that treating anyone who is absent for a health reason, in accordance with their stated policy, is a proportionate means of achieving the legitimate aims of securing employees return to work and supporting them in absence.

117. UT3 –the Claimant was invited to a formal health process by way of the letter sent on 3 August 2020.This meeting was rearranged and finally took place on 18 August 2020. At this point the Claimant had remained off sick for 6 months. Three letters were sent to the Claimant to rearrange the date. Each of them in the same standard format outlining the reasons for the meeting. The Tribunal considered that there was nothing to show these letters as being unfavourable. They form part of the Respondent's legitimate Health Review Process. Alternatively, if they are unfavourable, the Tribunal considered that they are a proportionate means of achieving a legitimate aim of supporting staff in absence and achieving their return to work.

118. UT4 – The Tribunal considered the letter entitled First Letter of Concern. It was concluded that this letter did not refer specifically to a warning being issued to the Claimant. The Tribunal appreciated that the Claimant considered the letter to contain a sanction, but this was not a warning. There being no evidence of a warning in the letter, this allegation is dismissed.

119. UT5 - A Letter of Concern was sent as part of the Health Review Process. The content of the letter berates the Claimant for not having organised an MRI scan at a time when the UK was still in the Covid Pandemic. The Tribunal noted that at this time the NHS was still not operating normally and concluded that it was unrealistic of the Respondent to suggest that the Claimant should have organised an MRI scan during that period. The Respondent said it had taken Covid into account, but still criticised the Claimant, which the Tribunal considered harsh. The Tribunal considered the sanction of restricting the Claimant's ability to move away from the department or apply for promotion. They concluded that this amounted to unfavourable treatment. They viewed these two points as unrelated to the Claimant's absence and that it therefore sent a signal to the Claimant that his employer was sanctioning him in some way for his absence. The Tribunal accepted that the Claimant felt that this letter restricted the potential for a reasonable adjustment to be made.

120. The Tribunal considered the Letters of Concern to be badly phrased. Whilst the Respondent considered them to be merely assertion of the policy, the Claimant, understandably saw them as a sanction for being ill. In particular when told that the reason was that he needed to take more ownership of his illness and obtain an MRI scan appointment. This occurred during a time of NHS crisis during the Covid pandemic when all routine appointments and treatment were halted for months. The Respondent made no allowance for this, but prevented the Claimant from being able to move to another position or to be promoted. There was no explanation given to him that reasonable adjustments could include a move to another position.

121. The Tribunal considered this procedure to be badly phrased and likely to have the opposite to the stated desired effect of supporting an employee. The fact that there was an appeal process, also indicated that it was a type of disciplinary. If the purpose of the Process was to support and promote the return to work, the action of imposing a restriction on the employee did not convey support. Furthermore, the fact that the appeal referred to the process as being a disciplinary process added to the evidence that it was reasonable for the Claimant to perceive it this way.

122. The Tribunal considered that the Respondent's aims of reducing employee absence, supporting their return to work and maintain stability in the workforce to ensure consistent business delivery were all legitimate aims of their business.

123. In respect of the proportionality of their actions, the Tribunal took into account that the message conveyed by the letter was not received in the way that the Respondent intended. The Claimant saw it as a sanction and restriction on any reasonable adjustments which might aid his return to work. The Tribunal considered that if the Respondent had omitted this part of the letter, or even worded it differently to say we would like to make adjust to your original job in your original location, such upset and indignation could have been avoided. There was therefore a less discriminatory way in which this could have been done. Their way of pursuing their legitimate aim was therefore not proportionate. The Tribunal therefore considered that this allegation is upheld.

124. UT6 Mr Harris, the appeal officer, gave the Claimant notice of the hearing of his appeal on 30 September 2020. He allowed this to be changed into a telephone hearing with an interpreter and rearranged the date. The Tribunal were not shown any evidence of any unfavourable treatment of the Claimant in the setting up of the meeting or the conduct of the hearing. The Tribunal considered carefully Mr Harris' evidence on how he conducted the meeting and could find nothing unfavourable in the way meeting was conducted.

125. UT7 The outcome letter for the appeal upheld the first letter of concern, but did acknowledge that the language used could have been more empathetic about the Claimant taking ownership of his illness.

126. Whilst the Tribunal accepted that the Respondent was following their policy, they considered it understandable that the Claimant saw the letter of concern as a sanction. However, the Tribunal were satisfied that the appeal process was run in accordance with policy. The Claimant only raised an issue about the wording of 'taking ownership' and this was addressed.

127. The Tribunal acknowledged that the outcome of the appeal was not entirely in the Claimant's favour, but did not consider that it amounted to unfavourable treatment as a result of his absence. This allegation was therefore dismissed.

128. UT8 The Claimant's evidence on this allegation pointed to him experiencing a difficult period in terms of his health and his partner taking over

communication with the Respondent on his behalf. The Claimant asserted that on 2 December the Respondent asked to speak to him and his partner responded saying she will respond by email. It was a result of this exchange that a list of questions was sent to the Claimant. Mr Ogiogwa did put parts of these in bold or large font. The Claimant's partner then objected to Mr Ogiogwa's involvement and asked for Ms Evants to take over. The Respondent accepted this, despite the fact that this would not limit the number of people who knew of the Claimant's health issues.

129. The Tribunal did not consider any of these actions by the Respondent to be unfavourable treatment of the Claimant. They acquiesced to his requests and conducted the review in a manner which he requested.

130. UT9 The Claimant was offered the opportunity to attend the meeting in person, but chose not to do so. It was therefore held in his absence to consider his written answers. When the Respondent offered to refer the Claimant to occupational health he responded 'n/a'. He also was asked for a return to work date and replied 'n/a'. The Tribunal found no evidence from the Claimant that indicated that the meeting was unfavourable. The Claimant did not indicate that the notes were not accurate. The Tribunal concluded that there was no evidence of an unfavourable act.

131. UT10 The Tribunal noted that the second letter of concern does not contain any sanction against the Claimant moving department or being promoted. The letter specifically says that the Respondent will explore redeployment and adjustments. The Tribunal considered that the letter was clear that the reason it was sent was due to the length of the absence and the lack of a return to work date.

132. The Tribunal concluded that this letter did not amount to unfavourable treatment as it followed the Respondent's own policy.

133. UT11 The evidence before the Tribunal lacked any complaint by the Claimant about being sent these notes, or that they were inaccurate in any way. The Claimant had not attended the meeting, as he chose to respond to written questions. The Tribunal therefore found no evidence of unfavourable treatment.

134. UT12 The Tribunal was not shown a third letter of concern dated 29 March 2021. There was evidence of a meeting on 29 March 2021 at which the Claimant's written answers to questions were considered. A letter was sent to the Claimant following this meeting, in which the Claimant was asked to consent to a further occupational health review. There is therefore no evidence that the alleged unfavourable act occurred.

135. UT13 The Tribunal took account of the evidence that the Claimant was invited to a further meeting on 24 August 2021 as a reconvened 3rd Formal health review. He was offered transport to the meeting or a phone meeting. The meeting ultimately took place on 30 August 2021 by phone. The Claimant provided no evidence to the Tribunal as to why the meeting notes were wrong or why he considered that this amounted to unfavourable treatment of him.

136. UT 14 The Respondent's letter on 22 September 2021 referred to reconvening the previous meeting on 27 September. The letter set out the reasons for the meeting as; to enquire whether the Claimant's health was improving, to review any medical information, to understand the prognosis for recover and to agree a time frame for return to work and any reasonable adjustments. The meeting did take place and the Claimant had a translator with him.

137. The Tribunal found no evidence of anything in the notes of the meeting which indicated that the Claimant was treated unfavourably. The Claimant did not point to anything specific in the meeting, other than being asked about his health situation. The Tribunal concluded that the Respondent was following their policy by holding this meeting and that it did not amount to unfavourable treatment.

138. UT 15 The Final Letter of Concern was issued on 12 October 2021. It includes the fact that the Claimant is to undergo 16 weeks of physiotherapy and does not give a date for return to work. However, the Respondent also asserted that that the Claimant had given no reason why he had not used AXA private health care, which was not true, as the Claimant had indicated that this was due to a lack of funds to pay the premiums. The Tribunal also noted that this letter included a reference once again to a sanction in relation to transfer and/or promotions. The Tribunal considered, for the same reasons as set out in UT5 above, that this was unfavourable treatment and that it was directly related to his absence. Therefore, for the same reasons as set out in UT 5 above, the Tribunal found that this allegation was discriminatory.

139. UT 16 The Tribunal reviewed the invite letter and considered, as previously that this letter follows the Respondent's health process and therefore does not amount to unfavourable treatment. The Tribunal considered that the same point applied to UT 18, 19 and 20 and dismissed those.

140. UT17 The Tribunal considered the Claimant's grievance letter of 15 May 2022 in which he complained of harassment, the fact that his AXA cover was stopped and that he considered his medical records as up to date. In response to this the Respondent offered a meeting to discuss these points as well as the Final Review Meeting, on the basis that the points overlapped. The Claimant's letter had included a potential return to work date, which was the first time he had offered this since February 2020 when he went off sick.

141. The Tribunal concluded that it was open to the Respondent to respond in this way to the Claimant's grievance and that it did not amount to unfavourable treatment as it was offering to discuss and address his concerns.

142. UT21 The Claimant offered, in his grievance in May 2022 to return to work on 11 July 2022, as well as suggesting reasonable adjustments. The evidence indicated that when the Respondent tried to set up meetings to discuss this and sent him for a further OH report, the Claimant went to the appointment, but refused to let the Respondent see the report.

143. The Tribunal concluded that at the time of the meeting on 27 September Mr Williamson had not seen the OH report. The Respondent listed

the most recent medical evidence as a letter from Circle Integrated Care on 17 September 2021 and a letter from N Bottoms, Endocrine Specialist Nurse at Luton Hospital, to the Claimant's GP on 27 January 2022.

144. The Tribunal also took into account the fact that the Claimant was not able/wiling to participate in a video conference and that he had not in fact returned to work as he said he would. The Tribunal considered that having previously disengaged from the health review process, there had been some hope of the Claimant reengaging when he offered to return, but that this final lack of co-operation with the process meant the Respondent could not obtain up to date information. The Tribunal considered that nevertheless, the act of dismissal, even after over 2 years of absence from work, did amount to unfavourable treatment due to the Claimant's absence.

145. The Tribunal proceeded to consider whether the decision to dismiss was a proportionate means of achieving the Respondent's legitimate aim. The Tribunal took into account the fact that the Respondent did not have a reliable date for the Claimant's return to work and that at that time they did not know what it was that prevented such a return from happening. The Tribunal also considered the fact that the Respondent had made a number of attempts to engage the Claimant in the Health Review process and that the Claimant had become resistant to contact and was not fully co-operative with the Respondent. This culminated in the Respondent not being allowed to see the most recent OH report, which could have assisted them. The Tribunal considered it legitimate that the Respondent should reach a point over 2 years after the Claimant's absence started, at which it needed to be able to plan its workforce and rely on them. The Tribunal were satisfied that it was proportionate for the Respondent to consider that where there was a lack of co-operation and communication with the Claimant, they could not rely on him to maintain a reliable work record.

146. The Tribunal also considered whether some lesser sanction than dismissal could have been applied to achieve the aim of returning the Claimant to regular work. No evidence was offered by either party as to how the Claimant could have returned to work with the Respondent at that time. The Tribunal also took into account the fact that the Claimant had taken the letter of concern to be sanctions and that this is what in part, had led to his withdrawal from co-operation with the Respondent. The Claimant had not offered any reasonable adjustments which would in fact have allowed a return and did not suggest that any alternative to dismissal would have been available. The Tribunal also considered that the Claimant's suggestion that he was being harassed by the Respondent asking him about a return to work date was not reasonable, given the long history of absence and the lack of recent co-operation or up to date information that he was prepared to provide to the Respondent. The Tribunal also considered that the prospect of the Respondent having to wait for the Claimant to self declare fitness to return, was not proportionate to the legitimate aim of ensuring a reliable workforce. The Tribunal therefore concluded that there were not any other steps which the Respondent could take at that time to try to bring the Claimant back to work (i.e an alternative to dismissal).

147. The Tribunal therefore concluded that the decision to dismiss was proportionate to the legitimate aim of maintaining stability in the workforce and

ensuring business delivery.

148. The Tribunal considered the appeal at which the Claimant provided the OH report, but failed to engage with the Respondent by providing a return to work date. The Tribunal considered it proportionate to uphold the dismissal where the report indicated that the Claimant could return to work but where he was not prepared to provide a date. The Tribunal considered that the evidence of Ms Verholeac – Genes, that the Claimant told her he could not work, also assisted the Respondent on this point. The dismissal therefore remained a proportionate means of achieving a legitimate aim.

Victimisation

149. The protected act relied on by the Claimant was the issuing of the Tribunal claim on 15 February 2022. This complies with the requirements of s.27(2)(a) Equality Act 2010.

150. The Claimant asserted that he was dismissed because he issued the Tribunal proceedings. The Tribunal considered the chronology carefully and noted that the dismissal did not occur until September 2022. There was therefore a period of 7 months between the issue and the dismissal.

151. Furthermore, the Claimant's evidence indicated that he felt that he was dismissed because the Respondent had been unable to force him to resign. He also referred to the fact that he had hoped that the Respondent's consideration of his sickness absence would be more lenient as a result of the commencement of Tribunal proceedings. This evidence by the Claimant himself, pointed away from the Tribunal proceedings being the cause of the dismissal.

152. The Tribunal considered that the points outlined above in relation to a proportionate means of achieving a legitimate aim were the same principal reasons for the decision to dismiss. The Respondent had reached the end of the Health Process and the Claimant had not given a date to return to work. Latterly, the Claimant had not been engaging fully with the process of return to work and the Respondent chose to the end the relationship for these reasons. The Tribunal Found no evidence that the principal reason for the dismissal was due to the Claimant having issued the Tribunal claim.

153. The Tribunal saw no evidence of Sandy Williamson having knowledge of the claim and no evidence from which we could infer there was such a connection. The Tribunal therefore did not consider that this amounted to victimisation.

Conclusion

154. A remedy hearing has been listed on 30 May 2025 and will proceed to decide compensation in respect of the two successful claims only.

Approved by:

Employment Judge Cowen

1 May 2025

JUDGMENT SENT TO THE PARTIES ON
2 May 2025

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision. If written reasons are provided they will be placed online.

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found here:

www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/