EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8001189/2024

Held on 12, 13 & 14 May 2025

Employment Judge J M Hendry

Mr C Booth	**Claimant** **Represented by,** **Mr L G Cunningham,** **Advocate**
Aberdeenshire Council	**Respondent** **Represented by,** **Mr R Taylor,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. **The Tribunal finds that the claimant was a disabled person in terms of Section 6 of the Equality Act 2010 at the relevant time.**

2. **The Tribunal finds that the claimant was discriminated against by the respondent in respect to Sections 15 (discrimination arising from disability) and of Sections 20 and 21 of the said Act (failure to make reasonable adjustments).**

3. In respect to the claims arising from the Equality Act 2010 the Tribunal awards the claimant the sum of Six Thousand Pounds (£6000) for injury to feelings, with interest at 8% per centum per annum until payment in full together with the sum of Five Hundred and Fifty-Five Pounds and Fifty-Seven Pence (£555.57) as interest to the 12 May 2025 and orders the respondent to pay said sums to the claimant.

4. The Tribunal finds that the claimant was unfairly dismissed by the respondent.

5. The respondent shall pay the claimant a monetary award of Twenty- One Thousand, Five Hundred and Forty-One Pounds and Ninety-Seven Pence (£21,541.97) made up of a basic award of Three Thousand, Two Hundred and Ninety-Seven Pounds (£3297), Statutory Rights, Five Hundred Pounds (£500) and loss of wages and pension contributions Seventeen Thousand, Two Hundred and Forty-Four Pounds and Ninety-Seven Pence (£17,244.97); the prescribed element amounts to Sixteen Thousand, Seven Hundred and Forty-Four Pounds and Ninety-Seven Pence (£16,744.97) the difference between the prescribed element and the monetary award amounts to Three Thousand, Seven Hundred and Ninety-Seven Pounds (£3797).

REASONS

1. The claimant sought findings that he had been unfairly dismissed by the respondent, had been subjected to disability discrimination and a failure to make reasonable adjustments.

2. The respondent opposed the claims. They argued that the claimant's dismissal was fair on the grounds of capability (ill-health).

Evidence

3. The case proceeded to a Final Hearing. The Tribunal had the benefit of a Joint Bundle of Productions. It also had an amended Schedule of Loss and calculations provided by the claimant's Counsel. No dispute arose out of the method of calculation or indeed more generally as to the quantification of loss.

4. The Tribunal heard evidence from Mrs Roz Baxter, the respondent's Waste Manager in charge of that part of the service that the claimant worked for. She was the decision maker that terminated the claimant's employment following a capability hearing. The claimant also gave evidence.

Issues

5. Although there was no list of issues prepared, the issues were not in dispute and related to the statutory claims made. The Tribunal had to consider the fairness or otherwise of the dismissal, whether the claimant was disabled in terms of s.6 of the Equality Act 2010 and if he had suffered discrimination in terms of s.15 of the Equality Act 2010 and through an alleged failure by the respondent to make reasonable adjustments (Section 20).

6. The respondent's position in relation to the claimant's disability status was neutral. It was perhaps surprising that given the claimant's mental health was managed to a great extent by his G.P. that no G.P. records were produced by either party. Nevertheless, the Tribunal had the benefit of the claimant's evidence on that matter and it also had regard to the Occupational Health Reports prepared for the respondent and other corroborating material in relation to sickness absences. I will deal with disability status first of all.

Findings – Disability Status

7. The claimant is a 35 year old man. He first developed mental health difficulties in early adolescence. The trigger at that point appears to have

been his failure to be able to follow his preferred career choice of joining the armed forces. Following his rejection he struggled with his mental health over an extended period. He became withdrawn. He lost interest in friends and socialising. He would not take care of his personal hygiene. He spent much time in his bedroom.

8. At this point he lived with his parents. His parents became concerned at his condition and after some months had elapsed persuaded him to visit his G.P. He was assessed by the GP as being depressed. He was prescribed a course of face-to-face psychotherapy whereby he would attend counselling sessions of 45 minutes every 2 weeks for 2 to 3 months. This assisted him in becoming more mindful of his condition and more alert to when he was becoming depressed.

9. The claimant's mental health improved and he did not have another severe episode of poor mental health until he was in his early 20s. At that time he had obtained work with SSE. He was involved in a minor accident with his company vehicle. The matter preyed on his mind and he began to become depressed. He became withdrawn and anxious. He consulted his G.P. He was once more diagnosed with depression/anxiety by his G.P. and prescribed the drug Fluoxetine. This assisted with his mood and stabilised his condition. Nevertheless, he had taken some time off work. He was given assistance by his employers through a support scheme they ran for employees with mental health difficulties.

10. In 2014/2015 the claimant became ill following the death of his Grandparents. This led to another lengthy period of depression and anxiety. He sought and obtained medical treatment.

11. In December 2016 he joined the respondent Council. The claimant became unwell with depression in 2017 and in 2018 for a period. He contacted his G.P. and was given medication for his anxiety which resolved the symptoms.

12. The claimant suffered another period of depression and was absent from work from 5 September 2021 until 23 September 2021. This was triggered by difficulties he had in his relationship with his wife who separated from him on 17 September. The claimant became depressed and suicidal. His parents became very concerned at his condition and they took him to Aberdeen Royal Infirmary where he was assessed and given an immediate referral to a Charity Penumbra who provided him with assistance. From this period until the date of termination of his employment the claimant's mental health was generally poor. During this period the claimant would be unable to function properly. He would find it difficult to concentrate. He would become withdrawn. He would become anxious. When he felt better he would return to work but his symptoms never fully resolved.

13. The claimant was absent again on the grounds of depression from 15 March 2023 until 5 May 2023 (52 days). He was also absent from 26 September 2023 until the termination of his employment (174 days). The Fit Notes he provided to his employers (which were not produced in the Tribunal process) indicated that he was suffering from stress.

14. Latterly, prior to the termination of his employment the claimant was given Sertraline 50mgs per day. This was increased in early 2024 to 100mgs per day (January/February 2024). The medication took a couple of months to become effective.

15. The claimant was referred to the respondent's Occupational Health provider in May 2023. They prepared a Report (JB.61-62). It recorded:

"*We have looked at the factors in relation to Colin's psychological health and his current fitness for post. Colin disclosed a historic diagnosis of mental illness which is normally well managed by prescribed medication. He is currently attending a psychiatrist as part of his recovery process. Colin explained that an accumulation of both personal and work issues triggered a decline in his mental wellbeing. Subsequently he has returned to work and had a return to work interview with management and was finding work beneficial. He states that he is currently on reduced hours as requested via*

flexible working hours to enable him to care for his children. He has no current work concerns."

16. In response to the question whether the Equality Act 2010 was likely to apply to the claimant the Occupational Health Advisor wrote: "*It is likely the Equality Act will apply. However, this is ultimately a legal decision.*" He noted that the claimant was fit to attend disciplinary interviews.

17. The claimant was referred once more to the Occupational Health Advisors in October 2023. They had a consultation with the claimant. At that point his G.P. had signed him off work with stress. It was noted:

"*Colin reports that both work and personal circumstances impacted on his mental wellbeing to the point that he could no longer remain at work. He contacted his G.P. and was issued with a Fit Note. Colin also disclosed historic diagnosis of mental health issues, he has recently been discharged from the psychologist and no longer requires medication. He is currently engaging in support via his workplace options. His personal issues are ongoing without any resolution to date. As you are aware current perceived work issues are also ongoing and this is impacting on his mental wellbeing.*"

18. The claimant was assessed once more in December 2023 by the Occupational Health Provider who provided a Report to the respondent (JB83-84). They noted:

"*Colin has been absent from work at this time since the end of September 2023. He has been suffering from anxiety and stress. He was also absent for a period this year.*

Unfortunately, he remains symptomatic. He is having problems with his sleep and his concentration, he feels very stressed most of the time. This is partly due to his personal circumstances which you are aware of and due to the pending disciplinary process, which he feels is unwarranted.

He has had four counselling sessions through the EAP. and is due to have some more. He says they have helped a bit. However, he feels he may need medication for good, he will discuss this with his G.P.

Colin does not feel able to engage in any form of any disciplinary process, either remotely or face-to-face or written at present. We could reassess the situation within the next 2-3 months."

19. The claimant was assessed as being unfit for his role at this point.

20. In relation to the Equality Act it was indicated: "*This is possible but is ultimately a legal decision*."

21. The increase in the claimant's medication (Sertraline) that took place in January/February 2024 led to his mental health improving and by May he would have been fit to return to work. Following his dismissal prior to his appeal he started work as a jobbing gardener and worked for about a week prior to the appeal hearing that took place on 29 May 2024.

Unfair Dismissal/Disability Discrimination

22. From December 2016 onwards the claimant was employed as a Waste Operative at the Portlethen Household Waste Recycling Centre. He worked 37 hours per week.

23. The respondent as the Local Authority for Aberdeenshire is responsible for waste services and provides residents with waste recycling centres throughout its area.

24. The waste recycling centres allow residents to deposit waste and have that waste recycled. The Portlethen Waste Recycling Centre had three permanent employees one of which was the claimant. His duties were to advise householders where their waste should be deposited and what waste could be taken by the centre. He would assist with the depositing of the waste and compacting it. The recycling centre did not take "trade waste".

25. In around October 2022 the claimant applied for flexible working in order to allow him to provide care to his two children. This was granted and his hours were reduced to 15 hours per week. The agreement was to last a year. This resulted in him mostly working weekends.

26. In January 2023 an incident took place at the Westhill Household Waste and Recycling Centre. The claimant became involved in a row with an operative there in relation to waste that he wanted to deposit as a private individual but which was deemed "trade waste" by his coleague. Matters progressed to a disciplinary hearing and the claimant was given a final written warning on 27 June 2023. This was recorded in an outcome letter signed by Roz Baxter, Waste Manager who was the Chair of the disciplinary hearing (JB66-67).

27. As a consequence of the disciplinary finding the respondent's manager Mrs Baxter took the view that the claimant required to have additional supervision. There was less management and supervisory oversight at weekends. Accordingly, the flexible working arrangement was cancelled and the claimant required to return to 37 hours.

28. The claimant appealed this increase in his hours. A further hearing took place with Mrs Baxter on 30 August following at which a compromise was reached and the claimant agreed to work slightly reduced hours every second week. The hours were arranged to allow the claimant to pick up his children from school and nursery.

29. From September 2023 onwards the claimant had serious personal difficulties following his separation from his wife which had taken place on the 17 September. These included issues in relation to residential contact with his children. This resulted in a recurrence of his depressive/anxiety condition and to a lengthy period of absence from 26 September 2023 onwards. In addition, on 21 September 2023 the claimant was informed that he was subject to a further disciplinary investigation.

30. Following receipt of the Occupational Health Report which was prepared in December 2023 the respondents were concerned there was no indication of when the claimant would be fit enough to return to work. He was still entitled to sick pay which reduced to half pay.

31. The respondents have an attendance management procedure (JB35-55). It sets out their policies in relation to employees with long-term absence. It indicates that employment can be terminated on the grounds of capability where there is:

- Inability to sustain satisfactory attendance levels;
- Prognosis is long-term;
- Where there is no foreseeable return to work;
- Occupational Health state employee is not fit to work;
- No further reasonable adjustments available.

32. It indicates the following matters should be considered prior to a capability hearing:

- Frequency and duration of absence;
- Any reasonable adjustments considered;
- Up-to-date medical information;
- Impact on service;
- Periods of special leave taken.

33. It further provides that it is not a requirement to wait until the employee's sick pay has been exhausted before instigating formal capability of ill-health retirement. It provides for a meeting prior to the capability hearing which the employee is invited to agree or disagree whether their employment should be ended on the grounds of ill-health capability.

34. The claimant was asked to complete a stress questionnaire at the end of 2023 (JB76). A self-assessment occupational stress document was finally completed (JB79-82). The claimant identified the source of his stress as "*pressure of all the problems I'm facing both at home and now at work*." He

asked for "*simply patience and understanding that my current circumstances are a major factor in my ability to think rationally*."

35. The claimant's Manager, Dawn Tatton, decided to escalate the claimant's case under the capability procedure. She prepared a "management case" (JB86-91) and noted in the introduction the claimant had a previous depression related illness. A table was provided showing the claimant's various absences for 2017 to date. It also recorded:

"*Colin has stated that were he to return to work at the end of his current fit note in May 2024 he would be able to revert to his full contract hours and standard working pattern.*"

36. It was noted that at the recent capability meeting the claimant advised that he had recently restarted medication and:

"*whilst it is too soon to say how effective this is at managing his symptoms, he did also state that as the medication dulls the motions that's why he is quiet and wasn't able to fully discuss his health at the meeting.*

Colin stated that his home situation is still very fluid and does not know yet what his routine will be for access to his children and subsequent childcare needs. Once this is known then Colin will be in a better position to return to work

At the flexible working hearing in August 2023 arrangements were made based on childcare needs which Colin advised had been finalised and that at the start of the capability meeting it was also confirmed that the flexible working arrangements would no longer be (been needed) as all necessary childcare arrangements had now been organised. The letter went on to indicate that the claimant's absence had an impact on the service with increased overtime costs covering the claimant's absence, impact to team morale, a risk to service delivery (the possibility of closing sites) and management workload''.

The report also noted:-

"*Cover is sourced from elsewhere in the service utilising release staff and staff on overtime. This means that we have less staff available to cover other employees requiring annual leave or sick leave. To date we have had to close the site for one weekend due to lack of available staffing to cover this site. At other times we have been running some of the sites with reduced staffing numbers to reduce the impact on our customers.*"

37. The conclusion reached by the manager was that there was no clear return date for the claimant. The service had provided support to him and that there was a clear business impact of his absence which stated:

> "*Without the anticipated return to work date, it is not possible to set fixed term place in cover, cover which requires that a recruitment process and therefore the only options for the service is to cover the post through the use of existing employees from other sites or by closing the site. With long term absence this is becoming increasingly challenging. There is still a degree of uncertainty as stated by Colin as to when he is likely to return to work.*"

38. A hearing took place on the 7 February at which the claimant disagreed that his employment should be terminated on the grounds of his ill-health.

39. A capability hearing was then scheduled to take place before Mrs Baxter. She wrote to the claimant advising him of the date for the hearing which was 8 March 2024 (JB92/93). Reference was made to the earlier hearing as follows:

> "*Following the capability meeting on 7 February 2024, you have not agreed to dismissal on the grounds of ill-health. Capability therefore matters progressed to a capability hearing. The hearing will consider your continued absence since 26 September 2023, the recommendations from Occupational Health Reports, and any support or reasonable adjustments to help you in the workplace.*"

40. The hearing was rescheduled for the 8 March. A detailed transcript was made of the meeting (JB94-104). The claimant attended with his full-time trade union representative Ms Lynch. The meeting was chaired by Roz Baxter, Waste Manager. Ms Tatton as the claimant's direct line manager outlined the management position and background. There was then a discussion. The claimant indicated that he was making every effort to get himself mentally fit and wanted to return to work (JB98). The claimant asked for additional time to get well. He suggested six months as this would be enough time for him to get better and for court proceedings involving his wife

to become finalised. The dose of his medication had been doubled in late January/February. His representative was noted as stating:

"*I think that what Colin is trying to do is put the service interest at forefront here, as Colin has been on medication for a good few weeks now and sometimes that takes a couple of months to work. The reason why Colin is asking for time and suggesting six months is so the service knows where they stand. This service employs people on temporary contracts, Colin might be better within six months but he doesn't want to say two, three, four months, he is giving benefit of the doubt saying six months. Hopefully he will be ready and that gives the service time to employ someone on a temporary contract and takes the burden out of the service. He feels he is better if he says six months and hopefully everything will be behind him, his mental health will be good and the Council will have employed someone temporary which I'm sure they've done on other occasions.*"

41. The practicalities of covering the claimant's absence were discussed. The claimant accepted that the lack of his presence could be causing some ''strain on the system". He said he did not want to be scapegoated for existing problems over staff levels.

42. The meeting adjourned at 10.47am. Ms Baxter considered the evidence before her. She came to the conclusion taking all the circumstances into account particularly the fact that there was no clear return date to work that the claimant should be dismissed. She did not consider whether the claimant was disabled of if adjustments could be made. She did not obtain an up-to-date Occupational Health Report on the claimant's condition nor seek any medical opinion from his GP as to whether it was likely that he could return to work after the expiry of his current sick note in May. She did not consider that the fact that the claimant was still in receipt of sick pay to be a relevant factor in her decision making or his length of service.

43. The claimant was upset and felt aggrieved at his dismissal. He felt that it was unfair and that he had been discriminated on the grounds of his absences which arose from his disability. He did not return to his GP for any additional support. He decided to appeal.

44. Towards the end of May the claimant was feeling better. Following the loss of his employment he had started work as a ‘‘jobbing’’ gardener. He enjoyed the fresh air and exercise.

45. The claimant appealed the dismissal. The appeal was heard by the Appeals Committee on 29 May 2024. He had completed a weeks’ work before the hearing on the 29 May. A detailed report was prepared by Mrs Baxter for the Committee’s assistance. It included the Occupational Health Reports. It also included a narrative of the grounds on which the claimant appealed and the management response.

46. The Committee heard oral evidence about the circumstances including submissions from the claimant and his representative. He raised new matters such as requesting unpaid leave, an extended holiday, a career break in accordance with Council Policies and the issue of discrimination. He asked for consideration to be given to moving him to a more mentally or physically demanding role as this would assist with his mental health. They adjourned. Shortly after this the claimant was asked to return with his representative and was advised that the Committee had not upheld the appeal. He was not given any reasons for the decision. It was unclear if they had engaged with the new matters he had raised. The matter was not followed up in writing.

47. The claimant has been in receipt of Universal Credit since 2022.

48. Following the claimant’s dismissal on the 18 March 2024 he was unemployed for three weeks. He then worked as a gardener on a self-employed basis from May until December 2024 when he found employment starting on 25 January 2025. In his new employment the claimant earns approximately £440 net.

Submissions

49. Counsel for the claimant prepared written submissions which he spoke to briefly. He asked the Tribunal to find the claimant a credible witness and to

accept that he was disabled. He submitted that the dismissal was patently unfair. The employer had asked too much of him to guarantee he was able to return. They did not have any information with which to take a view on the possible impact of the increase in his medication and did not weigh in the balance that his Fit Note was due to expire at the end of May. The appeal process was unfair. It was not clear whether or not the committee engaged with the grounds of appeal. It was not clear why they rejected the appeal.

50. Mr Taylor had also helpfully prepared submissions which he spoke to. He was neutral on the question of the claimant's disability status. He stressed that the claimant had been absent from work for 174 days. He had wanted a further 6 months absence. There was clear pressure on the department. He asked the Tribunal to consider carefully the difficulties the respondent's manager Mrs Baxter faced. It was not feasible to give the claimant a further 6 months absence. They would need to recruit for such a short period and this would involve hiring someone for a short period and training them. There was no clear return date and therefore the respondent's actions in dismissing were reasonable. He had noted that the claimant had said he had told the Appeals Committee he had started his own business and was working.

Discussion and Decision

Disability Status

51. The burden of proof is on a claimant to show that he satisfies the statutory definition of disability contained in Section 6(1) of the Equality Act (the Act) which provides:

> ***''A person (P) has a disability if — (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.''***

52. Schedule 1 of the Act contains supplementary provisions in relation to the determination of disability. Paragraph 2 is in these terms:

''2 (1) The effect of an impairment is long-term if- (a) it has lasted at least 12 months, (b) it is likely to last for at least 12 months, or it is likely to last for the rest of the life of the person affected. (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur…"

Paragraph 5 states:

''5 (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if – (a) measures are being taken to treat or correct it; and (b) but for that, it would be likely to have that effect.''

53. It should be noted that the ''Guidance on matters to be taken into account in determining questions relating to the definition of disability'' (the Guidance) does not impose legal obligations, but the Tribunal must take it into account where relevant. The Guidance at paragraph A8 states: ***''It is not necessary to consider how an impairment is caused… What is important to consider is the effect of an impairment, not its cause.''***

54. The Guidance at paragraph B1 deals with the meaning of **''substantial adverse effect''** and provides: ***"The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect."***

55. Paragraphs B4 and B5 say: ***''An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effect on more than one activity, when taken together, could result in an overall substantial adverse effect. For example, a person whose impairment causes breathing difficulties may, as a result, experience***

minor effects on the ability to carry out a number of day-to-day activities such as getting washed and dressed, going for a walk or travelling on public transport. But taken together, the cumulative result would amount to a substantial adverse effect on his or her ability to carry out these normal day-to-day activities.''

56. Paragraph B1 should be read in conjunction with Section D of the Guidance 15, which considers what is meant by ***''normal day-to-day activities''***. The paragraph states that it is not possible to provide an exhaustive list of day-to-day activities but ***''In general, day-to-day activities are things that people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities.''***

57. The Equality and Human Rights Commission: Code of Practice on Employment (2011) at Appendix 1, sets out further guidance on the meaning of disability. It states at paragraph 7 that ***''There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause."*** It goes on: ***''Someone with impairment may be receiving medical or other treatment which alleviates or removes the effects (although not the impairment). In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if the substantial adverse effects are not likely to occur even if the treatment stops (that is, the impairment has been cured).''***

58. In the case of ***Goodwin v Patent Office*** [1999] IRLR 4, the EAT held that in cases where disability status is disputed, there are four essential questions which a Tribunal should consider separately and, where appropriate, sequentially. These are: (1) Does the person have a physical or mental

impairment? (2) Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities? (3) Is that effect substantial? (4) Is that effect long-term?

59. I concluded that the claimant had a mental impairment namely anxiety/depression. This is a long-standing subsisting condition which recurs. When unwell and not in receipt of treatment the claimant becomes depressed, withdrawn and anxious. He is unable to work. He has difficulties concentrating. He becomes withdrawn and finds it difficult to motivate himself to take care of routine tasks such as personal hygiene. The effect is more than trivial and accordingly must be regarded as being substantial.

60. The claimant lives with what might be described as fragile mental health. However, between periods where there is a serious deterioration in his mental health he is able to live and work relatively normally and without medication of other medical interventions. He uses coping strategies such as mindfulness. It is apparent there can be long gaps between breakdowns. The period covering the last breakdown when in employment seems to have properly started with a lengthy period of absence in 2023 where although he returned to work part time from May until September he began a further even lengthier period of illness that lasted 174 days. The OH report at that point indicates that he was attending a psychiatrist as part of his recovery (JB 61) but was discharged before the next report is written (JB74). At this point the Adviser indicates that the Equality Act is 'likely' to apply meaning that the claimant is likely in their view to be assessed as disabled.

61. No argument was advanced either that the claimant's impairment lasted less than 12 months or that further breakdowns in his health were not likely and that he could not engage either sections 2(1) or (2). I can understand why as it seems from the evidence that once the claimant's mental health breaks down it takes some considerable time for him to recover even with therapy and medication. It was interesting to note that his first period of illness seems to have lasted considerably longer than 12 months before he engaged in

therapy. The effect of medical treatment must be discounted. I concluded that it was likely that the claimant's condition after the last breakdown in September 2024 would have lasted more than 12 months had he not sought treatment. As it was it lasted about 9 months and in this period he was unable to work and suffered the symptoms described above.

Unfair Dismissal

62. The first matter for the tribunal to consider was whether it had been satisfied by the respondent that the reason for the dismissal was one of the potentially fair reasons for dismissal contained in section 98(1) or (2) of the Employment Rights Act 1996 ('ERA'). They had said that it was the claimant's capability that had led to dismissal, so that it was for them to show that capability was the real reason for dismissal, i.e. under s.98 (2)(b) of the ERA. In the circumstances it is clear that the reason for dismissal was his absences and accordingly the reason for dismissal was capability.

Section 98(4) ERA

63. The task for the Tribunal in terms of section 98(4) of the Act was to ascertain whether, in all the circumstances (including the size and administrative resources of the respondent) the dismissal was fair or unfair. The Tribunal had regard to the well-known cases of ***British Home Stores Ltd v Burchell*** [1978] IRLR 379, ***Iceland Frozen Foods v Jones*** [1982] IRLR439, and ***Sainsbury's Supermarkets v Hitt*** [2003] IRLR 23 and to the guidance contained in those cases as to the approach the Tribunal should follow in assessing dismissal.

64. In order to act reasonably an employer must consult the employee and inform themselves about the true medical position (***Lindsay District Council v. Daubney*** [1977] ICR 556. Long-term absences as in the claimant's case, the element should form part of the decision-making process namely:

1. The employer should ascertain an up-to-date position;
2. The employer should consult with the employee and
3. The employer should consider the availability of alternative employment.

65. If an employer follows a fair procedure the important question is how much longer can the employer be expected to retain the employee. The case of ***BS v. Dundee City Council*** [2014] SC254 indicates that the following may be factors:
    1. The availability of temporary cover (as cost);
    2. Whether the employee has exhausted sick pay;
    3. Administrative costs of retaining the employee;
    4. The size of the organisation.

66. In the present case the Manager Mrs Baxter should be commended for approaching the matter in a careful and thorough way. She had the difficulty of managing the service both on a tight budget and with limited personnel. Unfortunately, there were a number of flaws in the approach which led to difficulties with her ultimate decision making. She indicated, correctly, that her approach should be "multifactorial". Her evidence was clear that she had discounted any consideration of the claimant still be entitled to sick pay. This was an important contractual benefit. She said that she had been told by HR to wholly discount this matter and although it is not a complete bar to dismissal it is a factor that a reasonable employer would consider.

67. Mr Cunningham indicated that in his view another flaw was that the claimant was not given advance notice in the invitation to the capability hearing that dismissal was a possible outcome. There is some substance in this that although the claimant must have been aware that his employers were working their way through the capability process and had reached the stage of asking him if he was prepared to resign, the situation was still a developing one. It was clear from the recorded reaction from the claimant and in particular, his trade union representative following the meeting in March they thought the

meeting was to discuss ways of moving forward rather than dismissal. They might have concentrated less on the 6 month absence proposal had they known that the respondent was contemplating dismissal and to this extent there was a real unfairness.

68. This latter difficulty was compounded by the fact that the Appeals Committee did not give the claimant any reasons for refusing the appeal. It might be assumed from the respondent's stance in these proceedings where disability status is not conceded that they did not accept he was disabled and that reasonable adjustments were not considered. In any event no evidence of what the Appeals Committee's reasoning was, how it approached the matters and why it rejected the appeal was before the Tribunal. Indeed, the Tribunal did not even receive a copy of the Minute of the meeting. To my surprise Mr Taylor indicated that the Minute would be silent on the reasons. He explained that the practice was simply to say whether or not an appeal had been granted or refused.

69. It may be an appropriate forum to remind the members of the Committee that they could be cited as witnesses in Employment Tribunal and other cases to give evidence about the reasons for rejecting an appeal. They are acting in a public and quasi-judicial capacity. It would be unfortunate if many months after a meeting they were asked to recall why a particular decision was made and what was considered and rejected and why? In such a situation they would, apparently, have no access to the written basis of that decision. Nor could they rely necessarily on the employer's case particularly where new matters are raised that were not addressed or envisaged by the Manager. The failure to set out reasons is clearly unsatisfactory. The Scottish Government recognises these difficulties and provides guidance for Local Authorities in carrying out and recording decisions in their document ''Right First Time''.

70. In this case the appeal was not simply a paper exercise. The claimant was actively seeking to keep his employment. He requested unpaid leave, an extended holiday, a career break and indicated he felt he had been discriminated against. He said that he felt the role of Waste Operative was not mentally or physically stimulating enough and sought redeployment. These were new matters which were not addressed by Mrs Baxter at the Capability Hearing. It is important to note that redeployment is part of the attendance management process and the Council also had policies allowing career breaks. By the time of the Appeal Hearing the medication that had been briefly discussed at the Capability Meeting with Mrs Baxter had stabilised the claimant's symptoms and he was fit enough to return to work. The evidence of the Tribunal was that he was fit enough to return to his role as a Waste Operative. He told his representative this and it appears that she did not provide the Appeal Committee with this information.

71. The date in which the claimant could return back to work was clearly a significant factor if not the significant factor in Mrs Baxter's decision to dismiss. I accepted the claimant's position that Mrs Baxter applied too high a bar virtually asking the claimant for a guarantee as to a date of his return. This, as the trade union representative had mentioned depends on the efficacy of his increased medication. I accepted the submission that even the most basic enquiry by the committee would have provided significant new evidence which a reasonable employer would have considered. It was submitted that there was a duty to seek up-to-date medical advice and that the failure to follow up an indication of a potentially beneficial effect of increasing the claimant's medication either at the dismissal hearing or later was a significant flaw in the fairness of the dismissal. I agree with this submission but what makes matters more problematical is that the employer had a Fit Note that was due to expire. The fact that the claimant was able to begin work in May as a self-employed gardener and whose mental health had improved significantly was likely to have been information that would have been contained in an up-to-date Occupational Health Report or even a Report from the claimant's G.P. The evidence of Mrs Baxter showed that the

employers placed responsibility on the claimant to produce a G.P.'s report. The last Occupational Health Report from the respondent was by the time of the dismissal hearing relatively elderly having been prepared in December of the previous year. I accept the submission that no reasonable employer would have failed to obtain an updated Occupational Health Report or a Report from the claimant's G.P. on whether there were reasonable prospects of his return in the near future.

72. I considered the question of whether or not the respondents could wait any longer. The evidence on this matter was not particularly persuasive. Mrs Baxter gave evidence about the cost of providing cover but there was no evidence of what these costs actually were. It was not clear what steps had been taken to canvass the claimant's colleagues as to whether they were prepared to continue doing overtime. At one point the claimant was only working weekends although there was no direct evidence on the matter it could perhaps be assumed this was cost effective for the respondents as otherwise weekends would have to be covered by staff working overtime. To return the claimant to such work does not appear to have been considered although to be fair to Mrs Baxter because of the disciplinary issues it may be that the position would have been the claimant should effectively work full time hours because of the supervisory issue that she had identified. Nevertheless, the matter does not have appeared to have been directly addressed. The claimant accepted that there could be some "strain on the service" as the evidence on this matter was not particularly persuasive (the recycling centre had only been shut on one occasion because of lack of staff). It was for the respondent to produce evidence of the impact.

73. On balance I came to the view that they had indicated that there was some difficulty with the service but that difficulty was at this point not acute. It was likely to become more significant going into the summer when holidays were being applied for. There are, however, other difficulties with the respondent's case in that they do not appear to have taken the claimant's length of service into account or that he was still entitled to sick pay. It was also apparent that

the meeting ended up focussing very much on the claimant's request for six months leave. No weight was apparently put on the fact that the claimant's fit note was due to expire in May 2024. It doesn't appear to have been challenged or asked about whether or not he was likely to be able to return to work. Part of the discussion related to the merits and demerits of his request for six months leeway. Considering all the circumstances here it appears to me that the dismissal was unfair. I have some sympathy with the respondents and the difficulty they have managing their waste service. The support they had given to the claimant could not be criticised. The handling of the final steps of the capability process appear to have been subject to some significant errors rendering it unfair.

74. Mrs Baxter was aware of the claimant's absence record and the fact that he had been absent through depression. The Occupational Health Reports particularly report in 2023 (p62) makes it clear to the employer that disability status is likely to apply and a later report that it would possibly apply (p84). By the time of the capability hearing the claimant was taking medication and that was referenced at the appeal. At that point the main symptoms the claimant was experiencing appear to relate to his sleep and the ability to concentrate. These matters would clearly have an impact on both his day-to-day activities and his ability to carry out his work safely.

75. I then went on to consider whether or not the dismissal was tainted by discrimination. I considered s.15(1) of the Equality Act which relates to discrimination arising from disability. The unfavourable treatment here does not require a comparator. Unfavourability is measured against an objective sense of what is adverse (***Trustee of Swansea University Pension & Assurance Scheme v. Williams*** [2015] IRLR 885). The claimant was dismissed because of his absences and these arose as a consequence of his disability. It appears that s.15(1)(a) is satisfied. Counsel also referred to the case of ***Ayodeli v. City of Lincoln & Another*** [2018] ICR 748. The burden of proof passes to the respondent to show that the treatment i.e. dismissal is a proportionate means of achieving a legitimate aim. I accepted that the

respondents had identified a legitimate aim namely to run an efficient and cost-effective waste recycling system. They must then satisfy the Tribunal that dismissal was proportionate. The application of s.15(1)(b) 2010 involves a three-stage test. The tests are objective. The reasonable responses test does not apply. The onus is on the employer to show that the unfavourable treatment is justifiable. An employer must lead evidence to support an assertion of justification.

76. There was little evidence that the service was not being delivered because of the claimant's absence. Indeed, the evidence was that the delivery of the service was being maintained (only one site required to be closed because of lack of staff). Whether this involved other staff absence was not made clear. The respondents were able to continue seeking support from existing staff. The claimant's evidence was that there were other employees of whom he was aware willing to undertake that cover. Cover could have been recruited by employing someone on a short-term contract or agency workers. Although costs were mentioned there were no details given of those costs or why they would be disproportionate. There was no detail of whether staff would be able and willing to cover the absence for a further period. Indeed, there was no discussion of the budget available for managers or any specific pressure of for example, if the claimant had taken a six month sabbatical that this might very well have helped offset any additional costs. There was no evidence of whether there was a need to recruit other staff more generally for the service or if staff members on long-term illness who were due to return or retire. It was simply insufficient in my view to maintain a defence of justification.

77. I turned to consider the question of reasonable adjustments. The respondents are in the unenviable position of not having come to a view on whether the claimant was disabled and whether reasonable adjustments were considered for that reason. The claimant relies on an alleged PCP that whereby the respondents operate a system whereby anyone that exhausts their six month

sick pay faces dismissal. Reasonable adjustments in this case are not just an academic exercise. As was pointed out in ***Archibald v. Fife Council*** (2004) SC (HL) 117 an employer is obliged to treat a disabled person more favourably than another. There is no need for a comparator when carrying out this exercise. It is sufficient for a reasonable adjustment to have some prospect of removing the disadvantage. I uphold the claim that there was a failure to make reasonable adjustments. The irony in this case is that a proper consideration of any of the advanced requests made by the claimant (redeployment for example) would have in itself led to the point when he could have returned to work.

Compensation/Remedy

78. The parties agreed that the value of the basic award in this case was £3,297. The claimant seeks financial compensation under the Equality Act and under the Employment Rights Act. The parties agreed the following:

1. Gross weekly wage	-	£ 471.00
2. Net weekly earnings	-	£ 407.00
3. Employer weekly pension contributions	-	£ 56.52
It was agreed that the claimant received 7 weeks pay in lieu of notice.	-	£ 2849.00
The claimant seeks financial loss from the period 18 March 2024 (date of termination to 25 January 2025 (44 weeks and 5 days). This includes earned from self-employment.	-	£ 1130.00

79. The following calculations apply. The wage loss is £18196.97. The pension loss £2527.00 (£56.52 x £44.71). This brings out a figure of **£20723.97** from which the below noted must be deducted**.** PILON and self-employed earnings) of **£3979.00.** This totals **£16744.97** to which **£500** for loss of statutory rights must be added. The total is **£17244.97.**

80. The claimant was in receipt of Universal Credit. The Recoupment Regulations apply. There is no continuing wage loss.

81. In relation to injury to feelings the Tribunal considered the three ''***Vento***'' scales. The claimant was upset at the manner of his dismissal and the failure to make adjustments to support his return to work. The dismissal did not materially impact on his ability to return to work. The lower scale is appropriate. These events were not a course of conduct and were isolated incidents. Otherwise, the claimant's ill health had been treated generally sympathetically. It does not merit the middle or higher bands. The middle of the lower band was sought and appears appropriate. The sum awarded will be £6000 which will attract interest at 8% from the 18 March until the 12 May 2025 (£421 x 8% = £555.72).

Employment Judge: J M Hendry

Date of Judgment: 9 June 2025

Date Sent to Parties: 16 June 2025