EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8002138/2024

Held in Edinburgh on 23-25 June 2025

Employment Judge M Sangster
Tribunal Member S Cardownie
Tribunal Member D McDougall

Mr S Gourlay — **Claimant In Person**

HBOS plc — **Respondent Represented by Mr G Cunningham Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claimant's complaints do not succeed and are dismissed.

REASONS

Introduction

1. The claimant presented complaints of unfair dismissal, that his dismissal amounted to direct discrimination and/or discrimination arising from disability, and that the respondent failed to comply with a duty to make reasonable adjustments.

2. The respondent admitted the claimant was dismissed, but stated that the reason for dismissal was capability, which is a potentially fair reason. The respondent maintained that they acted fairly and reasonably in treating capability as sufficient reason for dismissal. They accepted that the claimant

was a disabled person at the relevant time, as a result of anxiety and depression, but otherwise resisted the complaints of disability discrimination.

3. The respondent led evidence from Victoria Johnson (**VJ**), Mortgage and Protection Manager and Nicola Quin (**NQ**), Hearing Manager. The claimant gave evidence on his own behalf, and did not call any further witnesses. Evidence in chief was given by reference to written witness statements, which were taken as read. A joint set of productions, extending to 562 pages, was lodged.

Issues to be determined

4. The issues to be determined were discussed at the start of the hearing. It was agreed that the issues were broadly identified in the note issued by Employment Judge Jones, following the preliminary hearing held on 6 February 2025.

5. Whilst knowledge of disability was initially on the list of issues, the respondent conceded this point during submissions. Similarly, the claimant conceded during the course of the hearing that the respondent had provided a phased return to work, so that matter did not require to be determined in relation to the complaint of failure to make reasonable adjustments. By the end of the hearing, the issues to be determined were accordingly as follows:

*Unfair Dismissal – s94-98 Employment Rights Act 1996 (**ERA**)*

6. Was the claimant dismissed?

7. If so, what was the reason (or, if more than one, the principal reason) for dismissal and was it a potentially fair reason for dismissal? The respondent asserts that the claimant was dismissed due to capability.

8. If so, did the respondent act reasonably, in the circumstances, in treating this as a sufficient reason to dismiss the claimant?

*Direct Discrimination – s13 Equality Act 2010 (**EqA**)*

9. Did the respondent subject the claimant to less favourable treatment (i.e. did the respondent treat the claimant less favourably than it treated or would have treated others ('comparators') in not materially different circumstances) by dismissing him?

10. If so, was this because claimant is a disabled person?

Discrimination Arising from Disability – s15 EqA

11. Was the claimant treated unfavourably by being dismissed?

12. If so, was this due to something arising in consequence of disability? Namely his absences and the pressure to return to work.

13. If so, was the treatment pursuant to a legitimate aim?

Reasonable Adjustments - s20 & 21 EqA

14. Did the respondent have provision, criteria or practices ('PCPs') of:

    14.1. Requiring certain levels of performance; and/or

    14.2. Pressurising employees to return to work prematurely.

15. If so, did that PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?

16. If so, would the steps identified by the claimant, namely:

    16.1. Changing his line manager;

    16.2. Undertaking stress risk assessments; and/or

    16.3. The provision of a mental health advocate

    have alleviated the identified disadvantage?

17. If so, would it have been reasonable for the respondent to have taken that step at any relevant time, and did they fail to do so?

Remedy

18. If the claimant succeeds in any of his complaints, what compensation should be awarded to him?

Findings in fact

19. This judgment does not seek to address every point about which the parties have disagreed. It only deals with the points which are relevant to the issues which the Tribunal must consider to decide if the complaints made succeed or fail. If a particular point is not mentioned, it does not mean that it has been overlooked, it simply means that it is not relevant to the issues. The relevant facts, which the Tribunal found to be admitted or proven, are set out below:

20. The claimant commenced employment with the respondent on 25 April 2011. He was employed as a mortgage and protection advisor. In that role, he was responsible for advising customers on mortgage and protection products (the latter being life and critical illness insurance, as well as buildings and contents insurance). The claimant worked from home. VJ became the claimant's line manager at the start of 2023.

21. On 17 July 2023, the claimant was placed on 'Structured Support', as a result of some concerns which had been identified in relation to his performance. Structured Support is a stage of the respondent's performance management process. While on Structured Support, the claimant was given additional call listening opportunities, coaching and support around the tasks performed. During that process, there were two unsuccessful observations, meaning that the claimant's advice posed a risk to customers. VJ met with the claimant on 18 August 2023 to discuss this, and whether further training was required. Due to her concerns in relation to his wellbeing, Structured Support was then paused, and a wellbeing plan commenced. VJ also referred the claimant to Occupational Health (**OH**) and instructed that a stress risk assessment be conducted.

22. The claimant attended an OH consultation on 7 September 2023. OH reported that various personal situations had led to an exacerbation of anxiety and depression for the claimant. The report stated that the claimant was fit for work, but may benefit from temporary adjustments. The recommendations in the report were discussed with the claimant and it was agreed that his workload would be reduced by 25% for 4–6 weeks, in accordance with the recommendations. This was implemented with effect from 18 September 2023.

23. On 9 October 2023, the claimant commenced a period of long-term sickness absence, initially due to fatigue and latterly due to anxiety/depression/stress. VJ held weekly wellbeing discussions with the claimant during his absence, at his request. During his absence the claimant engaged in counselling sessions provided through the respondent's Employee Assistance Programme.

24. The claimant attended a further OH consultation on 1 December 2023. The OH report subsequently prepared indicated that the claimant's symptoms were significant and he was unfit to work at that time. It stated however that a return to work was anticipated in 2-4 weeks, provided there were no setbacks to his recovery. A number of recommendations were made to support the claimant on his return to work, such as:

    24.1. A phased return, over a 4-week period;

    24.2. That management contact a mental health advocate to signpost sources of support for them and the claimant;

24.3. The completion of a stress risk assessment; and

24.4. Regular meetings to be held with the claimant and that he should be able to take regular breaks.

25. VJ discussed the OH report and recommended adjustments with the claimant on 6 December 2023, during a weekly wellbeing discussion. It was agreed these would be implemented. They also discussed the recommendation regarding a mental health advocate and VJ provided the claimant with the names of the local mental health advocates, so he could make contact if he wished to do so. On 7 December 2023, the claimant was certified as unfit to work for a further 6 weeks. On 16 January 2024, the claimant was certified as unfit to work for a further 4 weeks.

26. On 31 January 2024, the claimant attended a Wellness Review Meeting to discuss his ongoing absence from work. VJ conducted the meeting, and the claimant was accompanied by a trade union representative. It was noted that the claimant was not fit to return to work, having experienced a deterioration in his mental health, due to personal issues, at the start of January 2024. He confirmed that he felt supported by the respondent and indicated that there was no further support or adjustments that would assist him to return to work at that stage. He indicated that he did not know when he may be in a position to return to work. VJ did not place any pressure on him to do so, accepting that he was unfit to return. It was however confirmed, at the conclusion of the meeting, that the next step in the respondent's process would be to proceed to a Final Formal Wellness Meeting.

27. VJ wrote to the claimant on 2 February 2024. In her letter, she confirmed what had been discussed on 31 January 2024 and that the claimant was not in a position to return to work at that time. She stated that the claimant would be invited to a Final Meeting and that a potential outcome of that meeting was the termination of the claimant's employment on grounds of capability.

28. The claimant attended the Final Meeting on 21 February 2024. VJ conducted the meeting, and the claimant was again accompanied by a trade union representative. At the meeting the claimant indicated that he would be in a position to returned to work, on a phased return, commencing 26 February 2024. It was discussed that a period of training would be required on the claimant's return to work, given the length of his absence and changes which had been implemented during that period. No further adjustments were identified as being required.

29. The claimant returned to work on 26 February 2024, on a phased basis. It was agreed that he would undertake training on his return, rather than operational duties. He chose his own working hours on his return, the level being in

accordance with OH advice. By 22 March 2024, the claimant had completed his phased return and, following training, coaching and observations, was signed off as competent to undertake all aspects of his role. He took a week's annual leave, returning to work on 1 April 2024. It was agreed that he would revert to seeing customers the following week, with VJ monitoring all of his calls for the first two weeks and providing feedback and coaching.

30. Structured Support was then reinstated in relation to the claimant, with effect from 22 April 2024. While there were some tweaks to the goals which had been identified in July 2023 given changes in internal procedures, these broadly remained the same. There were 4 key goals, which reflected the basic requirements of the claimant's role, namely:

    30.1. A welcome call requires to be completed prior to every appointment with a customer;

    30.2. Mortgage interviews to be conducted following correct processes, using Mortgage Conversation Guide and the respondent's mortgage portal, to advise customer on the correct mortgage suitable to their needs on every mortgage appointment;

    30.3. Customers to be provided with protection using their budgets on the PYYH (Protect you and your home) tool. Performance to be demonstrated via CJCM and Cavendish referrals; and

    30.4. A minimum of 2 slots being opened in the claimant's diary per day. In the event of cancellation, a new slot should be opened and the cancellation added to the Future Contact Register (**FCR**) for rebooking.

31. Structured support was initially scheduled for 4 weeks. The claimant was given additional call listening opportunities, coaching and support around the tasks performed during the structured support period. A Formal Review Meeting took place on 7 June 2024. By that stage, the claimant had been on structured support for over 6 weeks. VJ conducted the meeting, and the claimant was accompanied by a trade union representative. The claimant's performance against the 4 key goals identified was discussed at the meeting. It was noted that the claimant had not provided a personalised protection illustration to any customers in the structured support period, and was not having conversations with customers regarding this. VJ asked what further support could be provided. He asked to listen to 'good' calls. It was highlighted to him that he already had access to a library of recordings demonstrating this. VJ indicated however that she would also sit with him and listen to calls made by colleagues. This was subsequently done.

32. The claimant attended for a further OH assessment on 11 June 2024. The report issued following that assessment indicated that the claimant was managing his symptoms, was fit to work and was able to push himself to complete his work duties. The report indicated however that management may wish to consider adjustments such as the provision of mental health coaching, positive reinforcement, regular breaks, regular meetings with the claimant and a stress risk assessment. VJ discussed the OH report with the claimant on receipt. 8 coaching sessions were subsequently arranged and VJ continued to hold regular meetings with the claimant (at least weekly), which she documented.

33. VJ wrote to the claimant on 17 June 2024, summarising what had been discussed at the meeting on 7 June 2024. This included the support provided to date and the areas where the claimant was not performing against the performance goals identified. She confirmed that a 4-week Formal Action Plan would be implemented in relation to the 4 performance goals identified. She also confirmed the support that would be provided in that period and that a Final Review Meeting would then take place, to assess the claimant's performance in relation to the goals stated in the Formal Action Plan. He was informed of where the Formal Action Plan could be viewed. The letter stated that, if his performance did not improve, a potential outcome of the Final Review Meeting was the termination of his employment. The claimant was informed of his right to appeal against VJ's decision.

34. The Final Review Meeting took place on 29 July 2024. This was 7 weeks after the Formal Review Meeting, rather than 4, due to the fact that the claimant took annual leave during the Formal Action Plan, which resulted in it being extended. The claimant was informed in the letter inviting him to the Final Review Meeting that, if it was agreed that he had made good progress and was back on track the Formal Action Plan would come to an end. Alternatively, a potential outcome could be the ending of his employment on grounds of capability. That possibility was also referenced in the respondent's Performance Policy, which was enclosed with the letter. That policy states: '***The final Formal Review meeting will involve considering all the actions and support taken so far, and the progress made*** *– if your performance hasn't shown reasonable signs of improvement, or if it has worsened, then it is likely that we will dismiss you on capability grounds.'*

35. VJ conducted the Final Review Meeting. The claimant was accompanied at the meeting by a trade union representative. At the meeting, the support provided to the claimant, and the claimant's progress against each of the 4 performance goals in the Formal Action Plan was discussed. The following was noted:

35.1. The claimant was not conducting welcome calls with all customers, prior to their appointments. Despite dealing with significantly fewer appointments than his colleagues (meaning that he had more time to do welcome calls), his welcome call percentage was the lowest in the team;

35.2. The claimant was not following the correct process, or using the conversation guide or mandatory tools, in every mortgage interview with customers, despite knowing of these, that their use is mandatory, and having received full training in relation to them;

35.3. He had only provided 2 quotes to customers regarding home insurance in the year to date, and had not provided any quotes for other protection (such as life and critical illness insurance); and

35.4. Of the 5 cancelled appointments which the claimant had had, only 1 had been added to the FCR.

36. VJ indicated, at the conclusion of the meeting that she would require to reflect on the 4 performance goals stated in the Formal Action Plan, and would confirm the outcome of the Final Review Meeting in writing.

37. After reflecting on the Formal Action Plan and the claimant's performance, taking into account what the claimant had said at the meeting, VJ concluded that the claimant had not achieved the performance goals set, nor demonstrated sufficient progress towards these, despite being an experienced Mortgage and Protection Adviser, and having received significant levels of support over an extended period. The 4 performance goals represented the minimum requirements of the claimant's role. She concluded that his inability to meet the basic standards of his role presented unacceptable risks to the respondent's customers and to the respondent, as follows:

37.1. To the respondent's customers, in not having their mortgage and protection needs explored in sufficient depth, not being provided with the correct advice on every occasion and not being added to the FCR for appropriate follow-up; and

37.2. To the respondent - where no protection/insurance had been put in place, there could be a risk to the respondent if the customer were unable to pay. In addition, by breaching their legal obligations to customers, the respondent was exposed to potential enforcement action from its regulator and/or legal action from customers.

38. Having reached these conclusions, VJ determined that it was appropriate, at that stage, for the claimant's employment to be terminated, on grounds of capability. She wrote to the claimant on 2 August 2024 confirming this, and the

reasons why she had reached that conclusion. She confirmed that his employment would terminate with effect from 4 August 2024, and that he had the right to appeal her decision.

39. By letter dated 2 August 2024, the claimant appealed against the decision to terminate his employment. NQ was appointed to hear his appeal. In addition to his letter of appeal, the claimant submitted a key events timeline, a summary document and a power point presentation. NQ reviewed each of these, together with the performance plan, the performance meeting notes and correspondence and the wellness information, including OH reports and the wellness plan. Having done so, she invited the claimant to an appeal meeting.

40. The meeting was delayed, at the claimant's request, and ultimately took place on 24 September 2024. The claimant was accompanied at the appeal meeting by his trade union representative.

41. Following the appeal meeting, NQ interviewed VJ and considered all the evidence presented. Having done so, she determined that no element of the claimant's appeal should be upheld. She confirmed that decision, and provided the claimant with a detailed summary of her rationale for reaching the conclusions she did, in relation to each element of his appeal, in a letter dated 1 November 2024, which extended to 9 typed pages.

42. NQ concluded that VJ had provided significant wellbeing support to the claimant, and stated that she had seen substantial evidence of coaching and feedback provided to the claimant by VJ. While NQ identified that stress risk assessments were not completed for the claimant after December 2023, she concluded that this did not impact the performance management process: he did not state that stress was an underlying factor in not being able to achieve the 4 goals of the Action Plan, and was aware that he could request a stress risk assessment at any stage, but did not do so. She concluded that the performance concerns were justified and, even the claimant's own data, did not show appropriate behaviours or demonstrate sufficient improvement.

43. Had the claimant's employment not been terminated on 4 August 2024, it is likely that he would have been made redundant in December 2024. VJ had been asked to complete a selection matrix for her team by 24 July 2024, which she did. The claimant was allocated the lowest total score. Those at risk of redundancy were notified of this on 20 August 2024. For those individuals where redundancy was confirmed following consultation, they were given notice on 20 September and their employment terminated on 10 December 2024.

Submissions

Claimant's submissions

44. The claimant gave a brief oral submission. In summary, he stated:

    44.1. His dismissal was procedurally and substantively unfair. He was not appropriately supported. Support as absent or superficial, and his objectives were vague.

    44.2. His mental health was an underlying factor in his dismissal.

    44.3. Recommended adjustments were not implemented.

Respondent's submissions

45. The respondent lodged a written submission, extending to 27 pages, which they also supplemented orally. They summarised the evidence led and, in summary, stated:

    45.1. The evidence of the respondent's witnesses should be preferred to that of the claimant.

    45.2. The tests set out in ***British Home Stores v Burchell*** [1980] ICR 304 apply and were satisfied in this case. The Tribunal must not substitute its view in relation to these points.

    45.3. The process adopted by the respondent, and decision to dismiss the claimant, fell within the band of reasonable responses open to a reasonable employer in the same circumstances.

    45.4. The claimant's direct discrimination complaint must fail: any hypothetical comparator would have been treated in the same way.

    45.5. The complaint of discrimination arising from disability must also fail, as there is no link between the asserted 'something' arising from disability and the claimant's dismissal. Failing which dismissal was a proportionate means of achieving a legitimate aim.

    45.6. In relation to the reasonable adjustments complaint, the PCPs are not accepted and proposed adjustments were either made, or would not remove any substantial disadvantage asserted.

Relevant Law

Unfair Dismissal

46. S.94 ERA provides that an employee has the right not to be unfairly dismissed.

47. In cases where the fact of dismissal is admitted, as it is in the present case, the first task of the Tribunal is to consider whether it has been satisfied by the respondent (the burden of proof being upon them in this regard) as to the reason for the dismissal and that it is a potentially fair reason falling within s.98(1) or (2) ERA.

48. If the Tribunal is so satisfied, it should proceed to determine whether the dismissal was fair or unfair, applying the test within s.98(4) ERA. The determination of that question (having regard to the reason shown by the employer):-

"(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

49. In the case of ***Alidair Ltd v Taylor*** [1978] IRLR, Lord Denning stated *'Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent. It is not necessary for the employer to prove that his is in fact incapable or incompetent.'* Accordingly, where an employee has been dismissed for capability, there are two questions to be addressed by the Tribunal when considering reasonableness, namely:

(i) Whether the employer honestly believed the employee was incompetent or unsuitable for the job? and
(ii) Whether the respondent had reasonable grounds for that belief.

50. Before dismissing on the grounds of incapacity, an employer should inform the employee of the respects in which they are failing to do their job adequately, warn them of the possibility or likelihood of dismissal on this ground and give them an opportunity to improve their performance (***James v Waltham Holy Cross Urban District Council*** [1973] ICR 398).

51. Where warnings have been given, the Tribunal requires to consider whether it was reasonable for the employer to dismiss on the grounds of capability, taking

into account all the circumstances, including the warning. It is not for the Tribunal to consider whether the issuing of the warning was appropriate, but rather whether it was reasonable for the employer to take this into account. In making this assessment, Tribunals should consider whether the warning was issued in good faith, whether there were *prima facie* grounds for issuing it and whether it was manifestly inappropriate. Where a final written warning has not been appealed, there would need to be exceptional circumstances for going behind the earlier disciplinary process and, in effect, re-opening it (***Davies v Sandwell Metropolitan Borough Council*** [2013] IRLR 374 and ***General Dynamics Information Technology Limited v Carranza*** UKEAT/0107/14).

52. It is also essential that a fair procedure is followed. The Acas Code states that employers should carry out any necessary investigations to establish the facts of the case, inform employees of the basis of the problem, give them the opportunity to put their case in response and allow the employee to appeal against any formal decision made.

53. In determining whether the employer acted reasonably, it is not for the Tribunal to decide whether it would have dismissed for that reason. That would be an error of law as the Tribunal would have 'substituted its own view' for that of the employer. Rather, the Tribunal must consider the objective standards of a reasonable employer and bear in mind that there is a range of responses to any given situation available to a reasonable employer. It is only if, applying that objective standard, the decision to dismiss (and the procedure adopted) is found to be outside that range of reasonable responses, that the dismissal should be found to be unfair (***Iceland Frozen Foods Limited v Jones*** [1982] IRLR 439).

Direct Discrimination

54. Section 13(1) EqA states:

'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.'

55. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In ***Amnesty International v Ahmed*** [2009] IRLR 884 the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council*** [1990] IRLR 288 and (ii) in ***Nagaragan v London Regional Transport*** [1999] IRLR 572. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan,*** the act complained of is not inherently discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or

unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another*** [2009] UKSC 15.

56. For direct discrimination to occur, the relevant protected characteristic needs to be a cause of the less favourable treatment *'but does not need to be the only or even the main cause' (paragraph 3.11, **EHRC: Code of Practice on Employment (2011)**)*. The protected characteristic does however require to have a '*significant influence on the outcome'* (***Nagarajan v London Regional Transport*** 1999 ICR 877).

Discrimination arising from disability

57. Section 15 EqA states:

"(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."

58. Guidance on how this section should be applied was given by the EAT in ***Pnaiser v NHS England*** [2016] IRLR 170, EAT, paragraph 31. In that case it is pointed out that 'arising in consequence of' could describe a range of causal links and there may be more than one link. It is a question of fact whether something can properly be said to arise in consequence of disability. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

59. There is no need for the alleged discriminator to know that the 'something' that causes the treatment arises in consequence of disability. The requirement for knowledge is of the disability only (***City of York Council v Grosset*** [2018] ICR 1492, CA).

Failure to make reasonable adjustments

60. Section 20 EqA states:

'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.'

61. The duty comprises three requirements. 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.'* The third requirement is a '*requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid'.*

62. Section 21 EqA provides that a failure to comply with the first or third requirement is a failure to comply with a duty to make reasonable adjustments and that A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

63. Further provisions in Schedule 8, Part 3 EqA provide that the duty is not triggered if the employer did not know, or could not reasonably be expected to know that the claimant had a disability and that the provision, criteria or practice is likely to place the claimant at the identified substantial disadvantage.

Burden of proof

64. Section 136 EqA provides:

> ***'****If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.'*

65. There is accordingly a two-stage process in applying the burden of proof provisions in discrimination cases, explained in the authorities of ***Igen v Wong*** [2005] IRLR 258, and ***Madarassy v Nomura International Plc*** [2007] IRLR 246, both from the Court of Appeal. The claimant must first establish a first base or *prima facie* case of direct discrimination or harassment by reference to the facts made out. If the claimant does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the Tribunal to conclude that the complaint should be upheld. If the explanation is adequate, that conclusion is not reached.

66. In ***Madarassy***, it was held that the burden of proof does not shift to the employer simply by a claimant establishing that they have a protected characteristic and that there was a difference in treatment. Those facts only

indicate the possibility of discrimination. They are not, of themselves, sufficient material on which the tribunal 'could conclude' that, on a balance of probabilities, the respondent had committed an unlawful act of discrimination. The Tribunal has, at the first stage, no regard to evidence as to the respondent's explanation for its conduct, but the Tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant's case, as explained in ***Laing v Manchester City Council*** [2006] IRLR 748***,*** an EAT authority approved by the Court of Appeal in ***Madarassy***.

Discussion & Decision

Unfair Dismissal

67. The Tribunal referred to s.98(1) ERA. It provides that the respondent must show the reason for the dismissal, or if more than one the principal reason, and that it was for one of the potentially fair reasons set out in s.98(2). At this stage the Tribunal was not considering the question of reasonableness. The Tribunal had to consider whether the respondent had established a potentially fair reason for dismissal. The Tribunal accepted that the reason for dismissal was capability, as stated by the respondent in the terms of the letter terminating the claimant's employment. This is a potentially fair reason under s.98(2)(a).

68. The Tribunal then considered s.98(4) ERA. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reason is shown by the respondent. The answer to that question depends on whether, in the circumstances (including the size and administrative resources the employer is undertaking) the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the employee. This should be determined in accordance with equity and the substantial merits of the case. The Tribunal was mindful of the guidance given in cases such as ***Iceland Frozen Foods Limited*** that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent. There is a band of reasonableness within which one employer might reasonably dismiss the employee, whereas another would quite reasonably keep the employee on. If no reasonable employer would have dismissed, then dismissal is unfair, but if a reasonable employer might reasonably have dismissed, the dismissal is fair.

69. The Tribunal referred to the case of ***Alidair Ltd v Taylor.*** The Tribunal was mindful that it should not consider whether the claimant was in fact incapable of carrying out his role, but rather whether the respondent honestly believed that was the case and whether the respondent had reasonable grounds for that belief.

Did VJ have an honest belief?

70. The Tribunal concluded that VJ did have an honest belief that the claimant's performance would not improve to the level required and he was therefore incapable of carrying out his role.

Were there reasonable grounds for VJ's belief?

71. The Tribunal noted that concerns had originally been raised in relation to the claimant's performance in July 2023. Those concerns were being addressed, but that process was paused from August 2023, and adjustments put in place to support the claimant's wellbeing. He was then absent from 9 October 2023 to 26 February 2024. On his return to work he undertook 4 weeks of retraining, and, by 22 March 2024, following training, coaching and observations, was signed off as competent to undertake all aspects of his role.

72. Despite this, concerns in relation to his performance persisted and he was placed on structured support again from 24 April 2024. He was appropriately supported in that period.

73. The claimant was placed on a Formal Action Plan on 7 June 2024, and warned that if his performance did not improve in relation to the performance targets identified, he could be dismissed at the Final Review Meeting, which was initially scheduled to take place in 4 weeks. He did not appeal against that decision, despite being given the opportunity to do so. On the basis that the claimant did not appeal against this, and no exceptional circumstances were demonstrated, the Tribunal concluded that it was appropriate to take this at face value and not consider in detail the circumstances in which this was issued. The Tribunal concluded, as a result, that it was reasonable for VJ to take this into account. Even if the claimant had appealed however, the Tribunal would have reached the same conclusion: there was no evidence before the Tribunal to suggest that the warning given was manifestly inappropriate. The evidence presented to the Tribunal did not suggest that the warning was issued in bad faith.

74. By the time of the Final Review Meeting on 29 July 2024, there were reasonable grounds for VJ to believe that the claimant was not capable of carrying out his role. The performance goals set were not stretch targets; they covered the basic elements of the claimant's role. He had been given 4 weeks of retraining when he returned to work following his absence, followed by two further weeks where his calls were monitored and feedback provided. He then had a 6-week period of structured support, where the 4 performance goals were highlighted, before being formally warned that his performance, in relation to those 4 performance goals, was still deficient. OH had confirmed that the

claimant was fit to work, and the claimant did not identify any cogent reasons why he could not meet the performance goals stated in the Formal Action Plan, or at very least show some improvement towards doing so.

75. The Tribunal concluded, as a result, that VJ had reasonable grounds for her belief that the claimant's performance would not improve to the level required, and he was therefore incapable of carrying out his role.

Procedure

76. The Tribunal noted that structured support was reinstated from 22 April 2024. At that stage, the claimant was informed of the 4 areas where the respondent felt he was not adequately performing. An action plan was created and his performance against the 4 performance goals was monitored. He was provided with support to achieve the performance goals identified.

77. On 7 June 2024, VJ discussed the performance goals with the claimant and indicated that she did not feel he was achieving these or making adequate progress towards achieving them. The claimant was formally warned, in writing, that he could be dismissed if his performance did not improve, as measured against the 4 performance goals set out in that action plan. The Tribunal concluded, as a result, that the claimant had been informed of the respects in which he was failing to adequately perform his role, given an opportunity to improve and informed that he could be dismissed if he did not do so.

78. Prior to the Final Review Meeting, the respondent collated the evidence of the welcome calls conducted by the claimant, the process he followed in mortgage interviews, the quotes he had issued for insurance and protection and the entries he had made onto the FCR. There were no further steps which the respondent should, reasonably, have taken in the circumstances

79. The letter inviting the claimant to the Final Review Meeting set out that the purpose of the meeting was to review his performance against the performance goals set out in the action plan. He was informed that he could be accompanied at the meeting and that one potential outcome was the termination of his employment.

80. At the Final Review Meeting his performance against each of the 4 performance goals was discussed and he was afforded the opportunity to respond. He was informed of the outcome in writing and given the opportunity to appeal. He exercised that right, and NQ conducted a thorough review of the decision taken, reviewing all of the evidence presented by the claimant in that process, as well as interviewing VJ. Having done so, she responded in detail

to each element of the claimant's appeal, providing her rationale for why the claimant's appeal was not upheld.

81. Taking into account each of these points, the Tribunal found that the procedure adopted by the respondent was fair and reasonable in all the circumstances.

Conclusions re s.98(4)

82. For the reasons stated above and taking into account all the circumstances, including the size and administrative resources of the respondent, the Tribunal concluded that the respondent acted reasonably in treating capability as a sufficient reason for dismissal. The decision to dismiss the claimant for capability, and the procedure adopted by the respondent when reaching that conclusion, fell within the range of responses open to a reasonable employer in those circumstances.

83. For these reasons, the claimant's complaint of unfair dismissal is dismissed.

Direct Discrimination

84. The Tribunal then considered whether the claimant's dismissal constituted direct disability discrimination, as he asserted. It was not disputed that he was dismissed. The Tribunal considered whether that conduct amounted to less favourable treatment. The claimant relied on hypothetical, rather than actual, comparators.

85. The Tribunal concluded that any mortgage and protection adviser (or indeed any other employee) employed by the respondent who was not performing the basic requirements of their role, would have been dismissed by the respondent. A hypothetical comparator in these circumstances would accordingly have been treated in exactly the same way as the claimant was treated.

86. Given these findings, the Tribunal concluded that the claimant did not establish that he was treated less favourably than someone would be treated by the respondent in the same, or not materially different, circumstances. As he did not establish a *prima facie* case, the burden of proof did not shift to the respondent.

87. Even if the burden of proof had shifted to the respondent however, the Tribunal would have reached the conclusion that the claimant's disability did not influence the respondent's actions, and there was no basis upon which it could be inferred that the respondent's treatment of the claimant, in dismissing him, was because of disability. As set out above, the Tribunal was satisfied that the respondent genuinely believed the claimant was not capable of carrying out his

role and had reasonable grounds for reaching that conclusion. That belief, alone, was the reason the claimant was dismissed.

88. For these reasons, the claimant's complaint of direct disability discrimination, in relation to his dismissal, does not succeed.

Discrimination Arising from Disability

89. The Tribunal then considered whether the claimant's dismissal constituted discrimination arising from disability. The Tribunal considered section 15(1) EqA and the guidance ***Pnaiser***. The Tribunal noted that the first question to consider is whether the claimant was treated unfavourably. In determining this, no question of comparison arises. The EHRC Employment Code indicates that unfavourable treatment is treated synonymously with disadvantage. It is something about which a reasonable person would complain. Taking that into account, the Tribunal found that the claimant was dismissed and that this amounted to unfavourable treatment.

90. The next questions concern the reason for the alleged treatment. The Tribunal required to determine whether the reason for any unfavourable treatment established was something 'arising in consequence of' the claimant's disability, focusing on the respondent's conscious or unconscious thought process. If there is more than one reason, then the reason allegedly arising from disability need only be a significant (in the sense of more than trivial) influence on the unfavourable treatment, it need not be the main or sole reason. It was held in ***Pnaiser*** that the expression 'arising in consequence of' could describe a range of causal links. More than one relevant consequence of the disability may require consideration, and whether something can properly be said to arise in consequence of disability is a question of fact in each case. It is an objective question, unrelated to the subjective thought processes of the respondent, and there is no requirement that the respondent should be aware that the reason for treatment arose in consequence of disability.

91. The claimant asserted that his dismissal was due to a number of factors which arose in consequence of his disability. The Tribunal considered each in turn, to determine whether they did indeed arise in consequence of the claimant's disability, if so, whether the 'something' identified was established and, if so, whether it had a significant (more than trivial) influence on the respondent's decision to dismiss the claimant. The Tribunal's findings in relation to each are as follows:

    91.1. **The claimant's absences.** The Tribunal accepted that the claimant's absences arose in consequence of his disability. The Tribunal found however that the claimant's absences had no influence on the

respondent's decision to dismiss the claimant. The claimant returned to work on 26 February 2024, and was not dismissed until 29 July 2024.

91.2. **Pressure on the claimant to return to work prematurely.** The Tribunal did not accept that the claimant was pressured to return to work (see paragraph 93.1 below). Even if the claimant perceived this, it did not influence the respondent's decision to dismiss the claimant. Their decision to dismiss was made at a time when OH had confirmed that the claimant was fit to work. It was solely due to the fact that they believed he was not capable of carrying out the role.

92. The claimant's complaint of discrimination arising from disability accordingly does not succeed.

Reasonable Adjustments

93. In relation to each PCP asserted, the Tribunal considered whether the respondent had such a PCP and, if so, whether the PCP placed the claimant at a substantial disadvantage in comparison to those who do not have the same disability. The conclusions reached, in relation to each asserted PCP, are set out below.

93.1. **Pressurising employees to return to work prematurely.** The Tribunal did not accept that the respondent had this PCP. Whilst the claimant was informed that he may be dismissed at/following the final review meeting, if there was no foreseeable return to work date at that time, the respondent was required to inform the claimant of the factual position, and would have been criticised had they not done so. This is not the same as pressurising employees to return to work prematurely. The claimant only returned to work on 26 February 2024 because he indicated that he was fit to do so. It was not premature. Had the claimant indicated that he was not fit to work, that his GP advised against this or that he was still certified as unfit to work he would simply not have returned, and no pressure would have been placed on him to do so, as was the case at the Review Meeting held in January 2024. Even if the factual statement that the claimant was at risk of dismissal were to constitute a PCP, the proposed adjustments would not have alleviated any disadvantage suffered, as set out in paragraph 94 below.

93.2. **Requiring certain levels of performance.** The respondent did have this PCP. They required that employees be able to undertake the basic requirements of their role. The Tribunal did not accept however that this placed the claimant at a substantial disadvantage. The OH report obtained in June 2024 indicated that the claimant was managing his symptoms, was fit to be at work and was able to push himself to

complete his work duties. Even if the PCP did place him at a substantial disadvantage because of his disability however, the proposed adjustments would not have alleviated any such disadvantage, for the reasons set out in paragraph 94 below.

94. The Tribunal considered each of the adjustments proposed by the claimant, to ascertain whether the steps proposed would have eliminated or reduced any disadvantage to the claimant and, if so, whether or not it would have been reasonable for the respondent to have taken those steps. In relation to the effectiveness of the adjustments proposed, the Tribunal was mindful that there does not require to be absolute certainty, or even a good prospect, of an adjustment removing a disadvantage. Rather, a conclusion that there would have been a chance of the disadvantage experienced by the claimant being alleviated or removed is sufficient. In relation to each adjustment proposed, the Tribunal reached the following conclusions:

    94.1. **Changing his line manager.** The Tribunal concluded that this would not have alleviated any disadvantage experienced by the claimant. Any disadvantage was caused by a requirement that dismissal be considered after a certain level of absence, or that members of staff achieve certain levels of performance. Changing the claimant's line manager would not have changed those requirements, nor any disadvantage suffered.

    94.2. **Undertaking stress risk assessments and/or the provision of a mental health advocate.** As stated in ***Spence v Intype Libra Limited*** UKEAT/0617/06 *'The carrying out of an assessment or the obtaining of a medical report does not of itself mitigate or prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing.'* Undertaking a stress risk assessment, or the respondent taking advice from a mental health advocate would simply make the respondent better informed as to what steps, if any, to take. They are not reasonable adjustments, of themselves. To the extent that the adjustment proposed related to the provision of a mental health advocate for the claimant, this was offered to the claimant, but he determined that he did not wish to take up this offer. The respondent did not fail to take that step.

95. For these reasons, the claimant's complaint that the respondent failed to make reasonable adjustments does not succeed.

Employment Judge: M Sangster
Entered in register: 18 July 2025
and copied to parties