



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 8000427/2025 Hearing Held at Glasgow on 28 and 29 July 2025

Employment Judge: M A Macleod

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L Urquhart

**Claimant
In Person**

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Glasgow City Council

**Respondent
Represented by
Mr M Wallace
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claims all fail and are dismissed.

REASONS

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1. The claimant presented a claim to the Employment Tribunal on 20 February 2025 in which she complained that she had been unfairly dismissed and discriminated against on the grounds of disability by the respondent.

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2. The respondent submitted an ET3 response in which they resisted the claimant's claims.

3. A Hearing was listed to take place at the Employment Tribunal, Glasgow, on 28 to 30 July 2025. As it turned out, the Hearing concluded within the first two days allocated to it.
- 5 4. The claimant appeared on her own behalf. Mr Wallace, solicitor, appeared for the respondent.
5. The respondents called as a witness Anne Mullen, Senior Officer of the caretaking team in the Glasgow Health and Social Care Partnership.
- 10 6. The claimant gave evidence on her own behalf, and John Slaven, Regional Organiser for the GMB Trade Union was called to give evidence for her.
7. A Chronology was produced (66) and agreed by the parties.
8. A joint bundle of documents was presented to the Tribunal, to which reference was made throughout the Hearing.

List of Issues

- 15 9. A Draft List of Issues was produced with the joint bundle (69) and agreed by parties to be the List of Issues for the case. I have made some slight adjustments to the wording of the List of Issues, notwithstanding the parties' agreement to their terms, to reflect the statutory language, to correct an anomaly with the numbering and to add an issue related to
- 20 remedy.
10. The issues in this case are therefore:

Unfair Dismissal

1. What was the reason or principal reason for dismissal?

2. If the principal reason was capability

- 25 a. Did the respondent consult with the claimant?
- b. Did the respondent discover the true medical position prior to dismissing the claimant?
- c. Did the respondent offer suitable alternative employment to the claimant, and if not, why not?
- 30 d. Was the dismissal premature?

3. If the Tribunal finds that the claimant was not dismissed for the potentially fair reason for capability under section 98(2)(a) of the Employment Rights Act 1996, was the dismissal fair on the basis of some other substantial reason, namely that the

respondent had no confidence that if the claimant did return to work that he would be able to sustain his attendance?

4. Did the respondent act reasonably in all the circumstances in treating the claimant's capability as a sufficient reason to dismiss him?

5. Was the respondent's decision to dismiss the claimant reasonable in all the circumstances of the case?

Discrimination Arising from Disability (section 15, Equality Act 2010)

6. Did the respondent know, or could the respondent reasonably have been expected to know, that the claimant was a disabled person within the meaning of the Equality Act 2010 at the relevant time?

7. Did the claimant's dismissal amount to unfavourable treatment?

8. If so, was that treatment because of something arising in consequence of his disability?

9. Was the "something" the long-term absences and further anticipated absences?

10. Was that something arising from his disability?

11. If so, was the treatment a proportionate means of achieving a legitimate aim?

Failure to Make Reasonable Adjustments (section 20/21 Equality Act 2010)

12. Did the respondent know, or could the respondent reasonably be expected to know, that the claimant was a disabled person within the meaning of the Equality Act 2010 at the relevant time?

13. Did the respondent impose any or all of the following provision, criteria or practices (PCPs):

a. Taking all absences into account when applying the attendance management process;

b. Dismissing employees who are fit to work on the basis that further absences are anticipated.

14.If so, did any such PCP put the claimant at a substantial disadvantage in relation to the relevant matter in comparison with persons who did not have his disability?

15.If so, did the respondent know, or could the respondent reasonably be expected to know, that the claimant was likely to be placed at that disadvantage?

16.If so, did the respondent take such steps as were reasonable to avoid the disadvantage? The steps relied upon by the claimant are:

a. To discount some or all of the disability-related absences in applying the attendance management policy;

b. To allow the claimant to return to work as fit to do so and then wait and see whether there were further absences prior to moving to dismissal.

17.Were such steps reasonable?

18.If the Tribunal finds in favour of the claimant in relation to all or any of the above claims, what remedy should be awarded to the claimant?

11. Based on the evidence led and the information presented, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

12. The claimant, whose date of birth is 27 August 1959 (and not 28 April 1967, which was noted on the ET1) commenced employment with the respondent as a lifeguard on 23 May 1992. Over a period of years, he moved to different positions within the respondent's organisation, and in 2023 he started work as a caretaker in 2021.

13. At the time of the events leading to his dismissal, the claimant was employed as a caretaker for the respondent's Social Work Services department, based at the Riverside Hub and Spoke, in Baillieston, Glasgow.

14. The claimant was employed to work 37 hours per week, and earned £18,000 per annum (gross).

15. He was employed to carry out security checks, fire checks, identifying maintenance issues and other duties consistent with his role as a caretaker.

- 5 16. Over a period of years from 2008, the claimant suffered a number of absences from work due to illness, particularly stress. Between 4 October 2016 and May 2017, the claimant was absent due to stress for 137 days. On 7 January 2022, he became absent again due to stress, and remained off for 236 days until 16 December 2022.
17. On 10 October 2023, the claimant became absent, due to work-related stress. He did not return to work following this absent up to the point when his employment was terminated on 9 October 2024.
- 10 18. On 7 November 2023, a Maximising Attendance meeting was held with the claimant by David Rodden, his line manager. Martin Carlyle, HR, was present to take notes (85ff). The claimant attended and was accompanied by Sean Baillie, his Trade Union representative.
- 15 19. The claimant explained that *“the reason for his absence is due to stress concerning what he feels are unresolved issues over the past 3 years including bullying within the city chambers when he was employed there and his subsequent transfer to social work services, where he felt that he was unsupported during the transfer process. He feels harassed as he feels that no one is taking his grievances seriously.”*
- 20 20. It was noted that the claimant had concerns about being moved to another centre, and the respondent advised him that there was an overhaul of the service, but that there were no plans to move the claimant from his current location.
- 25 21. He maintained that his current job was “ideal”, but that he had lost the trust of his employer and HR, which meant he was unable to return to his role until the issues outstanding were resolved. If they were not resolved to his satisfaction, he would resign.
22. He was advised that since the issues he had were not with his current management, he should consult his trade union to establish how to resolve those issues.
- 30 23. There was a discussion about an Occupational Health (OH) report, which had been produced in August 2023 (83). He was told that colleagues could cover any tasks which he had concerns about, and that he should liaise with Mr Rodden about any other concerns.
- 35 24. It was recorded that *“Lyndsey (sic) feels there is a lack of trust between himself and management and feels stressed at the thought of returning to work whilst ongoing grievances are not resolved.”*
25. A further Maximising Attendance meeting took place with the claimant on 9 January 2024. The claimant attended and was accompanied by

Geraldine Agbor, of the GMB Trade Union. David Rodden chaired the meeting, and was accompanied by Martin Carlyle, HR, who once again took notes (90ff).

5 26. The claimant once again confirmed that the reason for his absence was related to stress concerning unresolved issues over the past 3 years. He repeated that he believed that nobody was taking his grievances seriously. His stress had worsened since the previous meeting, and led to feelings of depression, due to the lack of acknowledgement of his grievance.

10 27. Mr Rodden advised the claimant that he would be welcome back to work while his grievance was being processed, in order to avoid going to half pay in the coming months, but he insisted that this was impossible given the ongoing issues and feeling that HR and managers could be colluding against him. He also said that he planned to retire in a year and a half.

15 28. On 8 March 2024, Linda Cassells, Principal Officer in HR, wrote to the claimant (96):

20 *"I am writing to confirm the decision regarding the grievance submitted on 14 November 2023 by Sean Baillie, GMB. After consideration, it has been determined that your grievance is considered not competent. I have detailed below the reasons for this.*

Your submission outlined your concern into the following:

1. *Ostracising an individual because they have an impairment.*
2. *Making assumptions about an individual's ability because of their impairment.*
- 25 3. *Assuming that a mental disability means that a person lacks intelligence.*
4. *Unreasonably highlighting a person's disability.*

You also submitted supporting documentation for each point which I reviewed.

- 30 1. *I do not agree that attending counselling is viewed by management as an impairment. Counselling is a supportive measure to assist employees engage with the professionally trained counsellors who are independent from their employer with a view to improve overall well-being. In addition, exploring an alternative work location when an employee has expressed difficulty with their current location/colleagues is to resolve a situation and support the employee.*
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2. *All vacancies which are cleared for filling at the workforce board are advertised on the my job Scotland and regular bulletins of Social Work Vacancies are sent out to all staff. You would have had the opportunity to apply for any advertised vacancies.*

5 3. *There is no evidence to substantiate this claim. Documents submitted by you refer to your disclosure to management around having concerns on your behaviour which led to counselling being arranged at your request.*

10 4. *The sharing of information in relation to you attending counselling was shared with a Senior Manager who had been tasked with investigating allegations into your behaviour. From the documents submitted this information was pivotal in the Senior Managers decision on the outcome of these allegations.*

15 *All formal complaints and grievances have been fully investigated by the employing departments at the time. A further review of complaints was carried out by the Head of HR in Access. The Chief Executive, Annemarie O'Donnell also investigated matters raised and provided a written response.*

20 *I am satisfied that all concerns you have raised over the years have been appropriately investigated and both written and verbal outcomes provided to you and therefore a Stage 1 hearing will not be arranged."*

25 29. The claimant found this to be a confusing and unhelpful letter. He did not understand why it was said, in the heading, that the grievance was "not competent" or why no hearing was to be arranged. He pursued the matter through his Trade Union, and referred to it at a number of Maximising Attendance meetings over the coming months.

30 30. On 22 May 2024, a further Maximising Attendance meeting took place. David Rodden chaired the meeting, with Martin Carlyle in attendance to take notes (98ff). The claimant attended and was accompanied by John Slaven, GMB.

31. The claimant advised that he was feeling stressed and depressed since his transfer to Social Work, and continued to feel harassed as he felt that nobody was taking his grievance seriously.

35 32. He was told that he could return to work while his grievance was being processed, particularly given that he was now receiving half-pay, but he said that he could not return to work while his grievance remained unconcluded, as it was affecting his mental wellbeing, and felt that mentally he would be unable to perform his duties.

33. The notes go on to record: *"Lindsay's union rep advised us that they have received a response in respect of Lindsay's grievance, which was that it was considered not competent. Therefore, this is not the outcome that Lindsay was hoping for and this decision will be challenged. They are hopeful that it will be concluded and Lindsay can return to work before the end of July."*
34. The claimant was seen by OH on 11 June 2024. Their report (102) concluded:
- "Lindsay reports stress related symptoms which he perceives to be wholly related to work factors. I recommend that a stress risk assessment is performed (I have encouraged Lindsay to complete this). in my opinion Lindsay is not fit for work, however he is unlikely to return whilst the perceived work-related issues persist. It is a management and not a medical model which will resolve the situation ultimately. I have discussed this with Lindsay today and whilst he acknowledges that it will be difficult agreed this is necessary in order to resolve the situation. If there is no indication of a return to work despite this advice and there have been avenues forward to try and address this and symptoms persist then you may wish to refer back to OH but only if the ongoing symptoms continue and workplace issues have resolved. There are no medications that can cure Type 2 diabetes. Medication and lifestyle adjustments are aimed at controlling the blood sugar level. There is no indication that the criteria for IHR [Ill Health Retirement] would be met at this time as all treatment options have not been explored or the outcomes of treatment known.*
- The advice contained in this report are recommendations only and their operational feasibility requires to be assessed by the employer."*
35. The respondent convened a further Maximising Attendance meeting on 31 July 2024. The claimant attended and was accompanied by John Slaven, while Mr Rodden and Mr Carlyle also attended as before. Notes were taken (105ff).
36. The claimant repeated that he was feeling stressed and depressed since transferring to Social Work Services, and that he felt that nobody was taking his grievances seriously.
37. Mr Rodden advised the claimant that support was in place through phased return to work and amended duties, should he feel he could return to work, given that he was on reduced pay. Returning to work would allow him to resume full pay. The claimant replied that he was unable to return to work while the grievance was ongoing, as he would be unable to perform his duties.

38. The claimant was advised that the next stage in the process, given his length of absence, would be to progress to an Absence Review Meeting. He responded by saying that he expected to be dismissed, that he would appeal, and that he would attend the Absence Review Meeting.
- 5 39. Mr Rodden wrote to the claimant on 14 August 2024 to invite him to an Absence Review Meeting, on 20 August 2024 (109).
40. The Absence Review Meeting took place on that date, and was chaired by Anne Mullen, Principal Officer. Mr Rodden attended, as did Mr Carlyle, who took notes (110ff). The claimant was present along with Mr Slaven.
- 10 41. Ms Mullen had available to her the invitation letter (109), an enhanced absence history for the claimant (123), the notes of the absence meeting of 31 July 2024 (110) and the OH report dated 11 June 2024 (113)..
42. The enhanced absence history noted not only the dates upon which the claimant was absent, but the various OH reports and discussions with the claimant.
- 15 43. In the notes of the Absence Review Meeting, it was recorded (111/2) that a number of supports had been explored with the claimant. It was noted that the claimant had declined a referral to the Employee Assistance Provider; that a Stress Risk Assessment questionnaire had been completed but the issues were not related to his current duties but to his grievance; that due to dizzy spells when lifting items of climbing ladders, and his manager had advised him that these duties could be covered by colleagues; that amended hours or work pattern had been declined by the claimant; that a phased return would be accommodated upon the claimant's return to work; and that he would not meet the criteria for ill health retirement at that time.
- 20 44. It was also noted that the claimant was currently absent from work with no agreed return to work or timescale.
45. On 11 September 2024, a further OH report was produced (113).
- 30 46. The opinion set out was that the OH adviser had told the claimant that an early return to work would be appropriate, nothing that there was an improvement in his mood since the previous OH consultation.
47. She went on to say:
- 35 *"Lindsay is fit with temporary adjustments to return to work. There is an improvement in his mood and his mood is not impacting on his fitness for work. Due to the longevity of his absence, if operationally feasible, I recommend Lindsay is provided with a phased return to work suggestive over four weeks, gradually using up his working hours with the aim of*

5 *achieving his normal hours thereafter. I recommend he be provided with a reduced workload, additional time and regular breaks during the phased return to work, if operationally feasible. There is an improvement with his mood, however Lindsay has ongoing historical perceived work related concerns and there is the potential for recurrence without resolution. Advice contained in this report are recommendations only and their operational feasibility requires to be assessed by the employer."*

- 10 48. On 9 October 2024, Ms Mullen convened a meeting with the claimant, and Mr Slaven. Mr Rodden and Mr Carlyle attended. Notes were taken (115ff).
49. Mr Slaven gave evidence that prior to this meeting, he had had a discussion with the claimant, encouraging and agreeing with him that the best approach would be to bring a positive attitude to the meeting, and seek to find a way to return to work.
- 15 50. Towards the beginning of the meeting, the claimant asked Ms Mullen if she could overcome his grievance. She confirmed that the purpose of the meeting was not to address his grievance but to discuss the level of his absence.
- 20 51. After Mr Rodden had set out his position, the claimant was given the opportunity to put forward his arguments. Mr Slaven asked if the respondent had taken account of the new information in the claimant's OH report, to which Mr Rodden replied that he had. He said that the priority was to have the claimant back.
- 25 52. It was then noted that the claimant said that he always wanted to return when his grievance had been resolved, but he was told it was not competent. The note stated that he proceeded to discuss in detail the issues concerning the grievances which he had submitted. This happened more than once, but Mr Slaven reiterated that the claimant wished to return to work. The claimant said himself that he wanted to return to work even though the grievance was outstanding.
- 30 53. The claimant complained that he felt that he would not get a job that he wanted, and found out that there were several jobs available at that time. He also said that he wanted compensated for loss of earnings.
- 35 54. The claimant made reference to the job which he had been given, and Ms Mullen asked him if he was saying that he was fit for the job. The claimant was noted as replying that *"AM O'Donnell told me it was cushy wee job. I am not fit for the job and instead of paying me off they moved me on and moved to social work."*

55. When asked what would happen if the grievance were not resolved, Mr Slaven intervened to say that they felt that the claimant could return to work and resolve the “non-competent grievance”. The claimant said that he was fit for alarm duties, and that the respondent could always resolve his grievance. He said that the Council *“have so much to lose. They told me lies about this.”*

56. The claimant then set out his views on the way in which the respondent had failed, in his view, to deal with his grievance, and explained that he had contacted his MP. He maintained that the respondent did not wish to deal with the grievance as it would show up how much HR and his managers had been wrong.

57. Ms Mullen said that *“Previously said that you could not return to work unless grievance is resolved and my worry is that health will deteriorate while this continues.”* The claimant replied that if he came back to work, it would be less stressful. Mr Slaven said that they felt that it could be dealt with while the claimant was at work, and so they wanted him to return to work with adjustments.

58. The claimant reiterated that this could have been avoided if the respondent had followed their policies and procedures. He said that he was the victim and he wanted compensation for the way in which he had been treated.

59. Ms Mullen adjourned the meeting, and following the resumption, advised that her decision was that the claimant should be dismissed due to lack of capability as a result of ill health.

60. Following the meeting, Ms Mullen wrote to the claimant on 11 October 2024 (119) to confirm her decision.

61. She wrote:

“After taking a recess to consider all the information presented and the discussions that took place, I have taken the decision to terminate your employment. This on the basis that:

- *You have been absent from work since 10th October 2023, which has had a detrimental impact on service delivery*
- *You were unable to return to work despite having supports in place due to your perceived unresolved grievances impacting on your mental wellbeing*
- *Despite there been (sic) no significant changes in your current circumstances, you feel you can now return to work*

- *You may deem yourself fit to return to work, however based on your presentation and discussions that had taken place, I have no confidence that should you return to work, that you would be able sustain your attendance.*

5 *Your termination is effective from the date of the Absence Review Meeting, 9th October 2024.*

10 *Arrangements will be made for you to receive 12 weeks' pay as payment in lieu of notice together with payment for any outstanding leave due. The net payment due will be made to your bank on or after 15th October 2024. Your P45 will be issued to your home address."*

62. The claimant was notified of his right to appeal against the decision to dismiss him.
- 15 63. An appeal was presented by Mr Slaven on behalf of the claimant (133). He asserted that the claimant had indicated that he was fit to return to work, and that the decision of the manager not at least to try this option was arbitrary and premature. There were significant changes in the claimant's circumstances, and it would have been reasonable to enable the claimant to return to work and evaluate his progress rather than dismiss him. He suggested that this was a pre-determined outcome, and that the claimant had been treated disproportionately harshly in comparison with others.
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64. Evelyn Miller wrote to the claimant on 26 February 2025 (121) to advise the claimant that the Personnel Appeals Committee had decided that the decision to dismiss him was reasonable in the circumstances and therefore that his appeal had been rejected.
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65. Following his dismissal, the claimant has remained unwell. He has not applied for any jobs since he was dismissed, as he felt that he could not trust working for people, and was scared that the same thing would happen to him again. He felt strongly that nobody would employ him when he had been dismissed for capability, and that any prospective employer would ask him why he had left his previous job.
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66. He said before this Tribunal that he considered himself not to be fit for work, largely because of the way he was treated by the respondent.
- 35 67. He applied for state benefits, and has received £250 per month by way of universal credit. He expects to have full access to his pension in due course.

68. He was prescribed Sertraline, an anti-depressant, in 2012, and takes this at a dose of 100mg daily. He said that he felt really small as a result of his treatment by the respondent. He considered that he had lost any trust he had had in his employers, and had blamed himself for a situation in which nobody wanted to help him.

Submissions

69. Both parties made submissions, the respondent presenting written submissions to which Mr Wallace spoke. The claimant took the opportunity to respond verbally. The submissions are taken into account in the decision below.

The Relevant Law

70. In an unfair dismissal case, it is necessary for the Tribunal to have regard to the statutory provisions of section 98 of ERA. The Tribunal considered the requirements of section 98(1) of the Employment Rights Act 1996 ("ERA"), which sets out the need to establish the reason for the dismissal; section 98(2) of ERA, which sets out the potentially fair reasons for dismissal; and section 98(4) of ERA, which sets out the general test of fairness as expressed as follows:

"Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employers 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 the equity and substantial merits of the case."

71. **DB Schenker Rail (UK) Ltd v John Doolan 2011 WL 2039815** is an EAT decision in which Lady Smith clarified that the well known test in **British Home Stores Ltd v Burchell [1978] IRLR 379** can apply to capability dismissals, and accordingly a Tribunal must consider:

- i. whether the respondents genuinely believed in their stated reason;
- ii. whether they had reasonable grounds on which to conclude as they did; and

iii. whether it was a reason reached after a reasonable investigation.

72. The EAT has made it clear that the decision to dismiss on the grounds of capability is a managerial, not a medical, one.

5 73. Section 15 of the Equality Act 2010 provides:

(1) *A person (A) discriminates against a disabled person (B) if –*

a. *A treats B unfavourably because of something arising in consequence of B's disability, and*

10 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.*

15 74. Section 20 of the Equality Act 2010 sets out requirements which form part of the duty to make reasonable adjustments, and a person on whom that duty is imposed is to be known as A. The relevant sub-sections for the purposes of this case are sub-section (3) and (5). Sub-section (3): *"The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

20 Sub-section (5): *"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*

25 *to have to take to provide the auxiliary aid."*

75. Section 21 of the 2010 Act provides as follows:

"(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

30 *(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person..."*

Discussion and Decision

76. The List of Issues sets out the questions to be addressed by the Tribunal, and I take them in the order in which they are set out.

Unfair Dismissal

1. What was the reason or principal reason for dismissal?

2. If the principal reason was capability

a. Did the respondent consult with the claimant?

5 **b. Did the respondent discover the true medical position prior to dismissing the claimant?**

c. Did the respondent offer suitable alternative employment to the claimant, and if not, why not?

d. Was the dismissal premature?

10 **3. If the Tribunal finds that the claimant was not dismissed for the potentially fair reason for capability under section 98(2)(a) of the Employment Rights Act 1996, was the dismissal fair on the basis of some other substantial reason, namely that the respondent had no confidence that if the claimant did return to work that he would be**
15 **able to sustain his attendance?**

4. Did the respondent act reasonably in all the circumstances in treating the claimant's capability as a sufficient reason to dismiss him?

20 **5. Was the respondent's decision to dismiss the claimant reasonable in all the circumstances of the case?**

77. I deal with each of these questions in turn.

78. The reason for dismissal in this case was capability due to ill health. I considered that the letter of dismissal was clear in its terms, and that Ms Mullen, giving evidence, was straightforward in her assertion that this was
25 the reason for dismissal.

79. The claimant did not argue that there was another reason for his dismissal, but implied that since the decision was pre-determined, it was because he had raised a grievance in relation to his treatment by the respondent. I was not persuaded on the evidence that this was the case.
30 His grievance was dealt with separately, and the dismissing officer was not involved in the grievance. In any event, it was concluded by the time he was dismissed, and was no longer live, albeit that his union representative suggested that action was being taken at a high level to overturn that decision.

35 80. Next, I considered whether the respondent consulted with the claimant. In my judgment, they did. They conducted a number of absence meetings

5 which ultimately led to the Absence Review Meeting, which resulted in his dismissal. On each occasion, they allowed the claimant to speak, and to be represented, and to respond to questions about his fitness to work. At the final meeting, they asked the claimant and his representative whether or not he was fit to return to work, and consulted with them about the prospects of doing so.

81. The respondent conducted four meetings with the claimant – on 7 November 2023, 9 January, 22 May and 31 July 2024 – before the final Absence Review Meeting.

10 82. The claimant's consistent position was that he was not fit to work, and that he would be unable to return to work until his grievance was resolved.

15 83. Next, it is clear that the respondent made themselves aware of the true medical position in relation to the claimant. Medical reports were obtained from the respondent's OH department, in June and September 2024, which were also seen by and available to the claimant and his representative.

20 84. In each of the medical reports available, it was plain that the OH department advisor saw the claimant's focus upon his grievance as an obstacle to his return to work.

25 85. The respondent did not offer suitable alternative employment to the claimant, primarily, as it seemed to me, because the issue which the claimant had raised in his grievance did not relate to his current role, and therefore there was no basis upon which the respondent could be criticised for not offering a move to the claimant. In any event, until the Absence Review Meeting, there was no indication that the claimant was fit to return to work in any capacity. The claimant did not suggest that the role which he occupied at the time when he was dismissed was not suitable for him.

30 86. The final question under this heading was whether the claimant's dismissal was premature.

87. It is understood that this refers to the claimant's assertion that if he had not been dismissed, he would have been capable of returning to work and resuming active and useful service to the respondent.

35 88. It is important to consider the context here. The claimant had been absent from work since 10 October 2024, almost exactly a year to the day in time at the point when he was dismissed. During that time, neither the claimant nor OH suggested at any stage that he was fit to return to work, until the final report by OH in September 2024. The claimant remained absent

from work. A number of steps were offered to him in order to assist with a return to work, but he declined to accept those steps offered.

89. The decision taken by the respondent to dismiss the claimant was based, in my judgment, on a number of factors.

5 90. Firstly, the claimant's record of absence was significant. Not only had he been absent for approximately 12 months, he had had a history of absences prior to that.

10 91. Secondly, throughout this absence, there was no indication from the medical evidence obtained by the respondent that he was fit to return to work (until the report of 11 September), and none whatever from the claimant that he was able to do so until the final meeting which led to his dismissal.

15 92. Thirdly, the report of 11 September 2024 did not say he was fit for work, but that he was fit with temporary adjustments to return to work. It did indicate that there had been an improvement in his mood, and recommended a phased return to work, if that were operationally feasible. OH recommended a reduced workload, additional time and regular breaks.

20 93. Fourthly, and significantly, in my judgment, that report went to state *"There is an improvement in his mood, however Lindsay has ongoing historical perceived work related concerns and there is the potential for recurrence without resolution."*

25 94. Fifthly, at the Absence Review Meeting, the claimant repeatedly returned to the theme of his grievances, and his insistence that the respondent had failed utterly to deal with them. This represented not only a derogation from the strategy which Mr Slaven had attempted to agree with him in advance of the meeting, where they had decided to take a positive approach to a return to work, but also consistency with the claimant's previous assertions that he would be unable to return to work until his grievance was satisfactorily resolved. As a result, Ms Mullen had severe misgivings about the claimant's ability to return to work and provide consistent and regular service, since the reason for his absence – his ongoing frustration at the state of the grievances – remained just as vivid in his mind. In my judgment, Ms Mullen was very concerned that the risk of recurrence was greater than suggested by OH, because of the way in which the claimant presented himself at the Absence Review Meeting.

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95. Sixthly, the respondent considered that there had been no significant changes to the claimant's position. The claimant and his representative plainly disagreed with this, pointing to the fact that the OH report

indicated, for the first time, that the claimant was fit to return to work, with adjustments. However, Ms Mullen believed that the claimant's apparent improvement in mood and condition was not borne out by his insistence in the Absence Review Meeting that his grievances continued to be badly handled. She considered that he was refusing to move on from the decision taken by the respondent, and that he would continue to focus on the grievance rather than on his work. As a result, she considered it likely that he would not remain at work for an extended period of time.

96. Taking all of these matters into account, it is my judgment that the decision to dismiss the claimant was not premature. The claimant had consistently said that he could not return to work while his grievance remained outstanding. Notwithstanding the terms of the OH report, and the valiant efforts of Mr Slaven to help the claimant take a positive approach, it was quite clear that the situation had not changed, and that his focus, bordering on the obsessive, on his grievances, and his refusal to contemplate what a full return to work would look like, remained. In my view, it was not surprising – indeed, it was justified – that Ms Mullen took the view that the claimant would continue to go over his grievances even if he returned to work. Given that he had been absent for almost a year, during which he had continually stated that he could not return while his grievance was resolved, the respondent was justified in taking the view that since his attitude had not changed, there was no basis for confidence that he would return to work for any length of time.

97. It was also justifiable for the respondent to take into account the fact that he had been absent for a year with essentially the same complaints, and that absence could no longer be borne by the organisation.

98. I pass over Issue no 3, on the basis that I have found that capability was the real reason for the claimant's dismissal.

99. In my judgment, the respondent acted reasonably in treating the claimant's capability as a sufficient reason to dismiss him. The claimant had been unable to return to work for a year, and without any clear change in his attitude or his circumstances, it was entirely legitimate for the respondent to determine that he would not be able to return to work for an extended period of time. Even the relatively optimistic OH report of 11 September referred to the risk of recurrence.

100. However, leaving aside the risk of recurrence, it is my judgment that the claimant was not capable of work at the point when he was dismissed, and it was absolutely justified on the part of the respondent to take the view that he would not be capable of providing effective and reliable service in the foreseeable future.

101. It is therefore my judgment that the decision to dismiss the claimant on the grounds of capability was reasonable in all the circumstances. The claimant's claim of unfair dismissal therefore fails, and is dismissed.

Discrimination Arising from Disability (section 15, Equality Act 2010)

5 **6. Did the respondent know, or could the respondent reasonably have been expected to know, that the claimant was a disabled person within the meaning of the Equality Act 2010 at the relevant time?**

7. Did the claimant's dismissal amount to unfavourable treatment?

10 **8. If so, was that treatment because of something arising in consequence of his disability?**

9. Was the "something" the long-term absences and further anticipated absences?

10. Was that something arising from his disability?

15 **11. If so, was the treatment a proportionate means of achieving a legitimate aim?**

20 102. The respondent did not deny that they knew, or could reasonably have been expected to know, that the claimant was disabled within the meaning of the Act at the point when they dismissed him. They have conceded, in addition, that he was so disabled at that time.

103. The claimant's dismissal plainly amounted to unfavourable treatment. The termination of employment deprived the claimant of his livelihood and the possibility of his earning money from work.

25 104. In my judgment, the claimant's dismissal did take place because of something arising in consequence of the claimant's disability, namely his absence from work for almost exactly a year, and the belief that he would continue to suffer from absences from work due to the manner in which he presented at the Absence Review Meeting, in combination with the risk of recurrence identified by the OH department in September 2024.

30 105. The fundamental question, then, is whether the claimant's dismissal amounted to a proportionate means of achieving a legitimate aim. The legitimate aim relied upon by the respondent is the attendance management of its workforce, by which it is understood that the respondent maintains that it was a legitimate aim for them to require that employees attend work and provide effective and reliable service in
35 exchange for pay. I consider this to be a legitimate aim, and one which is supported by the terms of the respondent's agreed Maximising

Attendance Policy, which was negotiated with the staff side representatives in the organisation. The purpose of the policy is wider than the interests of any individual, in that it is also design to minimise detrimental effects of sickness absence on service provision, citizens and colleagues.

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106. In my judgment, dismissing the claimant at the point when the respondent did in this case – namely following 12 months of absence (less one day) during which there was no indication that the claimant would be able to return to work and provide effective, regular and reliable service to the respondent – amounted to a proportionate means of achieving the legitimate aims of the respondent. The respondent allowed the claimant to be absent for nearly 12 months before taking action to terminate his employment; consulted regularly with him in order to establish his readiness to return to work, considered the possibility of adjustments which would facilitate his return to work and only dismissed him at the point where they considered that it was no longer necessary or appropriate to maintain his employment.

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107. In my judgment, the respondent demonstrated a degree of patience with the claimant in allowing him time to show that he would be fit to return to work, and discussing with him what was required in order to bring about a return to work. Dismissal was not a decision made early in the process, but only after a considerable period of time had passed without any clear indication that the claimant could return to effective, regular and reliable service.

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108. In these circumstances, the claimant's claim under section 15 of the Equality Act 2010 fails, and is dismissed.

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Failure to Make Reasonable Adjustments (section 20/21 Equality Act 2010)

12. Did the respondent know, or could the respondent reasonably be expected to know, that the claimant was a disabled person within the meaning of the Equality Act 2010 at the relevant time?

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13. Did the respondent impose any or all of the following provision, criteria or practices (PCPs):

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a. Taking all absences into account when applying the attendance management process;

b. Dismissing employees who are fit to work on the basis that further absences are anticipated.

14.If so, did any such PCP put the claimant at a substantial disadvantage in relation to the relevant matter in comparison with persons who did not have his disability?

15.If so, did the respondent know, or could the respondent reasonably be expected to know, that the claimant was likely to be placed at that disadvantage?

16.If so, did the respondent take such steps as were reasonable to avoid the disadvantage? The steps relied upon by the claimant are:

a. To discount some or all of the disability-related absences in applying the attendance management policy;

b. To allow the claimant to return to work as fit to do so and then wait and see whether there were further absences prior to moving to dismissal.

17.Were such steps reasonable?

109. The respondent conceded that the claimant was a disabled person within the meaning of the 2010 Act by reason of depression, and that they knew or ought reasonably to have known that this was the case from 9 October 2024.

110. It is my view that the respondent did apply the first PCP asserted by the claimant, namely that they took all absences into account when applying the attendance management process.

111. However, I do not find that the respondent applied a PCP of dismissing employees who were fit for work on the basis that further absences were anticipated. The respondent argues that the claimant was not fit for work; however, it is apparent from the OH report of 11 September that it was their view that he was fit to return to work with some adjustments. The respondent assessed the OH view of the claimant as not being accurate as at the date of the Absence Review Meeting; in other words, having taken a positive approach to returning to work when speaking with his OH adviser, he returned repeatedly in the meeting with the respondent to his dissatisfaction with the grievance process. He had continually stated that he would not be able to return to work while the grievance remained outstanding. While he had suggested to OH that he might be able to return to work now, despite the grievance being outstanding, his presentation to Ms Mullen clearly indicated that he remained strongly influenced by his sense of injustice about the grievance process.

112. As a result, it was not only because the respondent took into account the risk of recurrence which OH had identified, but also because they did not consider that he was in fact well enough to return to work given the way he returned so often to the subject of his grievance, which was the matter which had, in effect, prevented him from working for the previous months.
113. Having found that the respondent did apply a PCP of taking all absences into account when applying the attendance management process, I turned to the question of whether this placed the claimant at a substantial disadvantage in comparison with people who did not have his disability. In my judgment, it is not clear that it did. While the claimant suffered a long term absence due to his disability, it is possible that an employee may have a significant absence, even over a period of months, but not be suffering from a disability within the meaning of section 6 of the 2010 Act.
114. It follows that I do not find that the respondent could be reasonably expected to know that the claimant would suffer such a substantial disadvantage in applying the PCP.
115. I did, however, consider whether the reasonable adjustments sought by the claimant could be regarded as reasonable in the circumstances.
116. Firstly, the claimant proposed that the respondent discounted absences which were related to the claimant's disability – "some or all" of those absences. It is simply not clear what the claimant is proposing here. If he is proposing that all absences should be discounted if they related to a disability of the claimant, that is not reasonable: to find otherwise may limit the power of an employer to take any action to seek to remedy the long-term absences of an employee who may be regarded as disabled.
117. The respondent's position was that discounting some or all of the claimant's absence would not have been reasonably practicable. It is unclear what they meant by this. It may simply mean that in their policy it is not envisaged that a significant part of an absence may be discounted.
118. In any event, I do not consider that it would have been a reasonable adjustment to the claimant to have discounted some or all of his absence. The reality here was that over an extended period of time, the claimant was saying that he was not fit to return to work due to his concern relating to the outstanding grievances. It may well be that the claimant was, in fact, unwilling to return to work without his grievance generating an outcome which he would find favourable. Why it would then have ameliorated the claimant's position to have discounted some of his absence, or indeed been justified to do so, is not clear. What difference it would have made is simply not clarified by the claimant.

119. As to the second adjustment sought, the claimant argues that it would have been reasonable to have allowed him to return to work in order to give him the opportunity to demonstrate that he was fit for work and able to provide regular and effective service.

5 120. In my judgment, this cannot be said, in the circumstances of this case, to be a reasonable adjustment. It was entirely reasonable for the respondent to take the view, following the Absence Review Meeting, that the risk of recurrence of his symptoms identified by OH was too great to allow him to return to work; further, it was also entirely reasonable for them to
10 conclude, following the Absence Review Meeting, that the claimant's insistence on raising questions about his grievance, which were plainly not relevant to the subject of the meeting, indicated that he was not likely to be able to return to work and focus upon his work without being distracted by his grievance. It is important to remember that he had been
15 confirming for some time that he was not fit to return to work while his grievance remained outstanding; nothing changed with regard to the grievance in the lead up to this meeting, and so when he said that he was able to return to work, it is not surprising that the respondent did not view this as an accurate or reliable expression of the claimant's position.

20 121. It would not, in these circumstances, have been a reasonable adjustment on the part of the respondent to allow the claimant to return to work, given that he continued to return to his grievance in a manner which caused them real concern.

25 122. It is therefore my conclusion that the respondent did not fail to make reasonable adjustments to ameliorate any disadvantage arising to him from the application of the PCPs.

123. It is not necessary, therefore, to address the final issue in this case, namely that of remedy to be awarded.

124. The claimant's claims therefore all fail and are dismissed.

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