EMPLOYMENT TRIBUNALS

Claimant: **Mr. J. Bagley**

Respondent: **Northumberland County Council**

Heard at: **Newcastle upon Tyne Employment Tribunal**

On **15 to 17 December 2025**

Before: **Employment Judge T.R. Smith.**

Representation

Claimant: **The claimant in person, supported by Ms. Gallacher (a friend)**

Respondent: **Ms. S. Firth (counsel)**

RESERVED JUDGMENT

1.The claimant's complaint of a failure to make reasonable adjustments under the EQA10 is not well founded and is dismissed.

2.The claimant's complaint of discrimination arising from disability under the EQA10 is not well founded and is dismissed.

3.The claimant's complaint of unfair dismissal under the ERA96 is not well founded and is dismissed.

Written reasons.

1.Abbreviations/definitions used in this judgement

1.1.EQA 10. The Equality Act 2010.

1.2.ERA 96. The Employment Rights Act 1996.

1.3.AS. Ankylosing Spondylitis.

1.4.The Policy. The respondent's Health and Well-being policy.

1.5.NEAT. Neighbourhood Environmental Action Team

1.6.The Code. The EHRC Code of Practice on Employment.

2.Personalities

2.1.Mr Bob Hodgson, area manager, north neighbourhood services (the manager who conducted the review meetings).

2.2.Ms Amanda Atkinson, people partner (who supported Mr Hodgson).

2.3.Mr Stephen Wardle, divisional manager, neighbourhood services (the dismissing officer).

2.4.Mr Paul Jones, director of environment and transport (the appeals officer).

3.The agreed issues and concessions

3.1.The tribunal revisited the list of issues discussed at the case management hearing held on 28 May 2024 and the parties confirmed that the issues set out below, subject to minor clarifications recorded therein, were agreed.

4.Time limits

4.1.Was the failure to make reasonable adjustments complaint, made within the time limit in section 123 of the EQA 10? The tribunal would decide

- Was the claim made to the tribunal within three months (plus early conciliation extension) of the act to which the complaint related?
- If not, was there conduct extending over a period?

- If so, was the claim made to the tribunal within three months (plus early conciliation extension) of the end of that period?
- If not, was the claim made within such further period as the tribunal thought was just and equitable? The tribunal would decide:

    4.1.1.Why the complaint was not made to the tribunal in time?

    4.1.2.In any event, was it just and equitable in all the circumstances to extend time?

5.Unfair dismissal

5.1.What was the reason or principal reason for dismissal? The respondent said the reason was capability (ill health). Can the respondent show on the balance of probabilities that the reason or principal reason for the claimant's dismissal was capability (ill-health)?

5.2.If the reason was capability, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The tribunal's determination whether the dismissal was fair or unfair would be in accordance with equity and the substantial merits of the case.

5.3.The claimant contended

- he was not provided with a copy of the respondents policy prior to December 2022
- he was not advised his employment was in jeopardy prior to the review 1, 2, and 3 meetings as set out in the policy

5.4.The tribunal would consider, in particular (in addition to the specific points highlighted by the claimant above) whether:

- the respondent genuinely believed the claimant was no longer capable of performing his duties?
- whether the respondent adequately consult the claimant?
- whether the respondent carried out a reasonable investigation, including finding out about the claimant's up-to-date medical position?

- could the respondent have been reasonably expected to wait any longer before dismissing the claimant?
- was dismissal within the range of reasonable responses?

6.Disability

6.1.Did the claimant have a disability as defined in section 6 EQA10 at the time of the events the claim was about? The tribunal would decide:

- Did the claimant have a mental impairment of PTSD/Complex PTSD
- Did it have a substantial adverse effect on the claimant's ability to carry out day-to-day activities?
- If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
- Would the impairment have had a substantial adverse effect on the claimant's ability to carry out day-to-day activities without the treatment or other measures?

6.2.Were the effects of the impairment long-term? The tribunal would decide:

- did they last at least 12 months, or were they likely to last at least 12 months?
- if not, were they likely to recur?

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

7.1.Did the respondent treat the claimant unfavourably by:

- dismissing the claimant on 27 July 2023

7.2.Did the following things arise in consequence of the claimant's disability:

- the claimant sickness absence

7.3.Was the unfavourable treatment because of any of those things?

7.4.Was the treatment a proportionate means of achieving a legitimate aim? The respondent said that its aims were:

- To ensure regular attendance at work in order to provide an efficient and cost-effective service and maintain attendance standards.

7.5.The tribunal would decide in particular:

- was the treatment an appropriate and reasonably necessary way to achieve those aims?
- could something less discriminatory have been done instead?
- how should the needs of the claimant and the respondent be balanced?

7.6.Did the respondent know or could it reasonably have been expected to know that the claimant had the disability and if so from what date?

8.Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

8.1.Did the respondent know or could it reasonably have been expected to know that the claimant had the disability (i.e. AS, anxiety and depression, PTSD/ complex PTSD) and if so, from what date?

8.2.A “PCP” is a provision, criterion or practice. Did the respondent have the following PCP:

- A series of attendance triggers (utilised to maintain a level of attendance at work) in the policy.

8.3.Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant’s disability, in that due to the claimant’s disability he experienced significant periods of absence?

8.4.Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

8.5.What steps could have been taken to avoid the disadvantage? The claimant suggested:

- Adjustment of the attendance triggers to discount wholly or in part disability - related absences

8.6.Was it reasonable for the respondent to have to take those steps and when?

8.7.Did the respondent fail to take those steps?

8.8.The respondent made the following concessions in respect of disability.

8.8.1.The respondent admitted that the claimant experienced the conditions of AS and anxiety and depression at the relevant time (i.e. at the time of the alleged discriminatory acts) and they were disabilities within the meaning of section 6 EQA 10. It further conceded it knew or ought to have known of those conditions at the relevant time.

8.8.2.AS affected the claimant's spine and other areas of his body and could cause inflammation. Part of the claimant's medication regime for AS involved taking immune suppressants. This in turn could make the claimant more susceptible to infection.

8.8.3.The respondent's position on PTSD/ complex PTSD was that while the claimant received a diagnosis on 06 July 2023, that diagnosis was sent to the claimant's GP on 12 July 2023 but the respondent did not see that diagnosis prior to the decision to dismiss the claimant. It accepted that the PTSD/complex PTSD was a disability within the meaning of section 6 EQA 10.

8.9.In submissions Ms Firth indicated that it was not necessary for the tribunal to make a determination on the PTSD/complex PTSD given the respondent's express concession in relation to anxiety and depression. It knew the claimant had a mental health condition at termination and that put him at a disadvantage. The tribunal agreed. An express finding of knowledge and disadvantage in respect of PTSD/complex PTSD was not required and the failure to make any such finding in no way disadvantaged the claimant, given the respondent's concessions in relation to anxiety and depression.

9.Evidence

The bundle

9.1.The tribunal had before it a bundle which was numbered 357 pages.

9.2.A reference in this judgement to a page number is a reference to the bundle.

9.3.The parties were reminded to take the tribunal to any specific documents relied upon during the course of their respective evidence.

Statements.

9.4.The tribunal was provided with the following witness statements.

For the claimant

- A statement of the claimant dated 14 March 2025.
- A statement of Ms Jane Gallacher dated 14 March 2025.

For the respondent

- A statement of Mr Bob Hodgson, dated 24 March 2025.
- A statement of Ms Amanda Atkinson, dated 17 March 2025.
- A statement of Mr Stephen Wardle, dated 19 March 2025.
- A statement of Mr Paul Jones, dated 12 March 2025

9.5.Mr Hodgson was not called by the respondent due to ill health. The tribunal indicated that whilst his statement would be read, the weight it would give to it would be less than the weight it would give to the evidence of a witness who had been subject to cross examination.

10.Findings of fact

10.1.The tribunal has only made findings on those matters necessary to determine the agreed issues.

10.2.Fortunately the core facts were substantially agreed. It has however been necessary for the tribunal to set out the full factual background so the reader can understand the tribunal's ultimate judgement.

11.Background

11.1.The claimant commenced employment with the respondent on 16 May 2016.

11.2.His employment ended on 14 September 2023.

11.3.At termination the claimant's substantive job title was refuse loader/HGV driver.

11.4.The claimant presented his claim to the tribunal on 11 December 2023. He had entered into ACAS early conciliation on 12 October 2023, with a certificate being issued on 13 November 2023.

12.The policy

12.1.At this stage it is helpful if the tribunal briefly summarised some of the salient features of the policy.

12.2.The policy was available to employees on the respondent's intranet (305/ 330).

12.3.It is helpful to briefly set out the salient features of the policy.

12.4.There were four absence trigger points.

- One, if an employee has three or more absences in a rolling 12 month period.
- Two, if an employee had 14 consecutive calendar days absence in a rolling 12-month period.
- Three, if an employee had 8 working days absence in a rolling 12-month period over more than one episode (this trigger was removed in April 2023 but applicable until a few months prior to the claimant's termination)
- Four, if there was a cause for concern about the health of an employee .

12.5.If a trigger point was hit the employee was invited to a review 1 meeting. The outcome of a review 1 meeting was the employee could enter into a monitoring period of up to 14 months (but see 12.10).

12.6.If a further trigger point was reached within a monitoring period the employee would be invited to review 2 meeting. The outcome of that meeting was the employee could enter into a monitoring period of 18 months.

12.7.If a further trigger point was reached within the monitoring period the employee would be invited to a review 3 meeting. The outcome of this meeting was the employee could enter into a monitoring period of 24 months.

12.8.If a further trigger point was reached within the monitoring period the employee would be invited to a final review meeting, where dismissal was a possible outcome.

12.9.The policy specified that progression through the review meeting process could ultimately lead to dismissal if an employee failed to improve or sustain their attendance at work (318)

12.10.If the respondent was advised an employee was unfit to return to work the respondent could at any stage move directly to a final review meeting i.e. trigger four. That flexibility appeared to the tribunal to be perfectly sensible. An employee with, for example, incurable cancer should not be put through the stress of an incremental policy.

12.11.The guidance notes to the policy placed the responsibility on both the manager and employee at a review meeting to identify if there was any underlying health conditions, whether diagnosed or undiagnosed (350).

12.12.At a review 2 meeting and a review 3 meeting the policy provided that employees *"should* [tribunal emphasis] *be reminded"* that progression to a final review hearing could result in dismissal.(320/321).

13.Sickness absences and review meetings

13.1.From 20 April 2020 to 30 November 2020 the claimant was absent from work for a total of 225 days. The claimant was shielding on medical advice in respect of his AS during the Covid pandemic.

13.2.From 11 January 2022 to 21 February 2022 (41 calendar days) the claimant was absent from work. His symptoms were described as pain in his chest and breathing difficulties.

13.3.Whilst absent he was referred to an occupational health nurse .He saw her on 20 January 2022 (105). The claimant reported that the breathing difficulties also affected his mood. The claimant was offered a referral to the staff psychology team . The claimant declined. The claimant was diagnosed as unfit for work and when fit to return, the recommendation was the claimant should be offered short frequent breaks coupled with a phased return. The claimant was asked whether there was any underlying medical reasons for his absence record. The claimant told the occupational health nurse he had not yet received a diagnosis for his respiratory symptoms. Thus the claimant was not suggesting there was any connection with his AS. As a result the occupational health nurse was to report to the respondent there is no underlying medical condition to explain the claimant's absence. The nurse recommended a further consultation on 10 February 2022.

13.4.On 24 January **(**107) the claimant was invited to a review 1 meeting.

13.5.The letter stated *"In accordance with the council's health and well-being policy you have reached corporate trigger levels in respect of the number and frequency of your absences from work and we would like to meet with you to discuss this at a review meeting stage I … The purpose of the meeting is to discuss your current circumstances and to ensure we are providing the support you require to assist you*

in your attendance at work. If you wish, you can be accompanied at the meeting by a trade union representative or colleague…"

13.6.Broadly similar wording appeared in each of the subsequent review meeting invitation letters.

13.7.The tribunal observed the invitation letters made specific references to the policy.

13.8.On 03 and 17 February the claimant attended two review 1 meetings The meetings were called because the claimant had been absent for 41 days during January and February 2022 and had three previous short-term absences.

13.9.The January/February absence was sufficient in itself to hit a trigger point but it is helpful to record the details of the other three absences.

13.9.1.The first was in July 2021 (7 days. Symptoms shortage of breath, headache , fever coughing, upset stomach)

13.9.2.The second in November 2021 (5 days. Symptoms headaches and migraine) . It is proper to record that in the claimant's return to work on 29 November (104) he told his manager that he thought they were immunity issues and is immune system and been affected and been recommended by the NHS to obtain vitamin supplements and a flu jab.

13.9.3.The third was in December 2021(8 days. Symptoms headache, migraine and sinus issues.)

13.10.In passing the tribunal noted that the absences in July, November and December would have been sufficient on their own to hit a trigger point so the review 1 meeting could have been held at an earlier date.

13.11.The meeting of 03 February 2022 was conducted by Mr Hodgson accompanied by Ms Atkinson. Short notes were kept, which the tribunal regarded as reasonably accurate (108) .

13.12.It was a feature of all the review meetings that they were conducted by Mr Hodgson supported by Ms Atkinson, and in each case broadly contemporaneous notes were kept. The notes were not challenged (save in respect of a comment attributed to the claimant at a meeting on 01 March 2023 when it was alleged the claimant said " *thank you for not disregarding me ,other employers have".* However

in the tribunal's judgement this evidential dispute did not need to be resolved to address the agreed issues) and the tribunal regarded the notes as a reasonable summary of the principal matters mentioned.

13.13.The occupational health report of **20 January 2022** was discussed.

13.14.The claimant said that since he had his Covid booster he seemed to be constantly ill. He did not attribute any part of his absence to his AS or to the medication he was taking for that condition.

13.15.The meeting was adjourned as the claimant was due to see his GP and it was noted that a further occupational health review was to be undertaken.

13.16.On **04 February 2022** the claimant's GP diagnosed that the claimant was suffering from costochondritis (a condition that resulted in inflammation of the cartilage that joined the ribs to the breastbone).

13.17.The respondent wrote to the claimant on 08 February 2022 (110) confirming the review 1 meeting would be reconvened on 17 February 2022.

13.18.On 10 February 2002 the client attended the follow up occupational health appointment (the report being dated 14 February ,114). The advice was that the claimant reported his conditions were improving and the recommendation was that he was fit to return to work, although as a driver only, on a three-week phased return with the claimant building up his contractual hours over that period. It was also recommended that the claimant was offered short frequent breaks, if practicable. The report noted that the claimant's GP had told the claimant that his symptoms were likely to be caused by costochondritis.

13.19.On 17 February 2022 the review 1 meeting was resumed. The claimant said although he was experiencing a small amount of discomfort he was feeling better and was fit to return to work. The phased return recommended by occupational health was discussed and agreed. The claimant was told his attendance would be monitored for 14 months. The claimant was advised that if he hit a further trigger point during that time he would be invited to review 2 meeting.

13.20.The discussion was confirmed in an outcome letter dated 18 February 2022 (119/120).

13.21.The claimant returned to work on 21 February 2022**.** In the claimant's return to work interview he was asked whether any of his absences were disability related to which he answered in the negative (121).

13.22.The three-week phased return was not completed before the claimant commenced a further period of sickness from 10 March 2022 until 26 June 2022, initially due to a cough, but subsequently because of breathing difficulties.

13.23.As a result of the further sickness absences the claimant was invited to a review 2 meeting by letter dated 25 March 2022. (123)

13.24.On 07 April 2022 the claimant attended a review 2 meeting. The claimant explained that he had experienced breathing issues on his phased return to work. He was due to see his GP to get the result of x-rays that had been undertaken. He was also due to have blood tests and a referral to an asthma clinic. In the light of the ongoing medical investigations the meeting was adjourned and a further occupational health appointment arranged.

13.25.An occupational health appointment took place on 05 May 2022 **(**with a report dated 09 May 2022 being subsequently produced 132/133).

13.26.The nurse noted the claimant said he suffered from breathlessness and chest discomfort. Fortunately an ECG and chest x-rays found no abnormality. The claimant reported he could only walk short distances and remained fatigued. Occupational health determined the claimant was unfit for work and referred the claimant to the respondent's physiotherapy team for chest physio therapy. A further appointment was arranged for 09 June to assess the claimant's progress.

13.27.The review 2 meeting (134) was reconvened on 16 May 2022**.** The claimant said his costochondritis, explained his breathlessness. The claimant did not suggest to the respondent his difficulties were in any way linked with his AS.The claimant also thought he might be experiencing long Covid. Given the continued uncertainty and the pending occupational health report the review 2 meeting was further adjourned and subsequently rearranged for 20 June 2022

13.28.In the interim the claimant attended the planned occupational health appointment on 09 June 2022 **(**with a written report being produced the following day 138/139). The nurse reported that the claimant believed his breathing symptoms had improved slightly although he still had chest discomfort. However following an

accident whilst absent from work he had injured his left foot and his hand and was only able to drive short distances and unable to pull heavy bins. The occupational health nurse recommendation was the claimant remained unfit for work due to those injuries and was likely to remain unfit for at least 2 to 4 weeks. Occupational health arranged a further review meeting 06 July 2022.

13.29.The much adjourned review 2 meeting was further reconvened on 20 June. The claimant indicating his breathing was "*where it should be",* his lungs were operating to full capacity, and although he had some minor niggles in his right hand it wouldn't affect his driving. The claimant was reminded he been off work for some 154 calendar days. It was agreed the claimant would return to work commencing 27 June 2022 on a phased basis. The claimant was notified that he would be monitored over an 18 month period and if he hit a further trigger point or there was an additional cause for concern he would be invited to review 3 meeting. This was confirmed in a letter of 24 June (142/143)

13.30.The planned occupational health review took place on 05 July 2022 (confirmed in writing on 12 July 2022 144/145). The report recorded the claimant was performing well on his phased return to work with no particular difficulties although the claimant did experience some chest discomfort . The medical advice was the symptoms of costochondritis would resolve in time. The claimant remained fit to remain in work and no further review was required.

13.31.Unfortunately the claimant was not able to demonstrate consistent attendance. He was absent again from 05 to 11 September 2022 with what were described as breathing problems, weakness and tiredness., On 22 October 2022 he was absent with diarrhoea and a head cold

13.32.On his return to work the claimant did not link any of the above absences to a disability.

13.33.On 06 to 11 December 2022 the claimant was absent from work with a cut to the hand he asserted came from a wheely bin.

13.34.As a consequence a further trigger point was hit so the claimant was invited to a review 3 meeting held on 20 December 2022.

13.35.The claimant accepted he had a bad record over the previous two years but felt his fitness had now improved.

13.36.The claimant was told that further concerns could lead to the claimant attending a final review under the policy. It is likely that it was at this stage the claimant asked for a copy of the policy because Mr Hodgson was reported in the notes saying *"I will share policy".*

13.37.During the discussion Mr Hodgson probed how the claimant came to cut his thumb in the manner he alleged. He struggled to understand how the claimant could have cut his thumb on a plastic bin, which was the claimant's explanation, which was so sharp it penetrated his protective gloves.

13.38.Mr Hodgson put it to the claimant that he'd been told the claimant had been breaking a sink to get the scrap and that was the real cause of the injury. The claimant became visibly upset, stood up, and said he wanted to go. The claimant then said he had cut himself on a sink and was going to tell the truth but a colleague told him not to do so.

13.39.Mr Hodgson indicated that he could not support the claimant if he did not tell the truth. The claimant then said he was struggling with his mental health for years and felt work was good for him until today and his crew had stabbed him in the back.

13.40.The claimant was so distressed that Mr Hodgson was concerned as to the claimant's well-being and asked if there was someone at home the claimant could talk to and arranged for him to urgently speak to occupational health.

13.41.Mr Hodgson made arrangements for the claimant to work the following day assisting a litter picking squad. His reasoning, which the tribunal accepted was sound , was that he had concerns for the claimant's mental state and it was unwise for the claimant to drive an HGV the following day.

13.42.On 22 December 2022 the claimant emailed Mr Hodgson (164/165). He asked for a copy of the respondent's policy . A copy was supplied promptly .

13.43.The claimant again emailed on 02 January 2023 and stated he had AS (164). The tribunal found this was the first time Mr Hodgson or Ms Atkinson were aware of the condition

13.44.The claimant stated in his e-mail that he did not realise that the meetings that had been taken place were part of the process which could ultimately lead to his dismissal.

13.45.He said many of his sickness absences (he did not identify them) were related to infections he developed over various times which he thought were connected with lowered immunity and his AS and he believed he was a disabled person. He said the respondent should have been making reasonable adjustments to the triggers in the policy and review meeting procedure. He did not state what those adjustments were.

13.46.Ms Atkinson emailed the claimant to say Mr Hodgson was on annual leave but they would discuss matters on his return

13.47.The claimant contacted Ms Atkinson on 05 January 2023 as he had been told there was a meeting on 9th and wanted to understand what the meeting was about.

13.48.Ms Atkinson responded within 10 minutes to say its purpose was to discuss the claimant's email of 02 January 2003 and what support could be offered.

13.49.On 09 January 2023 the claimant attended the meeting with Mr Hodgson and Ms Atkinson. The claimant stated that whilst he was suffering from low mood he was fit to work but preferred to avoid driving. He had enjoyed the litter picking. Mr Hodgson indicated he would make enquiries to see if a litter picking vacancy was available but even if not, such posts came up relatively frequently. He pointed out that such a role would attract a lower salary. The claimant indicated this was not about money.

13.50.The claimant explained he now thought some of his previous absences were linked to the immune suppressant medication he was taking for his AS. Mr Hodgson indicated that advice would be needed about AS hence the meeting would be resumed following an occupational health referral arranged for 23 January 2023.

13.51.Until January meetings have been held on a face-to-face basis but thereafter, because the claimant said he found such meetings stressful, it was agreed they would be undertaken by Teams

13.52.On 12 January 2023 Ms Atkinson sent an email to occupational health seeking advice and in particular whether the claimant's medication could affect his immune system and his capacity to attend work and whether AS qualified as a disability (286/287). Ms Atkinson made it clear why she wanted a response because she said that "*we may need to adjust triggers for him"*

13.53.The reply from occupational health was the issues would be discussed on 23 January.

13.54.On 23 January 2023 the claimant attended occupational health and a report was prepared that same day by a nurse (172/173). The claimant told the nurse that he had low mood and considered his mental health was declining. He thought from what he had read that he had symptoms/traits of autism, ADHD and PTSD. The claimant told the nurse that he wasn't taking his current medication because he did not feel fit to drive. Occupational health advised the claimant was not safe to drive a refuge wagon, was unfit for work, and require psychological assessment. He might be fit for alternative duties. Occupational health noted that the claimant had AS which was managed well. Occupational health made no comment upon whether the claimant's medication could have affected the claimant's immune system or whether the claimant had a disability.

13.55.The claimant was thereafter from 23 January 2023 continually signed off by his GP with depression and anxiety. Sadly he was never to return to work. AS or the immune suppressants played no further part in the claimant's absences.

13.56.On 27 January 2023 the respondent wrote to the claimant in respect of the review 3 meeting, taking into account subsequent events and investigations (176/177).

13.57.There was a discussion as to alternative work other than driving which the claimant considered he could not undertake due to his anxiety and depression.

13.58.The claimant was told he would be subject to a 24-month monitoring. If a further trigger point was reached the claimant could be called to a final review meeting. A further meeting would be arranged once the claimant had undertaken a psychological assessment.

13.59.The claimant sent the respondent an email on 12 February (180/181). He confirmed he could not drive an HGV. He asked about other duties that did not involve driving. The claimant again asserted that many (unspecified) of his sickness absences were the result of taking immune suppressant medication for his AS. He suggested the respondent should adjust the trigger points. He did not think it fair to give a review 3 outcome whilst his request was outstanding.

13.60.On 16 February 2023 Ms Atkinson explained she was awaiting occupational health advice in respect of his request for adjustments.(183). At about this point Ms Atkinson decided to escalate matters within occupational health with a referral to the occupational health physician for a full review as all the respondent's previous questions have not been fully answered by the occupational health nurse.

13.61.On 01 March 2023 the claimant was invited to a review 3 meeting. It was explained that the respondent was content to remove the driving duties from the claimant's role and to redeploy him as a refuge loader in order to address some of his concerns mentioned in his e-mail of 12 February 2023. The claimant asked for the proposal to be put in writing.

13.62.The claimant was told that arrangements had already been made to escalate his concerns in connection with reasonable adjustments to Dr Dang and an appointment had been made for 18 April.

13.63.Following the meeting Ms Atkinson wrote the claimant by email 02 March 2023. She confirmed that the respondent could offer the claimant a role as a refuge loader and set out details of the salary. She recorded that the respondent was awaiting occupational health advice in respect of AS and if this justified an adjustment to the policy. Thus, in principle the respondent had not rejected the possibility of an adjustment.

13.64.She informed the claimant that she understood occupational health were planning to speak to the claimant's GP to obtain information so that any further reasonable adjustments could be considered.

13.65.That appeared to cross with an email sent by the claimant at 19.03 the previous day when he indicated he accepted the role of refuge loader starting on 06 March and asked for an answer to his request reasonable adjustments to the policy.

13.66.The claimant was subsequently advised, when the claimant queried whether he would permanently lose his driving position that the role of refuge loader was on a temporary basis and confirmed he could start in the loader position on 06 March.

13.67.Unfortunately the claimant had a relapse on 06 March 2023 and did not report for work.

13.68.On 10 March (195) Ms Atkinson wrote to the claimant stating Dr Dang, would look at the entirety of the claimant's medical history and make any recommendations for reasonable adjustments. The claimant was asked to report to work in the role of refuge loader on the 14 March. He was advised it would be on a phased basis and the respondent asked for confirmation that the claimant would return to work on that date.

13.69.The claimant did not return to work on 14 March due to mental health challenges. His GP referred the claimant to the community mental health team.

13.70.The claimant attended a meeting with Dr Dang on 18 April 2023 (217/218) when the claimant's AS. and mental health were discussed.

13.71.Dr Dang accepted the claimant had AS. Her opinion was that AS was a generic condition which caused inflammation to the bones of the spine in particular, although other joints could be affected. It could cause symptoms in other parts of the body, typically back pain, stiffness and poor posture although other symptoms could also manifest themselves including fatigue, inflammation to the eyes and poor appetite. She agreed that immune suppressants did impact upon a person's overall ability to fight infection. She found that currently the claimant symptoms were linked to his mental health although the claimant's other symptoms of headaches and pain in his neck, pain in his breastbone and stiffness in his hands and wrists could be a flareup of AS. She found the claimant was presenting symptoms linked with mental health and that the was suffering from anxiety and depression

13.72.Dr Dang did not advise that costochondritis, was a likely consequence of the claimant's AS. That was not surprising given at no stage did the claimant, prior to dismissal, expressly link absences diagnosed as costochondritis, to his AS. Indeed in cross examination the claimant accepted that he only thought there was a link following termination.

13.73.Before returning to Dr Dang's report is necessary to deal with a further point. Since termination the claimant produced from an untitled publication (apparently medically reviewed by a Dr Zelman MD) from the Internet (95) and authored by a Ms Gatta who qualifications were not stated. It opined that the link between AS and costochondritis was about 70%.Significantly this article was never placed before the respondent until disclosure. A letter from the claimant's treating consultant

rheumatologist dated 19 February 2024, after the termination of the claimant's employment (90) was less positive. The author said condochondritis *"can be, but is not necessarily, associated with*[AS]"

13.74.Given the above evidence was not before the respondent prior to the conclusion of the internal proceedings the respondent cannot be faulted for making no reference to the same in its deliberations.

13.75.Returning to Dr Dang report she informed the respondent that the claimant had been seen by psychologist and 10 sessions of therapy have been suggested. No timescales could be given. The claimant was not fit to return to work due to physical and mental health challenges.

13.76.Dr Dang considered the claimant was likely to be disabled within the meaning of the EQA 10 and adjustments would need to be considered. She also said in respect of the policy "*I did feel that this needed to be left to one side for now as although I do believe many of the sickness absences are linked to his chronic condition, at the present time he is not fit to return in any case and we need him to focus on getting himself well again.*

13.77.Dr Dang arranged a follow up meeting.

13.78. Dr Dang's report, although relating to a consultation on 18 April, was only sent to the respondent on 18 May 2023.

13.79.Although a review meeting under the policy was arranged with the claimant for 24 April that did not take place for reasons which the tribunal considered were no party's fault, simply a breakdown in communication.

13.80.Fortunately the claimant was well enough to attend a review meeting on 18 May 2023. The claimant indicated he felt the same as when he first fell absent in January 2023 and nothing had changed. He felt he was not coping. He was due to start therapy sessions in June.. At present he could not even think about a return to work. The report of Dr Dang was not discussed as it was only received after the meeting.

13.81.The subsequent follow-up letter from the respondent dated 25 May noted the advice from Dr Dang and in the light of Dr Dang's report a further meeting would be

arranged after her follow-up consultation. The claimant was advised he would go on to no pay from 24 August 2023

13.82.The claimant attended a further appointment with Dr Dang on 27 June 2023 **(**223/224). The claimant thought his conditions were potentially getting worse. Dr Dang believed the claimant was unfit to return to work for the foreseeable future. Even with planned medical interventions she could not put a timescale on when the claimant could return to work but at best it would be likely to be *"months rather than weeks"* Dr Dang reported that the claimant told her that the last time he felt as unwell as he currently felt, it took him 2 to 3 years to recover.

13.83.On 05 July 2023 Ms Atkinson wrote to the claimant and referred to Dr Dang's report and indicated that in accordance with the policy the respondent would arrange a final review hearing (227). The claimant was offered the opportunity of a further meeting before the final review meeting to discuss Dr Dang's most recent report but he declined.

13.84.On 17 July 2023 the claimant was invited by letter to a final review meeting and advised that his future employment was at risk.

13.85.Prior to the final review meeting the claimant was provided with a management statement of case.

13.86.Amongst the information contained therein were details of the claimant's sickness record. From November 2021 to the date of the management report in July 2023 the claimant had a total of 345 calendar days of absence.

13.87.The claimant submitted his own representations (248/253). He said he believed he had been kept in the dark during the process and it was only after the review 3 meeting that he became aware that he might be dismissed. He again said that he had a disability and the respondent should have made a reasonable adjustment (unspecified) to the sickness review process and the sickness triggers.

14.The final review meeting

14.1.A final review meeting was conducted by Mr Wardle supported by Ms Lynn Graham from HR on 27 July 2023 via Teams .

14.2.Notes of the meeting were before the tribunal (242/247) .The tribunal found them to be a reasonably contemporaneous note of the principal matters discussed.

14.3.The management statement of case was presented by Mr Hodgson supported by Ms Atkinson. The claimant attended supported by Ms Gallacher.

14.4.The claimant raised two principal points. The first was Mr Hodgson's knowledge of when the claimant had AS. While Mr Hodgson accepted the claimant spent a long time shielding he had not told of the reason for shielding. The second was Mr Hodgson should have made reasonable adjustments. Mr Hodgson said arrangements were made to contact OH to ask for advice and that was followed. The principal reason the claimant was absent was not his AS but due to anxiety and depression.

14.5.Mr Hodgson explained the impact on the service of the claimant's absence was they had to second staff from NEAT to support waste collection. That put pressure on staff and additional time had to be spent training staff on routes. The respondent incurred the cost of agency staff who themselves need to be trained and the respondent suffered a high turnover.

14.6.The claimant confirmed he agreed with Dr Dang's reports.

14.7.The claimant had started what was known as Strike and Thrive therapy by the final meeting which included an element of CBT but it had sadly not benefited the claimant.

14.8.The claimant told Mr Wardle he didn't realise until January that the reviews put him potentially at risk of dismissal. The claimant attributed his severe anxiety to the fact that at the review 3 meeting the respondent was not explained the process to him or that he could be dismissed

14.9.Mr Wardle wanted the claimant to explain why if he thought his AS was contributing to his absences he didn't say so. The claimant said he didn't think they were connected with his AS until January 2023.

14.10.The claimant was specifically asked what the respondent should have done but did not do and the claimant said the respondent should have taken his disability into account.

14.11.Mr Wardle decided to terminate the claimant's employment.

14.12.Mr Wardle set out in a contemporaneous letter dated the 27 July 2023 (254/255) his reasoning for the decision to terminate the claimant's employment.

14.13.Mr Wardle determined the claimant would be dismissed on the grounds of ill-health capability.

14.14.He considered the claimant could not provide efficient and reliable service and there was no evidence of a sustained improvement in the near future.

14.15.He found the claimant should have been aware from the correspondence he was subject to a formal review process.

14.16.Whilst he noted occupational health had suggested reasonable adjustments and accepted that AS was a disability he noted adjustments could not be put in place until the claimant was fit to return to work . The claimant was given 7 weeks' notice, with the termination date of 14 September 2023, and advised of his right of appeal.

15.The appeal.

15.1.On 05 August 2023 the claimant lodged a notice of appeal (256/257 and 260/ 263).

15.2.The grounds of appeal had three central strands.

- Firstly until December 2022 the respondent did not make him aware that it was following a policy which could lead to his dismissal.
- Secondly the respondent failed to consider reasonable adjustments to its policy.
- Thirdly because of the two former matters he had a severe mental breakdown which in turn led to a period of sickness which was used to justify his dismissal.

15.3.In terms of the failure to make reasonable adjustments the claimant said "*in looking at my sickness absence, I believe* [the respondent] *should be making reasonable adjustments to the triggers it sets out in its* [policy] *for sickness absence …. and for the review meeting procedure itself. This is so I'm not disadvantaged by my disability….."*

15.4.The claimant said as a reasonable adjustment he should not have moved to a review 3 meeting. It was only by moving to a review 3. meeting that this caused his claimant's mental health to decline.

15.5.The claimant was supplied with the respondent's management statement of case prior to the appeal hearing.

15.6.On 09 November 2023 an appeal hearing was held by Teams at the claimant's request. The meeting was chaired by Mr Paul Jones supported by Mr Andrew Meikle, senior HR manager. Mr Wardle presented the management state the case supported by Ms Graham and the claimant attended, once again accompanied by Ms Gallacher

15.7.Notes were taken (288/300). The tribunal was satisfied those notes were reasonably contemporaneous and accurately reflected the principal matters discussed.

15.8.The claimant was expressly asked whether the outcome that he wanted from the appeal was reinstatement to which he said he did not. He wanted compensation and an apology.

15.9.The claimant accepted he was unfit for the foreseeable future in undertaking any work for the respondent.

15.10.The claimant accepted that from January until termination he was absence due to depression and anxiety and not AS.

15.11.The appeal was unsuccessful and the reasons for rejecting the appeal were set out in Mr Jones's letter of 14 November 2023 (301/304).

15.12.In summary Mr Jones noted the claimant had had 346 calendar days sickness absence from 24 November 2021 and none were stated to be because of AS. There had been a number of sickness review meetings and the claimant had progressed through the various stages with the claimant being advised at each point at what stage he reached. The medical evidence was that there was no indication of a likely significant improvement in the near future such that the claimant could return to work.

15.13.The respondent had considered reasonable adjustments such as removing driving duties but the problems driving were not linked to the claimant's AS.

16.Decision and relevant further findings of fact.

The approach

16.1.The tribunal began its analysis by considering the issue of reasonable adjustments.

16.2.It did so for the following reasons.

- Firstly if there had been a failure to make a reasonable adjustment that was likely to be a very material finding in determining the reasonableness or otherwise of the unfair dismissal complaint.

- Secondly the issue of a reasonable adjustment was also likely to feed into the respondent's justification defence under section 15 EQA10. The Code at paragraph 5.21 stated – "*If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified."*

16.3.The tribunal perhaps rather unusually decided to deal with the merits of the reasonable adjustment claim before turning to the time point.

16.4.Both parties made written submissions, amplified orally. The tribunal meant no disrespect to each party by not repeating those submissions. The mere fact it has not dealt with each and every submission does not mean that they were not fully considered.

17.Reasonable adjustments

The legal principles the tribunal applied

17.1.The duty under section 20 has essentially four requirements, see **Environment Agency v Rowan [2008] ICR 218**

17.2.In **Rowan** the EAT suggested the tribunal should identify:

- the provision criterion or practice applied by the employer;
- the identity of non-disabled comparators;
- the nature and alleged extent of the substantial disadvantage suffered by the claimant which required the need to identify:

    (i) the nature of the claimant's disability;

(ii) why this disability placed him at a substantial disadvantage (substantial meaning more than trivial)

(iii) what the substantial disadvantage was;

- in light of those matters what a reasonable adjustment would be.

17.3.The following additional legal principles are relevant to a reasonable adjustment claim:

17.4.The test of what steps are reasonable is objective **Smith-v-Churchills Stairlifts [2006] ICR 524.** This may involve an element of positive discrimination provided the steps required are objectively reasonable for the employer to take, see **Archibald – v-Fife Council [2004] UKHL 32** whilst taking into account the needs of the employee and employer **Chief Constable of Lincolnshire v Weaver EAT /0622/07.**

17.5.The assessment of whether the adjustment will be reasonable involves looking at the position at the time the decision was taken or not taken, see **Brightman -v-TIAA Ltd EAT 0318/19.**

17.6.It is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment.

17.7.The test as to effectiveness was not that an adjustment would only be reasonable if it was completely effective, the tribunal's focus had to be on whether the adjustment would be effective by removing or reducing the disadvantage a claimant experienced at work as a result of his or her disability. There had to be at least a real prospect that the adjustment contended for would have made a difference, see **FirstGroup Ltd v Paulley [2017] IRLR 258.**

17.8.Factors that may be relevant to effectiveness are set out in the Code.

17.9.Knowledge is set out in schedule 8 part 3 of the EQA 10. An employer was not subject to a duty to make reasonable adjustments if the employer did not know and could not reasonably have been expected to have known of the disadvantage.

17.10.The burden of proving lack of knowledge rested with the respondent.

17.11.This predominantly was a absent management adjustment and the tribunal agreed with Ms Firth that the leading authority on such matters was **Griffiths -v- The Secretary of State for Work and Pensions [2015] EWCA Civ 1265.**

18.Discussion

18.1.The PCP was clearly identified from the list of issues. In practice it was the triggers in the policy

18.2.The tribunal was satisfied that the claimant, who suffered from AS and had to take immune suppressants was more likely to have periods of absence than a none disabled person up until January 2023. His body defences were impaired and therefore that made him more prone to contracting viruses.

18.3.From that point the tribunal was further satisfied that the claimant who thereafter was suffering from anxiety and depression was more likely to have periods of absence than a none disabled person.

18.4.The respondent took no issue with the above.

18.5.By the time of submissions the claimant's case was advanced on two grounds.

- The first was that the claimant should have been allowed longer periods of absence than a none disabled employee before he faced the risk of sanctions. This was what Ms Firth pithily called the *"loosening of the triggers"* argument.
- The second, which was not apparent from the pleadings, (but for reasons that will become clear any tricky issue of amendment were irrelevant given the tribunal's ultimate finding) was that his disability related absences should have been ignored, so by January 2023 he should only have been at the review meeting 2 stage and not the review meeting stage 3. Again this was described helpfully by Ms Firth as the *"rolling back the process"* point.

18.6.It is important to reiterate what disabilities the claimant was relying upon. In terms of the rollback it was his AS.

18.7.In terms of loosening the triggers the claimant appeared to put his case as his AS and anxiety and depression. However there was no hint that the claimant's AS or the taking of immune suppressants had anything whatsoever to do with his absences from January 2023.

18.8.Whilst the claimant had raised the possibility that his AS had been a factor in his absences in January 2023 the respondent was not aware of the linkage until it received Dr Deng's report on 18 May 2023. It was only at this point that the

respondent became aware that the AS placed the claimant at a substantial disadvantage.

18.9.The tribunal has not forgotten that the claimant raised the possibility of his AS and medication impacting upon his attendance in January 2023. However that was an assertion and an assertion the respondent was entitled to obtain expert guidance upon. It did so. The process may have taken some time, in part because occupational health needed to speak to the claimant's GP but the tribunal was not persuaded the respondent had knowledge or ought to have had knowledge from January rather than May 2023.

18.20.Nor was the tribunal persuaded the respondent had imputed knowledge prior to January 2023.

18.21.In reaching this conclusion the tribunal also took into account the following factors: –

- Firstly prior to January 2023 neither in the sickness review meetings nor when meeting occupational health did the claimant mentioned that it was his AS or medication that was linked to his symptoms or to costochondritis. Occupational health ,who were the medical experts, did not perceive any such link even when their attention had been drawn to the fact that the respondent asked on a number of occasions whether there was any underlying disability.
- Secondly whilst the claimant had mentioned he had immunity issues that was in the context of having a Covid Booster (108) and not his disability
- Thirdly the claimant himself did not make the link until the final meeting on 27 July (245). Whilst the mere fact the claimant had not made the link would not mean as a matter of law that the respondent would necessarily escape if there was evidence that would put them on notice of the need to make enquiry. However as the tribunal said it was only put on enquiry in January 2023 when the claimant raised the possibility and that was investigated.

18.22.It was important to make the above finding because the respondent's knowledge fed into the reasonableness or otherwise of the adjustments sought.

Loosening the triggers

18.23.Would discounting the AS absences and those linked to the medication for AS have been a reasonable adjustment?

18.24.The majority of the claimant's absences prior to January 2023, but not all, were associated with breathing and fatigue.

18.25.If those absences were removed from June 2021 it would not prevent the claimant being absent again due to virus infections. He would continue to experience virus infections due to his susceptibility and would have been absent from work. Given that those absences were the majority, looking at the claimant sickness record the adjustment was not reasonable. It would not have helped the claimant to achieve a reasonable level of attendance. It was not reasonable because it would deprive the respondent of the ability to manage sickness absence. It would impact upon the respondent's finances, given the generous contractual sick pay arrangements found within a local authority and would continue to result in disruption to the service the respondent provided.

18.26.Even if claimant had been moved back to review 2 in June 2022 which was subject to an 18 month monitoring. In January 2023 he would have hit a trigger to move on to review 3 and final hearing before dismissal.

18.27.If the same exercise was carried out with anxiety and depression the same result would also occur.

18.28.It would not have had a realistic chance of removing the substantial disadvantage because the claimant would still remain absent.

18.29.The claimant still would not have been able to provide satisfactory attendance and the adjustment was not reasonable for the reasons already stated.

Rolling back the process

18.30.Part of the claimant's argument was that had adjustments being made to the trigger points prior to review meeting 3 he would not have reached that stage.

18.31.It was not clear to the tribunal how a reversion from a review meeting 3 to a review meeting 2 would have led to a reasonable possibility that the claimant would have been able to return to work

18.32.The difficulty with this argument is twofold

- Firstly the claimant's absence due to anxiety and depression was such that he didn't need to go through the various review stages. Once it was clear it was not possible to the claimant to return in the foreseeable future the respondent was entitled under its policy to go straight to the final review hearing.
- Secondly the claimant would still have reached the same stage under the policy. The claimant was absent in October 2022 which he agreed were not AS related. He was absent in December 2022 due to a hand injury. Therefore would have been subject to a review 1 meeting. He then would have been invited to a review 2 meeting when he was absent from more than 14 days due is due to his mental health in January 2023. He would be referred to occupational health and would have been certified, as being unfit for work in the foreseeable future which would then have passported him straight to a final hearing.

18.33.Nor would it have been reasonable to make the adjustment sought. It would not be reasonable because firstly the whole purpose of an attendance management policy was to encourage an employee back to work. Secondly discounting all of the absences due to anxiety and depression effectively would have meant the respondent could not make a determination as the claimant's future employment. If that were the case the logical conclusion would be the disabled employee could be absent throughout the working year without the employer been able to take any action in relation to that absence see **Bray -v- London borough of Camden EAT 1162/01.**

18.34.The respondent was entitled to manage the issue of ill-health absences within the workplace and the claimant could not reasonably expect to have been wholly removed from the scope of the policy.

18.35.Given the tribunal's finding in respect of the merits of the complaint it was not necessary to deal with the time point.

19.Section 15 EQA 10

The legal principles the tribunal applied

19.1.Section 15 EQA10 provides:

"15(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. "

19.2.Section 15(1) (a) contains a double causation test namely:

- The unfavourable treatment must be *"because of"* the relevant *"something"*
- The *"something"* must itself arise *"in consequence"* of the disability see **Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305**.

19.3.**Weerasinghe** stressed that the test was whether the unfavourable treatment was because of something arising in consequence of the disability and not simply whether it was as a consequence of the disability.

19.4.The unfavourable act identified by the claimant in the agreed issues was the dismissal itself.

19.5.It was obvious that a dismissal objectively was unfavourable treatment.

19.6.The dismissal was because of the claimant's sickness absence.

19.7.The claimant's sickness absence arose in consequence of the claimant's accepted disabilities of AS and anxiety and depression.

19.8.Thus it was for the employer to justify the decision to dismiss. What this required was the respondent to prove that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

19.9.To be proportionate the unfavourable treatment had to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so. In particular the tribunal had to consider whether a lesser measure would have been a proportionate means of achieving the respondent's legitimate aim, see **Naeem –v- Secretary of State for Justice 2017 UKSC 27.** The tribunal had to engage in an objective balancing exercise between the reasonable needs of the

respondent and the discriminatory effect on the claimant, see **Hampson v Department of Education and Science [1989] ICR 179 CA.**

19.20.Provided the decision-maker acted rationally and responsibly the tribunal was required to afford substantial respect to that judgement see **O'Brien -v- Bolton St Catherine's Academy 2017 ICR 737** at paragraph 53. That judgement, however, must be read with some care as there is no range of reasonable responses test, see **Hardys and Hansons PLC -v- Lax [2005] IRLR 726**

20.Discussion

20.1.The first point to make was the tribunal had already rejected the claimant's complaint for failure to make reasonable adjustments.

20.2.The twin aims of providing an efficient and cost-effective service and maintaining attendance standards were unarguably legitimate aims, and indeed the claimant took no point in this respect.

20.3.The real issue was whether dismissal was a proportionate means of achieving those aims.

20.4.The tribunal found it was.

20.5.The claimant's absence had an impact upon the respondent's service. The claimant was one of a number of HGV drivers based at the Berwick depot and an HGV driver was required for a refuge lorry to be dispatched. As the tribunal understood it there were five routes and therefore five HGV drivers were required.

20.6.At the Berwick refuge depot there were two senior loaders who also held HGV licenses so therefore could act up to cover short-term absences, such as holidays and attendance at training. The advantage of using such a member of staff was they would know the routes. The disadvantage was that a person from the NEAT service would need to be seconded to act as a loader.

20.7.The employees in the NEAT service engaged in matters such as litter picking, grass maintenance, street bin emptying, dealing with fly tipping, street gutter cleaning, gritting and snow clearing etc. Thus taking an employee from NEAT then impacted upon that service. The adequacy or otherwise of the NEAT service had a significant impact on the local environment and amenity.

20.8.Whilst there were HGV drivers within the NEAT service, if a senior loader was not available to cover the claimant's absence that in turn caused problems because of the difficulty in backfilling a NEAT drivers' duties. Street sweeping involved the use of a left-hand drive vehicle which was not an attractive role to many agency drivers. It required particular skills and training. If the street sweeping role was left uncovered by the driver undertaking the claimant's duties, then ultimately gutters could become blocked and flooding might occur.

20.9.The respondents did on occasion employ agency HGV drivers but they were more expensive than employees and in addition needed training and frequently moved to more lucrative work after a short period of time . Using an agency driver not only was expensive but they had to be trained on the routes and the respondent had the cost of covering the claimant's contractual sick pay.

20.10.There was clear evidence that even allowing for the fact the respondent was a large employer the claimants absence impacted upon the service, other employees and the service to residents.

20.11.The claimant's absence, through no fault of his own was significant, totalling over 350 days from November 2021.

20.12.The claimant did not dispute Dr Dang's opinion that he was unfit for work for the foreseeable future either at the final hearing or at the appeal hearing.

20.13.In order to provide an efficient service the respondent needed a sufficient number of staff which in turn required it to maintain attendance. The policy, the tribunal was told, was drawn up between both the respondent and the staff side representatives as representing what was agreed at a reasonable procedure to maintain such attendance. The application of the policy, given the length of the claimant's absence and the need to recruit to his post, was a proportionate means of achieving that aim

20.14.In reaching the above conclusions the tribunal asked itself whether there was a lesser sanction that the respondent could have imposed?. In evidence the possibility of the claimant remaining on no pay for a period of time in the hope of recovery was suggested. However that simply wasn't feasible because by the time of the appeal the claimant made it clear he did not want to return to work for the respondent and there was no indication of when he would be fit to return to work. Indeed there was some

evidence in the documents that the claimant had already started to set up his own business as a chimney sweep.

Thus the tribunal concluded the respondent had satisfied the statutory defence.

21.Unfair dismissal

21.1."98 (1) ERA 96 – in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that either it is a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee helped.

98 (2) – a reason falls within this subsection if it…….

(a) relates to the capability …. of the employee for performing work of the kind which he was employed by the employer to do….

98 (4) –….. Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):

(a) depends on the whether in the circumstances (including the size and the 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."

22.Discussion unfair dismissal

22.1.The respondent has satisfied the tribunal (and the burden was on the respondent) that the reason for the termination of the claimant's employment at dismissal was that it believed the claimant lacked capability due to ill-health to perform his contractual duties.

22.2.The tribunal reached this conclusion the following reasons: –

- Firstly the claimant did not challenge either Mr Ward or Mr Jones that it was capability that was the reason for dismissal.
- Secondly capability was wholly consistent with the documentation which showed a lengthy process, meetings and various referrals to occupational health.

22.3.However that is not the end of the matter

23.Section 98(4)

Initial considerations.

23.1.There is a second stage as set out under section 98 (4)ERA96 where there is no burden on either party.

23.2.At the heart of the second stage is whether the respondent could have been expected to wait any longer and if so for how long, see **BS -v- Dundee City Council [2013] CSIH 91.**

23.3.Whilst the claimant believed the respondent had caused his mental ill-health, which the tribunal did not accept, but even if it was wrong on that finding, it was simply a factor to be weighed in the balance and one that generally would favour a degree of latitude by the respondent to the claimant. It was not a trump card and if the respondent acted as the claimant believed it did, his remedy was in civil proceedings.

23.4.Before the tribunal addresses the four considerations that it must consider in any dismissal where the reason is said to be long-term in capability due to ill-health it is appropriate to address the specific allegations of unfairness raised by the claimant.

23.5.The tribunal identified at a previous case management hearing two specific matters but it is proper to say that the claimant in his witness statement and cross examination referred to other issues. For various reasons witness statements had been exchanged some nine months prior to the final hearing of this case and the respondent was not caught by surprise by these assertions. The tribunal has therefore addressed them.

24.Specific allegations of unfairness.

The claimant was not provided with a copy of the respondents policy prior to December 2022

24.1.Factually the claimant is quite correct that he was not given a physical copy of the policy until December 2022.

24.2.The question the tribunal had to ask was whether this produced procedural or substantial unfairness?

24.3.The claimant's case was he didn't know he was under a policy that could lead to the termination of his employment and when he so found out that led to such a deterioration in his mental health that he then lost his employment.

24.4.The obligation upon an employer is to take reasonable steps to bring to an employee's attention any policy that it might apply to that employee.

24.5.The obligation does not require the physical issuing of each and every policy. In large employers, who often have a multitude of policies both across the organisation and also departmental specific protocols (e.g. social services), that would be a very significant and unreasonable burden.

24.6.What steps did the respondent taken to draw to the claimant's attention that he was subject to the policy?

24.7.The respondent suggested the claimant knew of the policy through tool box talks. The tribunal found it highly likely the policy was subject to a tool box talk when the policy was brought into existence. The policy was probably one of the most used for most employees hence why it was likely it would have been mentioned.

24.8.The claimant could not remember if it was discussed at a toolbox talk. In fairness, given the passage of time and the claimant's health, that is not surprising. The toolbox talks only lasted about 10 to 15 minutes. Even if the claimant had been present the tribunal was not satisfied that this method alone would adequately draw to the claimant's attention the full terms and effect of the policy.

24.9.However the tribunal did find it was brought to his attention by other means.

- Firstly in all the invitation letters the wording made it clear the claimant was subject to the policy. As early as 24 January 2022, when the claimant was invited to a review 1 meeting, the invitation letter (107) commenced with the

word being *"in accordance with the council's health and well-being policy you have reached corporate trigger levels…*

- Secondly the reference to the availability of trade union representation at review meetings should have been a prompt that suggested to the claimant a degree of formality and importance, especially given the reference to monitoring periods.
- Thirdly whilst the claimant said he thought the review meetings were just meeting about sickness generally the tribunal did not accept that. The meetings were wholly different in format, style, documentation and those present to a sickness review meetings, which he was already undertaking in any event.
- Fourthly the reference to monitoring, monitoring periods and trigger points should have alerted the claimant to the fact this was a formal process. In particular the reference to the different monitoring points and that the review meetings were labelled in ascending order would suggest to the claimant that he was subject to an escalating procedure. Allied to this point the reference to a monitoring period in the policy highlighted that there were likely to be consequences for failure to maintain good attendance. The claimant had been subject to the policy's predecessor, the attendance management procedure, which has resulted in the claimant receiving a warning. The claimant therefore knew that attendance was monitored and poor attendance potentially had consequences.
- Fifthly whilst the tribunal found the claimant could not access the policy from his home computer and nor did he have direct intranet access his team leader had (who conducted the return-to-work interviews) and he never asked for a copy of the policy at an early stage. Nor did he ask HR. The claimant accepted he could have accessed the respondent's intranet with help from his team leader but he never asked.
- Sixthly at no stage at the review meetings prior to 02 January 2023 did he expressly indicate he did not understand what was happening. He did not ask what the corporate triggers were. He did ask why he was subject to review periods. He gave no indication to those conducting the meetings that he was

unaware of the process that had been embarked upon. The claimant accepted in cross examination that he knew he was being subject to the policy but when asked why didn't ask for a copy said "*I don't have an answer for that"*. He accepted it was possible that he closed his eyes to the process.

- Seventhly the tribunal was not satisfied that even if the claimant had been provided with a copy of the policy prior to or at the invitation to the review 1 meeting that it would have materially had any impact. All the claimant's absences were genuine in the sense that he was suffering from a variety of physical or mental conditions. Those absences would still have arisen whether the claimant had the policy or not. It wasn't suggested, for example by the claimant that if he had the policy earlier there were days when he was sick but would have come into work.

He was not advised his employment was in jeopardy prior to review meetings 1, 2, and 3 as set out in the policy

24.10.There was no obligation under the policy for the respondent to specifically tell the claimant at a review 1 meeting that his employment was potentially in jeopardy. Given a review 1 meeting was at the start of the sickness process, and given the central theme of the policy was to support an employee in a return to work the tribunal did not find this omission surprising, unusual or unfair. As an employee cannot help being sick the tribunal was persuaded that the threat of termination at such an early stage would be contrary to the ethos of the policy.

24.11.However the claimant was on stronger ground in respect of the review 2 and review 3 meetings as the policy expressly stated that employees "*should"* be reminded that if attendance was not improved or sustained it could ultimately lead to dismissal. He was not so told.

24.12.The tribunal found this was a breach of the respondents' policy and was a factor to be taken into account in determining the fairness or otherwise of the dismissal. The fact it would have made almost certainly no difference, because the claimant was genuinely ill, was not relevant to the issue of fairness although it was relevant to any Polkey argument.

24.13.What the tribunal did consider to be significant was that prior to the final meeting the claimant knew his employment was at risk.

Shielding absences taken into account

24.14.The claimant suggested that the absences caused by shielding were taken into account because the respondent decided the claimant was a liability due to his AS and they no longer wanted him in employment.

24.15.The tribunal was not so satisfied that shielding formed any part of the reason to dismiss. It reached this conclusion having looked at the management statement of case and notes of the final hearing and appeal hearing. In addition shielding was not taken into account in determining whether the claimant hit a trigger point.

Raising an underlying condition.

24.16.The claimant was critical that the respondent did not ask at any of the review meetings whether there was any underlying condition which explained all or part of his absence. The tribunal found unless it was plainly obvious, it was the claimant who best knew his own health and should have raised any suggestion there was an underlying health condition. He did not until, at the very earliest, 02 January .When he raised the matter with the respondent it was not ignored and occupational health advice was sought. In addition even prior to that date, the respondent had asked occupational health whether it thought there was an underlying condition and it received an answer in the negative.

Did the respondent genuinely believe the claimant was no longer capable of performing his duties?

24.17.The tribunal found the respondent did so believe.

24.18.It had the advice from occupational health and in particular the last report from Dr Dang, 28 June 2023, which made it clear the claimant could not perform his duties for the foreseeable future.

24.19.The claimant did not disagree.

24.20.The respondent genuinely believed the claimant was no longer capable of performing his duties.

Did the respondent adequately consult the claimant?

24.21.Although the policy suggested, in most cases a three-stage procedure before a final meeting a far greater number of meetings were held with the claimant before

that point. There were eight meetings in total. In part this was because at each stage the respondent wanted to obtain occupational health as the claimant had, on the face of it, a cocktail of health challenges. Those occupational health reports were always discussed with the claimant.

24.22.This was a lengthy process from about February 2022 until the final review meeting on 27 July 2023, a period of approximately 17 months. It was not rushed.

24.23.The tribunal is satisfied that this was genuine consultation. Consultation does not mean the respondent had to accept everything the claimant said but the tribunal was satisfied that the claimant was listened to and his representations were taken into account.

24.24.The consultation was adequate.

Did the respondent carry out a reasonable investigation?

24.25.The standard imposed upon the respondent is to undertake a reasonable investigation. It does not mean that the respondent has to consider every possibility however obscure. It must not ignore assertions brought to its attention by the claimant particularly if those might result in findings favourable to him.

24.26.As the tribunal has already noted there were eight meetings with the claimant before he was referred to a final meeting at which his employment could be terminated.

24.27.The respondent engaged with occupational health at the start of the review process. Occupational health towards the end of the review process obtained information from the claimant's GP. Up-to-date medical evidence was available prior to the final hearing.

24.28.A strong point for the claimant was that he raised reasonable adjustments as long ago as 02 January 2023. Ms Atkinson's letters of referral to occupational health were adequately drafted and raised appropriate questions to better inform the respondent about the steps it should take. Sadly the occupational health report of 23 January 2023 did not adequately address the questions raised. That however was noted by the respondent and the claimant's concerns pressed. The was thereafter some slight delay before the occupational health physician Dr Dang could see the claimant but in turn she was attempting to obtain information from the claimant's GP.

24.29.Dr Dang did find on balance that it was likely that some of the claimant's absences may have been linked to his AS and treatment for it but recommended the respondent concentrated upon getting the claimant back to work before adjustments were considered. That has support in law. Generally an employer will need some evidence of a return to work before it puts in place adjustments.

24.30.It was a relevant consideration, when looking at the adequacy of the investigation, that Dr Dang's last report was never challenged by the claimant. The respondent therefore was entitled to give it due weight and take it at face value.

The investigation was reasonable.

Could the respondent have been reasonably been expected to wait any longer before dismissing the claimant?

24.31.The claimant was unable to give either Mr Wardle or Mr Jones any reassurance as to when he could return to work.

24.32.The claimant remained signed off by his GP and had been signed off with the same condition for over 6 months.

24.33.The claimant's entitlement to contractual sick pay had ended at the hearing of his appeal.

24.34.The claimant had a total absence of approximately 350 plus days from November 2021 which was a further relevant consideration the respondent was entitled to take into account in deciding whether there was a prospect the claimant could provide reliable and consistent service going forward.

24.35.Mr Wardle and Mr Jones had before it the uncontradicted report of Dr Dang dated 27 June 2023 (223/224). She saw no improvement in the claimant's condition and believed the claimant was unfit for work for the foreseeable future. She specifically factored in the claimant was due to have a period of therapeutic interventions. The respondent was entitled to take into account the effect of the claimant's absence on the service. The tribunal is already dealt with this point earlier in its judgement and its findings are equally applicable for this section. The tribunal accepted that this was a large employer with a multi-million budget. That did not mean, however that the effect of the claimant's absence on work colleagues, the

efficiency of the service, and the effect of gaps in service had upon ratepayers were to be ignored.

24.36.The history of the matter, as set out in the tribunal's findings of fact showed the respondent did not rush the process. On a number of occasions it adjourned review meetings to obtain further medical evidence and actively looked at alternative employment with a view to trying to achieve a return to work. The respondent could have made more of the claimants account of how he cut his hand, when the claimant was untruthful ,but did not. An employer who simply wanted to exit the claimant from the organisation would likely have done so.

24.37.The respondent could not reasonably have been expected to wait any longer.

Was dismissal within the range of reasonable responses?

24.38.The tribunal determined that it was. The role of the tribunal was not to decide whether it would have terminated the claimant's employment but whether a reasonable employer could reasonably have terminated the claimant's employment.

24.39.The absence was significant and the tribunal's reasoning set out above as to whether the respondent could reasonably be expected to wait any longer is equally applicable to this question. Whilst another employer might have waited some months to see whether the claimant's therapy resulted in a significant improvement in his health it was not unreasonable from this employer, on the basis of the evidence, to take a view that it was reasonable to terminate particular having regard to the effect of the claimant's absence on the service.

25.Conclusion

25.1.The tribunal has looked at a number of specific issues then reminded itself that its task was to look at the process overall in determining whether dismissal was fair or unfair. Whilst it did find there was a breach of the respondent's own policy in not warning the claimant at an earlier stage that his employment was at risk that was not sufficient, overall to persuade the tribunal that the dismissal was unfair and out with the band of responses of a reasonable employer.

25.2.Having adopted this holistic approach the tribunal concluded the dismissal was fair in the particular circumstances of this case.

26.Postscript

26.1.The tribunal should add a short postscript. It is conscious the tribunal's decision will be extremely disappointing to the claimant. The mere fact the claimant has not succeeded should not in any way imply that the tribunal did not regard the claimant as being a witness who did his best ,in difficult circumstances as he clearly still has health challenges, to assist the tribunal and told the truth as he remembered it.

Employment Judge T.R.Smith

Date 28 December 2025

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.