



EMPLOYMENT TRIBUNALS

Heard at: Croydon (by video) **On:** 20 to 23 April 2026

Claimant: Mr Sanjay Newman

Respondent: London General Transport Services Limited

Before: Employment Judge Eoin Fowell

Ms R Effeny

Ms J Bird

Representation:

Claimant Mr John Neckles, Trade Union Representative

Respondent Mr Craig Ludlow of counsel, instructed by Howard Kennedy LLP

JUDGMENT

The unanimous decision of the tribunal is as follows:

1. The claimant's dismissal was fair.
2. The claimant did not have a disability at the material time.
3. The complaint of direct discrimination on grounds of disability is dismissed.
4. The complaint of discrimination arising from disability is dismissed.
5. The complaint of victimisation is dismissed.

REASONS

Introduction

1. These written reasons are provided at the request of the claimant following oral reasons given yesterday. As usual some editing has taken place for the sake of clarity, so these written reasons shall stand as the final version.
2. By way of background, Mr Newman worked for the company as a service engineer, part of the team servicing and maintaining the company's many buses. During the night shift on 9 February 2023, while he was working at their Morden Wharf depot, he had an accident at work. He fell backwards and injured his coccyx. It has taken a long time to heal, and even now, three years later, he is still suffering from its ill effects. He has not worked since.
3. The injury obviously led to some time off work. There were a number of reviews with his manager and a referral to Occupational Health before he was dismissed on 6 June 2023, just under 4 months later.
4. He says that this decision was premature and brings claims of unfair dismissal, disability discrimination and of victimisation. The victimisation claim goes back to complaints he raised about discrimination as long ago as 2018. He says that those earlier disputes cast a shadow over the way his absence was handled, and that as a result the Engineering Manager, Mr Stevens, was too ready to dismiss him.

List of Issues

5. The issues to be decided were set out in an agreed list and we will work through them in due course.

Procedure and evidence

6. Mr Stevens, who took the decision to dismiss Mr Newman, left the company in late 2023 and so we did not hear from him as a witness, just from Mr Newman and from the appeal manager, Mr Christopher McKeown, who is now the Group Engineering Director.
7. There was a main bundle of 509 pages and a supplementary bundle with further medical and mitigation evidence, running to a further 223 pages. Having considered that evidence and the submissions on each side we make the following findings of fact. Not every point is dealt with, only those necessary to deal with the issues in the list of issues and to support our conclusions.

Findings of Fact

Background

8. The respondent is better known as Go Ahead London. They operate over 2000 buses around the London area, with over 8,000 members of staff. The engineering staff work from a number of depots; Mr Newman started in Camberwell in 2016 before a move to Morden Wharf, not far from the O2 Arena, in 2018.

Injury

9. His work effectively came to an end with his injury in the early hours of 10 February 2023. At first, it did not seem very serious. His supervisor filled out a report form which said:

“While pulling on the lever bar it slipped and Mr Newman fell back and onto the floor, landing on one of the feet of the lift. Mr Newman immediately got to his feet and felt pain to his lower back. He continued with his duty and reported the incident to the Workshop Manager on his arrival at the garage.

Mr Newman did not require medical treatment at the time and returned to work the following night.”

10. However, over the weekend he went to hospital where he was diagnosed with a possible fracture of the coccyx and a soft tear injury to the pelvis.

Absence

11. Mr Newman remained off work and saw his GP on 28 February. She, Dr Murphy, signed him off for another month, until 31 March, so by then it was clear that this was not something that would be shaken off very easily.
12. He continued to be in pain, and with the end of March approaching, Mr Newman rang the surgery and spoke to another doctor. He said he didn't feel ready to go back to work. He had to stand up a lot because of the pain and was still taking cocodamol. He was signed off again until 30 April.
13. Mr Newman duly passed this information on to Mr Stevens, who had recently been appointed as the Engineering Manager, in charge of the engineering works at the depot. Mr Newman knew him and, he agreed, Mr Stevens had a generally positive view of him.

First Review Meeting

14. The two of them had a review meeting, via Teams, on 5 April. Mr Newman explained that he had started physiotherapy but he was still in a lot of pain and did not know when he would be back at work.
15. Mr Stevens sent him a letter after that meeting to confirm what they had discussed. It set a date for another meeting on 1 May, four weeks later. The letter also contained a warning that if Mr Newman was not able to return to work within a reasonable timeframe, Mr Stevens would have to consider dismissal on medical grounds.

Occupational Health Review

16. In the meantime Mr Stevens made an occupational health referral and so Mr Newman was then seen by a Dr Hughes, on 21 April. He or she could not give much indication of a return date. The brief report that followed simply stated:

“If a return to work were not possible in the next four weeks, it will be difficult to say when he can return.”

17. Mr Newman specifically asked Dr Hughes if his condition amounted to a disability. That request was recorded in the subsequent report. The doctor thought not, at that stage.

Second Review Meeting

18. That report was unfortunately not available for the next review meeting, because Mr Newman was reluctant to disclose it. He was still urging Dr Hughes to agree that he had a disability before he would allow it to be passed on.
19. However, the meeting went ahead on 1 May. Mr Newman explained that he was doing his physio exercises at home but they were leaving him in a lot of pain. He was struggling with day-to-day tasks too, and there was still no immediate prospect of a return to work.
20. Mr Stevens asked to meet again on 23 May. In the follow-up letter he said that at that next meeting Mr Stevens would consider “setting him a return to work date”. He also repeated the previous warning about the risk to his employment.

GP Advice

21. The next day, 2 May, Mr Newman went back to see Dr Murphy at the GP surgery and reported that he was still in a lot of pain but was gradually improving. He was signed off again for another month, to expire on 4 June. The doctor also provided a letter with some further commentary. She stated:

“This patient sustained a presumed coccyx fracture 3 months ago, while at work when he fell on a metal object. We would expect this to heal over time. I am not an occupational health doctor, but in my experience these injuries do not usually lead to requiring being off work indefinitely. With these injuries I would usually expect a full recovery. I have referred him to a musculoskeletal specialist who will hopefully be able to shed light on when he can be expected to go back to work realistically.”

22. As usual, Mr Newman forwarded that letter to Mr Stevens and to the HR department. He also agreed to disclose the Occupational Health report, “under duress” having failed to obtain a clear statement from Dr Hughes that he was disabled.

List of Vacancies

23. On 15 May the company sent Mr Newman a list of alternative vacancies, almost all for vehicle engineers or senior engineers at different locations. This was a list circulated to staff generally so that people were aware of vacancies, and it shows that there was a shortage of engineers. There were 23 vacancies for engineers or senior engineers, including 7 for engineers on night shifts.
24. The list was of no real use to Mr Newman since almost all of the vacancies were for his type of role, and he was not fit to do it. There were a small number of other roles, but it is now agreed that none of them was suitable.
25. At the time, however, Mr Stevens seems to have attached some importance to this list and asked Mr Newman to confirm that he was not interested in any of them before the next meeting, which he did.

Third Review Meeting

26. That next meeting, their third, was on 26 May. They discussed the occupational health report, now disclosed, but essentially the position remained as before; Mr Newman said he was feeling better but was still not well enough to return to work. He could not say when that would be. He was awaiting the appointment to see the musculoskeletal specialist, as mentioned in his GP’s letter.
27. After this meeting, Mr Stevens’ follow-up letter records that he had “set a return to work date of 5 June” but as Mr Newman was seeing his doctor that morning they would have a further review meeting the next day. Given that 6 June was not very far away, the implication is that Mr Stevens thought that they were nearing the end of the road. The letter ended with the usual warning that if he was not able to return to work “in a time acceptable to the company [then] I may

have to consider medical dismissal.” There was no particular warning that the next meeting might be his last, but Mr Newman must have realised that it was a real possibility because, as we will see, his main point in that hearing was that he should be allowed another three or four weeks.

Further GP Advice

28. Mr Newman saw Dr Murphy again on 5 June. Again, he told her that he was slowly improving. He said he had tried to cut down on the cocodamol and had even managed to go to the gym, but he had felt pain afterwards.
29. Dr Murphy recorded in her notes that he had not heard from the musculoskeletal specialist, and she asked her admin staff to chase it up.
30. She then signed him off for a further three months. That marked a departure from the previous pattern of monthly sick notes. It may be that she had changed her view of the likely path to recovery. Despite Mr Newman telling her that he felt better each time, there was no obvious improvement, nearly four months after the injury.

Dismissal Meeting

31. That was the background to the meeting Mr Newman had with Mr Stevens on 6 June. He was accompanied by Mr Neckles, who had attended the previous meetings, and who represented him at this hearing.
32. This time it was relatively short. Mr Neckles made a covert recording. That is not something we applaud but we were not asked to discount that evidence and there is an agreed transcript in the bundle.
33. It lasted nine minutes and three seconds. After some introductory remarks Mr Newman confirmed that none of the alternative vacancies was suitable. However, he also said that he was feeling much better, and was just waiting to see the musculoskeletal specialist, “to do the final check.”
34. That is difficult to reconcile with the three-month fit note. Mr Stevens did not really enter into any further discussion about any improvement. He simply asked if there was a return to work date. He also noted that it was 16 weeks since the injury and another three months would take it to 29 weeks.
35. Clearly, he felt that the only option available to him was to dismiss Mr Newman on medical grounds. So, with little more discussion, he went ahead and announced that outcome. He did not even, for example, ask if there was

anything else that he or Mr Neckles wanted to say. The decision was reached, or at least communicated, shortly before the six minute mark.

36. Mr Neckles interjected that the decision had been given without hearing from him at all. He said it was prearranged. Mr Stevens refuted that, Mr Neckles said he wasn't going to argue about it and they would deal with it in an appeal, and on that note the meeting ended.

Impact on Mr Newman

37. It is one thing to realise that a dismissal is on the cards, quite another when the blow actually falls. Mr Newman was badly affected. We have his GP records which show that he saw Dr Murphy again on 12 June and had slept very little in the meantime. His mood was very low and he was given sleeping tablets.
38. He was also, of course, left without any income. He had been on full company sick pay to that point, and would have been entitled to 6 months' full pay (had he remained so long) and then six months on half pay. (The contract of employment does state that there is no entitlement to this whole amount and that he may be dismissed at an earlier stage.)

The Appeal

39. Mr Newman appealed this decision on 11 June. The grounds of appeal were prepared with the help of Mr Neckles and there were seven of them. Summarising them, it was said that:
- (a) the evidence on which the decision was made was disputed;
 - (b) there was a failure to follow a proper procedure;
 - (c) the decision involved breaches of several sections of the Equality Act 2010;
 - (d) there had been a breach of the right to be accompanied;
 - (e) Mr Stevens was biased;
 - (f) there was a disparity of treatment, and;
 - (g) the decision was too severe.

Musculoskeletal Specialist

40. Shortly afterwards, on 21 June, Mr Newman saw the musculoskeletal specialist, Ms Eales. She provided a written report to his GP that day. Unfortunately, that letter does not add a great deal to the existing body of evidence. The diagnosis was couched in slightly different terms. Instead of a fractured coccyx etc., it was referred to as *coccydynia*. It explained that during the consultation she had given Mr Newman “a summary of our initial assessment, management plan and agreed goals” but these were not recorded in the letter in any detail, which is unfortunate since it may well have given some indication of the likely time-scales involved. It just said that the management plan contained three elements:
- (a) condition management advice and information,
 - (b) a course of physio, and
 - (c) referral to an ongoing review service.
41. The body of the letter records that Mr Newman had increased pain over his coccyx and that:
- “Pain levels are currently 8/10, and can flare to 10/10. Mr Newman currently takes [a variety of medication]. His pain is eased by use of the ring cushion, and aggravated by sitting, flexion and extension movements [etc]”
42. This letter was then forwarded to Mr McKeown on the morning of the appeal hearing.

The Appeal Hearing

43. That appeal hearing was held on 4 July. Again it was held by Teams. Mr McKeown was accompanied by a colleague or panel member, Mr Wood, and there was a note taker present. Once again Mr Neckles made a covert recording, even though Mr McKeown made a point of asking for any recording equipment to be turned off.
44. The appeal hearing was much more thorough. It lasted for about an hour and 10 minutes and Mr McKeown gave Mr Neckles a full opportunity to explain the grounds of appeal.
45. Mr Neckles began with the shortness of the previous meeting, suggesting that Mr Stevens had been biased and the decision pre-determined, then the fact that he (Mr Neckles) had been given no real opportunity to make representations. He went on to name various comparators, people who had also been off work

for a long time, and asked Mr McKeown to investigate those other cases for any disparity of treatment. At that stage, only the names were provided.

46. He went on to say that a number of legal claims might follow, such as direct discrimination on grounds of race. He also referred to disability discrimination, pointing out that the condition did not need to have lasted 12 months, it was enough if it was likely to do so. Hence, there was a duty to make reasonable adjustments, including looking for suitable alternative employment, and to allow more time for Mr Newman's physiotherapy to take effect or to obtain further medical evidence. These failures were said to be acts of victimisation too, but he did not suggest any particular reason why the company would want to victimise Mr Newman.
47. All of that took about 50 minutes. Mr McKeown then asked Mr Newman about his health and what he was capable of doing at the moment. Mr Newman felt that he was capable of coming in and doing some inspecting. He was able to stand for a few hours. Mr McKeown asked him about the recent report from his consultant that he had a pain level of 8/10, sometimes 10/10, and a good deal of medication, to which Mr Newman replied that he could walk but he accepted that he had pain in the nights, also if he sat too long, and that the more active he was, the more pain he was in.
48. Having gathered that evidence, the hearing concluded. Mr McKeown then set about investigating the individuals named. In some cases he knew the about them. In other cases he had to go to HR or to other managers to understand why they were off work for so long.
49. All this took longer than expected. It was derailed for a while by his being promoted to Engineering Director and having to take over new responsibilities. His enquiries were also hampered by staff absences in July and August, by his own holiday, and then by the need to discuss things with his panel colleague Mr Wood. The appeal outcome was not given until 19 October 2023, over three months later.
50. Given the extent of all the issues raised the outcome letter itself, at two pages, is not particularly detailed. The disputed evidence point and alleged lack of fairness were dealt with together and briefly, with a simple statement to the effect that there had been a proper review of the case and a decision had been taken in the absence of a reasonable return to work date. The alleged discrimination was discounted on the simple basis that there was, it stated, no evidence to support it. Similarly, the right to be accompanied had not been

breached because Mr Neckles had been at the final meeting and had been able to speak up on Mr Newman's behalf at any point.

51. As to the disparity of treatment with the comparators, the letter stated:

"You provided a list of names of a combination of current and ex employees that you say were all absent for longer than you and not dismissed. As I am sure you would expect, I won't share details of any other people's personal circumstances with you. Each and every case is considered on its own merits and circumstances. We do not find that this list of other people with circumstances that are different to yours demonstrates disparity of treatment. This ground for appeal is rejected."

52. We accept that those further enquiries were made by Mr McKeown. That was doubted by Mr Neckles at this hearing on the basis that no records have been provided to show that any further investigation was carried out. However, the exercise may have been quite informal. There was no need for interviews to be carried out. All that was needed was to obtain the basic details of the individuals in question. It is clear from his witness statement that Mr McKeown was familiar with some of them, so little or no further investigation would have been called for in those cases.

The Comparators

53. Various documents have been disclosed in the course of these proceedings about those suggested comparators. On the basis of that disclosure, there is a fairly long section in Mr Newman's witness statement setting out his evidence on that issue, but that is essentially a commentary on this paperwork. It is dealt with in part 11 of his witness statement from pages 44 to 50, under the heading *Disparity of treatment / Less favourable treatment*. The main focus in each case is on the number of days off.

54. Mr McKeown also dealt with that aspect in his witness statement, although in a more qualitative way. His view was that in each case the employee was working towards a return date, that essentially that things were improving, unlike Mr Newman.

55. We will not name those individuals. They were not witnesses or involved in this case, and no reason to disclose their personal information unnecessarily. We will just use initials.

56. We heard no submissions about any of them. The documents and attendance records were included in the bundle and we have been left to consider them. Having done so, our views are these:

- (a) LF was off for 92 days with a broken leg before his return to work. That is not out of line with Mr Newman, who had 82 work days off and was not expected back for another three months, so there was no disparity of treatment.
- (b) TC had a broken finger and is a similar case, but is no longer relied on as a comparator.
- (c) BB had a liver condition and was off for about five months before he was dismissed for his absence. That too is in line with Mr Newman's case. However, on that occasion, he was reinstated, by Mr McKeown and allowed a phased return to work. This was based on new information.

There seems nothing to distinguish those circumstances from those of Mr Newman. If Mr Newman had shown some clear prospect of a return to work, he too might well have been reinstated on appeal.

BB then had a second long absence for mental health problems about a year later, over about seven months, and that is all we know, but that is a very different sort of condition, and not a helpful comparison.

- (d) There were two individuals with the initial FW, but no records have been located for either of them and that comparison has not been pursued either.
- (e) RM was a case that Mr McKeown was familiar with. About 100 pages of the bundle relate to his circumstances. Initially he was off with an injury to his hand which led to an amputation of fingers. The surgery was delayed and he suffered anxiety / PTSD in the meantime. Then he was diagnosed with cancer which became protracted. At various stages it was expected that he would be able to return to work. We will say more about him in our conclusions, because he is, in our view, the only arguable comparator.
- (f) PP had back problems, which led to lots of short absences rather than one long absence, so his circumstances were very different. The longest absence was 32 days.
- (g) JD, who had alcohol and mental health problems, also had a considerable amount of time off. Sometimes he was off long-term,

sometimes for short periods. For example, he was off for 79 days from February to June 2022, then made a successful return. He went off again for 63 days from March to June 2023. Those were the two main absences though. After that, he was off for a week in September, and a few weeks off the following February, before a full recovery. That seems similar to Mr Newman's experience and so there was no disparity of treatment.

(h) The final name was ME but we have no information about him beyond his contract of employment.

57. As a footnote, some of the commentary in Mr Newman's statement is difficult to follow. He focusses there on the total length of the absences, but in many cases we cannot find any support for his figures. For example, he says that JD had 708 days absence on 116 occasions, but his absence record is on a single page of the bundle – page 310 – and covers over 10 years. The main absences started in 2021. Some were Covid related. In 2022 we can see 85 days in total – the long 79 day absence already mentioned and another 6 days in February. In 2023 there were 68 – the long 63 day absence and another week. In 2024 there were 25 days off.

Events in 2018

58. Before concluding our findings of fact, we should say a few words about the earlier events which are said to form the basis of the victimisation claim.

59. Mr Newman explained in his witness statement that he originally began work at the Camberwell depot. Difficulties began to emerge between him and his supervisor. This was in 2017 and 2018. Mr Newman felt that he was spoken to dismissively, that his work was scrutinised unnecessarily and that others had much more courteous treatment. All that was compounded when he was disciplined over his attendance record and then received a written warning. He felt this was very unfair. It was after that disciplinary action that he was transferred to Morden Wharf. It was a short notice transfer and the new depot was more difficult for him to get to each day. He believed that this was in reprisal for his complaints.

60. He submitted a grievance. In fact there were two – one on 2 April and one on 12 April. They led to a grievance hearing in May 2018. At the same time he brought a tribunal claim, alleging race discrimination. Mr Neckles was his representative in that process too.

61. His grievance was rejected and he appealed. In fact, Mr McKeown was on the appeal panel and in one respect he upheld the appeal. There was an issue about the grade at which Mr Newman began, and the length of time it took him to become a service engineer. Mr McKeown agreed with him and backdated that change of grade, leading to an award of back pay.
62. There were some similarities with the present case too. Mr Neckles attended the hearing and put forward comparator evidence to be investigated. The complaints included not only the written warning and the transfer but the pay issue and whether other people had more favourable shift patterns. That proved not to be the case. In fact, apart from the pay issue, the appeal was rejected. This left him with a continuing sense of injustice. However, he could do no more, and he settled down to his job at the new depot. The Tribunal claim rumbled on but was withdrawn in December 2020.

Events in 2021

63. In July 2021 however he submitted a further grievance. Again, he was unhappy about the way he was spoken to, and a lack of support from management. There was no single incident behind his complaint. It was a build up of things and a lingering sense of injustice from earlier events.
64. That led to another grievance hearing in October, and again it was rejected, as was the appeal. That is where matters stood at the time of his accident at work in February 2023.

Applicable Law and Conclusions

Unfair Dismissal

65. We will turn now to the applicable law, starting with the complaint of unfair dismissal. This important right is set out in s. 94 Employment Rights Act 1996, and by section 98 the employer has first to show a fair reason for the dismissal, in this case capability.
66. If that is shown, then by section 98(4):
 - “... the determination of the question whether the dismissal is 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 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.”

67. Here, the company relies on his absence (and hence his ‘capability’ to perform the role, to use the language of the Employment Rights Act 1996) so the question becomes whether they acted reasonably in all the circumstances in treating that as a sufficient reason for dismissal? The reason is not disputed.
68. The essential question in such cases, as made clear by the Employment Appeal Tribunal in **Spencer v Paragon Wallpapers Ltd** 1977 ICR 301, EAT, is whether, in all the circumstances, the employer can be expected to wait any longer for the employee to return.
69. This involves a balancing exercise. The Scottish Court of Session in **BS v Dundee CC** [2014] IRLR 131 set out the sort of factors to be taken into account. They include:
- (a) whether other staff are available to carry out the absent employee’s work
 - (b) the nature of the employee’s illness
 - (c) the likely length of his absence
 - (d) the cost of continuing to employ the employee
 - (e) the size of the employing organisation; and
 - (f) (balanced against those considerations), the unsatisfactory situation of having an employee on very lengthy sick leave.
70. Having done that, it is not just a case of us deciding what we would have done in Mr Stevens’s shoes, or Mr McKeown’s shoes. Reasonable people may disagree about where to strike the balance in the circumstances. We also have to bear in mind that we are not responsible for running a bus company, or an engineering department. We are not necessarily aware of all the competing pressures on the decision maker. So, we have to allow a degree of latitude. There is a range of reasonable responses in these circumstances, and we have to decide whether the decision to dismiss fell outside that range.
71. That principle was emphasised by the Court of Appeal in **London Ambulance Service v Small** [2009] IRLR 563, a case in which a paramedic, Mr Small, was dismissed for what the Tribunal thought were quite minor matters, or at least things that did not put him in dismissal territory. He was called out to attend an elderly female patient at home with severe abdominal pains. Instead of having

her carried down the stairs he got her to walk down, assisted by her son-in-law. He made an inappropriate remark about incontinence and criticised her daughter for not giving her paracetamol for the pain. When the Trust investigated further they found that he had failed to properly assess the patient. He should have taken a full history from her, given her oxygen, taken her blood pressure, as well as carrying her downstairs. All these points were serious enough for the Trust to conclude that he should be dismissed for gross misconduct and that decision was ultimately upheld.

72. The point is that the range of reasonable responses is quite a broad range, and Tribunals have to be careful not to trespass into it. As the Court said, at paragraph 43:

“It is all too easy, even for an experienced ET, to slip into the substitution mindset.”

73. A fair procedure is also important. In a case of this sort it should involve:

- (a) consultation with the employee
- (b) a thorough medical investigation (to establish the nature of the illness or injury and its prognosis), and
- (c) consideration of other options; in particular, alternative employment within the employer's business.

74. But again, if the process is questionable we cannot just impose our view of what should have been done and say that it made the decision unfair. We have to ask again whether the approach taken was outside that range of reasonable responses.

75. That principle was established by the Court of Appeal in the case of **Sainsbury's Supermarkets Ltd v Hitt** [2003] ICR 111. It was a misconduct case, where Mr Hitt was accused of stealing a box of razor blades from a Sainsbury's warehouse. The question there was whether the investigation was reasonable and adequate. The Court made clear that the Tribunal should not substitute its view of the appropriate standards, in each case it has to ask if the step taken was outside the range of reasonable responses, and that principle applies equally to other types of procedure.

Conclusions on Unfair Dismissal

76. Reviewing that list of relevant considerations from the **Dundee** case, the first is whether other staff were available to carry out Mr Newman's work. That was

simply not the case here. It is clear from the list of vacancies that they were short-handed in the engineering department. The list of vacant posts continued throughout Mr Newman's absence, so whether they kept him on or dismissed him, the company was going to remain short-handed. Hence, this is a neutral factor.

77. The nature of his illness is mainly relevant to the next consideration, which is the likely length of his absence. Generally, for any physical injury there will be a period of recovery and a reasonably foreseeable return date, but that is not how things turned out on this occasion. That is really the main question here, but we will go through the other aspects before returning to it.
78. The next consideration is the cost of continuing to employ him, which is the other side of the same coin. He was being paid in full throughout his absence and so that was a significant consideration. Had he exhausted his sick pay the company might have taken the view that his absence was less of a burden, especially when there was no immediate prospect of a replacement being recruited.
79. Lastly, there is the unsatisfactory situation of having an employee on very lengthy sick leave. That will include the disruption it causes at work, with night shifts being short-handed, the need for management action, HR and occupational health involvement, the accumulation of holiday pay, and no doubt other factors.
80. Having done our best to elaborate the relevant considerations, it boils down to the question posed in the **Spencer v Paragon** case - whether the employer could have been expected to wait any longer for the employee to return.
81. That, it seems to us, is the simple and straightforward situation as it appeared to Mr Stevens on 6 June. By that stage the absence had been going on for about 4 months, just over 16 weeks. There had been a referral to occupational health who expected Mr Newman to recover in a matter of weeks. There had been a letter from his GP to say that he should make a full recovery. But there was simply no evidence of any improvement.
82. The main, and it seems to us the obvious, concern was that the day before this hearing Mr Newman had been signed off for three months. Had it been a month, that might have been different. Even then, it would not have been a very positive development. It would just have been the latest in a series of monthly fit notes, as though his GP was kicking the can down the road, with no indication of whether it would be the last.

83. But a three-month fit note was a major change for the worse. We can understand that this seemed to Mr Stevens to put the matter beyond argument. It did not suggest that Dr Murphy, or anyone, could really say how long this would last, and it was enough to swing the balance decisively in favour of dismissal.
84. Of course, he could have delayed further. He could have made a further referral to occupational health. The previous advice from Dr Hughes, on 21 April, was that if return to work was not possible in the next four weeks it would be difficult to say when he could return. Those four weeks had passed without any sign of improvement, so they had already entered the unknown or unknowable period. In those circumstances it was certainly open to Mr Stevens not to request a further opinion from Occupational Health.
85. He could have asked for another report from Dr Murphy to explain why the absence was now expected to last until the 29 week point – why, in short, she had now provided a three-month certificate. But her last letter, of 15 May, was quite recent. It said that he had been referred to a specialist who, it was hoped, could shed more light on things.
86. In those circumstances, the most obvious alternative option was to wait for the report from the specialist rather than dismiss him. But there was no indication as to how long that would take. It is true that Mr Newman specifically asked for a delay of three or four weeks so that he could see the musculoskeletal specialist, but there was nothing to indicate to Mr Stevens that an actual consultation was likely to take place in that time. As a matter of general experience an appointment with a consultant usually begins with an appointment letter and a period of several further months before the actual consultation.
87. In all the circumstances we can understand why Mr Stevens was unwilling to make that extension. It would have resulted in a further meeting in about a month's time, at which point the existing fit note would be continuing and no further medical evidence would, in all probability, have been obtained. Altogether we cannot see that that decision to finalise matters on 6 June was outside the range of reasonable responses.
88. We have also given careful consideration to the way in which that meeting was conducted. It was surprisingly brief. That no doubt reflected the straightforward nature of the decision from Mr Stevens' point of view. It is clear from the transcript that he simply wanted to confirm that there was no news about a

potential return to work and that there were no suitable alternative vacancies on the list. That was soon established.

89. There has been no real suggestion during this hearing that light duties would have been available and we do not believe that they were. That would not have been in keeping with the fit note which stated that he was unfit to attend work at all for a full three month period. We bear in mind his account at the time of not being able to sit down for more than 15 minutes and that the more active he was the more pain he was in. Nor was it really suggested that there was any suitable alternative vacancy that he could have taken up, away from the engineering side.
90. Was this decision out of line with the company's approach generally? We note the sick pay arrangements and the term of the contract which stated that there was no obligation to retain a member of staff until their entitlement had been exhausted, so a dismissal before full pay had run out is at least in line with that provision.
91. We have already considered the various comparators put forward, and only one, RM, appears to call for any further consideration. According to Mr Newman's statement, on page 46, he was off for 646 days over two years, which would essentially be the whole two-year period. But it goes on to say that the major spells included 124 days in 2021/22 and then 3 other short absences in 2023, the longest being 12 days, so those figures simply do not tally.
92. His absence records are at page 356. There is no significant absence from 2019 to 2021. Then he was off from 23 August 2021 to 25 February 2022. He was then off again from 9 April to 28 August 2022, so that whole period was about a year, in which he was back at work for a month. Those dates are accurately set out in Mr McKeown's statement.
93. On reviewing this material, it was clearly a much more complicated situation to that of Mr Newman, involving mental health problems, an operation, delays to that operation, then a diagnosis with cancer, then delays to his cancer operation. There were regular reviews with him, as with Mr Newman, for example in September, October and November 2021. By November his progress in recovering from his operation was noted to be slower than expected. There was no clear return date. He was referred to Occupational Health, who said that his return to work would take more than three months [341]. That was in part because he had by then also been diagnosed with cancer, but a recovery in 3 to 6 months was still to be expected [342]. But that

depended on surgery, which was delayed until the following April. His sick pay had run out and he was allowed to take paid holiday around the time of the operation [343].

94. All of that seems to us perfectly understandable. The same process was followed in his case as for Mr Newman. And at each stage there were reasonable prospects of a return to work, but for one reason or another the date kept being put back. Realistically, once his sick pay had been exhausted the same considerations no longer applied and it would not have been so pressing from the company's point of view to terminate his employment. The fact that his absences continued for longer does not in fact seem to us to result mainly from RM having a disability, simply the fact that it was a second condition which arose unexpectedly and extended the timetable. At the same time it may be that concern over his cancer diagnosis played a part.
95. Reviewing this body of comparator material therefore it does not support the suggestion that the decision in Mr Newman's case was out of line with that taken in other cases. The company has a consistent record of following its own procedures, obtaining Occupational Health advice, then moving to a dismissal, (as with BB) after four to six months.
96. The last procedural point raised was that Mr Newman had been denied the right to be accompanied at the final hearing, but we do not see the force of that. The statutory right is to be accompanied, not to be represented. (And we note that there is no separate complaint here of a breach of that right). It would have been better to hear submissions at that stage from Mr Neckles, but in the circumstances, which were in reality very simple and straightforward, we cannot say that the failure to do so rendered the decision as a whole unfair.
97. Overall, it really did boil down to whether the company could reasonably have been expected to wait any longer. And given the extent of his physical limitations at that stage and the lack of any clear path to recovery, we have to conclude that that was a decision open to the employer in the circumstances.
98. If there was an unfair procedure on 6 June or beforehand, in the sense that it was outside the range of reasonable responses, we need to consider whether that unfairness was corrected by the appeal.
99. That appeal was carried out as a review, i.e. to decide whether the previous decision was unfair. In theory at least, Mr Newman could have recovered fully by the time of the appeal and it could still have been argued that the original decision was fair, if there had been no sign of that happening at the time.

100. However, Mr McKeown did not adopt that approach. He wanted to know if there had been any improvement by the date of that hearing, 4 July. If there had, we conclude that he would have been prepared to overturn the earlier decision, as he had with BB. He had considered the musculoskeletal report, provided that morning, and noted the contents. He asked Mr Newman how he was, and got a positive response. Too positive perhaps, in view of the report. He then had to check with Mr Newman how that squared with the pain scores in the letter. That short aspect of the hearing therefore yielded useful information about his current state of health, and revealed that there was no real improvement – in fact things seemed to have deteriorated.
101. That is not the way things were presented on his behalf. Neither in the grounds of appeal or at the hearing was there any positive mention of Mr Newman's health or of any recovery. The approach taken was more adversarial: that the original decision had been unfair – procedurally and substantively – and an act of discrimination or victimisation, was biased and should be rescinded. Only once that had happened should there be any discussion about a return to work.
102. Mr Neckles was also arguing that the condition was likely to last more than 12 months, which also undercut any suggestion of an improvement or a return to work in the near future.
103. In our view, the approach taken by Mr McKeown was the better one. It addressed the main, practical question of whether the company could reasonably be expected to wait any longer. And he gave that proper consideration, so even if Mr Stevens ought to have enquired further, or gathered more evidence, here was an opportunity for Mr Newman to put forward further information. He did so, in the form of the consultant's letter.
104. And of course Mr McKeown did then go and carry out further enquiries into the comparator cases, so he investigated the points put forward at the appeal stage, and gave what seem to us brief but sufficient reasons in reply. We agree that it would not have been appropriate for him to set out any confidential information about other members of staff in that letter.
105. In short, we are satisfied that the decision was fair in all the circumstances.

Disability

106. Turning to the claims of disability discrimination, the test of disability is set out at section 6 of the Equality Act 2010. It provides that:

A person (P) has a disability if—

- (a) P has a physical or mental impairment, and
 - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
107. In addressing that question there are additional provisions in Schedule 1 to the Act which is entitled *Determination of Disability*. That is where long-term is defined as meaning likely to last for at least 12 months.
109. There is also important statutory guidance entitled [Guidance on Matters to be Taken Into Account in Determining Questions relating to the Definition of Disability \(2011\)](#), which Tribunals may take into account.
110. Here, the only question is over the long-term condition, i.e. whether the effects of the injury *were likely to last* for at least 12 months. That cannot be judged in hindsight and the test, applying the Guidance at paragraph C3, is whether an impairment of that duration “could well happen.”
111. The Court of Appeal in **McDougall v Richmond Adult Community College** 2008 ICR 431 held that when considering this question Tribunals must only consider evidence that was available at the time of the alleged discriminatory act:
- “The Act required a prophecy to be made and did not permit recourse to evidence as to subsequent events.
112. We have not found this an easy question to resolve. The injury was on 10 February 2023, so that 12 month period was up on 10 February 2024.
113. The letter from his GP on 2 June said that she expected there to be a full recovery. Dr Hughes, the Occupational Health doctor, thought in April that it would be few weeks. At each meeting, Mr Newman said that he was getting better. And yet, the fit notes followed one after another. Even the letter from the musculoskeletal unit did not provide any time frame. Mr Neckles argued at the appeal that it was likely to last more than 12 months, but that seems more likely to have been the result of tactical considerations. There was certainly no medical evidence to that effect.
114. We do not know what answer would have been given if, for example, Mr Newman had asked the consultant, Ms Eales, whether “it could well happen” that he was still struggling with his back in February. Perhaps any answer would simply have been speculation. There were some indications in these repeated fit notes and continued use of painkillers that something more serious was amiss, but nothing to suggest a fundamental reappraisal by his doctors. We

have the advice from Dr Hughes that if it did not resolve in four weeks, it would be difficult to say when he could return, but even that does not give much support to the view that it might become a one-year problem.

115. The best we can suggest, in answer to this hypothetical question, is that his consultant would probably not have ruled it out but would not have expected it to happen either, and might well have thought that this form of words – “could well happen” – was putting it a little too high at that stage, was perhaps a little too pessimistic. That at any rate is our overall view, but as we shall explain, it is not a point on which the outcome of the remaining claims will turn.

Discrimination arising from disability

108. We will starting with the claim of discrimination arising from disability. The test under section 15 Equality Act is as follows:

(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.

109. So, this involves unfavourable treatment (dismissal) as a result of something arising in consequence of Mr Newman's disability, in this case his absence, or the likely length of his absence.

110. Most section 15 cases involve long-term absence. That is the most common “something arising” and the question then is whether dismissal is justifiable. In **O'Brien v Bolton St Catherine's Academy** 2017 ICR 737, the Court of Appeal considered a similar case and held that the test of proportionality under section 15 is essentially the same as the test of reasonableness in unfair dismissal cases. Lord Justice Underhill said at paragraph 53:

“... it would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law.”

111. Given our view on unfair dismissal therefore, the same outcome should apply to discrimination arising from disability. It is essentially the same balancing exercise. In short, having a disability is not a trump card of any sort.

Direct discrimination

112. Direct discrimination is rarely applicable in cases of disability, which is why section 15 (above) has been included in the Equality Act 2010, for cases where someone is treated unfavourably because of the *effects* of their disability. Direct discrimination is not concerned with the effects, only with the fact of being disabled.

113. The test under section 13(1) Equality Act is as follows:

“A person (A) discriminates against another (B) if,

because of a protected characteristic,

A treats B less favourably than A treats or would treat others.

114. The term “less favourable treatment” invites the question, less favourable than who? Mr Newman has of course provided various comparators for the purposes of his unfair dismissal claim, but it does not follow that they are of equal use in this context. Firstly, a comparator in a discrimination claim has to be someone who does not share the protected characteristic – someone who is not disabled.

115. Cancer is deemed to be a disability, so in at least one case the comparator is also disabled. In the absence of detailed evidence about each individual and their diagnosis, the effect on day to day activities, it is impossible to know about the others. As a general rule, anyone who is off work for a substantial period of time may well be disabled, on the basis that attending work is a normal day to day activity. There is a caveat, as in this case, where the condition is not likely to last 12 months but again, it is very difficult to know which of these individuals would also fall into that category. From Mr Newman’s point of view, It would be ideal to identify at least one individual who was off work for a longer period of time – and therefore treated more favourably – but who did not have a condition expected to last for at least 12 months. No one in that category was suggested to us.

116. Section 23(1) provides that:

On a comparison of cases for the purposes of section 13 ... there must be no material difference between the circumstances relating to each case.

117. That is certainly not the case with any of the actual comparators here.
118. Another way to approach this is to use a hypothetical comparator, someone who is not disabled, but who is otherwise in exactly the same circumstances, and attempt to work out how they would have been treated.
119. So, assuming for these purposes that Mr Newman was disabled at the time of his dismissal or appeal, a hypothetical comparator would be another vehicle engineer, with the same absence record, the same unclear prognosis, on the same medication, and with the same pain and mobility difficulties. The only differences allowed would be that Mr Newman has been labelled (in this hypothetical exercise) as disabled, while his colleague has not. As soon as that comparison is made, the proposition collapses. Why would Mr Newman have been treated any differently to his hypothetical colleague? All this reflects the fact that a claim of direct discrimination in these circumstances is essentially misconceived.

Victimisation

120. Finally, there is the claim of victimisation. This is a term often used to mean being picked on or unfairly treated but it has a narrower meaning in the Equality Act 2010. It applies where someone has made a *complaint* about discrimination and is singled out as a result.
121. The test under section 27 Equality Act is as follows:
- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
 - (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
 - (2) Each of the following is a protected act—
 - (a) bringing proceedings under this Act;
 - (b) giving evidence or information in connection with proceedings under this Act;
 - (c) doing any other thing for the purposes of or in connection with this Act; ...
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.

122. The alleged protected acts here are:
- (a) the grievance of 12 April 2018, alleging race discrimination
 - (b) the tribunal claim (2301694/2018) issued on 9 May 2019
 - (c) the attempt to insist that Dr Hughes, during the telephone consultation on 21 April 2023, agree that he had a disability, and
 - (d) his appeal against dismissal.
123. The first two are clearly protected acts. The third is simply not, it is not an allegation that Dr Hughes or anyone else had breached the Equality Act. The appeal document *does* qualify on that basis, but of course the only potential act of victimisation after that point in time was the outcome of the appeal itself.
124. We should say something about the burden of proof at this point. For victimisation, as with other types of claim, the key question is usually the reason *why* the employer acted as it did. Was it *because* Mr Newman raised a grievance or submitted a claim etc.
125. That does not have to be the only reason, or even the main reason, it just needs to have been a significant influence. That influence can even be the result of subconscious bias.
126. The Equality Act gives us a structure to follow in carrying out that exercise. Section 136 deals with the burden of proof. It provides that:
- (2) If there are facts from which the [tribunal] could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the [tribunal] must hold that the contravention occurred.
 - (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
127. So we first have to decide from all the evidence whether there might have been victimisation involved. If so, it is then for the respondent to satisfy us that there was not. If that happens, cogent evidence is required to show that the treatment in question was 'in no sense whatsoever' tainted by victimisation.
128. A mere difference in treatment is not enough by itself: something more is required. That may be some other feature of the case – the timing of the decision perhaps, or that it was out of the ordinary for some other reason. If a pregnant employee is made redundant, that is just a difference in treatment between her and her colleagues, but if the redundancy follows shortly after she

announces her pregnancy that will be a strong indicator of discrimination. Or again, if a manager takes a decision to discipline a member of staff of a different race or sex or age group over a dispute at work, that will not by itself call for an explanation, but if the manager's normal approach is to opt for mediation, it may well do so.

129. What is there here to support that view? The first point to occur is that the grievance and the Tribunal claim were raised in 2018 and 2019, so it would be very surprising if there were no reprisals until 2023. Mr McKeown was of course involved in that earlier appeal process. There was also a passing mention of Mr Stevens in that grievance process, to the effect that he had spoken to the grievance manager favourably about Mr Newman, and Mr Newman agreed that Mr Stevens generally had a favourable view of him.
130. More tellingly perhaps, none of this was mentioned at the appeal stage, even though other allegations were made, such as race discrimination. There was no mention at all of events in 2018 and 2021. In fact none was mentioned in this claim form either. It was first raised in a set of Further and Better Particulars supplied by Mr Neckles and then allowed at the first case management hearing by way of an amendment.
131. No explanation has been given for that. It cannot be that the background facts were not known. Mr Neckles was of course involved in those earlier events, and knew all about them at the appeal hearing.
132. Nothing, in short, has been shown that might connect these distant events, or even suggested, and so there is no basis for us to conclude that the dismissal or the appeal decision were acts of victimisation.

Conclusions

133. To conclude matters, if we are wrong in any of these conclusions, we would then need to consider what would have happened if Mr Newman had not been dismissed. If he had been granted the extension of three or four weeks to obtain the specialist report, for example. There would then have been a further review meeting a month later, and Mr Stevens would have been armed with that letter. He would have found himself in the same position that Mr McKeown was in at the appeal hearing on 6 July. There would still have been no realistic return to work date. So, even if we are wrong and the dismissal was premature or otherwise unfair, it seems to us unavoidable that he would have been in a position to fairly dismiss Mr Newman at that stage, and so any award of compensation would have to be reduced to reflect the financial and other losses resulting from that loss of time.

134. As it is, we are satisfied that it was open to the company to dismiss him when they did, and that no discrimination or victimisation was involved. For all of the above reasons the claim is dismissed.

Employment Judge Eoin Fowell

Date 24 April 2026

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