Case No. 2404551/19

EMPLOYMENT TRIBUNALS

Claimant: Mr J McAllister

Respondent: Commissioners for Her Majesty's Revenue and Customs

Heard at:	Manchester	**On:**	6-10 January and 12 March 2020
Before:	Employment Judge Hoey Mr Haydock Mrs Humphreys		Deliberations 23, 24 and 30 and 31 March 2020

REPRESENTATION:

Claimant: Mr Campion (counsel)
Respondent: Mr Serr (counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was fairly dismissed and his claim for unfair dismissal is ill founded and is dismissed.

2. The claimant's claim that his dismissal amounted to a breach of section 15 of the Equality Act 2010 is ill founded and is dismissed.

3. The claimant's claim that the reduction of the compensation payment in terms of the Civil Service Compensation Scheme was a breach of section 15 of the Equality Act 2010 is well founded to the extent that the reduction was to be 50%. The decision, following the claimant's successful appeal, to reduce the sum by 20% was not a breach of section 15 of the Equality Act 2010.

REASONS

1. This was a claim for unfair dismissal and unlawful disability discrimination. At a Case Management Preliminary Hearing the Employment Judge together with the parties' agents managed to focus the issues and progress matters. The case called for a 5 day hearing. Another day was added due to the amount of evidence needed and the Tribunal met for deliberations separately. This is a unanimous judgment of the Tribunal. Due to the pandemic the issuing of the judgment was delayed, for which we apologise.

2. Both parties were represented by Counsel and the parties worked together in accordance with the overriding objective. A joint bundle of documents amounting to 676 pages had been agreed.

Issues

3. The issues to be determined by the Tribunal were as follows, namely:

Unfair dismissal

(i) Was the principal reason for dismissal a potentially fair one, namely capability;

(ii) Was the dismissal fair or unfair in all the circumstances.

Disability

(iii) It was conceded that the claimant was a disabled person from the date of dismissal by reason of anxiety and depression.

Discrimination arising out of disability – Section 15

(iv) Did the following things arise in consequence of the claimant's disability, namely the claimant's absence and sick leave?

(v) Did the respondent treat the claimant unfavourably:-

a. By dismissing him; and

b. By reducing his compensation payment

(vi) Did the respondent treat the claimant unfavourably in any of those ways because of something arising in consequence of his disability, such as the sickness absence?

(vii) If so, did the respondent show that the unfavourable treatment was a proportionate means of achieving a legitimate aim, namely to ensure staff were capable of demonstrating satisfactory attendance and good standard of attendance and to provide a good customer service. The subsidiary aim was to apply the respondent's policies fairly and consistently. In respect of the compensation scheme, the legitimate aim argued was to distribute the fund fairly and

economically in line with applicable guidance by the Cabinet Advice entitled Efficiency Compensation dated November 2016.

It was argued that it was proportionately achieved as the decision maker calibrated the reduction appropriately applying the guidance based on appropriate and reasonable findings about the extent of the claimant's engagement with the absence management process.

4. The Tribunal heard from four witnesses, namely the claimant, Ms Williams, the claimant's Line Manager, Mr Khan, the Dismissing Officer and Ms Foxley, the Appeals Officer. Each witness had provided a witness statement and was asked appropriate questions.

Facts

5. The Tribunal was able to make the following findings of fact from the evidence heard and the productions to which the Tribunal's attention was directed. The majority of the findings of facts were not in dispute. The findings are made on the balance of probabilities. The Tribunal makes findings only in respect of the issues that require to be determined and not in respect of all the evidence which was presented.

6. The respondent was a public body responsible for collection of tax in the United Kingdom. The respondent had around 6000 staff based in Manchester. It had a number of different departments including Personal Tax Operations ("PT Ops"), Fraud Investigation Services, Risk Investigation and Talent. There shared resources but the departments were different in terms of job roles, recruitment, culture and skills.

7. The claimant started employment on 3 May 2011 as an Administrative Officer ultimately being employed in the Personal Tax Operations unit.

8. The claimant agreed a contract of employment with the respondent which entitled him to sick pay (at 6 months' full pay and 6 months' half pay). The contract also stated that poor attendance would be managed in accordance with the attendance management procedure which could potentially lead to dismissal. That was found at clause 6.3 which was repeated at clause 14.3 which stated "If, despite best efforts at support and encouragement, you are unable to meet the required standards of performance and/or attendance, your manager will take action under the Attendance Procedures which may result in downgrading or dismissal."

Attendance management procedure

9. There are a number of policy documents relevant to the claimant's employment. The first is the attendance management procedure. This is a policy which seeks to ensure staff are given reasonable support to return to work. Managers are told that each case is unique and they must use their discretion to make reasonable decisions in each case. Workplace adjustments should be considered and reviewed regularly. Occupational health should also be involved. The trigger point for action is 8 working days

or 4 spells of absence in a rolling 12 month period. Where the trigger point has been reached, a formal attendance meeting should be convened.

10. Formal action can be taken, including warnings. Dismissal can be considered where there has been a final written warning or where a continuous absence can no longer be supported.

11. Warnings should not be issued if the trigger point is reached because of certain situations, which includes during the first 6 months of absence which was brought about in circumstances that satisfy the qualifying conditions for injury benefit but a warning can be issued if the absence continues beyond that.

12. Continuous absence is a period of 14 consecutive days absence. Periods of absence can be linked and treated as a single absence where the absence is for the same reason, for different reasons but the gap between the absences if 2 weeks or less or a long/serious illness is followed by another unrelated absence. Where absence reaches 28 days, a formal attendance review meeting can be convened.

13. If a return to work is not likely within a reasonable timescale and/or the business cannot continue to support the absence, dismissal can be considered.

Workplace adjustments and priority movers

14. This policy sets out the respondent's approach to dealing with adjustments and sets out some non-exhaustive examples of adjustments that can be made (which includes adjusting trigger points). The policy sets out a process whereby the manager and job holder have a discussion, an assessment takes place and the parties seek to reach agreement as to suitable adjustments.

15. Part of the policy deals with "priority movers". This policy states that the priority is to retain the jobholder in their current role. Workplace adjustments must be considered to achieve this. Only in exceptional circumstances where options have been explored within the current area and there are no other adjustments which would allow a continuation in the current role can an application for priority mover status be made. Steps should be taken to see whether there are other roles within the existing workplace. A move under the priority mover policy can only be facilitated where there is an actual vacancy in existence.

Injury benefit scheme

16. Another relevant policy is the Civil Service Injury Benefit Scheme. This enables workers to claim an extension of paid sickness absence if there has been an accident or injury while on official duty which resulted in sickness absence or a loss of pay. The injury must meet qualifying conditions and there must be a link between official duties and the injury or illness. Any benefit paid is not an admission of any liability. To invoke the policy, a CSIBS1 form is completed by the employee and then the manager.

Civil Service Compensation Scheme

17. There is also a Civil Service Compensation Scheme that applies to civil servants (which included the claimant). This is a scheme regulated by the Civil Service Management Code which sets out discretion to award compensation where staff depart on efficiency grounds. Guidance governs how amounts are calculated. The discretion is whether to award 100% (of a sum fixed by the Code) or a lesser proportion.

18. A payment is only made where medical evidence shows there is an underlying medical condition or circumstances which are, at least partly, beyond the control of the individual, where there is clear evidence the employee has made efforts to comply with relevant policies and cooperate with occupational health and there is clear evidence the individual has tried to improve their attendance by cooperating with the department (such as by agreeing reasonable adjustments, showing commitment to return to work or showing a positive attitude).

19. The guidance document has a table showing what is needed for 100%, around 75%, around 50%, around 25% and 0% (of the relevant sum). 100% is payable where the employee has cooperated with all measures to improve attendance (such as all reasonable adjustments) and been proactive in seeking solutions, has kept in touch throughout all their absence, shown a positive attitude and full commitment to work (where possibly trying to return to work) and cooperated with occupational health and followed all the advice.

20. 75% is payable where the employee has done more of what is needed for 100% and around 50% is payable where there has been some proactivity and the employee has kept in touch for some of the time and a fair amount of commitment has been shown and a fair number of reasonable adjustments have been achieved.

Health issues and absence

21. The claimant experienced his first episode of anxiety and depression in 2013.

22. In October 2013 the claimant was referred to mental health services by his GP and undertook a number of CBT sessions. He was prescribed anti-depressants and was unfit for work for around two months. In May 2014 the claimant was transferred to a different team which was different to his previous role.

23. The claimant had the following absences:

    a. 5 to 7 January 2016 because of flu.

    b. 21 to 24 March 2016 for flu.

    c. 4 to 8 November 2016 for flu or migraine.

    d. 10 to 11 November 2016 for flu or migraine.

    e. 11 to 18 November 2016 for viral infection.

f. 8 December 2016 to 17 March 2017 by reason of stress.

24. On 11 January 2017 an occupational health report was obtained which stated that the claimant reported ongoing stress, anxiety and depression triggered by work issues. The claimant had changed medication. His managers had modified his duties and provided support which the occupational health adviser said was appropriate. The claimant was told he required to adapt to be able to cope in the long term and develop his coping skills. The long-term prognosis was “quite good”. At this stage the report suggested he would not be a disabled person under the Equality Act as his condition had not lasted 12 months and was not having a significant impact on his daily activities.

25. In February 2017 the claimant’s medication changed again.

Occupational health

26. On 13 March 2017 a further occupational health report was obtained. The claimant had impaired mental health capacity and function. He was tired and had low mood. The claimant was making good progress. The opinion was that the claimant should be fit to return to work in 2 weeks on a phased basis.

27. On 18 March 2017 the claimant returned to work on a phased basis into the Personal Tax Operations department. His duties were adjusted so he carried out processing duties on a temporary basis.

Absence and warning

28. By this stage the claimant had 69 days absence from 2014.

29. On 18 April 2017 the claimant attended a formal meeting given the level of absence. The trigger points for absence within the respondent’s policies were 8 working days in a rolling 12 month period. The claimant had 4 working days’ absence from 21 March 2016, 7 working days’ absence from November 2016 and 69 working days’ absence from 8 December 2016. The claimant was issued with a first written improvement warning because he had exceeded the 8 working days’ absence in a rolling 12 month period.

30. Over the next six months his attendance was to be monitored, from 1 April to 21 October 2017. His absence would be considered unsatisfactory if his absences reached 50% of the normal trigger points, namely 4 spells. If his attendance was satisfactory, there would be a further 12 month monitoring period (called a sustained improvement period). He was warned that if his attendance becomes unsatisfactory again further action could be taken.

31. The claimant did not appeal that sanction.

32. In May 2017, the claimant became administrative officer in the customer contact team. His line manager was Ms Williams. The role was principally telephone based but there was a rota involving 3 days on the telephone with 2 days on post.

33. The claimant met Ms Williams on 24 October and on 25 October 2017 and was told that his attendance had been satisfactory during the improvement

period. His attendance was now being monitored for a further 12 months, called the sustained improvement period. He was advised that his attendance would be considered unsatisfactory if his sickness absence reached normal trigger points, namely 8 days or 4 periods.

34. In November 2017 the claimant confirmed that he was pleased with the adjustments that had been put in place for him.

Further absence

35. From 9 November 2017 the claimant was absent for 4 days by reason of flu.

36. On 16 November 2017 the claimant met with Ms Williams to discuss his recent sickness absence. The claimant was reminded of the relevant trigger points. He understood the position.

37. From 14 May 2018 the claimant was absent for 5 days due to an ear infection.

38. At a return to work meeting on 21 May 2018 the absence was discussed. Reasonable adjustments were agreed and he was to work on correspondence for a few days and he could take additional breaks. This was his third absence period totalling over 11 days.

39. On 23 May 2018 the claimant was invited to a further meeting to discuss his absence. By this point, the claimant had ten days absence during the sustained improvement period. It was likely that the claimant would have received a final written warning at this meeting given his absence levels but the meeting was postponed due to the claimant's absence. The claimant was reminded of the Employee Assistance programme and of the purpose of the attendance procedure, which was to seek to achieve an expected standard of attendance.

40. The claimant was absent from work from 29 May to 15 July 2018 on account of diverticulitis, with acute abdominal pain. The claimant had been admitted to hospital. Ms Williams kept in touch with the claimant (in accordance with the normal keeping in touch procedure) and he was asked to keep his manager appraised of developments. Ms Williams believed that it was not possible to issue a warning while an employee was not at work.

41. As part of the keeping in touch procedure, Ms Williams visited the claimant on 14 June 2018. His fit note was to expire on 17 June 2018. The claimant indicated that he hoped to be fit to return to work on 18 June but that depended upon hospital advice. He was told that his return to work meeting would be conducted with Ms Burton as Ms Williams was on leave. He was kept up to date with work developments and reminded of the assistance programme.

42. On 18 June 2018 the claimant telephoned Ms Burton to say he had a fit note up to 24 June 2018. He had stomach pain. During a telephone call on 20 June 2018 the claimant was advised that he would be invited to a continuous absence meeting on 29 June 2018. A letter was sent to the claimant inviting

him to a meeting on 29 June given the claimant's absence at this stage had reached 25 days.

43. On 25 June 2018 the claimant attended work but said he was suffering stomach pains and had to go home. Prior to his departure, at a meeting the claimant asked if he could attend summer camp, which was a (paid) voluntary activity that he had done each year for the 4 previous years. It was scheduled to take place late July/early August. Ms Williams recorded in her keeping in touch notes that she replied "no for the moment". She was concerned that the claimant may not be fit to attend. The claimant's attendance had been approved by her months earlier but she was not satisfied it was in the claimant's interests to attend the camp on this occasion.

Sickness absence meeting

44. The claimant attended the sickness absence meeting on 29 June 2018. The claimant was asked if there is anything further the respondent could do to assist his attendance. He said no. His absences were not work related nor on account of stress. The claimant was advised that if the respondent believed that they could no longer support his absences the matter would be referred to a decision maker who would then decide appropriate action. The aim of the meeting was to seek to procure a successful return to work within a reasonable time. The claimant explained that he suffered from random spells of pain and felt bloated. He struggled to sleep and found it difficult to concentrate. He had a fit note to 30 June 2018 and was planning a return to work on 2 July 2018. Ms Williams suggested reasonable adjustments could include phased return, no telephony work, extra breaks and different hours. The claimant stated there was nothing else needed by way of adjustments.

45. On 11 July 2018 the claimant was advised by letter that the respondent was prepared to support the claimant's absence at this time. His absence would be reviewed and the decision could be reconsidered at any time if it becomes unlikely that the claimant was unable to return to work in a reasonable period.

46. On 16 July 2018 the claimant returned to work on a phased basis. It was confirmed that the claimant's absence was not connected to any previous absence. His absence was not stress related, and a fit for work plan was discussed.

Summer camp

47. The claimant raised the issue as to his attendance at the summer camp with Ms Williams.

48. At the meeting Ms Williams said she had made a decision and decided not to allow the claimant to attend camp as she did not feel the claimant was physically able to attend. The claimant was very upset as a result. The claimant accepted that Ms Williams said that she was worried about the camp's impact on the claimant's health.

49. The claimant took this badly and for the remainder of the day was quiet and shoved his chair under his desk aggressively.

50. Later that day Ms Williams went to the claimant's desk and gave him the notes of the return to work meeting to sign in the usual way. The claimant was unhappy that the note made no mention of the camp issue but he signed the note.

51. The claimant said that if he was not allowed special leave for the camp he would take paid or unpaid leave.

52. The claimant was due to attend work on 18 July 2018**.** His phased return to work plan required him to attend work at 9am but he did not arrive at that time. The claimant was struggling and felt unable to attend work, despite attending the train station. Given the claimant's non-attendance Ms Burton was concerned and called the claimant around 11.15am. The claimant said he was on the train but did not know if he would attend work. Ms Burton explained she would speak with him when he got in. The claimant was late into work that day.

Ms Burton meeting

53. When the claimant attended work, he met Ms Burton. Ms Williams was on leave 18 July 2018. The claimant said that "it had nothing to do with any of the managers but he had no faith in HMRC any more". He said the engagement was a joke. He said he had been crying most of the night. He said he had been suffering personal well-being problems. He said his attendance at camp had been cancelled. He said he did not agree with the reasoning. Ms Burton asked the claimant what he intended to do and he said he planned on resigning. He was advised to speak with a well-being advocate. The claimant was given the telephone number to speak with someone. He was advised not to make any hasty decisions. The claimant left work early.

Events on 19 July 2018

54. On her return to the office on 19 July 2018 Ms Williams had received an email from Ms Burton with a note summarising the discussion she had with the claimant. Ms Williams did not read this until after the meeting with the claimant.

55. Ms Williams asked to meet the claimant to update his fit for work plan. The claimant seemed disinterested during the meeting and sat with his head in his hands. The fit for work plan was agreed. Ms Williams asked the claimant if he was OK and he said he was not. He said he was letting the children down if he did not attend the trip.

56. Ms Williams had been told by her manager not to discuss the trip with the claimant as she planned on meeting the claimant with Ms Williams to discuss the issue. Ms Williams told the claimant that she was not going to discuss the camp issue as her manager would meet them later to discuss.

57. The claimant said "I am going if you like it or not. In fact I resign". He then threw his work ID onto the table and said he was going to pack up and go home.

58. The claimant asked for the guidance and procedures that led her to make the decision she did. She said her decision was backed by her manager, Ms Lucas and the most senior manager on the floor. The claimant accepts he banged the door on the way out as he was so upset.

59. In Ms Williams' note of the meeting she said that staff had been complaining about the constant bad mood the claimant had been in since his return to work on 16 July. As Ms Williams was discussing maters with her line manager, the claimant said Ms Williams was being unreasonable about not letting him go to camp. Ms Williams said she told him she stood by her decision and "was not going to change her mind".

60. Ms Williams asked the claimant if he was resigning. The claimant said he was but he had shut his computer down and had not typed anything. Ms Williams asked he put it down on paper before he left. He said he would. The claimant was extremely angry.

61. Ms Williams was very upset and shaking given the claimant's behaviour and went to see her manager. She felt intimidated.

62. Ms Lucas asked Ms Williams to complete the relevant forms and obtain the claimant's pass if he was resigning. The claimant banged the door on his exit.

63. The claimant accepted in cross examination that it was reasonable for Ms Williams to view his behaviour as "slightly aggressive and petulant". It was not how one would normally behave at work. He also accepted that the only criticism he had of Ms Williams was her refusal to allow him to attend camp.

64. The claimant attended his GP that afternoon and received a fit note signing him as unfit to work from 19 July to 15 August 2018. He complained of anxiety and low mood and had similar symptoms to those experienced before which counselling had assisted. The diagnosis was of mixed anxiety and depressive disorder. Medication was prescribed and with the fit note citing depression and work-related stress.

65. The claimant accepted that on 19 July 2018 there were other things going on in his personal life that were material to his (then poor) mental health.

66. At 9.34pm on 19 July, the claimant sent an email to Ms Williams saying "Firstly I'd like to apologise for my leaving work earlier on today during our meeting. After I returned home upset and had taken some time to reflect on how my phased return had gone, I realised I'd had a breakdown. I have been in to speak with my doctor who agrees that my mental wellness has taken a rapid downturn. He has prescribed me tablets to stabilise my anxiety and help me sleep better at night. He has recommended I stay off work and has given me a sick note for 4 weeks which I will forward on to you. If it's ok can we speak early next week? Again please accept my apologies for any disruption I may have caused to the office today. Kind regards."

20 July and beyond

67. On 20 July 2018 the claimant called to say he had a breakdown and was taking medication. When asked why he had contacted the respondent when he said he was resigning, he apologised for his behaviour and said he was not resigning. He said he had sent his fit note in the post. He was advised that he was being invited to a meeting on 2 August 2018. The respondent agreed to treat his resignation as withdrawn and continued to keep in touch with him in the usual way.

68. Ms Williams was of the view that if the claimant had not been absent from 20 July 2018, the likely outcome would have been a further warning, probably a final written warning.

69. On 24 July the claimant attended hospital for a colonoscopy.

70. On 26 July the claimant called to say he was taking medication to help his depression but the side effects made him sleep a lot. Ms Williams asked the claimant what had changed since his fit note stated work related stress. Ms Williams noted that all reasonable adjustments had been put in place and when he had returned to work he said there was no work-related stress. The claimant advised Ms Williams it was "due to not been (sic) able to attend camp".

Claimant is given forms for completion

71. In late July 2018 the claimant asked Ms Williams to provide a HRACC1 Form to make an application for a workplace injury benefit covering his absence from 20 July 2018. The claimant received the form around 30 July 2018 and on 3 August 2018 he completed a draft of the form but struggled to finish the document due to his mental health.

Formal absence meeting

72. On 1 August 2019 a formal meeting took place with the claimant, his union representative and Ms Williams. It was explained that the formal meeting was being conducted in accordance with the managing attendance policy. The meetings were to take place each month to determine whether the respondent could continue to support the claimant's absence and that if the respondent could not continue to support his absence, a decision maker would decide whether or not dismissal is appropriate. The aim was to see if the claimant's return to work could be secured within a reasonable time. The claimant said his medication had not fully kicked in as the medication affected his eating and sleeping. The fit for work plan was discussed and the claimant was given a stress reduction plan to complete.

73. The claimant's fit note was expiring on 15 August 2018 and he was asked if he was returning to work on 16 August. He said that he was not sure as the medication affected his mood.

74. Ms Williams noted that when the claimant returned to work on 16 July he had said that the reason for the absence was not work related and yet the reason

for the absence now was stated to be work related. The claimant was asked what had changed in 4 days. He said it was not being able to go to camp as he felt he has let many people down.

75. Ms Williams stated that she had checked the criteria and the camp did not fit and that when the claimant returned to work on 16 July he was not well and she thought it would not be the right decision. She had made her decision on the basis of the claimant's wellbeing.

76. Reasonable adjustments were then discussed which included a phased return, no telephony work, buddying, extra breaks and time off for medical appointments. The claimant confirmed there were no other adjustments needed.

77. The claimant explained that he felt anxious about returning to the business and did not want to think about it.

August 2018 occupational health report

78. On 9 August 2018 an occupational health report was obtained which confirmed that the claimant had a recent period of absence due to psychological health and had a colonoscopy for suspected diverticulitis. The report stated that the claimant believed he had a breakdown and was feeling very low in mood and struggled to sleep. He was taking medication and completed the first of 12 weekly therapy sessions. Although he had been diagnosed with depression, the symptoms appeared more like stress or anxiety. His mood and adjustments to medication prevented his attendance at work. The claimant advised the occupational health manager that no further reasonable adjustments were required. The claimant also said that "he would prefer/like to be moved to a different department, if the business can accommodate this. This would preferably be permanent".

79. With regard to the prognosis, the report stated that once the claimant has engaged in counselling and his medication has started to work (4 to 6 weeks after commencement) there should be no reason why he could not provide regular and effective service.

80. The report recommended that the claimant undertake a stress reduction plan which would enable a discussion about aspects of work and possible adjustments.

81. The report concluded by stating that due to the longevity of diagnosis and treatment for psychological health the claimant is likely to be covered by the Equality Act. Although he was currently unfit for work once he had engaged in further counselling sessions and his medication had time to work, the report said the claimant should be able to return to the workplace in around 2 to 4 weeks' time.

82. Ms Williams attempted to contact the claimant to discuss the report but the claimant was unable to deal with matters and take the calls.

Further absence

83. By text message on 14 August 2018 the claimant said his mood was really low and he did not want to talk to anybody. He was asked if he would return upon expiry of his fit note on 15 August 2018 and he said it did not look likely.

84. On 15 August 2018 Ms Williams spoke with the claimant who said although his fit note had expired he would not be returning to work as he was not fit. Ms Williams advised him that the business could no longer sustain his absence and the matter would be referred to a decision maker to consider next steps, which could include dismissal. The claimant said that he "knew this was coming".

85. Ms Williams took internal HR advice and realised that she had not established whether ill health retirement was an option. She decided to delay the referral until this had been considered. The claimant was content for this to be explored. After consideration, it was not considered to be a viable option.

86. Ms Williams also decided that more time was needed (given the position in relation to medication and therapy) and having taken HR advice, on 22 August 2018 Ms Williams told the claimant that his absence would be supported. The claimant said he was not feeling good and his moods had not changed. His medication had changed and he was attending his therapy sessions. He had a further 4 week fit note to 14 September 2018. The claimant was advised that Mr Brown would meet with the claimant given Ms Williams' absence on leave.

87. On 22 August 2018 Ms Williams wrote to the claimant to note that his current absence stood at 75 days (which would be the total to the point the current fit note expired on 14 September). A meeting was arranged for 5 September 2018.

Further absence meeting

88. On 5 September 2018 the claimant attended the continuous absence meeting with his union representative and Mr Brown. The purpose of the meeting was to explore whether a successful return to work could be achieved within a reasonable period of time. The claimant explained that his moods can change quickly he was going to see his Doctor in around 10 days when his fit note expired.

89. Mr Brown noted that the claimant had been sent the fit for work plan, the stress reduction plan and the HRACC1 form but the claimant had not returned the completed forms. The claimant said he was finding it difficult.

90. Mr Brown noted that the occupational health report had given rise to 2 questions on which the claimant's comments were sought. Firstly, he described his role as "full time telephony" when it also involved correspondence and secondly, he had stated he would like/prefer to be moved to a different department if it could be accommodated. Mr Brown said there could be no transfer as it was up to the claimant to apply for other jobs. The claimant said his role had become more like a full-time telephony role.

91. The claimant was asked if there were any other reasonable adjustments to consider, other than a phased return, reduced telephony work, buddying, extra breaks and time off for medical appointments. He said no, there was none he could think of.

Keeping in touch

92. On 11 September 2018 during the regular keeping in touch discussions the claimant told Ms Williams he was not feeling great and was not sleeping well. He was asked if he was returning to work upon expiry of his fit note on 14 September and he said his therapist did not think he was fit to return. It was agreed the claimant would call following his meeting with his GP the next day.

93. On 12 September 2018 Ms Williams had to contact the claimant a few times before he took the call. He advised Ms Williams that his medication was changing. He was not sure if he would return to work upon expiry of his fit note.

94. A fit note was obtained covering the period from 15 September to 14 October 2018. No reasonable adjustments were suggested in that note, nor were any suggested in the fit note from 15 October to 30 October 2018.

95. After numerous calls to the claimant Ms Williams managed to speak with him on 17 September 2018. The claimant said he was not sure if he would return to work. The claimant confirmed he was not fit to return to work in any capacity. He was advised that the matter was being referred to a decision maker with a recommendation of dismissal as the business could not support his absence any longer. Keeping in touch was to continue.

96. Ms Williams had considered whether to allow more time for the claimant to trial new medication but decided that it was not possible to know how things would progress and it was therefore appropriate to progress to the next formal stage. Ms Williams was concerned about the working days that were being lost, the impact upon productivity and the absence of any clear return to work date.

Referral to decision maker

97. On 19 September 2018 Ms Williams advised the claimant that the business was unable to sustain the claimant's current sickness absence and having reconsidered all the facts has referred the matter to Mr Khan, the decision maker who would decide whether he should be dismissed or some other sanction applied. The claimant said he was "not surprised".

98. On 20 September 2018 the claimant saw his GP again and his medication was changed. He was struggling with his mood and sleeping. The claimant had to persuade his Doctor to provide him with a one month fit note (rather than the two month fit note that was being proposed).

Respondent seeks return of forms

99. On 21 September 2018 Ms Williams sent the claimant a copy of the stress risk assessment for him to agree. Within that plan she had offered to support the clamant if he wished to go for other roles. She was not aware of the priority movers policy. She also asked the claimant to return the HRACC1 form so she could complete her section.

100. Ms Williams accepted that the claimant was really good at his job when he was working.

101. On 24 September 2018 the claimant completed the HRACC1 form and sent it to Ms Williams. This was in fact the HR Stress 1 form ("Work Related Stress Report") which sets out concerns about stress at work. Ms Williams emailed the claimant to note that certain of his comments in relation to the HRACC1 form were (in her view) inaccurate. Ms Williams said that the camp did not fit the respondent's criteria and that it was her decision for him not to attend camp (which had the support of her managers). The claimant said that on 19 July he met with Ms Williams and told her the decision affected his mental health and he could not be in the building any longer and left "quietly". Ms Williams disagreed with what he had stated and said the meeting was to discuss his fit for work plan and she did not intend to discuss the camp issue until her manager met with the claimant. She said it was the claimant who raised the issue. Ms Williams said she was not going to change her mind and with that the claimant threw his pass on the desk said he was resigning and banged open the door and walked out. She said the claimant was disruptive. There were complaints from others about the claimant's behaviour.

102. The claimant did not change the report and submitted it on 10 October 2018. In the form he says that the decision to refuse him attendance at the camp caused his mental health to deteriorate. He believed the decision taken had affected his mental health. He said he had a breakdown in the office and suffered depression and anxiety. Ms Williams completed the section on "Investigation findings". She stated that she told the claimant why she made a decision not to let him go and that the claimant disagreed and subsequently said he would resign but changed his mind. The senior manager completed his section of the form as reviewing manager and the form was submitted to HR on 11 October 2018. These forms are retained by HR and used to identify themes or concerns. Ordinarily the person who investigates the matter and reports the employer's perspective would be someone who was independent.

Dismissal meeting

103. On 4 October 2018 Ms Khan, Decision Maker, wrote to the claimant to invite him to a meeting on 12 October 2018 to consider whether the claimant should be dismissed or his absence supported. The claimant had already been sent the attendance management policy together with the 3 continuous absence meeting notes and the 9 August 2018 occupational health report.

104. On 12 October 2018 Mr Khan wrote to the claimant to confirm that following the claimant's cancellation of the meeting, it was postponed until 19 October. The claimant's request that it be held at his house was approved.

105. The claimant attended his GP on 15 October 2018 and received another fit note stating he is unfit to return to work until 30 October 2018. The claimant's medication was changed for a third time.

106. The meeting took place on 19 October 2018 at the claimant's home with Mr Khan. The claimant chose not to have any union representative present.

107. The claimant agreed that at the end of the sustained improvement period his absence would total 99 days, increasing to 107 days by the end of the month. The claimant said he had just started his third course of (new) medication a few days ago and he had attended 9 (of the 12) therapy sessions. The claimant said he had a breakdown on the office on 19 July 2018. He said he was not ready to come back to work. He said the office was "a bad place to be". When asked what outcome he wanted, he said PT Ops was "a horrible place to work" and he wanted to move to a different directorate, perhaps fraud investigation, risk investigation or talent teams. In cross examination the claimant accepted that his description of PT Ops "went too far".

108. The claimant accepted in cross examination that he was not fit to return to work, even if a new role had been offered to him. He was still struggling with sleep and mood swings.

109. The meeting lasted around 10 minutes. The claimant wanted the meeting "over and done with".

110. The claimant contacted his GP on 30 October 2018 and was declared unfit for work until 12 November 2018. No reasonable adjustments were suggested in the fit note.

Reason for dismissal

111. Mr Khan considered the issues and procedures and prevailing facts. He set out his rationale in a document that was sent to the claimant. He believed "there was no evidence that the claimant's health is showing any signs of improvement which could lead to him returning to work. His long-term absence is now into the sixth month. He told me he was not ready to come back to work." He concluded that downgrading was not an option and there were no further reasonable adjustments that could be made to help the claimant achieve satisfactory attendance. The claimant had accepted that nothing had changed since 19 July 2018. There had been no improvement. He had been signed off for another month at that point. He was not fit for work and there was no prospect of a return within a reasonable period.

112. In Mr Khan's view, from the information he had and his assessment of the claimant, the claimant did not want to return to work. He had tried to get healthy but did not want to return to work and had become more entrenched.

113. Mr Khan considered the August occupational health report. He noted that the report said once the clamant had engaged in counselling and his medication has started to work (within 4 to 6 weeks) there should be no reason why the clamant could not provide effective and regular service. By the date of the meeting the claimant had 9 weekly therapy sessions and had tried 3 different

medicines. The claimant's line manager had already delayed referral to allow the treatment to take effect. No improvement had occurred.

114. Mr Khan considered that there had been sufficient time to allow the claimant's health to improve. He concluded that there was no sign of anything changing. There was no clear prospect of a return to work in the near future.

115. Mr Khan also concluded that the claimant did not want to return to work. He was "single minded" in stating that he did not want to go back to work and work with his colleagues. Mr Khan concluded there was no feasible alternative to dismissal given the claimant's view.

116. He considered reasonable adjustments and concluded that all adjustments had been exhausted by Ms Williams. Mr Khan considered whether a transfer could be achieved to another team, such as Fraud Investigation Service/Risk and Intelligence Service or Talent. It was not possible simply to order a transfer. There needed to be a business case. There were a limited number of roles and recruitment was competitive. There needed to be a specific skill set. A transfer would be something that would need time. The claimant would need to return work in the first instance. The claimant had all but ruled that out and was not in a position to return to work.

117. The other teams had a different way of working which is the nature of intelligence and investigative work. Those roles involved working with confrontation and adversarial situations. The claimant had already asked to move out his previous role which involved face to face contact. It had been the customer contact that caused the claimant issues and led to his very first transfer.

118. With regard to the Talent team, this was a small group of people who were experienced managers. There were no vacancies.

119. For the Priority Mover policy to apply the claimant would need to be ready to return to work. A move to a different business unit would require director involvement and a specific vacancy would need to exist. This was not pursued.

120. Mr Khan also took account of the breakdown the claimant said he had suffered and of the reasons for it. Mr Khan's view was that the claimant did not see Ms Williams's perspective. Mr Khan understood the claimant's anger but also the duty Ms Williams had with regard to the claimant's health. He considered both the claimant's and Ms Williams's perspectives.

121. Mr Khan was aware of the HR Stress1 form and of the 2 versions as to what happened on the day in question in July. He considered that there was no need to undertake further investigations. He understood both positions. He also took account of the fact that no grievance or complaint had been raised by the claimant in relation to Ms Williams and the claimant continued to liaise with her following the incident. The claimant had also apologised for his actions.

122. Mr Khan was not aware that an application for Injury Benefit had been made prior to making his decision. Mr Khan's view was that even if he knew a successful application had been presented, his decision would still have been the same. The claimant would have been absent for over a hundred days. He would still not be in a position to consider a return to work. He had stated that he did not wish to return to work. There was no prospect of a return to work within a reasonable period of time.

123. Mr Khan considered the claimant's absence would have an impact on the team. The number of calls remains the same and those left would have to take up the slack. The claimant's team comprised around 10 or 11 people and the claimant was not replaced with existing staff having to cover the claimant's work. The absence also impacted on productivity and morale. Ms Williams was having to spend a considerable amount of time managing and supporting the claimant rather than supporting the rest of the team.

124. Mr Khan concluded that the claimant's attendance was not up to the required standard, he was not fit to return to work and there was no clear prospect of a return to work date and the claimant had shown no desire to return to work. In his view the claimant had shown no movement and did not want to return to work.

Claimant is dismissed

125. The claimant was dismissed with notice, his employment ending on 28 December 2018.

126. With regard to justification for the dismissal, Mr Khan was of the view that the nature of the department in which the claimant worked meant there was no specific evidence or data to consider, as such. He was only able to estimate the impact the claimant's absence had using his experience. There was no back filling of his role and others had to deal with the same amount of business. Customers were likely to have to wait longer to have their queries dealt with.

127. Mr Khan was not aware of the significance of a qualifying injury with regard to absence nor of the application. He based his decision on the information before him.

Compensation scheme payment

128. Given the dismissal was for capability, Ms Williams completed an application in respect of the Civil Service Compensation Scheme. She recommended there be a reduction to 50%.

129. The recommendation was completed by the HR Director who set out the reasoning of Ms Williams: "When John returned back after his first period of sick his behaviour impacted not only on my team but other teams surrounding him, John did not agree that I would not support him attending 1 week camp for disadvantaged children. John would slam his chairs/door/desk. He did not attend work on time when he was on a phased return. I had a meeting to discuss his fitness for work plan and the subject was raised again. He threw

his official pass on the desk and told me he was resigning. There have been at least 2 conversations between John and my higher officer about his behaviour. There is a history of attendance issues unrelated to the 2 medical conditions above. I agree that it was beyond John's control to return back sooner with this first period of sick due to being hospitalised as for the second period of sick there is no evidence to suggest why he cannot return back to work now."

130. She stated that the claimant maintained keeping in touch "most of the time". There were "lots [of] times whereby John has not made himself available to answer my calls but contacted me the following day." She concluded that "John does not have a positive attitude to the Department and has made this very clear on the Stress Risk assessment. I feel he has not considered any of the reasonable adjustments the department can put in place for him to return back to work. John has not made any attempt to return back to work."

131. The claimant delayed keeping in touch on 11 September 2108, 12 September 2018 and 17 September 2018.

132. Ms Williams recommended an award of 50% based on the following: "John has not always made himself available to answer my calls when we have agreed on previous KIT when I will contact him again. I have asked John several times to send back his completed Stress Risk Assessment and HRACC1. Both forms were originally sent to him in July for him to complete. I received the SRA on 14 September and am still waiting for the HRACC1 form. John's behaviour was very disruptive the 4 days he came back in July. This impacted on my team and the team John was sitting with. John turned up late on 17 July. This was part of his phased return."

133. Mr Khan as decision manager reiterated the above and said "Mr McAllister has cooperated a fair amount with efforts to support him back to work. He has tried to keep in touch and has shown some desire to return to work. But Ms Williams does point out that he has not always been available for agreed KIT contact. She had to ask him several times after eventually receiving back his completed stress risk assessment and HRACC1. He was late to work during his phased return to work and she considered his behaviour disruptive during the 4 days he returned (although he did apologise for his behaviour)."

134. The HR director summarised the position: "The employee has been absent from work on continuous sickness absence since 20 July 2018 with anxiety depression and stress, prior to this period of absence the employee was absent 28 May 2018 to 14 July 2018 with suspected diverticulitis. This employee's level of absence has been an ongoing concern. He received his first written improvement warning on 21 April 2017 after a total of 80 days of sickness absence over 3 occasions between 18 March 2017 and 19 March 2018. On 23 May 2018 his manager invited him to a meeting on 31 May 2018 to discuss ongoing concerns regarding his attendance. This meeting did not take place as the employee went off sick on 28 May 2018. The meeting was rearranged 26 July 2018. However, the employee went off sick on 20 July 2018 and has not been back since. The underlying medical condition is confirmed by the regular fit notes from the GP and occupational health report dated 9 August which offers a number of suggestions around self

improvement and signposts. It states once he has engaged in the counselling process and his medication has started to work there should be no reason why he could not provide regular and effective service. OH foresaw a return date in around 2 to 4 weeks times. To date there has been no return to work date."

135. The HR director approved the 50% recommendation for the reasons Ms Williams stated. The 50% recommendation was approved.

Appeal against dismissal

136. On 18 November 2018 the claimant appealed against his dismissal lodging an 11 page letter with 15 appendices. He argued that there were procedural errors, the decision to dismiss was not supported by available evidence and new evidence has come to light that should be taken into account.

137. The desired outcome of the appeal was full reinstatement with a successful application to the Civil Service Injury Benefit Scheme. He was seeking a return to work, once he was fit to do so, in an alternative area outside PT Ops that is not in a contact centre based environment. Due to his disability, which prevents him from travelling, he sought home working.

138. The claimant believed that the guidance was not properly followed with regard to mental health issues. He said that workplace injuries are excluded from the formal attendance management procedure. He was in the process of making an application for injury benefit. Both, he said, were ignored. He argued that it can never be the case that an absence excluded under workplace injury can result in an efficiency dismissal.

139. He also said that on 25 September 2018 he sought the CSISB form and requested no formal decision be taken regarding his absence until his application was properly considered. He argued that by not providing the form his application was delayed. He received the HRACC1 form on 30 July and completed it on 3 August and was told on 24 September by Ms Williams she disagreed with events as set out by the claimant.

140. The claimant argued that his absence by reason of diverticulitis and stress from 29 May to 15 July 2018 and from 19 July 2018 onwards should have been linked.

141. He argued that it was unfair not to issue him with a formal written warning before dismissing him.

142. He also argued that the decision to dismiss was not supported by the information that was available. In this regard the claimant relied on the absence of any investigation into the events on 19 July 2018.

143. He argued that following the August 2018 occupational health report an adjustment in the form of a change of role to a different department might have assisted his return to work. That might have reduced his absence.

144. Finally, he argued that there was only one occasion when the claimant was unable to return Ms Williams's call, which was due to his medication having changed and being in bed. The allegation that he failed to keep in touch was, he says, inaccurate.

Appeal meeting

145. On 6 December 2018 the appeal meeting took place. It was chaired by Ms Foxley with the claimant and his union representative. The meeting took place at the claimant's home (as the claimant was not prepared to attend the office).

146. The claimant confirmed he had completed his therapy sessions and had been referred to a second stage mental health team. He argued that he had recently changed his medication again and that insufficient time has been given to get the medication right. He argued that the respondent had not considered a move to a role in a different department.

147. Ms Foxley explained that the purpose of the appeal was not to review the evidence again but whether the decision to dismiss was fair and reasonable. She would consider whether there were any procedural errors.

148. The claimant stated that he was not to return to work and was not sure when he would be fit to return. By the appeal hearing the claimant had completed his course of counselling and had tried different forms of medication. He was unable to say when he would be fit to return to work. He accepted that there had been no improvement since July 2018.

149. A draft of the minutes was sent to the claimant on 10 December 2018 which the claimant commented upon. The claimant sent Ms Foxley a letter on that date commenting on the stress at work form arguing that there had been no independent investigation into his breakdown.

Reasoning of appeal officer

150. Ms Foxley considered the evidence available to her. Having done so she concluded that the decision to dismissal was fair and reasonable. She decided that Mr Khan's deliberations were very detailed and comprehensive. She decided there were no procedural errors. The Stress 1 form had been completed and submitted. She took account of the fact that the claimant had not raised a grievance about Ms Williams and he had continued to engage with her thereafter. There was no mention of the camp issue again after July. She looked at the information she had as a whole, which included both the claimant and his manager's responses. She considered both positions. She concluded that the claimant had a negative attitude to the department. He had said it was a "horrible place to work". She did not believe the claimant wanted to return to work. She believed the claimant did not seem to like the work.

151. The Civil Service Injury Benefit Scheme application had been submitted in December. Ms Foxley decided to proceed to deal with the appeal notwithstanding that process was ongoing. She had taken advice and as no decision had been made she would proceed to deal with the matter as she understood it. It was not clear when the outcome would be and at that stage

there was no qualifying injury. If the claimant had been told he had a qualifying injury she would have taken advice as to whether the outcome of the appeal would have been any different.

152. Ms Foxley considered the claimant's argument about linking absences. It was academic in her view since the absences were linked in any event as they were for 2 separate conditions but less than 2 weeks' apart. The claimant's absence was continuous.

153. She concluded that reasonable adjustments had already been made. Additional time for appointments and counselling had been allowed, together with a phased return and reduced duties. She considered the claimant's request to change roles but she had no power to secure a move to another area of the business (which was the same as Mr Khan's powers). She did not look at the Priority Movers policy as she believed the claimant was not in a fit state to return to work. His mental health was not stable and his medication was not working. In her view the claimant needed to be in work to deal with any move and he was not fit and not likely to be fit.

154. She concluded that occupational health advice had been followed "all the way".

155. She concluded that there was no rule about warnings having to be issued prior to dismissal where there is continuous absence. The policy, in her view, did not require the issuing a warning before dismissal could be considered.

156. Ms Foxley considered what alternatives there were for the claimant but concluded none was suitable. The claimant was not fit to return to work in any capacity and there was little point looking at alternatives. She believed that the claimant's role could not be done from home (given the nature of the work). In August the medical position was that the claimant would be fit in 4 to 6 weeks. That had not happened and there was no evidence to suggest a return to work was imminent. Sufficient time had been given for the claimant to return to work. Nothing had changed in October and the position remained the same in December. There was no reason to think things would change.

157. Ultimately, having balanced all the facts, Ms Foxley decided that the business could no longer sustain the claimant's absence. The claimant was unable to give a date when he would be likely to return. It seemed little had changed with regard to the condition and likelihood of a return to work in the foreseeable future. The claimant admitted that he was not ready to return to work and was still unable to provide a return to work date at that point or in the future.

158. With regard to justification, Ms Foxley said she used her knowledge and experience as to what an individual's absence would cause the department. It was not possible to quantify this as it was not known what work was done but the claimant's role was not replaced. His absence impacted upon productivity.

159. The appeal meeting lasted around an hour.

Appeal dismissed

160. On 17 December 2018 the appeal outcome letter was sent to the claimant together with the rationale document. That confirmed that nothing had materially changed since 19 July 2018. The claimant had attended his counselling sessions and was now on a different type of medication. Given there was no improvement nor any indication when it was likely that the claimant would return to work, his dismissal was confirmed.

161. The claimant's employment ended on 28 December 2018.

Injury benefit application.

162. On around 18 or 19 December 2018 Ms Williams submitted the claimant's injury benefit application for consideration which the claimant and Ms Williams had completed.

Appeal against compensation payment reduction

163. On 18 December 2018 the claimant appealed against the decision to award him 50% of the compensatory award in terms of the Civil Service Management Code.

164. On 28 March 2019 the Civil Service Appeal Board decided to increase the award made to the claimant from 50% to 80%. The reason for so doing is that the report setting out the rationale for 50% missed any assessment of the impact of the claimant's proven mental health condition on the situation in which he found himself. The claimant had provided evidence of his condition and treatment which was supported by the occupational health report of August 2018. The respondent should have taken advice to assess the claimant's ability to cope with the events facing him. Their failure to do so resulted in a finding that the 50% award was unfair and 80% was fair to reflect the fact that the claimant "was largely not in control of events at the time of his dismissal".

Post dismissal issues

165. The claimant remained unfit to work from his dismissal until February 2019. Following a further change to the claimant's medication in February 2019 the claimant found that his mood improved. His GP opined that the claimant was likely to remain unfit to work on 20 February 2019. With effect from March 2019 he secured alternative employment working 16 hours a week as a cashier in a supermarket.

Injury benefit application outcome

166. On 15 March 2019 an occupational health physician prepared a report which supported the claimant's application stating: "based on all the current submitted information and medical evidence it is accepted that the claimant is experiencing significant symptoms/problems with related functional incapacity attributed to his experiences with stress and depressed mood". He ticked the box saying there was a direct causative relationship between the index event

and the medical cause of the absence saying that the medical cause was 50% or more attributable to the index event but not 90% or more. He stated that the medical criteria of a qualifying injury appeared satisfied and the whole absence was caused by the qualifying injury.

167. On 14 May 2019 the claimant was advised that his application for injury benefit was successful and he was considered to have suffered a qualifying injury or illness. This resulted in his absence from 20 July to 28 December 2018 being paid absence. On 21 May 2019 the respondent advised the claimant that his sickness absence for the period 20 July to 28 December 2018 had been "deleted" and arrears of salary were being paid to the claimant

The Law

Unfair dismissal

168. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. Section 98(1) places the burden on the employer to show the reason or principal reason for the dismissal and that it is one of the potentially fair reasons identified within Section 98(2), or failing that some other substantial reason.

169. The potentially fair reasons in Section 98(2) include a reason which:- "**relates to the capability or qualifications of the employee for performing work of a kind which he was employed by the employer to do".**

170. Section 98(3) goes on to provide that "capability" means capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

171. Where the respondent shows that dismissal was for a potentially fair reason, the general test of fairness appears in section 98(4): "…the determination of the question whether the dismissal is fair or unfair (having regard to the reasons 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".

172. It has been clear ever since the decision of the Employment Appeal Tribunal in **Iceland Frozen Foods Limited -v- Jones [1982] IRLR 439** that the starting points should be always the wording of section 98(4) and that in judging the reasonableness of the employer's conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In most cases there is a band of reasonable responses to the situation and a Tribunal must ask itself whether the employer's decision falls within or outwith that band. This approach was endorsed by the Court of Appeal in **Post Office –v- Foley; HSBC Bank Plc –v- Madden [2000] IRLR 827**.

173. The application of this test in cases of dismissal due to ill health and absence was considered by the Employment Appeal Tribunal in **Spencer –v- Paragon**

Wallpapers Limited [1976] IRLR 373 and in **East Lindsey District Council –v- Daubney [1977] IRLR 181**. The **Spencer** case establishes that the basic question to be determined when looking at the fairness of the dismissal is whether, in all the circumstances, the employer can be expected to wait any longer, and if so how much longer. Matters to be taken into account are the nature of the illness, the likely length of the continuing absence, and the overall circumstances of the case.

174. In **Daubney**, the Employment Appeal Tribunal made clear that unless there were wholly exceptional circumstances, it is necessary to consult the employee and to take steps to discover the true medical position before a decision on whether to dismiss can properly be taken. However, in general terms where an employer has taken steps to ascertain the true medical position and to consult the employee before a decision is taken, a dismissal is likely to be fair.

175. The Employment Appeal Tribunal considered this area of law in **DB Shenker Rail (UK) Limited –v- Doolan [UKEATS/0053/09/BI**). In that case the Employment Appeal Tribunal indicated that the three-stage analysis appropriate in cases of misconduct dismissals (which is derived from **British Home Stores Limited –v- Burchell [1978] IRLR 379**) is applicable in these cases. The Court of Session in decided **BS v Dundee City Council [2014] IRLR 131** in which at dismissal the employee had been off sick for about 12 months (after 35 years' service) with a sick note for a further four weeks. The Court reviewed the earlier authorities and said (at paragraph 27):

> "Three important themes emerge from the decisions in **Spencer and Daubney**. First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasize, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered."

176. The significance of the cause of the incapacity was considered in a number of cases which culminated in the decision of the Court of Appeal in **McAdie –v- Royal Bank of Scotland** [2008] ICR 1087. The Employment Tribunal found as a fact that the claimant in that case had been suffering from a severe adjustment disorder caused by treatment in the work place including harassment. In giving the judgment of the Court Wall L J reviewed a number of previous decisions in paragraph 36 onwards, and expressed himself to be in complete agreement with what had been said by the EAT in **McAdie** which was as follows:-

> "it seems to us that there must be cases where the fact that the employer is in one sense or another responsible for an employee's incapacity is, as a matter of common sense and common fairness, relevant to whether, and if so when, it is reasonable to dismiss him for that incapacity. It may, for example, be necessary in such a case to "go the extra mile" in finding alternative employee for such an employee, or to put up with a longer period of sickness

absence than would otherwise be reasonable … thus it must be right that the fact that an employer has caused the incapacity in question, however culpably, cannot preclude him forever from effecting a fair dismissal. If it were otherwise, employers would in such cases be obliged to retain on their books indefinitely employees who were incapable of any useful work. Employees who have been injured as a result of a breach of duty by their employers are entitled to compensation in the ordinary courts, which in an appropriate case will include compensation for lost earnings and lost earning capacity: Tribunals must resist the temptation of being led by sympathy for the employee into including granting by way of compensation for unfair dismissal what is in truth an award of compensation for injury. We also agree with Morison P [a reference to **London and Fire Civil Defence Authority –v- Betty** [1994] IRLR 384] in sounding a note of caution about how often it would be necessary or appropriate for a Tribunal to undertake an enquiry into the employer's responsibility for the original illness or accident, at least where that is genuinely in issue: its concern will be with the reasonableness of the employer's conduct on the basis of what he reasonably knew or believed at the time of dismissal, and for that purpose a definite decision on culpability or causation may be unnecessary".

Discrimination arising from disability

177. The claimant put his case in part under Section 15 of the Equality Act 2010 which reads 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.

(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".

178. Paragraph 5.6 of the Equality and Human Rights Commission: Equality Act 2010 Code of Practice provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with than of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

179. In order for the claimant to succeed in his claims under section 15, the following must be made out:

a. there must be unfavourable treatment;
b. there must be something that arises in consequence of the claimant's disability;
c. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability;
d. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim

180. Useful guidance on the proper approach was provided by Mrs Justice Simler in the well-known case of **Pnaiser v NHS England** [2016] IRLR, Employment Appeal Tribunal:

> "A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
>
> The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it."

181. Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and the respondent's motive in acting as he or she did is simply irrelevant.

182. The Supreme Court considered this claim in **Williams v Trustees of Swansea University Pension and Assurance Scheme** [2018] IRLR 306 and confirmed that this claim raises two simple questions of fact: what was the relevant treatment and was it unfavourable to the claimant?' 'Unfavourably' must be given its normal meaning; it does not require comparison, it is not the same as 'detriment'. A claimant cannot succeed by arguing that treatment that is in fact favourable might have been even more favourable. The court confirmed that demonstrating unfavourable treatment is a relatively low hurdle.

183. In **Williams** the claimant was able to access his pension early due to illhealth and because of the pension rules. The claimant argued that he ought to be able to access an enhanced element (which was calculated on his final salary level). He said the reduced figure arose because it was calculated by reference to his part time and not full-time salary was unfavourable treatment (because it stemmed from his only being able to work part time, due to his disability). While he succeeded at the Employment Tribunal, this was over-turned by the Employment Appeal Tribunal and Court of Appeal.

184. The Supreme Court said that in dealing with a section 15 claim, the first requirement was to identify the treatment relied upon. In that case it was the award of a pension. There was nothing intrinsically unfavourable or disadvantageous about the pension on the facts of this case. On the facts the pension was only available to disabled employees (since the entitlement only arise upon permanent incapacity). While that could be less favourable than someone with a different disability, who may have worked more hours upon cessation of employment, no comparison was needed for the purposes of section 15. The claim failed. The Court emphasised that unfavourable treatment meant what it says and was not a high hurdle to surmount.

185. The Equality and Human Rights Commission Code of Practice contains some provisions of relevance to the question of justification. Paragraph 5.2.1 of the Code suggests that if a respondent has failed to make a reasonable

adjustment it will be very difficult for it to show that its unfavourable treatment of the claimant is justified. As to justification, in paragraph 4.27 the code considers the phrase "a proportionate means of achieving a legitimate aim" (albeit it in the context of justification of indirect discrimination) and suggested that the question should be approached in two stages:-

* is the aim legal and non discriminatory, and one that represents a real, objective consideration?

* if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances

186. As to that second question, the code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. It goes on to say the following at paragraph 4.31:-

> "although not defined by the Act, the term "proportionate" is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. But "necessary" does not mean that the [unfavourable treatment] is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."

187. Also of note is that in paragraph 19.9 of the Code of Practice it is made clear that:-

> "where an employer is considering the dismissal of a disabled worker for a reason relating to that worker's capability or their conduct, they must consider whether any reasonable adjustments need to be made to the performance management or dismissal process which would help improve the performance of the worker or whether they could transfer the worker to a suitable alternative role".

188. The Code at paragraph 4.26 states that:

> "it is for the employer to justify the provision, criterion or practice. So it is up to the employer to produce evidence to support their assertion that it is justified. Generalisations will not be sufficient to provide justification. It is not necessary for that justification to have been fully set out at the time the provision ration or practice was applied. If challenged, the employer can set out the justification to the Employment Tribunal."

189. In **Chief Constable v Homer** 2012 ICR 704 Baroness Hale stated that to be proportionate a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so. She approved earlier authorities which emphasised the objective must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. It is necessary to weigh the need against the seriousness of the detriment.

190. In **O'Brien v Bolton St Catherine's Academy** [2017] IRLR 547 a case relating to a dismissal because of long-term sickness absence the Court of Appeal held that, when considering whether dismissal was justified the following should be considered:

1. the decision to dismiss should be assessed as at the date of any internal appeal decision (so that any new evidence that has come to light since the original decision to dismiss should be taken into account)
2. the impact of the absence on the employer will be a significant factor in whether dismissal is a proportionate response
3. if the impact of the absence on the employer is obviously very severe then a general statement to that effect may be all that is required. If it is not, then more detailed evidence should be produced
4. ultimately employers are entitled to some finality. That is all the more so where the employee has not been as co-operative as the employer is entitled to expect about providing an up-to-date prognosis and where the evidence relied on is produced late in the day and is not entirely satisfactory

191. The question is whether the action is, objectively assessed, a proportionate means to achieve a legitimate end. The employer has to show (and the onus is on the employer to show) that the treatment is a proportionate means of achieving a legitimate aim. The Tribunal can take account of the reasonable needs of the respondent’s business but the Tribunal must make its own judgment as to whether the measure is reasonably necessary. There is no room for the range of reasonable response test.

192. The Tribunal is required to critically evaluate, in other words intensely analyse, the justification set out by the employer. The assessment is at the time the measure is applied and on the basis of information known at the time (even if the employer did not specifically advert to the justification position at that point). Flaws in the employer’s decision-making process are irrelevant since what matters is the outcome and now how the decision is made.

193. There must firstly be a legitimate aim being pursued (which corresponds to a real need of the respondent), the measure musty be capable of achieving that aim (ie it needs to be appropriate and reasonably necessary to achieve the aim and actually contribute to pursuit of the aim) and finally it must be proportionate. The discriminatory effect needs to be balanced against the legitimate aim considering the qualitative and quantitative effect and whether any lesser form of action could achieve the legitimate aim.

Statutory defence

194. There is a statutory defence set out in Schedule 22(1) of the Equality Act 2010 which states that a person does not breach the Equality Act 2010 if the respondent must carry out a requirement pursuant to an enactment.

Submissions

195. Both parties produced detailed written submissions which were supplemented by oral submissions. The Tribunal took a considerable amount of time to consider these at length.

Claimant's submissions

196. The claimant's counsel submitted detailed written submissions which raised a number of points.

197. Firstly, it was argued that the respondent had failed to independently investigate the cause of the absence from 20 July, which stemmed from the reversal of the camp decision and that the dismissing officer should have asked more as to why the claimant said his place of work was "a horrible place to be". Had this been done it was submitted mediation or a move would have been offered. Any investigation into the events in July would have found the respondent to be at fault.

198. Secondly, the respondent unfairly assumed the claimant did not want to return to work. He had suffered a genuine breakdown, changed his medication and shown he was keen to return to work, such as by seeking a lesser fit note absence and by taking steps to get fit and even returning to work too soon. The respondent overlooked the impact of the claimant's mental health as found by the civil service board.

199. Thirdly, the respondent failed to give the claimant enough time to complete his therapy session and get used to his new medication. The claimant had only been off for around 3 months (or 5 months if the previous absence is linked) by the date of dismissal.

200. Fourthly, up to date medical evidence should have been sought and a prognosis obtained and it was unfair to ask the claimant for a return date, when this was a medical matter.

201. Fifthly, the process should have been paused pending the outcome of the injury benefit application. The absence management process makes it clear that no warning should be issued during the first 6 months where there was a qualifying injury. That was ignored.

202. Sixthly, the respondent failed to consider alternatives to dismissal such as working from home and working in a different department. There was insufficient heed given to the occupation health report and no reference to the priority movers policy.

203. With regard to justification it was submitted that there was no data or evidence, simply generalisations from the respondent. There was no evidence of any targets having been missed and the claimant was the only individual within Ms William's team who was on long term absence (the others being intermitted short term absence).

204. It was argued that the reasons for the reduction in compensation did not stand up to scrutiny. The claimant had difficulty completing the HR Stress 1 form. As the civil service board found, the claimant was largely not in control of events at the time of dismissal. The reduction was not justified given the only criterion Ms Williams marked the clamant down was his allegedly not having a positive attitude, full commitment to work and a return to work.

205. It was argued that the case law shows that the employer's responsibility for an employee's absence is a relevant factor when looking at the fairness of dismissal. In this case the respondent was significantly responsible for the claimant's absence.

206. The decision to dismiss and reduce compensation was unlawful disability discrimination.

207. With regard to the claim for unfair dismissal, there was no attempt to re-integrate the claimant back into work, nor to independently investigate the issues that led to his breakdown and absence or to find the claimant a suitable alternative role.

208. The claimant's counsel supplemented his detailed written submissions orally. He noted that there was little by way of facts in dispute given the agreed chronology. There were 2 distinct absences latterly, namely the absence because of diverticulitis from 29 May to 15 July and then the absence because of depression from 20 July. He argued that there was nothing to suggest the claimant was a malingerer or that his absences were anything other than genuine.

209. Counsel argued that if the absence was due to injury or disease at work different considerations and a different philosophy applies. This, it was submitted, was what the respondent itself acknowledges given the qualifying injuries situation. The circumstances are different where there is a qualifying injury. In those situations one does not move through the warning procedure during the first 6 months. It was submitted that on the face of the respondent's own procedures, they cannot issue a warning if the trigger points are met.

210. With regard to proportionality, the impact on the individual needs to be weighed against the impact of the warning. Losing one's job can be catastrophic.

211. Counsel argued that the HR Stress1 form should have been completed. Evidence should have been obtained and somebody other than the line manager investigate and take statements. Had that happened, it is almost inevitable that Ms Williams and Ms Lucas would be seen as in part causing the claimant's mental breakdown.

212. Had a proper investigation been undertaken, the suffering of the claimant would have been clear. It ought to have been obvious that the claimant would struggle returning to the workplace he suffered a breakdown. There was a lack of consideration as to alternative options.

213. The occupational health report of 9 August is important. The respondent says the key part is that it says no further reasonable adjustments are required. Yet the document does make it clear the claimant would prefer to be moved to a different department preferably permanently This should have been checked. The dismissing and appeal officers knew the claimant wanted a move.

214. The claimant had been on 3 different types of medication and had only just started the next course. He still had 3 sessions of therapy left. The occupational health report is almost 3 months old when dismissal is decided upon. By the appeal date it is 4.5 months old. It was unreasonable not to secure another medical opinion

215. Another issue relied upon was the length of absence. At the time of dismissal, the claimant had only 3 months 13 days absence (by reason of his depressive illness). By the termination date he had 5 month and 9 days. This is quite a short period for someone to be dismissed when suffering absence arising from disability.

216. The evidence was that if the absence had not been for depression, he would have stayed on a 1st warning or moved to a final warning. She would not have referred for dismissal. When one looks at causation and why dismissal was considered, disability related absence can be isolated. In reality when asking why the claimant was dismissed, it was clear he was dismissed for absence less than 6 months in length.

217. As to objective justification, it is for the employer to justify the treatment. Generalisations are not sufficient. The respondent relies upon impact on business and alleged impact on customer service with the mantra that business could not sustain the absence any longer but there was no actual evidence, just assumptions. There were no others on long term absence albeit some were on short absence. It was suggested that customers wait longer because of the absence but there was no evidence on the actual real impact. No evidence of any missed targets.

218. As to the statutory compensation part of the claim, there were 4 explanations.

219. Firstly, the lack of responsiveness. There were good reasons why the claimant did not make himself available to answer calls. He was often sleeping. There was nothing to show the claimant did not get back in a timely manner to Ms Williams.

220. Secondly, the suggestion as to delayed return of risk assessment and forms. The claimant was not sure how to complete the stress reduction plan and was having difficulty completing the other form due to his mental health issues.

221. The other 2 reasons pertain to days in July and the impact on the team. Reference was made to banging doors. The evidence shows a

deterioration in the claimant's behaviour and mental health. Turning up late and tearfulness was because of the claimant's disability.

222. In short, the reasons for reducing compensation are all matters that arise from the claimant's disability. There was no evidence to justify a reduction from 100%.

Respondent's submissions

223. Counsel for the respondent provided detailed written submissions. The submission began by summarising the absence:

a. By 8 December 2016 the claimant had 14 days absence in 3 periods. This would ordinarily have resulted in a written improvement warning.
b. There was a further 69 days absence by reason of stress until 3 July 2017 which resulted in the clamant moving roles and being given a written improvement warning.
c. There were a further 3 absences totalling 10 days from September 2017 to May 2018 which would have resulted in a final written warning had the clamant not gone ill again on 29 May 2018.
d. From 29 May 2018 until 16 July 2018 the claimant had 34 days absence because of diverticulitis.
e. From 19 July until his dismissal on 28 December 2018 the claimant was absent by reason of stress (and would at least have been given a final written warning had he been at work).

224. Counsel argued that it was conceded that by December 2018 the claimant had a disability that satisfied the definition within the Equality Act 2010 as it was clear his impairment was long term. The earliest knowledge could be ascribed to the respondent was on 9 August 2018 by the occupational health report. Those reports in January and March 2017 suggested the claimant did not satisfy the definition.

225. With regard to the claim for unfair dismissal, by the date of dismissal the claimant had been absent continuously for 100 days (which had followed other short term intermittent absences). The claimant had almost been absent for a full calendar year. As at the date of dismissal there was no prospect of an imminent return to work.

226. With regard to the argument about medical evidence, counsel for the respondent argued that there was no need for further medical input. Occupational health reports had been obtained in January and March 2017 and on 9 August 2018. These did not recommend a follow up report and the attendance management policy required a report within the last 3 months, which happened in this case. There was nothing within any fit note that suggested there would be an imminent return to work or further adjustments were needed. The claimant in fact told the decision makers that he was not fit to return to work in any capacity and there were no other reasonable adjustments. There was no new information which suggested the August 2018 report should be updated. The claimant was in fact unfit to return to work in any capacity until March 2019.

227. With regard to the argument that no warnings were issued, the claimant was given a first warning on 21 April 2017. He would have received a final warning had he been at work on 29 May 2018. Counsel argued that there was nor requirement to issue a final warning where there was continuous absence (absence lasting more than 14 consecutive days) and where the decision maker was satisfied there would be no return within a reasonable period of time. The claimant's absence was clearly continuous whether linked to the previous absence or not.

228. With regard to the argument the respondent ought to have awaited the outcome of the injury benefit application, counsel noted that where there is a continuous absence no warnings are needed. In any event the criteria for satisfying qualifying benefit are subjective. The claimant could be entitled to a qualifying injury even if objectively unreasonable which happened in this case once the respondent was entitled to refuse the claimant paid leave given he was just back from a 34 day absence and was not fit to return full time.

229. Counsel argued that even if the respondent was responsible for the claimant's absence (which was denied) it was still possible to fairly dismiss as the question was one of reasonableness. The entitlement to a qualifying injury award 6 months after the dismissal could not affect the fairness of the dismissal. The application was only submitted on 14 December 2018, the delays being the fault of the claimant and his union.

230. With regard to the discrimination claim, only the last period of absence was related to a disability. As the "something" comprised all absences from January 2016 (and the absence from December 2016 was not related to a disability as defined within the Act), it was for the Tribunal to assess if the "something" arose as a consequence of the disability.

231. Counsel argued there were 3 legitimate aims:

a. The maintenance of a fair effective and transparent sickness management regime
b. The efficient use of resources and
c. The need to ensure proper standards of service are protected

232. It was argued that these were proportionally applied for the following reasons:

a. The claimant had 245 days absence over 23 periods from January 2016 to December 2018 for different reasons, continuous and intermitted and most were unrelated to disability.
b. The absence was unpredictable making it difficult to plan and accommodate.
c. Resources were used up in managing the claimant's absence, including in paying sick pay and the impact upon service delivery.
d. On several occasions the respondent disapplied the policy and accommodated the claimant (and on 3 occasions the claimant was due to receive a warning but did not due to absence).

e. There were repeated failures by the claimant to return to work on dates suggested and prognosis at the October and December meetings were poor and there was an inability to give a return to work date despite having competed counselling and have tried several different medications.
f. The claimant accepted there were no reasonable adjustments that the respondent had failed to implement.
g. The final absence was for worked related stress but there was no adjustment that would have achieved a return to work.
h. The respondent was not culpable for the claimant's health issues as the respondent was entitled to refuse leave and the claimant was aggressive and unreasonable (and apologised). No grievance or complaint was raised by the claimant against Ms Williams and he continued to speak with her. There was no medical evidence to support any connection between the July incident and the claimant's illness.

233. With regard to the issues not pled, the first was the alleged culpability of the respondent for the claimant's impairment. This was not relevant and detracts from his absence record. There was no obligation requiring the respondent to allow him to go given his recent 34 day absence, phased return to work and scheduled operation within a few weeks. Ms Williams was scared because of the claimant's conduct at work. The claimant accepted in cross examination that his only criticism of Ms Williams was her refusal of his special leave and nothing else.

234. Counsel for the respondent also noted that the claimant accepted that his absence from 19 July 2019 was also triggered by personal issues in his life.

235. The second issue not pled was that the respondent failed to consider alternative roles. At the point of dismissal, the claimant was not fit to work in any capacity and there was no evidence a move to any other department would facilitate a return to work. The claimant accepted that he would not have returned to work even if a new role was offered to him. It was not reasonable to move the claimant from Personal Tax Operations because:

a. He had already been moved once in April 2017 from another department to deal with work related issues.
b. The claimant had expressly said he was happy with the reasonable adjustments put in place and was content with his role. He was absent from work for other reasons.
c. There was no medical report suggesting another role would make a difference. It was the claimant's preference but no fit note or GP or other medical expert recommended any role change.
d. Mr Khan had explained in his witness statement why a change would not be practicable, essentially that there were no suitable roles and the roles are materially different

236. Wirth regard to **Polkey**, counsel for the respondent argued that waiting longer before dismissing would have made no difference whatsoever. The claimant was unfit for any work and signed unfit until March 2019 and

even then he only worked on a part time basis. By February 2019 the claimant would have been absent for 7 or 9 months (depending on whether you link the absences) which would allow (even on the claimant's argument) warnings/dismissal. The claimant would have been dismissed in any event. Finally, any investigation into the July incident would have found the claimant to have been solely at fault.

237. He argued the compensation scheme payment did not give rise to any unfavourable treatment since the treatment is the award of compensation. Most if not all beneficiaries of compensation are disabled persons. The claimant would not have been eligible if he were not disabled. It was not unfavourable treatment not to get a higher sum per **Williams**.

238. The reasons for reducing the payment were not, in any event, disability related – failure to keep in touch (due to mobile signal), delay in completing the forms (due to the claimant delaying his submission), late attendance and disruptive behaviour (all at a time the claimant was not absent due to the mental impairment). There were multiple failures by the claimant to keep in touch. He could prepare lengthy documents as needed, evidenced by his long appeal document and he was represented by a trade union throughout.

239. With regard to justification, the respondent was entitled to cooperation by staff which failing compensation should be reduced. The aim is the administration of a fair efficient and effective compensation scheme which incentivise employees to improve attendance and cooperate to remain in employment. The requirements were proportionately applied by expecting certain appropriate behaviours which cannot be excused, even if in part disability related.

240. Finally, counsel referred to schedule 22 paragraph 1 of the Equality Act 2010 which prevents a complete defence if discrimination is required by law, which he submitted the scheme was.

241. Counsel for the respondent also supplemented his written submissions orally. The claimant had 245 days absence over 23 separate periods. By 8 December there were 14 days absence over 3 separate periods. This would have resulted in a warning but the claimant is off sick again. There was a 69 day continual period of absence when the claimant returns in march 2017

242. During the sustained improvement period from October 2017 to 2018 there are 3 further absences and 10 days sickness. Another invite meeting would have led to a final warning but again the claimant is off work on 29 May 2018 by way of a continual absence for diverticulitis to 16 July, for 34 days. There is then another period continually to 28 December.

243. Counsel submitted that the respondent's policy requires these 2 periods to be put together and they were. The claimant himself asked that they be put together.

244. Counsel argued that the claimant is relying on a number of matters not pleaded to argue his dismissal is unfair. Nevertheless he dealt with each of the issues.

245. With regard to the pleaded issues, the issues were the failure get further medical evidence, no written improvement warning and the applications. There was no requirement to obtain further medical evidence. The reports in January, March and 9 August and supplemental report 21 August were sufficient. The report did not recommend a follow up and said the claimant would be back to work in 2 to 4 weeks.

246. The policy does not require it and the fit notes suggested no return to work and no possible adjustments. The claimant had indicated that he was not fit to attend in any capacity. In light of that it was argued that there was no contractual or policy requirement or fairness requirement to obtain further medical input.

247. The claimant was incapable of any work at all until at least March 2019.

248. With regard to the argument that he did not receive a final written improvement warning, it was clear from the facts, it was argued, that every time a warning is about to be issued, the claimant goes off sick again. This was seen on 21 April and 29 May 2018. A final warning had been planned but was postponed due to illness.

249. The reason why no final warning was issued was due to the claimant's frequent absence. In any event there is no requirement to issue a final written warning. Continuous absence is not continued absence. The policy requires satisfaction that the individual is not likely to return. Whether one looks at May or July 2018 or links previous absence it is still continuous. Under the policy it is clear that a warning is not needed because the claimant is on continuous absence. There would be no point issuing a warning for someone on continuous absence. Warnings are for shorter intermittent periods.

250. With regard to the qualifying injury, the claimant satisfied the conditions based upon his subjective view as to how he was treated.

251. The respondent was also entitled to refuse the claimant time off for volunteering. He had 34 days sickness absence and was not fit to return to full time work. It was submitted that the suggestion that the respondent was obligated to seek medical evidence at its own expense to determine if the claimant should be allowed paid leave which is entirely discretionary is absurd. If the claimant was right, there could be no dismissal for 6 months which is perverse.

252. Finally, as the injury entitlement was only authorised in May 2019, many months after dismissal, it can have no bearing on the fairness of the dismissal.

253. With regard to the points not pleaded, the claimant argued that the respondent was culpable for the claimant's depressive condition and that rendered dismissal disproportionate and as such it was unfair. Counsel submitted that this is not an issue that requires to be considered by the Tribunal. But even if so, it was clearly the claimant who was responsible for what occurred on 15 to 19 July.

254. The respondent was correct not to allow the claimant to go to camp. He was ill and on a phased return to work. He was due to be away from work for a colonoscopy. Further, his conduct on 16 to 19 July was "outrageous". The claimant apologised for his behaviour. He had said he would resign. It was a "petulant reaction" to being refused his request. He does not lodge any grievance or argue that his line manager should change.

255. The second area of the claim that was not foreshadowed was the suggestion that dismissal was disproportionate because something else could done, namely move out of the area of the business or allow homeworking. Tis is fallacious because the claimant is unfit to return to work on 15 July in any capacity whatsoever. There is no evidence a move to a new department would facilitate a return to work, same for home working. It is not reasonable nor practicable so to do.

256. With regard to the scheme claim, the treatment is not unfavourable, there is no causation and any treatment is justified. **Williams** shows why the treatment is not unfavourable. Just because if could be more favourable does not mean it was unfavourable. This case is on all fours with **Williams**.

257. There is also no causation since none of the grounds to reduce the award is disability related: Failure to keep in touch, delay in returning the form and lateness.

258. One of the reasons was his failure to keep in touch which was due to mobile signal. That is nothing to do with disability. There were times when the claimant comes back from his GP and promises to keep the respondent updated and doesn't. He is physically capable to go to the GP but apparently not to call or text the respondent. The keeping in touch days are significant because they follow on from the expiry of the fit notes.

259. There is no medical evidence to say the failure is disability related. It is not even health related, such as failures to complete the form. The claimant has the benefit of a representative and can complete long documents, such as his 13 page appeal document.

260. The statutory defence was not pleaded but counsel wished to continue with it. It arises under Schedule 22 of the Equality Act 2010.

261. With regard to justification, there is no requirement to produce data. The impact on the business is obvious - full sick pay, management time and impact on service delivery. The claimant's absence must have impacted on the business, else he did not add any value when present. It is open to the

Tribunal to infer the fact absence will impact on service since the post needs to be backfilled or the remaining team take the strain. It is permissible to start with the proposition that the claimant adds value and if not there it has an impact. Underhill LJ in **O'Brien** said often the impact is obvious

The claimant's response

262. The 25 June 2018 meeting with Ms Williams was referred to because that is when she says the claimant is told he could not go to camp. She said she said "no for the moment. It is not a firm decision there was therefore a clear distinction between 25 June and 16 July meeting. Why would the claimant ask again on 16 July if a final decision had been made? It is not open to the respondent to say the claimant did not have a breakdown on 19 July given the witness admissions.

263. The medical evidence by Dr Griffen shows that there was a direct causative link between the event and the absence. In his view the claimant was correct in his belief.

264. Counsel for the claimant was content to deal with the argument that the respondent had a statutory defence even although this had not been pleaded. He did not seek further time to consider his position. He argued that the claimant is prejudiced by allowing the argument but did not seek to delay matter by being given further time to consider. He argued one issue is whether or not the scheme was incorporated contractually as well as statutory which would require evidence. Witness evidence was concluded.

265. Having researched the matter briefly, the question is whether the employer had a choice to discriminate. In this case the respondent did. It could offer 100% or some other sum. There was a discretion and the respondent chose to discriminate, It was not under any statutory obligation to do so and so the statutory defence was not made out.

266. With regard to **Polkey**, **Andrews v Software** makes it clear that the Tribunal should use common sense and experience and a sense of justice. It is incumbent on the employer to adduce relevant evidence. The claimant's evidence is that from 3 March he was able to return to work and worked as cashier in a supermarket. There was no evidence that the claimant could not resume regular and effective service in due course. On the contrary the evidence shows in a few months he would have. There should therefore be no reduction in compensation.

Discussion and decision

267. The Tribunal considered the evidence, submissions and productions in great detail. It has taken time to do so given the complexity of the issues and we have sought to set out our reasoning below in a proportionate way and considered each point raised by both parties in their oral and written submissions very carefully. The Tribunal reached a unanimous decision on each of the issues. We shall deal with each of the claims in turn.

Unfair dismissal

The principal reason

268. The reason for the dismissal was the set of facts or beliefs held by the respondent that led to the dismissal of the claimant. In this case the set of facts or beliefs that led to dismissal was the claimant's capability assessed by reference to the claimant's health. Both the dismissing and appeals officers believed the claimant (by his own admission) was unfit to work and, in their view, there was no reasonable date of return to fitness and work.

269. The claimant was therefore dismissed by reason of capability, which was a potentially fair reason for dismissal. The next issue is whether the respondent dismissed the claimant fairly for that reason in all the circumstances.

Was the dismissal fair or unfair in all the circumstances

270. We require to consider a number of issues under this head: whether the respondent genuinely believed the claimant was incapable, whether that was honestly held, whether the investigation that led to that belief was reasonable and whether dismissal was a sanction that falls within the range of responses open to a reasonable employer in all the circumstances.

Genuine belief claimant was incapable

271. We considered the evidence from the dismissing and appeal officers carefully. They did not think there was any prospect of an imminent return to work by reason of the claimant's health. We are satisfied the respondent genuinely believed the claimant was incapable.

Was that belief honestly held

272. We also assessed whether or not the respondent's belief in the capability of the claimant was honestly held. That was satisfied in this case.

Reasonable investigation/process?

273. The key question is whether the respondent carried out a reasonable investigation or procedure in all the circumstances before choosing to dismiss the claimant because of his capability.

274. In determining whether the investigation was reasonable, we must avoid deciding what we would do and avoid applying a counsel of perfection. Instead we consider whether what the respondent did in the circumstances was reasonable, taking account of size, resources, equity and the merits. Did it fall within the range of responses open to a reasonable employer?

275. We begin our analysis of this part of the statutory test by considering the challenges levelled by the claimant in relation to the process or procedure that led to the dismissal.

Failure to independently investigate the cause of the absence from 20 July

276. While this was not part of the dismissal process *per se*, the question is whether the respondent's failure to carry out an independent investigation into the events in July resulted in the dismissal being unfair.

277. We carefully considered the evidence of both the dismissing and appeal officers. These individuals took account of the claimant's position. They knew, for example, that he maintained he had suffered a breakdown in July. They knew that the claimant was of the view that the treatment of his managers led to his breakdown and was a reason for his absence.

278. The dismissing officer was asked about this and was of the view that even if the absence had been shown to be the respondent's fault, the level of absence and prognosis was such that he would still have dismissed.

279. At the time of dismissal, the only issue the claimant raised was the reversal of the decision to allow him to go to camp.

280. We preferred the respondent's submissions with regard to this issue. While some employers would undoubtedly have investigated the cause of the absence in the way submitted by the claimant, we are satisfied that an equally reasonable employer could have acted as the respondent did in this case. While some employers may have investigated the matter prior to dismissing, the approach taken by the respondent in this case was reasonable. Both the dismissing and appeals officers took account of the claimant's perspective in relation to the reason for absence. They balanced what he said with the position advanced by his manager.

281. Both individuals knew that the claimant believed that his breakdown had been caused by the respondent's actions in July. Both considered whether it was reasonable to wait any longer before choosing to dismiss and were satisfied that in all the circumstances it was appropriate to dismiss at that juncture. We do not consider in all the circumstances that these decisions were unreasonable. A reasonable employer in all the circumstances would have so acted. The failure to investigate the cause of the claimant's absence did not render the procedure unfair or unreasonable.

282. The claimant made his view of the respondent clear during his dismissal and appeal meetings. While some employers may well have gone further and sought out more information, the conclusions reached by the dismissal and appeal officer were not unreasonable. The investigation carried out fell within the range of responses open to a reasonable employer.

Assuming the claimant did not want to return to work.

283. We carefully considered the evidence of both the dismissing and appeal officers in this regard. They concluded that the claimant did not want to return to work. It was accepted that there were a number of factors that suggested the claimant did wish to return, such as seeking to improve his fitness, seeking a one month fit note rather than a two month fit note. But equally the claimant accepted he made unfavourable remarks about the

respondent (which he conceded, with the benefit of hindsight, had gone too far).

284. Both the dismissing and appeal officers knew of the facts upon which the claimant relies and of the claimant's position. They knew about his mental impairment and associated health issues. They took this information into account. On the evidence before both the dismissing and appeal officers they did not act unreasonably and they reached a conclusion open to a reasonable employer in all the circumstances with regard to this issue.

Failure to give the claimant enough time to complete his therapy sessions and get used to his new medication.

285. Both the dismissing and appeal officers considered that they had waited long enough given the facts before them. By the appeal stage the claimant had completed his counselling sessions. He had changed his medication again. The claimant himself accepted that he did not know when he would be fit to return to work. The occupational health report from August had suggested the claimant could be fit once he had completed his medication and sessions. That had not happened within the timescale recommended in August. It had also not happened within the timescales suggested in October. The respondent did not act unreasonably by concluding it was unlikely to happen again in December.

286. The claimant had already been given a number of months to return to fitness. Both the dismissing and appeal officers looked at the entire absence period and assessed the likelihood of a return within a reasonable period of time. There was no suggestion that the claimant was likely to change his position.

287. While a reasonable employer may well have waited given the further change to the claimant's medication to see whether this would work on this occasion, an equally reasonable employer in our view could choose not to wait further given the facts before the respondent. They had waited a reasonable period of time and their actions in this regard were reasonable.

Failure to obtain up to date medical evidence and asking the claimant for a return date

288. These were 2 related points in that the claimant was arguing it was unfair not to obtain more up to date medical evidence before dismissing and asking the claimant for a likely return date rather than getting medical input.

289. In terms of the respondent's policy, dismissal is a potential outcome were there is no reasonable return to work date. In this case the claimant's position was essentially the same as it had been in August. It was the same in December as it had been in October. The claimant was unfit to attend work by his own admission and he did not know when he would be fit to return to work. He accepted that there were no adjustments that would secure a return to work at that time.

290. The medical evidence obtained by the respondent had set out the position clearly in October. The claimant's fit notes made it clear subsequent to that date, together with the claimant's own position which he advanced at the time, that the

claimant was not fit to return to work and the prognosis had not changed. He accepted there were no reasonable adjustments that would have facilitated his return to work at that time. The claimant had indicated a preference to work elsewhere but that was not, as such, a reasonable adjustment (and nor was such a claim presented to the Tribunal).

291. Ultimately again while a reasonable employer may well have sought an up to date medical report, an equally reasonable employer in our view could have done what the respondent did in this case. The respondent acted on the information it had before it. There was no suggestion that a further medical report would add anything of substance. The respondent had all the information it needed to make a decision. It acted reasonably in this regard.

292. We also considered that the respondent acted reasonably in looking for an indication of a potential return to work date from the claimant. This was in accordance with the respondent's policies. It was clear that there was no prospect at the date of dismissal of a return to work in the short to medium term. The claimant's position remained as it had been in July which was indeterminate. While some employers might have sought medical input, we considered that an equally reasonable employer could do as the respondent did given the information before it. Taking account of the size, resources, equity and merits, the respondent acted reasonably in their approach.

Warnings

293. We also accept the respondent's submissions with regard to the claimant's suggestion that a warning ought to have been issued prior to dismissal. The claimant was issued with a first warning in April 2017. Ms Williams believed she could not issue a final warning when the claimant was absent, which had occurred on a number of occasions when meetings had been convened to consider next steps.

294. We carefully considered the terms of the respondent's policies in this regard. We prefer the respondent's interpretation of the policy and are of the view that there is no requirement to issue warnings (prior to dismissal) in cases of continuous absence. The question is whether the respondent is satisfied the individual is likely to return within a reasonable period of time. Issuing a warning is of no consequence in these types of cases. Whether or not the claimant's absences are linked, it is clear, as the appeal officer opined, that the claimant's absence was continuous.

295. The purpose of managing attendance processes are to enable staff to attend work, or to return to work from absence, and to support them in those circumstances; and to minimise the disruption to the business of staff absence in general. The respondent was entitled to consider dismissal given the claimant's absence, in our judgment, because ill health is a matter which is outwith the control of an employee, and therefore setting a target to avoid ill health, in effect, requires an employee to do something over which he has no control. This confuses an absence management process, in which absences are calculated and monitored in the way the respondent did in this case, with some form of disciplinary warning process, which cautions an employee not to behave in a particular way by warning of sanctions to be applied.

296. The respondent's actions were reasonable in this regard and their failure to issue any further warnings was not unreasonable.

Failure to pause the process pending the outcome of the injury benefit application.

297. As the dismissing officer was not aware of the application, it would not have been reasonable to have paused the dismissal meeting for that reason. The claimant did not ask that it be paused. The position in relation to the appeal is different, however, given the appeal officer was aware of the application and the claimant (and his union) had asked they defer making a decision on the appeal until the application had been determined.

298. The appeals officer took advice and as there was no outcome of the application and it was not clear when that would be, she decided to proceed to make a decision based on the information she had.

299. We carefully considered the parties' submissions and prefer the respondent's submissions in this regard.

300. There was no prohibition in proceeding with the making of a decision pending an application and while one employer may choose to hold off making a decision we did not consider that the proceeding in the way the respondent did was unreasonable.

301. The respondent acted reasonably in all the circumstances.

302. By the time of the appeal hearing, even applying the claimant's interpretation of the policy, the respondent would have been entitled to proceed with action given the decision was taken 6 months after the relevant date but we did not consider the policy to prohibit the taking of action in respect of long term absence even where there is a qualifying injury. Ultimately the question is whether the respondent acted reasonably in all the circumstances and having carefully considered the evidence in this case and equity and the substantial merits, we concluded that the respondent acted fairly and reasonably.

Failure to consider alternatives to dismissal such as working from home and working in a different department.

303. The Tribunal was satisfied that the respondent did fairly and reasonably consider alternatives to dismissal. Both the dismissing and appeal officer considered this issue and reached conclusions that were reasonable in the circumstances.

304. The claimant had apologised for his actions in July and continued to liase with Ms Williams. There was no suggestion that he was unable to work with her (and he accepted that his issue was the reversal of the camp decision not with her personally as such).

305. The critical issue was that the claimant accepted he was and remained unfit to work at both the dismissal and appeal meetings. He candidly accepted that even if any alternatives were offered he would not have returned to work since he was unfit to work. There was no medical support for a move and the

claimant expressed the move as a preference. The fit notes submitted by the claimant also supported the respondent's position in this regard.

306. The priority movers policy requires a specific vacancy to exist before it applies and there was no suggestion that the claimant had a specific vacancy in mind at the time. Both the dismissing and appeal officers were of the view that the claimant was unfit to work and as such there was no point looking at alternatives at that juncture. Had there been a suggestion that the claimant was fit, the position may have been different. We considered the respondent's approach to be reasonable in all the circumstances in this regard. We also accepted Mr Khan's evidence with regard to alternative roles.

307. The respondent believed that they had supported the claimant for a considerable period of time. The evidence before them was clear. The claimant's position was that he remained unfit and he was not sure when the position would change. The decision not to consider other alternatives was not unreasonable in the circumstances of this case.

308. In our view the respondent did not act unreasonably in its approach to re-integrating the claimant back into work. He was clear that he was unfit to return to work. That position had not changed and was supported by all the information in the respondent's possession. It was not unreasonable for the respondent not to take further steps in seeking an alternative role. While some employers might have done so, an equally reasonable employer could have acted as the respondent did in our view.

Did the decision to dismiss fall within the range of reasonable responses – did the respondent go the extra mile

309. In addition to considering each of the claimant's challenges to the dismissal, we have taken a step back to consider whether in all the circumstances the respondent's dismissal of the claimant by reason of capability was fair in all the circumstances, taking account of size, administrative resources, equity and merits of the case

310. We considered the process of dismissal up to and including the conclusion of the appeal. We carefully assessed the information before the dismissing and appeal officer and the submissions of both parties, together with the productions to which our attention was directed. We also took into account the size of the respondent, its resources, equity and the substantial merits of this case. We also took into account the impact of dismissal upon the claimant, the loss of his career. We also considered the claimant's counsel's submissions in their entirety in considering this matter.

311. The approach taken by the respondent was not perfect but we have concluded that it was reasonable. The claimant had been given a reasonable period of time to improve his absence. The respondent did take account of the reasons for his absence. While an independent investigation was not carried out as to the reason for the breakdown the claimant said he suffered because of the work related issues, the respondent took account of the information that it had before it.

312. The dismissal and appeal officers reasonably considered all the information as to the claimant's absence, his position and the prognosis. The respondent had already delayed taking action and provided the claimant with further time. We considered that the respondent had "gone the extra mile" in the sense that they had given the claimant a number of months to return to fitness. The position in December had not changed and the outlook remained as it was in October. We took into account the periods of absence. The respondent's decision to dismiss in all the circumstances was reasonable.

313. There was no suggestion that anything the respondent could do would secure a return to work. The information before the respondent suggested an uncertain future. Given the time that had passed and the prevailing circumstances we concluded that the respondent acted fairly and reasonably in dismissing the claimant.

314. In reaching our decision we applied the authorities and legal tests set out above. We concluded that the respondent could not reasonably be expected to wait any longer given the facts. The respondent did consult the claimant who remained unable to provide a view as to a potential return. That is a significant factor. The respondent had taken steps to consider the claimant's health and had a reasonable understanding of the position. Nothing had materially changed since the occupational health report from August. It was not unreasonable for the respondent to conclude that they had waited long enough for a return to work given the facts of this case.

315. Applying the authorities and reasoning we have set out above we concluded that it was decision to dismiss fell within the range of responses open to a reasonable employer given the facts of this case. It was not reasonable for the respondent to wait any longer in all the circumstances.

316. Even if the respondent had caused, to any extent, the claimant's absence we are satisfied that the respondent did act reasonably in dismissing and had given the claimant a reasonable period of time to return to fitness.

317. The claimant was accordingly fairly dismissed, the respondent having acted fairly and reasonably in dismissing him by reason of capability in all the circumstances, taking account of the size of the respondent, the resources, equity and the substantial merits of the case.

Disability

318. It was conceded that the claimant was a disabled person from the date of dismissal by reason of anxiety and depression. While the respondent did not concede that the claimant was absent prior to August 2018 for the reasons set out below, we do not consider that to be material.

Discrimination arising out of disability – Section 15

Was the treatment by reason of something arising in consequence of disability

319. The first issue within the agreed list of issues was whether the treatment, his dismissal, was because of something that arose in consequence of his disability. The claimant was absent by reason of his disability which led to his dismissal. The absence from July 2018 was accepted as being because of the claimant's disability by the respondent. The claimant was dismissed because of his absence (which included specifically his absence from July onwards) and because he was not likely to be fit to return to work. That reason was, in our view, sufficiently connected to his disability such that the treatment, his dismissal, was by reason of his disability.

320. With regard to the compensation payment claim, the question is whether his sick leave (and absence thereby) was by reason of his disability. Looking at matters in the round we have concluded that his absence (which led to his dismissal by reason of capability and therefore his entitlement to the payment) was because of something arising in consequence of the claimant's disability. It was accepted that it was the claimant's final absence that led to his dismissal. That was because of his disability. While his previous absences may not have been related to his disability, it was his final absence that led to his dismissal and which we consider sufficient in the circumstances.

Was there unfavourable treatment

321. The second question within the agreed list of issues was whether the respondent treated the claimant unfavourably by dismissing him and by reducing his compensation payment. The parties agreed that the dismissal was unfavourable treatment.

322. With regard to reducing the compensation payment, the respondent argued that the Supreme Court's reasoning in **Williams** was applicable. Just as the pension payment in **Williams** was not found to be unfavourable treatment, it was argued that the compensation payment under the Scheme was not unfavourable treatment. We have considered the Supreme Court's judgment and the facts of this case and the respondent's submissions carefully. We do not accept the respondent's submissions in this regard.

323. We think the situation that applied in **Williams** is different to the current situation and the reasoning from the Supreme Court can be distinguished. The key distinctions in our view are (1) the fact that the entitlement in **Williams** (the pension) was only available to those who were permanently unable to work and were therefore disabled persons and (2) the rules as to entitlement to the benefit were the specific rules of the pension scheme in question.

324. In this case, entitlement to the compensation payment is to all persons who are dismissed by reason of capability. That would include disabled persons but also those who do not satisfy the legal definition of disability (who are dismissed because of capability).

325. The rules in our case differ from the position in **Williams** and the respondent has a discretion to determine whether to pay 100% or a lesser sum. The claim is that the respondent reduced the sum that would otherwise

be paid because of something arising in consequence of the claimant's disability. The treatment was the act of reducing the compensation by 50%. The exercise of the discretion is the treatment relied upon in this case. Reducing the compensation is clearly unfavourable treatment in our view.

326. Applying the test in **Williams**, the first question is what is the treatment (which in that case was the pension). The treatment in this case is the act of reducing the compensation payment. In **Williams** there was nothing intrinsically unfavourable or disadvantageous about the pension. We do not think that applies here since it is clearly intrinsically unfavourable or disadvantageous to reduce the compensation payment.

327. We take account too of the guidance in the Equality and Human Rights Code which states (at paragraph 5.7) that "unfavourably" means the person is put at a disadvantage and the Supreme Court's reasoning in **Williams** that the hurdle to establish unfavourable treatment is not high and is a question of fact determined in all the circumstances.

328. We therefore consider that the treatment of reducing the compensation was unfavourable treatment.

Was the unfavourable treatment because of the "something"

329. The next question is whether the respondent treated the claimant unfavourably in any of those ways because of something arising in consequence of his disability.

330. Given his dismissal was because of his absence and the latter absence period was disability related, this, in our view, is made out. We accept that earlier periods of absence were not disability related but the latter period was and it was the latter period which led to the dismissal. It was the claimant's case that it was his disability that led to his dismissal, since his disability (the mental impairment) led to his absence. The dismissal was, in our view, because of the absence.

331. The reasons given for reducing the compensation payment were not answering calls, delay in returning the forms, disruptive behaviour and turning up late.

332. From the facts we have found, the reason why the claimant was unable to answer calls and return calls was because (in part) the claimant was sleeping during the day, which arose because of his disability. On the facts the reason why the claimant had not returned all his manager's calls (which led, in part, to the reduction in the compensation payment) was because of the claimant's disability. We accept there were other reasons too, (which, as the respondent pointed out do not relate to something arising in consequence of the claimant's disability) but the claimant's disability was part of the reason.

333. We accepted the claimant's evidence that the delay in completing and returning the forms was partially due to his having difficulty completing the forms due to his mental health issues.

334. The reasons for reducing the compensation payment were (in part) because of something arising in consequence of the claimant’s disability. The claimant’s disability was not a minor part of the reasoning, it was *a* reason for the reduction.

Justification - dismissal

335. The final issue is whether the respondent showed that the unfavourable treatment was a proportionate means of achieving a legitimate aim, namely to ensure staff were capable of demonstrating satisfactory attendance and a good standard of attendance (which comprises the aims of the maintenance of a fair effective and transparent sickness management regime and efficient use of resources as set out in respondent counsel’s submissions) and to provide a good customer service (or as submitted by counsel for respondent in his submissions, the need to ensure proper standards of service are protected). The subsidiary aim was to apply the respondent’s policies fairly and consistently.

336. Firstly, we considered whether the aims relied upon were legitimate and we concluded that they were. Ensuring staff were capable of demonstrating satisfactory attendance and good standard of attendance, (including the maintenance of a fair, effective and transparent sickness management regime and efficient use of resources) providing good customer service and applying the respondent’s policies fairly and consistently were all aims that are legitimate.

337. The aims relied upon are legal and not discriminatory in themselves. They represent a real and objective consideration pertaining to the respondent. The aims were rationally connected to the dismissal. In other words, dismissal was potentially capable of achieving those aims.

338. The next question is whether the aims were proportionately achieved by dismissal. We considered each of the aims individually and carried out the requisite balancing exercise. We have taken account of the discriminatory effect of the treatment (the loss of the claimant’s job and career with the respondent) as against the respondent’s reasons for applying the aims, taking into account all the relevant facts.

339. We considered whether the aims could be achieved by less discriminatory means, such as by the issuing of a warning in this case.

340. The first aim was to ensure staff were capable of demonstrating satisfactory attendance and a good standard of attendance, which comprises the aims of the maintenance of a fair effective and transparent sickness management regime and efficient use of resources. We agree with the respondent’s counsel that these aims are interrelated and we will consider them together.

341. The claimant had been absent for a lengthy period of time. The respondent had issued a warning to the claimant in 2017 and had sought to keep in touch with him and secure his return to work. An important issue was whether or not a lesser form of sanction would have achieved the aim. We do

not consider that a warning in this case would have made any difference. The claimant knew that he was at risk of dismissal. The claimant was aware of the respondent's policies and trigger points. The respondent's policy was that dismissal was an option where a return to work was not reasonably likely.

342. We set out above why we considered a warning was not necessary in this case. We have also taken into account the claimant's absence and the likelihood of a return to work. We carefully considered counsel for the claimant's detailed submissions. We have concluded that dismissal of the claimant was a proportionate means of achieving the aims relied upon.

343. We balanced the effect of the aim (the claimant's dismissal) with the respondent's need to ensure staff were capable of achieving a satisfactory attendance and achieved a good standard of attendance, including the maintenance of a fair effective and transparent sickness management regime and efficient use of resources.

344. Having carefully considered the submissions of both parties, we preferred the respondent's submissions with regard to proportionality in respect of these aims.

345. The claimant had 245 days of absence over 23 periods from 2016 until his dismissal, each for different reasons and periods, continuous and intermittent. Many of the absences were unrelated to a disability. We also took account of his last period of absence (from July to dismissal in October) which was because of the claimant's disability. Ms Williams was of the view that the claimant would have been issued with a warning or final warning prior to his last period of absence (from July to his dismissal).

346. We took account of the fact that there was no failure by the respondent to comply with sections 20 and 21 of the Equality Act 2010, failure to make reasonable adjustments (which was not a claim advanced before the Tribunal). The respondent had carried out its obligations in this regard.

347. The claimant's absence impacted upon the respondent in terms of managing the absence. The respondent delayed taking action on a number of occasions and did not strictly apply the trigger points. They sought to encourage attendance and work with the claimant to procure his return to work.

348. The respondent waited a reasonable period of time and took cognisance of the prognosis which was, as the claimant accepted, unclear. No lesser form of action would have achieved the aim in this instance. No warning would have secured the outcome sought. The claimant himself accepted that there was no way of knowing how long the claimant would remain unable to return to work and resume normal attendance.

349. We are acutely aware of the impact dismissal had upon the claimant and we balanced that as against the impact upon the respondent, even taking account of the claimant's argument that the respondent was, at least in part, to blame for his last absence.

350. We considered the respondent to have shown that dismissal was a proportionate way of achieving the aim of ensuring staff were capable of achieving a satisfactory attendance and achieving a good standard of attendance which includes the aims of the maintenance of a fair effective and transparent sickness management regime and efficient use of resources.

351. Dismissal on the facts of this case was within the terms of the sickness management regime and efficiently managed resources.

352. The next aim relied upon was to provide a good customer service (described as maintaining proper standards of service). There was little evidence before the Tribunal as to the precise impact the claimant's absence had on customer service. The claimant's counsel's submissions had force in this regard.

353. We considered the respondent's evidence that the nature of the claimant's work was such that it was not possible to identify the precise impact upon customers. Both the dismissing and appeal officers were experienced officers who knew what the impact of a person carrying out the claimant's role on the team would have.

354. There were no other staff on long term absence in the team, which comprised about 10 or 11 people. There were some staff with intermittent short-term absences. The claimant's role was not filled during his absence. The remaining staff required to deal with the same amount of calls and business as they would when the claimant was present.

355. While this is not the same as the situation in **O'Brien**, since the impact of a head teacher's absence is obvious, we do accept the respondent's counsel's submissions that the impact upon the respondent's business is obvious and needed no evidence. Ms Williams was of the view his absence impacted upon productivity and morale. This was not a mere generalisation but an assessment of the position from a knowledgeable perspective. The respondent was unable to provide customers with the same level of service given the claimant was not at work to carry out his tasks. His absence impacted upon the respondent but we had no specific detail as to what in particular the impact was other than the statements referred to.

356. We carefully considered the Court of Appeal's reasoning in **O'Brien** and applied it in this case. Objective justification of the decision to dismiss is assessed at the date of appeal taking account of the information before the respondent as we have done. The impact of the claimant's absence on the respondent is a significant factor in whether dismissal is a proportionate response. We take into account the impact of the absence on the employer and in particular the effect the claimant's continued absence and uncertain prognosis had upon the respondent.

357. The Tribunal is unable to assess the precise impact the claimant's absence had on the respondent given the lack of evidence on this regard as the claimant's counsel points out. We accepted the claimant's counsel's submissions in this regard. In the Tribunal's view the respondent has not shown that dismissal is a proportionate means of achieving the aim of

customer service, by itself. Had that been the only aim relied upon, the dismissal would not have been justified given the lack of evidence of the impact the claimant's absence had.

358. The subsidiary aim relied upon by the respondent was to apply the respondent's policies fairly and consistently. In this regard the respondent did seek to be fair and consistent. It had provided the claimant with a fair opportunity to improve his attendance. We have considered this aim as part of the first aim relied upon, namely to achieve satisfactory attendance, since that was the purpose of the policies in this area. In that regard and for the reasons above we have concluded that dismissal was a proportionate means of achieving that aim.

359. The Tribunal took a step back to consider whether it was satisfied itself that the dismissal was a proportionate means of achieving a legitimate aim. This requires a different analysis from that carried out in relation to the fairness of the dismissal. The Tribunal balanced the effect of the dismissal upon the claimant with the respondent's aims.

360. We considered matters objectively bearing in mind that the onus is on the respondent to show that the dismissal was a proportionate means of achieving a legitimate aim. We have reached our own judgment as to whether the measure was reasonably necessary in light of the aims relied upon.

361. We looked at the information before the respondent at the time it decided to dismiss, up to and including the appeal hearing, and intensively analysed the aim and its application. We considered the effect of dismissal upon the claimant and balanced this against the aim being pursued. We appreciated the immense impact dismissal had upon the claimant and balanced this against the respondent's aims as set out above.

362. In our judgment claimant was dismissed because of his absence and in the absence of a foreseeable return to work. It is clearly envisaged within the respondent's policies that where circumstances arise in which an employee is unable to provide such service, the respondent may, by following a defined process, reach the point where dismissal may be the outcome.

363. It is notable that the claimant accepted that he was not fit to return to work at the point of the appeal meeting and he did not know when he was likely to be fit. The claimant's absence record was regarded by the respondent as unacceptable. In our judgment, that was a reasonable conclusion to reach, based on the evidence available.

364. The respondent's position was that the claimant had failed to maintain regular and effective service. He was dismissed because of his absences, and because that record suggested to the respondent that his absence record would not improve. There was no reasonable prospect of a return to work. The claimant had been warned as to his absence at an earlier stage and he was aware of the respondent's policies in this regard. The claimant did not express surprise when the respondent determined that a recommendation should be put forward for dismissal. The respondent made its decision on the

basis of what they knew. The dismissing and appeal officer together considered the full picture.

365. The respondent sought to apply their policies and procedures in a manner which was consistent with the way in which they treated others. There is no evidence that the claimant was treated inconsistently.

366. It is our judgment that the respondent did act proportionately by dismissing the claimant in pursuit of a legitimate aim. That aim was to ensure staff were capable of demonstrating satisfactory attendance and good standard of attendance, (including the maintenance of a fair, effective and transparent sickness management regime and efficient use of resources), in order to carry out its duty. The respondent required staff to attend work and to efficiently manage its resources, which include the deployment of staff.

367. We have concluded that dismissal was proportionate in all the circumstances. The respondent applied its own policies, and the managers involved followed the guidance by which they were bound. The claimant's attendance at work was unacceptable to them, and the Tribunal cannot find that to be disproportionate. The respondent had considered steps short of dismissal and given the claimant a reasonable opportunity to improve his attendance to give the claimant a further opportunity to improve his attendance. The position that pertained in respect of August remained the position in December.

368. Accordingly, it is our judgment that the claimant's dismissal was a proportionate means of achieving a legitimate aim, and the claim under section 15 is accordingly dismissed.

Compensation payment - justification

369. We are of the view that the aims relied upon, distributing the fund fairly and economically in line with applicable guidance by the Cabinet Advice entitled Efficiency Compensation dated November 2016 were legitimate aims.

370. The aims corresponded to a real need of the respondent, to ensure public funds were used properly in line with the guidance. We were satisfied that the measure applied (the reduction of compensation) was capable of achieving that aim.

371. Reducing compensation was appropriate and reasonably necessary to achieve the aim and did actually contribute to the pursuit of the aim.

372. We then considered whether the aim was proportionately achieved. The respondent relies upon the fact that the decision maker calibrated the reduction appropriately applying the guidance based on appropriate and reasonable findings about the extent of the claimant's engagement with the absence management process.

373. We were not satisfied that this aim was proportionally achieved by reducing the sum by 50%. We consider that the outcome of the claimant's appeal to the civil service appeal board was correct with regard to this point.

Ms Williams had overlooked the fact that the claimant's mental health had affected his response (in respect of some of the reasons she used to justify the reduction (in part)).

374. With regard to the claimant's lack of responsiveness, we accept that in part there were good reasons why the claimant did not make himself available to answer calls. He would sleep during the day and the claimant did try to get back to Ms Williams for most of the occasions. For some of the occasions, however, the reason was entirely unconnected to anything arising in consequence of the claimant's disability, such as the difficult telephone signal and there was justification in making some reduction of the payment.

375. We accepted the claimant's evidence that the delay in returning the risk assessment and forms was partially due to his having difficulty completing the forms due to his mental health issues.

376. We also accept that the claimant's mental health could well have been a factor that led to his behaviour which led to the reduction in his scoring.

377. We accept that the respondent had a discretion in making its assessment but the respondent required to act in a way which achieved the legitimate aim in a proportionate manner.

378. We accept (as submitted by the respondent) that not all of the reasons relied upon for reducing the sum related to something arising in consequence of the claimant's disability and that there was a justified (and non-discriminatory) reason or reducing the sum from 100% but not, in our view, by 50%. We do not accept the claimant's submission that no reduction was appropriate. We do not consider that a proportionate way to achieve the legitimate aim would have been for 100% of the sum to be paid, with no reduction. Public funds require to be carefully managed in a non-discriminatory way.

379. We have critically evaluated, in other words intensely analysed, the justification set out by the respondent in light of the information available at the time the measure was applied on the basis of information known at the time. We considered that, applying the test in this area, the appeal board reached the right decision on the facts in light of the full factual matrix. A reduction of 20% in all the circumstances achieved the legitimate aim in a proportionate manner. The respondent required to ensure the compensation fund was distributed fairly and economically and in line with the guidance. A proportionate means to achieve the legitimate aim was to reduce the payment by 20%. That reflected the fact there were legitimate reasons to reduce the payment from 100% as the respondent's submissions set out. Those reasons were unrelated to the claimant's absence and were not because of something arising in consequence of the claimant's disability.

380. It was in our view a proportionate means to achieve the legitimate aim to reduce the payment by 20% given the facts.

381. In reaching this decision we were satisfied that there was a legitimate aim being pursued in reducing compensation and this corresponded to a real need of the respondent, the managing of public funds/applying the guidance. We were satisfied that the measure was capable of achieving that aim.

382. Reducing compensation was appropriate and reasonably necessary to achieve the aim and did actually contribute to the pursuit of the aim. When assessing proportionality we carefully balanced the discriminatory effect against the legitimate aim and we considered the qualitative and quantitative effect. We were satisfied that a lesser form of action (than reducing by 50%) could have achieved the legitimate aim, namely a reduction by 20% to 80%.

383. The claim therefore that the reduction of the payment was a breach of section 15 of the Equality Act 2010 is upheld to the extent that the initial decision to reduce the payment by 50% was unfavourable treatment because of something arising in consequence of the claimant's disability which was not objectively justified. The decision to reduce it to 80% was a proportionate means of achieving a legitimate aim.

Statutory defence

384. Finally, the Tribunal considered the respondent's submissions with regard to the statutory defence. This was not a matter that had been raised in advance but equally the claimant had not set out a number of his challenges in relation to the dismissal in advance. Both counsel admirably dealt with the issues that arose and provided detailed submissions in relation to each of the factual and legal issues that arose. This also applied in relation to the statutory defence argument.

385. We decided to consider the respondent's argument despite the absence of fair notice to the claimant. The claimant's counsel was given the chance of further time to consider the position, including to provide a written response but he confirmed he was able to provide us with the claimant's response. Having done so, we considered both parties' submissions and the authorities in this area and concluded that the claimant's submissions were to be preferred.

386. Put shortly, the respondent was only under a statutory obligation to offer the scheme. How it made its decision as to what it offered under the scheme was a matter of discretion (ie whether to offer 100% or a lesser sum). On that basis the respondent's statutory defence argument is not meritorious since the respondent was not under any obligation to discriminate (and make payment of less than the full sum).

Next steps

387. The claim for unfair dismissal is ill founded and is dismissed. The claimant was fairly dismissed.

388. The claim that the dismissal was unlawful disability discrimination in breach of section 15 of the Equality Act 2010 is ill founded and is dismissed.

389. The claim that the reduction of the compensation payment by 50% was unlawful disability discrimination by being in breach of section 15 of the Equality Act 2010 is well founded, albeit the decision to increase the compensation to 80% (upon the claimant's successful appeal) was in our view not discriminatory, being objectively justified. We shall issue a separate note with regard to case management in terms of dealing with remedy.

Employment Judge Hoey

Date: 5 May 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
11 May 2020

FOR THE TRIBUNAL OFFICE

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