



EMPLOYMENT TRIBUNALS

Claimant: Mr. D. Shooter

Respondent: British Telecommunications PLC

Heard at: London South Croydon **On:** 11-13 September 2017

Before: Employment Judge Sage

Members: Ms. S. Campbell

Mr. M. Walton

Representation

Claimant: In person

Respondent: Mr Rushmore Solicitor

JUDGMENT

1. The Claimant's mental impairment of anxiety and depression amounts to a disability under the Equality Act 2010.
2. The Claimant's claim for direct discrimination is not well founded and is dismissed.
3. The Claimant's claim for victimisation is not well founded and is dismissed.
4. The Claimant's claim for harassment is not well founded and is dismissed.
5. The Claimant's claim for discrimination contrary to section 15 of the Equality Act 2010 in respect of "demanding a target of 80%" by Mr Downing is well founded. All other claims pursued under this section are not well founded and are dismissed.
6. The Claimant's claim for failure to make reasonable adjustments under section 20 and 21 of the Equality Act 2010 is well founded.

REASONS

1. By a claim form presented on the 24 February 2017, the Claimant brought complaints of unfair dismissal, disability discrimination and breach of contract. The Respondent defended the claims.

Witnesses

The Claimant

For the Respondent, we heard from the following:

Mr. Malynn Manager

Mr. Downing Manager

Mr Wooff Operations Manager

Mr Steer Manager

Mr Murgatroyd Senior Operations Manager.

2. The Issues were agreed to be as follows:

Unfair dismissal claim

- 2.1 What was the reason for the dismissal? The Respondent asserts that it was on the grounds of ill health – the Claimant will state that it was discrimination because of his disability (or discrimination arising – see below).
- 2.2 At the time that the Respondent had formed that belief had it carried out as much investigation as was reasonable in the circumstances?
- 2.3 Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?
- 2.4 If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged.
- 2.5 Does the Respondent prove that if it had adopted a fair procedure the Claimant would have been fairly dismissed in any event? And/or to what extent and when?

Disability

- 3.1 The Respondent accepts that the Claimant is disabled because of ulcerative Colitis but the Respondent does not accept that the Claimant is disabled because of anxiety and depression. In respect of the anxiety/depression:
- 3.2 The Respondent admits that the anxiety/depression is a mental impairment.
- 3.3 Did the anxiety/depression have a substantial effect on the Claimant's ability to carry out normal day-to-day activities; and
- 3.4 Were those effects long term?

Section 26: Harassment on grounds of disability

- 4.1 Did the Respondent engage in unwanted conduct as follows:
 - 4.2 Jimmy Malynn talking to the Claimant about a redundancy package and informing him that he had a possible disciplinary against him;
 - 4.3 Demanding that he achieve a target of 80% by Jimmy Malynn (verbally) and by Mark Downing (in writing);
 - 4.4 Being accosted on the 29 October 2015 by Steve Wooff and Steve Clamp then being subjected to a one hour "disciplinary interrogation";
 - 4.5 Being sent on special leave by Steve Wooff as the Claimant was considered to be a psychiatric risk to himself and others and escorted out of the building (and later having his house raised by the police on the grounds he was "homicidal, genocidal and suicidal");
 - 4.6 Being telephoned at home in 2016 by Steve Wooff and by corRespondent sent to him.
- 4.7 Was the conduct related to the Claimant's disability (either ulcerative colitis or anxiety/depression);
- 4.8 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
- 4.9 If not, did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

- 4.10 In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Section 13: Direct discrimination on grounds of disability

- 5.1 Has the Respondent subjected the Claimant to the following treatment falling within section 39 of the Equality Act 2010, namely:
- 5.2 Dismissal by Mick Steer;
 - 5.3 Jimmy Malynn talking to the Claimant about a redundancy package and informing him that he had a possible disciplinary against him;
 - 5.4 Demanding that he achieve a target of 80% by Jimmy Malynn (verbally) and by Mark Downing (in writing);
 - 5.5 Being accosted on the 29 October 2015 by Steve Wooff and Steve Clamp then being subjected to a one hour "disciplinary interrogation";
 - 5.6 Being sent on special leave by Steve Wooff as the Claimant was considered to be a psychiatric risk to himself and others and escorted out of the building (and later having his house raised by the police on the grounds he was "homicidal, genocidal and suicidal");
 - 5.7 Being telephoned at home in 2016 by Steve Wooff and by correspondence sent to him.
- 5.8 Has the Respondent treated the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies on hypothetical comparators. If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic? If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Section 15: Discrimination arising from disability

- 6.1 The allegation of unfavourable treatment as "something arising in consequence of the Claimant's disability" falling within section 39 Equality Act are:
- 6.2 Dismissal by Mick Steer;
 - 6.3 Jimmy Malynn talking to the Claimant about a redundancy package and informing him that he had a possible disciplinary against him;
 - 6.4 Demanding that he achieve a target of 80% by Jimmy Malynn (verbally) and by Mark Downing (in writing);
 - 6.5 Being accosted on the 29 October 2015 by Steve Wooff and Steve Clamp then being subjected to a one hour "disciplinary interrogation";
 - 6.6 Being sent on special leave by Steve Wooff as the Claimant was considered to be a psychiatric risk to himself and others and escorted out of the building (and later having his house raised by the police on the grounds he was "homicidal, genocidal and suicidal");
 - 6.7 Being telephoned at home in 2016 by Steve Wooff and by corRespondent sent to him.
- 6.8 Does the Claimant prove that the Respondent treated the Claimant as set out in paragraph 8.1 above?
- 6.9 Did the Respondent treat the Claimant as aforesaid because of the "something arising" in consequence of the disability (either colitis or Depression/anxiety)?
- 6.10 Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

Section 27: Victimization

- 7.1 The Claimant has carried out the following protected acts:
- 7.1.1 Previous proceedings under case number 2341041/2012 and the letter of grievance in 2015.
- 7.2 If there was a protected act, has the Respondent carried out any of the following treatment because the Claimant had done a protected act?
- 7.3 Dismissal by Mick Steer;

- 7.4 Jimmy Malynn talking to the Claimant about a redundancy package and informing him that he had a possible disciplinary against him;
- 7.5 Demanding that he achieve a target of 80% by Jimmy Malynn (verbally) and by Mark Downing (in writing);
- 7.6 Being accosted on the 29 October 2015 by Steve Wooff and Steve Clamp then being subjected to a one hour "disciplinary interrogation";
- 7.7 Being sent on special leave by Steve Wooff as the Claimant was considered to be a psychiatric risk to himself and others and escorted out of the building (and later having his house raided by the police on the grounds he was "homicidal, genocidal and suicidal");
- 7.8 Being telephoned at home in 2016 by Mr Wooff and by correspondence sent to him.

Reasonable adjustments: section 20 and section 21

- 8.1 Did the Respondent apply the following provision, criteria and/or practice ('the provision') generally, namely requiring the Claimant to achieve a target of 80% (after having an adjusted target of 65%).
- 8.2 Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that he could not achieve this target?
- 8.3 Did the Respondent take such steps as were reasonable to avoid the disadvantage?
- 8.4 Did the Respondent not know, or could the Respondent not be reasonably expected to know that the Claimant had a disability or was likely to be placed at the disadvantage set out above?

Time/limitation issues

- 9.1 The Respondent will state that some of the acts complained of are one off acts and are out of time.
- 9.2 Does the Claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?
- 9.3 Was any complaint presented within such other period as the employment Tribunal considers just and equitable?

Findings of fact

- 10 These were agreed or on the balance of probabilities we find to be as follows:
- 11 The Claimant was employed by the Respondent from the 26 October 1987 and was employed as a Communications/Frame Engineer. It was not disputed that the Claimant suffered from ulcerative colitis which was accepted to be a disability under the Equality Act and the Claimant suffered from depression and anxiety which the Respondent disputed was a disability.
- 12 The Claimant's evidence in relation to his mental impairment of depression and anxiety was seen in his disability impact statement, which was in the bundle at page 44. The contents of the statement were not challenged in cross examination. The Claimant stated that his depression and anxiety was accompanied by severe paranoia, random panic attacks, insomnia and agoraphobia. The Claimant stated that this adversely impact on his bowel disease causing a relapse. The Claimant stated that he was signed off unfit for work due to anxiety and depression in early November 2015 and was referred for psychiatric appointments to assess the extent of his depression and anxiety. The Claimant attended counselling for a few sessions but did not find this useful; having seen no improvement with continuing anxiety and panic attacks, agoraphobia, paranoia and insomnia. He attended CBT therapy and his local clinic and was prescribed with sertraline by his doctor in June 2016. The medication had little effect and he stated that the mental impairment had a significant adverse impact on his normal day-to-day activities. The Claimant

was taken in cross examination to his claim form at page 9 of the bundle where he referred to becoming depressed over the following months after his meetings with Mr Downing and Mr Wooff, and he replied that depression was an ongoing thing, due to the grievance he took out in October and prior to that, there was a lot of stress imposed upon him at work.

- 13 The Tribunal were taken to an OH report dated the 30 November 2015 which recorded that the Claimant felt his situation was 'hopeless', his sleep pattern was disturbed and he described feeling anxious and experiencing feelings of paranoia. He also reported that his concentration was reduced. The Tribunal further noted that the Claimant had self-reported that he had first made a comment on the BT intranet about 'putting a rope around his neck'. He also confirmed that he had made a comment relating to 'homicide and genocide' but stated that the words were said in jest. The Tribunal saw a report from an Assistant Psychologist dated 24 December 2015 seen at pages 141-2 of the bundle, which confirmed that the Claimant was suffering severe symptoms of depression and severe symptoms of anxiety, this was accompanied by severe levels of psychological distress. However, it was confirmed that the Claimant was not a risk to himself or others at that time.
- 14 The Claimant was then taken to an occupational health report dated 19 January 2016 at page 144 of the bundle to the part of the report which stated that the Claimant had no significant past psychiatric history but there "have been referrals in the past, which all seem to relate to problems with his managers and stress". The Claimant confirmed that he had previously been on medication for about six months in 2002, which was Seroxat, he was only able to take this medication for about six months and because of the side-effects he experienced. The Claimant was then taken to a report from his GP dated 8 September 2016 at page 268 bundle, this medical report confirmed his referral for further counselling for his stress and anxiety and confirmed that the Claimant felt a low mood, lacked motivation and felt stressed. The medical reports in the bundle reflected the Claimant remained signed off with anxiety and depression until dismissal.
- 15 The Tribunal therefore finds as a fact that the Claimant suffered from mental impairment at the relevant time which had a substantial adverse impact on his ability to carry out normal day-to-day activities. The Claimant suffered from low mood, lack of motivation, suffered stress, agoraphobia and paranoia, all of which impaired his ability to engage in normal day-to-day activities such as leaving the house. The paranoia was evidenced in the OH report in November 2015. Low mood and lack of motivation arising out of his depression adversely impacted on his ability and capacity to engage in normal day-to-day activities and therefore we conclude that the impairment has substantial adverse impact on the Claimant. We further conclude that the mental impairment began to have a substantial adverse effect in early November 2015 and continued until the effective date of termination on the 13 October 2016, at that date he remained signed off sick. There was no evidence at the date of termination that his health had improved. The Tribunal conclude on the evidence that the mental impairment of anxiety and depression that had lasted for 49 weeks was likely to last for more than 12 months at the relevant time. We therefore conclude that the depression and anxiety amounts to a disability under the Equality Act.
- 16 The Claimant previously pursued an employment Tribunal claim against the Respondent case number 2341041/2012 "the 2012 Tribunal" for disability discrimination and victimisation. He was successful in some of his claims (discrimination arising from disability and harassment). The Claimant claims that subsequent to that case he was subjected to victimisation.
- 17 Following the 2012 Tribunal hearing dealing with remedy, the Claimant was issued with a reduced target on the 8 October 2013 as part of his coaching plan as

a reasonable adjustment and the Tribunal saw this at page 93 of the bundle and in his grievance at page 119. The reduced target was 65% and it was arrived at after conducting a one day coaching visit on the 18 September 2013 and had been in place until June 2015.

- 18 The Tribunal heard that Mr Malynn took over as the Claimant's line manager around mid February 2014. The Tribunal were told that Mr Malynn managed around 20 people in his team. The Tribunal saw the minutes of a meeting that took place on 21 February 2014 and it was noted that this was his first meeting with the Claimant. He undertook to review the Claimant's the current coaching plan and they also discussed his disability and methods of coping with fatigue at work.
- 19 Mr Malynn in his evidence in chief stated that during his one-to-one meetings with the Claimant, they discussed his productivity targets and it was noted that he proposed to try and move the Claimant to a higher target. Mr. Malynn confirmed to the Tribunal he had been asked by his line manager to improve the performance of his team and he had asked the Claimant if there was any way that his performance could be improved as part of that process. He stated that he was merely looking for ways to improve the team performance and ways of managing the Claimant to see if they could move closer to a 20% reduction rather than the present 35%. It was noted by the Tribunal that the Claimant worked a long day of nine hours and Mr Malynn confirmed that he discussed the Claimant's fatigue caused by his ulcerative colitis with him and suggested that he should not prepare work for the following day or to work above his contracted hours. Mr Malynn said that he would support the Claimant to achieve this target. This was in part corroborated by the meeting notes we have referred to above.
- 20 Mr Malynn in response to the Tribunal's questions confirmed that he had been tasked by his manager to seek overall improvements in the team's performance, but was not told how this should be done. He confirmed that they were looking at a "ballpark figure" of improved performance for the Claimant and he was looking to see if the Claimant could get closer 80% performance, but if he could not, "nothing would change". There was no evidence before the Tribunal that the Claimant was required to improve his performance and no evidence that if he was unable to do so, he would face capability proceedings or dismissal.
- 21 Mr Malynn obtained an updated occupational health report and the Tribunal saw this in the bundle at pages 112 to 113 dated 6 August 2015. The report stated that the Claimant's medical condition was essentially unchanged and confirmed that it had been agreed that "he would meet 65% of expected targets". On the second page of the report it was confirmed that the Claimant would be "expected to meet his existing targets which reflect his need to have more frequent toilet breaks and the fact that he suffers from fatigue".
- 22 Mr Malynn after having a one to one with the Claimant to discuss the OHS report, ceased to be his line manager. The one to one meeting discussed the Claimant's performance target and the Claimant insisted that if the Respondent attempted to move the target it would be a 'contempt of court'.
- 23 Mr Malynn accepted in his evidence in chief at paragraphs 18-25 that he had a conversation with the Claimant about the voluntary leavers package and he had told the Tribunal he had the same conversation with all his team members. The Tribunal noted that there was no evidence that the Claimant was singled out in any way and these conversations took place with all staff. The Tribunal conclude therefore that there was no evidence that having this conversation with the Claimant was less favourable treatment because of disability and no evidence that it amounted to harassment on the facts. There was also no evidence that this conversation was unfavourable treatment due to something arising out of the Claimant's disability as there was no obvious or identifiable causal connection

between this conversation and something arising from his ulcerative colitis.

- 24 Mr Malynn denied he had a conversation with the Claimant about a possible disciplinary against the Claimant and the Tribunal find as a fact that there was no credible or consistent evidence to support this allegation particularly as it was not referred to in the Claimant's grievance letter dated 14 October 2015 at pages 119-122 of the bundle. The Claimant also did not pursue any such allegation in his subsequent grievance hearing (see page 151 of the bundle), we therefore conclude that this allegation is not supported on the facts before us.
- 25 Mr Downing then took over the line management of the Claimant in September 2015. He referred to a couple of meetings he attended with the Claimant, which were not minuted but his evidence to the Tribunal was that the Claimant referred to his 2012 Tribunal claim in every meeting. He confirmed that in his second meeting with the Claimant he informed him that he "may be starting him on an informal plan to support to see if he could improve his performance". In this meeting the Claimant referred to his target of 65% and he indicated that he could not necessarily achieve a higher performance level. Although Mr Downing's evidence in his statement appeared to indicate that his objective was to see if the Claimant was capable of improved performance, that was not supported by the documentary evidence in the bundle. The Tribunal saw at page 115 which was a written record of the meeting on the 8 October 2015 where it was stated to be a performance discussion (although not formal). This note recorded that the Claimant's target "would be 80%" and he had "set a glide path of 71% 73% 75% and 77% to start". In this meeting, the Claimant informed Mr Downing that he could not do more than he was already doing and he was unable to work to this performance target. His concerns were not addressed in the meeting nor in the written report produced for the Claimant after the meeting, Mr Downing was therefore placed on notice that he was likely to be put at a disadvantage by the PCP. The Claimant's consistent evidence to the Tribunal in answer to its questions was that he had worked for the Respondent for nearly 30 years and had "got near to 70% but could not achieve 80%".
- 26 Although Mr Malynn had commissioned an OHS report to give him an up to date assessment of the Claimant's capabilities and the need for any further adjustments, Mr Downing could not recall seeing or asking to see this document (even though he was told by HR that a report had been produced).
- 27 The Tribunal saw the email at page 116 dated the 9 October 2015 which was sent to the Claimant after the productivity meeting which stated that "I/the business would expect, taking that it (sic) to account the maximum the business believes is a reasonable adjustment is 20%". He also concluded that "a reasonable adjustment would be for you to achieve 80%". He also stated that to allow the Claimant to get to this level he had "a fair glide path to an interim target" and he was "looking to move to 80% in the future". Mr Downing stated in answer to questions posed by the Tribunal that these figures were merely suggested however he conceded that on being taken to the precise figures and timetable expected of the Claimant that there was no evidence that this was a mere expectation, it was an instruction. Mr Downing also confirmed that the 100.04% figure used as a benchmark for performance only comprised of non-disabled employees' average performance, in other words, he was comparing the Claimant's performance with those who were not suffering from a disability.
- 28 Mr Downing presumed without any evidence, that the Claimant could achieve the higher level performance figures by utilising new technology, however there was no evidence in the minutes of the meeting or in the email (referred to above) that reflected that a discussion took place about how technology could assist the Claimant. Mr Downing accepted that this was "something he missed" which was why there was no mention of this discussion in his email. The Claimant in his

closing submissions stated that he had used an iPhone briefly but it caused him eye strain and he went back to using the lap top because he felt it was more 'user friendly'. Although Mr Downing told the Tribunal that this target was merely 'aspirational' this was not supported by the wording his email or of the minutes of his meeting which reflected that specific targets to be achieved over a glide path, required a 2% improvement per week, cumulatively over a period of 4 weeks. The Claimant's medical condition and his performance had remained static for a period of 2 years and there was no evidence that Mr Downing took into account the Claimant's disability or whether or how the Claimant would achieve these new targets.

- 29 The Tribunal find as a fact that the new increased target was imposed on 9 October 2015 and this target remained in place until the date of termination. If the Claimant had returned to work he would be required to perform at this higher level on the glide path, we therefore conclude that this was a one off act with consequences that continued until the date of termination.
- 30 The Claimant submitted a grievance on the 14 October 2015 and this was seen at pages 119 to 122 bundle; the Respondent normally responded to grievances within 28 days (see page 130 of the bundle) however the outcome of this grievance was delivered in March 2016, nearly six months later. The HR person who had responsibility for the management of the grievance was Miss Hulme and she appointed Mr Jones to deal with it. The Tribunal also noted that this email had the heading of "further employment Tribunal action!".
- 31 The Claimant posted various comments about the Respondent's managers on the Respondent's intranet (called the BT Open Forum Website) which were derogatory (seen on page 223 of bundle). He was called to a meeting on 29 October 2015 to discuss those comments by Mr Wooff and the minutes of that meeting were at pages 222 to 227 of the bundle. The minutes were not agreed. Also discussed at this meeting was a comment that the Claimant made to Mr Downing where he allegedly said to him that he was "more homicidal, genocidal than suicidal." He denied saying this and denied that he had ever been violent to anyone but admitted that he felt resentful towards management who he felt were harassing him and breaching court orders; he stated that he felt stressed by the situation he was in. Although the Claimant denied using these words, the Tribunal find as a fact that he had informed occupational health that he had said these things and this was also corroborated by Mr Downings email at page 131(a) of the bundle. The Respondent also alleged that the Claimant said to Mr Downing that he didn't give a "rat's arse" and although the Claimant could not recall saying this. The Tribunal find as a fact that the Respondent's recollections were consistent with the minutes and we conclude from this consistent evidence that this comment was made.
- 32 Although the Claimant did not approve the minutes of the disciplinary investigation that took place on 29 October, they appeared to be reasonably accurate and the Claimant made no specific complaints about their accuracy. The Claimant was taken in cross examination to the minutes and he did not dispute what was recorded in the minutes but he said that the words were spoken in jest or in sarcasm and taken out of context. Although the Claimant stated he was not suicidal and had never attempted to go through with it and added that the Respondent was "not going to find a pile of dead bodies" in the exchange, this response was troubling and the Respondent was justified in having some concern about the Claimant's mental well-being. The Tribunal heard that this matter was escalated to HR and a subsequent phone call was made to the Claimant's GP who advised that the police be called. The police were called and attended the Claimant's home address. The actions of the GP and of the police are outside of the consideration of the Tribunal as there was no evidence that they were acting under the instruction of the Respondent or that they were aware of the Claimant's disabilities; we therefore we make no findings of fact about the decision to call the

police nor of the police actions thereafter.

- 33 After the investigatory meeting ended Mr Wooff took the decision to send the Claimant home on special leave in order to get medical assistance. The Tribunal conclude that this was reasonable in the light of the troubling things that the Claimant had posted on the Internet and the things he had said to Mr Downing which gave the Respondent a justifiable concern that the Claimant's mental well-being was seriously impaired. The Tribunal conclude that this decision was consistent with the evidence before them and was a reasonable course of action to take in the light of some of the comments made and posted by the Claimant.
- 34 The Claimant made a complaint against Mr Wooff who was his duty of care manager after the decision was made to send him on special leave. The Claimant's complaint about sending him on special leave was that Mr Wooff had taken his comments out of context as he had said them in sarcasm. The Tribunal were taken to notes of telephone conversations made to the Claimant during his initial sickness absence dating from 29 October to 18 November 2015 (see the bundle at pages 236 to 239). These calls were firstly on a daily basis but after the 18 November 2015 they were reduced to once a week. The notes reflected that the calls covered various topics, they did not solely relate to work matters. It was the Claimant's evidence that he found these discussions to be discriminatory and acts of harassment however the record of these discussions did not show that the calls were anything but a manager attempting to keep communications open between the employer and employee. Although the Claimant alleged that Mr Wooff laughed at the discussion about the police raid, there was no evidence that this occurred and it was not put to him in cross examination. The Tribunal also noted that when the Claimant complained about Mr Wooff, he was replaced by a different duty of care manager. The Claimant's case was that Mr Wooff had called him a couple of times per week and asked about his psychotic assessment which he felt were "prying phone calls". The Tribunal find as a fact that these calls were made to keep in touch with the Claimant and were reasonable and supportive taking into account the Respondent's genuine concerns about his health and well-being. Although these calls were unwanted by the Claimant, there was no evidence that these calls had the purpose of effect of creating an intimidating hostile or degrading environment for the Claimant.
- 35 The Claimant's first sick note was seen in the bundle at page 132 and was dated 6 November 2015. It referred to a Mental Health Assessment and he was signed off for two weeks. All subsequent sick notes referred to anxiety and depression and the Claimant remained off sick until the termination of his employment.
- 36 The Respondent carried out a grievance fact finding meeting on 2 February 2016 and this was seen at pages 148 to 153 of the bundle; this was carried out by Mr Jones. The Tribunal read these minutes and it was noted that the focus of the Claimant's grievance was Mr Downing. The Claimant withdrew all allegations of discrimination against Mr Malynn in this meeting. Mr Downing was interviewed on 14 March 2016 and the outcome of the grievance was that the Claimant's claims were not upheld.
- 37 The Claimant was warned in writing that he faced dismissal due to his sickness absence. Mr Steer invited the Claimant to a meeting to discuss his sickness absence and it was his evidence that he received no response to his letters. He told the Tribunal that he spoke with Mr Lafferty, the Claimant's duty of care manager at the time to try and encourage him to engage with the process either in writing or by telephone, but the Claimant failed to do so. Although the Claimant was invited to a number of resolution meetings prior to dismissal, he did not attend because he stated that his ulcerative colitis meant he was not able to travel to the meeting, however he gave no reason why he failed to engage in writing or by telephone.

- 38 The Claimant was dismissed by letter dated 20 July 2016 and was provided with three months' notice terminating on the 13 October 2016. The Claimant was given the right to appeal against the decision to dismiss but he failed to do so because he told the Tribunal that he did not want his job back.
- 39 Mr Murgatroyd in his letter to the Claimant dated the 2 August 2016 (page 263 of the bundle) summarily considered the misconduct charge, he concluded that his conduct constituted gross misconduct. As he noted that the Claimant had been dismissed under a different procedure, he closed the case. The Claimant did not attend the disciplinary hearing and a decision was made in his absence that he should be dismissed with notice. The Claimant did not appeal this outcome.

The Law

98 Employment Rights Act 1996

- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show--
- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
 - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it--
- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
- (3) In subsection (2)(a)--
- (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
- (4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)--
- (a) depends on 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.

Equality Act 2010

6 Disability

- (1) A person (P) has a disability if--
- (a) P has a physical or mental impairment, and
 - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

13 Direct discrimination

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

15 Discrimination arising from disability

- (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.

20 Duty to make adjustments

- (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
- (2) The duty comprises the following three requirements.
- (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

21 Failure to comply with duty

- (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
- (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

26 Harassment

- (1) A person (A) harasses another (B) if--
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of--
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account--
- (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.

Closing submissions

40 The **Respondent** provided written submissions and the skeleton argument, which were considered by the Tribunal but in addition the Respondent's oral submissions were as follows:

41 The Claimant's disability is stated to be anxiety and depression and the evidence is limited, you have a statement from the Claimant at page 44 of the bundle there was no mention of medication being taken in 2002 and a limited explanation of the day-to-day impact the condition had on his normal day-to-day activities. The relevant period is not covered by impact statement. At page 84 of the bundle in October 2012 there is an occupational health report and there is no mention of his

mental health. At page 112 of the bundle is another report and the following page refers to vitamin D but no other medical conditions. At page 132 is the first sicknote dated November 2015 where the Claimant is undergoing a Mental Health Assessment but there is no diagnosis. There is a further fit note at page 134 and the medical report at page 136 and 137. The first time we see reference to disturbed sleep but it is not a substantial adverse effect and it is not long-term. In January 2016 at page 144 the report confirmed that the Claimant is undergoing CBT there is limited information about the effect it is hoped he will return to work within a few weeks. Therefore, I say the effect is not long term. The Claimant has no past psychiatric history therefore it is counter to what the Claimant says in 2002.

- 42 Dr McCauley's letter confirmed that the Claimant referred to psychosis because the risk to others and he was referred to counselling because of low mood and he lacks motivation, but this is not substantial or long term effect. The Claimant did not start medication until June 2016. At page 278 you will see a letter from the neighbour but it gives no evidence of the effect or of whether it is long-term. I say, the Claimant has failed to discharge the burden that stress and anxiety is a disability.
- 43 With regard to ulcerative colitis in October 2012 at page 84 the nature of the condition state it has flare-ups and at page 85 it varies from day to day. Adjustments had been made for fatigue and to ensure he has close proximity to the toilet. At page 113 the condition can fluctuate, but my submission is that the Claimant can exceed the targets. At page 88 this is not been addressed by witnesses, but I invite the Tribunal to read this, she makes the comment of the ability of occupational health to calculate a percentage but the Claimant can achieve an occupational health cannot offer any detail.
- 44 The previous judgement on ulcerative colitis at pages 45 and 49 said the failure to make reasonable adjustments related to any adjustment for the Claimant. The Claimant was being asked to achieve the same performance as his peers, that case ceased when he was granted a 20% reduction. At page 50 of the previous judgement it stated that the Claimant cannot be expected to work as fast as his peers but the Respondent can expect the Claimant to improve productivity, the Tribunal recognised that 20% was applied and the Claimant was working within this (see page 62) and within 12 to 13% of the average of his peers and this was when his peers were working an average of 80%. The Respondent complied with the recommendation and my submission is that there was no authority that the Claimant cannot be expected to reach more than 65%.
- 45 The allegations against Mr Malynn with regard to leavers package. This is admitted; however, discrimination is denied, he accepted he spoke to the Claimant about footwear, but this is not discrimination.
- 46 With regard to whether or not discussing the leavers package with the Claimant was harassment, this was not related either to his disability and did not have the purpose effect, creating an intimidating, hostile or degrading environment for the Claimant. He put in no evidence to suggest that. It is the same is for direct discrimination as it is not related to either disability. In respect of direct discrimination there is no evidence of a comparator. There was no evidence from the Claimant on this and Mr Malynn said he would have the same discussion someone who was not disabled therefore we say is not because of a disability. With regard to discrimination arising from disability, he was not able to say what it was arising from therefore we say it is no link to the disability.
- 47 With regard to victimization, two events predates this which is the employment Tribunal and the grievance. Mr Malynn's evidence was clear, there is nothing to do with the Claimant's previous employment Tribunal claim when discussing the leavers

package and it is unclear what dates are relied on by the Claimant; they must occur before September 2015 and we say the claims are well out of time. It is also submitted that the Respondent suffered could suffer prejudice because of the delay in pursuing this claim. Mr Malynn was asked about the documents that were not in the bundle, the Claimant raised a grievance making allegations against him and Mr Downing, and he met with the investigator. He dropped the allegations against Mr Malynn. The Respondent is prejudiced by the delay, documents have been mislaid the balance of prejudice against the Claimant and he has offered no mitigation. The Respondent referred to case of Ramprakhrishnan v Pizza Express UKEAT/0073/15, which stated that all relevant factors should be considered and no one single factor is determinative, the failure of the Claimant to explain the delay should go against him.

- 48 With regard to the allegation of demanding that the Claimant meet an 80% target, the Respondent does not accept that this was demanded but does accept an improvement was expected and there was an expectation not so much to achieve 80%. It was his behaviours to achieve quick wins. It was not in isolation and there was no threat of a disciplinary or capability proceedings. No steps were taken to enforce the glide path which was not put in place. There was no evidence in support to say that the Claimant could not meet the 80% target. The Respondent accepts that asking the Claimant to improve productivity was related to his colitis but denied he created an intimidating, hostile or degrading environment for the Claimant and it was not linked to his depression.
- 49 With regard to direct discrimination, there was no evidence of a comparator. It would be a percentage improvement of productivity expected of someone without a disability; they would be expected to improve. We say there is no less favourable treatment and it is not because of a disability.
- 50 In respect of arising from disability, we say increasing productivity is unfavourable treatment and it arose in consequence of his ulcerative colitis. The Respondent will say that this is justified in pursuing a legitimate aim of investigating his abilities. In respect of the claim to victimization, we say this is not causally linked to the grievance. Mr Malynn and Mr Downing stated that there was no link between the previous proceedings and this act and it is out of time. The fact find by Mr Wooff, who denied the Claimant was accosted on 29 October and the purpose of the meeting was to investigate the comments (see page 240). The Claimant accepted those were his comments and he admitted saying the words homicidal suicidal and genocidal and accepted he made the comment about a rat's arse, he said they were in jest or flippancy but they were not related to his health condition. With regard to the claim of harassment, the fact find meeting was not related to his disability and it did not create an intimidating, hostile or degrading environment for the Claimant. Turning to the claim for direct discrimination again, we say there is no comparator. The Respondent submits that any employee who made those comments of this nature would face a fact find meeting. The claim for discrimination arising from again, we say it is unfavourable treatment but it does not arise from disability and if it is found by the Tribunal to be so then we say it is justified. Regarding the claim of victimization, we say there is no causal link between the grievance and the previous employment Tribunal proceedings and it is out of time. It is also noted that Mr Wooff was never the subject of a grievance and when the Claimant attended the grievance meeting on 2 February 2016, he did not add Mr Wooff to his series of complaints.
- 51 The Claimant's claim of being sent home on special leave, we say the decision was based on his comments made during the fact find meeting. Mr Wooff's evidence was that the decision to send him home was because of what was said to him and he could not satisfy himself that the Claimant was not a danger to himself or others. It was appropriate to join a red flag conversation which is referred to at pages 131(i) and (j) , which supported the decision to send him home and this was on full pay.

- 52 The evidence regarding the police visit, this was on the instruction of the Claimant's GP of which the Claimant gave consent (to contact the GP). This was the decision of the police, not that of the Respondent and we say it was sensible to contact the police. With regard to the claim of harassment, being sent home on special leave was not related to either disability and did not create an intimidating, hostile or degrading environments and the police raid was not related to the Claimant's disability. In the claim for direct discrimination, the Claimant was sent home because of comments he made there is no comparator but Mr Wooff's evidence was that anyone making similar comments would be sent home. Again, with regard to the police raid there was no evidence of a comparator. In the Claimant's claim of discrimination arising. The Claimant did not put anything forward that shows this was related to his disability and we say that this was not in consequence of his disability. The Respondent will state the being sent home was not unfavourable treatment and the police visit was not action done by the Respondent. The Respondent will also state the treatment was justified for the well-being Claimant and was proportionate. In the claims of victimization, there was no causal link and the claim is in any event out of time.
- 53 The allegations in relation to correspondence from Mr Wooff, none of his conduct was inappropriate. The comments were within the context of him acting as his duty of care manager. In relation to the claim of harassment, this was not related to stress condition and was not related to either disability. These were discussions undertaken as duty of care manager and did not create an intimidating, hostile or degrading environment for the Claimant and could not therefore be harassment. Turning to the claim of direct discrimination, there was no evidence of a comparator but a comparable employee would receive the same treatment. Therefore we say there is no less favourable treatment because of disability. In relation to the claim of discrimination from something arising from disability, we accept that the duty of care arises from his stress and are unfavourable treatment but it is bound to be unfavourable. We say they are justified to check on the Claimant's welfare. The claim of victimization, we sat there is no causal connection. Therefore it is not well founded and we say that this is out of time as the time limit is 9 October 2016, therefore anything before that date is out of time.
- 54 Turning to the dismissal, we say the absence was due to stress and anxiety and it is not alleged to be as a result of harassment. In relation to the claim for direct discrimination, there was no evidence of a comparator, however, a comparable employee who failed to communicate would face a resolution meeting and would be dismissed. The dismissal does not arise from ulcerative colitis but does arise out of stress and it is unfavourable treatment, but it is justified. In relation to victimization, there was no evidence of a causal link and there is no time issue.
- 55 The claim for failing to make reasonable adjustments, the PCP is the 80% target, we do not accept the PCP was applied but I accept the case of *Carrera v United Research Partners UKEAT/0266/15* which stated that Tribunals can take liberal approach and the Claimant's perception can have some relevance, but it is limited. Mr Steer's letters to the Claimant stated he wished to have meetings with him and if the Claimant misinterpreted those letters, I would argue that it cannot be a PCP only to hold the PCP meeting. The PCP amounted to productivity improvements and they put the Claimant at no substantial disadvantage, he has not shown that he cannot meet the target, taking into account the time saving tips that were resisted by him. We know the Claimant's productivity was impacted but there was no evidence the Claimant could not achieve 80% and he never tried. We do know that adjustments in place included breaks of between 60 to 90 minutes per day. The Claimant had some room for improvement and time-saving tips were not attempted. The use of the mobile was suggested but the Claimant refused to attempt them and we say his refusal was not related to his disability. We say there was no substantial disadvantage. The Respondent took reasonable steps to remove the disadvantage

of the productivity targets. We also say that the Claimant's claim is out of time.

- 56 Regarding unfair dismissal we don't want to add anything as the dismissal manager Mr Steer's evidence was unchallenged.
- 57 With regard to remedy we argue Polkey. Mr Murgatroyd properly considered the matter and the Tribunal should take into account the disciplinary decision which places a hard stop on the losses. A reduction should be made for the Claimant's contributory conduct, he failed to attend any meetings and failed to appeal the decision to dismiss we say there should be a 25% reduction in any compensation of failing to appeal.
- 58 The **Claimant produced a brief closing submission in writing** which was taken into consideration by the Tribunal. In outline he stated that in 2015 the Respondent began comparing his performance to those in his team who were able-bodied after an increase in their target from the previous 85% to 100.4%, and in doing so expected him to achieve a higher figure of 80%. The Claimant referred to being sent home after what he described as an aggressively staged surprise visit during a disciplinary interview and false allegations being made against him. He referred to the telephone calls by the duty of care manager as being unwanted behaviour where inappropriate dialogue was used. He stated that all managers were aware of his disability, but recklessly dismissed their own occupational health reports and his GP reports.
- 59 The **Claimant's oral submission** referred the Tribunal to pages 141-2 and 280 of the bundle which referred to his depression since June 2016, and his sick notes in the bundle at pages 132-3 where depression was diagnosed. The Claimant stated he was treated unfavourably throughout. He confirmed that he did not appeal because he did not want his job back. He denied that he failed to use the iPhone in carrying out his duties, he stated that he used one briefly but found the laptop more user-friendly and reduced eyestrain.

The Decision

The unanimous decision of the Tribunal is as follows:

- 60 The Tribunal have considered all the evidence referred to above we have concluded that the Claimant's mental impairment of anxiety and depression amount to a disability under the Equality Act. We have concluded that the symptoms the Claimant reported to occupational health in November 2015 and the evidence of the psychologist that his general anxiety, depression were severe and were treated with various interventions such as CBT and medication. We have concluded that the adverse impact was that it caused low mood, lack of motivation, paranoia and agoraphobia which adversely impacts on the Claimant's ability to carry out normal day-to-day activities. On the issue of whether it lasted 12 months or was likely to last 12 months we have concluded that at the relevant time, namely the date of termination this condition was likely to last 12 months as he continued to remain off sick from early November 2015 until 13 October 2016 and there had been no indication before the Tribunal that his anxiety or his depression had improved after having treatment or that the symptoms were abating. We conclude therefore, the condition was long-term and was likely to last for 12 months.
- 61 The next issue before the Tribunal is whether the allegations against Mr Malynn are well-founded and we have found as a fact that the allegations in relation to the discussion about a redundancy package and the possible disciplinary action were not well-founded. We have concluded that the discussion about the redundancy package took place with all employees in the team and therefore there was no evidence that this was less favourable treatment because of the Claimant's disability

of ulcerative colitis. There was no evidence that this discussion amounted to harassment and the Claimant made some no such complaint during his grievance meeting and there was no evidence that this was unfavourable treatment due to something arising out of his disability. Similarly, there was no evidence that the discussion about a redundancy package amounted to victimisation because the Claimant had previously pursued employment Tribunal proceedings. On the facts, all these claims are not well-founded and are dismissed.

62 We also conclude that the allegations against Mr Malynn in respect of “demanding that he achieve a target of 80%” are also not well-founded on the evidence before us. We concluded that the discussions with Mr Malynn were about the *possibility* of achieving a higher target and he appeared to approach the matter reasonably and with a measured and appropriate approach. The Tribunal noted he secured an up-to-date, occupational health report to inform him of the Claimant’s capabilities. The Tribunal noted that the Claimant made no specific allegations against Mr Malynn and there was no evidence to show that his conduct in this meeting amounted to an act of harassment, direct discrimination, discrimination arising from disability or victimisation. There was no evidence that a non-disabled comparator would have been treated more favourably in a discussion about improving targets and the Claimant failed to provide any evidence in support of his claim for direct discrimination. In relation to the claim of discrimination arising from disability against Mr Malynn, there was no evidence that the conversation about achieving a higher target amounted to unfavourable treatment because of his inability to reach the target of 80%. We have found as a fact that this was simply a discussion and no instruction or direction had been issued for the Claimant to perform to the higher target, discussions were at an embryonic stage. Therefore, on the facts there was no demand to achieve a higher target. There was also no evidence to suggest that Mr Malynn considered imposing on the Claimant a higher target because of a protected act, this was not put to him in cross examination and this was an allegation that had not been advanced by the Claimant in his grievance. There was therefore no consistent evidence that Mr Malynn’s conversation about a higher target was victimisation because of the previous employment Tribunal proceedings. The Claimant’s claims are therefore not well-founded and are dismissed.

63 The Tribunal considered the meeting with Mr Downing on 9 October 2015 and the subsequent instruction in writing to improve his target performance to 80%; we conclude that this was conduct that related to the Claimant’s disability of ulcerative colitis. The issue for the Tribunal is whether this would be an act of harassment towards the Claimant and we conclude that there was no evidence to suggest that the conduct of the meeting or the subsequent email had the purpose or effect of violating the Claimant’s dignity or of creating an intimidating, hostile, degrading or humiliating or offensive environment for the Claimant. The Tribunal noted that this was a meeting to discuss performance generally and was in pursuit of a legitimate business aim that was carried out in a reasonable manner. Although the Claimant disagreed with the views expressed by Mr Downing, there was nothing to suggest the conduct of the meeting or the words spoken amounted to an act of harassment and we conclude that it would not be reasonable to conclude that the conduct of the meeting had that effect.

64 Turning to the claim for direct discrimination in respect of the claims against Mr Downing, we conclude that the meeting and the subsequent email of 9 October is not an act of direct discrimination. There was no evidence that this was less favourable treatment because of his disability of ulcerative colitis, there was no evidence to suggest that a non-disabled person working to the performance of between 65 to 68% would have been treated more favourably in a meeting to discuss performance.

65 We now consider whether the claims against Mr Downing were acts of discrimination arising from disability. The Claimant claimed that the something arising from his disability was his inability to reach a target of 80% and we conclude

that requiring him to perform at that level (after a period of four weeks) is unfavourable treatment. Mr Downing produced no evidence to show that the action he took was a proportionate means of securing the legitimate aim of increasing productivity generally. There was no evidence that before he had the meeting with the Claimant and prior to issuing the email, he had considered the up-to-date, occupational health advice that had been prepared and he failed to respond to the Claimant's concerns about his health and his inability to perform to the higher level of productivity. The Tribunal accept that a legitimate aim was improving performance across the business generally but there was no evidence that they considered alternative approaches that mitigated any adverse effects that may be caused to the Claimant when imposing this new target. The Respondent has failed to provide any evidence to suggest that they took into account the Claimant's disability and the way the increased target would adversely impact upon his ability to perform to the increased level required in his productivity. The Claimant's claim is therefore well-founded.

- 66 The Tribunal will now consider the issue of whether this complaint is in time. The act alleged occurred on 9 October 2015 and the Claimant raised a grievance about this matter. The outcome of the grievance was communicated to him in March 2016. The outcome did not address the mandatory 80% target. After raising the grievance, the Claimant went on long term sick leave and never returned to work. The Claimant remained subject to the higher performance level until the date of termination of his employment therefore this was therefore a one off act but with consequences that continued to apply to him in his role. We therefore conclude that this claim is in time.
- 67 We now consider whether the actions of Mr Downing requiring the Claimant to achieve a target of 80%, was a failure to make a reasonable adjustment. We conclude that this amounted to a PCP and we heard consistent evidence that this put the Claimant at a substantial disadvantage because he could not comply with it and we refer about paragraph 25 above in our findings of fact. We also heard that non-disabled employees could meet the target of 100.04%, the Claimant was therefore placed at a substantial disadvantage in comparison with those who are not disabled. We have concluded that the Respondent did not take such steps as were reasonable, we have concluded that before imposing the higher target they failed to take into account the up-to-date medical evidence before them and failed to engage with the Claimant when he stated that he was not able to meet this target, which is stated quite clearly in the meeting with Mr Downing. He also failed to carry out a workplace assessment or to put in place a coaching plan to see if further adjustments were needed to avoid the disadvantage caused to the Claimant. We find this head of claim to be well-founded.
- 68 We now turn to whether or the claim for failing to make reasonable adjustments is out of time and we refer to our findings of fact. We conclude that this was a one-off act but with continuing consequences; the PCP continued to apply to the Claimant requiring higher performance until the date of termination. Although the Respondent stated the glide path was not applied to the Claimant, this was due to the fact that the Claimant was off sick. However, had he returned to work, he would have been required to perform at the higher level as set down on the glide path expecting an improvement of 2% per week. This claim is therefore in time and well founded.
- 69 We now turn to the Claimant's allegation of discrimination against Mr Wooff, firstly in respect of the meeting held on 29 October. We have found as a fact above that the meeting was conducted properly and the minutes were not subject to any significant challenge by the Claimant in Tribunal; the Claimant accepted that he said some of the troubling things in the meeting in respect of homicide, genocide, and suicide but did so in sarcasm and jest. This did not detract from the troubling nature of the comments and the Respondent would have been entitled to be concerned about the Claimant's health and well-being. The Tribunal noted that the Claimant also accepted when speaking to occupational health accepted that he had said these

things. There was no evidence that the meeting was conducted as an interrogation, the minutes reflected what appeared to be an even-handed discussion where the Claimant was able to say anything he wished (and he did so). The Claimant's claim of harassment is therefore not well-founded on the facts before us. The Tribunal further conclude that there was also no evidence that the conduct of this meeting was less favourable treatment because of his disability; we prefer the consistent evidence of the Respondent's witnesses that this was called because of Mr Downing's concerns for the Claimant's wellbeing as well as the content of the posts that he placed on the Internet. We conclude that had a non-disabled person conducted himself in this way, a disciplinary investigatory meeting would also have been convened. The Claimant's claim of direct discrimination is not well founded and is dismissed.

- 70 There was no evidence to suggest that the disciplinary investigatory meeting on the 29 October or that the Claimant was "accosted or interrogated" in this meeting because of something arising from his disability (which would have been ulcerative colitis). It was evident that the only focus of discussion was of the Claimant's comments and there was no evidence that the comments he made in the meeting were made due to the Claimant's bowel condition. His claim of discrimination because of something arising from his disability on these facts are not well-founded and are dismissed.
- 71 There was no evidence before the Tribunal to suggest there was a causal link was made between the Employment Tribunal proceedings in 2012 or his grievance submitted on 14 October 2015 and being called to the investigatory meeting on the 29 October (and being accosted). Again, the reason the Claimant was called to this meeting was as a result of his conduct and his behaviour; there was no evidence that it was because of either protected act. The Claimant's claim for victimisation on these facts are not well-founded and are dismissed.
- 72 Turning to the facts relating to the decision to send him home on special leave, the Tribunal found as a fact that the Respondent acted reasonably and with good cause when they sent the Claimant home on special leave. This conduct was subsequently found to be reasonable as the Claimant was referred for a mental health assessment and was signed off sick with anxiety and depression until his dismissal. He was clearly unwell at the time. The decision to send the Claimant on special leave cannot amount to an act of harassment and there was no evidence that the purpose or effect was to create an intimidating, hostile, degrading environment, its purpose was to allow the Claimant time and space to seek medical support and for his well-being. There was no consistent evidence before the Tribunal and it was not an allegation that appeared in the Claimant's claim form that he was escorted out of the building; we do not find this credible or consistent taking it into account the evidence of both parties. The Tribunal do not find the Claimant's claim for harassment on this ground well-founded and it is dismissed.
- 73 We also do not find the act of sending the Claimant home on special leave to be an act of direct discrimination. If an employee who had committed the same acts as the Claimant, but was not disabled, this person would also be sent on special leave. There was no evidence that this was less favourable treatment because of either ulcerative colitis or depression and anxiety. The Claimant's claim for direct discrimination on these facts is not well-founded and is dismissed. The Tribunal also dismisses the claims of discrimination arising and for victimisation, there was no evidence that the Claimant was sent on special leave he had raised a grievance or because he had previously pursued employment Tribunal proceedings. There was also no credible evidence to suggest that being sent home on special leave was unfavourable treatment arising out of his disability.
- 74 The facts relating to the Claimant being telephoned at home by Mr Wooff and in correspondence are above at paragraph 34 of our findings of fact. The Claimant

alleged that these calls amounted to harassment, direct discrimination, discrimination arising and victimisation. We have found no consistent evidence that the telephone calls, which were described as duty of care calls, were inappropriate and there was no evidence that the words or the manner in which these calls were conducted could amount harassment or direct discrimination or discrimination arising. These were essentially calls of a welfare nature and when the Claimant became unhappy about his discussions with Mr Wooff; he was replaced. The Tribunal conclude there was no evidence to suggest that the contents of the calls or the written communications amounted to discrimination on any ground.

- 75 Turning to the final act which the Claimant suggests is an act of direct discrimination is dismissal. There was no evidence that the Claimant was dismissed because of either disability (ulcerative colitis or depression and anxiety); the Claimant was dismissed because of his lengthy sickness absence and his failure to engage in the termination process.
- 76 There was no evidence that this was an act of direct disability discrimination, there was no evidence that had a non-disabled person been absent for the same length of time and failed to engage in the sickness absence process, would be treated more favourably. We conclude that had a non-disabled person been absent same length of time in the same circumstances, they would have been dismissed at the same time. The Claimant's claim direct discrimination in respect of dismissal is not well-founded and is dismissed.
- 77 On the issue of whether the dismissal is discrimination because of something arising out of the disability, we find that dismissal is unfavourable treatment arising out of the Claimant sickness absence due to his mental impairment which we have concluded is a disability. The issue for the Tribunal is whether the Respondent can show it is a proportionate means of achieving a legitimate aim. We have concluded that dismissing an employee after a sickness absence of over eight months (page 251 absent from the 6 November 2016 until the 13 July 2016) with no prospect of a return to work in the near future was a proportionate response. The Claimant did not engage in the process and failed to send in any written representations or to seek to provide oral representations by telephone. The Respondent was therefore entitled to dismiss the Claimant at that time, taking into account his lengthy absence, his failure to engage in the process and his evidence to the Tribunal that he did not wish to work for the Respondent. The Claimant's claim for discrimination arising is not well-founded and is dismissed.
- 78 On the issue of unfair dismissal, the Respondent has shown a potentially fair reason of capability and we are content that the Claimant was dismissed for that reason. We also conclude that dismissal was within the band of reasonable responses open to the Respondent taking into account the Claimant's lack of engagement and his significant length of absence with no positive prognosis for the future. We also considered the Claimant's evidence to the Tribunal that he failed to appeal his dismissal because he did not want his job back. The Claimant's conduct during his sickness absence was entirely consistent with an employee who did not wish to engage with the Respondent or return to work and the Respondent was entitled to conclude that there were no further steps that could be taken during their attendance procedure to encourage the Claimant to return to work. We conclude therefore that the dismissal is procedurally and substantively fair. The Claimant's claim for unfair dismissal is therefore not well-founded and is dismissed.
- 79 The Tribunal have not heard evidence in relation to remedy and the parties are encouraged to see if this matter can be resolved without the need for a further hearing. The only issue for the Tribunal will be an award for injury to feeling and for clarification to assist the parties in their discussion, we have found no facts to suggest that an award of aggravated damages would be appropriate in this case. The parties should inform the Tribunal within 28 days of the promulgation of this

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decision if they wish the matter to be listed for a 1 day remedy hearing and at the same time to provide dates to avoid.

Employment Judge Sage

29 September 2017