THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

MEMBERS: Mrs S Dengate
Ms J Bird

BETWEEN:

Mr SL Khutan

Claimant

And

Asda Stores Ltd

Respondent

ON: **27 March – 1 April 2019**

Appearances:

For the Claimant: In Person
For the Respondent: Ms H Gardiner, Counsel

RESERVED JUDGMENT

All claims fail and are dismissed.

REASONS

1. By a claim form presented on 13 April 2017, the Claimant complains of race discrimination; religion or belief discrimination; disability discrimination; harassment; unfair dismissal; failure to pay notice pay; failure to pay holiday pay and; unlawful deduction of wages. A claim of direct disability discrimination was withdrawn. All claims were resisted by the Respondent.

2. We heard evidence from the Claimant and from his sister, Parmjit Khutan, on his behalf. The Respondent gave evidence through Darren Coker (DC) General Manager; Noel Boland (NB) Transport Operations Manager; Vicky Teelwah (VT) People Co-ordinator and Kiran Bal Bajwa (KBB), HRBP.

3. The parties presented a joint bundle of documents and references in square brackets in the judgment are to pages from the bundle.

The Issues

4. A list of issues in the case have been agreed between the parties and will be more specifically referred to in our conclusions.

The Law

Direct Discrimination

5. Section 13 of the Equality Act 2010 (EqA) provides that 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.

Harassment

6. Section 26 EqA provides that a person (A) harasses another (B) if – A engages in unwanted conduct related to a relevant protected characteristic …… and 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.

7. In deciding whether the conduct has the effect referred to above, account must be taken of: a) the perception of B; b) the other circumstances of the case; c) whether it was reasonable for the conduct to have that effect.

Failure to make reasonable adjustments

8. Section 20 EqA provides that where a person (A) applies a provision, criterion or practice (PCP) which puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled it is the duty of (A) to take such steps as it is reasonable to have to take to avoid the disadvantage.

9. Section 21 EqA provides that a failure to comply with a section 20 duty constitutes discrimination against a disabled person.

Discrimination arising in consequence of disability

10. Section 15 EqA provides that 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.

Findings of Fact

11. The Claimant was employed by the Respondent from 22.9.07, working latterly as a Warehouse Operative in its Dartford distribution centre, until his dismissal on 2.12.16.

12. On 21 August 2010, the Claimant had an accident in the warehouse as a result of which he was off sick until 16 July 2011, at which point he opted to convert his sick leave to healthcare leave, which was an option available to him under the Respondent's Absence and Sickness Policy (the "Absence Policy").

13. Under the Absence Policy, where an employee with at least 3 years' service is off sick and Occupational Health (OH) has advised that they are unlikely to return to the business for a considerable amount of time, they can opt to take Healthcare Leave. The effect of this is that the sickness absence is converted to a career break and during this time neither holiday or sick pay accrues. [178]

14. The Claimant's Healthcare Leave ended on 6 October 2013 and the following day he returned to work on a phased basis, working 2 hours per day, 3 days per week. The Claimant went off on sick leave again on 14 November 2013 and never returned to work prior to his dismissal on 2 December 2016, over 3 years later.

15. The Claimant complains about the way his sickness absence was managed. His main complaint is that he was bombarded with letters from the Respondent asking him to attend meetings with management or OH when he had told them repeatedly that he was unfit to do so. He claims that this treatment amounted to direct race discrimination, harassment and a failure to make reasonable adjustments.

16. The Claimant referred in his oral evidence, by way of example of the bombardment, to having received 3 letters from the Respondent in November 2013. The first letter, dated 25 November 2013, invites him to a meeting to discuss his absence and to an OH appointment, if necessary. The letter informs him of his right to bring a representative and gives him the option of a meeting at home. [230]. The meeting was arranged for 29 November 2013, which the Claimant took issue with. It was a recurring theme of his case that he was given short notice of meetings and that this was unfair and/or discriminatory.

17. The second letter, sent on 27 November 2013, was a follow up to the first, informing the Claimant that an OH appointment had been arranged for 29 November 2013. The letter contained Q&As about the OH process, including the

consequences of not attending, which the Claimant perceived as a threat. [232-233]

18. The third letter from the Respondent was dated 29 November 2013 and headed: "Notification of Withholding Company Sick Pay (CSP)". This was an unfortunate letter as it assumed that the Claimant was entitled to company sick pay when, it was the Respondent's case before us that, in fact, he had no entitlement at that point in time. We address the reasons in our conclusions latter on. The letter refers to the Claimant's failure to make contact and lists the matter for a further OH and welfare meeting on 3 November 2013 (a past-date and the reason why the Claimant refers to this and subsequent correspondence arranging meetings for past-dates as "*Tardis*" letters). [237-238]

19. We address the issue of "bombardment" in our conclusions.

20. On 28 November 2013, the Claimant rang the Respondent to inform it that he would not be attending the OH appointment or absence review meeting as he was not mentally capable of doing so, but would be submitting two grievances [234]. The Claimant followed this up in writing on the same day, stating that he was unfit to attend any meetings because of his bi-polar and depression. He then asked for any questions to be addressed to his Solicitors and for the Respondent to stop bombarding him with letters. [235-236]

21. Although the Claimant had intimated in November 2013 that he would be raising grievances, it was not until 7 August 2014, that he raised his first grievance, in which he alleged disability and race discrimination against a number of staff, relating to his return to work between 7 October and 14 November 2013. [296-301]. The grievance was dealt with by NB (who took it over from Peter Wildman).

22. The grievance was heard in the Claimant's absence on 13 March 2015, as he refused to attend a grievance meeting, even though OH had deemed him fit enough to do so. [390]. The Respondent appointed a GMB representative to act on the Claimant's behalf, which he subsequently took issue with. [359]

23. On 18 March 2015, after 16 months of continuous absence, the Claimant eventually attended an OH meeting. [382-389]. In the report the following day, OH referred to the assessment as challenging due to the Claimant's reluctance to engage in the process. They advised that he was unlikely to return to work in the foreseeable future and that there were no recommended accommodations (adjustments) at that time. [390-390a]

24. On 12 April 2015, NB wrote to the Claimant rejecting his grievance and on 23 April 2015, the Claimant wrote to NB complaining about the grievance being dealt with in his absence and without him having provided his full account. [401, 408-409] The Respondent treated the Claimant's letter as an appeal against the grievance, though, bizarrely, the Claimant took issue with that as well, insisting that it was not an appeal.

25. DC was assigned to hear the appeal. However, as with the first grievance, several attempts were made to arrange a meeting with the Claimant and after several adjournments, the appeal meeting went ahead on 19 May 2015, in the Claimant's

absence, with an appointed GMB representative appointed on his behalf by the Respondent. [422]. The hearing went part heard and the Claimant was given the opportunity to attend the resumed hearing but did not do so. [432-433] On 2 October 2015, DC wrote to the Claimant rejecting the appeal. [447-448].

26. On 5 October 2015, DC wrote to the Claimant inviting him to a capability meeting on the 15 October 2015, in order to discuss the next steps in relation to his employment. By this point, the Clamant had been absent from work for almost 2 years and had rebuffed many attempts by the Respondent to meet to discuss his absence. [449] The Claimant replied on the 7 October 2015 that he was not well enough to attend and that he was still working on his grievance, despite being told that the process had been exhausted.

27. In the meantime, the Respondent arranged a telephone OH appointment, which was the Claimant's preferred option. However, the Claimant withheld permission for OH to access his medical records.

28. On 14 January 2016, OH reported that the Claimant remained unfit for work for the foreseeable future and was not benefiting from interventions with his medical health team. [491]. Based on this report, the Respondent decided to begin the formal capability process under the "Managing Sickness Absence – Long Term Sickness and Ill Health Capability Policy" section of the Absence Policy [171-176].

29. On 20 January 2016, DC invited the Claimant to a formal capability meeting on 26 January, the purpose of which was to discuss the impact of his absence on his ability to carry out his role. The letter warned that one of the potential outcomes of the meeting could be his dismissal. [493]. The Hearing was re-arranged for the 9 February 2016 after the Claimant said that he was unfit to attend, with the warning that it would proceed in his absence if he did not attend. [498-499]

30. The Claimant did not attend the meeting and, as before, a GMB representative was appointed by the Respondent to represent his interests. [504-508]. Following the meeting, and before a final decision, DC wrote to the Claimant giving him a final opportunity to attend an outcome meeting or make representations by 21 March 2016, before a final decision. [522-523]. He did neither.

31. The decision of DC was that the Claimant would be dismissed. However, he delayed delivering the outcome, which was due to take place on 15 April 2016, because he wanted to seek advice from the Claimant's GP on how best to deliver the news. The matter was further delayed because the GP did not respond until 9 August 2016. Even then, the only advice given was that the Respondent should speak to the Claimant's mental health team. [548]. Having then contacted the mental health team, the Respondent was simply advised that the Claimant would react negatively to the news of his dismissal.

32. On 11 November 2016, OH provided a final report (just on the papers) giving advice on how to deliver the news of the dismissal to the Claimant. [576-577]

33. On 22 November 2016, the Claimant was invited to an outcome meeting on 2 December 2016. He did not attend.

34. On 2 December 2016, DC wrote to the Claimant confirming his dismissal with immediate effect with 11 weeks' notice pay in lieu. The Claimant was advised of his right to appeal the decision, but did not exercise it. [589-590]

Submissions

35. The Respondent provided written submissions, which were spoken to. It is not proportionate for me to reproduce the submissions, but in brief, the Respondent submitted that dismissal was by reason of capability following a 3 year plus absence, with no prospect of a return to work in the foreseeable, and was in all the circumstances fair. The Claimant had not proved a prima facie case of direct race or religious discrimination. The claims of harassment, discrimination arising and reasonable adjustments and unlawful deduction of wages were not made out on the evidence.

36. The Claimant made oral submissions. These are set out below, almost verbatim:

> "*Lesley Watkins and other managers knew I had a grievance. For the last 5 days all I have heard is lies. When Counsel spoke, all I heard was lies. Not fair to unfairly to dismiss someone. Mr Trott's outcome was just a defence. Medical experts would know how to treat people with bi-polar. In the bundle there were missing letters. Investigations were not reasonable, I was bullied and harassed to attend meetings. They treated me like a slave. They could have put me on healthcare leave.*
>
> *Managers who had a duty of care failed when I had my accident and have failed now. I have suffered in the hands of Asda managers, they have discriminated against me for years. It is Mind rape.*
>
> *The ill treatment continued for years. The people who were supposed to help me bullied, harassed and mocked me. The all had a duty of care. Instead they dismissed me. Caused me psychological and physical harm. They treated me like a slave. They have also tried to cover up their illegal actions. Even in the way they took out documents from the bundle.*
>
> *The accident destroyed my life but what happened after was worse. A bandwagon of bullies and racists. They destroyed my life due to race and disability. If Asda do not get reprimanded heavily, they will do it to other colleagues. When I returned to work they still treated me unfairly. Everything is in my particulars of claim. Asda should think again before doing this. They did not care and treated me as slaves*".

Conclusions

37. Having considered our findings of fact, the parties' submissions and the relevant law, we have reached the following conclusions on the issues:

Direct Religion & Belief Discrimination and Direct Race Discrimination

38. At a preliminary hearing on 17 November 2017, the Claimant confirmed that the religion or belief he relied upon was Hinduism [121]. However, at our hearing, he said he was relying on Sikhism as well. He then confused the issue further by

saying that he believed in Christianity, Jehovah witnesses and Islam. Hence, at the end of his evidence, we were unclear what religion or belief, if any, the Claimant ascribed to. On a strict reading of section 13 EqA, the Claimant does not have to ascribe to a particular religion to be discriminated against because of it. However, it does make establishing a prima facie case that much harder.

39. His allegations of religious discrimination, which are pleaded in the alternative as Race discrimination, are as follows:

He was referred to as "Sul" a swear word in Punjabi and his name "Lal" was insulted too.

40. In his Scott Schedule, the Claimant alleges that DC sent him several letters offending his name. He claims that he received 14 letters in which his middle name was cited as "Sul" instead of "Lal".

41. The earliest of such letters that we have seen is dated 20 November 2015, though the first one referred to in the Claimant's Scott Schedule is dated 16 December 2015. The letters from DC continue in this form until 2 December 2016.

42. The Claimant told us that "Sul" is a swear word in Punjabi used against Muslims. We took that evidence on face value as we were unable to independently verify it.

43. We saw 3 examples (pre-dating the "Sul" letters) of letters in which DC had cited the Claimant's middle name incorrectly, as "La" instead of "Lal" [432, 447 & 449],

44. The evidence of DC was that it was a genuine mistake. He said that he did not know the meaning of the word "Sul" and would have obtained the Claimant's address and title from the Respondent's database.

45. It is fair to say that the Respondent's administration in relation to its correspondence with the Claimant was very poor. Letters contained incorrect dates for meetings, there were spelling mistakes, incorrect titles (The Claimant was addressed as "Ms" in one letter [537]), invites to meetings on dates that had passed (the Claimant refers to these as "Tardis" letters). Also, mail was sent to the Claimant's old address after he had provided updated details. These errors were not one-offs either, they were repeated. Getting the Claimant's middle name wrong was consistent with the sloppiness and lack of attention to detail that dogged the Respondent's contact with the Claimant over this period.

46. The Claimant first refers to the issue in a grievance he raises with the Chief Executive on 15 March 2016 (525). Given that the first of these letters was received in November 2015, it is surprising that he did not raise the issue straight away. It is clear from the volume of correspondence we have been taken to that the Claimant was not backwards in coming forward in highlighting errors in the Respondent's letters. For example, he made a point of raising immediately the incorrectly past-dated notifications of meetings, which he took great exception to and treated as deliberate. There is no explanation as to why he did not do the same in the case of his incorrect name, which, given his evidence as to the connotation, is a lot more offensive.

47. DC had never met the Claimant and had no axe to grind with him. Further, we have no reason to assume that DC had any view as to the Claimant's religion (which was not Muslim) and we accept his evidence that he did not know what the offending term meant. We do not find it credible that DC would have gone out of his way to offend the Claimant, having recently dealt with his grievance appeal which involved allegation of discrimination.

Notice Pay

48. The Claimant contends that he has not received his 11 weeks' notice pay and that this is because of his religion. The Respondent denies this and took us to a payslip print out for the period ending 10 December 2016. That shows that the Claimant was paid a sum of £5266.80, which equates to exactly 11 weeks' pay, based on a 40-hour week at £11.97 per hour. The Claimant accepts that he received this sum but contends that it was an ex-gratia payment. [701] In an email dated 5 December 2016, payroll was instructed by HR People Management to pay the Claimant PILON (Pay in lieu of notice) of £5,266.80. [598] There is no PILON clause in the Claimant's contract so describing the sum as compensation in the payslip is consistent with the fact that there was no contractual entitlement to terminate without notice. We therefore find that any breach of contract relating to the failure to give notice has been satisfied. The claim therefore fails.

49. We find that the direct religion or belief claim is not made out.

Direct Race Discrimination

50. The Claimant describes his race as "Black".

51. The direct race discrimination complaint based on the same allegation as for religion and belief above are also dismissed. Islam is not a race but a religion and the Claimant did not make a positive case that the term "Sul" or indeed "La" was used because he is black. Even if that was his case, there was no evidence before the tribunal to support such a finding. The notice pay claim is not made out on the facts.

Holiday hours were "stolen"

52. The Claimant alleges that he has been paid the incorrect holiday pay since the start of his employment. He provided a table of the holiday pay he contends he has received and what he claims to be entitled to for each holiday year from tax year 2010/11 onwards. [1489-1491]. The Respondent disagrees with the Claimant's figures, contending that he has using the wrong hourly rate and including shift premiums that were not applicable to him. We also note that he has not pro- rated the hours to take account of the period of his Healthcare Leave (which he accepts does not attract holiday pay) or his final year of employment. The Claimant did not appear to understand the concept of pro rata entitlement. The Respondent also provided its own holiday breakdown figures [134-135].

53. The Respondent's holiday year runs from April to April. [204] Employees are entitled 28 days leave, including bank holidays. Leave is calculated in hours, and in the Claimant's case equated to 224 hours per year. At the start of the holiday

year, the payslip shows the total number of hours for the whole year and as holiday is taken, the number of hours remaining are shown on successive payslips. Holiday accrued while the Claimant was off sick.

54. To the extent that the discrimination claim relates to non-payment of holiday accrued and payable before 16 July 2011 (When the Claimant took healthcare leave) it is out of time and there are no reasons to extend time. We are therefore not considering that claim.

55. For the period 7 October 2013 (his return from healthcare leave) to 5 April 2014 the Claimant was paid 103.25 hours holiday. Having gone through the calculations with the parties, we are satisfied that it is consistent with the pro rata entitlement for that period. [666]

56. In the holiday year 2014/15, the Claimant should have had the full entitlement of 224 hours. However, he was paid for 152 hours, a shortfall of 72 hours. [679-680]

57. In the holiday year 2015/16 – The starting hours are shown on the payslip are 300 rather than 224. It would appear from this that the shortfall in the hours for the previous year were added to this tax year, albeit there are an additional 4 hours not accounted for. [681]

58. We were taken to a payslip dated 14.11.15, which recorded a payment for 8 hours holiday of £90.63. The Claimant says that this payslip is fake as he did not receive the money into his bank account. The Claimant produced a copy of his bank statement for the relevant period and the payment was not shown. The Respondent was unable to explain the missing payment. [687]. Given the Respondent's demonstrably poor administrative record in this case, we are prepared to accept that the Claimant did not receive the 8 hours holiday pay, though we regard the payslip as inaccurate rather than fake.

59. In the holiday year 2016/17, the Claimant received 176 hours holiday, which was paid in 2 amounts, of £459.71 and £1,628.40 on termination. We are satisfied that these amounts are consistent with the Claimant's pro rate entitlement.

60. Hence on the above analysis, the only shortfall in holiday pay was the £90.63 in 2015/16. However, the Claimant, and the Respondent, accepts that in the year 2015/16, he was overpaid by £1353.40, a sum which the Respondent did not claw back. In those circumstances, the debt of £90.63 has been more than extinguished. In fact, the Claimant was in credit.

61. The factual basis of the discrimination claim is therefore not made out.

The Respondent sent a bombardment of letters with "tardis" type letters, threats and false failings

62. This complaint relates to correspondence sent to the Claimant by the Respondent. There are 31 letters relied on by the Claimant between 25 November 13' and 26 February 15'. [148-149]

63. I have referred to the first 3 of those letters at paragraphs 16-18 above. The rest of the correspondence from the Respondent is, in the main, either an invite to, or

about, a welfare meeting, OH appointment or grievance meeting; or it is in response to correspondence received from the Claimant. The context for this correspondence was the Claimant's refusal to co-operate with the Respondent's attempts to engage with him about his absence. The Claimant said that he did not wish to see anybody from management and that they should not contact him until he was better. He refused to disclose his medical records on the basis that he had told them what was wrong with him and that he was unfit for work and that that should have been enough. He was also failing to keep the Respondent updated on his condition, in breach of its sickness absence policy. For all of these reasons, the Respondent was having to contact him more frequently than they would otherwise.

64. Having reviewed the correspondence, we are satisfied that it, in all cases, it was sent for a legitimate purpose. We therefore do not agree that the Claimant was bombarded with letters.

65. The Claimant also alleges that the letters contained a number of false failings. He refers by way of example to a letter dated 25 July 2014, where failings listed include failing to make contact with the depot and failing to attend an OH appointment, both of which, we find, were factually correct [288a]

66. The reference to "tardis" letters is explained at paragraph We have already explained the reference dealt with the reference to the "tardis" at paragraph 23 above. The Claimant alleges that the past dates were given deliberately to mess with his head, a concept he referred to in evidence and in his submissions as "*Mind rape*". However, we are satisfied that it was not deliberate but simply another example of the lack of attention to detail displayed by the Respondent in its correspondence with the Claimant.

67. We are satisfied that none of the matters referred to above were because of the Claimant's race.

Harrassed to attend a meeting when ill

68. The Claimant alleges that he was harassed to attend meetings when he was ill. That he was ill was not in dispute as the purpose of the meetings was to discuss the illness. Although the Claimant's stock response to any request to attend a meeting was that he was too ill to do so, OH advised the Respondent otherwise and it was therefore entitled to accept that advice. Meetings were adjourned repeatedly to accommodate the Claimant and he was offered various options such as attending with his mental health councillor, having the hearing at a neutral venue or sending a GMB representative. None of these were taken up. The Respondent told the Claimant that if he did not attend meeting they would proceed in his absence. That is not harassment but an inevitable consequence of his non co-operation. The complaint is not made out.

Sending confidential and sensitive information and documents to wrong address

69. The Claimant says that his payslips and P45 were sent to his old address rather than his new one. The Respondent accepts this and contends that it was an error caused because it had not updated its records after the Claimant notified if of his

change of address. We are satisfied that this was not deliberate but was another example of poor administration. It had nothing to do with the Claimant's race.

He has not received the correct sick pay

70. This relates to both company sick pay (CSP) and statutory sick pay (SSP). In his Scott Schedule, the Claimant says that he has not been paid the correct sick pay from the commencement of his employment, though the period changed over the course of the hearing.

71. Dealing firstly with SSP, it was the Respondent's case that the Claimant was not entitled to SSP pay while on Healthcare Leave and that as he only returned for 38 days before going off sick again, he had not re-qualified for SSP.

72. The relevant statutory regime for the entitlement to SSP is the Social Security Contributions and Benefits Act 1992 (SCCBA). That provides for a maximum of 28 weeks' pay, at the statutory rate, in relation to any period of incapacity for work (PIW).

73. It is not for the tribunal to adjudicate on any disputes about the entitlement to SSP as the HMRC Statutory Payments Dispute Team has exclusive jurisdiction in dealing with such matters. The context in which it arises in our proceedings is as an act of discrimination so the issue that we have to decide is whether the non-payment of SSP was because of the Claimant's race.

74. There is no evidence before us at all that the non-payment of SSP during the Claimant's last period was because of his race. Although the Claimant raised the issue of his entitlement to CSP in his grievances, he did not at any point query the non-payment of SSP, which suggests that he did not believe he was entitled to it at that time. We are satisfied that the Respondent genuinely believed that the Claimant was not entitled to SSP and its reasons were based on its understanding of the statutory provisions relating to SSP and had nothing to do with race.

75. Turning to CSP, this claim relates to entitlement from 14 November 2013, when the last period of absence commenced. The Claimant was not paid sick pay during this period and the Respondent says that this was because he was not entitled to it under the Absence Policy. The policy, which we were taken to, provides that CSP entitlement runs from April to April each year and, subject to service, amounts to 26 weeks' pay in any single period of absence. The policy also deals with what happens when a person returns from sickness and provides that: "*When Company Sick Pay expires and a colleague continues to be absent into the start of a new Company Sick Pay year, they will not receive a new yearly entitlement. This can only happen after the colleague has returned to work……..*" [166]

76. The Claimant had been continuously absent when the April 2013 leave year commenced. Although he was at work between 6 October 2013 and 14 November 2013, the Respondent contends that his entitlement did not reset when he then went off sick because he did not return on full duties.

77. The provision quoted above refers only to a return to work and not to a return on full duties. The only reference to full duties is in a different context. What amounts to a return to work is not defined in the Absence Policy. However, OH had only deemed

the Claimant fit to return on a phased basis, which was agreed as 2 hours a day, 3 times a week, over a 7- week period. The Claimant's normal hours were 40 per week but he returned on 6 hours per week - 15% of his normal working hours. This meant in broad terms, that he was unfit for his full duties during this period for 85% of his normal working time.

78. In our view, on a proper construction of the CSP terms, a return to work means a significant return to duties and we do not consider that the Claimant returned to work for CSP purposes. We therefore agree with the Respondent that his entitlement to CSP did not re-set, albeit for different reasons.

79. The issue is slightly complicated by the fact that the Respondent notified the Claimant at the time that his CSP was being withheld because of his failure to follow the Policy. It then went on to pay him some CSP for 2013/14 (£405.09). [134-135]. Much later, in his grievance outcome letter, he was advised that he was only entitled to CSP if he returned on full duties. [609] He has therefor received a number of mixed messages. Nevertheless, we are satisfied that the Respondent genuinely believed that the Claimant was not entitled to CSP based on the terms of its policy and therefore the failure to pay it (save in error) was not related to his race.

80. The race discrimination claims are not made out.

Disability Discrimination

81. The Respondent concedes that the Claimant was a disabled person at the relevant time by reason of his bi-polar condition and leg injury.

Discrimination arising in consequence of disability

82. The Respondent concedes, and we find, that dismissal amounts to unfavourable treatment for the purposes of section 15 EqA. We are also satisfied that the Claimant's dismissal arose in consequence of disability as he was dismissed for long term sickness absence and such absence arose from his disability. We have therefore considered whether dismissal was a proportionate means of achieving a legitimate aim.

83. The Respondent submitted that its legitimate aim was: *ensuring attendance of its workforce and the efficient running of the business.*

84. In considering the issue of proportionality, we have asked ourselves whether dismissal was reasonably necessary to achieve the stated aims. Allonby v Accrington & Rossendale College and others [2001] EWCA 529. Put another way, could the aims reasonably have been achieved by a less discriminatory route and do the respondent's aims outweigh the discriminatory impact of the treatment/measures.

85. For the reasons that we set out under the "Unfair Dismissal" heading below, we find that dismissal was proportionate and therefore the claim fails.

Failure to make Reasonable Adjustments

86. The PCP relied upon is the application of the Respondent's Absence Policy. The Claimant's case was that the Respondent should have adjusted its policy in two respects: firstly, the requirement to maintain regular contact should have been adjusted so that the Respondent limited its contact with him to every 3 months. Secondly, the final capability hearing should not have been progressed to dismissal until his grievances were resolved.

87. The Absence Policy provides that in normal circumstances, contact will be made in person every 4 weeks and weekly by telephone. [171] The Claimant's case is that it would have been a reasonable adjustment for the Respondent to only make contact every 3 months. His argument was based on his assertion that he was being bombarded with letters and should have been left alone to get better. We have already rejected that. The Respondent considered such an adjustment unreasonable as a person's condition can change dramatically over 3 months and it was important that they had up to date information on the Claimant's health so that they could make informed decisions. We agree. It was reasonable for the Respondent to want to keep in regular contact with the Claimant, particularly given the nature and length of his absence.

88. Whilst the Claimant objected to the Respondent's attempts to engage with him about his absence, there is insufficient evidence to find that this put him at a substantial disadvantage. Further, the Respondent had no medical advice suggesting that such an adjustment was necessary and there was nothing to indicate that such an adjustment would have facilitated the Claimant's return to work.

89. Turning to the second adjustment suggested, the Claimant confirmed in evidence that by resolution of his grievances, he meant a determination of them in his favour. The Claimant considerably delayed in raising his grievance, he then failed to engage with the Respondent on the investigation, failed to attend the hearing or appeal and refused to accept that the process was at an end. There was no reasonable prospect of the decision changing. The process had already been considerably delayed so that the grievance could run its course, which it did. Given the length of the Claimant's absence (over 3 years by the time of dismissal) it would not have been a reasonable to delay matters any further.

90. We find that neither of the proposed adjustments would have been reasonable for the Respondent to make. The claim is not made out.

Harassment

91. The unwanted conduct alleged is the bombardment of letters, threats and false failings when the Claimant was ill. This relates to the matters dealt with at paragraphs 61-65 above. As we have already rejected the Claimant's characterisation of the correspondence in these terms, it follows that the factual basis for the harassment claim is not made out and the claim therefore fails.

Unlawful Deduction of Wages

92. The entitlement to CSP and Holiday pay have been considered above and for the reasons already stated, we find that the Claimant was not entitled to further payments.

93. The Claimant also claims that he was entitled to a discount card entitling him to a 10% discount on purchases. The Claimant cannot claim this as an unlawful deduction as a discount card does not fall within the definition of wages.

94. The unlawful deduction of wages claim fails.

Unfair Dismissal

95. We are satisfied, that the Claimant was dismissed for capability due to his long-term sickness absence. The Claimant was off work with mental health issues related to his bi-polar condition from 14 November 2013 and remained unfit for work up until his dismissal. Attached to the Claimant's termination letter of 2 December 2016 is an appendix setting out DC's detailed reasons for dismissal and based on these, we find that the reason for dismissal is made out [591-595]

96. Having established the reason for dismissal, we went on to consider whether dismissal was in all the circumstances fair, taking into account equity and the substantial merits of the case.

97. Two important aspects of a fair procedure in long term absence cases are i) consultation and ii) medical investigation. In reality the two are intertwined as the main purpose of consultation is to establish the true medical position and from that the likelihood of a return to work in the near future.

98. The Respondent made repeated attempts to consult with the Claimant about his absence but he refused to co-operate. Indeed, the Respondent's attempts to engage were treated negatively by the Claimant, who viewed them (wrongly, as we have found) as harassment and discrimination. He refused to attend meetings (including his own grievance meetings) even though they were repeatedly re-arranged to accommodate him. We are satisfied that the Respondent did all that was reasonably possible in the circumstances to consult with the Claimant.

99. Over the period of the Claimant's absence, the Respondent obtained 4 OH reports, dated: 8.8.14; 19.3.15; 14.1.16; and 11.11.16 respectively. The Claimant was offered several OH appointments but only attended 3, declining to attend any more. The advice across all 4 OH reports was that the Claimant was suffering from serious mental health issues and was unlikely to return to work in the foreseeable future. The Claimant does not dispute that prognosis and we are satisfied that the Respondent conducted sufficient medical enquiry prior to dismissal.

100. We are satisfied that the procedures adopted by the Respondent were reasonable in the circumstances. Although the dismissal meeting was held in the Claimant's absence, that was only after it had been re-arranged a number of times, and the Claimant had been warned that it would go ahead if he failed to attend. As

with other meetings, the Respondent ensured that there was a GMB representative present to represent the Claimant's interests. We are therefore satisfied that any detriment caused by his non-attendance was minimal and of his own making. As stated in our findings, the Claimant did not appeal the decision.

101. On the question of whether it was reasonable to dismiss, to put matters into context; by the time of dismissal, the Claimant had been absent for over 3 years; with minimal engagement with the Respondent about his absence. Between 16 July 2011 and 2.12.16, (5 years, 5 months) the Claimant had only attended work for 5½ weeks, and even then, working at 15% capacity. In light of this and the undisputed medical prognosis, the Respondent could not be expected to hold the Claimant's job open any longer. We find that dismissal was in all the circumstances fair.

Judgment

102. The unanimous judgment of the tribunal is that all claims fail and are dismissed.

Employment Judge Balogun
Date: 14 June 2019