EMPLOYMENT TRIBUNALS

Claimant: Mr D Doyle

Respondent: Muller UK & Ireland Group LLP

Heard at: Manchester **On:** 29 November 2021 to 3 December 2021, 20 and 21 January 2022, 16 and 17 February 2022 (in Chambers)

Before: Employment Judge Ainscough
Mr D Mockford
Mr P Stowe

REPRESENTATION:

Claimant: In person
Respondent: Miss K Barry of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claim for unfair dismissal in accordance with section 94 of the Employment Rights Act 1996 is unsuccessful and is dismissed.

2. The claim for direct disability discrimination in accordance with section 13 of the Equality Act 2010 is unsuccessful and is dismissed.

3. The claim for discrimination arising from disability in accordance with section 15 of the Equality Act 2010 is unsuccessful and is dismissed.

REASONS

Introduction

1. This was a claim brought by the claimant as a result of his dismissal from his role as a tanker driver for the respondent, a company specialising the production of dairy products, on 2 April 2019. The claimant alleged that he had been subject to

disability discrimination as a result of the handling of his grievance and ultimately, his dismissal.

2. The respondent, whilst conceding that the claimant was a disabled person, because of extreme stress and anxiety, denied that he had been subject to any disability discrimination or unfairly dismissed.

The Proceedings

3. The parties agreed a List of Issues with Employment Judge Ryan at a case management preliminary hearing on 14 November 2019, and that list was recorded in Employment Judge Ryan's note of that hearing.

4. However, at the outset of the hearing the claimant made an application to amend his claim to include a claim for failure to make reasonable adjustments to facilitate his return to work from sickness absence.

5. The Tribunal heard submissions from the parties and concluded that the application would be denied because the claimant had not provided any particulars of the amendment required, had not dealt with it in his own witness statement and the prejudice that would be caused to the respondent in having to deal with such an amended claim at such short notice was far greater than that which would be caused to the claimant in not bringing the claim.

6. The claimant gave evidence in person at the Tribunal on day two of the final hearing. The claimant was unable to attend on day three as he was awaiting the outcome of a COVID-19 test result. The claimant resumed his evidence on day four via the Cloud Video Platform, with the agreement of the respondent. Dave Wardle, the manager responsible for managing the claimant's sickness absence, gave evidence on the afternoon of day four and for the remainder of day five.

7. At the end of day five, the respondent's representative indicated that she may make an application to strike out the part of the claim that dealt with the allegations that the failure to properly deal with the claimant's grievance amounted to direct disability discrimination. As a result, Case Management Orders were given to the parties to deal with any such application.

8. The respondent's representative did make the application to strike out that part of the direct disability discrimination claim. The Tribunal considered written submissions from both parties and concluded that this part of the direct disability discrimination claim would be struck out. It was the Tribunal's conclusion that this part of the claim had no reasonable prospect of success in light of the claimant's answers given during cross examination. Oral reasons were given to the parties. There was no request for written reasons.

9. As a result of that decision, it was no longer necessary to hear evidence from those managers who dealt with the grievance or the grievance appeal.

10. Subsequently, on day six the Tribunal heard evidence from Paul Monaghan, the manager responsible for dealing with the claimant's appeal against dismissal, and Sarah Gazzard, the HR Manager involved in both the grievance and disciplinary process.

11. The Tribunal was referred to a bundle of some 485 pages. There was also a supplemental bundle from the claimant which included copies of his Occupational Health records.

Issues

12. At the outset of the hearing, the claimant confirmed that he no longer relied upon hypothetical comparators for the purposes of the direct disability discrimination claim because he had given evidence at paragraph 55 of his witness statement of actual comparators. Therefore, the following List of Issues was amended to include the actual comparators identified by the claimant.

13. In addition, following the strike out of part of the direct disability discrimination claim, the following List of Issues reflects the issues that were considered by the Tribunal when making its decision:

1. **Unfair dismissal claim**

    1.1. Was the claimant dismissed? This is admitted.

    1.2. What was the reason for the dismissal? The respondent asserts that it was a reason related to capability. The claimant accepts that in that the reason was related to his ill-health.

    1.3. Did the respondent carry out a fair investigation into the claimant ill-health absence and its causes, give the claimant appropriate warnings and chances to improve attendance and wait for a reasonable period before deciding that the claimant should be dismissed?

    1.4. Was the decision to dismiss within the reasonable range of responses for a reasonable employer?

    1.5. If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct?

    1.6. Can the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event and at what point? Alternatively, is there a chance the claimant would have been fairly dismissed?

2. **Section 13: Direct discrimination because of disability**

    2.1. Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely*:*

        2.1.1. dismissing him?

    2.2. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on actual comparators.

2.3. If so, has the claimant proven primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

2.4. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

3. **Section 15: Discrimination arising from disability**

3.1. Did the respondent treat the claimant unfavourably because of something arising in consequence of the disability? The claimant's case is that the something arising was his absence from work.

3.2. Does the claimant prove that the respondent treated the claimant as set out in paragraph 1.1 above?

3.3. If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

3.4. Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had a disability?

Relevant Findings of Fact

Claimant's Employment

14. The claimant was employed as a tanker driver in the Inbound Logistics Department. The claimant travelled to farms and collected milk from the farms for delivery to the respondent to make milk-based products.

15. The claimant was employed from May 2010 until 2 April 2019 when he was sacked by the respondent on the grounds of capability.

16. Dave Wardle was the claimant's immediate line manager and was known as a "team leader". Wilson Sharpe was the claimant's second line manager and was responsible for all drivers and was known as the "tanker inbound logistics manager".

17. Sarah Gazzard was the sole HR Business Partner for the Inbound Logistics Team and the Outbound Logistics Team.

18. Paul Monaghan, at the time the claimant was employed, was the Outbound Logistics Manager and Wilson Sharpe's counterpart.

19. During the course of the difficulties with the respondent, the claimant was assisted by three trade union representatives, Mike Larkin, Andrew Bailey and Susan Ianson.

20. The claimant identified Stephen Summerscales, Fred Hewitt and Stephen Clayton as actual comparators for the purposes of the direct disability discrimination claim.

Policies applicable to the claimant's employment

21. The respondent operated a bullying and harassment policy, an equal opportunities policy, an equality and diversity policy, a grievance procedure policy and finally a sick pay and attendance management procedure.

22. The attendance management policy amounted to approximately one half of an A4 page in the policy. If an employee was off on short-term sickness, the policy set out four stages which consisted of warnings (both verbal and written) and a final stage which could amount to dismissal.

23. Those employees with long-term sickness were not dealt with under the short-term sickness absence policy but rather each case was dealt with on an individual basis. No further detail was given in the policy as to how such cases would be dealt with. The Tribunal was not referred to any separate capability procedure.

Claimant's sickness absence up to 20 July 2019

24. On 26 April 2018 the claimant reported absent from work as a result of a bereavement. The claimant was referred to Occupational Health and a report was produced on 14 May 2018 which recorded that the claimant was absent as a result of the bereavement and work-related issues. It was the opinion of the Occupational Health provider that the claimant was unable to return to work as a result of the workplace issues and warned that if they were not resolved it would have a negative impact on the claimant's mental health. The Occupational Health provider was under the impression that a stress risk assessment had been completed and should in fact be re-addressed.

25. The claimant submitted a fit note which covered the period from 1 June 2018 to 15 June 2018 in which it was cited that the claimant was unfit as a result of a family bereavement.

26. The claimant attended an absence meeting with the second line manager, Wilson Sharpe, on 7 June 2018. That meeting lasted approximately 20 minutes and Wilson Sharpe was accompanied by Sarah Gazzard from the HR department. The notes of the meeting recorded that the claimant understood he had a right to be accompanied at that meeting but chose not to exercise that right. The note also recorded that the purpose of the meeting was to discuss the possibility of a return to the substantive role, a return to the substantive role with reasonable adjustments or a transfer to a suitable alternative position. The paperwork also provided options of group income protection and termination of employment.

27. At the meeting the claimant informed Wilson Sharpe that the work-related issues continued, and Wilson Sharpe was aware that those issues related directly to his line management. The claimant agreed that in light of those ongoing issues it would not be appropriate to complete the stress risk assessment and the meeting was terminated.

28. The stress risk assessment arose out of the stress management policy (of which the Tribunal has not seen a copy) and is a tool to help prevent and manage stress in the workplace. The purpose of the form is for the individual employee to complete the form and indicate the stressors in their particular role. The second

part of the form is then completed by the line manager and the two parties are to meet to agree on a way forward.

29. In evidence the claimant said that he had received the invitation to that meeting very late in the day and as a result could not get a representative to attend with him. The letter inviting the claimant to that meeting was sent out on 4 June 2018. However, the Tribunal notes that the claimant indicated that he was happy to proceed in the absence of a representative.

30. Wilson Sharpe subsequently sent a letter to the claimant on 12 June 2018 indicating that the stress risk assessment would be completed once the claimant had started counselling and had a representative at the meeting. It was agreed that a date for return to work could not be established at that time.

31. The claimant provided a second fit note from 29 June 2018 to 13 July 2018 in which the doctor recorded the reason for absence as family bereavement.

32. On 5 July 2018 Wilson Sharpe invited the claimant to a second absence meeting scheduled to take place on 12 July 2018. Unfortunately, the claimant was unable to attend that meeting because he was unable to arrange a representative to accompany him.

33. On 13 July 2018 the claimant submitted another fit note to cover the period from 13 July 2018 to 20 July 2018 in which the doctor described the reason for the claimant's absence as a family bereavement.

Claimant's grievance

34. On 20 July 2018 the claimant submitted a grievance in which he complained about his line manager, Wilson Sharpe. The claimant complained of acts of bullying, harassment, sexual harassment and victimisation. The chronology of the grievance covered from September 2015 until January 2018.

35. Sarah Gazzard, the HR adviser, acknowledged the claimant's grievance and by 2 August 2018 Darren Fisher, the Depot Logistics Manager, had been appointed to conduct the claimant's grievance hearing.

The claimant's sickness absence after 20 July 2018

36. On 24 July 2018 the claimant submitted a further fit note that covered from that date until 4 August 2018. The GP cited depression as the reason for the absence.

37. On 6 August 2018 the claimant was invited to another absence meeting to take place on 9 August 2018 to be led by Dave Wardle, the inbound logistics team leader. In evidence, Sarah Gazzard said that she had made the decision to appoint Dave Wardle given the clear conflict between the claimant and Wilson Sharpe following the submission of the claimant's grievance. It was Sarah Gazzard's evidence that despite Dave Wardle being named as a potential witness to some of the incidents outlined in the claimant's grievance, he had sufficient training to deal with the claimant's absence management.

38. The claimant attended the meeting on 9 August 2018 and subsequent absence management meetings with Dave Wardle and did not object to Dave Wardle's management of his absence. Page 3 of the handwritten notes confirms that the claimant was happy to proceed with that meeting. The claimant was accompanied to the meeting of 9 August 2018 by a trade union representative, Mike Larkin. The purpose of that meeting was to discuss the claimant's absence and the stress risk assessment.

39. During the meeting the claimant asked if he could take the stress risk assessment paperwork away and complete it in his own time because it was personal. When the claimant was asked by Dave Wardle about a return to work, he said that there was not much resolution to his complaints of bullying and victimisation and as a result his position was untenable. Dave Wardle asked the claimant about performing an alternative role, to which the claimant responded that he had not considered that because he was employed as a tanker driver. The claimant was reminded of the employee assistance programme by Sarah Gazzard and informed the meeting that he was undertaking cognitive behavioural therapy. The meeting lasted approximately 25 minutes.

40. The claimant completed his part of the stress risk assessment on 9 August 2018 in which he detailed his stressors as constant pressure from manager and micromanagement. The claimant believed this amounted to bullying and harassment which stemmed from unresolved earlier issues. The claimant described the impact of the stress as "fatigue, weight loss, chest pains, sleep problems, change in appearance and muscle tension".

41. The claimant attended a grievance meeting with Darren Fisher on 15 August 2018 at which he was accompanied by Mike Larkin. At that meeting, the claimant informed Darren Fisher that he was looking to leave the company and his trade union representative confirmed that the claimant did not feel able to return despite raising all of the issues because nothing had happened.

42. The claimant subsequently submitted the following fit notes:

(1) A fit note from 20 August 2018 to 2 September 2018 that cited depression as the reason for the absence;

(2) A fit note from 30 August 2018 to 31 September 2018 that cited depression;

(3) A fit note from 8 October 2018 to 7 November 2018 that cited depression;

(4) A fit note from 8 November 2018 to 7 December 2018 that cited stress at work.

43. The claimant attended an absence meeting with Dave Wardle, Sarah Gazzard and accompanied by Mike Larkin on 10 October 2018. The claimant confirmed in the notes that he was happy to proceed with that meeting.

44. During this meeting the claimant told Dave Wardle that he did not want to come back because he was being bullied and victimised and that he was waiting for the outcome of the grievance. The claimant stated that he did not want to work for a

company that treated him in this way. The claimant's trade union representative asked Dave Wardle why the meeting had been called, to which Dave Wardle responded that they wanted to get the claimant back into work. The claimant's trade union representative informed the meeting that this would not happen whilst the grievance was ongoing.

45. As a result, Sarah Gazzard took the decision that it was not possible to complete the stress risk assessment until after the outcome of the grievance was known. The claimant confirmed that a return to work was not a possibility and not something that he would consider.

Grievance investigation and outcome

46. On 22 October 2018 Dave Wardle was interviewed by Darren Fisher as part of the claimant's grievance.

47. On 4 December 2018 the claimant received the outcome to his grievance. The claimant's grievance was not upheld, and he was given the opportunity to appeal.

48. On 10 December 2018 the claimant submitted his grounds of appeal.

Claimant's sickness absence following grievance outcome

49. On 19 December 2018 the claimant attended an absence meeting with Dave Wardle and Sarah Gazzard and was accompanied by Mike Larkin. In the handwritten notes of the meeting, the claimant ticked the box to confirm that he was happy to proceed. It was the claimant's view that nothing much had changed since the last meeting and he was now going through an appeal of his grievance which he was finding stressful. The claimant confirmed that the unresolved grievance was a barrier to his return to work and his trade union representative confirmed that until that was resolved the claimant could not come back to work.

50. Dave Wardle suggested that the claimant might be able to return to work in an alternative department. The trade union representative indicated this would not be possible because the claimant was aggrieved with the company itself.

51. The claimant indicated that a return to work would depend on what happened in the appeal. The trade union representative said that it would not depend, but rather that if the appeal did not go in his favour, the claimant would not be returning. The claimant clarified that he would not be able to return as a tanker driver in those circumstances but would consider alternatives.

52. The claimant attended a grievance appeal meeting on 4 January 2019 and was provided with the outcome on 11 January 2019. The appeal manager, Ian Williams, did not uphold the appeal and concluded that the claimant should be in a position to return to work and assume his substantive role.

53. In the outcome letter Ian Williams recorded that the claimant had told him that he wanted to leave the business with a settlement agreement. Ian Williams informed the claimant that that was not something he would support and maintained that the claimant could return to his substantive post.

54. On 25 January 2019 the claimant attended an absence meeting with Dave Wardle and Sarah Gazzard and was accompanied by his trade union representative, Mike Larkin. The meeting lasted approximately 15 minutes. In the handwritten notes the box to check whether the employee is happy to proceed with the meeting was left unchecked.

55. At the outset of the meeting the trade union representative said he was unable to stay for long in light of an emergency call. Dave Wardle asked the claimant how he could return to work, to which the claimant responded that he was stressed as a result of the grievance and was under the doctor. When asked if there was anything that could be done to help, the claimant answered that he remained under the doctor and would have to seek further support. After a short adjournment, Dave Wardle informed the claimant that in light of his answers he would be referred to Occupational Health. This outcome was confirmed in a letter to the claimant of 25 January 2019.

56. On the same date, Dave Wardle made a referral to Occupational Health in which he indicated that the reason for referral was capability and long-term absence. Dave Wardle sought advice on the nature of the claimant's condition and whether he was able to return to work.

57. The Occupational Health provider completed the report on 5 February 2019 and made reference to considering a copy of a stress risk assessment dated 9 August 2018. The Occupational Health provider recorded that the claimant was of the opinion that he did not want to return to work in his substantive role or in an alternative role.

58. When meeting with Occupational Health, the claimant made it clear that he was not looking to return to work and in fact wanted a compromise agreement.

59. It was the opinion of the Occupational Health provider that the claimant was unlikely to return to work in his substantive role in light of the unresolved work issues. The Occupational Health provider advised a review of the stress risk assessment in order to consider whether the claimant could return in an alternative capacity.

60. The claimant attended an absence meeting with Dave Wardle and Sarah Gazzard on 6 March 2019 and was accompanied by his trade union representative, Mike Larkin. The handwritten notes confirm that the claimant was happy to proceed with that meeting.

61. At the outset of the meeting Dave Wardle asked the claimant whether the Occupational Health provider was right in recording that, “the relationship with the business has broken down to the extent that you don’t want to return to your role or business”. The claimant was asked if this was an accurate reflection, to which he said “yes”. When the claimant was asked whether he was resigning, his response was that he had received advice from a solicitor that he needed to stay employed.

62. Dave Wardle informed the claimant that the claimant therefore needed to return to work and as a result, the claimant was provided with a vacancy list. The vacancy list set out a number of vacancies. The claimant's immediate response was that he had been forced out of his job and an alternative was not something that

he would consider. When the claimant was asked again by Dave Wardle whether he would be resigning, the claimant said it was a possibility.

63. The claimant was asked whether he was fit to do an alternative role and he said he was still off with stress. When asked whether he would do a temporary alternative role his response was that he was employed as a tanker driver, he had been forced off with stress and did not want anything else. As a result of the claimant's answers the meeting was adjourned.

64. On reconvening the meeting, it was put to the claimant by Dave Wardle that the Occupational Health report said he was fit to return in an alternative role and the claimant was offered a DDO role in chill. The claimant complained that he felt he was being subject to a job interview, that a stress risk assessment had not been completed and that he was off with stress. The claimant also confirmed that until the grievance was resolved it was a barrier to his return to work.

65. Sarah Gazzard clarified that the stress risk assessment had not been completed because the outcome of the grievance was not known, and that the purpose of the stress risk assessment was to return the claimant to his role as a tanker driver. Sarah Gazzard was of the view that as Occupational Health had advised that this was not possible, it was not worth discussing the stress risk assessment.

66. Dave Wardle told the claimant that they were struggling because they wanted to get the claimant back to work but there were limited options other than termination of employment on grounds of ill health. The claimant responded saying that he would consider that to be constructive dismissal. Dave Wardle asked the claimant to go away and think about the vacancy list before the next meeting. The claimant said they would meet again after he had sought further advice.

67. Following this meeting, the respondent sought clarification from Occupational Health in regard to the following:

(a) The timeframe from when the claimant would be fit to resume driving duties and whether it would be within four weeks;

(b) Whether there was a requirement to contact the GP for further clarification; and

(c) Whether any medical treatment intervention would assist.

68. Occupational Health provided an addendum to their report dated 13 March 2019 without a further appointment with the claimant.

69. Occupational Health advised that the claimant should not drive at work while he continued to be adversely affected by stress and anxiety. It was the view of the Occupational Health provider that the unresolved work matters were the cause of the stress and anxiety and had to be resolved before the claimant could return to work in his driving role.

70. The Occupational Health provider did not request GP records because the cause of the claimant's adverse health were unresolved work matters rather than an

underlying medical condition. The Occupational Health provider also confirmed that there was no ongoing treatment.

71. On 15 March 2019 the claimant received a letter from Dave Wardle setting out what was discussed at the meeting on 6 March 2019. The claimant was informed that because his absence was in excess of 46 weeks, dismissal was a possibility and his absence could not continue indefinitely.

72. On 22 March 2019 the claimant was invited to an absence meeting on 26 March 2019 in which he was informed that the absence would be discussed, and one possible outcome could be his dismissal on grounds of ill health incapacity. That meeting was rearranged to take place on 2 April 2019.

Meeting with the claimant on 2 April 2019

73. On 2 April 2019 the claimant met with Dave Wardle and Sarah Gazzard and was accompanied by a trade union representative, Andrew Bailey. In the handwritten notes of the meeting, the claimant confirmed he was content to proceed. The meeting lasted approximately 20 minutes.

74. The claimant was asked whether he had had a chance to look at the vacancy list. The claimant's response was, “Don’t want another job. Feel forced out of my job so not something I’d consider”. Dave Wardle told the claimant that the Occupational Health report had confirmed that he could return with reasonable adjustments or return to another department. The claimant was informed the only other option was to terminate his employment on the grounds of ill health.

75. The claimant's response was that he had further evidence for the grievance procedure. As a result, Dave Wardle and Sarah Gazzard adjourned the hearing. Following the adjournment Dave Wardle informed the claimant that he would not be denied the right to raise a further grievance, but that would not change the decision to terminate the claimant’s employment.

76. Dave Wardle confirmed that the dismissal was on the grounds of ill health capacity rather than as a result of a disciplinary. The claimant was asked whether he anything to add, and he confirmed he did not.

77. On 3 April 2019 the claimant received a letter from Dave Wardle confirming that because the claimant would not consider an alternative role in the business and in light of his absence for a period of 48 weeks with no prospect of return, dismissal on grounds of ill health incapacity was appropriate. The claimant was reminded of his right to appeal.

78. On 4 April 2019 the claimant submitted an appeal on the following grounds:

(a) A failure to thoroughly investigate his grievance;

(b) Not taking his health into consideration;

(c) The length of time to complete his grievance and respond to subject access request;

(d) Other points to be raised at the appeal hearing.

Appeal hearing – 9 May 2019

79. On 9 May 2019 the claimant met with Paul Monaghan and Sarah Gazzard and was accompanied by his trade union representative, Sue Ianson.

80. At the outset of the meeting the claimant and his trade union representative set out their concerns about the grievance. Paul Monaghan informed them that he would not reopen the grievance.

81. The claimant concluded by saying that whilst he had been offered alternative roles, he was not well enough and did not want another job. The claimant was then asked what he wanted from the appeal. The claimant informed Paul Monaghan that, "I wanted to leave under a compromise agreement. I've done everything I can do. Occupational Health have said there are unresolved issues, company ignoring Occupational Health. Its left me leaving under capability".

82. The claimant was asked again what he was looking for and informed Paul Monaghan that it was recompense. The claimant went on to say that he had been in touch with ACAS about a Tribunal and that the appeal hearing was the last step with a view to going to a Tribunal. The claimant's trade union representative reiterated that the claimant was looking to resolve the matter amicably through a compromise agreement. The claimant asked how long the matter would take to resolve as he was looking to go to a Tribunal.

83. On 29 May 2019 Paul Monaghan wrote to the claimant and informed him that he was upholding the dismissal because the information provided about the management difficulties had been dealt with by the grievance, and that because the claimant was too unwell to work for the foreseeable future and was not willing to take up an alternative role, his dismissal would stand.

Relevant Legal Principles

84. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

85. The primary provision is section 98 which, so far as relevant, provides as follows:

> **"(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 sub-section (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 sub-section if it … relates to the capability…. of the employee for performing work of the kind which he was employed by the employer to do,**
>
> **(3) (a) capability in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality.**

> **(4) Where the employer has fulfilled the requirements of sub-section (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 reasonable 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".**

86. If the employer fails to show a potentially fair reason for dismissal, dismissal is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied.

87. In **Jones v Interserve Project Services Ltd ET Case No.3302615/09** the Tribunal upheld the complaint of unfair dismissal because the claimant was clearly suffering from depression and the respondent had failed to obtain a medical report prior to dismissal.

88. In the case of **Lynock v Cereal Packaging Ltd 1988 ICR 670, EAT**, the Employment Appeals Tribunal determined that were there is no suggestion of a connected underlying health condition, there is no requirement for an employer to obtain a medical report prior to dismissal.

89. Discrimination against an employee is prohibited by section 39(2) Equality Act 2010:

> **"An employer (A) must not discriminate against an employee of A's (B) –**
>
> **(a) …**
>
> **(b) …**
>
> **(c) by dismissing B;**
>
> **(d) …."**

Direct disability discrimination

90. Section 13 of the Equality Act 2010 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."**

Discrimination arising from disability

91. Section 15 of the Equality Act 2010 states that there will be discrimination arising from disability 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."**

Code of Practice on Employment 2011

92. The Code of Practice on Employment issued by the Equality and Human Rights Commission in 2011 provides a detailed explanation of the legislation. The Tribunal must take into account any part of the Code that is relevant to the issues in this case.

93. In particular, the Tribunal has considered:

(a) paragraphs 4.30 - 4.32 to decide whether the respondent's actions were proportionate to achieving a legitimate aim;

(b) paragraphs 3.4 – 3.6 to decide whether the claimant was subjected to less favourable treatment.

(c) paragraphs 3.29 – 3.30 to decide whether the comparators identified were appropriate.

Burden of Proof

94. The burden of proof provision appears in section 136 and provides as follows:

> **"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".**

95. In **Hewage v Grampian Health Board [2012] ICR 1054** the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**, as refined in **Madarassy v Nomura International PLC [2007] ICR 867** where Mummery LJ held that "could conclude", in the context of the burden of proof provisions, meant that a reasonable Tribunal could properly conclude from all the evidence before it, including the evidence adduced by the complainant in support of the allegations, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment.

96. Importantly, at paragraph 56, Mummery LJ held that the bare facts of a difference in status and a difference in treatment are not without more sufficient to amount to a prima facie case of unlawful discrimination. However, whether the burden of proof has shifted is in general terms to be assessed once all the evidence from both parties has been considered and evaluated. In some cases, however, the Tribunal may be able to make a positive finding about the reason why a particular action is taken which enables the Tribunal to dispense with formally considering the two stages.

Submissions

Respondent's Submissions

97. It was the respondent's position that the claimant's case was at odds with what was said in the meetings of which there were contemporaneous notes.

98. The respondent submitted that the claimant made a personal choice not to return to work and that the dismissal was as a result of that personal choice rather than because of the claimant's ill health. In the alternative the respondent submitted that the dismissal was proportionate.

99. The respondent contended that the claimant had not shifted the burden of proof shift to the respondent to explain why discrimination was not the reason for the claimant's treatment. The respondent disputed that the comparators identified were appropriate comparators, and the claimant has not provided any evidence that they were treated more favourably.

100. The respondent contended that it had done all it could and had in fact gone further than necessary to ensure the claimant's continued employment. The respondent submitted that the claimant closed down discussions about an alternative role and a dismissal was within the range of reasonable responses.

101. The respondent submitted that the claimant had not previously stated that it was inappropriate for David Wardle to deal with his absence management.

102. The Tribunal was asked to note that as early as August 2018 the claimant had said that his position was untenable.

103. The respondent contended that at the meeting on 19 December 2018 the trade union representative revealed the claimant's true intentions – that unless the grievance went his way, he would not be returning.

104. The respondent submitted that the claimant was not pushing to complete the stress risk assessment and was happy for a referral to Occupational Health in January 2019. The respondent contended that the claimant made it clear during his meeting with Occupational Health in February 2019 that he did not want to return to work in any role. The respondent contended it was not incumbent for the respondent to look at the stress risk assessment given the claimant's position.

105. The respondent asked the Tribunal to note that on numerous occasions the claimant made reference to wanting a compromise agreement.

106. The respondent contended that the report of 13 March 2019 was not necessary but was indicative of the respondent trying to do all it could. The respondent contended that even at the meeting on 2 April 2019 the respondent was content to discuss alternatives, but the claimant was not interested.

107. The respondent submitted that it was the difficulties the claimant had with his previous line manager that led to his intransigence and ultimately his dismissal. The respondent contended that the content of the claimant's appeal was proof of this.

108. The respondent contended that the notes of the appeal hearing revealed that the claimant did not have an issue with how the respondent dealt with his absence management.

109. The respondent denied that Dave Wardle was influenced by the claimant's disability when making the decision to dismiss. The respondent contended that the comparators (Fred Hewitt and Stephen Clayton) were treated in the same way as the claimant in that they were also dismissed.

Claimant's Submissions

110. The claimant sought to rely on the written submissions that he had provided to the Tribunal.

111. In his written submissions the claimant stated out that when alternative job offers were made there was no explanation of whether that job would accommodate the reasonable adjustments he required. The claimant contended that was pressured to accept a role or be dismissed, and that Occupational Health advice was not followed. The claimant reiterated that the respondent failed to make reasonable adjustments.

Discussion and Conclusions

Section 13 Equality Act 2010 – Direct Disability Discrimination

112. There was no dispute between the parties that the claimant was a disabled person because of extreme stress and anxiety for the purposes of section 6 of the Equality Act 2010.

113. There was no dispute between the parties that the claimant was dismissed on 2 April 2019 on the grounds of ill health incapacity. A dismissal amounts to a detriment for the purposes of section 39 of the Equality Act 2010, and an employer is prohibited from discriminating against an employee and subjecting them to a detriment. Therefore, the question for the Tribunal was whether in fact the dismissal was discriminatory.

114. At the outset of the hearing the claimant relied on three comparators he identified in his witness statement as Fred Hewitt, Stephen Summerscales and Stephen Clayton. Section 23 of the Equality Act 2010 provides that when such a comparison is made there must be “no material difference between the circumstances relating to each case”.

115. It was the claimant’s case that all three comparators were treated more favourably than him. The claimant complained that he was treated less favourably than the comparators because he was a disabled person.

116. Stephen Summerscales suffered an injury in a road traffic accident and was initially unable to drive and returned to work in an administrative role. Stephen Summerscales subsequently had further treatment and as a result was permanently excluded from driving and took a permanent alternative role with the respondent.

117. Whilst Stephen Summerscales was not dismissed, his circumstances were materially different to that of the claimant because he wanted to return to work and was willing to accept an alternative role. Stephen Summerscales was therefore not an appropriate comparator.

118. Fred Hewitt was unable to drive as a result of ill health. Fred Hewitt remained off sick until he had confirmation from the DVLA that he could no longer drive. Fred Hewitt was not capable of doing alternative roles and as a result was dismissed.

119. The claimant maintained that Fred Hewitt was treated more favourably because he was allowed to remain off sick for a longer duration before he was

dismissed. However, this was not the claimant's case. The claimant complained about his dismissal. Fred Hewitt was also dismissed and therefore suffered a similar detriment. The claimant was not treated less favourably than Fred Hewitt.

120. Stephen Clayton was unable to continue driving as a result of a hip problem. Stephen Clayton remained on long-term absence until he developed further health conditions and was unable to return to work in any capacity. The respondent accommodated his long-term absence until it was clear he was no longer able to return to work. The claimant was not treated less favourably than Stephen Clayton.

121. The claimant has not proven any facts from which the Tribunal could conclude that the reason for the claimant's dismissal was because he was a disabled person. As a result, the burden of proof did not shift to the respondent to explain why the claimant was dismissed in the context of the direct discrimination claim, and this claim fails.

Time Limits

122. The time limit issue is no longer an issue for the Tribunal to determine as the claimant's claim that he was treated less favourably because his grievance took too long to resolve has been dismissed. It was not disputed that all remaining claims were brought within the prescribed time limit.

Section 15 Equality Act 2010 – Discrimination arising from Disability

123. The dismissal of the claimant was unfavourable treatment. There was no challenge from the respondent that the claimant was treated unfavourably in this way.

124. The claimant contended that the unfavourable treatment was because of his absence from work and that this was something that arose as a result of his disability.

125. The claimant's absence from work from April 2018 until mid July 2018 was as a result of a family bereavement. From mid July 2018 until December 2018, the fit note cited depression and then stress at work as the reason for the absence. The Tribunal was not provided with any fit notes between December 2018 and April 2019.

126. The Occupational Health report of 5 February 2019 confirmed that whilst the claimant was not fit to drive in his substantive role, he was fit to return to work. The advice given was that consideration should be given to adjustments to facilitate a return to work in an alternative capacity.

127. The claimant said at the numerous absence meetings that he was stressed as a result of the grievance process. The claimant was unable to consider a return to work whilst the grievance remained a stressor. The Tribunal concludes that the claimant was absent as a result of his disability.

128. The Tribunal determines that there were two reasons for the claimant's dismissal. The first was because of the position taken by the claimant at the meetings on 6 March 2019 and 2 April 2019: that he could not return to work in his substantive role or any other role in light of the outcome of the grievance. The

respondent took the view that the claimant was therefore incapable of working for the respondent and dismissed him.

129. The position taken by the claimant was not something which arose from his disability. The claimant was unhappy about the outcome of his grievance and did not want to return to work for the respondent in any capacity. The claimant said on numerous occasions that he wanted to leave with a compromise agreement.

130. The second reason was, in light of the reference to the claimant's period of absence in the meeting on 6 March 2019 and in the dismissal letter of 3 April 2019, the claimant's absence. The respondent was clear that the absence could not continue, and matters had to be brought to a head.

131. Therefore, the Tribunal concludes that second reason for the claimant's dismissal arose from his disability.

132. In the amended grounds of resistance, the respondent contended that any dismissal which arose as a consequence of the claimant's disability was a proportionate means of achieving a legitimate aim. The respondent's legitimate aim, it said, was to "monitor, encourage and maintain acceptable levels of attendance for employees to ensure that high service levels were provided across the business functions of the respondent". The respondent went on to say that by doing this it meant that their employees were not placed under additional burdens in terms of workload.

133. It was the respondent's case that it was proportionate to dismiss the claimant "in light of the persistent high level of absence which rendered the claimant unable to effectively discharge the requirements of his role once all other options had been considered".

134. The Tribunal accepts the legitimate aim of the respondent because employers are entitled to a standard of attendance in order to stop a burden being placed on other employees.

135. The Tribunal concludes that the dismissal of the claimant was a proportionate response in pursuit of the respondent's legitimate aim.

136. By the time of the claimant's dismissal he had been absent for in excess of 48 weeks and had been given the opportunity to air his grievances at a hearing and an appeal. The respondent had attempted on numerous occasions to discuss alternative roles and had made a referral to Occupational Health and sought clarification from Occupational Health before taking the decision to dismiss. The respondent had done all that could be expected of a reasonable employer.

137. Therefore, the claim for discrimination arising from disability fails.

Unfair Dismissal

Reason for dismissal

138. It was agreed between the parties that the reason for the claimant's dismissal was capability. The Occupational Health report of 13 March 2019 confirmed that the claimant was no longer capable of performing his role as a tanker driver. At the

meetings on 6 March 2019 and 2 April 2019 the claimant said he did not want to do the tanker driver role or any other job. The respondent was also unable to sustain the claimant's long term absence.

Reasonableness of dismissal

139. The question for the Tribunal is whether the respondent acted reasonably in treating capability as a sufficient reason to dismiss the claimant.

140. The respondent had a basic policy in terms of absence management. Whilst there was some description of how those with short-term absence would be dealt with, there was no description of how a long-term absence would be managed. Instead, managers were asked to deal with it depending on individual circumstances.

141. The claimant complained that Dave Wardle should not have dealt with his absence management in light of his involvement in the grievance. However, the claimant did not object to Dave Wardle's appointment as an absence manager. In addition, at each meeting the claimant attended with Dave Wardle, he did not object to Dave Wardle dealing with the matter at the outset. It is only since the claimant's dismissal that he has raised this issue.

142. Dave Wardle was the claimant's line manager and despite being named as a witness in the claimant's grievance, it was appropriate that he managed the claimant's absence. If the claimant had genuinely believed there to be a conflict of interest, he would have objected to Dave Wardle's appointment, but he did not.

143. Prior to dismissal, the claimant was subject to eight absence meetings at which the respondent discussed his absence and the possibility of a return to work. The claimant was absent for in excess of 48 weeks and was referred to Occupational Health prior to the respondent taking the decision to dismiss. Whilst there was no particular procedure within the respondent's policy, the Tribunal concludes that the procedure followed by the respondent was fair and reasonable.

144. At each meeting the respondent attempted to discuss the possibility of a return to work with the claimant, and when it was clear he did not want to return to his substantive role, the respondent sought to facilitate a return to an alternative posting. Towards the end of the meetings, the claimant was clear that he did not want to return to work in any capacity.

145. The claimant complained that the respondent's failure to deal with the stress risk assessment was evidence that his dismissal was unfair. In August 2018 the claimant was provided with a blank stress assessment and completed the same. The respondent was waiting for the grievance procedure to be exhausted before completing the management part of the stress risk assessment.

146. The grievance procedure was exhausted on 11 January 2019. At the absence meeting on 25 January 2019, the claimant informed the respondent that he was too ill to consider returning to work in any capacity, and as a result the respondent referred the claimant to Occupational Health.

147. The Tribunal accepts the respondent's evidence that a stress risk assessment is completed when an employee has been assigned to a role. The nature of the

queries on the form corollate to the performance of a specific role and are not generic.

148. Given the position taken by the claimant in January 2019 that he was unable to return in any capacity, it would not have been appropriate to complete the stress risk assessment at that stage.

149. It is right to say that the Occupational Health provider suggested a review of the stress risk assessment in order to facilitate a return to work when drawing the conclusion in the report of 5 February 2019. However, at the very outset of the absence meeting on 6 March 2019 to discuss that very report, the claimant was asked whether he had told the Occupational Health provider that his relationship with the business had broken down to the extent that he did not want to return to the business at all. The claimant confirmed that that was the case. As a result of this confirmation, a decision was taken not to progress with the stress risk assessment.

150. It is clear to the Tribunal that the respondent persisted in trying to return the claimant to work rather than dismiss right up until the conclusion of the meeting on 2 April 2019.

151. In addition, by the time of the claimant's dismissal he had been absent in excess of 48 weeks. The respondent was unable to sustain the claimant's long term absence because the burden of his role had been passed on to other employees. The Tribunal is of the view that the claimant's dismissal was within the range of reasonable responses.

152. The claimant had indicated on numerous occasions, as early as August 2018, and indicated to Occupational Health that he just wanted to leave the business on a compromise agreement. The respondent was faced with an employee who no longer wished to work for the business despite its very best efforts.

153. As a result, the Tribunal concludes that the claimant was fairly dismissed and the claim for unfair dismissal fails.

Employment Judge Ainscough

Date: 31 May 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

1 June 2022

FOR THE TRIBUNAL OFFICE