



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH
BEFORE: EMPLOYMENT JUDGE K ANDREWS

MEMBERS: Ms B Leverton
Mr J Gautrey

BETWEEN:

Mr C Ishola
Claimant

and

Transport for London
Respondent

ON: 9 – 13 & 16 October 2017
17- 20 October 2017 in chambers

Appearances:
For the Claimant: In person
For the Respondent: Mr A Allen, Counsel

JUDGMENT

1. The claim of a breach of the duty to make reasonable adjustments is successful in respect of allegations 10 & 11.
2. The claim of indirect discrimination is successful in respect of allegation 11.
3. The claimant was not directly discriminated against because of his race or disability.
4. The claimant was not discriminated against because of something arising from his disability.
5. The claimant was not harassed.
6. The claimant was not victimised.
7. The claimant was not unfairly dismissed.
8. The claimant suffered no unlawful deductions from his wages.
9. The respondent did not breach the claimant's contract of employment.
10. A remedy hearing will be listed. Directions in that respect are given below.

REASONS

Claims and Issues

1. In this matter the claimant, who is black African, makes multiple complaints arising out of his dismissal in June 2016, the process that the respondent followed prior to that dismissal and his treatment in that period. The claimant's list of issues is at appendix A to this Judgment. Included in the bundle is a document prepared by the claimant headed Additional Information on allegations 1, 3-8, 12, 14, 15, 19 & 21. Taken together these documents show that, despite attempts made at earlier preliminary hearings to reduce the scope of the allegations to be considered at this hearing, many remain wide ranging. In particular issues 6, 17 & 21 describe general categories of claims rather than distinct issues which are dealt with elsewhere in the list. Further, issue 5 is in effect a personal injury claim described as breach of contract for which the Tribunal has no jurisdiction. The claimant confirmed that issue 8 does not include any claim in respect of notice pay as he now accepts that that was paid.
2. In respect of the claims of disability discrimination, the respondent has conceded that the claimant was disabled at the material times.
3. In respect of the claim of automatically unfair dismissal, the claimant says that he was dismissed because he made a protected disclosure and because he asserted a statutory right. He confirmed that the protected disclosures upon which he relies are his letters/emails sent to the respondent on 3, 17 and 23 March 2016 and paragraph 30 of his letter on 30 May 2016.
4. In respect of the claims of victimisation, the claimant relies upon the protected acts set out in the list of issues except for number 10 which he withdraws. The respondent accepts that the acts numbered 4, 5 and 9 were protected but disputes the remainder.
5. In respect of the claim of race discrimination, the claimant confirmed that this allegation relates only to Mr Walters's decision to dismiss.

General background

6. The claimant's disability is depression and migraines. The Tribunal recognises that the claimant continues to suffer from mental health issues and he found certain aspects of the Hearing to be challenging. The claimant appeared to be, however, fully able to present his case both orally and in writing and had a very good knowledge both of his position and the documents. He was well prepared for cross-examination of the respondent's witnesses. We did ensure, however, that breaks were taken as needed and I checked with the claimant that he was able to proceed at all relevant steps.

7. It is a feature of the claimant's correspondence in 2015/16 to various managers within the respondent that at times he has made wide-ranging and scathing criticisms of a number of people occasionally in extreme terms. The claimant said that this reflected how he felt at the time and although he stands by his general allegations that he has been unfairly treated in a discriminatory way, he recognises that some of the more extreme statements (e.g. a reference to capital punishment) were not appropriate. He says this was a product of his disability. We accept this but note how extremely upsetting such statements could be for the recipient and/or subject.
8. There have been previous proceedings between these parties. In 2015 the claimant brought two claims, heard together, in relation to his treatment from 14 April 2014. The first claim was issued on 4 August 2015 and the second on 3 November 2015. Therefore claims with which this Tribunal can deal can relate to events no earlier than 3 November 2015 although such events may be relevant as background.
9. In those previous proceedings all but one of the claimant's claims were dismissed.

Relevant Law

10. The Judgment in the previous proceedings, dated 5 October 2016, also set out and we adopt, a comprehensive statement of the law on race and disability discrimination in its various forms. The only specific observation we add to that statement is in relation to claims of a breach of the duty to make reasonable adjustments and establishing a PCP: a single action towards an employee is not a PCP in itself.
11. The claims before this Tribunal also include claims of indirect discrimination, unfair dismissal (both ordinary and automatically unfair), breach of contract and unlawful deductions from wages. The question of whether the discrimination claims were brought within the relevant time limit also arises. The relevant law in relation to those additional matters is set out below.

12. Indirect discrimination & time limits

13. Section 19 of the Equality Act 2010 ("the 2010 Act") states:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

14. Any complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act complained of or such other period as the Tribunal thinks just and equitable (section 123 of the 2010 Act). Where the alleged discriminatory act is one of the failure to act, section 123(4) provides that in the absence of evidence that failure is taken to occur when the alleged discriminator does something inconsistent with doing the act, or otherwise on expiry of the period in which they might reasonably have been expected to do it.
15. There is guidance from the Court of Appeal for Tribunals in exercising that discretion set out in the case of *Robertson v Bexley Community Centre* (2003 IRLR 434). The Tribunal has a very wide discretion in determining whether or not it is just and equitable to extend time. It is entitled to consider anything that it considers relevant subject however to the principle that time limits are exercised strictly in employment cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. On the contrary the Tribunal cannot hear a complaint unless the Claimant persuades it that it is just and equitable to extend time. The exercise of discretion is the exception, say the Court of Appeal, rather than the rule.
16. Conduct extending over a period is to be treated as done at the end of that period (section 123(3)(a)). (This is distinct from an act with continuing consequences where time runs from the date of the act as above.) Where an employer operates a discriminatory regime, rule, practice or principle then that will amount to an act extending over a period (*Barclays Bank plc v Kapur* (1991 ICR 208 HL). When deciding if there is such conduct, however, *Hendricks v Commissioner of Police for the Metropolis* [2002] EWCA Civ 1686 confirms that the correct focus is on the substance of the complaint that the respondent is responsible for the state of affairs leading to the alleged discrimination rather than too literal approach in analysing whether a regime, rule, practice or principle exists on specific facts.
17. Unfair dismissal
18. The dismissal was admitted by the respondent and accordingly it is for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2) of the Employment Rights Act 1996 ("the 1996 Act"). Those potentially fair reasons include capability, the reason relied upon by the respondent, which is to be assessed by reference to skill, aptitude, health or any other physical or mental quality (section 98(2)(a) and (3)(a)).
19. If the respondent establishes a potentially fair reason then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of

the case (section 98(4)). In applying this test, the burden of proof is neutral.

20. In considering whether the respondent has acted reasonably in treating the claimant's capability as sufficient reason for dismissing him the Tribunal looks to whether the respondent's decision fell within the band of reasonable responses to the claimant's capability which a reasonable employer could adopt (*Iceland Frozen Food v Jones* 1983 ICR17). That case also confirms that the correct approach is to consider all the circumstances of the case, both substantive and procedural.
21. In coming to this decision the Tribunal must not substitute its own view for that of the respondent.
22. In considering capability dismissals in particular there is guidance to the Tribunals from case law. These can be distilled down into a number of key principles:
 - a. each case is to be judged according to its own specific circumstances but in cases concerning long term absences the issue often amounts to whether the employer can be expected to wait any longer for the situation to improve;
 - b. the employer should consult with the employee before making its decision; and
 - c. the employer should take steps to discover the true medical position however the decision whether to dismiss is managerial not medical.
23. Underpinning all these factors is that a reasonable procedure should be followed by the respondent. When considering the procedure used by the respondent, the Tribunal's task is to consider the fairness of the whole of the process. Any deficiencies in the process will be considered as part of the determination of whether the overall process was fair (*OCS Group Ltd v Taylor* [2006] ICR 1602).
24. The fact that an employee's incapacity arises from a disability for the purposes of the Equality Act 2010 ("the 2010 Act") does not mean that a dismissal for a reason related to this must be unfair (*Royal Liverpool Children's NHS Trust v Dunsby* [2006] IRLR 351 EAT).
25. In addition to a dismissal being unfair as described above, an employee who is dismissed where the reason or principal reason for the dismissal is the making of a protected disclosure shall be regarded as automatically unfair (section 103A of the 1996 Act).
26. Any disclosure of information which in the reasonable belief of the worker making the disclosure and, if made on or after 25 June 2013, is made in the public interest and tends to show one or more of the matters listed at section 43B(1) will be a qualifying disclosure. That list includes that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject and that the health and safety of any individual has been, is being or is likely to be endangered. The disclosure

must identify, albeit not in strict legal language, the breach relied upon (Fincham v H M Prison Service EAT 0925 & 0991/01).

27. To be protected a qualifying disclosure has to be made in accordance with one of six methods of disclosure which include to the person's employer (section 43C(1)).
28. A mere allegation is not sufficient to be regarded as information – there must be a conveyance of facts (Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38).
29. Whether a worker had a reasonable belief as required by section 43B will be judged by taking into account that worker's individual circumstances. The information does not have to be true but to be reasonably believed to be true there must be some evidential basis for it. The worker must exercise some judgment on his or her own part consistent with the evidence and resources available (Darnton v University of Surrey 2003 ICR 615).
30. "Public interest" is not defined in the 1996 Act nor is there any statutory guidance as to its meaning but the worker must reasonably believe the disclosures to be in the public interest.
31. A dismissal will also be automatically unfair if the reason, or principal reasons, for the dismissal is that the employee brought proceedings to enforce or asserted a relevant statutory right (section 104 of the 1996 Act). Those rights are defined at section 104(4) and do not include rights in relation to discrimination or victimisation.

32. Unlawful Deductions

33. An employer may not make deductions from the wages of any worker without the worker's prior agreement and where the total amount paid to a worker is less than the total owing, the deficiency shall be treated as a deduction (section 13 of the 1996 Act).

34. Breach of contract

35. The Tribunal has jurisdiction to consider claims of breach of a contract of employment where that claim arises or is outstanding on termination of the employee's employment. A number of claims are expressly excluded from this jurisdiction including claims in respect of personal injury (Extension of Jurisdiction Order 1994).

Evidence

36. We heard evidence from the claimant and, for the respondent, from:
 - a. Mr A Walters, Performance Manager
 - b. Ms S Bhaimia, People Management Adviser Specialist (PMA)
 - c. Ms S Fearon- McCaulsky, PMA Manager
 - d. Mr F Olafare, First Contact Manager

- e. Ms N Gordon, Team Manager
- f. Ms S Oduwole, HR Business Partner
- g. Mr V Wilkie, Team Manager

37. Agreement was reached with the parties that the two comparators upon whom the claimant relies will be referred to as comparator A and B to protect their privacy.
38. Having assessed all the evidence, both oral and written, we have found on the balance of probabilities the facts set out below.

Findings of Fact

39. The claimant was employed by the respondent as a customer service administrator. The general factual background to the claimant's employment are summarised at paragraphs 14 to 23 of the October 2016 Judgment. The position regarding the claimant's sickness absence and the respondent's management of that from May to November 2015 appears at paragraphs 74 to 95. This Tribunal has adopted those findings and it is not necessary to repeat that general background here in detail.
40. In summary, the claimant complained about the behaviour on 15 April of a manager/supervisor, Ms Pacynko, by an email of the same date and on 6 May 2015 again by email on the same date. That complaint was dealt with by Mr Day who found against the claimant. Mr Day's conclusion was sent to the claimant on 12 May 2015 and the claimant commenced a period of sick leave on that day from which he did not return prior to his dismissal in June 2016. The claimant appealed Mr Day's decision and also made a complaint of bullying and harassment against him. Both the appeal and that complaint were dealt with by Ms French. That appeal was unsuccessful which was communicated to the claimant on 29 June 2015. The respondent says that the workplace issues were, as far as they were concerned, resolved from that point albeit clearly not to the claimant's satisfaction.
41. A first absence review meeting took place between the claimant and Ms Gordon on 10 June 2015 as described in the previous Judgment and the claimant attended an OH appointment on 27 August 2015. A report following that appointment was sent to Ms Gordon, copied to the claimant, on the same day. It stated:

"... He is currently unwell as a result of depression which he relates to issues in the workplace..."

[He] is currently unfit for work in any capacity.

It is difficult to give you an indication of timeframes for a recovery and return to work. Usually in cases such as this where the condition is a result of external factors the symptoms may continue until either the external factors change or the individual's ability to deal with them changes.

As advised above Mr Ishola relates his current illness to issues in the workplace which he feels have not been addressed to his satisfaction.

I therefore suggest that, if not already done, any ongoing workplace issues are appropriately addressed and resolved as it is likely that unless Mr Ishola perceives this as being appropriately addressed and resolved there may continue to be symptoms or the symptoms may re-occur.”

42. The claimant then issued his first claim naming Ms Gordon as an individual respondent. Mr Ndoci was therefore asked to take over the management of the claimant’s sickness absence.
43. The correspondence between Mr Ndoci and the claimant is set out in some detail in the previous Judgment. This contact commenced with a telephone call from Mr Ndoci to the claimant on 17 September 2015 which resulted in the claimant accusing Mr Ndoci of “stressing him out”. Thereafter, in summary, despite efforts by Mr Ndoci no meeting took place between him and the claimant and the tone of the claimant’s correspondence and his allegations regarding Mr Ndoci hardened. Ultimately Mr Ndoci decided to make a further appointment for the claimant with OH and shortly thereafter, on 3 November 2015, the claimant issued his second claim naming Mr Ndoci as an individual respondent.
44. On 4 November 2015 the claimant’s pay was reduced to half pay in accordance with the respondent’s sick pay scheme. Guidance issued by the respondent on that scheme states that where an employee is about to exhaust their entitlement to full or half pay the manager should seek to inform them of that “ideally at least one month in advance”.
45. As a claim had been brought against Mr Ndoci he was removed as the claimant’s sickness review manager and Mr P Kamurasi took over that role. The claimant was informed of this change by Ms Bhaimia who took over as the PMA advising management in December 2015 (Ms Bhaimia had relatively recently joined the respondent and was specifically chosen to provide this advice as she had no previous knowledge or involvement with the claimant). The claimant replied indicating that Mr Kamurasi was one of the reasons he was suffering from depression and Ms Bhaimia, having made further enquiries, decided to seek an alternative manager to manage the process. This led to the appointment of Mr Walters and he continued thereafter to manage the claimant’s absence until his dismissal. The claimant was informed of this change by Ms Bhaimia on 15 January 2016. He raised no objection and he was then advised on 26 January 2016 that a second sickness review meeting would be arranged. The claimant was also informed that Mr Walters would be given access to the OH reports and the claimant’s home and email addresses for correspondence.
46. In the meantime the claimant had attended an OH appointment and a report was provided dated 19 January 2016. That report stated:

“... He has been absent from work since May 2015 due to stress and depression. He feels this has been caused by workplace issues. The workplace issues are still ongoing.

On assessment today, he is not fit for work... It is unlikely his symptoms will improve until he feels the workplace issues have been addressed. Mr Ishola is able to have meetings with management, but his preference is to have these at his home because he feels more comfortable and does not have the energy to go out.”

47. Ms Bhaimia when setting up that OH appointment, had offered to provide a taxi for the claimant. She emailed him on 15 January 2016 asking him to confirm whether he wished to make use of that taxi service. The claimant did not reply to that question and no taxi was provided.
48. By a letter dated 27 January 2016 Mr Walters invited Mr Ishola to attend a second sickness absence review meeting on 3 February 2016 at 11am at his home. The letter stated that the purpose of the meeting would be to discuss his sick absence and, following his appointment with OH, to consider what options were available including any interventions and/or reasonable adjustments to assist getting him back to work. The claimant was advised of his right to be accompanied by a union representative or workplace colleague. Mr Walters asked the claimant to let him know as soon as possible (and in any event at least three working days beforehand) if that date, time or location of the meeting was inconvenient. This letter was emailed to the claimant on 27 January and, Mr Walters said, sent first class and by registered post. Ms Bhaimia said in her covering email that it was sent by all three methods. It had previously been agreed with the claimant that correspondence would be sent to him by email, registered post and first class mail. The registered copy was received by the claimant on 9 February 2016 – the claimant says that no attempt to deliver it before then was made. We accept that he received it on the 9th but find it more likely than not that attempts had been made by Royal Mail to deliver it before then. We also find that the letter was sent first class and was delivered but the claimant may not have opened it.
49. It is apparent that although the claimant had access to a laptop, he was not regularly opening his emails although he did on occasion use email as his only way of corresponding. We also note that the claimant sent an email at 00.06 on 27 January and the email attaching the 27 January letter was sent at 14.28. We accept however that the claimant’s use of email was erratic and therefore it is quite possible he did not open the email from Ms Bhaimia until after 3 February.
50. In any event Mr Walters received no reply to his letter dated 27 January and he emailed the claimant again on 1 February stating that he would be visiting him at his home on 3 February 2016 at 11am and asking him to confirm that he would be available. Again Mr Walters received no reply to that email but we accept that the claimant may well also have not read this email prior to 3 February.
51. Consequently, it is more likely than not that the claimant was not aware of the contents of the 27 January letter before 3 February and therefore the claimant had received no specific confirmation of the planned visit. Accordingly, the respondent did attend the claimant’s house on 3 February without his express consent although, as Mr Walters said in his evidence,

they assumed they had consent. They were wrong to make that assumption, notwithstanding the statement by OH that this was the claimant's preference, but this was borne out of a desire to make progress with the claimant.

52. The claimant also seeks to draw a parallel between the earlier correspondence from Ms Bhaimia regarding provision of a taxi and Mr Walters's correspondence regarding the home visit to show that it was clear he had not given his consent. We have found, in any event, that he had not.
53. Mr Walters, accompanied by Ms Bhaimia and a notetaker, attended at the claimant's home on 3 February 2016. The claimant was not present.
54. The claimant's account of what then happened, based on what he says he was told by his neighbour, is set out in a note he made for himself that day. Mr Walters's version is as set out in his email to the claimant sent the following day. Having considered those contemporaneous documents as well as the evidence given to us by the relevant witnesses, we prefer the account of Mr Walters and Ms Bhaimia. The weight of evidence supports that account and it is in keeping with their other interactions with claimant which have been courteous and professional.
55. In the meantime, following receipt of the 19 January 2016 report Ms Bhaimia had contacted OH on 26 January 2016 asking further questions, namely whether the claimant's condition fell within the 2010 Act and whether, if the respondent was in a position to redeploy the claimant on a temporary basis or until the work matters had been addressed to another team, would he be fit to do so. She also sent an email on 28 January 2016 posing a further question seeking confirmation on what the workplace issues were as the complaints had been investigated, the internal process concluded and an outcome provided to the claimant. She asked if the claimant was able to engage in mediation (which had been suggested) as the respondent would be happy to temporarily place him into another role until mediation was concluded. The claimant says that this was a new referral that was done without his consent. Ms Bhaimia's evidence, which we accept, was that she was seeking clarification in asking these questions and they did not amount to a new referral.
56. On 26 January 2016 a reply to those initial queries was prepared by the OH consultant which stated that the claimant was not fit for work in any capacity and therefore could not be redeployed on a temporary basis to another team and that his condition fell within the 2010 Act. That reply however was not sent to Ms Bhaimia as it was sent first to the claimant who, when he saw it, refused to give his consent for it to be disclosed.
57. On 10 February 2016 Mr Walters wrote to the claimant setting out his account of his recent correspondence with him and his efforts to meet him. He also reminded the claimant that failure to adhere to the respondent's absence at work policy, for example by not attending sickness review

meetings, may result in his sick pay being suspended. He also invited the claimant to a rescheduled meeting at 11am on 19 February 2016 at his home address and sought confirmation that he would attend. He said that if he did not receive that confirmation the meeting would be held in the claimant's absence and the purpose of the meeting would be to discuss his sickness absence and to consider what options were available including any reasonable adjustments which would assist his return to work. He also informed the claimant that he would have the right to be accompanied by a trade union representative or workplace colleague. This letter was sent to the claimant by email, first-class and registered post.

58. The claimant's wife, Ms Babs, replied to Mr Walters on 15 February 2016. (At this point Mr Walters did not know that she was the claimant's wife; he found that out at this Hearing.) She also sent this reply to Mr Olafare. She said that she was one of the claimant's representatives and that he was very unwell at the time as confirmed in his most recent OH report. She said that unfortunately no workplace companion was available to support the claimant and that:

"Given his health conditions, and the fact that he has been treated unfairly by the previous PMAs and managers, it would put him at a substantial disadvantage if he attends the meeting without a companion."

59. Ms Babs also put on record that the claimant was not happy that his details were being passed from one manager to another "without due process". She complained that there had been no explanation as to the change from Mr Kamurasi to Mr Walters. This is true but given the issues raised by the claimant we find that it was reasonable for the respondent not to give an express explanation. She also complained that Ms Bhaimia had made two applications to the OH for two separate medical reports without the claimant's prior consent or knowledge. She said that this raised matters relating to access to medical reports, data protection and breach of confidentiality and that this amounted to further harassment. She said that the claimant found the treatment he had been subjected to be unacceptable, unfair and discriminatory.

60. Mr Walters acknowledged this email from Ms Babs on 17 February 2016 but said he would be responding direct to the claimant. He did this in a letter dated 23 February 2016. In this letter Mr Walters confirmed:

- a. That the OH had advised the respondent that the claimant was unfit for work but able to have meetings with management and that he preferred to have such meetings at his home.
- b. His view, again, of recent correspondence and the arrangements made in relation to meeting at his home.
- c. That the claimant had not communicated that he was finding it difficult to find a workplace companion but that he was happy to consider the claimant bringing a family member or a friend to the sickness absence review meeting and asked for the name of that individual and their relationship. He stated, however, that they would only be there to support him and could not take on the role of

- a workplace colleague/union representative as set out in the absence at work policy.
- d. The reason for the change of manager and that the claimant had not raised any concerns about the appointment of Mr Walters.
 - e. That Ms Bhaimia had emailed OH to ask questions supplementary to their report dated 19 January 2016 and that OH had confirmed that they needed to notify the claimant, which they had done, in order to respond.
 - f. In respect of the statement that a PMA had been treating him unfairly, he attached the PMA complaints procedure and stated that if the claimant wished to raise a complaint he should email Ms Fearon-McCaulsky. (That procedure is used by the respondent to deal with complaints about advice given by PMAs. It does not include any right to representation or any right of appeal.)
 - g. That the next sickness absence review meeting would be rescheduled to 4 March 2016 at 11am and asked the claimant to confirm his attendance. He said that as this was the third time they had sought to convene the meeting, if the claimant was unable to attend he may need to make his decision on the basis of the information currently available. He repeated the warning that if the claimant did not adhere to the policy his sick pay may be withheld.
61. The claimant replied by email on 24 February 2016. In summary he said that he was not well enough to reply, Ms Babs would reply on his behalf, he felt he was being threatened and this was unfair, victimisation and disability discrimination, Mr Walters did not have the right to threaten him, his behaviour was insulting and arrogant, raising a grievance was a waste of time and energy and the PMA complaints procedure was evidence there was no justice within the respondent.
62. Mr Walters forwarded this email to Ms Bhaimia and Mr Olafare stating that he felt it was quite clear that the claimant had no intention of meeting with him.
63. Ms Babs also emailed Mr Walters on 24 February 2016. She opened by stating that she found it offensive that Mr Walters had mistakenly said her name was "Baba" rather than "Babs". She then referred to the home visit and complained that his behaviour had been threatening and intimidating and was "a form of harassment, bullying, stalking and monitoring" and that if the claimant had been present he would have called the police. She referred to the deadlines set by Mr Walters in relation to confirming availability for a meeting and stated it was very unfair and "overbearing, insulting and arrogant". She stated that the claimant would not be attending the meeting and asked him to make his decision on the basis of the information available. She concluded the letter by stating that the claimant was suffering a long campaign of harassment, victimisation and discrimination and looked forward to receiving the outcomes/decision of the second absence review meeting.

64. On 26 February 2016 a further short report was prepared by OH who stated that they were unable to give much more information about the workplace issues other than to say that the claimant felt treated unfairly by management and this had not been addressed to his satisfaction. This was sent to the claimant for him to consent to its release to Ms Bhaimia but that was not given and therefore it was not sent to the respondent.
65. On 1 March 2016 Mr Walters wrote to the claimant in reply to Ms Babs's email of 24 February 2016. He restated his position regarding the home visit and the amount of notice given of the proposed review meeting on 19 February 2016. He confirmed that Ms Babs had said the claimant would not be attending the meeting on 4 March 2016 and that accordingly it would be held in his absence. Finally he enclosed a copy of the respondent's bullying and harassment policy outlining the process to be followed if one wished to raise a formal complaint. That policy includes the right to representation and an appeal. The letter was emailed by Ms Bhaimia to the claimant and confirmation also given that it had been sent by registered post and 1st class post.
66. Ms Babs replied to Ms Bhaimia by email restating the claimant's position on the home visit and requesting that the manager in charge of managing the claimant's sickness absence should be the one sending the emails as the role of the PMA is to provide advice and guidance.
67. Ms Bhaimia replied to that email on 2 March 2016 to the claimant responding to some of those points. The claimant replied to her on the same day stating, "Stop harassing me with your emails" and claiming that she had been biased and unfair from the very first day and asking her to leave him alone. Ms Bhaimia replied on the following day stating that her manager, Ms Fearon-McCaulsky, would be responding in due course.
68. Ms Fearon-McCaulsky emailed the claimant on 3 March 2016 saying that she was responding to his request to appoint another PMA and declining to do so. The claimant then replied to her saying that he had not formally requested a change of PMA (which was true) but had advised that she was crossing the line as she had processed a request for medical reports without obtaining his consent. He said that he did not want any further harassment from Ms Bhaimia and that Mr Walters should be the one to contact him and if they needed advice and guidance from the PMA they would contact Ms Fearon-McCaulsky. This reply is the first of the alleged protected disclosures.
69. Very late on 3 March 2016, at 23.24, the claimant emailed Mr Walters asking for confirmation of the venue booked for the meeting scheduled for the following day. Mr Walters replied at 10:24 the next morning stating that as the claimant's representative had confirmed by email that he would not attend the meeting, it would be concluded in his absence. At 11.04 the claimant emailed Mr Walters that a workplace colleague had volunteered to attend on his behalf and asked him to confirm the venue. Mr Walters did not reply. His evidence was that he could not see that it was possible

for a representative to attend at such short notice and that although he accepts he could have postponed the meeting at that point he was anxious to move to the next step i.e. refer the claimant to OH.

70. Mr Walters's decision was that he wanted to schedule a further OH appointment for the claimant and he emailed OH on 11 March 2016 to that effect. He specifically asked for clarification on whether the claimant was still unable to return to his substantive role and whether he would be able to take up a position in a less stressful area of the business. He stated that he was looking to support the claimant back into the business and would be open to identifying a role that he may be able to carry out within any suggested restrictions.
71. Mr Walters wrote to the claimant on 17 March 2016 advising him of his decision to refer him back to OH and that he had made arrangements for him to attend the medical assessment on 1 April 2016 at 9am.
72. The claimant replied to later the same day. This letter, another alleged protected disclosure, made various complaints about Mr Walters's behaviour including allegations that he had threatened to stop his sick pay, threatened to open a disciplinary case and had taken two weeks to write to him following the sickness absence review meeting of 4 March 2016. He referred to the bullying and harassment policy and alleged that he had been put at a substantial disadvantage and asked what made him, the claimant, different to Mr Walters and referred to his race, his disability and his status as a junior member of staff. He stated that he expected Mr Walters's salary to be stopped and to face disciplinary action. The claimant copied a director, Mr Shashi, into the email. He stated that he believed Mr Walters's behaviour was a form of bullying, harassment, victimisation and discrimination. He made wide-ranging allegations regarding other managers and PMAs and requested notes from the sickness review meeting.
73. Mr Walters replied to the claimant on 23 March 2016 responding to the various points he had raised. He asked if the claimant would like his letter to be treated as a formal complaint under the bullying and harassment policy and confirmed that there were no notes of this second review meeting as it amounted to a paper review of the documentation that had been provided and that this had led to his decision as set out in his letter of 17 March 2016.
74. The claimant replied in detail on 23 March 2016, another alleged protected disclosure, covering much of the ground already addressed in earlier correspondence. He said that he would attend the OH appointment subject to the state of his health. Also that he would not be raising a grievance as he believed it would be a waste of time and energy and the "case would be covered up as usual". He again stated that he believed he was being victimised and discriminated against because of his disability and race.

75. Although it was not the respondent's usual policy Mr Walters agreed, following a request by Ms Babs, to copy the claimant into his email to OH with the referral questions. That email was sent on 23 March 2016, duly copied to the claimant, with a number of questions including seeking: an update on the claimant's health and any progress with treatment, fitness to meet with management for formal meetings, whether he fell within the 2010 Act, prognosis for return to work date as the work matters had been addressed, any reasonable adjustment that could be put in place to support a return to work, whether redeployment would be advisable and any timeframe around being fit to return.

76. On 29 March 2016 Mr Walters emailed the claimant offering to make arrangements for a taxi to take him to and from the OH appointment. Then on the following day he sent a detailed reply to the claimant's letter of 23 March 2016. In addition, the claimant had emailed Mr Walters on 29 March 2016 with a series of questions which included a query as to whether Mr Walters had seen the independent medical report paid for by the respondent.

77. This report, from a jointly instructed expert Dr Rehman, had been obtained in the course of the previous Tribunal claims on the issue of whether the claimant was disabled. It was a relatively lengthy report which concluded that he was disabled and set out relevant background to the underlying issues. It also stated that:

"...Mr Ishola's prognosis is dependent and directly proportional to the level of work stress he perceives. As such it is my opinion that, in the balance of probabilities, once there is resolution of the current workplace issues to [his] satisfaction, he will effect a full recovery."

78. Having received the query from the claimant, Mr Walters asked Ms Bhaimia about it who in turn was advised by Ms Purkiss-Webb, a more senior HR manager, that Mr Walters should not see the report as it was prepared for another purpose i.e. the previous claims. None of Ms Bhaimia, Mr Walters or Mr Olafare therefore saw this report in the course of their dealing with the claimant's sickness absence. The respondent says this was in accordance with the Presidential Guidance on Case Management issued in March 2104 which states:

"All documents and witness statements exchanged in the case are to be used only for the hearing. Unless the Tribunal orders otherwise, they must only be shown to a party and that party's adviser/representative or a witness (insofar as is necessary). The documents must not be used for any purpose other than the conduct of the case."

79. Mr Walters replied to the claimant's queries of 29 March 2016 by email on the following day setting out his replies in red font.

80. On 1 April 2016 at 07.33 a letter from the claimant to Mr Walters was emailed stating that he was not well enough to attend the OH appointment scheduled for that day. He requested that it be rescheduled - if possible in

the afternoon. The appointment was accordingly rescheduled to 4 April 2016 at 2pm. This confirmation was emailed by Ms Bhaimia to the claimant on 1 April 2016 at 10.44.

81. The claimant did not attend the OH appointment on 4 April 2016. Mr Walters wrote to the claimant on 7 April 2016 confirming that he had asked Ms Bhaimia to set up a further and final OH assessment on 21 April 2016 at 12pm. He referred to Ms Bhaimia's letter of 29 December 2015 where she had advised that employees are contractually obliged to attend OH appointments and that failure to attend may result in suspension of sick pay.
82. The claimant replied to Mr Walters on 12 April 2016. He stated that he felt the red font used by Mr Walters in his email on 30 March 2016 was very disrespectful and threatening and that it set a very bad tone. He stated that he felt he had been consistently victimised, threatened and harassed since Mr Walters had been appointed and stated that he was so full of hatred towards him. He referred to the offer of a taxi to the OH appointment but said he did not trust the taxi or his driver and would get the train. He said that he had not known about the appointment on 4 April 2016 and he believed Mr Walters's mission was to stress him to death. He then asked questions about the PMA complaints process.
83. Mr Walters replied to this letter on 18 April 2016 apologising for the use of red font and replied, as far as he was able, to the various points raised by the claimant.
84. On 21 April 2016 Ms Babs emailed Mr Walters at 11.41 advising that the claimant was not well enough to attend the OH appointment.
85. On 28 April 2016 claimant was advised that he would be moving to nil pay from 4 May 2016.
86. Also on 28 April 2016 the OH advised Ms Bhaimia that they did not have the claimant's consent and so was unable to release any further reports and that the respondent would have to proceed based on previous advice and any other information available to them.
87. On 10 May 2016 Mr Walters wrote to the claimant inviting him to a further sickness absence review meeting on 1 June at 11:15am which could be held at his home, the respondent's office or a mutually agreed location. He said the purpose of the meeting was to discuss the claimant's long term sickness and review what options were available including any reasonable adjustments to assist his return to work and redeployment. He also set out that he had been unable to obtain up-to-date advice from the OH as the claimant had refused to give his consent for releasing an updated report and gave the claimant a final opportunity to give that consent so that OH could answer the questions set out in the email dated 23 March 2016. In the absence of that consent Mr Walters stated that he would have no option but to proceed with the meeting and make his

decision on the basis of the information available at that time. He advised the claimant of his right to be accompanied by a trade union representative or workplace colleague. He stated that if there was no prospect of the claimant returning to work in the role of CSA and OH were unable to advise on redeployment, then the outcome of the meeting may include dismissal.

88. According to the absence from work policy, at this stage the line manager should contact the respondent's pension fund as it looks as though an employee is likely to be dismissed on grounds of medical incapacity and this should be done as soon as possible and certainly in advance of dismissing the employee. This was not done and no explanation given for that failure. We find that it was oversight on the part of Mr Walters possibly due to a lack of advice from the PMA. An application was subsequently made by the claimant himself after his dismissal but it was rejected.
89. It then became apparent that although Mr Walters believed that his 10 May 2016 letter had, in the usual way been sent by email, first-class and registered post, he was unable to provide the claimant - when requested - with a tracking number for the copy sent by registered post. He therefore emailed the claimant on 26 May 2016 stating that he was happy to reschedule the meeting to 8 June 2016. He stated that this was sufficient time for the claimant to reconsider providing his consent to the OH to release their reports as well as attending the meeting. He said if the claimant was unable to attend he would consider any written statement from him or his union representative or his union representative could attend the meeting. He said that if the claimant did not confirm his attendance by 3 June 2016 he would go ahead in his absence.
90. In reply the claimant on 26 May 2016 said that Mr Walters's email was too flawed to allow any sensible response, that his behaviour was sickening, obnoxious, atrocious, that he felt threatened, stressed and depressed and was not well enough to attend the meeting. He asked to be sent the outcome by email and post.
91. Ms Fearon-McCaulsky replied to the claimant acknowledging that the claimant had asked for the outcome to be sent to him by email and post but stating that there were still ways he could engage with the process and that he may wish to send a representative or send written representations.
92. On 30 May 2016 the claimant wrote to Ms Fearon-McCaulsky in a letter headed "Bullying, disability related harassment and discrimination arising from disability complaints against Sophia Bhaimia (PMA)". The letter comprised thirty short paragraphs. The last of those paragraphs (which reserved the right to take legal action if there was a cover up) is the final alleged protected disclosure. Most of the letter was complaints about Ms Bhaimia and the opening and closing paragraphs indicated that to be the case. At paragraphs 10 to 12, however, there were also references to complaints about Ms Fearon-McCaulsky in that the claimant alleged she

had failed to act when he had previously raised these issues with her. At paragraph 12 he stated:

“You have basically treated me unfavourably which contravenes section 15 of the Equality Act 2010...”.

93. The respondent treated this letter as a complaint just against Ms Bhaimia as is apparent from Ms Fearon-McCaulsky's email to the claimant on 2 June 2016 where she advised that his complaint against Ms Bhaimia would be dealt with under the bullying and harassment policy. This was not an unreasonable reading of the letter but in fact it does also contain a complaint against Ms Fearon-McCaulsky and, by implication, against Mr Walters in relation to the home visit.
94. The complaint was passed by Ms Fearon-McCaulsky to Ms Oduwole, HR Business Partner on 9 June 2016 and Ms Bhaimia was removed from the case and another PMA, Ms Ademolu, took over. The handling of this complaint is described below.
95. On 8 June 2016 Mr Walters and Ms Ademolu met. A notetaker was also present. The meeting was due to start at 11am but they waited until 11.30 just in case the claimant attended. The purpose of the meeting was stated to be to review the claimant's medical position and identify any adjustments that could be made to support him back into the workplace.
96. Mr Walters reviewed the efforts that had been made to meet the claimant and to obtain an updated opinion from OH with a view to assessing what options were available to the claimant in moving forward with his employment with the respondent. The meeting adjourned to allow Mr Walters to review the documents which he did for about an hour. When it reconvened Mr Walters recorded that he had been unable to get a prognosis of a return to work, any reasonable adjustments to support the claimant back to work or if redeployment was advisable; that the claimant had been off work for 12 months and that OH had confirmed (albeit in January 2016) that the claimant was unfit for work for the foreseeable future and that it was unlikely that his symptoms would improve without improved workplace systems. He also said that the claimant had refused to give consent for access to his GP records which in fact he had not as he had not been asked for his GP records. Mr Walters said in evidence that this was a mistake and should have read OH but we find that the notes are more likely than not to be accurate given the context of the paragraph and as Mr Walters had corrected the notes elsewhere. Therefore although Mr Walters said GP at the time, that was a mistake at that time when he meant to say OH.
97. Mr Walters adjourned the meeting again to consider the outcome. Ms Ademolu wrote to the claimant on 9 June 2016 to advise him of the process that had been followed and that a decision would be made on Mr Walters's return from leave on 16 June 2016.

98. In fact Mr Walters worked on the matter and started drafting the outcome letter whilst on leave. The final version was sent to the claimant on 24 June 2016 together with a copy of the notes of the meeting. The letter was detailed and set out a full timeline of events both before and after Mr Walters's appointment. He fully set out his reasoning for his decision to terminate the claimant's employment on the ground of medical incapacity. In particular he noted that:
- a. The claimant had been unable to perform his role for more than 12 months.
 - b. The claimant had failed to actively engage in the process and did not attend any sickness absence review meeting or OH appointment since January 2016 and refused consent for written advice to be released.
 - c. Accordingly the decision was based on the OH report from January 2016 which was that he was not fit for work and that it was unlikely his symptoms would improve until he felt that the workplace issues had been addressed.
 - d. He did not believe there was any prospect of a return to work in the foreseeable future and that it had been difficult to identify or explore support that could be offered on a return to work.
 - e. He had been advised that the workplace issues were managed in line with internal processes which were exhausted and therefore as far as the respondent was concerned were dealt with and concluded.
 - f. As OH could not advise on whether the claimant was fit to be placed into the redeployment unit, because consent to release reports was not given, he could see no benefit in placing him in that unit.
99. The claimant was advised that he would be paid 7 weeks in lieu of notice and that he was entitled to 44 days accrued annual leave which would also be paid in lieu. He was also advised of his right to appeal to Mr Olafare.
100. The claimant submitted a letter of appeal on 25 June 2016. He did not specify any particular grounds of appeal but asked for an appeal by way of review and asked that Mr Walters be contacted for relevant documents. He said that he expected the outcome in writing within 7 days of receipt of the appeal.
101. Mr Olafare acknowledged the claimant's letter on 28 June 2016 and asked to meet so that he could fully understand the reasons for his appeal. He set out the usual wording about the right to be accompanied by a trade union representative or workplace companion. He also advised that the claimant could send "a representative" to attend on his behalf or send written representations. Mr Olafare's evidence was that the use of "a" representative suggested that the claimant could have sent a family member. We do not agree with that interpretation. Elsewhere in the letter representative was expressly described "as defined earlier", i.e. a union representative etc, which was the logical meaning throughout the letter.

102. The claimant replied on 29 June 2016 stating that Mr Olafare was causing him a great deal of additional stress, that he wanted the appeal by review and he was not well enough to attend a meeting. Further that his grounds for appeal were for Mr Olafare to review all the documents Mr Walters had reviewed. He said that he expected the outcome no later than 1 July 2016.
103. Mr Olafare acknowledged this on 30 June 2016, apologised if he had caused him additional stress, confirmed the meeting would be held in his absence and said he would send his decision by 13 July 2016.
104. Mr Olafare sent his appeal outcome letter to the claimant on 6 July 2016. He set out the background, what he had reviewed and his decision that the appeal was unsuccessful. He said that he had taken into account the claimant's length of absence and any likely return to work, lack of engagement, OH advice, the management of his absence under the policy and the claimant's non-attendance at review meetings. He concluded that he felt the policy had been correctly followed and there was no new or different information showing he was fit for work or engaging in the process to get back to work. Therefore he upheld the original decision.
105. There was a delay in handling the claimant's complaint dated 30 May 2016 referred to above. The respondent's grievance policy states that grievances should usually be concluded in 28 days.
106. Ms Fearon-McCaulsky chased Ms Oduwole on 11 July 2016. Ms Oduwole apologised, said she was very busy and asked if someone else could deal with it. She received no reply and on 13 July 2016 she confirmed that she would be able to complete it within two weeks. She was unaware that the claimant had been dismissed in the meantime.
107. Ms Fearon-McCaulsky had informed Ms Oduwole that the claimant wished for the investigation and outcome to be dealt with in writing only and accordingly she interviewed Ms Bhaimia, Mr Walters and Ms Fearon-McCaulsky.
108. Ms Oduwole wrote to the claimant on 22 July 2016 setting out her reasoning for not upholding the complaints of bullying and harassment and discrimination arising from disability. She was satisfied that Mr Walters and Ms Bhaimia had made every reasonable effort to contact him prior to the home visit and also that Ms Fearon-McCaulsky had not failed to respond to his complaint and that Ms Bhaimia had not made any decisions in relation to the management of his absence. She set out the process for appealing her decision.
109. The claimant emailed Ms Oduwole on 24 July 2016 saying he did not believe the outcome letter addressed his complaints but that appealing would be a "waste of time" and that he had already been dismissed. He also requested notes of her investigatory meetings.

110. The claimant emailed Ms Oduwole again on 25 July 2016 asking for the address of the appeal officer and also who had appointed her to conduct the appeal. Ms Oduwole replied accordingly.
111. The claimant again emailed on 26 July 2016 commenting that the investigation meetings were “inadequate and scrappy” and challenged the genuineness of the grievance notes. He also challenged the delay in the grievance response. Ms Oduwole noted his comments and reminded him of his right to appeal which he did not pursue.
112. The respondent’s sickness absence policy states that “where an employee is about to exhaust their entitlement to full sick pay the manager should seek to inform the employee, ideally at least one month in advance of the date that they will move to half pay.
113. The claimant’s sick pay was reduced from full pay to half pay by letter dated 2 November 2015 to take effect on 4 November 2015 and further reduced to zero pay by letter dated 28th April 2016 to take effect 4 May 2016. This was clearly not in accordance with the policy.
114. By letter dated 13 August 2016, the claimant raised a grievance headed “unlawful deduction from wages complaint raised on 8th August 2016”. This followed a conversation with Mr Selmes, Payroll Manager, on 8 August 2016 where the claimant queried what he described as unexplained and unlawful pay deductions to his final salary. Mr Selmes emailed the claimant with an explanation. The claimant was concerned that whilst off sick on half pay he was unable to plan his finances due to the respondent paying him erratically. There was also an unexplained “rounding loan” figure of £494.01 deducted from his final salary. He also complained that his pay in lieu of notice was based on a seven year period rather than the full period of his employment of seven years and seven months.
115. The grievance was acknowledged by Ms Ademolu, PMA, on 22 August 2016 stating that as the claimant had left the respondent the grievance process would be modified as per the procedure and completed in writing only and that Mr Wilkie had been appointed to conduct the grievance investigation.
116. The claimant emailed Ms Ademolu on 23 August 2016, asking for a specific reasonable date when he would receive the findings of Mr Wilkie’s investigation. Mr Wilkie replied saying he was not able to provide an exact date. The claimant replied on 26 August 2016 threatening to take legal action if he did not receive payments for the amounts he believed were owing within 14 days.
117. Mr Wilkie carried out his investigation and informed the claimant of the outcome by email on 11 October 2016 attaching a letter, report and 13 appendices. He concluded that an overpayment had occurred due to administrative errors in the respondent’s system and the respondent were

entitled to deduct overpayments. He made several recommendations to improve the payroll system and also recommended that there should be better communication with employees affected. Mr Wilkie also concluded that the correct pay in lieu of notice had been paid in accordance with the policy that it was accrued at one week for each complete year of service. He concluded that he could see no evidence of discrimination and victimisation.

Conclusions

118. Time limits

119. The respondent says that many of the individual acts complained of by the claimant in his various allegations of discrimination are out of time. We conclude however that the substance of the claimant's complaint is that the respondent was responsible for a state of affairs leading to the alleged discrimination. Accordingly the alleged discriminatory conduct extended from 3 November 2015 to the end of his employment bringing all the claims in time. Even if that is not correct, we conclude that it would be just and equitable in all the circumstances, particularly given the nature of the claimant's disabilities, to extend time.

120. Direct Discrimination

121. The claimant says that his dismissal was an act of direct discrimination both because of his race and because of his disability.

122. The claim of race discrimination is made only in respect of the decision of Mr Walters, who is white British and in this regard the claimant compares himself to comparators A and B, who are also white British. The circumstances of comparator A were significantly different to those of the claimant in addition to the difference in their colour and nationality. She had two spells of long-term sickness absence. The first for 7 months and 20 days and the second for 8 months and 18 days with an 8 months period between them when she was working. She returned to work after that second absence. Her total period of absence therefore was of similar length to the claimant's but, critically, she fully engaged with the respondent (Ms Gordon was managing her process) in both attending sickness review meetings and OH assessments.

123. The circumstances of comparator B were that he had a series of shorter absences, the longest of which was 3 months and he also engaged with management and the OH.

124. Not only were there significant differences in the circumstances of the claimant and comparators A and B but there was absolutely no evidence of any other nature to support the extremely serious allegation that Mr Walters acted as he did because of the claimant's race. We conclude that the reason Mr Walters made the decision to dismiss the claimant was that he had been absent on long-term sick absence and had not engaged in

the sickness review and OH assessment processes and therefore there was no information available to justify waiting any longer. This decision as of course upheld by Mr Olafare who is himself black. Indeed, we note that the respondent has a very diverse workforce which quite properly reflects the demographic of the areas that it serves. Of the seven managers for the respondent who gave evidence to us, Mr Walters is the only one who is white and a variety of ethnicities - black African, Afro-Caribbean and Asian - are reflected within them. We find that it is unlikely that racist behaviour of the sort alleged against Mr Walters could either take place within that environment or, even if it did, it is extremely unlikely that it would be tolerated or condoned.

125. For all these reasons the claim of direct race discrimination fails.
126. As for the claim of direct disability discrimination, it follows that having concluded the reason for the dismissal was as set out above, it was not because of the claimant's disability. We conclude that that was also the reason for Mr Olafare's decision not to uphold the appeal.
127. Accordingly the claim of direct disability discrimination also fails.

Disability Discrimination – reasonable adjustments

128. The exact formulation of the reasonable adjustment claims was not completely clear from the list of issues but having carefully reviewed that list, the Additional Information document (from which we take the numbering used below) and the claimant's written submissions we have analysed them as follows. In each case we identify first whether we find the alleged PCP is made out and if so, then the adjustment (RA) sought and whether it was reasonable. If it was, then whether the claimant suffered a disadvantage.
129. Allegation 1 – dismissal
130. (a) (c) (d) & (e) Alleged PCP: application of the respondent's sick absence policy to the claimant. This is a PCP.
- (a) RA: greater efforts at redeployment/search for suitable alternative employment before termination - We find that it was not reasonable to require more efforts by the respondent on redeployment – they had done enough in this respect prior to dismissal. As for the alleged failure to respect medical advice, it is correct that neither Mr Walters nor Mr Olafare saw Dr Rehman's report. Accordingly they did not fail to respect it although clearly the respondent as a corporate entity knew it existed and it was in the hands of their solicitors. We have considered whether, in these circumstances, especially as Mr Walters specifically asked about the report after the claimant raised it with him, the decision makers should have been given a copy but conclude that it cannot be reasonable to be

required to contravene the Presidential Guidance referred to above.

However, as the claimant had specifically asked Mr Walters if he had seen the report, they could have asked the claimant to agree that they could use it for these purposes which he may have done. We do not find however that there was any disadvantage to the claimant in the decision makers not seeing the report as, in essence, it said the same thing as the OH reports that they did have sight of i.e. the claimant was unlikely to return to work whilst the underlying work issues were not resolved to his satisfaction.

(c) RA: allow C more time to recover especially as he had raised complaints on 12 April and 30 May - Generally we find that the respondent had waited long enough for the claimant to recover or at least start to recover given their unsuccessful attempts to engage with him and arrange for him to attend OH. Allowing more time would not have made any significant difference as all the indications were that until the workplace issues were resolved to the claimant's satisfaction he would not be able to return to work. The respondent believed they were resolved, or as resolved as they could be, and given the history it was highly unlikely that they could be resolved to the claimant's satisfaction. Therefore it was not reasonable to be required to wait longer.

(d) RA: conduct further review meetings - The first review meeting had been with Ms Gordon in June 2015. Mr Ndoci had tried to meet with the claimant from September 2015 and then Mr Walters (or Ms Bhaimia on his behalf) started to try to hold a review meeting from January 2016 making five separate attempts (on 27 January, 10 February, 4 March, 10 & 26 May). However the claimant did not attend. It was not reasonable to expect the respondent to conduct or attempt to conduct further reviews.

(e) RA: appoint an independent manager after a complaint was made against decision makers (presumably the 30-paragraph complaint dated 30 May 2016) - The respondent treated this as a complaint against Ms Bhaimia. She was not a decision maker; her role was advisory. Although she was very influential ultimately Mr Walters made the decision. The letter did include an implied complaint against Mr Walters but, given the timing of it after the process was well underway, it would not be reasonable to replace Mr Walters at that stage especially as he was the third manager appointed following complaints by the claimant regarding the previous two (Mr Ndoci and Mr Kamurasi).

(b) Alleged PCP: Mr Walters's decision to proceed with the meeting on 4 March 2016. This was not a PCP. It was a one-off act in the course of dealings with one individual.

(f) Alleged PCP: (i) requiring the claimant to return to work without a proper and fair investigation of grievances: this was not a PCP. It was a one-off act in the course of dealings with one individual. (ii) Turning a blind eye: this was not a PCP. It was a one-off act in the course of dealings with one individual and in any event is not proved on the facts.

(g) Alleged PCP: giving the claimant 7 days' notice for the meeting on 8 June 2016. This was a PCP as it was part of the respondent's standard policy.

RA: give the claimant sufficient time to seek advice and get representation - The invite letter dated 27 May 2016 was emailed to the claimant on 31 May and also sent 1st class and by registered post. Whether this amounted to 7 days' notice or not, depending on when the claimant actually received that invite, the claimant had known on 26 May at the latest that he was being invited to a further review meeting which gave sufficient time. It is not reasonable to be required to give more.

(h) This in fact is an argument about time limits not RAs.

131. Allegation 2 - erratic payment of contractual sick pay

Alleged PCP: operation of the respondent's payroll system. This was a PCP.

RA: notify the claimant of payroll end dates - It is undoubtedly unfortunate that the coincidence of the dates that the respondent received the claimant's sick notes with the payroll end dates led to overpayments that then had to be repaid but there was no group disadvantage as this issue would have an adverse effect on all employees on sick pay, disabled or not, in those circumstances.

132. Allegation 3 - failure to initiate proper and fair investigations into grievance and turning blind eye. As allegation 1(f).

133. Allegation 4 - failure to respond to correspondence

Alleged PCP: the Director's failure to respond personally to emails from the claimant. This is a PCP. Ms Fearon-McCaulsky confirmed that there is a policy that correspondence to Directors is delegated.

RA: The Director to reply to emails personally, to initiate investigations and copy individuals to the effect that discrimination is unacceptable - This is not a reasonable adjustment. It is completely reasonable and indeed normal practice for Directors in large organisations to delegate correspondence of this nature.

134. Allegation 7 - extension of sick pay

Alleged PCP: the respondent's sick pay scheme. This is a PCP.

RA: to continue the claimant on full pay - In the absence of any finding from the claimant's grievances of culpability of any of the managers towards the claimant and given the claimant's failure to engage with management and OH, this is not a reasonable adjustment.

135. Allegation 9 - PMA complaints policy & process having no right to be accompanied and no appeal

Alleged PCP: the PMA complaints policy and process is a PCP.

RA: unspecified but presumably to allow employees to be accompanied and a right of appeal - This was not an unreasonable policy and in any event the claimant suffered no disadvantage. He did not pursue a complaint under this policy, he was advised of an alternative route (the bullying and harassment policy) which included both rights and he took that route.

136. Allegation 10 - lateness in advising the claimant of half and nil pay

Alleged PCP: a failure to comply with the sick pay policy of ideally giving one month's notice of reductions. This is a PCP. Although at first sight it looks like a one off act towards the claimant, Ms Bhaimia did confirm that late notification is not uncommon and provided evidence of other employees to whom it had happened.

RA: compliance with the written policy - This is reasonable and although the policy only says "ideally" it is clear that this was a common breach. On the question of disadvantage we agree with the claimant that breaching this policy would have more adverse impact on an employee suffering mental health issues – the claimant's disability – than on an employee on long term sick without that disability.

Therefore this did amount to a breach of the duty to make reasonable adjustments.

137. Allegation 11 - not allowing a friend or family member to act in capacity of workplace companion

Alleged PCP: the respondent's standard policy that only trade union representatives or a workplace colleague can accompany employees at sickness review meetings. This is a PCP.

RA: to allow Ms Babs to attend with the claimant or on his behalf and to participate - Both Mr Walters and Mr Olafare did not expressly or impliedly

agree that Ms Babs could attend and participate. Both gentlemen told us that if Ms Babs had attended they would in practice have agreed to her active participation in the meetings. We note that there was no express request by the claimant after he had been told of the limits on Ms Babs' role to expand her role but in the context of the correspondence at the time, it is clear that at least part of the reason the claimant did not attend meetings was that limitation. From the correspondence it was clear that she was acting as a representative in the fuller sense of the word. We agree with the claimant that expressly allowing the role of Ms Babs to be expanded was a reasonable adjustment and the failure to do so, given his mental health, did cause him a comparative and substantial disadvantage.

Therefore this did amount to a breach of the duty to make reasonable adjustments.

138. Allegation 12 - failure to investigate complaints within reasonable time

Alleged PCP: the respondent's failure to comply with the timescales in its own grievance policy. This is not a PCP. It was a one-off act (or acts) in the course of dealings with one individual but in any event is not proved on the facts. The time taken to complete the two grievances was not unreasonable even though it was outside the 28 day period and taking into account the claimant's particular disability.

139. Allegation 14 (1) - putting the claimant under pressure to attend OH

Alleged PCP: the respondent's policy of expecting employees to attend OH appointments in person. That is a PCP.

RA: as the respondent knew of the claimant 's mental health issues to arrange for the claimant to do a telephone consultation or at home - Given that the claimant did not specifically ask for either of these adjustments and the most recent OH advice was that the claimant was able to attend meetings, there was no duty on the respondent to make them.

140. Allegation 14 (2) - rejecting the claimant's medical expert report

Alleged PCP: Mr Walters and Mr Olafare not taking the expert's report into account. This is not a PCP. It was a one-off act in the course of dealings with one individual.

141. Allegation 15 (1) - processing and receiving OH reports without the claimant's consent

Alleged PCP: This is not a PCP. It was a one-off act in the course of dealings with one individual and in any event was not proved on the facts.

142. Allegation 15 (2) - not telling the claimant in advance what the referral was for

Alleged PCP: the respondent's standard policy of not telling the employee the referral questions in advance. This is a PCP.

RA: telling the claimant in advance - On the facts Mr Walters agreed to do this once asked and did so in practice.

143. Allegation 18 - failure to contact pension fund

Alleged PCP: failure to comply with the respondent's policy of contacting the pension fund. This is not a PCP. It was a one-off act in the course of dealings with one individual and in any event the claimant suffered no disadvantage as a later application was rejected.

144. Allegation 19 -threats to stop sick pay

Alleged PCP: the respondent's policy of reminding employees that if they do not attend OH appointments without good reason their pay may be stopped. This is a PCP.

RA: to not send such reminders - Even if disadvantage was proved, this would not be a reasonable adjustment. It is quite reasonable and arguably required of an employer, to remind employees of this risk.

145. Allegation 20 – failure to appoint an independent PMA and manager etc

This is the same as allegation 1 (e).

146. Accordingly the only reasonable adjustments claims that succeed are in respect of allegations 10 & 11.

147. Disability discrimination – indirect

148. Allegation 7 - extension of sick pay

149. As stated above the respondent's sick pay scheme is a PCP. Whether this is discriminatory in relation to disability was not specifically addressed by the claimant. A mere assertion that disabled people are more likely to have long-term sick leave is perhaps dangerous and itself could fall into the trap of making discriminatory assumptions. However, even if it does have that discriminatory effect and put the claimant at the undoubted disadvantage of receiving less pay, we accept that it is a proportionate means of achieving the legitimate aim of running an efficient business.

150. Allegation 9 - PMA complaints policy & process having no right to be accompanied and no appeal

As stated above the PMA complaints policy and process is a PCP. Even if it puts people disabled with depression or migraine at a particular disadvantage, it did not put the claimant at that disadvantage as he did not

pursue a complaint under this policy, he was advised of an alternative route (the bullying and harassment policy) which included both rights and he took that route.

151. Allegation 11 - not allowing a friend or family member to act in capacity of workplace companion

As stated above the respondent's standard policy that only trade union representatives or a workplace colleague can accompany employees at sickness review meetings is a PCP.

For the same reasons as in the reasonable adjustments claim above, we accept that limiting the right to be accompanied as the respondent did on these facts put people disabled with depression at a particular disadvantage and it put the claimant at that disadvantage. We do not accept that that can be justified by the respondent as a proportionate means of achieving a legitimate aim especially as both Mr Walters and Mr Olafare told us that if Ms Babs had attended they would in practice have agreed to her active participation in the meetings.

This therefore amounted to indirect disability discrimination.

152. Allegation 14 (1) - putting the claimant under pressure to attend OH

As stated above the respondent's policy of expecting employees to attend OH appointments in person is a PCP. We do not accept however that this put persons with the disabilities of depression and migraines at a particular disadvantage nor did they put the claimant to any disadvantage. Even if disadvantage could be established we accept that this PCP was a proportionate means of achieving the legitimate aim of obtaining up-to-date medical advice before making a decision regarding an employee's employment.

153. Allegation 14 (- 2) - rejecting the claimant's medical expert report

As stated above this is not a PCP.

154. Allegation 15 (1) - processing and receiving OH reports without his consent

As stated above this is not a PCP.

155. Allegation 15 (2) - not telling the claimant in advance what the referral was for

As stated above, this is a PCP. We do not accept however that this put persons with the disability of depression and migraines at a particular

disadvantage nor did it put the claimant to any disadvantage, as when he asked to be told the questions in advance he was.

156. Allegation 19 -threats to stop sick pay

The respondent's policy of reminding employees that if they do not attend OH appointments without good reason their pay may be stopped is a PCP. We do not accept however that this put persons with the disability of depression and migraines at a particular disadvantage nor did it put the claimant to any disadvantage. We repeat that it is quite reasonable and arguably required of an employer, to remind employees of this risk.

157. Accordingly, the only indirect discrimination claim to succeed is in respect of allegation 11.

158. Disability discrimination – arising from

159. Allegation 1 – dismissal

The dismissal of the claimant was unfavourable treatment. He was dismissed because of his long term sick leave which itself arose as a consequence of his disability. We accept that the respondent had a legitimate aim of operating a system which seeks to engage with employees who are off sick, aimed at securing those employees' return to the workplace and by which the employment of those who are incapable of work due to ill-health is terminated. On these facts the dismissal of the claimant was proportionate given the length of time he had been off sick and his failure to engage with management and OH.

160. Allegation 2 - erratic payment of contractual sick pay

The claimant was not paid correctly on occasion. This was unfavourable treatment. It was due to the coincidence of the claimant's medical certificates ending at the same time as the payroll cut off. It was not because of something arising in consequence of his disability.

161. Allegation 7 – extension of sick pay

Reduction of pay is unfavourable treatment. The claimant's pay was reduced because he was on long term sick leave due to his disability. This is however justified by the respondent as a proportionate means of achieving the legitimate aim of running an efficient business.

162. Allegation 10 – lateness in notifying the claimant of reductions in pay

This was unfavourable treatment. The claimant was off sick due to his disability but the reason for the late notification was an administrative failure. It was not because of something arising from that disability or absence.

163. Allegation 15 (1) - processing and receiving OH reports without the claimant's consent

This allegation is not proved on the facts.

164. Allegation 15 (2) - not telling the claimant in advance what the referral was for

This is not unfavourable treatment and in any event when asked, Mr Walters agreed to do this and did so in practice.

165. Allegation 18 - failure to contact pension fund

This was unfavourable treatment but we conclude that it was due to an oversight by Mr Walters. It was not because of something arising from the claimant's disability or absence.

166. Allegation 19 - threats to stop sick pay

This is not unfavourable treatment. In any event, even if it were because of the claimant's reaction to it, and it arose in consequence of the disability, it is justified by the respondent. It is a proportionate means of achieving the legitimate aim of keeping employees advised of their position.

167. Accordingly all claims of discrimination arising from the claimant's disability fail.

168. Harassment

169. Allegation 13 – visiting the claimant's home without his consent

170. The respondent has submitted that this allegation is similar in nature and tone to allegations made and dealt with in the October 2016 Judgment. Although they relate to a home visit, the allegation of harassment itself is different and does properly fall to be decided afresh by this Tribunal.

171. We have found that Mr Walters and Ms Bhaimia attended the claimant's house without his express consent although they assumed he had consented. The respondent accepts that the visit was unwanted conduct. It was related to disability given the reason for the visit (a sickness review meeting) but it was not for the purpose of violating the claimant's dignity etc or creating the proscribed environment.

172. We accept that the conduct had that effect but the question of whether it reasonably had that effect is to be objectively assessed whilst taking into account the claimant's perception.

173. In making this assessment we have considered at length the competing relevant factors. On the one hand there was the context of an

undoubtedly difficult relationship between the claimant and respondent. The claimant's perception of this relationship is extremely relevant particularly taking into account his depression. Further, the claimant did not know Mr Walters etc were coming and found that out after the event from his neighbour. On the other hand, the OH report of 19 January 2016 recorded that the claimant was able to have meetings with management but preferred to have them at his home because he felt more comfortable and did not have the energy to go out. The claimant was absent and we have found that the account given by the neighbour of what happened is incorrect (this could be either because the neighbour got it wrong or the claimant has wrongly recorded what the neighbour told him). Mr Walters's discussion with the neighbour was in fact appropriate and did not disclose any confidential information.

174. Balancing all these factors, we conclude that the unwanted conduct could not reasonably have had the proscribed effect on the claimant. Therefore it did not amount to harassment.
175. Allegation 14 - putting the claimant under pressure to attend OH when they already had medical reports and ignoring Dr Rehman's report
176. This was unwanted conduct related to the claimant's disability given the reason for the proposed OH visits and the existence of the expert report. However it was not for the purpose of violating the claimant's dignity etc or creating the proscribed environment. There was very little, if any, evidence from the claimant as to the effect this had on him. In any event, in all the circumstances even taking into account the claimant's perception, it could not reasonably have had that effect.
177. Allegation 15 (1) - processing and receiving OH reports without the claimant's consent.
178. On the facts this did not happen.
179. Allegation 15 (2) - not telling the claimant in advance what the referral was for.
180. When this did happen, prior to the claimant's request to be told the questions in advance, even if it amounted to unwanted conduct, it was not for the purpose of violating the claimant's dignity etc or creating the proscribed environment. In all the circumstances even taking into account the claimant's perception, it could not reasonably have had that effect.
181. Allegation 16 – fabricating information that the claimant refused to give consent to access his GP records.
182. This allegation is not proved on the facts. Mr Walters made a mistake at the meeting on 8 June 2016.
183. Accordingly all claims of harassment fail.

184. Victimisation

185. The list of issues sets out the alleged protected acts. In his submissions, the claimant also referred to a letter dated 12 April 2016 which was not in the list of issues and therefore cannot be relied upon at this later stage.

186. The respondent accepts that those numbered 4, 5 & 9 were protected acts.

187. We have considered each of the remaining alleged protected acts and conclude that each of them is protected. They each make express reference in various formulations to allegations of bullying, harassment and/or discrimination and either expressly, or impliedly from the context, relate those allegations to his sick absence/disability.

188. Allegation 1 – dismissal.

189. As stated above, the reason for the dismissal was capability. It was not because the claimant had done a protected act.

190. Allegation 2 – erratic payment of the claimant's sick pay.

191. This was a consequence of the coincidence of the claimant's medical certificates ending at the same time as the payroll end dates. It was not because the claimant had done a protected act.

192. Allegation 4 – failure to respond to correspondence.

193. This was due to the respondent's practice that correspondence to Directors is delegated. It was not because the claimant had done a protected act.

194. Allegation 8 – pay deduction

195. The reason for this was the respondent's policy that any overpayment would be deducted from the next available pay packet. It was not because the claimant had done a protected act.

196. Allegation 12 – failure to investigate complaints within a reasonable time

197. As stated above, this allegation is not proved on the facts.

198. Allegation 13 – visiting the claimant's home without his consent

199. The reason for the home visit was as stated in Mr Walters's letter to the claimant dated 27 January 2016. It was not because the claimant had done a protected act.
200. Allegation 14 – putting the claimant under pressure etc
201. The respondent's actions in these respects were not because the claimant had done a protected act. They wanted the claimant to attend OH in order to get updated medical advice about his prognosis and prospects for a return to work/redeployment. The reason the decision makers did not have access to Dr Rehman's report was the advice they received from HR which was that the report was prepared for the purposes of Tribunal proceedings and could only be used for those purposes.
202. Allegation 18 – failure to contact the pension fund
203. This failure was due to an oversight by Mr Walters. It was not because the claimant had done a protected act.
204. Allegation 20 – failure to appoint etc
205. The letter did include an implied complaint against Mr Walters but the failure, if it was a failure, to replace him was not because the claimant had done any protected act but because the respondent treated the letter as a complaint just about Ms Bhaimia.
206. Accordingly, all claims of victimisation fail.
207. Breach of contract/unlawful deductions
208. Allegation 2 - erratic payment of contractual sick pay
209. The claimant says clause 11.1 of his contract of employment, which states that sick pay will be paid in accordance with the respondent's sick pay rules, was breached. The claimant was, ultimately, paid accurately. The claimant said that this exacerbated his illness and that he could not plan his finances. Even if there was an implied term that payment would be made on time, the claimant suffered no loss as he received the correct amounts due to him.
210. Allegation 3 - failure to initiate proper and fair investigations & turning a blind eye
211. The claimant relies upon a breach of the implied term of mutual trust and confidence and clause 24 of his contract of employment (treatment of colleagues). The allegation is not proved on the facts.

212. Allegation 8 – pay deduction
213. Clause 20 of the claimant’s contract of employment provides for recovery of amounts due to the respondent by deducting it from his salary. The claimant relies upon a breach of the implied term of mutual trust and confidence. That term however does not extend to contradicting an express term in the contract. Recovery of the overpayment was not therefore a breach or an unlawful deduction from wages.
214. Allegation 9 – PMA complaints policy etc
215. The claimant has not identified which term he says is breached. If it is the implied term of trust and confidence, that is satisfied by the alternative process available to him (the bullying and harassment policy).
216. Allegation 10 – lateness in notifying the claimant of half and nil sick pay
217. The claimant has not identified which term he says is breached. If it is the implied term of trust and confidence, there was no breach as although the respondent’s own guidance provides for one month’s notice, this is expressed to be “ideally” and not an absolute requirement.
218. Allegation 13 – visiting the claimant’s home without his consent
219. The claimant relies upon the implied term of trust and confidence. For the same reasons set out above on the claim of harassment, that this did not amount to a breach of contract.

Unfair dismissal

220. Dealing first with the claimant’s allegation that his dismissal was automatically unfair because the reason for it was that he made protected disclosures, we consider first whether the alleged disclosures were in fact protected.
221. In substance, the disclosures dated 3, 17 & 23 March 2016 were all capable of being qualifying disclosures but we find were not made in the public interest. Rather they were about the claimant’s personal situation and accordingly were not protected disclosures. The disclosure on 30 May 2016 was not capable of being a qualifying disclosure and in any event was not made in the public interest being again about the claimant’s personal situation. Accordingly it was also not a protected disclosure.
222. We have set out above in the context of the claims of direct discrimination our findings on the reason for the dismissal. Furthermore, even if we are wrong and one or more of the disclosures relied upon was

protected, we conclude that they played no part in the decision to dismiss. Therefore the claim of automatically unfair dismissal would fail in any event.

223. For the same reason, the claim that the dismissal is automatically unfair because the claimant was dismissed because he had asserted a relevant statutory right also fails. The reason for his dismissal was as stated above. In any event, the claimant had not in fact asserted a relevant statutory right before his dismissal.

224. Turning then to the claim of ordinary unfair dismissal, as already stated we have found that the reason for dismissal was the claimant's capability due to his long term absence from work; a potentially fair reason for dismissal.

225. Assessing the respondent's decision and process against the relevant reasonableness standard, we conclude that it took sufficient steps to consult directly with the claimant in writing. Given his earlier response to Mr Ndoci when he tried to contact him by telephone, it was reasonable for the respondent to conduct its contact with the claimant just in writing at this stage.

226. We also conclude that the respondent took reasonable steps to discover the true medical position of the claimant before dismissal. Mr Walters and Mr Olafare had the OH reports from August 2015 and January 2016. Substantial efforts were made to get the claimant to attend OH for a more up to date report before a decision was made but he did not. The claimant says both gentlemen should have referred to Dr Rehman's report (but we note he did not say this at the time). We considered this very carefully but conclude that in all the circumstances it was reasonable for them not to (given the relevant Presidential Guidance) and in any event, in substance Dr Reman's report did not say anything materially new or different to the OH reports that they did have before them.

227. As to whether a reasonable procedure was followed, first we find that both Mr Walters and Mr Olafare were sufficiently independent. Although the claimant, by the time of his dismissal, had raised a complaint about Mr Walters and the home visit, this was very late in the process and it was reasonable to proceed with the dismissal process whilst that was investigated. It is relevant that Mr Walters was the third manager appointed to deal with the claimant in this regard and he had raised complaints against the other two. As for Mr Olafare, although he had earlier occasional involvement in correspondence with the claimant this did not influence him in his decision making to the detriment of the claimant. A reasonable process was adopted prior to their involvement (although there were reasonably lengthy gaps earlier on between review meetings this was not to the claimant's disadvantage). Both Mr Walters and Mr Olafare were reasonable in their dealings with the claimant save that we have already decided that the failure to allow the claimant to be accompanied at his sickness review meetings by a family friend or member amounted to a breach of the duty to makes reasonable

adjustments and indirect disability discrimination. We have considered very carefully whether that in itself made the dismissal procedurally unfair. The decision to dismiss however was not based solely on the claimant's non-attendance at those meetings. It was also based on the claimant's very lengthy absence, medical advice that he was not fit to return to work nor to be redeployed without the underlying issues being resolved to his satisfaction and his non-attendance at the further OH appointments made for him. He also did not take the opportunity afforded to him to make written submissions. Given that overall picture, the failure to allow representation did not make the dismissal unfair. In all the circumstances, dismissal fell within the band of reasonable responses a reasonable employer could adopt.

Remedy

228. A remedy hearing of 3 hours will be listed before the same Tribunal in due course to assess the compensation payable to the claimant in respect of the two findings of failure to make reasonable adjustments and the one finding of indirect discrimination. The assessment of compensation will reflect that these claims overlap.
229. The parties shall provide their dates to avoid to the Tribunal within 14 days of the date this Judgment is sent to them. At least 14 days before the remedy hearing the claimant shall send to the respondent a statement of the remedy he is seeking together with copies of any supporting documents.

Employment Judge K Andrews
Date: 27 November 2017

Appendix A