



EMPLOYMENT TRIBUNALS

Claimant: Christopher Port

Respondent: Wilmington Healthcare Ltd

Heard at: East London Hearing Centre (hybrid hearing)

On: 02 - 05 & 09 August 2022

Before: Employment Judge Paul Housego

Members: Mrs M Daniels
Mr M Rowe

Representation

Claimant: In person

Respondent: Melanie Tether, of Counsel, instructed by Mills & Reeve LLP

JUDGMENT

The Claims are dismissed.

REASONS

Summary

1. Mr Port was called to a meeting to discuss his performance, in which it was indicated that his employment would be ended if it did not improve soon. He raised a grievance about this and was then absent from work for over 6 months. He did not engage with the Respondent about the grievance (which was not upheld) or with the capability process. He was dismissed for capability reasons. He claims there was a concerted effort to remove him which caused his mental health problems, making this an unfair dismissal. He claims disability discrimination, by reason of mental health problems, and he also raised complaints of sexual harassment and victimisation after raising a grievance.

2. The Tribunal decided that this was a fair capability dismissal after long absence with no prospect of return, that while the Claimant was disabled as claimed, the Respondent did not know of it, and could not reasonably be expected to know of it, until well into the sickness absence if at all. Therefore, the disability discrimination claim also failed. The Tribunal did not find the underlying belief of Mr Port that he was “set up to fail” had any evidential basis.
3. The Tribunal decided that the sex discrimination complaints were entirely separate from the disability claims, that Mr Port had intentionally not brought them within time, and that they were so far out of time that it was not just and equitable to extend time, so that they were also dismissed.

Claims made and relevant law

4. The claims are of unfair dismissal and disability discrimination (direct, by reason of the dismissal), S15 (detriment from something arising from disability) indirect disability discrimination, victimisation (the protected act being a grievance of 05 May 2019) and failure to make reasonable adjustments. Mr Port also claims that he was harassed in his working environment by comments with a sexual connotation made by colleagues to one another and about other colleagues.

5. Section 13 of the Equality Act 2010:

“13 Direct discrimination

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

(2) ...

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) ...

6. Mr Port claims indirect disability discrimination:

“19 Indirect discrimination

(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.”

7. The provision criterion or practice (“PCP”) Mr Port says was discriminatory was the treatment of long-term sickness absence (and provision of sick pay).

8. S15 of the Equality Act 2016:

“15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”

9. Mr Port says that his sick pay and dismissal were the detriments about which he complains.

10. Mr Port also says that the Respondent failed in its obligation to make reasonable adjustments:

“20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

- (a) removing the physical feature in question,
- (b) altering it, or
- (c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

- (a) a feature arising from the design or construction of a building,
- (b) a feature of an approach to, exit from or access to a building,
- (c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
- (d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.”

11. Mr Port says that adjustments should have been made to sick pay, and to the capability process for dismissal. Alternatively, he should have been relocated to another department.

12. The claim for harassment - S 26 of the Equality Act 2010:

“26 Harassment

(1) A person (A) harasses another (B) if—

- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
- (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.”

13. There was also a claim for victimisation, based on a grievance filed by Mr Port in May 2019.

26 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

- (a) B does a protected act, or
- (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

- (a) bringing proceedings under this Act;
- (b) giving evidence or information in connection with proceedings under this Act;
- (c) doing any other thing for the purposes of or in connection with this Act;
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.

14. In respect of a claim for unfair dismissal, the Respondent has to show that the dismissal was for a potentially fair reason¹. The Respondent says this was capability which is one of the categories that can be fair². The Claimant does not dispute that was the real reason, but says that it was nevertheless unfair.

15. It has to be shown that the dismissal was fair³. The employer must follow a fair procedure throughout⁴, and dismissal must fall within the range of responses of a reasonable employer⁵. It is not for the Tribunal to substitute its own view of what should have happened, for it is judging whether the actions of the employer were fair, and not deciding what it would have done.

16. The burden of proof as to the reason for dismissal is on the employer, on the balance of probabilities, but this is not disputed. There is no burden or standard of proof for the Tribunal's assessment of whether it was fair to dismiss⁶. If the dismissal was procedurally unfair the Tribunal has to assess what would have happened if a fair procedure had been followed⁷.

¹ S98(2) of the Employment Rights Act 1996

² Also S98(2) of the Employment Rights Act 1996

³ S98(4) of the Employment Rights Act 1996

⁴ Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA

⁵ Iceland Frozen Foods Ltd v Jones [1982] UKEAT 62_82_2907

⁶ Section 98(4) of the Employment Rights Act 1996

⁷ Polkey v AE Dayton Services Ltd [1987] UKHL 8

17. As it is asserted that the dismissal was by reason of unlawful discrimination the Tribunal must be satisfied that in no sense whatsoever was the dismissal tainted by such discrimination. For the discrimination claims, it is for Mr Port to show reason why there might be discrimination⁸, and if he does so then it is for the Respondent to show that it was not.
18. The claims for sexual harassment were filed a long time outside the time limit of 3 months (extended by the Acas early conciliation period). The test for discrimination claims is whether it is just and equitable to extend time to permit the claim to proceed⁹. There is an extension of time for the ACAS early conciliation procedure, but the early conciliation period was long after the three-month period, so it is not relevant to this claim.
19. We have considered the case law summarised and explained in Robinson v Bowskill & Ors (p/a Fairhill Medical Practice) (Jurisdictional Points : Claim in time and effective date of termination) [2013] UKEAT 0313_12_2011 and the factors in section 33 of the Limitation Act 1980 which is referred to in the BCC v Keeble [1997] IRLR 336, cited in *Robinson*.
20. The most recent guidance is in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23:

"37. The first concerns the continuing influence in this field of the decision in Keeble. This originated in a short concluding observation at the end of Holland J's judgment in the first of the two Keeble appeals, in which the limitation issue was remitted to the industrial tribunal. He said, at para. 10:

"We add observations with respect to the discretion that is yet to be exercised. Such requires findings of fact which must be based on evidence. The task of the Tribunal may be illuminated by perusal of Section 33 Limitation Act 1980 wherein a check list is provided (specifically not exclusive) for the exercise of a not dissimilar discretion by common law courts which starts by inviting consideration of all the circumstances including the length of, and the reasons for, the delay. Here is, we suggest, a prompt as to the crucial findings of fact upon which the discretion is exercised." The industrial tribunal followed that suggestion and, as we have seen, when there was a further appeal Smith J as part of her analysis of its reasoning helpfully summarised the requirements of section 33 (so far as applicable). It will be seen, therefore, that Keeble did no more than suggest that a comparison with the requirements of section 33 might help "illuminate" the task of the tribunal by setting out a checklist of potentially relevant factors. It certainly did not say that that list should be used as a framework for any decision. However, that is how it has too often been read, and "the Keeble factors" and "the Keeble principles" still regularly feature as the starting-point for tribunals' approach to decisions under section 123 (1) (b). I do not

⁸ Igen v Wong [2005] ICR 931, Madarassy v Nomura International plc [2007] EWCA Civ 33, Laing v Manchester City Council [2006] I.C.R. 159, and Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913

⁹ S123 Equality Act 2010 Time limits

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

regard this as healthy. Of course the two discretions are, in Holland J's phrase, "not dissimilar", so it is unsurprising that most of the factors mentioned in section 33 may be relevant also, though to varying degrees, in the context of a discrimination claim; and I do not doubt that many tribunals over the years have found Keeble helpful. But rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language (as occurred in the present case – see para. 31 above). The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.

38. I am not the first to caution against giving the decision in Keeble a status which it does not have. I have already noted the Judge's reference to the decision of this Court in Afolabi. At para. 33 of his judgment in that case Peter Gibson LJ said:

"Nor do I accept that the ET erred in not going through the matters listed in s. 33 (3) of the 1980 Act. Parliament limited the requirement to consider those matters to actions relating to personal injuries and death. Whilst I do not doubt the utility of considering such a check-list ... in many cases, I do not think that it can be elevated into a requirement on the ET to go through such a list in every case, provided of course that no significant factor has been left out of account by the ET in exercising its discretion."

In *Department of Constitutional Affairs v Jones* [2007] EWCA Civ 894, [2008] IRLR 128, Pill LJ at para. 50 of his judgment referred to Keeble as "a valuable reminder of factors which may be taken into account" but continued:

"Their relevance depends on the facts of the particular case. The factors which have to be taken into account depend on the facts and the self-directions which need to be given must be tailored to the facts of the case as found."

That point was further emphasised by Elisabeth Laing J, sitting in the EAT, in *Miller v Ministry of Justice* [2016] UKEAT 0004/15: see paras. 11 and 29-30 of her judgment. In *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640, [2018] ICR 1194, Leggatt LJ, having referred to section 123, says, at paras. 18-19 of his judgment:

"18. ... [I]t is plain from the language used ('such other period as the employment tribunal thinks just and equitable') that Parliament has chosen to give the employment tribunal the widest possible

discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see [Keeble]), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see [Afolabi]. ...

19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

Although the message of those authorities is clear, its repetition may still be of value in ensuring that it is fully digested by practitioners and tribunals."

21. We have also taken note of the judgment of Auld J in *Robertson v Bexley Community Centre* [2003] IRLR 434 (also cited in *Robinson*):

"25. It is also important to note that time limits are exercised strictly in employment and industrial 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. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule".

Respondent's position on disability

22. The Respondent accepted that Mr Port was disabled at all material times by reason of anxiety and depression, but that they did not know of it, and could not reasonably be expected to know of it.

Issues

23. The issues were set out with great clarity by EJ Fowell in a case management order dated

24. They are as follows:

3. The claim

3.1. Mr Port worked for the company as a Client Support Executive until his dismissal on 24 February 2020. The company say that this was on grounds of capability and followed a long period of absence, beginning on Monday 7 May 2019. Mr Port says that he has long-standing mental ill-health,

amounting to a depressive illness, that he was subject to increasing hostility from his line manager in the previous couple of months, who criticised his performance and told him that if he did not improve in the next two weeks he might well be dismissed. He raised a grievance about this on 5 May 2019 and says that his position then became intolerable, with his manager making a public reference to him as a weasel (pretending, he says, to be referring to a character in Game of Thrones) and he went off sick that day. His grievance was heard and dismissed in his absence, but the company waited until the following year to terminate his employment on grounds of his absence. They rely in part on his failure to respond to invitations to attend meetings to manage his absence.

3.2. After clarification at this hearing, the complaints presented are as follows:

- a) unfair dismissal under section 98 Employment Rights Act 1996*
- b) direct discrimination (under section 13 Equality Act 2010) on grounds of sex*
- c) discrimination arising from a disability (under section 15 Equality Act 2010)*
- d) failure to make reasonable adjustments (under section 21 Equality Act 2010)*
- d) indirect discrimination (under section 19 Equality Act 2010) on grounds of disability*
- e) harassment (under section 26 Equality Act 2010) on grounds of sex and disability*
- g) victimisation (under section 27 Equality Act 2010)*

3.3. The issues to be decided are as set out below.

4. Unfair dismissal

4.1. What was the reason for dismissal? The company says that it was on grounds of capability.

4.2. Did the company act reasonably in all the circumstances in treating that as a sufficient reason to dismiss Mr Port? The Tribunal will usually decide, in particular, whether:

- a) the company genuinely believed that he was no longer capable of performing his duties;*
- b) the company adequately consulted him;*
- c) the company carried out a reasonable investigation, including finding out about the up-to-date medical position;*

d) whether the company could reasonably be expected to have waited longer before dismissing him.

4.3. The burden of proof is neutral here but Mr Port says that his dismissal was unfair because:

- a) the decision to dismiss was made in his absence;*
- b) it had been taken before he went off sick;*
- c) it was taken by or between his line manager, Jenni Winman and the HR Manager, Alicia Parsons, who continued to manage his sickness absence from then on;*
- d) the respondent failed to refer him to an independent Occupational Health adviser;*
- e) they inviting him to meetings while off sick was intended to apply unfair pressure on him; and*
- f) refused to allow him to be accompanied to a hearing by a solicitor.*

4.4. If the procedure was unfair, what difference would a fair procedure have made to the outcome?

5. Section 26: Harassment on grounds of sex

5.1. Did the company or any of its employees engage in unwanted conduct in that female colleagues on occasion:

- a) told paedophile 'jokes';*
- b) 'joked' about raping a male colleague;*
- c) angrily said they wanted to punch a male colleague in the face;*
- d) criticised senior male colleagues behind their backs as being arrogant and propagating an attitude that men were inferior to women;*
- e) discussed lewd sexual fantasises about 'young and sexy' men, (usually a celebrity or actor); and*
- f) Ms Winman making the "weasel" comment.*

5.2. Was the conduct related to his sex?

5.3. Did the conduct have the purpose or effect of violating Mr Port's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

6. Section 13: Direct discrimination on grounds of sex

6.1. *Did the company, in*

- a) *attempting to dismiss him in the period before he went off sick;*
- b) *threatening him with dismissal at the outset rather than invoking the Performance Improvement Procedure;*
- c) *reducing his pay to statutory sick pay on very short notice;*
- d) *ultimately dismissing him; and / or*
- e) *subjecting him to any of the treatment not found to have been harassment on grounds of sex;*

treat him less favourably than it treated or would have treated someone else in the same circumstances apart from his sex. In particular, Mr Port compares his circumstances with his colleague Maxine Braden, whom he says was treated much more considerately when struggling with performance.

7. *Disability*

7.1. *Did Mr Port have a physical or mental impairment at the material time, namely a depressive illness?*

7.2. *If so, did the impairment have a substantial adverse effect on his ability to carry out normal day-to-day activities?*

7.3. *If so, was that effect long term? In particular, when did it start and is or was the impairment likely to have lasted at least 12 months?*

7.4. *Note that in assessing the likelihood of an effect lasting 12 months, account should only be taken of the circumstances at the time the alleged discrimination took place, not afterwards.*

7.5. *Further guidance is available in the Employment Statutory Code of Practice produced by the Equality and Human Rights Commission.*

7.6. *Were any measures taken to treat or correct the impairment? But for those measures would the impairment have been likely to have had a substantial adverse effect on Mr Port's ability to carry out normal day-to-day activities?*

8. *Section 26: Harassment on grounds of disability*

8.1. *Did the company or any of its employees engage in unwanted conduct as follows:*

- a) *Ms Winman making the "weasel" comment.*
- b) *failing or refusing to postpone the grievance hearing until Mr Port was well enough to attend;*

c) failing or refusing to allow him to be accompanied by his friend (Mr Gunn) at the grievance hearing;

d) failing or refusing to comply with his Subject Access Requests so as to allow him to prepare properly for the grievance hearing;

e) sending the emails from Alicia Parsons dated 20 and 28 June 2019 inviting him to a meeting and informing him of the likely termination of his employment.

8.2. Was the conduct related to his disability?

8.3. Did the conduct have the purpose or effect of violating Mr Port's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

9. Section 19: Indirect discrimination on grounds of disability

9.1. The provisions, criteria or practices in question are the company's:

- a) Absence from Work policy; and
- b) Grievance procedure.

9.2. In each case, did it put him at a particular disadvantage compared with others without his disability in that given his condition:

- a) he was less able to maintain a satisfactory level of attendance; and
- b) he could not attend the grievance hearing while off sick, particularly without the companion of his choice.

9.3. And did it put Mr Port at that disadvantage in that:

- a) his pay reduced rapidly to statutory sick pay;
- b) his grievance was dismissed in his absence;
- c) he was unable to resolve his work-related issues internally, and so make a return to work in a timely fashion, resulting in his dismissal.

9.4. Can the company show that these provisions, criteria or practices were a proportionate means of achieving a legitimate aim? The company says that the aim of the grievance policy was:

- a) to resolve employee grievances in a timely fashion, particularly allegations of bullying and harassment; and
- b) to complete the initial investigation into the claimant's grievance.

9.5. As to proportionality, the respondent says that:

- a) *the grievance hearing was rescheduled once;*
- b) *Mr Port did not respond to invitations;*
- c) *he did not make clear why he was not participating; and*
- d) *he was given the opportunity to appeal.*

10. *Reasonable adjustments: section 20 and section 21*

10.1. *This is very similar to the complaint of indirect discrimination. Again, the provisions, criteria or practices in question are the company's:*

- a) *Absence from Work policy; and*
- b) *the Grievance procedure,*

10.2. *In each case, did it put him at a substantial disadvantage compared with others in that:*

- a) *he was less able to maintain a satisfactory level of attendance, and his pay was reduced to statutory sick pay very quickly as a result;*
- b) *he could not attend the grievance hearing while off sick, particularly without the companion of his choice.*

10.3. *If so, did the company take such steps as were reasonable to avoid that disadvantage? The burden of proof does not lie on Mr Port, but he says that the following steps should have been taken:*

- a) *continuing his pay for longer; and*
- b) *allowing him to be accompanied by his friend; and/or*
- c) *delaying the grievance hearing until he was well enough to attend.*

10.4. *Did the company not know, or could the company not reasonably have been expected to know, that he had a disability or was likely to be placed at this disadvantage?*

11. *Section 15: Discrimination arising from disability*

11.1. *This involves unfavourable treatment as a result of something arising in consequence of Mr Port's disability.*

11.2. *Can the company shown that it did not know that Mr Port had a disability, and could not reasonably have been expected to know?*

11.3. *Can Mr Port prove that the company treated him unfavourably because of the "something arising" in consequence of his disability, namely his sickness absence*

11.4. *If so, what unfavourable treatment did he receive? He relies on*

- a) the reduction in his pay to statutory sick pay;*
- b) failing or refusing to postpone the grievance hearing until he was well enough to attend;*
- b) his dismissal.*

11.5. *Can the company show that this treatment was a proportionate means of achieving a legitimate aim? The company relies on the length of his absence, the nature of his role and the points set out above in the context of justifying indirect discrimination.*

12. *Section 27: Victimisation*

12.1. *Did Mr Port make a complaint at work about discrimination, or about a breach of the Equality Act? This is known as carrying out a “protected act”*

12.2. *Alternatively, did the company believe that he had?*

12.3. *He relies upon the grievance he raised on or about 5 May 2019, which refers to feeling bullied and harassed and being stressed.*

12.4. *If this was a protected act, did the company carry out any of the treatment mentioned in paragraph 8.1 or 11.4 above as a result?*

13. *Time limits*

13.1. *The claim form was presented on 22 June 2020, within a month of the end of efforts at early conciliation through ACAS. That period began on 25 April 2020 and so any act or omission which took place more than three months before that date, i.e. before 26 January 2020, is potentially out of time.*

13.2. *It follows that the complaint of unfair dismissal is in time but the complaints of discrimination may not be, since notice of dismissal was given on 22 January 2020. To complain of any earlier events, Mr Port must prove that they were part of a course of conduct extending over a period of time and ending after that date, or persuade the Tribunal that it would be just and equitable to extend the normal time limit.*

25. Case law indicates that a list of issues is not a pleading, but a tool to facilitate a hearing, and could not be approached with the formality one might approach a commercial contract or pleading¹⁰. Nor must a Tribunal stick slavishly to them¹¹. In this case the list of issues clearly set out the Claimant’s case.

¹⁰ Leslie Millin v Capsticks Solicitors LLP and Others: UKEAT/0093/14/RN

¹¹ Saha v Capita UKEAT/0080/18/DM

Evidence

26. There was a bundle of documents of 1,500 pages. The Claimant gave oral evidence. For the Respondent, Sarah Eglington, Angela Hayward, Kayleigh Seagroatt, Christopher James, Victoria Paxman and Jenni Winman and Alicia Parsons gave oral evidence.

The hearing

27. The hearing was a hybrid hearing, with two witnesses giving evidence remotely. There were no technical issues that were not resolved. The Claimant was afforded opportunity for breaks whenever he felt necessary.

The Claimant's case

28. He had endured a largely female workplace where comments were made about men and about sex, which, if made by a man about women would have been regarded as totally unacceptable. He felt deeply uncomfortable about them but did not feel able to complain until after he was dismissed. His work had been good, but when he got a new manager, Jenni Winman, she picked on him for no good reason. Out of the blue he was called to a meeting and told that if he did not improve in 2 weeks (in reality only a week because of time off already booked) he would be dismissed. He filed a grievance about this, and it caused him to become ill. His mental health problems were exacerbated by this, such that he was signed off for 2 months at a time. At one point they suggested an occupational health referral but did nothing about it. Eventually he was dismissed, and (as set out in the list of issues) says this was unfair and disability discrimination. He says this is because he was "set up to fail", and this caused his mental health to relapse. The relapse in his mental health was the reason he was away from work so long, and that was the reason he was dismissed. Therefore, he says, there is a direct causative link between the unfair way he was treated by the Respondent and his illness, which resulted in his absence, and that was the reason for his dismissal, which makes it both an unfair dismissal and disability discrimination.

The Respondent's case

29. Mr Port had not said anything in his recruitment interview to indicate mental health problems, and they would never ask such a question in interview. He had filled in a form about himself, and not said that he had any disability, and there was a box specifically asking about mental health. Nothing he had said or written since starting employment could have led to a suspicion of mental health problems. Even he did not consider himself disabled at the time. Only after he had been off sick for some months did he say that he may have disabling mental health problems to fall within the Equality Act 2010. Concerns about his work were genuine. After he had gone off sick he had not engaged in any meaningful way. He had not taken part in the grievance process. He had not responded to any attempt to discuss his health. After he had been away 6 months, they tried to get him to claim on their long term sickness insurance policy, but he had not done so. He was able to respond in detail and at length when dismissed, so while not

doubting that his mental health was a problem for him, they thought his non engagement was not involuntary. He had not appealed his dismissal. After over 6 months away from work, with no prospect of return, business needs meant his role needed filling, and dismissal for capability reasons was fair, and inevitable. At the start of his absence, they had paid him double the usual sick pay. The sexual harassment claim was denied factually, and in any event was so far out of time that it should be dismissed. It was unconnected with anything leading to his dismissal. There was no detriment arising from a PCP that was not a proportionate means of achieving a legitimate aim. The grievance was a protected act, but he had not suffered any detriment by reason of putting it in, and it was not about sexual harassment. They had, during his absence, done all they could to assist him.

Submissions

30. Ms Tether provided written submissions of some length, which meticulously unpicked the Claimant's case, setting out the law, but also explaining the Respondent's case with a clarity that meant that Mr Port (an able person) could clearly see the way the Respondent put its case. These were provided in writing on Monday lunchtime, the day before submissions, so that Mr Port was able to consider these in advance.
31. Mr Port also provided written submissions, early on 09 August 2022. He had found the weekend difficult and found it hard to compose them. They are, nevertheless, clearly written. He reiterated the case he has long put. He believes that the Respondent, led by Jenni Winman, set out, intentionally, and for reasons he cannot know, to dismiss him, by intentionally destroying his health. He believes that everyone connived in this endeavour, and that the human resources people involved were insincere and were just trying to trick him into saying things that would enable them to dismiss him.
32. As both submissions were lengthy oral submissions were brief, each commenting on those of the other.

Facts found

33. Mr Port worked for the Respondent from 18 September 2017. He went off sick on 07 May 2019 and did not return. He was dismissed by letter dated 20 January 2020, with effect from 24 February 2020. He contacted Acas to start the early conciliation period on 25 April 2020, which ended on 25 May 2020. The claim was filed on 22 June 2020.
34. Mr Port says that he says that in his job interview he said that he suffered "*burnout*" and that was why he left teaching. Ms Winman does not recall this, and her notes of the meeting were not retained when she moved offices. The human resources file might have been thought to have them, but they were not present. Taking Mr Port's case at its highest, this is not such as to put the Respondent on notice of disability. Mr Port says that he did not, at the time, consider himself disabled by reason of mental health problems. (He says that he had two episodes of, in the vernacular, nervous

breakdowns, in 1996 and in 2008, and had anti-depressants and weekly psychotherapy until Easter 2012, and so he would probably qualify as disabled.) If Mr Port himself did not consider himself disabled, and as he exhibited no symptoms of mental health difficulty until going off sick in May 2019, it is impossible to find that the Respondent should have had any inkling that Mr Port had, in the past, had mental health problems making his mental health fragile.

35. The Tribunal accepts Jenni Winman's evidence that Mr Port's mental health was not discussed in his job interview. Any competent manager (and Jenni Winman is plainly such) knows that you do not raise health matters in interviews. If someone is offered a role enquiry is then made as to any health issues to see how to accommodate them. That is the Respondent's process.
36. Mr Port was sent a form about his health, once offered the job. He filled it in. He did not disclose any mental health problem, even though the form expressly asked about mental health.
37. Mr Port was not well managed by his first manager. He was left to his own devices. In a reorganisation she was made redundant. He then moved to the management of Jenni Winman, in January 2019.
38. Mr Port and the person he worked with, Angela Hayward, needed support and another person, Maxine Braden, was recruited. She started on 16 April 2018 and left on 01 August 2018. In her exit interview she said that she found working with Mr Port difficult and that was one of her reasons for leaving (there were other reasons, to do with the work itself). Mr Port was not told about this at the time and saw the exit interview notes as part of disclosure after a subject access request.
39. Maxine Braden was not replaced as a further reorganisation reduced the workload.
40. From January 2019 his line manager became Jenni Winman. She is a very experienced manager who loves her job. She could see that Mr Port was not performing as she would like. She could see that he had not been trained well. She told him that she would treat the first three months like a standard probation period, and that by the end of that time she would expect him to be up to speed.
41. Mr Port worked closely with Angela Hayward, upon whom he relied considerably. She was part-time, four, then three, days a week.
42. In a 1-2-1 meeting on 22 January 2019 Mr Port reported that he felt that he was thrown in at the deep end.
43. Jenni Winman took Mr Port to a report he had prepared for a client on 05 February 2019. She was concerned that he was overthinking things, going into far too much detail, and delaying responses by several times revising the text of his email reports to clients.

44. On 20 February 2019 there was a further 1-2-1. Mr Port was still not performing as Jenni Winman would have liked. She agreed to create more templates to help him and did so.
45. Ms Winman also arranged for Mr Port, with others, to have instruction from another manager. She asked him to raise matters he thought he needed help with. Mr Port complains that he was not told whether (or not) he should take notes; that he did not know if this was immersive learning or classroom type learning. The Tribunal did not consider this a valid criticism. Mr Port was a teacher for a decade, and ought to have been able to work out for himself how to get the most out of any learning opportunity.
46. This did not help Mr Port improve, and Angela Hayward reported to Jenni Winman on 04 March 2019 that Mr Port was still getting too involved in content (rather than problem resolution) and still had not grasped a fairly basic concept (“drawdown” – where customers pay in advance for a certain amount of content and “drawdown” on it when they wish).
47. Because of her concerns about Mr Port’s work, and Angela Hayward having gone from 4 days a week to 3 days a week, Jenni Winman got approval to recruit someone else. Mr Port thought this was to replace him, because the approval refers to concerns about Mr Port. In fact, it was to augment the team which was suffering from Mr Port’s inability to work at the level Jenni Winman wished, and the reduction in Angela Hayward’s working week (and sometimes she worked from home).
48. On 20 March 2019 Jenni Winman emailed Mr Port and said that she had put together a list of questions for him to gauge how he was progressing towards his objectives. She would speak to him about it the next morning. She did so. There were 30 questions to be answered in half an hour. They were short questions and short answers required. There was an interruption and as a result there was 50 minutes in all (09:11-10:17). Mr Port answered 18 of them, not all correctly.
49. Jenni Winman’s note about this indicates that she thought Mr Port was not happy in the role, and did not like her more purposeful management, he having been left very much on his own under his previous manager.
50. The next 1-2-1 was on 24 April 2019. Mr Port was not dealing with “sleepers” – alerts from customers’ programs indicating that they were using them outside the terms of their licences. This was a difficult meeting for Jenni Winman, who found Mr Port disengaged, and that he stared at her in a hostile way and answered questions monosyllabically and unhelpfully. She brought the meeting to a premature end, feeling that the relationship had broken down. Mr Port denied being hostile and said that he thought Jenni Winman was unfair in her treatment of him. Nevertheless, the contemporaneous note made by Jenni Winman clearly shows that was how he came across to her. Mr Port indicated to Jenni Winman that he did not think the role, or the job, was for one for him in the longer term.
51. As a result of this, Jenni Winman involved human resources, principally Alicia Parsons.

52. On 25 April 2019 Jenni Winman emailed Mr Port:

“Following on from our 1:2:1 meeting yesterday, I am extremely concerned about your performance and would like to meet with you do discuss this further. Can you please be available at 3pm to meet with myself and Alicia.”

53. Mr Port says that he saw Jenni Winman and Alicia Parsons in discussion on the morning of the 25th. He thought, probably correctly, that they were discussing the meeting they were to have with him later. That would be expected.

54. At the meeting Jenni Winman spoke to notes she had made, about the course of his work since January 2019, and the issues with Mr Port’s performance. These were genuine concerns. She said that she needed to see an improvement over the next two weeks, or his job was at risk. She said that he had come across as despondent and rude and was concerned about his conduct in meetings. Alicia Parsons participated in the meeting to a lesser extent. She is very conscious that human resources involvement can be somewhat concerning for an individual. She had not met Mr Port before. It was apparent to the Tribunal from her department throughout the Tribunal that she is very skilled at rapport building and clearly fully understands her role. She softened the impact of this as much as possible, but nevertheless it took Mr Port very much by surprise. At one point she asked if he had anything to say: his reply was to the effect that he had a lot to say but wanted first to hear all they had to say, and then take advice.

55. On 29 April 2019 Jenni Winman set out her concerns in an email to Mr Port. It is a clear exposition of the history, of what her concerns are, and what she expected to see change. It said that if there was no improvement his employment may be terminated. It ended by asking him to take up the support available to him, and concludes *“...and if you need and (sic – any) help with time management, I am more than happy to assist you with that too.”*

56. Mr Port responded to Jenni Winman by email later on 29 April 2019, copying in Alicia Parsons, thanking her for putting all in writing but that he was taken aback by some of the points raised, with which he strongly disagreed. He would respond more fully after considering things. He concluded:

“During the meantime, thank you for offering your support which I will endeavour to utilise.”

57. Mr Port’s account in the Tribunal was that this was a deeply hostile meeting and that he was *“being set up to fail”* and that they had by this time decided to dismiss him. While he had been given a two-week period to demonstrate an improvement in performance, with pre-booked holiday and a bank holiday it was in reality only a week. The email from him, and the evidence of Alicia Parsons and of Jenni Winman was that it was a difficult meeting, by reason of the subject matter, but that the aim was to try to get things back on track. Mr Port is, plainly, an able person, and capable of the work, and they wanted him to do so, after not having been adequately managed for the previous 15 months.

58. The Tribunal finds that this was no more than effective management, which had previously been lacking. There was no hidden agenda. Mr Port is correct in pointing out that there was a process for having a performance improvement plan (PIP) which was not followed. Alicia Parsons' evidence was that this was not always used, as it was formulaic and time consuming. While not ideal to have a policy and not use it, Mr Port was not dismissed for performance issues. That fact is not relevant to the claim for unfair dismissal.
59. Mr Port says that Jenni Winman and Alicia Parsons should have realised that his demeanour in the meetings of 24th and 25th was disassociation, or emotional numbing, or another manifestation of mental health problems. An expert psychiatrist might possibly have wanted to explore this. It is unrealistic to expect Jenni Winman or Alicia Parsons to have any such concerns. Alicia Parsons had no previous experience of Mr Port and so would not be able to see any difference in him. It did not occur to Jenni Winman that Mr Port might be depressed or otherwise affected mentally, for he was attending social events as usual. He was always somewhat reserved and kept himself to himself.
60. Having thought about matters and having spoken to a friend who is a retired solicitor, Mr Port filed a grievance on 05 May 2019. This is about the non-use of the PIP policy. It makes no reference to sex discrimination, although he stated that: *"I often feel bullied and harassed (perhaps due to my age)"*. He suggested in that email that this may be behind the performance issues being raised. He made a subject access request.
61. Mr Port's mental health deteriorated subsequent to the meeting on 25th April 2019. He was signed off work on 07 May 2019 and did not return. His email of 08 May 2019 said that he had left work as he felt unwell, overwhelmed and panicky. He said he felt no better and would not be coming in on 08 May 2019 for that reason. The email makes no reference to any long-term issue, or of any past problems. He was not able to return, as he did not improve. On 13th and 14th May 2019, he emailed human resources concluding that he was suffering ongoing mental health issues and was to see his GP.
62. His subsequent contact with the Respondent was limited to sending in fit notes stating that he was not fit for work for periods of two months at a time. The reasons differed over time, but *"anxiety"*, *"panic attacks"* and *"work related stress"* feature largely, and *"depression"* towards the end of the period of sickness absence.
63. Mr Port's medical records (not seen by the Respondent before this claim was started) indicate a degree of paranoia (and as this is a public document no elaboration is given) and a recurrent feature was that he was extremely distrustful of people. The Respondent knew of none of this before these proceedings, and had no way of knowing.
64. Mr Port did not respond to invitations to participate in the progress of his grievance. There was an investigation meeting on 14 May 2019, and an independent manager prepared a report, dated 04 June 2019. As this had no input from Mr Port other than the initial grievance it is unsurprising that it

was not upheld. Mr Port considered that it was underhand to send him the SAR documents and then determine the grievance a day or two later before he had the chance to look at them. However, Mr Port had not responded to anything from Mr Grimes, the Investigating Officer, and had not requested this. There was no reason for Mr Grimes to think that Mr Port was going to participate in the process. There was no reason for Mr Grimes (or anyone else in the Respondent) to think that there was any deep-seated mental health issue affecting Mr Port. There is no reason to think that Mr Grimes, a manager not connected with Mr Port's work, was part of a conspiracy to undermine him and dismiss him.

65. During the period of absence, the people in human resources (there were four, Alicia Parsons mostly) made efforts to help Mr Port. The correspondence was as follows.
 - 65.1. On 08 May 2019 Mr Port's email was acknowledged, and he was signposted to the Respondent's Employee Assistance Programme ("EAP").
 - 65.2. On 13 May 2019 he was sent a text message saying a conversation would be very helpful, but she did not want to call unannounced, and asked Mr Port to call her.
 - 65.3. On 20 May 2019 Mr Port was sent a letter saying that sick pay was discretionary and did not usually exceed 10 days in a rolling 12-month period, but that they would pay him until 29 May 2019, which was 22 days, and then move him to statutory sick pay ("SSP").
 - 65.4. On 20 June 2019 Alicia Parsons again pointed Mr Port towards the EAP and said that she was looking at ways to try to resolve the workplace stress affecting him, and suggesting the topics which needed to be discussed, and what support framework could be put in place for him to achieve the goals they had for him. She said the aim was to identify a way forward to address the issues at the heart of the problem, but that if this was not possible then it might affect his continued employment. She asked him to come to a meeting on 26th. The letter is a model of how to approach such a situation.
 - 65.5. On 28 June 2019, Mr Port having not responded to the letter of 20th and having not attended the meeting, Alicia Parsons wrote again. She asked Mr Port to come to a meeting on 04 July 2019. If he did not want to come to work, she offered to arrange a neutral location, or if he wished it, to come to his home. She offered him the option of bringing a friend as a companion, provided that friend was not a lawyer. (Mr Port has a friend who is a retired solicitor and took it that he could not bring his friend, but did not ask. It is not usually regarded as unfair for an employer not to permit an employee to bring a lawyer to such a meeting.) That letter also pointed out that with work related stress, removing the cause could remove the stress, so that postponing discussion might not be positive. It reiterated that the Respondent was looking to try to address the issues at the heart of the problem. It set out what it was intended to discuss, and that it was eager to resolve Mr Port's concerns. It said

that ultimately, if they could not be resolved they might have to look at ending his employment. It concluded by again signposting the EAP, and by saying that letters such as this had a formal tone, and being conscious of his health condition offered to have a discussion on the telephone about it. It included a list of questions to be addressed. Mr Port accepts that at face value they are all sensible and reasonable questions to ask. He thought, and continues to believe, that none of this was genuine. He believes it was all part of a concerted underhand plan to end his employment. This letter, in particular, is an exemplar of first-class human resources professionalism, clear, positive and without ambiguity, formal but not hostile, and indicating how a positive route forward can be followed.

- 65.6. On 02 July 2019 Mr Port emailed another person in human resources (the person who had sent the text message). Mr Port's emails were all authored by Mr Gunn, before approval by Mr Port who then emailed them himself. He said he had been to his GP and was *"diagnosed as suffering from work-related stress, anxiety and panica attacks, together with further areas of work-related psychiatric injury, as identified during my recent assessment by NHS Mental Health, and which may engage 'disability' under the Equality Act 2010."* This was very misleading, as while the first part of this was correct, the rest was what he had complained of, not what was diagnosed. It was Mr Gunn who drafted this. Mr Port agreed that he knew, through Mr Gunn, that disability comprised both the substantial effect on ability to carry out day to day activities, and that it had lasted, or was expected to last, at least 12 months. He accepted that at the time this was written he did not think he qualified as disabled, because of the use of the word *"may"*. It follows that as neither he nor his solicitor friend thought he was disabled the Respondent, still ignorant of the past history, could not be expected to know.
- 65.7. Mr Port sent a similar email on 15 July 2019. He said he was in no fit state to attend to any work matters. He said he would keep them informed at two monthly intervals and enclosed a fit note signing him off for two more months.
- 65.8. On 22 July 2019 Alicia Parsons wrote again, after that fit note arrived. It said again that discussion about workplace stress was usually the starting point for their resolution. It suggested that a referral to occupational health might be helpful. It pointed out to Mr Port that there was an insurance policy which would pay up to 50% of his salary for up to 5 years after 26 weeks' absence and she enclosed a claim form. Plainly she was anticipating that it was likely that the absence was going to be long term. Again, she signposted the EAP. Mr Port regarded everything from Alicia Parsons as suspect. She was, in his view, party to what he regarded as the intimidation he had suffered at work. He thought the Respondent should have brought in wholly new people not party to this mistreatment. The Respondent could have had no way of knowing that was his view. It is wholly without substance. Alicia Parsons

could not have done more to help Mr Port, and the Tribunal finds the accusation that she was hostile to him, or doing anything underhand, totally without substance. The Tribunal notes that Mr Port accepts that he has suffered from hypervigilance to the point of paranoia. This is an example of this symptom of his mental health issues. There was no referral to occupational health as Mr Port did not respond. Alicia Parsons explanation is reasonable – he had not engaged thus far, and if they made an appointment for him and he did not attend there was a £700 charge.

- 65.9. On 16 September 2019 Mr Port emailed again, in much the same terms, sending in a fit note for two months.
- 65.10. On 17 September 2019 another human resources adviser (one whom it appears had not been involved before, which is what Mr Port said he wanted (although not saying so)) emailed Mr Port. She said she was sorry to bother him with work related matters, but as his SSP soon ran out, she again wanted to draw his attention to the insurance claim that could be made. She attached a further copy of the claim form. She also gave him all the details of how to get help from the EAP. There was no reason at all why Mr Port should have ignored this most helpful letter from someone who he had no reason to suspect. It is probably a reflection of his mental state at the time. It appears that at some point Mr Gunn began to be less than objective, which perhaps also contributed to this – rationally extraordinary - refusal to make a claim which would have been nothing but beneficial to him.
- 65.11. On 06 December 2019 Mr Port was invited to a meeting by Alicia Parsons, to take place on 16 December 2019, again at the office, or if he wished at a neutral location or his home. The email followed the same path as the email of 28 June 2019. This time it said the meeting would take place in his absence if he did not attend.
- 65.12. On 06 December 2019 another human resources adviser sent the claim form, completed so far as they could, to the insurance company, just in case he got in contact with the insurance company.
- 65.13. On 12 December 2019 Adobe licences were renewed by Jenni Winman except for that of Mr Port. Mr Port indicates this shows a predetermination of dismissal. That was the likely outcome, given long absence, lack of engagement, and no indication of likely return. Even if not, there was no likelihood of Mr Port needing a licence for the foreseeable future.
- 65.14. On 16th Jenni Winman met with Alicia Parsons. Mr Port did not attend and had not responded to the letter. It was a short meeting with the decision to dismiss (as Mr Port accepts) being inevitable.
- 65.15. Alicia Parsons delayed the letter until 22 January 2020. It sets out with clarity that he had been absent since 08 May 2019, that there was no prospect of him returning to work in the foreseeable future, and that he had not engaged with them. It reported that they had

tried to claim on the insurance provider for him, but that they would not do so without him making a claim. In these circumstances they decided to terminate his employment, with effect from 24 February 2020. The right of appeal was set out.

- 65.16. Mr Port sent a response, which states that it has been written for him by the same person as before (and this is apparent from its phraseology). It says that there is no legal basis for appeal. Mr Port explained to the Tribunal that this was because he had been away a long time, and there was no likelihood of him returning soon, so that superficially this was a fair dismissal. The letter says that it was *"in both sides' best interests to have all relevant matters heard in open court"*.
- 65.17. Mr Port's belief is that there was a concerted plan to dismiss him on flawed competence grounds, and that the implementation of that plan caused him to become mentally unwell, and they then used the resulting absence as the reason to bring that plan to its culmination. Because they had acted malevolently throughout, the dismissal was unfair even though the basic facts were indisputable as matters of record.
66. The Respondent does not have contractual sick pay. They have discretionary sick pay, of 11 days in any rolling 12 months. The Respondent accorded Mr Port 22 days sick pay, so double the norm. In any event, reasonable adjustments are to help people to get back to work, and paying while not at work is not usually considered a reasonable adjustment matter.
67. The Tribunal noted that the early conciliation period ended on 25 May 2020 but that the claim was not lodged until 22 June 2020, nearly a month later. With the sex discrimination claim so long out of time the Tribunal would have expected it to be lodged immediately the Acas early conciliation period ended, not wait a further four weeks.

Conclusions

Sex discrimination

68. The Tribunal could see no reason why the sexual harassment claim could not have been filed within the three-month time limit. The matters complained of pre-date, and are unconnected with, the allegations relied on for the unfair dismissal and disability discrimination claims. There was no mental health or work-related reason why they could not have been filed in time. No coherent reason for not making the claims was put forward by Mr Port. Having been dismissed he decided to add these historical matters to his claim. The length of the delay is considerable, and there is no good reason for it. The allegations are not of any sexual harassment of Mr Port but are about the asserted environment.
69. Asked about this Mr Port accepted that these matters were largely under his previous manager, that initially he had a good relationship with his new manager (Jenni Winman) and did talk to her about work related issues when

she was first in post. He had decided not to raise the other matters, which he thought were now going to be in the past. When filing the grievance and after he was off sick, leaving on 07 May 2019, and before he became really ill, he discussed this with his lawyer friend and they made a conscious decision to limit matters in the grievance to the failure to use the PIP process. He could not now recall why it took four weeks to file the claim after the end of the early conciliation period.

70. The sexual harassment claims are so far out of time that they must be dismissed on jurisdictional grounds. It is not just and equitable to extend time to allow claims so stale to be litigated. There is no cogent reason for the claims not being made in time, and the delay is of years. It was a conscious decision not to make a claim about them within the time limit. The Tribunal therefore decided that it was unnecessary to make any findings of fact about the allegations as it was not just and equitable to extend time to enable them to be considered.

Disability discrimination

71. On the facts set out above the claims for disability discrimination must fail. Mr Port never disclosed mental health problems before he went off sick in May 2019, and it was not until July 2019 that he first indicated that he considered himself *possibly* within the definition of disability in the Equality Act 2010. At work he exhibited no symptoms of mental health problems. There is no way the Respondent could have had any inkling that Mr Port might have any mental health issue. Therefore, the disability discrimination claims must all be dismissed.
72. The claim for victimisation cannot succeed because the claimed protected act – the grievance – was about dealing with performance without using a PIP. It mentioned bullying and harassment, but only that he thought it might be to do with age. There was nothing about sexual harassment. It was not Mr Port's case that anything which happened was because he had mentioned bullying and harassment in that grievance. If it is part of his case, the Tribunal does not accept it.
73. It is therefore redundant to go through the disability related issues seriatim, because they do not fall to be considered. The Tribunal's findings of fact mean that none would have succeeded in the merits.

Unfair dismissal

74. The relationship breakdown between Mr Port and Jenni Winman came about because of Mr Port's demeanour at a meeting between them, called to discuss competency issues. There was nothing to suggest mental health problems were impacting on Mr Port at that time. He was still socialising with the team, and there was no other indicator of mental health problems. Indeed, Mr Port attributes his mental health problems to being told that he must improve in a short period and then filing his grievance, which is right at the end of his time working for the Respondent. That means that Mr Port himself does not say that he was exhibiting any signs of mental health difficulty, because there was none until the meeting of 29 April 2019. He was not spoken to about competence matters which arose from mental

health problems. It was the other way round. Mental health problems arose because he was spoken to about competence issues.

75. The Tribunal's conclusion is that these concerns about competence were genuine and real. Mr Port does not agree, but he had not been managed for 15 months. His new manager wanted (and needed) to manage him. He had, for example had no formal appraisal in all that time, had no real induction and little training. It was a sensible decision of Jenni Winman to assume no prior knowledge and then to expect Mr Port to get up to speed in three months (the usual probation period for new starters). He did not get up to speed. That was clear, on its own, from the evidence of Angela Hayward. Mr Port did not regard her as part of the plot against him in which he believes, and their relationship was amicable.
76. The premise of the principal claim is also not sound. That claim is that the treatment Mr Port received at the hands of the Respondent caused his mental health to deteriorate to the point of disability. It was that deterioration which resulted in his absence, and it was his absence that was the reason for his dismissal. Therefore, he says, as they caused the disability his dismissal must be disability discrimination. That is not an argument which the Tribunal considers tenable.
77. There are some matters which perhaps might have been done better. There is a PIP policy, and it would have been better to use it. Mr Grimes knew there was a SAR about the absence of use of the pip, and that was the subject of the grievance. He might have found out when that information was provided, and then said to Mr Port that he had a set period to send in any information he wished to rely on, and to comment on the interview with Jenni Winman.
78. However overall, this was a textbook example from the Respondent's human resources department, in particular Alicia Parsons, in the way Mr Port was dealt with after he went off sick.
79. The Tribunal finds that Jenni Winman was simply trying to manage effectively someone who had not been managed for 15 months, did so appropriately (save perhaps not using a formal PIP – although she had given Mr Port 3 months). There is no reason at all to suspect that there is any credence to Mr Port's belief that there was a concerted long-term plan to remove him.
80. Mr Port's assertion that he should have been redeployed would be dependent on him being able to return to work. He says that he could not return to work to the team who he believed were seeking his dismissal, but there was no way they could have known that was his belief. It was a mistaken belief.
81. On the merits, the claim about unfairness of sick pay could not succeed. Mr Port was given double the sick pay usually paid.

Unfair dismissal claim

82. The basis of the unfair dismissal claim is misplaced. Mr Port was away from work for over 6 months. His only involvement was submission of fit notes stating that he was unfit for work each two months. The Respondent could not hold his job open indefinitely. There was no indication that he might be fit to return to work in the foreseeable future. A capability dismissal was inevitable. Unfortunately, Mr Port remains signed off from work, and so even had dismissal at that point been inappropriate it would surely have occurred by now.
83. The management of Mr Port by Jenni Winman was entirely appropriate. She realised that he was not “*up to speed*” and reset the clock, treating him as a new starter. That could not be fairer.
84. Mr Port was not told of the exit interview of Maxine Braden. That was August 2018. There was no adverse consequence for Mr Port from that exit interview, and it is not relevant to his subsequent work history. It recorded Maxine Braden’s view. Jenni Winman similarly had difficulties with Mr Port. If she did know of it this reinforces the finding that there was nothing in Mr Port’s approach to her that was rooted in mental health.
85. The way the absence of Mr Port was handled by Alicia Parsons was exemplary. The Tribunal considered carefully the letters written by Alicia Parsons and found them to be exemplars of human resources professionalism. They covered the ground they needed to cover. They were well phrased. They were not legalistic. They expressly stated that they had to be somewhat formal, but positively invited conversation over the phone. Anyone getting such letters would know that there was someone to whom they could speak, who was keen to help resolve the issues. Mr Port did not respond to that clear and repeated invitation.
86. This Tribunal has no agenda save to adjudicate fairly. Its’ members have decades of experience and expertise in deciding claims like this. It is to be hoped that Mr Port (who was kind enough at the end of his oral evidence to say that he was grateful for the fairness of the hearing) can accept the conclusions to which we have come.

**Employment Judge Housego
Dated: 10 August 2022**