EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Tadesse	**v**	**The London Borough of Camden**

Heard at: London Central
On: 17 – 23 January 2024

Before: EJ G Judge Hodgson
Mr D Schofield
Mr R Baber

Representation
For the Claimant: in person
For the Respondent: Mr S Thakerar, counsel

JUDGMENT

1. **The claim of unfair dismissal is well-founded and succeeds.**

2. **The claim of failure to make reasonable adjustments fails and is dismissed.**

3. **The claim of discrimination arising from disability (section 15 Equality Act 2010) fails and is dismissed.**

4. **The claim of direct race discrimination fails and is dismissed.**

5. **The claim victimisation succeeds in relation to the following three allegations:**

    a. **by bypassing stage 1 and stage 2 of the sickness management procedure on 15 November 2022;**

b. by failing to recommend the claimant for ill health retirement; and
c. by dismissing the claimant.

6. The remaining claims of victimisation fail and are dismissed.

REASONS

Introduction

1.1 The claim, lodged with the tribunal 17 February 2023, alleged unfair dismissal, direct discrimination, and victimisation.

The Issues

2.1 The claimant initially brought allegations of unfair dismissal, direct discrimination, and victimisation.

2.2 Further potential claims were identified at a case management discussion before EJ J Burns on 30 May 2023. At the final hearing amendment was granted to include claims of discrimination arising from disability, failure to make reasonable adjustments, and one further claim of victimisation.

2.3 The issues in this matter were discussed with the parties, and a definitive record sent. The parties did not dispute the accuracy.

2.4 The full issues are set out at appendix 1.

Evidence

3.1 We heard from the claimant, and his daughter, Ms Helina Tadesse.

3.2 For the respondent, we heard from Ms Debora L'Esteve, employment relations manager for the respondent and Ms Francis Woods, HR strategic lead.

3.3 We received an agreed bundle, and an additional bundle.

3.4 Various other documents were sent during the hearing.

3.5 Both parties provided written submissions.

Concessions/Applications

4.1 On day one, we considered the issues attached to the case management order of EJ J Burns. A number of the points were unclear. He had specified the parties should agree a final list of issues. They had failed to do so. Further consideration was given to the list of issues on day two. It

was noted that there were no claims of disability discrimination, of any nature, in the original claim form. They had been referred to by EJ J Burns, and it appears they were raised at the case management; unfortunately, whilst some claims were recorded on the issues, they remained unclear and no formal amendment had been allowed.

4.2 By consent, the respondent agreed to allow amendment to include allegations of discrimination arising from disability and failure to make reasonable adjustments. The full extent of that amendment is recorded in the draft issues as sent to the parties on 19 January 2024. The tribunal allowed the amendments to include claims of discrimination arising from disability and failure to make reasonable adjustments, as they were not objected to by the respondent, the respondent had prepared, and the case could proceed without adjournment. A further act of victimisation was allowed by amendment. This concerned the failure to recommend the claimant for ill-health retirement. The respondent conceded that the reason for refusal was the same as the reason for the dismissal and there was no hardship in allowing the amendment.

4.3 We noted, on day one, the bundle contained many redacted documents. The respondent indicated that the claimant had sought redactions as he considers some of his medical conditions to be confidential, and he did not wish them to be disclosed. The tribunal ordered the respondent to produce to the tribunal an unredacted version of the bundle, and this was provided, albeit there was still some redactions.

4.4 On day one, the claimant indicated he wished to seek specific disclosure. He was asked to put his request in writing and to set out the documents he wished to receive. The request was received on day two, 18 January 2024. The claimant sought confirmation of the figures for redundancy payments for certain individuals, which had been redacted in the bundle. The tribunal decided that the information was not relevant to any matter to be considered by the tribunal. As the information was not relevant, it would not be disclosed. We refused the application on the morning of day three, 19 January 2024.

4.5 The claimant alleged there was an agreement, reached at a mediation in December 2021, concerning the use of an independent occupational health (‘0H’) expert. On day three, the claimant provided documentation relevant to a mediation which occurred in December 2021. That documentation contained no order from the tribunal which referred to any agreement concerning occupational health.

4.6 On day two, we noted that the respondent had conceded disability, but had failed to state in relation to each impairment what was the effect on day-to-day activity. We ordered the respondent to provide confirmation of the basis on which it conceded disability, and this was provided.

4.7 Following the hearing both the claimant and respondent applied for rule 50 Employment Tribunal Rules of Procedure 2013 orders. These are dealt with in a separate decision which will form a case management order

The Facts

Background

5.1 The respondent, the London Borough of Camden, employed the claimant from 4 January 2006, first as a security agent then as a customer services officer. The claimant commenced sickness absence on 1 April 2021. He never returned to work. He was dismissed on 22 November 2022 for ill-health, following a lengthy absence.

5.2 Around March 2021, the respondent wanted the claimant to work in a Covid test centre. The claimant commenced sickness absence on 1 April 2021. The claimant submitted two employment tribunal claims in July 2021, claims 2204179/2021 and 2204704/2021 ('the previous claims'). They were combined and heard together. Two allegations succeeded: his claim that failing to offer him a move to a venue other than Camden town library between 16 March and 12 April 2021, was a failure of reasonable adjustments, and an act of victimisation. The further claims of direct discrimination, and victimisation failed and were dismissed. There was no finding that any information or allegation made by the claimant was false and made in bad faith.

The claimant's sickness absence

5.3 The claimant had a contractual right, during sickness absence, to 6 months' full pay and six months' half pay. The contract provides that there is no further entitlement.

5.4 There is a sickness absence procedure. The policy provides for return to work discussions. For long periods of absence, paragraph 5.3, states "your line manager should have a conversation with you to see if a phased return could support you to get back into work." Paragraph 6.4 provides that the line manager should make regular contact when the periods of absence are lengthy.

5.5 There is a formal "sickness absence management procedure" at section 8. Paragraph 8.1 provides for three stages. Stages one and two provide for absence review meetings. Stage 1 envisages the need to obtain medical information and consider reasonable adjustments. Stage 2 provides for further monitoring and the issue of a notification of concern, and ultimately movement to a formal "employment review meeting" at stage 3.

5.6 It follows that stages 1 and 2 involve monitoring, discussion, obtaining evidence, and warnings, if appropriate.

5.7 It is possible to proceed directly to stage 3 under 8.4 of the procedure which states as follows:

> **In some circumstances, where there is no realistic possibility, following medical evidence, of a return to work, it may be necessary to escalate through the procedure, i.e. going straight to stage three.**

5.8 Whereas stages 1 and stage 2 normally result in a notice of concern, stage 3 may lead to dismissal. Section 11 sets out the procedure:

> **11.1. A stage three Employment Review Meeting could ultimately result in dismissal, so the format of the meeting is different from meeting held at stage one and two:**
> **• the designated Chair must be a Head of Service, a Chief Officer or the Chief Executive;**
> **• the line manager who chaired the process at stage one and two must attend to present the sickness management to date;**
> **• any outcome will reflect our commitment to being a consciously inclusive organisation with regards to diversity;**
> **• if it becomes clear that more medical information is required, the meeting may be adjourned until this can be obtained.**

5.9 There are a number of potential outcomes set out in section 12.

> **12.1. Dismissal may be appropriate where:**
> **• there has been a recurrence or continuation of absence during the period for which a notification of concern is active;**
> **• The employee is seriously ill and there is no prospect of a return to work within acceptable timescales.**
> **12.2. Before making any decision to dismiss, the Chair should be certain that:**
> **• current medical information has been reviewed, including what is likely to happen in the future;**
> **• ways to help an employee return to, or remain in work, have been considered, e.g. making reasonable changes to the workplace and/or role if the employee is disabled, and looking at whether the employee could be redeployed to a different job where recommended by occupational health;**
> **• the impact of the employee being away from work on service delivery and/or colleagues has been assessed.**

5.10 As an alternative to dismissal, ill-health retirement ('IHR') is provided for in section 13."

> **13.1. Ill health retirement is an alternative outcome to dismissal at stage 3 of the formal procedure. It means that if you have to leave work at any age due to illness, you may qualify for immediate payment of your pension benefits based on the opinion of a specialist independent doctor.**
>
> **13.2. Ill-health retirement can only be granted where an independent medical registered practitioner assesses your medical condition and confirms that it meets the criteria for eligibility for ill-health retirement under the Local Government Pension Scheme (LGPS). You have to be a member of the LGPS for at least two years to qualify and a referral for the assessment should be made through our occupational health provider.**

13.3. There are graded levels of pension benefit based on how likely you are to be capable of obtaining gainful employment after you leave. The different levels of benefit are:

• Tier 1: If there is no reasonable prospect of being capable of obtaining gainful employment before your Normal Pension Age* (NPA), ill-health benefits are based on the membership you would have had if you had stayed in the Scheme until your NPA.
• Tier 2: If you are unlikely to be capable of obtaining gainful employment within 3 years of leaving, but may be capable of doing so before your NPA, then ill-health benefits are based on the membership built up to leaving plus 25% of your prospective membership from leaving to your NPA.
• Tier 3: If you are likely to be capable of obtaining gainful employment within 3 years of leaving, ill-health benefits are based on the membership at leaving. Payment of these benefits will be stopped after 3 years, or earlier if you are in gainful employment or become capable of undertaking such employment

13.4. Where the Council is considering ill-health retirement as an option, as recommended by the occupational provider, and you are a member of the Local Government Pension Scheme (LGPS), a senior manager (not a manager involved at stages one or two) will convene an Employment Review Meeting to consider the recommendation.

Managing absence related to long term/serious/terminal illness

13.5. On some occasions an individual may be suffering from a long term, serious or terminal illness. It is very important to deal with such cases with tact and sensitivity. Each case will be assessed and managed according to its particular circumstances but managers may need to consider the possibility of escalating through the formal procedure. Further advice can be sought from your HR Business Advisor.

Management of the employee's absence

5.11 Attempts to stay in touch with the claimant proved difficult. The evidence received is patchy, and based largely on documents. The respondent arranged occupational health reviews through a provider, Medigold. The respondent was aware at all material times the claimant objected to the use of Medigold.

5.12 An appointment was set with occupational health for 2 June 2021. The respondent gives no evidence about the discussions it had with the claimant at the time, if any. An email of 19 July 2021, from David Revill, an employee of Medigold, gives a history of the contact.

5.13 At a meeting on 2 June, the claimant advised that he had an issue of Medigold. An appointment with occupational health on 21 June 2021 was abandoned because of a lack of time , but the claimant attended. On 7 July 2021, the claimant refused the clinician's call.

5.14 On 23 July 2021, Mr Anthony May, who was the designated manager, wrote to the claimant to enquire why he had not attended the occupational

health assessment and asking when he would return to work. The claimant responded on 23 July 2021, he noted that he was on sick leave and stated that being asked when he would return was causing him more stress. The claimant stated "I have been used as a cash cow to milk Camden and managers used 0H intimidation and systematic racism discrimination against me."

5.15 On 7 September 2021, Mr May sent a further email he noted he did not wish the claimant to feel harassed but asked when would be a suitable time to contact him. He did not receive a response to this.

5.16 On 12 November 2021, the claimant contacted Maxine Weatherly (albeit the email starts “Dear Carole”), principally about his grievance. He indicated he was not well enough to return and stated he had lost trust in the way they performed grievances.

5.17 Mr May sent a further email on 22 November 2021. This suggested he may call the claimant once a fortnight.

5.18 The claimant responded on 22 November stating he had sent a sick note on 11 November 2021 and replied to Carole Stewart on 12 November 2021. He did not allege harassment.

5.19 On 3 December 2021, the claimant sent a further email noting his pay had been reduced to half. He sought holiday pay. This was reiterated in a further email of 8 December 2021.

5.20 At this time, the previous claims were ongoing.[1] Mediation was entered into in December 2021. Both parties have given evidence on that mediation hearing before this tribunal. The respondent accepts that there was a discussion about ill-health retirement, as the claimant wished to be considered for it. The respondent accepted that he had difficulty with Medigold and an agreement was reached to obtain an occupational health report, for the purposes of ill-health retirement, from a suitably qualified practitioner. The claimant would not be required to use Medigold.

5.21 At some point (the evidence on this was unclear) a decision was made either not to contact the claimant, or to minimize contact, because of the ongoing litigation.

5.22 Progress was made with the independent medical assessment. It appears most contact with the claimant occurred through the in-house lawyers. Ms Chuks, a senior lawyer, contacted the claimant on 25 February 2022. She sent a draft letter of instruction and a CV of an independent medical expert. The claimant was sensitive about disclosure of his medical documents, particularly online. The claimant was offered two doctors, Dr Fletcher, and Dr Manavi. The respondent advanced both as suitably

[1] The hearing ultimately commenced on 21 June 2022.

qualified. The claimant chose Dr Manavi. Instructions were agreed. The claimant attended the appointment.

5.23 Instructions were sent to Dr Manavi on 24 March 2022. The purpose of the report was said to be to consider the following: the claimant's current ability to work and function; the prognosis for return to work and whether he would meet "the test for ill-health retirement"; and did he liver condition constitute disability. The instructions state -

> **The report is not solely for the purposes of the employment tribunal proceedings as both Camden and Mr Tadesse hope it will assist in managing their ongoing relationship. Mr Tadesse has also expressed the need to get his health back on an even keel and is concerned at the health uncertainties he faces.**

5.24 An opinion was sought as to whether the claimant satisfied the test for ill-health retirement, but the specific test is not set out adequately or at all in the letter of instruction.

5.25 Dr Manavi's medical report confirms he is a consultant physician in genitourinary medicine. His opinion deals largely with the effect of the immunity and liver issues. It records the medication and the effect. Tests in 2017 suggested focal bridging fibrosis and the claimant had been under investigation for hepatocellular carcinoma. The report records the claimant's hearing loss and notes the diagnosis of mixed anxiety and depression. At the appointment, the claimant identified the depression and vertigo as his main health concerns. The report noted excessive alcohol consumption.

5.26 Dr Manavi confirmed he is not an expert in occupational health. The immunity and liver conditions were life long, but managed by drugs and were unlikely to contribute to limitations in daily activity. The current risk of deterioration being low.

5.27 Dr Manavi confirmed the claimant was unlikely to meet the test for ill-health retirement by reference to any immunity or liver conditions as the medication was effective.

5.28 It is unclear from the instruction to Dr Manavi the basis on which the claimant alleged, if at all, that he was unable to work and should qualify for ill-health retirement. Dr Manavi stated he was not an occupational health physician, but the report gives appropriate expert evidence in relation to those matters in which Dr Manavi's had expertise.

<u>The previous claims</u>

5.29 The previous claims were heard by EJ Joffe, commencing 21 June 2022. The decision was sent to the parties on 25 July 2022. The claimant succeeded on one claim of victimisation and one claim of failure to make reasonable adjustments.

Further events leading to the dismissal

5.30 On 28 March 2022, the claimant exhausted his entitlement to sick pay. On 27 April 2022 the claimant contacted Ms Chuks. His letter appears to state ceasing pay was the equivalent of getting rid of him. Ms Chuks responded on 29 April 2022 confirming his employment had not ended. By letter of 3 May 2022, HR services confirmed his sick pay was terminated on 28 March 22. The respondent accepts that it would have been appropriate to pre-warn him the sick pay was coming to an end. It is said that the payroll system was being updated and administrative processes were not prioritised.

5.31 During that period, there was a library restructure, and voluntary redundancies were sought. At no time did the claimant seek voluntary redundancy. The restructure completed around May 2022.

5.32 On 15 May 2022, the claimant sent an assessment from the Department of Work and Pensions. The claimant stated he had attended a work capability assessment and it had been accepted he had limited capability for work. He stated, "I won't be providing sick notes to LBC."

5.33 The report itself states "You no longer need to send us a statement of fitness for work…" It says nothing about the provision of sick notes to his employer. The report states "We have decided that you have limited capability for work on work-related activity." It does not explain why. The claimant stopped sending any fitness to work notes. The respondent failed to reply to his letter of 15 May 2022, and failed to inform him of the continuing need to supply fitness to work notes.

5.34 On 16 May 2022, the claimant contacted the “Pensions Shared Service” team and sought details of ill-health retirement payments.

5.35 It is unclear who, for the respondent, reviewed Dr Manavi's report. Ms L'Esteve's statement, at paragraph 23, states the report was "not helpful in assessing Mr Tadesse's eligibility for ill-health retirement." It is unclear why. She confirmed the council did not progress "this issue at this time as the ET claim was progressing."

5.36 Ms L'Esteve records that the respondent received the tribunal decision was received on 25 July 22 and agreed compensation on 5 September 2022. At some point, it was decided to "reconnect" with the claimant.

5.37 On 24 August 2022, Ms Julie Bann from Sharpe Pritchard, solicitors, wrote to the claimant. She stated:

> **We are supporting London Borough of Camden (“the Council”). We understand that at Judicial mediation, you expressed your wish to explore ill-health retirement. To this end, you agreed to the independent medical expert and will have received the Report from Dr Kaveh Manavi of 20 May 2022.**

…

In order to progress your application, you will need to be assessed by an independent OH expert. As you know, the Council instruct Medigold to provide Occupational Health assessments. If you could respond to this letter and confirm that you agree to this assessment, the Council will arrange an assessment consultation for you as soon as possible.

5.38 By email of 6 September 2022, Ms Bann, from Sharpe Pritchard, contacted the claimant again she stated, "Now the ET claim has resolved, we would like to discuss with you your employment." This letter refers to ill-health retirement, but failed to set out any procedure.

5.39 The claimant wrote to Ms L'Esteve on 6 September 2022. His email recorded the history of the appointment with Dr Manavi. The claimant stated:

> **…Following the previous mediation hearing on 27 April 2022 LBC decided to send me to an independent medical expert (IME) for assessment pretending to be helpful to see if I am entitled for ill-health retirement but achieved nothing except having significant impact on my mental well-being…**
>
> **…I don't feel that it is necessary for me to attend any more IME assessments and provide more GP records because I have multiple illnesses which need at least two or more professionals to make a decision about my IHR. Moreover, I have already attended IME…**

5.40 Ms L'Esteve responded on 9 September 2022. The email states

> **I am concerned that you appear to have lost all trust and confidence in the council as your employer I would ask that you take some time to consider how you interact with others going forward…**

It continues -

> **.We remain your employer and we need to re-establish good lines of communication. It is not appropriate this at this stage to continue to make serious but unfounded allegations when we are trying to progress your request to be considered for ill-health retirement**.

It continues -

> **We share your frustration in relation to the independent medical expert's report, which was clearly not helpful in respect of ill-health retirement process.**

5.41 The email confirms that for the purposes of ill-health retirement, the respondent must obtain a report from an independent registered medical practitioner (IR MP). It goes on to state

> **In the circumstances, in order to proceed with your ill-health retirement application, we do need to obtain a certificate from an OH expert. On receipt of that report, we would arrange a meeting with you to discuss the report and make a final decision regarding your employment.**

5.42 This falls short of asking the claimant to attend an occupational health meeting, and fails to identify appropriate experts.

5.43 On 9 September 2022, the claimant responded by email . He stated

> **I do not agree to attend any 0H referral assessments for the reasons I raised in my previous email to you.**

5.44 The previous email referred to was from 6 September 2022, above.

5.45 Ms L'Esteve failed to respond. She failed to identify an appropriate medical practitioner.

5.46 Ms L'Esteve reviewed the sickness management procedure and decided stages one and two were unnecessary. She says at paragraph 34 of her statement: "I saw little benefit to either party in trying to run through the stage 1 and stage 2 of the process at this time." There appears to be no further attempt to explain the process to the claimant, or obtain occupational health reports.

5.47 The claimant was invited to an employment review meeting by letter of 15 November 2022.

5.48 At no time was the claimant offered any alternative to Medigold. The council did not consider whether it could use any other provider, although identification of another provider was an option available.

5.49 At the meeting on 22 November 2022, the claimant was dismissed. We will consider relevant facts further when considering our conclusions.

5.50 Following his dismissal, the claimant lodged an appeal on 23 November 2022. By letter of 5 December 2022, Ms L'Esteve responded. The purpose of the letter is unclear, but appears to be intended to seek further information.

5.51 The claimant gave further information on 27 February 2023. The claimant indicated he sought various outcomes including that the "IHR decision" be overturned.

5.52 The appeal was not, in any sense, a rehearing. It proceeded on on 16 March 2023 before a three-person appeal panel, supported by Ms Francis Woods, HR strategic lead. The outcome letter was drafted by Ms Woods and sent on 23 March 2023.

5.53 The decision recorded there were four permissible grounds of appeal which relate to procedure, failure to take into account a significant fact, the outcome not being open to a reasonable person, and there being new evidence. It asserted the claimant stated he was "not seeking for the dismissal decision to be overturned." The appeal was rejected, save it recorded that the stage 3 employment review meeting contained an

incorrect statement in that it failed to notice his previous claims have been successful in part.

5.54 To the extent it is necessary to find further facts in relation to the appeal, we will deal with that in our conclusions.

The law

6.1 Under section 98(1)(a) of the Employment Rights Act 1996 it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. At this stage, the burden in showing the reason is on the respondent.

6.2 In considering the fairness of the dismissal, the tribunal must have regard to the case of **Iceland Frozen Foods v Jones** [1982] IRLR 439 and have in mind the approach summarised in that case. The starting point should be the wording of section 98(4) of the Employment Rights Act 1996. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal consider the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision, for that of the respondent, as to what was the fair course to adopt. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

6.3 Section 98 Employment Rights Act 1996 provides-

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—**
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it—**
> **(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
> **(b) relates to the conduct of the employee,**
> **(c) is that the employee was redundant, or**
> **(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or**

on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—
(a) 'capability', in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) 'qualifications', in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.
…

6.4 Section 123 Equality Act 2010 sets out the time limits for bringing a claim of discrimination.

(1) Subject to section 140A 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.

…
(3) For the purposes of this section--

(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something--

(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

6.5 It is for the claimant to convince the tribunal that it is just and equitable to extend the time limit. The tribunal has wide discretion but there is no presumption that the tribunal should exercise its discretion to extend time (see **Robertson v Bexley Community Centre TA Leisure Link** 2003 IRLR 434 CA).

6.6 It is necessary to identify when the act complained of was done. Continuing acts are deemed done at the end of the act. Single acts are done on the date of the act. Specific consideration may need to be given

to the timing of omissions. In any event, the relevant date must be identified.

6.7 The tribunal can take into account a wide rage of factors when considering whether it is just and equitable to extend time.

6.8 The tribunal notes the case of **Chohan v Derby Law Centre** 2004 IRLR 685 in which it was held that the tribunal in exercising its discretion should have regard to the checklist under the Limitation Act 1980 as modified by the Employment Appeal Tribunal in **British Coal Corporation V Keeble and others** 1997 IRLR 336. A tribunal should consider the prejudice which each party would suffer as a result of the decision reached and should have regard to all the circumstances in the case particular: the reason for the delay; the length of the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued had cooperated with any request for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to a cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

6.9 This list is not exhaustive and is for guidance. The list need not be adhered to slavishly. In exercising discretion the tribunal may consider whether the claimant was professionally advised and whether there was a genuine mistake based on erroneous advice or information. We should have regard to what prejudice if any would be caused by allowing a claim to proceed.

6.10 Tribunal's may, if they consider it necessary in exercising discretion, also consider the merits of the application, but if the tribunal does so the party should be invited to make submissions.

6.11 **Galilee v The Commissioner of Police of the Metropolis** EAT/0207/16, suggests the relation back principle does not apply and 35(1) of the Limitation Act 1980, which provides for a statutory deeming of a relation back, does not apply to employment tribunals. We will assume that for new claims included by amendment, time will be considered at the point the amendment is granted.

6.12 Direct discrimination is defined in section 13 of the Equality Act 2010.

> **(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**.

6.13 **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 is authority for the proposition that the question of whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

> **employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. (para 10)**

6.14 Victimisation is defined in section 27 of the Equality Act 2010.

> **Section 27 - 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.**
>
> **(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.**
>
> **(4) This section applies only where the person subjected to a detriment is an individual.**
>
> **(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.**

6.15 Prior to the Equality Act 2010 the language of victimisation referred to less favourable treatment by reason of the protected act. Under the Equality Act 2010, victimisation occurs when the claimant is subject to a detriment because the claimant has done a protected act or the respondent believes that he has done or may do the protected act.

6.16 We have to exercise some caution in considering the cases decided before the Equality Act 2010. However, those cases may still be helpful. It is not in our view necessary to consider the second question, as posed in Derbyshire below, which focuses on how others were or would be treated. It is not necessary to construct a comparator at all because one is focusing on the reason for the treatment.

6.17 When considering victimisation, it may be appropriate to consider the questions derived from Baroness Hale's analysis in **Derbyshire and Others v St Helens Metropolitan Borough Council and others** 2007 ICR 841. However as noted above there is no requirement now to specifically consider the treatment of others.

> **37. The first question concentrates upon the effect of what the employer has done upon the alleged victim. Is it a 'detriment' or, in the**

> **terms of the Directive, 'adverse treatment'? But this has to be treatment which a reasonable employee would or might consider detrimental… Lord Hope of Craighead, observed in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 at 292, paragraph 35, 'An unjustified sense of grievance cannot amount to "detriment"'.**
>
> **40. The second question focuses upon how the employer treats other people…**
>
> **41. The third question focuses upon the employers' reasons for their behaviour. Why did they do it? Was it, in the terms of the Directives, a 'reaction to' the women's claims? As Lord Nicholls of Birkenhead explained in *Khan*'s case [2001] IRLR 830, 833, paragraph 29, this**
>
> > **'does not raise a question of causation as that expression is usually understood ... The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'**

6.18 Detriment can take many forms. It could simply be general hostility. It may be dismissal or some other detriment. Omissions to act may constitute unfavourable treatment. It is, however, not enough for the employee to say he or she has suffered a disadvantage. We note an unjustified sense of grievance is not a detriment.

6.19 The need to show that any alleged detriment must be capable of being objectively regarded as such was emphasised in **St Helens Metropolitan Borough Council v Derbyshire** 2007 IRLR 540. **Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 IRLR 285 was cited and it was confirmed an unjustified sense of grievance cannot amount to detriment. That in our view remains good law. In **Derbyshire**, Lord Neuberger confirmed the detriment should be viewed from the point of view of the alleged victim. Rather than considering the 'honest and reasonable test as suggested in Khan' the focus should be on what constitutes a detriment. It is arguable therefore that whether an action amounts to victimisation will depend at least partly on the perception of the employee provided that perception is reasonable. It is this reasonable perception that the employer must have regard to when taking action and when considering whether that action could be construed as victimisation. Detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment. The detriment cannot be made out simply by an individual exhibiting mental distress, it would also have to be objectively reasonable in all the circumstances. The stress and worry induced by the employer's honest and reasonable conduct in the course of his defence cannot, except in the most unusual circumstances, constitute a detriment. The focus should be on the question of detriment.

<u>Reasons for unfavourable treatment.</u>

6.20 When the protected act and detriment have been established, the tribunal must still examine the reason for that treatment. Of course, the questions

of reason and detriment are often linked. It must be shown that the unfavourable treatment of a person alleging victimisation was because of the protected act. A simple 'but for' test is not appropriate.

6.21 It is not necessary to show conscious motivation. However, there must be a necessary link in the mind of the discriminator between the doing of the protected act and the treatment. If the treatment was due to another reason such as absenteeism or misconduct the victimisation claim will fail. The protected act must be a reason for the treatment complained. It is a question of fact for the tribunal. **Chief Constable of West Yorkshire police v Khan** 2001 IRLR 830 HL is authority for the proposition that the language used in the Sex Discrimination Act 1975 is not the language of strict causation. The words by reason that suggest that what is to be considered, as Lord Scott put it, is "the real reason, the core reason, the causa causans, the motive, for the treatment complained of that must be identified." This in our view remains good law.

6.22 It is not necessary for a person claiming victimisation to show that unfavourable treatment was meted out solely by reason of his or her having done a protected act.

6.23 Lord Nicholls found in **Najarajan v London Regional Transport** 1999 ICR 877, HL, that if the protected act has a significant influence on the outcome of an employer's decision, discrimination will be made out. It was clarified by Lord Justice Gibson in Court of Appeal in **Igen and others v Wong and others** 2005 ICR 931 that in order to be significant it does not have to be of great importance. A significant influence is an influence which is more than trivial.

Subconscious motivation

6.24 The House of Lords in **Nagarajan** rejected the notion that there must be a conscious motivation in order to establish victimisation claims. Victimisation may be by reason of an earlier protected act if the discriminator consciously used that act to determine or influences the treatment of the complainant. Equally the influence may be unconscious. The key question is why the complainant received the treatment.

6.25 Section 23 refers to comparators in the case of direct discrimination.

> **(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.**

6.26 Section 136 Equality Act 2010 refers to the reverse burden of proof.

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**

> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**
>
> **(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.**
>
> **(5) This section does not apply to proceedings for an offence under this Act.**
>
> **(6) A reference to the court includes a reference to--**
>
> **(a) an employment tribunal;**
> **(b) …**

6.27 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd** [2003] IRLR 323 which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong** [2005] IRLR 258**.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [**2007] IRLR 246**.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board** 2012 UKSC 37

6.28 The law relating to reasonable adjustments is set out at section 20 of the Equality Act 2010.

> **(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) …**
>
> **(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) …**

6.29 In considering the reverse burden of proof, as it relates to duty to make reasonable adjustments, we have specific regard to **Project Management Institute v Latif** 2007 IRLR 579 we note the following:

> **… the Claimant must not only establish that the duty has arisen, but there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred, that there is a breach of that duty. There must be evidence of some apparently reasonable adjustments which could be made.**

6.30 Section 15 Equality Act 2010 defines 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.**

6.31 In **Pnaiser v NHS England** [2016] IRLR 170, EAT, Simler P at [31] gives guidance on the general approach to be taken by a tribunal under s 15. The man points can be summarized as follows:

(1) Was there unfavourable treatment and by whom?
(2) What caused the impugned treatment, or what was the reason for it?
(3) Motive is irrelevant.
(4) Was the cause/reason 'something' arising in consequence of the claimant's disability?
(5) The more links in the chain of causation, the harder it will be to establish the necessary connection.
(6) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
(7) The knowledge requirement is as to the disability itself, not extending to the 'something' that led to unfavourable treatment.
(8) It does not matter in which order these matters are considered by the tribunal.

6.32 Causation must not be too loose. Section 15 requires the tribunal to isolate the 'something' in question and to establish whether the ‘something’ was caused by the disability and if that ‘something’ caused

the unfavourable treatment[2] (a two-stage test): In **Basildon & Thurrock NHS Foundation Trust v Weerasinghe** [2016] ICR 305, Langstaff, P said this at paragraph 26.

> **26 The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The tribunal has first to focus on the words "because of something", and therefore has to identify "something"—and second on the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B.**

Conclusions

7.1 We first consider the claim of unfair dismissal.

7.2 Has the respondent established a potentially fair reason? It is the respondent's position that the decision to dismiss was taken by Ms Carole Stewart, director of community service. She did not give evidence. As to the reason for dismissal, we have the evidence of Ms L'Esteve who alleges that she was not a decision-maker, but who was involved in briefing, and discussing the relevant facts and circumstances, which led to the decision. The letter of dismissal from Ms Stewart was drafted by Ms L'Esteve, as was the accompanying case summary.

7.3 It is the respondent's case that it dismissed for a potentially fair reason. The respondent's submissions say, the claimant was dismissed "on the ground of capability due to ill health."[3]

7.4 We are satisfied that Ms L'Esteve's involvement went beyond simple advice. Whilst the respondent contends that formal responsibility lies with Stewart, Ms L'Esteve's influence was so great that her advice, reasoning, and input cannot be delineated from the process. Her involvement was so important and integral that we find her to be a joint decision-maker.

7.5 The case summary refers to the continuous absence since 1 April 2021 as being the reason for dismissal. However, it also makes a number of factual assertions which appear to form part of the reason. Ms L'Esteve was responsible for setting out that factual matrix accurately. We find it contained a number of assertions which were not adequately supported, and appear to be the assertion or opinion of Ms L'Esteve.

7.6 The claimant was requesting IHR at tier level 1, and it was alleged he had refused to attend a medical assessment with the occupational health provider, Medigold. The date of refusal was not recorded. The letter of

[2] It must be a material cause.
[3] Paragraph 5of the respondent's submissions.

dismissal records a further reason which was that the "relationship with the council is irretrievably broken down due to [the claimant's] perception of discrimination." This was presented by Ms L'Esteve as a fact. It reflected her assertion in a letter of 9 September 2022. This may have been Ms L'Esteve's opinion, but it should not be presented as a fact, absent it being explored adequately or at all the claimant. Her contribution to the decision was material.

7.7 It follows the full reason included commentary about the claimant's perception of discrimination, an assertion the relationship had irretrievably broken down, criticism of the claimant for allegedly refusing to attend an occupational health meeting, and the continued period of absence.

7.8 Whilst the reason was multifaceted, we have concluded that the principal reason for dismissal was his perceived capability, as evidenced by the period of absence.

7.9 Did the respondent act fairly by treating that reason as a that a sufficient reason to dismiss?

7.10 When an employee has been continuously absent for a long period, and there appears to be no prospect of the employee returning, it will frequently be fair to dismiss. However, it is necessary to follow a fair procedure. Frequently, it will be necessary to have appropriate medical evidence. Medical evidence may not always be necessary. However, if medical evidence is not obtained, a failure to address why it has not been obtained undermines the fairness of the process. particularly when the reason for absence is not clear, and when the respondent's own process, as in this case, envisages the evidence will be required. Even when a claimant says he is unable to work, an employer may act unfairly in accepting the assertion at face value when the circumstances are complex. In this case, there are issues about the relationship, issues about the reason for absence, and requests for ill-health retirement.

7.11 We accept in this case that the claimant alleges that he was no longer capable of work in the context of his request for ill-health retirement. Ill-health retirement is provided for in section 13 of the sickness procedure and is described as "an alternative outcome to dismissal at stage 3." We find the intention is that ill-health retirement, by being a matter requiring the employee's consent, would lead to mutual termination of the employment, thus avoiding dismissal.

7.12 We have considered paragraph 12.2 of the sickness procedure above. Before dismissing, the chair must be certain that the current medical information has been reviewed. The chair is also required to look at the alternative set out at paragraph 12.4.

7.13 Paragraph 13.2 specifies that ill-health retirement may only be granted after a report has been obtained from an independent medical registered practitioner (IMRP) who confirms the eligibility criteria. In brief, section 13

provides, to qualify for tier 1, there must be no reasonable prospect of being capable of attaining gainful employment before normal retirement age. Absent such a report, ill-health retirement is not an option.

7.14 The sickness policy envisages three stages. The first two are concerned with monitoring and warnings. The third may lead directly to dismissal. It is possible to skip stages one and two, but only in the circumstances provided for at 8.4 of the policy. It states "

> **In some circumstances, where there is no realistic possibility, following medical advice, of a return to work, it may be necessary to escalate through the procedure, i.e. going straight to stage three.**

7.15 An employer acting reasonably would have considered its own procedure. It was necessary to recognise the importance of medical evidence. However, medical evidence was relevant to distinct aspects of the procedure. The first concerned the relevant medical position underpinning the absence which may justify dismissal. The second was obtaining a specific occupational health report from a IMRP for the purposes of IHR. Whilst the two may overlap, they cannot be assumed to be the same.

7.16 The position was further complicated by the previous litigation. As a result of the mediation process, it had been agreed to obtain an occupational health report for the purposes of IHR. It had been agreed not to use Medigold. Whether the claimant's complaints about Medigold were well founded is irrelevant. This respondent agreed to use a different provider, and the claimant was entitled to expect the respondent to honour that promise.

7.17 The claimant had a number of conditions, as has been acknowledged when conceding disability. The claimant's fitness for work certificates predominantly cite mixed anxiety and depressive disorder. Following the mediation, the claimant attended an appointment with Dr Manavi, being one of the respondents nominated health experts. The respondent’s instructions to Dr Manavi demonstrate mixed reasons for obtaining the report. In part it was obtained for the purpose of the litigation, and to identify disability. In part it was obtained for the purpose of IHR. Dr Manavi was not an occupational health practitioner, and that should have been obvious to the respondent. It is clear that he could report on the immune condition and liver issues. He could not report adequately on depression and anxiety. He could not produce a report for the purpose of IHR approval, as he was not an OH specialist. The respondent’s approach to instructing Dr Manavi was unhelpful and confusing. It may have been necessary to obtain a report on the issues concerning immunity and liver function. It should have been obvious it would be necessary to obtain, thereafter, an 0H report, and the respondent failed to make that plain. It is unsurprising the claimant felt frustrated, and that contributed to his apparent lack of cooperation.

7.18 The respondent failed to explain to the claimant, adequately or at all, the difficulties with medical evidence.

7.19 It is apparent the respondent undertook some form of review and considered how it would proceed with the claimant's employment. The evidence we received about the process was inadequate. On 24 August 2022, the respondent's solicitors wrote to the claimant regarding the "ill-health retirement application." The letter went on to say the council must instruct Medigold to provide an occupational health assessment. This was in direct contravention of the agreement. It fails to give any adequate explanation, of what was needed and why. It fails to set the request in context. It does not explain that ill-health retirement is an alternative to dismissal, or address the potential need to obtain medical evidence for the purpose of considering dismissal. This is particularly unfortunate given the difficulties that had arisen between the parties in the previous litigation,

7.20 The claimant's response of 6 September is reasonably measured and reflects a degree of confusion. It refers to the previous agreement to send him to an independent medical expert. We do not read his letter is an absolute refusal. He refers to it not being necessary to attend any more IMP assessments because of his multiple illnesses. He noted he had already attended an IMP appointment. The claimant's position was reasonable, given the respondent's lack of clarity, and the respondent's apparent reneging on its original agreement.

7.21 It would be wrong to say that the report of Dr Manavi was unhelpful. It is the opposite. The report detailed the immune condition and the liver issues. It effectively confirmed that neither had a current effect on his ability to work. It pointed out the main problems revolved around alcohol, balance, and depression and anxiety. There was no reason why that report could not have been used in a referral to occupational health, where the other conditions, which were more directly relevant to his absence, could have been considered. We reject the respondent's assertion that at that point the claimant refused to allow the report to be used at all. It was the respondent's position that the report was unhelpful. To the extent it could be said there was a refusal by the claimant, that must be viewed in context.

7.22 The respondent's approach was at best confused and it failed to recognise the importance of Dr Manavi's report in context. The respondent failed to explain to the claimant either what was needed or what was wanted. Insisting the claimant went to Medigold, given the context the previous litigation, was antagonistic and insensitive. It was bound to lead to a negative reaction.

7.23 Ms L'Esteve's response of 9 September was ill considered. Instead of seeking to conciliate, reassure, and explain, it took an aggressive stance stating that the claimant appeared to have lost all trust and confidence in the council and admonished him, suggesting that he "takes some time to consider" his "interaction with us going forward." It goes on in a similar tone to say "it is not appropriate at this stage to continue to make serious but unfounded allegations when we are trying to progress your request to

be considered for ill-health retirement." It does go on to refer to the need to obtain a OH expert report, but it does nothing to set out the process, or to reassure the claimant that he will not be required to go to Medigold.

7.24 On 9 September, the claimant sent a short email stating "I do not agree to attend any 0H referral assessments for the reasons I raised in my previous email to you." This is a reference to his more lengthy email or 6 September, and must be read in that context. We do not read this is an absolute refusal to attend any 0H referrals. The claimant had been told he must attend an OH referral with Medigold in the letter 24 August, and it is in that context that is objection must be understood.

7.25 There was no further attempt at explanation, instead, Ms L'Esteve then assumed that there was a total refusal by the claimant, in all circumstances, to attend any 0H referral thereafter. She did not enquire further. She did not seek to find a new provider, or to make any alternative arrangements.

7.26 It appears Ms L'Esteve was responsible for deciding to proceed to stage 3. Ms L'Esteve's reasons are recorded in the notes of 15 November 2022. She gives four reasons: the claimant had been off work for 18 months with no prospect of return; the claimant wished to pursue IHR; no fit notes had been received since 7 March 2022; and recent emails indicated the working relationship had irretrievably broken down, and he showed no willingness to resolve this. The relevant emails are not identified, and it remains unclear what she had in mind.

7.27 Paragraph 8.4 of the sickness procedure sets out the circumstances when it may be appropriate to go to stage 3. There must be no realistic possibility of a return to work as demonstrated by medical advice. That medical evidence had not been obtained. It was not open to Ms L'Esteve, in accordance with the procedure, to go to stage 3. Moreover, she took into account matters which she should not, in particular asserting the relationship had irretrievably broken down when there was little or no evidence for this, and when it had not been discussed with the claimant. The only evidence of the irretrievable breakdown was Ms L'Esteve's unsupported assertion.

7.28 Ms Stewart, at the stage 3 hearing, accepted, apparently without reservation, the assertions made by Ms L'Esteve. She proceeded on the basis that it was the claimant's fault, being an unspecified refusal, that an the OH report had not been obtained. As evidenced by the dismissal letter, it was assumed that there had been an irretrievable breakdown in relationships because of the claimant's continuing attitude. It was assumed that he would not be able to return to work, and whilst that may have been the claimant's case, the medical evidence in support was entirely inadequate. Moreover, there was a failure to identify adequately, or at all, the reason why it was alleged he could not return to work.

7.29 We find that there were unjustified assertions and assumptions, which combined with serious procedural errors, that undermined the fairness of the dismissal.

7.30 The sickness absence management report prepared by Raheel Mapara, Library development lead, was a report that lacked balance and failed to adequately analyse whether reasonable attempts had been made to keep in touch with the claimant. It also failed to set out adequately the reasons for failing to obtain an OH report, instead it blamed the claimant for a lack of cooperation. That negative attitude to the claimant, and the failure to recognise the respondent's inadequacy in seeking to maintain communication with the claimant, or to obtain medical evidence, were repeated in the approach of Ms L'Esteve, and the briefing she gave to Ms Stewart. The normal procedure was ignored, instead it was escalated to stage 3, despite there being inadequate medical evidence and inadequate attempts by the respondent to obtain it. Ms L'Esteve assumed a breakdown in the relationship, and made decisions on that assumption. There was a lack of critical focus on the reason for the claimant's absence, and whether there was reasonable prospect of his returning. The reason for absence had been anxiety and depressive disorder. Inadequate consideration was given to whether that could be addressed, and if so how. The assumption the relationship had broken down was based on the claimant having brought claims of discrimination and the respondent's assertion that he continued to reference them inappropriately. This formed a substantial reason for dismissal. We consider this further when looking at the allegations of victimisation.

7.31 We have considered the appeal. The appeal proceeded on the basis that the claimant did not wish to be reinstated. The claimant wished to have ill-health retirement. As noted, that was an alternative to dismissal, and appears to be based on mutual termination. It is not reasonable to expect the claimant to understand the fine legal distinction. It is reasonable to expect the respondent to have some insight. Inevitably, for there to be ill-health retirement, it would be necessary to substitute ill-health retirement for dismissal. It was implicit that he was appealing against dismissal.

7.32 We have noted serious procedural flaws. The appeal failed to recognise any procedural defects. It did nothing to address them. The appeal did nothing to remedy any unfairness.

7.33 For the reasons we have given we find that dismissal at that time was outside the band of reasonable responses of a reasonable employer; the dismissal was unfair.

<u>Disability discrimination</u>

7.34 Disability is conceded. For the reasons we have given, we find that no claim of disability discrimination was brought in the original claim form. Disability discrimination claims were discussed at the case management discussion and seem to been allowed into the issues, without objection, by

the respondent. The claims remained unclear at the start of the hearing. No clarity can be obtained from the pleadings, as no disability discrimination claims were pleaded. We discussed the claims in detail and, by consent, allowed amendments. The only claims we can consider are those allowed by amendment.

Discrimination arising from disability

7.35 It is accepted by the respondent that the claimant's disability caused his absence from work, an inability to work, and his application for IHR. Those are said to be the matters arising in consequence of disability for the purpose of this claim.

7.36 We consider each of the detriments.

4a. On or around 28 March 2022, by the respondent stopping his sick pay.

7.37 We accept that the respondent stopped paying sick pay. This may be seen as unfavourable treatment. However, the treatment was not directly because of something arising in consequence of disability. The treatment was an application of his contract of employment. It may be argued that the limited right to sick pay in the contract is triggered because of the absence. However, we find that it is a proportionate means of achieving a legitimate aim. The respondent's resources are not infinite. The aim is to manage resources appropriately. That is a legitimate aim. It is proportionate to provide for a limited period of sick pay. That allows individuals, who have some prospect of returning, a period of grace whereby they may recover. Sick pay scaffolds the ability to recover and return to work. We must consider the discriminatory effect against the reasonable needs. We find it is proportionate for sick pay to be limited, and the period provided for is generous.

4b. Around 15 May 2022, by the respondent failing to inform the claimant of any continuing requirement to file a sick note.

7.38 It was the claimant who asserted on 15 May 2022 he no longer needed to supply fitness for work certificates. The DWP report stated the DWP no longer needed certificates. The claimant made an assumption about his need to provide them to the respondent.

7.39 On the balance of probability, the email was overlooked. We doubt that this is unfavourable treatment. It is not every unfortunate oversight which should attract legal liability.

7.40 The respondent did not chase the claimant for any fitness for work notes. The failure to supply them was referred to in the dismissal hearing on 15 November 2022. There is no evidence to suggest that the reason for the oversight was a matter arising in consequence of disability. This claim fails.

4c. In April 2022, by the respondent sending the claimant to a medical practitioner, Dr Manavi, who could or did not provide an opinion on whether the claimant should qualify for ill health retirement.

7.41 The claimant and respondent agreed that there should be a report from an independent 0H specialist for the purposes of IHR. The claimant had multiple conditions. The expert identified could assist, predominantly, with immunity and liver function. The report dealt adequately with those points, and was helpful. A more considered approach should have identified that Dr Manavi was not an OH specialist, and a further report would be necessary.

7.42 There may have been a degree of incompetence, or lack of clear thought, on the part of the respondent.

7.43 It was not unfavourable treatment to send him to Dr Manavi. It may be argued that the treatment occurred because of the ill-health absence. However, obtaining appropriate medical evidence was necessary. A number of reports may have been needed. Dr Manavi was appropriate to advise in a particular field, and he did so appropriately. This provided valuable evidence. The aim was to establish the medical position. Obtaining this report was a proportionate means to achieve that aim.

7.44 This claim fails.

4d. By failing to communicate with the claimant for approximately eight months from 12 April 2022 to 21 November.

7.45 We reject this claim. There was communication in the period. There may have been a delay after obtaining Dr Manavi's report until 24 August. However, there was further communication in September. This allegation is not made out on its facts. It would have been open to the claimant to plead some other allegation regarding a shorter period. It is not suggested that failure to contact him before 12 April was unfavourable, and we are not satisfied that any delay until 24 August, during a period when the previous claims were ongoing, was unfavourable treatment. The claim fails factually. We consider it no further.

<u>Failure to make reasonable adjustments</u>

7.46 This was another claim which was allowed by amendment. There was significant discussion about the provision criterion or practice. The PCP was identified as follows: “The provision criteria or practice (PCP) relied on is said to be the application of the Ill health Retirement Procedure as contained in the Sickness Management Procedure.”

7.47 It was specifically conceded the sickness management procedure, as a whole, was not relied on as the PCP.

7.48 As noted previously, the ill-health retirement procedure was an alternative to dismissal, but it cannot be granted absent a recommendation by an occupational health provider.

7.49 The disadvantage was said to be as follows: “The claimant says the PCP put him at a substantial disadvantage in relation to the relevant matter compared with those who are not disabled, it being his case that it led to his dismissal without ill health retirement.”

7.50 The IHR procedure did not directly or indirectly lead to dismissal it did not subject the claimant to that disadvantage, because the IHR procedure led only to the possibility of termination by mutual consent. It follows the PCP did not lead to the disadvantage and therefore, the duty to make adjustments did not engage. The claim fails at this point. Lest we be wrong about the engagement of the duty, we will consider the proposed adjustments.

7.51 The IHR procedure was not applied because there was no supporting medical evidence. The claimant has not proceeded on the basis that it was the application of its sickness procedure which led to his dismissal.

7.52 We have considered the reasonable adjustments. The first adjustment refers to an ill-health retirement assessor. It is unclear what is meant by an ill-health retirement assessor. We presume this means an independent medical practitioner capable signing the necessary certificate. This would not have been an adjustment procedure. This would be an application of the procedure.

7.53 The second adjustment was assigning a manager to stay in touch with the claimant. This would have had had no effect on the procedure.

7.54 The third adjustment is advising about the sick note policy for long term sickness. This would have had had no effect on the procedure.

7.55 The fourth adjustment is not stopping his sick pay. This had no effect on the procedure.

7.56 It would have been possible for the claimant to allege that it was the sickness procedure which led to the disadvantage of dismissal. He did not do so. We are obliged to decide only the pleaded cases. The pleaded case in this case is defined by the amendment. It is inappropriate to speculate on any other claims, as they are before us, and respondents had no opportunity to address them.

7.57 The claim of failure to make reasonable adjustments fails.

<u>Direct discrimination</u>

7.58 The claimant alleges that there are two actual comparators. The specific identities of those individuals are in our view irrelevant. They have given

no evidence. Their right to privacy must be balanced against the article 10 right of freedom of expression. Article 8 provides that the right is qualified if a relevant authority can show that it is lawful, necessary, and proportionate. The comparators have been cited by the claimant. They have played no active part. Their identities are irrelevant. It is not necessary and proportionate to limit their expectation of privacy.

7.59 We refer to them by initials only. AL was approved for ill-health retirement. He applied for ill-health retirement and an appropriate report and certificate was obtained. He was not in the same material circumstances as the claimant.

7.60 ZM received a redundancy payment. He applied for voluntary redundancy when it was considered in 2022. The claimant did not apply. The claimant is not in the same material circumstances.

7.61 We next consider the allegations of less favourable treatment.

11a. Not allowing him the benefit of Ill health retirement.

7.62 For the reasons we will come to, not allowing the claimant ill-health retirement has been found to be an act of victimisation. We have considered whether there is any factor from which we could conclude that the claimant's race was a material reason for his treatment. The fact that he brought proceedings alleging race discrimination was, for the reasons, we will come to a material reason for the way he was treated. It is the mind of the alleged discriminator that is considered. Whilst it is clear that a negative view was taken of the claimant for bringing a discrimination claim, and thereafter maintaining, in some manner, his complaints, it cannot be assumed that a more positive view would been taken of someone who brought the same claim but was of a different race. We accept that it is possible the treatment could be both direct discrimination and victimization. The relevant circumstance for the purpose of the comparison was the bringing of the claim and the respondent’s perception of the claimant’s conduct. For these purposes we find that the motivation of Ms L'Esteve and Ms Stewart are the same, albeit Ms Stewarts motivation may have relied entirely on the representation of Ms L'Esteve.

7.63 We find there is no fact which turns the burden. In any event, we are satisfied by the explanation. He was not approved for ill-health retirement because there was no report obtained which would have formed the basis for approval. Part of the reason why the report was not obtained related to the claimant bringing previous claims. We will consider this further below. On the balance of probability, the fact the claim were brought and maintained was a material factor, but his race was not.

11b. Not making him redundant on 22 November 2022

7.64 The claimant was not made redundant because he did not apply for redundancy, and redundancy was never in question. The treatment had nothing to do with race.

7.65 It follows the claims of direct discrimination fail.

Victimisation

7.66 It is accepted that the claimant undertook protected acts. He brought employment tribunal proceedings which contained allegations of discrimination. We now consider the individual allegations of victimisation.

13a. By the respondent stopping the claimant's sick pay in or around 28 March 2022.

7.67 The claimant sick pay was stopped because his entitlement to sick pay under this contract came to an end. The explanation is made out. In no sense whatsoever was this an act of victimisation.

7.68

13b. by the respondent not replying to the claimant's email of 27 April 2022 to Elizabeth Chuks.

7.69 This claim fails on the facts. There was a response from Ms Chuks on 29 April 2022 stating she had made enquiries and would respond to the claimant. There is a detailed response on 3 May 2022. It follows the claim fails.

13c. By the respondent failing to advise the claimant, following his email of 15 May 2022, that he needed to provide a sick note, it being the claimant's case that he was criticised for not sending a sick note at the dismissal hearing on 15 November 2022.

7.70 On 15 May 2022 the claimant asserted he would need to provide no further sick notes. There was no specific response given by the respondent. We found on the balance of probability the failure to reply was an oversight. There is no fact to suggest that the failure was because of any protected act. We do not accept the claimant was criticised for failing to send the fitness to work certificates. To the extent that it was discussed at the meeting on 15 November 2022, there is no fact from which we could conclude that it was because of any protected act. It was discussed because the sick notes were not provided. This claim fails.

13d. By failing to communicate with the claimant for approximately eight months from 12 April 2022 to 21 November 2022.

7.71 This claim fails factually. The respondent did communicate with the claimant at least by 24 August 2022 and thereafter in September 2022.

13e. By bypassing stage 1 and stage 2 of the sickness management procedure on 15 November 2022.

7.72 The respondent accepted it bypassed stage 1 and stage 2 of the sickness management procedure and proceeded to a stage 3 hearing on 15 November 2022.

7.73 We have considered the circumstances above. The respondent was entitled to proceed to stage 3 in the circumstances envisaged in the policy. It was necessary to have appropriate medical evidence. The medical evidence was not obtained. The reasons for bypassing stage 1 and stage 2 are set out as noted above. There is reference to the working relationship having irretrievably broken down and the claimant's unwillingness to resolve this. This reference must be read in light of the dismissal letter. This letter refers to the relationship having irretrievably broken down due to the claimant's "perception of discrimination." At the hearing Ms L'Esteve accepted that she had in mind the claimant's bringing specific allegations of discrimination, and his maintaining the view that he had been discriminated against. It has been no part of the respondent's case that any allegation of the claimant was either a false allegation, or false information, or made in bad faith. It is the fact that he brought allegations of discrimination, pursued them, and maintained his view which is said to constitute the basis for the irretrievable breakdown. An employee is entitled to make allegations of discrimination, those allegations are protected, unless they are false and made in bad faith. The fact that some fail at a tribunal does not mean the claimant must abandon them or that any maintenance of his original views leads to an irretrievable breakdown of relations. The fact that the claim is not proven does not make it a false allegation made in bad faith.

7.74 There may be occasions when behaviour becomes so extreme that the respondent can legitimately say it has reacted to the behaviour rather than the underlying protected act, as envisaged in **Martin v Devonshires Solicitors** UKEAT/0086/10. We find **Devonshire** was an extreme case and is easily distinguished.

7.75 In this claimant's case there is direct evidence the protected acts were taken into account when considering whether to pass to stage 3. We asked for specific submissions on the explanation advanced by the respondent. There is some consideration given to this in the submissions of unfair dismissal, but the explanation is not addressed in the submissions on victimisation. There is reference to **Devonshire**, but this is not founded on any cross examination at the hearing.

7.76 It is clear that the protected acts were considered and Ms L'Esteve objected to the claimant continuing to hold what she viewed to be his perception. From that she concluded the relationship had irretrievably broken down. This was unfair and premature and was based directly on the protected acts, not on some severable action, as might be envisaged by **Devonshire**.

7.77 Bypassing stage 1 and 2 and progressing directly to stage 3 was an act of victimisation.

13f. By refusing to provide a post-employment reference to the claimant in the outcome letter of 22 November 2022.

7.78 It is unclear what is meant by refusal. It is claimant's position that the letter of dismissal does not refer to a reference. That is true. That, however, is not a refusal. At best, it can be seen as an omission, but there is no obligation to deal with the reference in the letter of dismissal.

7.79 This allegation fails on its facts. There was no refusal to provide the reference. We accept the respondent's evidence that a reference would have been provided had one been requested.

13g. By failing to recommend the claimant for ill health retirement.

7.80 The claimant was not recommended for ill-health retirement. To be recommended, it was necessary to obtain an appropriate certificate from an OH practitioner. No OH practitioner was instructed, and no report was obtained. It follows the reason for the treatment was the lack of a report.

7.81 However, it was open to the respondent to seek a report. It had agreed to do so at the mediation. The claimant attended an appointment with the respondent's nominated practitioner, but that did not lead to the appropriate certificate, as the practitioner was not an OH specialist. Thereafter, the respondent did not identify any further OH practitioner. There was general reference to returning to Medigold and this led to difficulties. Reference to Medigold was in breach of the respondent's own agreement with the claimant. The respondent failed thereafter to review the matter, or to make alternative arrangements. Unreasonable criticism was made of the claimant for alleged refusal, as we have set out above. The main reason why an OH report was not obtained was because of the failure of the respondent to identify a relevant independent OH expert and put a clear proposal to the claimant. Instead, it was assumed that the claimant had objected generally. That was an unreasonable assumption. Underpinning that assumption was Ms L'Esteve's attitude to the claimant, and in particular her belief that there was an irretrievable breakdown in relations. That in turn, for the reasons we are set out above, was contingent on her belief about the claimant's perception and his continuing views. As noted above, that was victimisation in the context of proceeding to stage 3. A material reason for not obtaining the report was Ms L'Esteve's attitude and assumptions. This cannot be separated from her views about the claimant and his protected acts. Put briefly, the protected acts were a material reason for Ms L'Esteve's approach, including her failure to take further steps to obtain a medical report. The failure to obtain the medical report made refusal of IHR inevitable. Here there is a unbroken chain of causation leading to the failure to obtain the OH certificate and the treatment, being the refusal of IHR. We find this to be an act of victimisation. We should make it plain that this finding does not

mean the claimant would or did qualify for IHR. The finding is made in the context of a loss of opportunity.

13 h. By dismissing the claimant.

7.82 The principal reason for dismissal was the absence for ill-health. However, the IHR policy envisaged an alternative to dismissal. That was not fully explored because the OH certificate was not obtained. For the reasons we have set out above ,failure to obtain the OH certificate, or take further steps to obtain it, was an act of victimisation.

7.83 There are a number facts from which we could conclude that the dismissal was an act of victimisation. Moving straight to stage 3 was unreasonable. A failure of explanation for unreasonableness is a fact form which an inference may be drawn. Here there is no explanation which is not itself tainted by victimisation, for the reasons we set out above. The dismissal letter itself does not simply refer to the ongoing absence, and the unlikelihood of returning. The dismissal letter refers directly to the breakdown in the relationship, and the evidence we received is the breakdown was assumed because of Ms L'Esteve's attitude towards the claimant's previous claims, and his alleged continuing perception. It follows there is express evidence that the fact of the protected acts, being the allegations of discrimination embodied in the previous claims, was a material reason.

7.84 There is no explanation which in not sense whatsoever is because of alleged vicimtisation. It follows the dismissal is an act of victimisation.

Time

7.85 We noted when considering the issues that the question of time must be considered.

7.86 Neither party addressed the matter adequately or at all in submissions. We must consider whether it is just and equitable to extend time . It is for the claimant to produce an explanation, but the failure to produce an explanation is not itself conclusive. We have no doubt that the claimant does have issues of anxiety and depression. He is a litigant in person and it is clear that he has found these proceedings challenging. He does not have a sophisticated understanding of the law, but instead has a firm belief in the unfairness of the respondent's approach.

7.87 We have no doubt that EJ J Burns sought to take a purposive approach at the case management discussion. A number of claims are identified, including claims of failure to make reasonable adjustments and discrimination arising from disability. It would have been open to the respondent to alleged those claims had not been brought, and should not be in the issues, but this was not raised, either at the time or by way of appeal. It follows the respondent was put on notice of the claims at a relatively early stage, and the respondent allowed them to proceed

without objection. Those claims were further considered at the final hearing and allowed to proceed by way of amendment. It follows those claims were allowed by amendment without objection.

7.88 The disability discrimination claims were allowed to proceed by consent, it being accepted by the respondent that there was no specific hardship. There was one victimisation claim allowed to proceed, being a failure to recommend the claimant for ill-health retirement. It was conceded at the hearing that the explanation for this was essentially the same as the explanation for dismissing the claimant, and there was no hardship to the respondent in dealing with the additional claim. It was therefore allowed.

7.89 If follows that these claims have all proceeded without objection since at least the case management discussion. There is no suggestion that they cannot be dealt with. Refusing to extend time would create considerable hardship for the claimant in that he would be denied the benefit of claims which are well-founded. Not extending time would be a windfall for the respondent in circumstances when it knew the claims existed and has had an opportunity to prepare and advance evidence and submissions. In the circumstances we consider it is just and equitable to extend time in relation to those cases that succeeded on the merits.

7.90 We have found allegation 13e to be to be part of a continuing course of conduct with allegation 13h, and therefore in time in any event.

7.91 As for the claims which fail substantively, but were presented out of time, we need not consider them further.

Rule 50 Employment Tribunal Rules of Procedure 2013

7.92 The claimant has applied for a rule 50 order. That will be dealt with in a separate order. A rule 50 order has been made.

Further conduct

7.93 It is necessary to consider remedy. During the hearing we received evidence that the claimant may still apply for ill-health retirement. The mechanism for this is unclear and is unclear whether he may apply for tier 1. It is unclear whether the respondent will be obliged to assist in obtaining the medical report. We noted there is an obligation to mitigate loss and applying for ill-health retirement may be an act of mitigation.

7.94 When there is a finding of unfair dismissal, the claimant is entitled to seek reinstatement or engagement. This is an unusual case, it is unclear how the possibility of a recommendation for ill-health retirement would interact with any request for reinstatement. These are matters which may form issues for any remedy hearing. It is appropriate to allow the parties some time to consider whether progress can be made. We invite the parties to

consider whether any remedy can be agreed, and whether there can be any progress on the claimant's application for ill-health retirement. If no progress can be made within four weeks, the parties should write the tribunal with proposals for the remedy hearing.

_____
Employment Judge Hodgson

Dated: 29 March 2024

Sent to the parties on:

3 April 2024
.....

.....
For the Tribunal Office

Appendix 1 – the issues

Unfair Dismissal

1. Was the claimant dismissed for a potentially fair reason? The respondent states that dismissal was on grounds of capability due to ill health, the claimant being absent from work.

2. Did the respondent act reasonably in treating the reason as a sufficient reason to dismiss the claimant?

Disability

3. The respondent concedes the claimant is disabled it states “the following conditions all or individually constitute disabilities within section 6 Equality Act 2010: underlying immunity condition, deafness, tinnitus and balance problems, liver problems, depression and anxiety. ”

Discrimination arising from disability under s15 Equality Act 2010 [4]

[4] The section 15 discrimination arising from disability claim and the claim of failure to make reasonable adjustments were not included in the claim. There included by amendment recorded in the reasons.

4. The claimant alleges he was treated unfavourably by the respondent by the following acts or omissions:

    a. on or around 28 March 2022, by the respondent stopping his sick pay;
    b. around 15 May 2022, by the respondent failing to inform the claimant of any continuing requirement to file a sick note;
    c. in April 2022, by the respondent sending the claimant to a medical practitioner, Dr Manavi, who could or did not provide an opinion on whether the claimant should qualify for Ill health retirement .
    d. by failing to communicate with the claimant for approximately eight months from 12 April 2022 to 21 November.

5. Was the treatment because of something arising a consequence of disability. The claimant states the matter arising in consequence of disability is said to be his absence from work due to ill health, his inability to work, and his application for ill health retirement.

6. Was any unfavourable treatment a proportionate means of achieving a legitimate aim? The respondent states the legitimate aims it relied on are as follows:
    a. managing public funds; and
    b. complying with the claimant's suggestion that communication was causing him stress.

Failure to make reasonable adjustments under s20 and s21 Equality Act 2010

7. The provision criteria or practice (PCP) relied on is said to be the application of the Ill health Retirement Procedure as contained in the Sickness Management Procedure.

8. The claimant says the PCP put him a substantial disadvantage in relation to the relevant matter compared with those who are not disabled, it being his case that it led to his dismissal without ill health retirement.

9. The potential reasonable adjustments identified are as follows:

    a. allocating an ill health retirement assessor who was able to give a relevant opinion.
    b. assigning a manager to stay in touch with the claimant and support the claimant between April 2022 and November 2022;
    c. advising the about sick note policy for long term sickness;
    d. not stopping his sick pay.

Direct discrimination under s13 Equality Act 2010

10. The claimant confirmed he is relying on no protected characteristic - race. He defines his race by reference to his colour, stating he is a black man.

11. The claimant alleges he was subject to the following less favourable treatment:

    a. not allowing him the benefit of Ill health retirement; and
    b. not making him redundant on 22 November 2022.

12. The Claimant alleges there are two actual comparators:

    a. AL- who it is alleged was approved for ill health retirement

b. ZM - who it is alleged received a redundancy [payment] and was not dismissed for incapacity.

Victimisation under s27 Equality Act 2010

13. The respondent accepts the claimant, by submitting to employment tribunal claims, claims 2204179/21 and 2204704/2021, undertook protected acts in respect of race and disability discrimination allegations. The claimant alleges he suffered detrimental treatment. Did the respondent victimise the claimant's by subjecting him to the following alleged detrimental treatment:

    a. by the respondent stopping the claimant's sick pay in or around 28 March 2022;
    b. by the respondent not replying to the claimant's email of 27 April 2022 to Elizabeth Chuk;
    c. by the respondent failing to advise the claimant, following his email of 15 May 2022, that he needed to provide a sick note, it being the claimant's case that he was criticised for not sending a sick note at the dismissal hearing on 15 November 2022;
    d. by failing to communicate with the claimant for approximately eight months from 12 April 2022 to 21 November 2022;
    e. by bypassing stage 1 and stage 2 of the sickness management procedure on 15 November 2022;
    f. by refusing to provide a post-employment reference to the claimant in the outcome letter of 22 November 2022;
    g. by failing to recommend the claimant for ill health retirement;[5]
    h. by dismissing the claimant.

Unpaid holiday leave

14. To the extent any claim was pleaded, it was dismissed by the judgment of EJ J Burns on 30 May 2023.

Time

15. Are all or any of the claims out of time? If so, should time be extended?

[5] This allegation was allowed by amendment on 18 January 2024, the respondent conceding that dealing with the allegation caused not hardship.