



EMPLOYMENT TRIBUNALS

Claimant: Mr A Earl
Respondent: Driver and Vehicle Standards Agency

Heard at: Newcastle Employment Tribunal
On: 23-27 October 2022, 16 February 2022 - hearing
15 February and 8 April 2023 - deliberations
Before: Employment Judge Jeram, Ms C Hunter and Mr E A Euers

Representation:
Claimant: Ms S Ismail of Counsel
Respondent: Ms H Hogben of Counsel

RESERVED JUDGMENT

1. The claimant's complaints of direct disability discrimination, victimisation and of a single complaint of harassment alleged to have taken place on 31 August 2021 are dismissed upon withdrawal by the claimant.
2. The claimant's complaints of unfair dismissal, discrimination arising in consequence of disability, a failure to make reasonable adjustments, harassment and unauthorised deduction from wages are not well founded and dismissed.

REASONS

1. By a claim presented on 15 December 2022, the claimant makes complaints of unfair dismissal, disability discrimination, harassment related to disability and unauthorised deduction from wages. Complaints of direct disability discrimination, victimisation and an allegation of harassment related to disability alleged to have taken place on 31 August 2021 were withdrawn by the claimant during these proceedings, and they were dismissed.

2. The issues were identified at the outset but subject to a number of amendments throughout the hearing by agreement between the parties. The final list is attached to this judgment at Appendix A.
3. The Tribunal had before it an agreed bundle of documents together with further additions of documents by agreement between the parties. For the claimant's case, the Tribunal received written and oral evidence from the claimant (including a supplementary statement) and his trade union representative Kevin Stephens; it read the evidence of Michelle Earl whose evidence the respondent did not challenge. For the respondent, the Tribunal received written and oral evidence from: Brian Lynn (Local Driving Test Manager), Gobinder Walia (Local Driving Test Manager and the claimant's line manager), Lindsay Thomas (Testing Network Manager and grievance investigator), Neil Petrie (Operational Delivery Manager and dismissing officer) and Mark Pearson-Leach (Operations Delivery Manager for the North West region and appeal officer).

Findings of Fact

4. The respondent's Supporting Attendance Procedure identifies attendance as '*unsatisfactory*' where an employee sickness level meets or exceeds the sickness absence trigger point. The trigger points include an absence of 15 working days in a rolling 12-month period.
5. The policy states that '*where a return to work is not likely within a reasonable timescale and the business cannot continue to support an absence, managers should seek Occupational Health advice to consider whether employees are likely to meet the criteria for ill health retirement . . .*'
6. The respondent's Ill Health Retirement Policy identifies the criteria for eligibility, one of which is that the employee '*[has] suffered a breakdown in health that is likely to stop [the employee] working until retirement age*'. That is immediately followed by the heading '*How to apply for ill health retirement*' and it goes on to explain:
'First, you must speak to your employer. Your employer must tell you about your right to apply for ill health retirement and if they intend to refer you for it'.
7. The claimant was employed by the respondent between 14 June 2004 and 27 July 2022 as a driving examiner based at its Gosforth depot in Newcastle.
8. In 2014, the claimant suffered a subarachnoid haemorrhage, which left him with mild cognitive difficulties including short-term memory problems. As a result, he took 199 days off work sick leave.
9. In 2015, the claimant was diagnosed with Meniere's disease, a chronic condition which can give rise to intermittent symptoms of dizziness, which when severe the claimant should avoid driving. Other symptoms include decreased hearing and nausea or vomiting. An Occupational Health physician at the time advised the respondent that the condition was likely to amount to a disability within the meaning of the Equality Act 2010. The condition was described as chronic, and one which may give rise to intermittent symptoms of dizziness, in which event, the respondent

was advised that the claimant should stop driving and any driving examiner role should be withheld, until they have improved sufficiently.

10. The claimant's return to work coincided with a change in line management. The claimant became aggrieved to learn that his outgoing manager had himself returned from sick leave and had moved into an administrative role utilising his managerial skills at the respondent's Eastgate House premises when he i.e. the claimant had also earlier sought, unsuccessfully, an alternative role carrying out administrative work. The claimant's new line manager was Gobinder Walia ('GW').
11. The claimant and GW openly discussed the fact of the claimant's conditions, and how the claimant managed their effect upon him. The claimant informed GW that he only seemed to suffer dizzy spells at weekends or whilst on annual leave and that he always had a warning before the onset of a vertigo attack. The only work-related impact the claimant described to GW was his view that he sometimes forgot street names, though in the final two years or so, he said he was getting better at remembering names; GW held the view that the claimant was in fact better than he was himself at remembering street names.
12. Between February 2016 and December 2021, the claimant had a better absence record than most of his colleagues. During this period, he was absent five times due to Meniere's disease, but did not reach the trigger point contained in the respondent's capability process.
13. The claimant carried out his duties to a satisfactory standard without the need for any reasonable adjustments. Like his fellow examiners, he was required to carry out seven driving tests per day, each lasting 57 minutes, and to write up the reports for each failed test. We accept the evidence of GW that the claimant was able to complete 7-tests per day, that on average approximately half of the candidates would fail, requiring the claimant to write up reports for those test failures, that a test report rarely exceeds 6 sentences, that the claimant would dictate his reports directly into his iPad, that he often completed his tasks before the end of the day, and was one of the first to leave the office.
14. The claimant was well regarded in the Gosforth office, known for his jovial attitude and easy relationships with his colleagues. He also played an integral role in the office; he was an excellent mentor for new entrant examiners, and he worked overtime. In June 2021, the claimant applied for and secured a place on a course to qualify as a Staff Instructor, with a view to training up new examiners.

8-Test Day Proposal

15. In summer 2021, the respondent made a proposal, in part response to the backlog of tests caused by the pandemic. It suggested that examiners increase the number of tests per day by one, to 8 tests per day with some adjustments to the time taken for tests. It was a poorly received proposal and was, eventually, abandoned.
16. The proposal, however, precipitated a change in the claimant's enthusiasm for the job and his attitude towards it that had commenced around the time of the national lockdown. He became disillusioned, making his views of the new pilot scheme well known. He complained, openly and bitterly about his job, his wages, and how

equivalent grades in the Civil Service were paid more than his own. Colleagues began to avoid the claimant.

17. In anticipation of the proposal being confirmed, several examiners had applied to reduce their contracted hours, with a view to avoiding the eight-test day. In September 2021, the claimant applied to reduce his working hours from 37 to 35 hours per week for the same reason; his application was not in any way related to his disabilities and nor did he suggest as much. All decisions on the applications were deferred until the full extent of the impact of the lockdown and covid restrictions were known, save for that of the claimant, which was approved, so agitated and vocal was he about the proposed change.
18. The claimant repeatedly stated, verbally and in writing including in his quarterly performance management review, that that he was looking forward to either leaving his role for alternative employment or taking early retirement. Although he stated in his quarterly review that he was being asked to leave his Staff Instructor course because of his part time hours, it was in fact because he had elected to leave it, seemingly because he had had a disagreement with the instructor. He indicated in the same review that he wished to see Occupational Health. GW had passed on to the claimant advice he had been given by HR, namely that he should approach his own GP before seeking an appointment with Occupational Health, advice that the claimant said his GP disagreed with, and that advice was one of a number of growing reasons that the claimant had begun to take umbrage with GW's management. When GW asked the claimant on 29 September 2022 why he sought to do see Occupational Health, the claimant replied that he wished to explore the possibility of obtaining a recommendation that he maintain a 7-test day, as a '*reasonable adjustment*' in anticipation of the implementation of the 8-test day proposal, thereby enabling him to continue to work full time and continue to carry out 7 tests per day.
19. The claimant was aware of the impact of his conduct on his colleagues; when he attended a return-to-work meeting on **27 May 2022**, he verbally apologised to his colleagues about his behaviour.
20. On **4 October 2021**, the respondent announced that the eight-test day would not be implemented; the claimant withdrew his application for part-time working and therefore remained on full time hours.

Photograph Incident – October 2021

21. In **October 2021**, the claimant was on sick leave for five days with a chest infection and flu -type symptoms. On **13 October 2021** GW made a welfare telephone call to the claimant.
22. The claimant said he believed he may have caught the infection from his colleague DC. He often joked with GW about how he and DC regularly cross infected one another with coughs and flu.
23. GW asked the claimant when his upcoming wedding was; he had intended to make a surprise wedding cake. The claimant, in a staged voice that was intended to be overheard by GW, shouted over to his fiancé to ask her when his wedding date was; it was plainly a joke, and the claimant does not suggest otherwise. GW replied by

saying he couldn't believe the claimant had to ask Michelle to confirm the wedding date and that '*she will kill you for that*'.

24. The next day, GW received a text message from the claimant stating '*now this. Just appeared. May have to go to the doctors with it*'. The text was accompanied by a picture of the lower half of the claimant's face showing his lip in a swollen condition. GW believed that the message was an extension of the humorous exchange the previous day, in which he and the claimant had discussed the possibility of a catching of an infection, alternatively GW's reference to Michelle giving the claimant to thump for asking her to confirm their wedding date.
25. GW showed the picture to the claimant's colleague, PD, who was standing next to him when he had opened the text message. He made no comment about the claimant when doing so.

Building Alarm – 29 November 2021

26. On **29 November 2021**, GW returned to the Gosforth depot after an absence of several weeks. He was informed by the cleaner that the building alarm had been sounding the whole of the previous day. The tenants that bore the responsibility for turning off the alarm had recently vacated the building. GW contacted the sites facilities management provider for advice. He managed to locate a box of keys in the building and eventually identified the correct key with which to switch off the alarm. GW then left the building to conduct a driving a test.
27. On his return he spoke to the claimant and his colleague JB. He asked whether the alarm had sounded in his absence before explaining to them the respondent had now acquired responsibility for the management of the alarm and how to stop it, if the need arose. He informed them that it was key number 31 that was required to switch the alarm off. He repeated the key number on 2 or 3 occasions to both the claimant and JB using words to the effect of '*has everyone got that, key 31?*' and on one occasion directed a comment to the claimant to the effect of '*Alan, can you remember, key 31?*'. He also raised his voice to be heard by JB, who has impaired hearing, something that JB had no issue with.
28. The claimant retorted with words to the effect of: '*I have Meniere's this is very embarrassing for me*'.
29. Later that day, in the afternoon, the claimant entered GW's office stating '*this is nothing to do with this morning, I don't like anyone taking the piss out of me right, you sent a picture of my lip to [PD]*'. GW said he did not know what he was talking about; once he understood what he was being accused of, he denied sending the picture to anyone. The claimant disbelieved him, calling him a liar and stating that he would have GW's phone checked by his network provider.
30. GW attempted to reassure the claimant in a one-to-one meeting that afternoon. The claimant again informed GW that he would be leaving the respondent for another job or to take early retirement at the end of the year. He left the office only to re-enter with his phone, to show GW that there were equivalent roles elsewhere in the Civil Service that paid significantly more than his role.

31. PD returned to the office, having worked elsewhere in the previous week. He informed GW that the claimant had contacted him during the weekend to ask if he, GW, had sent PD the picture of the claimant's lip. PD told GW that he had confirmed to the claimant that the picture had not been forwarded to him.

Sick Leave – 9 December 2021

32. On **9 December 2021**, the claimant was involved in a minor collision in the test car. He went on sick leave, and informed GW that he was not too bad but had a slight pain in his back. He said he was keen to return to work, but GW suggested he take a few days off to identify whether his pain would develop.

33. The claimant's absence was managed by Brian Lynn ('BL'), Local Driving Test Manager. During his period of absence, the claimant submitted a grievance against GW.

Claimant's Grievance

34. On **6 January 2022**, the claimant emailed Neil Petrie ('NP'), Operational Delivery Manager to inform him that he was unhappy about GW's conduct allegedly sending to PD the photograph of his face to colleague PD and that GW had repeatedly and publicly asked him if he could recall the number of the alarm key. He attached a completed Incident Report form, an internal form used to report information security incidents and said that he intended to complain to the ICO about the matter.

35. On **4 February 2022**, the claimant submitted a written grievance against GW. He complained about two things. First, that GW had sent the picture of the claimant's lip to PD. Second, that GW had humiliated him by repeatedly asking him whether he could remember the correct key. The claimant said GW had walked over to him and addressed him personally and publicly to inform him that the key to the alarm was key 31, on at least 6 occasions, in differing ways, such as telling him that he knew what the claimant was like, asking whether he had '*got that*' and asking him to repeat the number back to him. The claimant said GW continued until he asked him to stop.

36. The complaint was in the same terms as those sent to NP on 6 January 2022. The claimant confirmed to NP that he was not open to mediation and that he sought an independent investigation requiring the disclosure of GW's personal phone records.

37. Lindsay Thomas, Testing Network Manager ('LT') was appointed to investigate the grievance.

38. LT interviewed the claimant about his grievance on 22 March 2022. The claimant was accompanied by his trade union representative, Kevin Stephens ('KS'). The claimant found the interview difficult and upsetting. He described GW as one of his better managers and that the behaviour that the claimant was reporting was, on his own account, '*out of character*' for GW. He described the jovial relationship he had with him, as well as the exchange about the date of the wedding. He said GW had apologised to him in the one-to-one meeting and confirmed when asked that he thought the apology was genuine, before adding that the sending of the photograph had taken matters too far. He said he had made a request to his employer for disclosure of the contents of GW's phone.

39. He informed LT that on his return to work, he spoke to PD about his lip and PD responded by saying he already knew about it as GW sent a photo to him. He said he was unsure how the text had been sent to PD and when asked said that he did not see actually see the picture on PD's phone '*it was verbal and he held up the phone*'. He maintained that GW was lying about not having sent the photo to PD.
40. The claimant said that of the two incidents he complained about, it was this incident that caused him the greater stress. He described feeling targeted, as part of an (unparticularised) bullying campaign by GW, and that he felt paranoid about it. He maintained that GW had lied.
41. As to the second matter, the claimant said he felt humiliated when GW repeatedly described key number 31. He felt GW was referring to his memory and making fun of it. He felt humiliated and he said he had asked colleague MB in the office to check he was not being overly sensitive. He did not say what MB's views were. The claimant said that on his return from a driving test GW '*continued*' to ask him about the alarm key again, asking whether he had remembered adding that GW said '*I know what you're like. So what number is it?*' He said he asked GW to stop as he found his conduct humiliating, but that GW responded by telling him that he was trying to avoid the claimant forgetting the key code and telling him how wanted him to write it down.
42. He volunteered that he was '*often*' called '*etch-a-sketch head*' but, he said, he could take that as a joke. He made no reference at all to being called a '*wobble head*' or having a '*head wobble*' or any variation on those words.
43. The notes of the meeting record that GW informed LT that his colleague MB had seen some of the exchange but was unable to comment as he went to the toilet.
44. On the same day, LT interviewed PD. He said GW had shown him a zoomed in photograph of a face whilst making a joke about himself. PD did not at the time recognise the photo as being one of the claimant. He confirmed that GW had not sent him the photograph. He said that the claimant later showed PD the same photograph, in response to which PD made an unguarded comment that he had already seen it. It was only at that point PD said, that he realised that GW must have been showing him a picture of the claimant. PD said he could not recall whether the claimant challenged him explicitly or whether the claimant had worked out that it was likely to be GW who had shown him the photograph, but also confirmed that he had told the claimant that he had not received the photograph. PD was complimentary of both GW and the claimant, and said he had respect for the claimant, who had been his mentor. He added that the claimant seemed to be a lot less happy, seemed to be unable to switch off and stated that the claimant appeared to be getting himself involved in the problems of others e.g. LGV tests which made him more stressed.
45. Although the claimant contends in his written evidence to this Tribunal that he did not think his colleague JB was present, he did tell LT that she was present during the exchange about the alarm key. In his interview with LT, the claimant had described JB as his '*support mechanism*'.

46. On 30 March 2022, LT interviewed JB. JB said she could recall the incident. She said the alarm was sounding. He said GW turn off the alarm with the key came into the office and said *'it's number 31, can everyone remember 31?'*. She said GW stood behind the claimant and said *'Alan, can you remember number 31?'* before looking to JB and in *'banter'* and in a raised voice, because he knew she was hard of hearing, said *'number 31'*. She denied that the claimant told GW to stop, as he claimed in his interview with LT. She said GW was being his usual self, that is good humoured and without malice and that he *'didn't go on and on, the way Alan is making out'*. She made comments similar to PD about the claimant in that she viewed him as having undergone a change in personality, that he was overly sensitive, and that *'any little thing winds him up'* and that he had become miserable. She said she missed the *'old Alan'*.
47. In her interview, JB volunteered to LT that showing a colleague a photograph of his medical affliction was the type of thing that the claimant would himself be likely to do.
48. Following that interview, and on the same day, LT interviewed GW about the claimant's grievance. He said he may well have shown the picture of the claimant's lip and nose to PD, and he would not suggest otherwise, if PD confirms he did. He maintained that he did not send a picture to him PD and that the claimant would not find data to support that he did send anything. LT asked, and GW showed her, the photograph of the claimant's face.
49. About the alarm key complaint, GW said he had found the alarm key in a heap of around 20 keys and was addressing both the claimant and JB who were the only people in the office and that he may well have repeated himself *'a couple of times'* because the key was difficult to find. GW said he was particularly aggrieved about the allegation that he was a liar.
50. In line with the other interviewees, the GW described a significant change in the claimant's demeanour after the pandemic and the 8-test day proposal. He too described a propensity on the claimant's part to become involved and therefore become stressed, by events that were not matters for him; he gave different examples to those provided by PD. He said that this was the first year that he had not placed a new entrant to be mentored by the claimant, because of his attitude.

Claimant's Grievance – Outcome

51. LT completed her report on **19 May 2022**. LT did not uphold the claimant's grievance, for reasons set out in her report. She added, however:

'Staff have become more concerned about Alan recently as he seems to have become a shadow of his former self and there are genuine concerns for him and his welfare. However, since the pandemic staff feel he has struggled, and even more so since the eight-test day was mentioned. The office environment has become strained and makes staff feel awkward to the point they don't want to work there. Staff comment are that Alan gets easily wound up with little thing that often don't concern him directly which then in turn gets him down.'

GW grievance against the claimant – 24 May 2022

52. On 24 May 2022, GW raised a formal complaint against the claimant. The complaint was about a number of matters, including the claimant's failure to apologise to him about calling him a liar and falsely asserting that GW has placed the sole '*blame*' about the fire alarm incident on the claimant. The grievance was investigated by manager Daniel Harrison ('DH').
53. On **25 May 2022**, the claimant was sent a copy of LT's grievance report, together with all witness statements.
54. On Friday **27 May 2022**, the claimant attended a return-to-work meeting with BL (see below), in which he was informed that his line manager GW. On 7 June 2022, the claimant was invited to a meeting with DH discuss GW's grievance.
55. On **10 June 2022**, the claimant requested MB be interviewed as a witness to the alarm key incident. LT considered that unusual, given that the claimant had explicitly informed her, with reasons, why MB could not comment on the incident. Nevertheless, she agreed to interview MB. There was a short delay because MB was involved in a car accident.
56. On **29 June 2022**, MB in interview with LT stated that he was present for a short time, perhaps less than a minute. He recalled GW repeatedly asking the claimant for the number of the key, approximately 2 to 3 times. He said it was not aggressive but that it did make the atmosphere uncomfortable.

Amended Grievance Outcome – 1 July 2022

57. LT did not attach significant weight to MBs evidence, given that he was not a witness to the full incident and had no knowledge of the context or background of the events. On **1 July 2022**, LT completed an amended report, incorporating evidence given by MB; her conclusion, however, remained unchanged.

Grievance Appeal – 7 July 2022

58. The claimant appealed the outcome of his grievance on **7 July 2022**. He attended, as before, accompanied by a trade union representative appeal hearing with Warren Farrell ('WF') on **19 August 2022**.
59. On **26 August 2022** WF dismissed his appeal finding no evidence that the investigation was biased, or unfairly conducted, as the claimant had alleged.
60. On **4 August 2022** GW's grievance against the claimant was suspended; later, on 19 October 2022 it was withdrawn.

Absence Management – January 2022 to July 2022

61. In the meantime, the claimant's absence was being managed by Brian Lynn ('BL'), Local Driving Test Manager.
62. The claimant's GP certified that he was unfit to work between 14 December 2021 and 16 January 2022 by reason of work-related stress and anxiety.

63. On **12 January 2022**, the claimant and BL met for the first, informal, absence review meeting, which should have taken place earlier, were it not for the seasonal break. The claimant was accompanied by Kevin Stephens ('KS') his trade union representative, as he was at all subsequent review meetings. The claimant said his road traffic accident had resulted in a stiff neck for a couple of days, followed by bouts of dizziness and vertigo. He said the stress he was feeling at work 'brought on' his Meniere's disease. He said his dizziness had been constant whereas he it was now coming and going. He said he had had 3 bouts of vertigo in the last few weeks, compared to usual rate of 1-2 per year. He mentioned that about 4 years ago the DVLA had stopped him driving for 6 months when his vertigo was particularly bad.
64. He said he thought he was likely to be able to return to work on or around the expiry of his fit note and that he was willing to attend Occupational Health if required. He also mentioned having memory problems, so the claimant was advised to speak to his GP about it.
65. The first, formal, absence review meeting commenced, but not concluded, on **20 January 2022**, at which the claimant said he would be able to work at Eastgate House but due to his dizziness, he could not drive. He said his GP said stress triggers his dizziness.
66. Completion of that meeting was deferred, however, until after an Occupational Health report was obtained. Such a report was produced on **21 February 2022**. In it, the Occupational Health advisor stated that the claimant was unfit for work with stress and anxiety and that the claimant had described both personal and work-related stressors.
67. The advisor said that the claimant informed her that his brain haemorrhage had left him with '*significant memory issues*' that were causing him some distress, and that his GP had referred him to a memory clinic. She said that it appeared that his stress had triggered symptoms of Meniere's. She said that the symptoms of Meniere's disease was deafness and dizziness. She said that the claimant had informed her that there were no lasting issues with regards to the accident sustained in December 2021. She was unable to predict a date when the claimant would be in a position to return to work whilst his symptoms persisted and suggested that he was referred to counselling and re-referred to Occupational Health '*at a later date*'.
68. On **1 March 2022** the first formal absence review meeting was resumed, by which time the Occupational Health report had been received by all. BL and the claimant discussed the cause of the claimant's work-related stressors. The claimant identified them as: the sending by GW of '*medical photographs*' to PD, GW '*taking the mick*' out of the claimant's memory and the car accident. He said that these matters had caused him to be off work. He had been prescribed propranolol, but felt the dosage was too high and he said he had stopped taking it; he agreed to discuss alternatives with his doctor. He said his doctor had arranged a liver scan as well as an appointment with a memory clinic. He said he had managed his symptoms well for the last 6 years, but '*with the things that have been happening at work that has pushed me over the edge*'. He asked whether he was in danger of losing his job, adding that '*this has been going on with too much time on the sick the investigation is taking so long, all this is causing me further stress and anxiety*'.

69. On 3 March 2022, the claimant contacted BL, copying in KS to inform him that he had contacted the Employee Assistance Programme and arranged the first of a course of six counselling sessions. He said that he had been '*strongly advised*' to call ACAS, but that he would discuss this with KS first.
70. On **30 March 2022** a formal absence review meeting took place. The claimant was concerned that the respondent was '*deliberately*' taking too long with his investigation in order to take his sickness absence to a point when dismissal was a potential outcome. He said he had not spoken to his doctor about changing his medication but he said he tried to resume taking it recently, but it had made him dizzy, so he stopped taking it altogether.
71. He said he wished to return to work but was instructed by BL to speak to with his GP and take advice before returning to work; he and KS also gave the claimant strong advice against stopping his medication, without medical advice, as he said he had done. He was urged by BL to contact his GP to obtain dates for attendance at the memory clinic as he had still not received dates for them. The claimant agreed to complete the initial stress risk assessment.
72. On 1 April 2022, the claimant was issued with a fit note which stated he was unfit to work from 27 March 2022 to 30 April 2022 because of work-related stress and anxiety.
73. On 6 April 2022 the claimant confirmed that he would not be returning to work before 19 April 2022 being the date he had a GP appointment.
74. On **21 April 2022** the claimant emailed BL to inform him that he had completed his course of counselling, '*but with limited success as the [counsellor] stated I can't make progress dealing with work related stress and anxiety whilst waiting for [the] outcome of investigation (sic)*'. He also said he had been prescribed sertraline.
75. On 29 April 2022, the claimant emailed BL to say he would be returned to work at some point in May 2022.
76. On 3 May 2022, the claimant submitted a fit note covering the period 30 April 2022 to 28 May 2022. In the last week of May, the claimant informed the respondent he was feeling better and wanted to return to work.

Return to Work Meeting – Friday 27 May 2022

77. A return-to-work meeting was held on Friday, **27 May 2022**.
78. The claimant mentioned to BL and KS that he had read his colleague's comments in LT's investigation report and that this had made him reflect on what he had been like to work with. He stated he agreed with his colleagues that he had taken on too much by getting involved in things that did not concern him, such as LGV issues, and the 8-test proposal.
79. He was informed that GW had submitted a grievance about him, which he said was not a nice thing to do to someone who was off work with stress and anxiety. When

asked how he felt about it, he said he felt 'okay-ish', it would obviously stress him out a bit but that it was out with his control.

80. He said he would return to work on Monday 30 May 2022 but also stated he had not discussed this with his GP. He identified a number of upcoming appointments including an occupational health appointment and a GP appointment on 6 and 7 June respectively, a grievance investigation closure meeting on 10 June and a neurology appointment regarding his memory on 18 August 2022. Discussions were had about a phased return to work and a familiarisation day. The claimant volunteered, but BL refused, overtime working during the forthcoming extended bank holidays.
81. At 17:50 on Sunday, **29 May 2022**, the claimant emailed BL stating he would not return to work as planned on Monday 30 May. He said he did not sleep that night thinking about GW's grievance against him. He said he had had another vertigo attack that day and had been vomiting for 3 hours. We are not satisfied that this statement is accurate, for reasons we explain below. He said he was also stressed thinking he would be sacked and thought he was returning to work prematurely before seeing his GP and Occupational Health. He added that his wife had insisted that he resume his medication.
82. On the morning of **30 May 2022**, the claimant emailed BL to inform him that he had secured an appointment with his GP, that his blood pressure had increased dramatically and that he was *'having panic attacks again'*. He said that the information that GW had submitted a grievance against him *'has definitely got something to do with me having a relapse'*.
83. KS followed with an email of his own that same day to BL in which he said that being informed of the grievance submitted by GW *'has definitely come as quite a shock for Alan especially as the grievance he has made has not yet been concluded. All this appears to be having a detrimental effect on his recovery'*. He asked that the grievance made by GW was addressed as soon as reasonable to enable the claimant to *'move forward from this'*.
84. NP replied to KS the following day to explain that, having obtained HR advice, he concluded that the claimant should be informed of the grievance because of the need for transparency but that he strongly urged the claimant to engage in mediation with GW since GW was agreeable to this and it would help resolve matters as quickly as possible.
85. On 29 May 2022, the claimant obtained a further fit note covering the two-week period until 12 June 2022.
86. A second Occupational Health report was produced on **6 June 2022**. In it, the physician stated *'Alan is currently unfit for driving/examining while he has ongoing poor sleep and low mood and poor concentration'*. She stated that the claimant should not return to his role until he was sleeping better and feeling better and is fit to undertake driving tests.

87. The physician also reported that the claimant was unlikely to be fit to return to work as an examiner at the end of his current fit note, but *'may be able to undertake some office work, if available'*. No such work was available.
88. She stated that the medication the claimant took did not have an impact on his ability to drive but repeated that he must not drive if he is experiencing symptoms of severe dizziness. He had declared both conditions and was deemed fit for driving by the DVLA. The physician suggested that the claimant might benefit from the use of aide memoires, including the use of lists and mobile phone or satellite navigation, the increased use of notes and possible use of checklists.
89. The Occupational Health physician said the claimant's symptoms of Meniere's disease were vertigo, vomiting and hearing issues and that his last episode occurred seven weeks ago. Given the conflict between this comment on the assertion made by the claimant to BL on 30 May, we are not satisfied that the claimant had a vertigo attack on 30 May.
90. In response to specific questions, which questions were not available to the Tribunal, the physician stated:
'Alan has diabetes, Meniere's disease (as described above) he has had a brain haemorrhage (and has short-term memory problems) but he is currently struggling with work-related stress symptoms.'
91. She said he would *'benefit from a swift resolution of the grievance process and support with relationships at work as he feels trust in his management has been damaged by his perception of the recent situation.'*
92. She said the medication the claimant took did not prevent the claimant from driving. She recommended a phased return to work with a consideration of providing office based tasks initially. She also recommended *'a quick resolution to the current grievance process will be beneficial and in my opinion Alan is likely to struggle to return to driver examiner work while these processes are ongoing'*.
93. She said that the claimant had been deemed fit for driving by the DVLA, but that he struggles with memory problems, for which she recommended use of aide memoires such as the making of lists.
94. Finally, she stated *'Alan finds his ongoing problems with memory upsetting and this is a trigger for his stress related issues-he has found reference to memory problems made at work unhelpful and is found some relationships at work difficult. . . '*
95. The physician recommended that when the claimant did return to work, he was given a phased return with a reduced number of tests; she noted that the undertaking of stress risk assessment was a process that had already commenced.
96. On **9 June 2022**, a further absence review meeting took place. As before, he attended accompanied by KS. On this occasion, the claimant had read the Occupational Health report, but BL had not. The claimant, when asked said that it was the grievance submitted by GW that led to him not attending work on Monday, 30 May 2022. He said his pressure had shot up. He recounted an incident the previous year that presented a fire risk. He said his counsellor has suggested he

made lists to assist as memory, but stated that he would forget to read the lists. He said 'people' were making fun of him, calling him '*Etch-a-Sketch head*' and he mentioned the '*thing that's happened with [GW]*'. BL stated that these things had not been brought to his attention before. The claimant said he could go on forever, saying that he scalded his grandson. He said both his GP and Occupational Health had recommended the was too unwell to carry out examiner work, but that Occupational Health said he was fit for administrative work. The hearing was adjourned so that BL could obtain and read the Occupational Health report. He had been issued a fit note until 10 June 2022. Both BL and his trade union representative strongly advised the claimant to contact his GP to discuss his health further and identify whether he would be fit to return to normal duties in the near future.

97. On 13 June 2022 the claimant was issued with a fit note for the period 12 June to 10 July 2022 citing the reason for his absence as work-related stress and anxiety.
98. On **29 June 2022**, the claimant emailed BL to confirm his blood pressure medication was being doubled and that his anti-anxiety medication was being changed to one which was incompatible with operating machinery or driving. He said he had discussed with GP has memory problems including his concern that he had almost caused a fire at the test centre, and at home, and of physically scalding his grandson. He said that he scored 'low' on a memory test conducted by his GP. He said they discussed obtaining a different job. He said that his GP agreed that he would be a health and safety problem. He said they discussed the memory clinic and other options such as ill health retirement. He said he had received a letter stating his sick pay would reduce to half pay in July 2022, and felt he had had no help other than that which he had obtained himself on the Employee Assistance Programme, and that his grievance against GW had '*been dragged out the last six months*', and had not been carried out fairly and furthermore GW had raised a grievance against him.
99. On **6 July 2022** a formal '7 month' absence review meeting took place. The claimant was again accompanied by KS, his trade union representative. On this occasion, BL had received and read the Occupational Health report of 6 June 2022.
100. The claimant said that he agreed with the contents of the report, adding that his GP was of the same view i.e. that he was unfit to return to work as an examiner. He said his GP agreed that he presented a health and safety risk and that they had discussed ill-health retirement.
101. He confirmed his GP had doubled his blood pressure medication and changed his anxiety medication to trazodone which he said restricted his ability to work with machinery and that he was not driving. He said he did not know how long he would be taking this for.
102. He said he was unsure that he had the capacity to retrain into an administrative role of the Lightbox way, he believed, he would remain a health and safety risk. He said he was unsure that he could manage retraining or working in an office with 50 or 60 people, saying it would '*send [his] anxiety through the roof*'.
103. The claimant was asked to elaborate on by the suggestion that the respondent had discriminated against him. He stated that seven years ago, his manager had refused to allow him to move to Eastgate House, only to then move himself. He said

he should have been doing 5 tests a day, instead of 7 but confirmed that he had withdrawn his application for part time working when the 8-test day proposal was abandoned.

104. The claimant stated he anticipated an extension to his fit note, stating that the grievance investigation had taken six months that it was affecting his health and it was *'one of the main factors of my sickness absence. . . It has stopped me [from] returning to work . . . It is affecting my blood pressure and I would like it taken into account'*. KS repeated the contents of the Occupational Health report to the effect that a timely close the investigation would be beneficial.
105. Nothing in the minutes of this meeting suggest, as the claimant does, that BL's manner in conducting this meeting took on a *'different nature'* to earlier meetings. Other than the competing evidence, there is nothing else to indicate one way or another. We are not satisfied that there was anything unusual or untoward in the manner in which this hearing was conducted. The medical evidence was agreed, there was only one alternative role available to the claimant, which the claimant found difficult to entertain. Although we recognise that differences in their relative experience are likely to have contributed to a different perception, it was KS's role to ensure that the hearing was conducted at a pace that his member was comfortable with – he was not, or should not have been, a passive observer. If his attempt to raise a hand was insufficient to catch the eye of BL or otherwise have the desired effect, it was open to him to interject.

Decision Meeting – 18 July 2022

106. On **12 July 2022**, the claimant was invited to a decision meeting in accordance with the respondent's absence management procedure.
107. Although the letter of invitation was not made available to the Tribunal, neither the claimant or his representative at the time, or in these proceedings, suggested that there was any material error or omission in the content of the letter that might impact on the fairness of the procedure.
108. On Monday **18 July 2022**, the decision meeting took place, and it was chaired by Neil Petrie, ('NP') Operational Driving Manager. The claimant was accompanied by a senior trade union official, Darren Gerrard ('DG'). BL attended the decision meeting also.
109. There was a discussion about the likelihood of the claimant returning to work within a reasonable timeframe. At the meeting, the claimant confirmed:
- a. he still had trouble sleeping, sometimes missing a complete nights sleep, that he his blood pressure was still high and that he did not believe he was fit to return to his role of driving examiner;
 - b. his anti-anxiety medication trazodone made him lightheaded, and he was advised not to drive whilst lightheaded;
 - c. his counselling sessions had not abated his stress and anxiety;
 - d. he continued to worry that he was a health and safety risk mentioning that he had nearly set fire to his house and run his wife over and was concerned he was a danger to others;

- e. the claimant asked why he was not being offered ill-health retirement and that he was considering applying for it: MP explained it was for the claimant to apply for this himself.
110. The claimant confirmed when asked that he did not feel he was able to retrain, and he maintained that even the prospect of retraining into a new role was too stressful. Although the claimant suggested in his oral evidence that the minuted phrase *'at this moment I don't feel I could do'* was a typographical error and that what he actually stated was *'at that moment I don't feel I could do'*, i.e. when he spoke to BL, he did not feel he could retrain thereby suggesting that at the meeting with NP, he could have retrained, we reject that suggestion. We do so, first because that construction is inconsistent with the minutes of the rest of the meeting, the evidence of BL; his own trade union representative said he found the claimant's position ambiguous (see below); the minutes of the meeting were not corrected; it formed no part of his appeal that NP ignored his plea that he was fit and willing to retrain into an administrative role, and dismissed him anyway; he makes no such claim in his written evidence. This was one of the instances which led the tribunal to consider the evidence of the claimant to be generally unreliable.
111. DG stated that the claimant's prognosis was complex and that *'unless something can be nailed down for a definite, the meeting is to look at whether the absence can be sustained its very difficult'*. DG stated that he thought what the claimant was asking for was too ambiguous to construe.
112. NP took the view that the claimant's absence was unsustainable. DG emailed NP that same day to state the claimant was to apply for ill-health retirement and that in his belief, this would mean that any decision of NP's must be paused until the application for ill health retirement was resolved. When asked about this in cross examination, the claimant said stated that the possibility of ill health retirement was not something that he himself sought to pursue, but rather it was something that his trade union representative had pressed.
113. NP took advice from HR as to how best to proceed. He was advised, after some deliberation, that his decision should not be held in abeyance until the ill-health time a decision had been received.

21 July 2022 – the Claimant's Attempted Return To Work

114. In the meantime, at 23:13 on Wednesday **20 July 2022**, the claimant sent to GW an email informing him of his intention to return to work on Friday, **22 July 2022**.
115. Instead, on Thursday, **21 July 2022**, the claimant entered the Gosforth office, and took his place at his desk as if he were attending work as normal. He informed GW that he had returned to work following his sickness absence; he said he could see that there had been a misunderstanding and was happy to attend mediation with him. GW contacted NP to ask him whether he was aware of the claimant's return to work. NP obtained advice from HR, to the effect that the claimant ought not be at work since it was not supported by advice from Occupational Health, or for that matter the claimant's own GP.

116. NP attended the Gosforth depot to find the claimant sitting chatting to his colleagues and the general office as if it were an ordinary tea break. He waited until his colleagues went out on tests before speaking to the claimant and GW.
117. The claimant informed NP that he was no longer stressed and was ready and fit to return to work, advancing no explanation as to how the situation had altered so markedly since their meeting on Monday; he said he had no problems with his memory other than a bit of forgetfulness since his brain haemorrhage seven years ago which he had managed well in the last six years; he was not applying for ill-health retirement as he *'would not qualify'*; he was no longer on anti-anxiety medication and that although his doctor told him not to stop his medication, he had done so without consulting her because he, i.e. the claimant *'knew best'*; he said he was fine to drive and had driven to Gosforth alone.
118. The claimant approached GW, shook his hand and informed him that they could *'just do some mediation to resolve [their] grievances'*. The claimant had previously refused all offers of mediation and at the time was in the process of appealing the outcome of his grievance against GW.
119. On the claimant's own account, NP asked him to leave because of his 'medical condition'; we accept NP's evidence that he explained to the claimant that he needed to leave the premises for medical reasons.
120. The claimant asked NP and GW not write anything down on paper, despite NP offering to do so, as an aide memoir. When NP asked him to leave the premises, the claimant demanded it be put in writing so GW typed up NP's request printed out and go to the claimant. We were not shown a copy of that note. The claimant shook hands with both GW and NP, said he was sorry that things will come to this and that he would now leave matters in the hands of lawyers.
121. The claimant had not, at this point, received NP's decision.

Dismissal

122. NP confirmed his decision in writing to the claimant on **22 July 2022**. He confirmed that the claimant would be dismissed on grounds of ill health capability. He had taken the view that, having regard to the length of absence together with the lack of any medically supported indication that he was fit to return to work in any capacity in the foreseeable future, his absence could no longer be sustained.
123. In the letter confirming dismissal, NP wrote *'after considering all the relevant factors, I have decided to terminate your employment . . . because you have been unable to return to work within any timescale. This also includes your attempt to come back to work today against medical advice and your declarations of being a health and safety liability due to your memory problems. The symptoms are all recorded following your review meeting. At our decision meeting you were considering ill-health retirement due to the seriousness of your conditions. I realise you have now decided against this course of action as you felt you would not qualify'*.
124. We accept the evidence of NP that what caused him to dismiss the claimant was because of incapacity together with the respondent's inability to sustain the

claimant's continued and indefinite absence. Although NP was plainly aware of the numerous ways in which the claimant said his impaired short-term memory manifested in his personal life, those comments formed no part, conscious or otherwise, of his decision to dismiss. We accept that the passage above was an attempt, albeit a poorly constructed attempt, on the part of NP to articulate that his decision was consistent with the claimant's own view of his incapacity.

125. The letter of dismissal confirmed that the claimant was entitled to 13 weeks' notice pay, which would be paid at the rate of half pay to reflect the rate at which he was in receipt of sick pay. It confirmed that the claimant's effective date of termination would be 22 July 2022 and that he would be paid wages in lieu of notice.

126. The claimant was 57 years old at the date of dismissal.

Appeal against Dismissal

127. The claimant was invited to a meeting to consider his appeal against dismissal; he had not provided any written grounds of appeal. The meeting took place on **22 August 2022** and it was chaired by Mark Pearson-Leach ('MPL'), Operations Delivery Manager for the North West region. The claimant attended, again represented by DG. MPL informed the parties that his remit was to consider whether the original decision to dismiss was correct and reasonable.

128. The claimant's explanation to MPL of his grounds of appeal were not altogether easy to follow.

129. The claimant said his first ground of appeal was that he had suffered a brain haemorrhage in 2014 and that the last eight years he had struggled to remember street names, that it took longer to do a driving test and that the respondent had failed in its duty to make reasonable adjustments.

130. The claimant said that a part of the reason he was stressed was because he had never been given reasonable adjustments. This was a new assertion. The claimant informed MPL that he had become stressed as a result of the proposed 8-test day proposal. He acknowledged that his application to work part time so as to avoid the 8-test day proposal was accepted by the respondent and that he returned to full time to continue with the usual 7-test day. However, he said he required an adjustment to the requirement to carry out 7 tests in a day, not in relation to being on the road, which he said he was 'ok' about, but only in relation to the time it took for him to complete driving test related paperwork; he said he would require an extra 5-10 minutes to complete it. MPL noted that the claimant had never raised this before with NP although the claimant said DG had told him he should be on a 5-test day on 6 July 2022.

131. He also said the main cause of his stress and anxiety was that he was a bullying campaign being conducted by GW '*behind his back*'. He said that although he thought at the return-to-work meeting in May 2022 that was fit to return, his blood pressure increased causing pains in his head, which he attributed to the stress of the grievance that GW submitted against him. He said he was, for the first time, prescribed medication for his blood pressure.

132. The claimant said he started to have sleeping difficulties that that set him back. He said that after his meeting with NP, his brother said that the respondent could fit an automatic switch to the heaters and provide him with a work buddy, and the claimant believed that these reasonable adjustments would *'solve the problem'*. This, he said, meant he no longer needed to take his prescription anti-anxiety medication.
133. The claimant confirmed that the decision meeting before NP, he was still too unwell to return to work.
134. MPL asked the claimant about the last Occupational Health report, noting that it said he might be okay to work in the future. The claimant said *'if the light-headedness was gone and the sleeping returned to normal there's no reason why I couldn't return as a driving examiner. In the meantime, it would of help if the grievances had been resolved quicker (sic)'*. He said the only thing he was struggling with was the lack of extra time between tests.
135. He confirmed that the trazodone made him lightheaded, and that when he stopped taking it, he was no longer lightheaded. He said he had twice he stopped taking it, on both occasions when he attempted to return to work, May and again in July 2022. He said he had not taken medical advice before doing so on either occasion because his doctor did not say he needed to consult with her before stopping.
136. After a break, DG summarised the claimant's appeal by saying that the claimant's stress was caused by two factors. The first, *'major'* factor was that the brain haemorrhage in 2014 had led to a failure over *'a number of years'* on the part of the respondent to make reasonable adjustments which had, in turn, caused a deterioration in his condition. He said that the respondent had failed to act consistently with other cases in which *'similar conditions with memory and stress and alike'*. He said there had been a failure to act professionally towards the claimant, from colleagues and his line manager, as a result of which the claimant found himself in a position that he may otherwise not have been in. Finally, DG said that, although he had been informed by NP that the respondent no longer holds *'an options meeting'* as part of its capability procedure, he nevertheless noted that one had not been held in this instance and believed that it should. He did not state what options he believed should have been made available to his member.
137. MPL rejected the claimant's appeal, finding that at the decision meeting all the evidence before NP was that the claimant's absence had been for a significant period, and that the reason for the dismissal was that the claimant was unable to return to work within a reasonable timescale that could be supported. On **24 September 2022** the claimant was sent a letter confirming the outcome. In it, MPL stated that he found that the decision to dismiss was reasonable and that at the point the decision was made, the claimant was clearly unfit return to work and that his absence had been of such duration that it was not reasonable to continue to support it.

Legal Framework

Unfair dismissal

138. An employee has the right under section 94 of the Employment Rights Act 1996 (ERA) not to be unfairly dismissed. It is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held: ERA section 98(1).
139. Section 98(4) poses a single question namely whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant. It requires the Tribunal to apply an objective standard to the reasonableness of the investigation, the procedure adopted and the decision itself.
140. The tribunal must have regard to the appeal process when considering the unfair dismissal claim. It should examine the fairness of the disciplinary process as a whole and each case will depend on its own facts – **Taylor v OCS Group Ltd** [2006] ICR 1602, [2006] IRLR 613.
141. When considering whether there an employer should have considered the possibility of ill health retirement before deciding to dismiss it is important to consider whether on the facts of the particular case there was any real reason to think that an employee is or might be eligible: **Matinpour v Rotherham MBC** UKEAT/0573/12.
142. Section 15 of the Equality Act 2010 provides:- (1) A person (A) discriminates against a disabled person (B) if – A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that treatment is a proportionate means of achieving a legitimate aim.
143. The tribunal must determine whether the reason for any unfavourable treatment was something arising in consequence of the claimant's disability – this involves an objective question in respect of whether 'the something' arises from the disability which is not dependent on the thought processes of the alleged discriminator.
144. Any unfavourable treatment must be shown by the claimant to be as a result of something arising in consequence of the claimant's disability, not the claimant's disability itself. The EHRC Code at paragraph 5.9 states that the consequences of a disability '*include anything which is the result, effect or outcome of a disabled person's disability*'. It has been held that tribunals might enquire as to causation as a two-stage process, albeit in either order. The first is that the disability had the consequence of '*something*'. The second is that the claimant was treated unfavourably because of that '*something*'. In **Pnaiser v NHS England** 2016 IRLR 170 EAT it was said that the tribunal should focus on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious for process of that person, but to keep in mind that the actual motive in acting as the discriminator did is irrelevant.
145. Disability need only be an effective cause of unfavourable treatment. The claimant need only establish some kind of connection between his or her disability and the unfavourable treatment. A claimant can succeed even where there is more than one reason for the unfavourable treatment. As per Simler J in the **Pnaiser** case, the '*something that causes the unfavourable treatment need not be the main or sole*

reason, but must have at least a significant (more than trivial) influence on the unfavourable treatment, and so amount to an effective reason or cause for it'. There may be more than one link in a chain of consequences, 'however the more links there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact'.

146. Section 26 Equality Act 2010 provides that a person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
147. In deciding whether it has the proscribed effect, s.26(4) requires the tribunal to take into account each of the following: the perception of B; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect.
148. The duty to make reasonable adjustments arises under Section 20 of the 2010 Equality Act which provides as follows '*(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*'.
149. The tribunal must identify the provision, criterion or practice applied, the non-disabled comparators and the nature and extent of the substantial disadvantage suffered by the claimant. '*Substantial*' in this context means more than minor or trivial.
150. If the duty arises, it is to take such steps as is reasonable in all the circumstances of the case for the respondent to have to take in order to prevent the PCP creating the substantial disadvantage caused to the claimant. This is an objective test, where the tribunal may substitute its own view of reasonableness for that of the employer.
151. To be '*reasonable*' there need only to be a prospect that the adjustment would alleviate the substantial disadvantage, not a '*good*' or '*real*' prospect. It is unlikely to be reasonable for an employer to have to make an adjustment involving little benefit to a disabled person.
152. As to what amounts to a reasonable adjustment, there are a significant number of factors to which regard must be had which, as well as the employer's size and resources, will include the extent to which the taking the step would prevent the effect in relation to which the duty is imposed.
153. An employee has the right not to suffer unauthorised deductions from wages: s.13 ERA 1996. 'Wages' means any sums payable to the worker in connection with his employment': section 27(1). This definition of wages does not include payment of a sum in lieu of notice: **Delaney v Staples** [1992] IRLR 191, HL.

Discussion and Conclusions

Unfair Dismissal

154. We are satisfied that the genuine reason for the claimant's dismissal related to the claimant's lack of capability. The claimant had been off work at the date of dismissal for over 7 months and he had informed NP that his own view of his ability to return to work accorded with that of his GP as well as that of Occupational Health. He had confirmed to NP that he remained, at the date of dismissal, unfit to work as an examiner, with no indication of a return to work in the foreseeable future. Indeed, the claimant advised that his medication caused light-headedness which prevented him from driving. NP's view was arrived at only after several absence review meetings to discuss the claimant's health, the obtaining of two Occupational Health reports and a further decision meeting. We have found that the claimant's own declarations that he was a health and safety liability was something that formed no part of NP's decision to dismiss the claimant.
155. We are satisfied that the claimant was aware of the risk of dismissal, there being no suggestion raised at the time or in these proceedings that he was not. He was represented at all stages by his trade union, and he repeatedly expressed his concerns about the possibility of termination of his employment.
156. The claimant was provided with, and appears to have availed himself of, the Employee Assistance Programme as well as six sessions of counselling, albeit to little apparent effect. He was twice referred to Occupational Health to provide a report on his ability to work.
157. Although Occupational Health advised that he '*may be able to do some office work*', there was no such opportunity at the Gosforth depot, and the claimant does not suggest that there was. There was an administrative role at the Lightbox. We do not think the respondent can be criticised for failing to make a formal offer of an administrative role at the Lightbox when the claimant himself not only confirmed that he did not believe he was capable of retraining but furthermore, that such an option was, in his view, likely to compound the stress and anxiety that was the very cause of his absence from work.
158. We further note that the claimant's own trade union representative was openly expressing his own concerns about the claimant's position at the decision meeting with NP.
159. The claimant remained, according to his fit note and according to Occupational Health, unfit to work when on 21 July 2022, he attempted a return to work without warning. The claimant was unfit to resume work, according to his doctors fit note. We see little significance in NP treating the claimant as unfit to be a work on that day; he had no real alternative.
160. We have considered whether, that stage, NP should have deferred his decision to dismiss the claimant, to make further enquiries of Occupational Health about the claimant's declaration that he was forthwith fit to return to work. It was certainly an option open to him, albeit not one that the claimant, or his trade union representative had sought at the time. NP, however, had before him a claimant whose position only 4 days earlier was that he agreed with the evidence of the GP and Occupational Health i.e. that he was unfit to work and furthermore his incapacity was such that his trade union representative had informed him that he was making an application for ill-health retirement. Indeed, the only change in circumstances since the decision

meeting was the claimant's withdrawal from prescribed medication without medical approval or even consultation. We do not consider that it was outside the band of reasonable responses for NP in those circumstances to proceed to dismiss the claimant without making a further referral to Occupational Health. Furthermore, having regard to the fact that even at the appeal stage the claimant was still of the view that his sleeping difficulties and his light-headedness needed to be rectified before he could return to work, we do not consider that any failure to make a further referral to Occupational Health at this stage amounted to a procedural failing rendering the dismissal unfair.

161. The claimant took the opportunity to appeal NP's decision. He confirmed that he had informed NP that he remained unfit to return to work. He informed MPL that there were a number of causes of his current stress and anxiety, including a historical failure to make reasonable adjustments that he said compounded his stress, the 8-test day proposal, his belief that he was being bullied by GW, and the length the grievance investigations took. At the point MPL made his decision, the 8-test day proposal had been abandoned and the claimant's expressed belief that he was being bullied by GW was connected to his grievance, the appeal stage of which had not yet concluded. GW's grievance was yet to be completed, also.
162. Although ostensibly conducted as a review of NP's decision, MPL did in fact make enquiries about the claimant's current state of health and its prognosis. The claimant said that he continued to suffer from light-headedness and sleep disturbance. The Occupational Health physician stated that the claimant was not fit to work whilst he had sleeping problems. The immediate cause of the light-headedness was a prescription medication for anxiety; the physician stated that the claimant was not to drive whilst lightheaded. Save those occasions when the claimant said he had ceased taking them without medical approval, there was no suggestion that his medication was likely to be changed. Nor was there compelling evidence that the claimant's sleeping difficulties were likely to cease, in the foreseeable future. The claimant was effectively representing to MPL that he continued to be unfit to work for the very reasons that the Occupational Health physician had said he was unfit to return to work.
163. Furthermore, the claimant's grievance appeal had not yet concluded; although it might be have been anticipated that it was likely to be concluded in the near future – the appeal hearing with WF had taken place on 19 August 2022 - GW's grievance had not yet been concluded and the claimant had informed MPL that his recovery had been hampered by the mere knowledge that GW had submitted a grievance against him.
164. We address the various specific criticisms made of the procedure by the claimant.
165. As we have already observed, the only administrative role was one based at the Lightbox. It was not suggested by the claimant that there were any other administrative roles which could or should have been offered to him. The possibility of working in a role at the Lightbox was discussed at the meeting on 6 July 2022 with BL, but the claimant rejected it as an acceptable option. He did so again, when it was raised by NP at the decision meeting on 18 July 2022.

166. The respondent did not obtain updated Occupational Health advice, as alleged by the claimant, ‘*after 12 June*’ (by which we understand the claimant to mean, simply, that the respondent could have, but failed to obtain a third such report). When NP dismissed the claimant on 22 July 2022, the last report had been produced some 6 weeks earlier, on 6 June. The claimant did not suggest to either BL or NP that there was a need for an updated report. Nor was there any obvious change in circumstances that might demand another report. On the contrary, the factors said by the physician to amount to contraindications of a return to work, were extant when NP made his decision and again when MPL made his decision. The claimant reported that he continued to have sleeping problems and his medication caused him to be lightheaded. No updated report was necessary at the dismissal or appeal stage.
167. Turning to the contention that the respondent failed in its obligation to direct the claimant to the possibility of ill health retirement or guide him through the process. This matter emerged and was pursued as an issue in these proceedings seemingly only after a question was posed by a member of the Tribunal panel. We are not persuaded that the Attendance Policy requires management to seek Occupational Health opinion on the specific question whether the ill health retirement criteria are met, rather it requires the seeking of advice, we interpret to allow *management ‘to consider’* whether they are met. Furthermore, we consider, in the absence of anything to suggest that a failure to adhere to the strict letter of the ill health retirement policy would give rise to any liability, a guidance document only. We imagine, but readily accept that the policy does not state in terms, that the employee should have reason to believe they fulfil the eligibility criteria before placing a requirement on the employer to inform the employee whether or not it intended to refer him for assessment. Whatever the correct interpretation of the policy, NP did not do as the policy apparently requires, but the claimant was represented by his trade union at the time who not only had thought about the possibility, but also informed NP on 18 July 2022 that the claimant intended to apply. Three days later, the claimant informed NP that he ‘*didn’t qualify*’. The claimant was 57 years of age at dismissal, the eligibility criteria required a likelihood of an inability to work until retirement age and that there was no medical evidence to suggest that the claimant was likely to be permanently incapacitated; on the contrary, the Occupational Health report of 6 June 2022 suggested that the claimant would be fit to return to work in the right circumstances. Applying **Matinpour**, we consider that there was no real reason for the employer to think that the claimant was, or might be, eligible. Finally, on the claimant’s own oral evidence, ill health retirement was not something that he sought to explore, but rather something that his trade union raised on his behalf. Thus, even in the event that the attendance policy and ill health policy required management to adhere strictly to its wording, we are unpersuaded that any failing to do so made any difference, on the facts of this case, to the fairness of the claimant’s dismissal.
168. We have already observed that there was nothing inappropriate in the manner in which BL conducted the meeting on 8 July 2022. In any event, the question for the Tribunal is whether the decision made by NP was fair or unfair – BL’s actual or alleged conduct at the previous meeting had no discernible impact on NP’s decision and the claimant did not suggest it did. Furthermore, the claimant was, at that meeting with NP on 18 July 2022, accompanied by DG, senior trade union official who was likely to have significantly greater experience than KS.

169. MPL believed that NP had decided to dismiss because the claimant's absence was unsatisfactory and unsustainable. As we have found, the claimant's declaration that he was a health and safety liability was not a factor in NP's decision to dismiss the claimant. The claimant and his trade union representative did not invite MPL to take a view on the relevant passage in the dismissal letter, much less invite him to '*investigate*' NP's decision to decide whether it was. There was no need, and no relevant failing, to investigate whether it was.

170. The claimant had been absent from work for over 7 months when NP made his decision to dismiss, in circumstances where there was no reliable indication of when his health would improve to the extent that he was fit to return to work. By the time of the appeal, almost 8 months had passed and the claimant confirmed to MPL that he was still suffering from the symptoms that, according to Occupational Health, rendered him unfit to return to work. The decision to dismiss the claimant in those circumstances, as well as the procedure adopted, fell within the band of reasonable responses.

171. The complaint of unfair dismissal is not well founded and is dismissed.

Section 15 complaint

172. The respondent knew at all material times that the claimant was a disabled person by reason of his brain haemorrhage and Meniere's disease.

173. The claimant's dismissal clearly amounts to an act of unfavourable treatment. The claimant identifies the '*something*' as the claimant's continued absence from December 2021 and the parties agree that the claimant was dismissed because of that '*something*'.

174. Although the claimant sought to argue, more generally these proceedings, that his own declarations of being health and safety liability were a factor in NP's decision to dismiss the claimant, we do not understand that the claimant places any reliance on this in respect of this claim. In any event, we have found, for reasons we have explained above, that the reference to the claimant making declarations that he was a health and safety liability formed no part of NP's decision to dismiss the claimant.

175. The '*something*' relied upon by the claimant is his absence. The ostensible reason for the claimant's absence was stress and anxiety. That was not relied upon as a disability in the claimant's case.

176. There is no issue between the parties that the claimant suffered from dizziness, being a symptom of his Meniere's disease, and '*memory problems*' which was caused by his brain haemorrhage. The claimant says, and the respondent agrees, that there is a '*connection*' between his absence and his dizziness / vertigo and memory problems. A connection is insufficient; what is required is that at least one of his disabilities is an effective cause of his absence.

177. The question for the tribunal was whether it can be established that the absence arose in consequence of one or both of the claimant's disabilities. The burden of establishing as much is on the claimant. The test is an objective one. The reason need not be the main reason, much less the sole reason, so long as it is an effective

or significant i.e. one that is more than a trivial cause. There may be more than one causal link.

178. We considered what evidence there was before us that the dizziness and vertigo was a factor in the claimant's absence. Historically, the Meniere's disease had caused dizziness or vertigo on an evening or weekend or so that it caused the claimant to take only a modest time off work, and even so, the claimant enjoyed a better attendance record was better than most of his colleagues.
179. The claimant reported a flare up of vertigo in the weeks after his absence commenced. In the minutes of the informal meeting on 12 January 2022, the claimant said that usual frequency of episodes was 1-2 times per year, but that he had suffered three bouts of dizziness in the previous month, albeit these had improved from being constant to being intermittent. It appears, therefore, that in the first month of his absence he had suffered an increased number of vertigo attacks, but they had already begun to improve. We found that the last episode occurred in or around mid-April 2022.
180. Throughout this period, the claimant was on sick leave and the reason given by his GP was stress and anxiety. The fit notes do not suggest that dizziness or vertigo was an operative cause of the claimant's absence even in the December 2021-January 2022 period. Notably and despite the fact that both Occupational Health reports mention the episodes of dizziness, neither suggested they were a contributory factor to the claimant's absence, instead particularising the reasons for his absence as being low mood, poor sleep and low concentration.
181. Finally, we do not understand the claimant or his counsel to say that it was a significant cause of his absence.
182. We therefore considered the evidence of any link between the stress and anxiety and the flare up of episodes of dizziness and/or vertigo.
183. There was no evidence before us to suggest that stress and anxiety arose in consequence of the claimant's Meniere's disease. There was, however, evidence contained in the first Occupational Health report of 21 February that the flare up of episodes of vertigo was triggered by the stress and anxiety.
184. We conclude that there is insufficient evidence before us that, on the balance of probability, the dizziness spells or vertigo attacks that the claimant suffered during his absence were an effective cause of his absence. On the evidence before us, the cause of the claimant's absence was stress and anxiety. We were provided with no evidence to support an argument that the stress and anxiety arose in consequence of Meniere's disease; there was evidence, however, that the reported flare up of dizziness and vertigo attacks was a consequence of the stress and anxiety.
185. We turn to consider the claimant's memory problems that are symptoms of his brain haemorrhage. The evidence before us is that the claimant suffers short-term memory problems. The claimant declared his condition and was cleared by the DVLA to drive. The disability or its symptoms did not appear to impact historically on the claimant's attendance at work. The evidence before us suggests that the claimant was, before 9 December 2021, fit to work full-time working a 7-test day. He

had been working efficiently before he was absent from work. In circumstances where he knew he was able to seek reasonable adjustments, he withdrew his application to work part-time so that he could return to working a 7-test day. There was no evidence of a deterioration of his memory problems; the Occupational Health physician anticipated circumstances in which he could return to his role, albeit on a phased return.

186. We do not discount the possibility that a medical link might be made between the claimant's short term memory problems and his absence, but no such medical evidence was presented to us. Neither the fit notes or the Occupational Health reports support a finding that the claimant's memory problems were the, or an, effective cause of his absence.
187. We did not consider that there was any other reliable evidence that the claimant's short term memory problems were, of themselves, an effective cause of the claimant's absence. Although the claimant was informing his employer during his absence that he was displaying behaviour that would be of concern to an employer were he at work, this information was not supported by any other source of evidence at the time and was not a bar to the claimant's return on his own account given to MPL. We consider that the most that can reasonably be said of the behaviour that the claimant reported during his absence is that may have coincided with his absence but we are not satisfied that it was not a direct cause of it.
188. We are not satisfied that there is evidence to support a causal link between the claimant's short term memory problems and his absence. We therefore consider the evidence of a link between the claimant's short term memory problems and his stress and anxiety.
189. The Occupational Health physician stated, that the claimant's memory problems were upsetting to him and that '*this is a trigger for his stress related issues*'. There may have been several effective causes for the claimant's stress and anxiety but on the evidence before us, his short term memory problems is certainly one of them. That is evidence of a link between his memory problems and his stress and anxiety.
190. The question for the tribunal, therefore, is whether the claimant's memory problems were the trigger for his stress related issues to the extent that they were also an effective cause of his absence; if that chain of causation can be made out on an objective basis, then the treatment can be said to arise in consequence of the disability.
191. The claimant in his own evidence claims his short-term memory problems were causing him such anxiety and stress that it caused him to be off work. There were no difficulties with the claimant's memory at work, immediately before he went on sick leave and what precipitated the absence was a car accident. We are not satisfied that the claimant's memory problems caused him stress and anxiety such that it caused him to go on sick leave.
192. We consider the evidence to support the possibility that the necessary link was an effective cause of the claimant, having commenced sick leave, then remaining absent from work. The claimant says that his short term memory loss caused him to act in a way that caused him alarm and worry. Examples including causing a fire

risk, nearly running over his wife and scalding his grandchild. If that worry were an effective cause of the claimant remaining absent from work, then that would be sufficient to create the necessary causative link. However, the difficulty the tribunal had with the type of behaviour the claimant was informing his employer about, was that we would expect to see other evidence that, even if not directly supporting, was at least consistent with the types of behaviour that the claimant was reporting. There was no evidence that the claimant's condition was deteriorating and no comment from the claimant's GP or Occupational Health about the extent to which his memory problems affected him. Not only did the physician in the report of 6 June 2022 report that in the right circumstances the claimant would be able to return to work, we note that before MPL, the claimant said he saw 'no reason' not to return to work once his sleeping problems and light-headedness abated; that would be both odd and dangerous if the claimant's memory had caused him the difficulties he was reporting to his employer. The evidence we had pointed away from the claimant encountering the types of difficulties he was reporting to his employer at the time and that he relies upon as causing him the stress and worry that he says was an effective cause of his absence. We are not satisfied of the claimant's case in this regard and it is no part of the claimant's case that his stress and anxiety was caused by an erroneous perception on his part of his memory problems.

193. What there was before the tribunal, however, was a significant amount of evidence to the effect that the claimant had, over time, become disillusioned to the point of embitterment about his job role. It affected his personality, his outlook and his relationships with all his colleagues, including his line manager, a relationship that both men regarded as good until recent times. We considered that to be compelling evidence of a build up of stress and anxiety on the part of the claimant.
194. The claimant accused GW of conducting a bullying campaign, something that is unsupported by any evidence before the Tribunal. The claimant's grievance consisted of two discreet complaints about GW, neither of which were events that, on our findings and in the context of their relationship, out of the ordinary and more relevantly, neither of which were connected to the claimant's memory problems.
195. Our findings aside, on the claimant's own account at the time, he regarded the more serious allegation of the two as being the accusation that GW sent a picture to PD, which was, again on his own account at the time, wholly unconnected to his disability. The claimant reported that he doubted his own judgment about the alarm key incident to the extent that he discussed with MB whether he was being overly sensitive about GW's comments. He passed comment to LT that 'people' used the phrase '*etch a sketch head*', and he described how he was able to laugh it off to her and although he subsequently denies saying that at the appeal stage what is clear is that comment – nor any comment about a wobble head – formed any part of his grievance. On the claimant's own case, we regard these features to be a feature of a much greater unhappiness the claimant had with his employer more generally; he had changed from someone who was jovial, well regarded and very well liked to someone who was to be avoided and who repeatedly and openly expressed a desire to leave his job, either by retiring or taking another job with better pay. We were not satisfied that these elements, on the balance of probability were more than a trivial cause of his absence from work. However, on our findings, discussed further below, the claimant has not in fact established that the alarm key incident and any comments made were connected to his disability.

196. Throughout March 2021 and on 21 April 2021, the claimant was himself connecting his inability to ‘*make progress*’ with a return to work with the outstanding grievance investigation. His attempt to return to work in May 2022 was stymied when he was informed that his own line manager had submitted a grievance against him, almost immediately after LT had found against the claimant; understandably, that set his progress back. The claimant asked LT to reopen her grievance investigation. A week after he was interviewed by DH in relation to GW’s grievance, the claimant’s GP commenced providing him with monthly, instead of fortnightly fit notes. The claimant appealed the outcome of LT’s extended investigation. The Occupational Health physician was of the view that the claimant would struggle to return to work whilst the grievance investigations were ongoing.

197. We consider that there is ample evidence that the investigation into the claimant’s grievance was a significant and effective cause of the claimant’s absence. The claimant’s grievance consisted of a complaint that GW bullied him and humiliated him by referring to his memory problem. As steadfast as the claimant was in expressing that belief, and proceeding on the basis that it was a genuine belief, it was an erroneous belief. We are unable to identify any evidence before us to link the claimant’s subjective and erroneous belief about his manager to his disabilities. We do consider, however, that the claimant’s scepticism of his manager was part of a much bigger and longer standing unhappiness with his employer and his role. We are unable to identify any evidence to link the claimant’s disillusionment with his job to his disabilities. We consider it may well be possible that there exists a medical link between what was described by his peers as a personality change, and his disabilities, or their symptoms, but we can identify no evidence of such a link before us, and the claimant does not identify such a link.

198. The burden rests on the claimant to establish a link between his absence and his disabilities. The link, or the chain of links, need not be the main cause, much less the sole cause of the treatment, but it must nevertheless be an effective cause. Whether the disabilities are taken together or separately, we are not satisfied, on the balance of probabilities and on the evidence before us, that there was any such link or chain of links between the two.

199. The complaint is not well founded and is dismissed.

Reasonable Adjustments

200. The respondent accepts that it operates and applies a provision, criterion or practice requiring post holders to undertake the duties of their post.

201. The application of the PCP put the claimant, when compared to others who are not disabled to the substantial disadvantage of being unable to work on or after the 12 June.

202. We also accept that the application of the PCP meant that the claimant, when compared to others who are not disabled, was at increased risk of being subject to the respondent’s capability procedure.

203. The respondent knew that the claimant was put to both substantial disadvantages above; it applied the absence management procedure because the claimant was absent.
204. The question for the Tribunal was whether it was a reasonable adjustment to the PCP to allow the claimant to undertake administrative duties or offer him an alternative role so as to avoid dismissal.
205. We have found that there were no administrative duties for the claimant to carry out whilst unfit to carry out the role of driving examiner, and the claimant did not suggest to his employer or to this tribunal that there were. It formed no part of the claimant's case that the respondent should have created a temporary role for him but, for the avoidance of doubt, it would not have been reasonable to do so; on the evidence before us, driving examiners are necessarily required to complete their own paperwork and the managerial role, of which the claimant has no experience, was being carried out by GW.
206. The only available alternative role was the administrative role at the Lightbox. The respondent discussed that role with the claimant on 6 July 2022. The claimant replied that the prospect of retraining into such a role was likely to aggravate his stress and anxiety; it would '*send it through the roof*'. He had occupied his driving examiner role for over 22 years and there was no evidence that he had any experience of carrying any administrative duties. The claimant said his blood pressure had dramatically increased as a result of recent events and that his blood pressure medication had been doubled. We are satisfied, on the evidence before us, that offering the claimant that role was not a reasonable adjustment because it was unlikely that doing so would lead to the prospect of a return to work and/or a prospect of avoiding being subject to the absence management procedure.

Harassment complaints

207. The claimant accepted in evidence as confirmed in his closing submissions that he does not allege that these acts were done with the purpose of creating the proscribed environment, only that it had the necessary effect.

On or around 31 August GW said to the claimant 'if you have a head wobble. .'

208. This complaint was dismissed upon withdrawal by the claimant.

Between 14 and 18 October 2021, GW showed PD a photograph of the claimant's lip and told him that it was as a result of the claimant forgetting his wedding anniversary.

209. We note that although the claimant maintains in his written evidence that GW sent a photograph to PD, although he chooses to advance an allegation before this tribunal is that PD was shown the photograph, seemingly on the basis that this is what PD told LT. We further note that the claimant contends now, even though he made no mention or complaint of it in his grievance, and despite the incident occurring in his absence, that the showing of the photograph to PD was accompanied by a comment about the claimant.

210. We have found that GW did show PD a photograph of his lip on a date in or around mid-October 2022; we also found, he made no comment to PD linking the photograph to the claimant. On that basis the factual allegation is not well founded.

211. It necessarily follows that we did not accept the claimant's contention that GW passed comment to PD, as alleged in these proceedings that *'this was result of the claimant forgetting his wedding anniversary'*. That being so, the necessary link to disability is not made out; it cannot be said that the showing a picture of a swollen lip of itself amounts to conduct related to disability.

212. This allegation of harassment is not well founded.

On 29 November 2021, GW repeatedly asked the claimant directly whether he could remember the alarm key number.

213. We found JB's evidence to LT the most helpful in arriving at our findings of fact about this allegation. We did not find that GW made repeated comments that were directed at the claimant; we find he directed one comment to the claimant to the effect of *'Alan, can you remember key 31?'*. For that reason, the factual complaint fails.

214. In any event, although the conduct alleged was plainly unwanted, we were not satisfied that the conduct as we found it to be was related to the claimant's disability; we consider that it was related to the fact that the alarm had been activated, that the office had learned that it had acquired responsibility for the alarm key, that GW was not consistently at the Gosforth office, that the keys were kept amongst a number of other keys and that GW was concerned to ensure that his staff knew how to retrieve it, if required.

215. Nor, for the avoidance of doubt, were we satisfied that it was reasonable, in all the circumstances for the comments to have the proscribed effect; it was important to ensure that staff knew how to deactivate the alarm, GW made approximately two further comments directed at both the claimant and JB, and on the claimant's own account, he had wondered whether he was overreacting, and sought the opinion of MB. Having regard to MB's own comment to LT to the effect that the atmosphere was uncomfortable, that does not assist in this analysis; he was there only for less than a minute of the exchange and if MB had observed the claimant's retort to GW – of this we have no evidence – then we would be unsurprised by his description. Nor is MB's description consistent with JB's account that, having observed the whole of the incident, she considered that GW was behaving as his usual self .

216. This complaint is not well founded.

On 21 July 2021 NP told the claimant he had to leave the premises because he was a health and safety risk due to his memory issues

217. We have found that what NP said to the claimant was that he was required to leave *'for medical reasons'*. For this reason, together with the fact that the claimant's own written evidence did not support this factual allegation, the complaint is not well founded.

On 22 July 2022, the respondent, in its letter of dismissal, referred to the claimant's declaration that he was a health and safety liability to justify his dismissal.

218. The comments were not related to disability, but to the fact that the claimant had described himself as a health and safety risk; the words reflected the claimant's own. They were used to emphasise the point that NP's decision was not inconsistent with the claimant's own comments. We considered whether it was reasonable for the conduct to have had the proscribed effect. We conclude that the comments were unnecessary, confusing and had the obvious potential to offend. Had the claimant described himself as a health and safety liability once, or only a few times, we may have been persuaded that it was reasonable to have the proscribed effect. However, the claimant's emails and the minutes of the meeting reveal that the claimant repeated this comment, and on at least one occasion commented that his GP agreed that he was a health and safety 'problem'. We also consider the claimant's perception; neither the claimant nor his trade union representative raised the comment again either with NP or MPL on appeal, as a something that caused, required apology, or even something that required clarification; they did not refer to it again, something we consider unusual given the volume of correspondence and length of meetings in this case. It is in those circumstances that we are unable to conclude that it was reasonable for the comment to have had the effect of creating the proscribed environment.

Unauthorised deduction from wages

219. The claimant was receiving sick pay at half the rate of his ordinary pay when he was dismissed. The respondent paid him his notice pay at half rate, which it maintains is consistent with his contractual entitlement. The claimant contends that his notice pay should be paid to him at the full rate of pay.

220. The payment the claimant received on termination of his contract of employment was in relation to the period after his employment was terminated; it was a payment made in lieu of notice. That payment does not constitute 'wages' for the purposes of a s.13 claim: **Delaney v Staples**.

221. The complaint is not well founded.

Employment Judge Jeram

Date: 9 May 2024

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Appendix A
Issues agreed between the parties

Summary of the Claimant's claims

1. The Claimant was unfairly dismissed contrary to sections 94 to 98 of the Employment Rights Act 1996 ("the ERA");
2. The Claimant was subjected to unfavourable treatment because of something arising from disability contrary to section 15 of the Equality Act 2010 ("the EqA");
3. The Respondent failed to comply with a duty to make reasonable adjustments contrary to section 21 of the EqA;
4. The Claimant was subjected to harassment contrary to section 26 of the EqA;
5. The Claimant was subjected to an unlawful deduction of wages contrary to section 13 of the ERA.

Jurisdiction

6. Have the Claimant's disability discrimination claims been brought within three months starting with the acts and omissions to which the claim relates, subject to any extension resulting from ACAS Early Conciliation?
7. If not, do the alleged acts and omissions which the Claimant refers to in his claim form constitute a continuing act of discrimination, the end of which fell within the time limit?
8. If not, are there any grounds on which it would be just and equitable to extend time?

Disability (s.6 EqA)

9. It is accepted by the Respondent that the Claimant was disabled by reason of his Meniere's disease and his memory problems caused by a subarachnoid haemorrhage at the relevant times.

Claim 1: Unfair Dismissal (s.94 - 98 of ERA 1996)

10. It is accepted that the Claimant's termination amounts to a dismissal within the meaning of section 95(1)(a) of the ERA.
11. What was the reason for the Claimant's dismissal? It is the Respondent's position that the Claimant was dismissed on the grounds of his capability.
12. Did the Respondent have a fair reason to dismiss the Claimant within the meaning of section 98 of the ERA?
13. If so, did the Respondent act fairly and reasonably in the circumstances within the meaning of s98(4) of the ERA in treating the reason as a sufficient reason for dismissing the Claimant.
14. Did the Respondent carry out a fair and reasonable investigation before dismissing the Claimant?
 - a. The Claimant avers that the Respondent:
 - i. Failed to explore the Claimant's options in respect of alternative work in the meetings of 6 July 2022 (chaired by Brian Lynn) and 18 July 2022 (chaired by Neil Petrie).
 - ii. Fail to enquire about alternative roles for the Claimant within the DVSA.
 - iii. Failed to obtain medical evidence or refer the Claimant for a medical examination to assess whether he was fit to work as a driving examiner and or to undertake work in an office-based role after 12 June 2022.
 - iv. Fail to obtain Occupational Health advice (in accordance with the guidance on formal health and attendance review meetings at page 817 of the hearing bundle) to consider whether the Claimant was likely to meet the criteria for ill-health retirement as an alternative to dismissal.
 - v. Failed to tell the Claimant about ill-health retirement and if they intended to refer him for it and failed to guide him through each stage of the ill-health retirement process, as per the Ill-Health Retirement guidance at page 996-997 of the hearing bundle.
15. If there were any procedure failings which rendered the Claimant's dismissal unfair, would the Claimant still have been dismissed had a fair procedure been followed?
 - a. The Claimant says that the manner in which the questions were asked by Brian Lynn on 6 July 2022 were inappropriate, as the Claimant was 'bombarded with lots of different questions despite everyone being aware of the Claimant's memory problems, they were very quickfire', he was asked questions that were 'very leading and confusing the Claimant' and that Kevin Stephen attempted to put his virtual hand up to interject and stop what he considered to be an 'onslaught' however he was ignored paragraphs 6 to 8 of Kevin Stephen's witness statement).
16. Was the Respondent's decision to dismiss the Claimant within the range of reasonable

responses available to a reasonable employer?

17. Did the Respondent conduct fair appeals process?

- a. The Claimant avers that the Respondent failed to carry out a fair appeals process as Mr Pearson-Leach:
 - i. Failed to investigate whether the Claimant's declaration that he was a health and safety liability formed part of Neil Petrie's decision to dismiss him.
 - ii. Failed to obtain or consider obtaining an Occupational Health report to confirm whether the Claimant was fit to return to work after 12 June 2022.
 - iii. Failed to ascertain whether Neil Petrie had considered obtaining a Occupational Health report to confirm whether the Claimant was fit to return to work.
 - iv. Failed to obtain or consider obtaining Occupational Health advice to consider whether the Claimant was likely to meet the criteria for ill-health retirement.
 - v. Fail to ascertain whether Neil Petrie had considered obtaining Occupational Health advice to consider whether the Claimant was likely to meet the criteria for ill-health retirement.

18. If there were any procedural failings which rendered the Claimant's dismissal unfair, with the claimant have been dismissed had a fair procedure been followed?

19. Was the Respondent's reasons a sufficient reason given their size and resources in all the circumstances?

Claim 2: Discrimination arising from disability (s.15 EqA 2010)

20. Did the Respondent subject the Claimant to the following treatment, and if yes was that unfavourable treatment of him?

- a. The Respondent accepts that the Claimant's dismissal on 22 July 2022 is capable of amounting to unfavourable treatment.

21. At the time the Respondent subjected the Claimant to the treatment, did the Respondent know, or ought it to have known, that the Claimant had the disabilities of Meniere's disease and memory problems caused by a subarachnoid haemorrhage?

- a. The Respondent admits that, at all material times, the Claimant was disabled by reason of Meniere's disease and memory problems caused by a subarachnoid haemorrhage.

22. Was the treatment because of one or more of the following "somethings"?

- a. The Claimant's continued absence from December 2021, which was connected

to the Claimant's memory issues and/or dizziness.

23. Did the 'somethings' above arise in consequence of the Claimant's disabilities of Meniere's disease and memory problems caused by a subarachnoid haemorrhage?
24. What were the legitimate aims that the Respondent are relying on to justify the treatment of the Claimant? The Respondent relies on the following legitimate aims:
 - a. Running an efficient service to protect scarce public funds.
 - b. Ensuring staff were capable of demonstrating satisfactory attendance levels; and
 - c. Applying policies and procedures fairly and consistently.
25. Was the treatment of the Claimant a proportionate means of achieving those aims?

Claim 3: Failure to make reasonable adjustments (ss.20-21 EqA 2010)

26. The Respondent admits that they applied the following PCPs to the Claimant:
 - a. Requiring the Claimant to be able to drive to undertake all the duties of his post.
27. Did the application of the PCPs put the Claimant, because of his disabilities of Meniere's disease and memory problems caused by a subarachnoid haemorrhage, to the following substantial disadvantage(s):
 - a. The Claimant could not return to work after 12 June 2023 as he was deemed unfit to drive; and/or
 - b. The Claimant was more likely to be subjected to the Respondent's capability process. (i.e. the Claimant is more likely to exceed the 'trigger point' referred to at paragraph 51 of the Supporting Attendance Procedure and is therefore more likely to be subject to consideration of dismissal/downgrading, as referred to at paragraph 57 of the Procedure).
28. When the PCPs were applied to the Claimant:
 - a. did the Respondent know, or ought it to have known, that the Claimant was disabled because of Meniere's disease and memory problems caused by a subarachnoid haemorrhage?
 - b. did the Respondent know, or ought it to have known, that the application of the PCP put the Claimant to the above disadvantages?
29. Did the application of the PCP put persons who did not share the Claimant's disabilities of Meniere's disease and memory problems caused by a subarachnoid haemorrhage to the above disadvantage(s)?
30. Would the Respondent taking the following steps have avoided the above disadvantages?

- a. Allowing the Claimant to undertake administrative duties when he was unable to drive or offering him an alternative role to avoid dismissal.

31. Did the Respondent take such steps?

32. If not, was it reasonable for the Respondent to have to take such steps to avoid the disadvantage?

Claim 4: Harassment (s.26 EqA 2010)

33. Did the Respondent engage in the following conduct:

- a. The Claimant's manager, Gobinder Walia, saying to the Claimant, "if you have a head wobble and you can't remember to submit it, ask Jo" in relation to a '1 2 1' form, on or around 31 August 2021.

GW disputes that this was ever said. The Respondent therefore does not admit that it occurred and does not admit that this amounts to harassment..

- b. The Claimant's manager, Gobinder Walia, showing Phil Dixon a photograph of the Claimant's lip on a date between 14 October 2021 and 18 October 2021 and telling Mr Dixon that this was a result of the Claimant forgetting his wedding anniversary. Mr Dixon told the Claimant about this incident on 18 October 2021.

The Respondent does not admit that they engaged in this conduct and does not admit that this amounts to harassment related to disability.

- c. Gobinder Walia repeatedly asking the Claimant directly whether he could remember the alarm key number on 29 November 2021.

The Respondent does not admit that they engaged in this conduct as alleged or that it amounts to harassment related to disability.

- d. Neil Petrie telling the Claimant that he had to leave the premises on 21 July 2022 because he was a danger to staff and health and safety risk due to his memory issues.

The Respondent admits that they told the Claimant to leave the premises but denies saying that he was a danger to staff and health and safety risk due to his memory issues. The Respondent states that he was told he had to leave the premises due medical reasons and following advice from HR that he needed a note from his GP or OH in order to return to the workplace,

- e. The Respondent referencing the Claimant's declarations that he was a health and safety liability due to his memory his to justify his dismissal on 22 July 2022, as

noted in the Claimant's letter of dismissal dated 22 July 2022. The Respondent admits referencing the Claimant's declarations that he was a health and safety risk in the dismissal letter.

- i. The Respondent admits that they referenced the Claimant's declarations of being a health and safety liability in the dismissal letter but does not admit that this was to justify his dismissal.

34. Was that conduct unwanted by the Claimant?

35. Did that conduct relate to the Claimant's disabilities of Meniere's disease and memory problems caused by a subarachnoid haemorrhage?

36. Did the conduct at 31(c) have the purpose, or, alternatively, the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment ?

37. Did the conduct at 31(a), (b), (d) and (e) have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment ?

38. Was it reasonable for the conduct to have that effect, taking into consideration the Claimant's perception and the other circumstances of the case?

Claim 5: Unlawful Deduction of Wages

39. The Respondent accepts that they paid the Claimant's notice pay at half pay. Did the Respondent have a contractual provision that allowed them to pay the Claimant half pay during his notice period?

- a. The claimant accepts that he was a Crown employee within the meaning of s191 ERA 1996.
- b. The Claimant accepts he was not entitled to a statutory minimum notice in accordance with s.86 ERA.
- c. Did the Respondent have a contractual notice provision that allowed them to pay the Claimant half pay during his notice period?.
- d. If the Respondent was contractually entitled to pay the Claimant's notice pay at half, was the Claimant ready, willing and able to work as of 21 July 2022, and therefore entitled to be paid his full pay during his notice period?

Remedy

40. If the Claimant was unfairly dismissed:

- a. what compensation is he entitled to receive?

- b. If the Tribunal has concluded that the dismissal was procedurally unfair, should any compensation awarded to the Claimant be reduced on the grounds that any breach by the Respondent did not make a material difference to the decision to dismiss, and as such the Claimant would have been dismissed in any event?
41. If the Claimant was subject to discrimination, what compensation is he entitled to receive?
42. If the Claimant has suffered an unlawful deduction of wages, how much is the Claimant entitled to be paid?