EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102505/2016

Heard in Glasgow on 13, 14, 15, 16, 19, and 20 December 2016
And a Members' Meeting on 13 April 2017

Employment Judge: Lucy Wiseman
Members: Elizabeth Farrell
John Hughes

Mr Charles McDougall	**Claimant** **Represented by:** **Mr L G Cunningham - Advocate**
UK Border Force	**Respondent** **Represented by:** **Mr A Gibson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is to dismiss the claim.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 21 April 2016 alleging he had been unfairly dismissed and discriminated against because of disability. The claimant also made a claim in respect of payment of notice, holiday pay and wages.

2. The respondent entered a response admitting the claimant had been dismissed for reasons of capability and/or some other substantial reason, namely long term sickness absence. The respondent admitted the claimant was a disabled person pursuant to section 6 Equality Act, but denied the allegations of discrimination.

3. The Tribunal agreed with the application made by the representatives, at the commencement of the Hearing, to limit this Hearing to determine the issue of liability. The claimant seeks the remedy of reinstatement or re-engagement if successful with his claim.

4. Mr Cunningham confirmed the claim in respect of holiday pay had been withdrawn because the claimant was now satisfied he had been paid in full.

5. The issues for the Tribunal to determine are:-

- Direct discrimination – did the respondent treat the claimant less favourably than it treated or would have treated a real or hypothetical comparator when it made stereotypical assumptions about the claimant's ability to perform his role as a Higher Officer, and did the respondent do so because of the claimant's disability.

- Discrimination arising from disability – did the respondent treat the claimant unfavourably (when it dismissed him) because of something arising in consequence of the claimant's disability (absence). If so, was the treatment a proportionate means of achieving a legitimate aim.

- Indirect discrimination – did the respondent's Attendance Management Policy put people with a disability at a particular disadvantage compared to others; did the Attendance Management Policy put the claimant at that disadvantage and if so, was the application of the Attendance Management Policy to the claimant a proportionate means of achieving a legitimate aim.

- Reasonable adjustments – did the respondent apply a provision, criterion or practice (being the way in which the contracts operated in the workplace and the pressures that those practices brought to bear on all employees and the Attendance Management Policy) to the claimant which put him at a substantial disadvantage (likely dismissal) in comparison with persons who are not disabled. If so,

did the respondent fail to make reasonable adjustments to remove that substantial disadvantage.

- Unfair dismissal – was the reason for the dismissal of the claimant the potentially fair reason of capability; if so, did the respondent act reasonably in treating that reason as a sufficient reason for dismissing the claimant and was the dismissal of the claimant procedurally fair.

- Wages

- Notice

6. We heard evidence from the claimant; Mr James Boyle, Border Force Officer and trade union representative; Ms Ann Marie Symes, Senior Officer and the claimant's line manager; Mr Adam Scarcliffe, Assistant Director, Scotland East, who took the decision to dismiss and Mr Murdo MacMillan, Deputy Director, North region, who heard the claimant's appeal.

7. We were also referred to a jointly produced bundle of documents. We, on the basis of the evidence before us, made the following material findings of fact.

Findings of fact

8. The respondent was formed in March 2012 following a merger between Customs and Immigration. The respondent is part of the Home Office, and is responsible for frontline border control operations at air, sea and rail ports in the United Kingdom.

9. The claimant commenced employment with the respondent on 18 June 1988 and was employed as a Higher Officer based at Glasgow Airport. His duties involved responsibility for a team of 6/10 employees and their deployment; HR duties such as annual leave and being Duty Manager, responsible for the airport, at times each week.

10. The claimant earned £3,583 gross per month, giving a net monthly take home pay of £2,688.

11. The claimant reported to Ms Ann Marie Symes, Senior Officer, who in turn reported to Mr Gordon Summers, Assistant Director, who in turn reported to Mr Murdo MacMillan, Deputy Director of the North region. Ms Symes had worked with the claimant on/off for 16 years and saw him on a daily basis.

12. The merger was a difficult time for all involved because the respondent brought together staff from different business areas, with different terms and conditions and wanted to achieve a flexible workforce able to perform a range of functions.

13. Ms Symes, Senior Officer, agreed one of the underlying difficulties was that each side believed the other had achieved a better deal and this fuelled a reluctance to co-operate. The key difficulties related to:-

    (i) annualised hours allowances – a number of employees were encouraged to accept a new contract, but sought to rely on their old contract when called upon to take up new duties;

    (ii) targets – a number of staff did not agree with the targets imposed on their team but had to comply or face possible disciplinary action;

    (iii) dual-trained staff – Customs officers agreed to undertake training to carry out new functions, whereas Immigration officers refused to do so when they learned it was not contractual. This led to Customs Officers carrying out a range of duties and feeling “put upon”;

    (iv) airport security – all staff working at the airport are subject to security and

(v) rosters – there were three sets of terms and conditions and three rosters. There were a number of short notice changes to rosters, and employees refusing to carry out work they had been rostered to do.

14. Ms Symes accepted the above issues were on-going bones of contention which made the role of the Higher Officer more difficult because planning was difficult, and staff were unhappy. The Higher Officers used to "moan" about these issues on a regular basis.

15. The claimant was at work on 28 January 2014. He had finished organising the team, when someone told him they had an "office day" and would not be available for what he had planned. The claimant felt he had had enough.

16. The claimant emailed Ms Symes on 28 January at 14.05 (page 29). The email was copied to Mr Tony McMullin, Director; Mr Christopher Murphy, Acting Assistant Director and Mr Andrew Moore, Health and Safety representative. The subject matter of the email was "The Situation".

17. The claimant commenced the email by stating he had mentioned things to Ms Symes on numerous occasions but nothing had been done about it. He referred to the "final straw" being the Annualised Hours Allowance document. The claimant set out a lengthy narrative dealing with issues (i) to (v) above and the difficulties they caused and noted he felt he had no support from Ms Symes.

18. The claimant stated that he came in each day to plan and organise his resources to discover that people on the deployment plan weren't on duty or the roster was not up to date or somebody had agreed different start times or finish times but hadn't recorded it anywhere.

19. The claimant noted that he had over a fairly extensive time lost his temper at Ms Symes due to these frustrations, for which he had apologised when he had calmed down. He stated he had read the Department's Policy on stress,

and found it an almost mirror image of what his work life had descended into. The claimant could not understand how things had got so bad without him getting help or understanding.

20. The claimant said he felt totally isolated and abandoned and stated he was no longer coping. The claimant did not blame Ms Symes, but stated he needed to go to the doctor and have a break. He confirmed he would like to be left alone for a time.

21. Ms Symes was astounded when she read the email: she could not believe the claimant felt like that, and she had not noticed. Ms Symes could not understand why the claimant had not spoken to her or asked for time off. They had enjoyed some chat about weddings the previous day and she could not reconcile that with what she read. Ms Symes had had no indication prior to the email on 28 January that the claimant was feeling stressed.

22. Ms Symes noted the claimant asked, in the email, to be left alone for a while, and so she respected those wishes and did not contact him until 25 February 2014 (page 32). Ms Symes, in her letter of 25 February, thanked the claimant for sending sick lines, noted he did not want to discuss how he felt but noted it was part of the sick leave procedure that she stay in contact. Ms Symes also confirmed that an occupational health referral was normal in cases where an employee is suffering from stress.

23. The respondent's Attendance Management Policy and Procedure and Guidance were produced at pages 294 – 351. The policy provides for a Stage 1 case conference; a Stage 2 (six month) case conference and a Stage 3 hearing after one year's absence.

24. The claimant, in terms of the Policy, was paid 60 days full pay plus shift allowance and then six months half pay. Ms Symes sent the claimant forms to complete to apply for Injury Benefit (which is paid at the rate of 85% of salary). The claimant believed he completed and returned the forms but

these were not received by Ms Symes. Ms Symes sent the claimant further Injury Benefit forms to complete in May (page 47) and these were returned to her in June. Ms Symes forwarded the forms to the Insurance Company and there then followed the usual process whereby the Insurance company sought information from the respondent, and medical information regarding the claimant. Ms Symes facilitated this process but acknowledged it was a particularly lengthy process in respect of the claimant, and that the claimant was extremely frustrated by the delay. The claimant's application was ultimately successful.

25. Ms Symes, by letter of 4 April (page 360) invited the claimant to attend a Stage 1 case conference on 14 April, although in fact this meeting did not take place until 13 June. A note of the meeting was produced at page 58.

26. The claimant was not well enough to participate in the meeting and so it proceeded in the claimant's absence. Ms Symes and Mr Christopher Murphy, Assistant Director, Scotland West (and Ms Symes' line manager) met to discuss the occupational health report and review the case.

27. The occupational health report dated 2 May 2014 was produced at page 45. The report noted difficulties and conflicts at work had led to the claimant experiencing some anxieties, and frustration in dealing with operational issues and priorities. The report confirmed the claimant had recently started a stress management control programme which was due to last six weeks. The diagnosis was confirmed as work-related anxiety and the claimant was unfit for work. The main issue was his coping skills. The report concluded by stating that upon completion of the programme, he should be fit for a short, phased return to work over two weeks. Further, it would be important upon his return to work to provide him with support to assist him cope with things he is unable to change.

28. Ms Symes noted, at the case conference, that prior to the claimant returning to work, there would need to be a discussion regarding options, and, for a period of time, until he felt able to return to front line duties, he could be

offered desk type duties, for example Assurance type work or the Freight team. The claimant could be closely monitored and work at a pace suited to him: he would not, for example, be expected to work a shift roster.

29. Ms Symes knew the claimant would receive a copy of the notes of the case conference and she felt it might be helpful for him to see details of options which could be discussed when he was ready to return to work.

30. A second occupational health report was obtained on 31 July 2014 (page 96). The report confirmed the claimant was suffering from an anxiety/depressive disorder on a background of perceived work-related stressors. The claimant was unfit for work, and would remain so for probably two to three months. In the medium to long term the claimant was expected to recover in order to return to his contractual duties, although he would need support in order to do so.

31. The report noted that when he had recovered, he would benefit from a phased return to work lasting four to six weeks, working 50% of his hours in the first week and gradually increasing this to full time.

32. The claimant was invited, by letter of 3 August (page 99), to attend the Stage 2 case conference. The Stage 2 conference took place on 19 August 2014, and a note of the conference was produced at page 138.

33. The claimant was not fit to attend the conference, and his trade union representative Mr Jim Boyle, attended in his place and met with Ms Symes. Ms Symes had, prior to the meeting, sent the claimant and Mr Boyle a list of the issues she wished to discuss. Mr Boyle met with the claimant the day prior to the conference and had been briefed on these issues.

34. Ms Symes noted the terms of the occupational health report and the fact the claimant was not fit to return to work in the near future, but that he should be able to return in the mid-long term. A phased return had been recommended over 6 weeks and Ms Symes indicated she was prepared to allow the

claimant to set the percentage of attendance during the phased return. Mr Boyle suggested the claimant was unlikely to want to return on a phased or part time basis because this still counted as sick leave.

35. Ms Symes also indicated the claimant would not be on front line duties when he returned to work and he could spend time re-familiarising himself and ease gently back into things.

36. Ms Symes noted the occupational health report had recommended face to face meetings, which the claimant had agreed to, but then cancelled.

37. Mr Boyle noted the delay in getting a response to the application for Injury. Benefit was increasing the claimant's anxiety. Ms Symes was sympathetic to this, but the process was not within her control.

38. There was a constant exchange of emails between the claimant and Ms Sykes regarding the application for Injury Benefit. Ms Sykes pursued the matter vigorously on behalf of the claimant.

39. The claimant attempted to commit suicide in December 2014. He was admitted to hospital for 5 days to detox, and spent four months in Leverndale psychiatric hospital.

40. The respondent obtained an occupational health report in June 2015 (page 188). The report noted a very detailed and helpful report had been obtained from the claimant's consultant psychiatrist. The report confirmed the claimant had been having some very significant psychological symptoms since January 2014 which had resulted in a hospital admission for four months. The claimant had developed very significant depression and was not currently fit to undertake any work, or to participate in any meetings with management.

41. The report further noted the psychiatrist was of the view that a return to work may be possible, but his recovery was going to take months rather than weeks.

42. The respondent obtained a further occupational health report in October 2015 (page 190), which noted another report from the claimant's psychiatrist had been received in September. The report noted the claimant had been making a degree of progress, but the perceived stress of attending the appointment and thinking about work, had triggered a deterioration in his mental health. The claimant was still receiving fairly intensive psychological input and remained under monthly review with his consultant psychiatrist, and saw a community psychiatric nurse every two weeks to assess his progress; a clinical psychologist every two weeks and a psychiatric occupational therapist to assist with everyday functioning.

43. The report confirmed the claimant still suffered from significant symptoms, and remained unfit for work. The report noted it was likely to be another 4 – 6 months before the claimant's mental health improved enough to engage with his employer and may be fit for some form of work. The Consultant Occupational Physician noted some concern about the claimant's longer term capacity to return to his role, and questioned the reality of the claimant being able to return to high functional levels given the severity of the depressive episode.

44. The respondent had put a number of questions to the Consultant to answer, and a very full response was provided noting uncertainty with regards to whether his recovery would enable him to return to his role.

45. The claimant's Consultant Psychiatrist, Dr Palmer, provided a report dated 3 December 2015 (page 194) at the claimant's request. Dr Palmer referred to an earlier report dated 21 May 2015 provided for an occupational health review, and a further letter dated 3 September 2015. Dr Palmer felt these reports accurately reflected the facts surrounding the claimant's condition and the impression the claimant was making good progress. Dr Palmer did

not, in September, feel the claimant was able to tolerate a meeting with his managers, but it was possible a review with occupational health would be helpful. Dr Palmer noted, with hindsight, regret at making this suggestion, because it appeared to have led to the employer issuing a letter inviting the claimant to discuss his progress and the possibility of dismissal.

46. Dr Palmer confirmed the claimant had been treated for a severe depressive episode associated with a serious suicide attempt. Work related stress had been clearly described as a significant contributing factor.

47. Dr Palmer considered the claimant had made good but slow and steady progress in terms of responding to treatment. He remained unfit for work. Dr Palmer noted the claimant was committed to return to work and was making steady progress towards that goal. Dr Palmer confirmed the view that "it is likely that he will be fit to engage with his employer very early in 2016 with a view to discussing the implementation of a phased return to work plan". It was noted the claimant would also need to discuss adjustments to his working arrangements prior to any return to work, again on a phased basis.

48. A Stage 3 Hearing took place on 10 December 2015. Mr Adam Scarcliffe, Assistant Director, chaired the hearing and was accompanied by Ms Julie Cosgrove. The claimant was not fit to attend the hearing, but was represented by Ms Patricia Corrigan, full time trade union representative and Mr Jim Boyle.

49. Mr Scarcliffe had been provided with all of the medical evidence and correspondence in the case, and a summary timeline setting out the history of the case.

50. Mr Scarcliffe noted the purpose of the meeting was to consider whether action should be taken in accordance with the department's attendance policy and this meant consideration of whether the claimant should be dismissed or whether the department would continue to support his absence. Mr Scarcliffe confirmed, that having read the papers prior to the

hearing, he was satisfied the attendance management policy had been applied correctly to date, and all reasonable steps had been taken to try to get the claimant back to work.

51. There was some discussion regarding the reason for the claimant's absence. Mr Scarcliffe referred to issues raised in the claimant's email, such as shift working, targets, staff training, airport security and the way the business operated in general. Mr Boyle noted the trade union had concerns about the claimant's state of mind when he wrote the email: many of the issues were general workforce issues affecting many employees. Mr Boyle reiterated they were not sure what frame of mind the claimant was in when he wrote the email, and he questioned whether the claimant had simply been having a rant. There was no dispute regarding the fact the issues management had at the time were all things the claimant had come across before, and, in comparison to jobs he had previously carried out, it was strange he had had this reaction.

52. Mr Scarcliffe confirmed it was relevant to consider the fact the claimant had been absent for two years, and it had not been established what triggered the absence. Further, there was nothing to state what the exact issues were that would help get him back to work, and help management make reasonable adjustments to get him back. There was also nothing to suggest it would not happen again if he did come back to work. Mr Boyle countered these points by reminding Mr Scarcliffe that the claimant now had tools to help him deal with situations.

53. The meeting focussed on the reports from occupational health and the claimant's psychiatrist. Mr Scarcliffe noted the occupational health report stated it would be 4 – 6 months before the claimant could return to work and that he was unlikely to return to a role as a Higher Officer. The report from the Consultant Psychiatrist contradicted this and indicated the claimant would be fit to have discussions with management in the New Year regarding a return to work.

54. Mr Boyle urged Mr Scarcliffe to prefer the report of the claimant's psychiatrist because the psychiatrist was more highly qualified and had been treating the claimant regularly. Further, the occupational health physician had not obtained an up-to-date report from the Psychiatrist prior to completing the report.

55. Mr Scarcliffe acknowledged the claimant had engaged with the trade union and the medical authorities, but not with management and accordingly they were still not aware of what the trigger for the absence had been and how to address it. Ms Corrigan referred to a gradual and phased return during which issues could be identified and addressed. Mr Scarcliffe had reservations regarding the return to work being the first engagement the claimant had with management after such a lengthy period of absence.

56. Mr Scarcliffe concluded the Stage 3 hearing by informing those present that he had to give more thought to the opposing health reports. Mr Scarcliffe acknowledged the occupational health report painted a relatively bleak outlook and although he attached some weight to this, he attached more weight to the Consultant Psychiatrist report primarily because it was the most recent report. Mr Scarcliffe was concerned that the claimant had been absent for 23 months and the most optimistic report indicated he would be fit to "engage in discussions" early in the New Year. The claimant had not been fit to attend the Stage 3 case conference and therefore Mr Scarcliffe had been unable to actually speak to the claimant about the prognosis.

57. Mr Scarcliffe was also concerned that the respondent did not know, beyond the general terms of the claimant's email, what had caused him to go off sick. Mr Scarcliffe considered that without that information it would be difficult for the respondent to know what adjustments would be required. There had, for example, been reference to a phased return to work, but there was no certainty regarding how long this phased return may have to last or whether it would lead to the claimant returning to his former role (although Mr Scarcliffe agreed a downgrading could be an option).

58. The claimant had not, throughout his absence, wanted to engage in discussions with management. Mr Scarcliffe noted that more recently the claimant had been encouraged by the Consultant to meet management for discussions, and although he had agreed, this had not in fact happened. Mr Scarcliffe questioned, against this background, the likelihood of the claimant returning to work in the timescale indicated.

59. Mr Scarcliffe also had regard to the needs of the business. The claimant's role had not been covered during the period January to March. Thereafter there had been a re-shuffle of the team and in April a member of the team had been appointed to act-up to cover the role. This arrangement was still continuing.

60. Mr Scarcliffe noted the respondent employed a number of temporary employees, who required support from expert officers. Further, the respondent had faced budget cuts at a time when it was dealing with an increased volume of air traffic.

61. Mr Scarcliffe took the decision to dismiss the claimant. He reached that decision after having regard to the fact that he had no confidence the claimant would be able to engage in discussions about a return to work early in 2016. There would have to be discussions regarding not only the terms of a return to work, but also adjustments. There was no indication how long a phased return may have to last, or whether the claimant would return to the role of Higher Officer, and if so, how long before he could do so. Mr Scarcliffe considered the respondent had supported the claimant's absence over 23 months and it was likely there would not be a return to work for 2/3 more months. Mr Scarcliffe concluded it was likely to be 2/3 months before the claimant returned to work because being fit enough to engage in discussions about a return to work was only the first step in actually achieving a return.

62. Mr Scarcliffe wrote to the claimant on 18 December 2015 (page 202). Mr Scarcliffe confirmed he had considered all of the information available to

him, and he referred to the occupational health report and the Consultant Psychiatrist report. Mr Scarcliffe noted the Psychiatrist confirmed the claimant had suffered a set-back after attending the occupational health appointment and discussing work issues. The Psychiatrist also indicated the claimant would be fit to engage with management very early in 2016.

63. Mr Scarcliffe expressed concern regarding the claimant's lack of contact with management during his absence. There had been no discussion about the perceived work stressors and no written representations had been made. Mr Scarcliffe felt this made the task of assisting and supporting a return to work very difficult because, without clarity regarding the factors behind the stress, it was difficult to assess the claimant's ability to return to work.

64. Mr Scarcliffe confirmed he had decided to dismiss the claimant because he had been unable to return to work within a reasonable timescale. The effective date of termination of employment, following a period of notice, would be the 18 March 2016. Mr Scarcliffe decided to reduce the compensation under the Civil Service Compensation Scheme by 50% because the claimant had very little contact with management throughout his absence and had not engaged to assist management to understand and help with the work related reasons for the absence.

65. The claimant appealed against the decision to dismiss (page 215). The grounds of appeal noted the claimant had been absent with work related stress. He had had limited contact with management, but this had been the advice of his Consultant. The appeal also referred to the conflicting medical advice and argued the decision to dismiss was disproportionate in circumstances where the claimant was only weeks away from returning to work.

66. Mr Murdo MacMillan, Deputy Director North region heard the claimant's appeal. Mr MacMillan was provided with all of the papers which had been before Mr Scarcliffe, together with the grounds of appeal. Mr MacMillan was

also provided with a letter from the claimant's Advanced Occupational Therapist, Ms Cairns (page 226) which confirmed the opinion the claimant was ready to return to work in a graded manner. Ms Cairns confirmed she supported a return to work as long as adjustments were made in the initial period over a few months, which should include reduced hours, late starting times, no late shifts, time to refamiliarise himself and retraining if necessary. Ms Cairns also felt the claimant should initially be kept away from front line duties. The claimant also produced a further letter from Dr Palmer dated 14 January, 2016 (p 224) which confirmed the view that the claimant "is fit to engage with his employer from January 2016, with a view to discussing the implementation of a phased return to work". Dr Palmer added that he agreed with the suggestions of Ms Cairns.

67. The appeal hearing took place on 11 February 2016. Mr MacMillan was present and the claimant attended and was represented by Mr Boyle. A note of the hearing was produced at page 244. Mr MacMillan gave the claimant and Mr Boyle an opportunity to address him on each of the 10 points of appeal.

68. The claimant felt there had been insufficient input from his healthcare specialists prior to reaching a decision to dismiss. The claimant was critical of the occupational health meeting which he had treated as being technically the first meeting with management. The claimant felt the wrong approach had been taken at this appointment: he had for example been asked why he thought the respondent could sustain his absence. Mr MacMillan acknowledged the claimant had found the appointment difficult, but placed weight on the fact it was an independent report from a Consultant Occupational Physician. Furthermore, the occupational health Consultant had received a report from the claimant's Consultant Psychiatrist prior to the appointment.

69. Mr MacMillan did not consider the reports to be contradictory: they both predicted fitness to return to work, but a question mark over ability to return to previous job role and it was only the timeline which differed. Mr MacMillan

noted the length of the claimant's absence was unusually long and the fact there was an impact on the business. There was a question mark over the length of time to get the claimant to a position of being able to return to work; whether a phased return would be successful and the health reports gave no firm recommendations or prognosis. Furthermore, there had been no attempt by the claimant, in the period between the dismissal and the appeal to indicate he was fit to return to work.

70. The second appeal point was that the claimant had been granted Injury Benefit which is paid when an employee's absence is work-related. The claimant argued that he had been off with work-related stress and therefore as his absence had been caused by the respondent, it should influence how his appeal was dealt with. Mr MacMillan was satisfied the respondent's procedures had been correctly followed and that the respondent had done all it could to get the claimant back to work. The issue was one of length of absence and prospects of a return to work. The respondent did not understand what had caused the work place stress and felt they needed to do so in order to be able to manage the condition and prevent further impact in the future.

71. The third appeal point related to the fact the claimant's limited contact with management had been on the instruction of his Consultant. Mr MacMillan reviewed all of the contact logs and was satisfied the claimant had had contact up until he received medical advice to the contrary. Mr MacMillan was satisfied there had not been any basis for Mr Scarcliffe to reduce compensation by 50%. (However, the claimant had, by the time of the appeal, turned 60 and therefore compensation under the scheme was no longer applicable because the claimant could access his pension).

72. The fourth point of appeal related to the above.

73. The fifth point of appeal was that the claimant's trade union had offered to approach the Consultant Psychiatrist, Dr Palmer, to request further information to assist Mr Scarcliffe make his decision, but Mr Scarcliffe had

not agreed. Mr MacMillan was satisfied Mr Scarcliffe could have asked the claimant's Consultant for a further report, but Mr Scarcliffe had the report dated December 2014, and relied on that.

74. The sixth point of appeal related to the fact the claimant had participated in extensive treatments and therapies which had resulted in him gaining coping mechanisms. Mr MacMillan accepted this.

75. The seventh point of appeal was that when the claimant's medical experts deemed him fit to return to work and therefore he should be allowed to do so with support from the management team. Mr MacMillan noted that no end date had been given, and absence could not continue on an open-ended basis. The reports from Dr Palmer suggested the claimant was fit to engage in discussions about a phased return to work: the reports did not state the claimant was fit to return to work.

76. The eighth point of appeal was that there was no justification for a termination date of 18 March, when a phased return to work was likely to start before then. Mr MacMillan clarified the effective date of termination was 18 December 2015, with three months being paid in lieu of notice. Mr MacMillan acknowledged that it was envisaged the claimant would engage in discussions early in the New Year, with a view to a phased return to work; however, no dates or plan had actually been put in place due to the occupational therapist being off sick. Mr Boyle argued they now had the letter from the occupational therapist.

77. Mr MacMillan considered that notwithstanding the letter from the occupational therapist, no plan had been presented to the respondent. The claimant had not, for example, been signed off as being fit to return to work. Further, there was still the issue of whether the claimant would be able to return to his role. The issue of what had caused the absence remained outstanding and, without that information, the respondent could not know what steps to take to address these matters.

78. The ninth appeal point was that the claimant would continue to receive support from his medical team during the phased return process. Mr MacMillan accepted this.

79. The tenth appeal point was that the decision to dismiss was disproportionate given the time and support allocated to the claimant to get him back to work, particularly when he was weeks away from a positive outcome. Mr MacMillan reiterated the need for the respondent to understand what had caused the claimant's stress. He referred to the claimant's email of the 28th January 2014 and expressed concern that many of the issues (and people) cited in the email had not changed. Mr MacMillan considered that in order to manage the claimant effectively in the future, the respondent needed to understand what the stressors were. The claimant's position appeared to be that none of the issues were relevant any longer because he now had coping mechanisms to help him.

80. Mr MacMillan also considered there was a failure on the part of the claimant and Mr Boyle to address the issue of what level the claimant would be able to function at in the future. Mr MacMillan focussed on the fact the suggestion of the Consultant Psychiatrist was that the claimant was ready to start talking about a return to work rather than actually returning to work.

81. Mr MacMillan wrote to the claimant on 25 February (page 250) to provide a copy of the appeal hearing notes, and his decision. Mr MacMillan set out the points of appeal and his response to each point. Mr MacMillan concluded there was uncertainty whether the claimant's recovery would enable him to return to his previous high functional levels where he would become functionally capable of his full range of duties. Accordingly, he was not satisfied that there was a realistic prospect of the claimant becoming functionally capable of the full range of duties in the short to medium term. Mr MacMillan decided not to uphold the appeal.

82. Mr MacMillan decided the restriction of compensation to 50% was unreasonable, and if a compensation payment was relevant, it should be paid at the eligible rate.

83. The respondent's Attendance Management Procedure, under the section entitled Appeals, stated (page 318) that "an appeal hearing should be conducted as a full re-hearing of the case. This means that the Appeal Manager must consider all the facts afresh and come to their own decision." Mr MacMillan accepted he had reviewed Mr Scarcliffe's decision to dismiss rather than re-hear the case. However, he had reviewed all of the evidence thoroughly. Mr MacMillan was unsure whether the procedure produced at page 318 was in force at the time of these events.

84. Ms Symes had reported to her, in early January 2014, that an employee had had £40 stolen from her bag. Ms Symes contacted the Police and provided them with a list of the staff on duty on the day the money went missing. The money turned up in a brown envelope addressed to Ms Symes approximately two week later.

85. The Police confirmed to Ms Symes, on 27 January, that they intended to take everyone's fingerprints, DNA and a sample of handwriting. Ms Symes and the claimant were asked to be the first to attend at the police station.

86. Ms Symes contacted the claimant to ask him to attend at the police station. The claimant agreed, but telephoned her later to advise that when he got there the portable fingerprint machine had not yet arrived and so he was to go back the following morning.

87. Ms Symes received a telephone call on 29 January from the police to thank her for attending to give her fingerprints. She was asked when the claimant would attend. Ms Sykes expressed surprise because she had understood he had attended to do this. The police asked for the claimant to attend, but Ms Sykes explained he had gone off on sick absence. Ms Sykes admitted to the Police that the sickness absence had not been expected.

88. The fingerprints of all employees in the department were taken. The claimant contacted the police to inform them he could not attend to do his fingerprints under instructions from his GP.

89. Ms Sykes was subsequently advised by the police that they were not taking the matter any further.

90. The respondent wished to investigate why the claimant had not attended to provide his fingerprints. Ms Symes and Mr Chisholm met with the trade union representatives to make them aware that when the claimant returned to work there would be an investigation into the theft of the money and why the claimant had not attended to provide his fingerprints. The trade union representatives were adamant they did not want the claimant to know about this because it would affect his recovery. The respondent respected this and confirmed the matter would be held over pending the claimant's return to work.

Credibility and notes on the evidence

91. We found the respondent's witnesses to be credible and reliable. They gave their evidence in a straightforward manner and acknowledged points made by the claimant's representative when it was appropriate to do so. We preferred their evidence to that of the claimant in any dispute.

92. We found the claimant's evidence to be less impressive. He was clearly nervous and emotional about telling the Tribunal what had happened to him. This was compounded by the fact the claimant was upset the issue of the missing money and the obtaining of fingerprints was going to be raised in these proceedings. The claimant's upset regarding these matters did not affect the weight to be attached to the claimant's evidence, they simply set the tone.

93. There was a dispute between the evidence of the claimant and Ms Symes regarding whether the claimant had made her aware prior to 28 January that he was feeling stressed. The claimant described how he had been feeling, and that he had raised issues in various meetings and told Ms Symes that if nothing was done he would go off with stress. Ms Symes wholly rejected that suggestion. Ms Symes' position was that she and the claimant were friends and saw one another on a daily basis. She had not noticed the claimant displaying any of the usual signs of stress prior to the 28th January and he had not made any comment to her about going off with stress.

94. Ms Symes acknowledged the merger had caused a number of issues about which the claimant and others would complain. Ms Symes acknowledged she may perhaps have missed the signs of stress with the claimant, but countered this by stating the question pre-supposed there were signs of stress. Her clear position was that the claimant acted no differently to usual and she did not see any signs of stress, or know the claimant was feeling stressed.

95. We preferred Ms Symes' evidence regarding this matter. We considered we were supported in this by the fact the claimant had not visited his GP complaining of stress prior to 28 January; he had not had any absence with stress and his attendance record was good. Further, Mr Boyle told the Tribunal that given what the claimant had dealt with in previous roles, it was a surprise the claimant was stressed by the current situation. This comment lent weight to fact of Ms Symes' surprise at the claimant's absence due to stress.

96. We concluded the claimant had not shown signs of stress at work prior to 28 January and had not made the respondent aware he was feeling stressed prior to this date.

97. Mr Gibson, in his submissions to the Tribunal, invited us to find the reason for the claimant's absence had been due to personal reasons. The claimant, it was suggested, went off because he did not want to provide his

fingerprints to the police or deal with an investigation into the missing money. Further, having gone off on sickness absence, the claimant's anxiety was compounded by financial worries. We, on the one hand, noted Ms Symes understood the claimant had attended at the police station to give his fingerprints. However, she subsequently learned (on 29 January) that he had not yet given his fingerprints. Ms Symes honestly explained to the Tribunal that she found this odd and that feeling was compounded by the fact the claimant had gone off the previous day with an unexpected absence and did not want to be contacted.

98. We, on the other hand, had regard to the claimant's evidence that he had gone, when requested, to give his fingerprints, but the portable fingerprint machine had not yet arrived at the local police office at the airport. The claimant attended again a couple of days later, but the police officer whom he had arranged to meet was not there. The claimant accepted he had been contacted later, when off on sickness absence, to attend at Aitkenhead police station to give his fingerprints. He discussed this with the Psychiatrist and then contacted the police officer to explain he was unwell and did not know when he would be able to attend to do it.

99. We, having had regard to this evidence, could not accept Mr Gibson's submission that the cause of the absence was the missing money and request to give fingerprints. We considered the fact the claimant attended on two occasions to give his fingerprints undermined that argument. We did however accept this issue had a part to play in the claimant going off on 28 January and we also accepted it clouded/confused the picture for the respondent because Ms Symes was unaware the claimant had attended at the police station a second time to try to give his fingerprints.

100. The respondent's uncertainty about the reason for the claimant's absence was apparent throughout the attendance management procedure and particularly so at the dismissal and appeal. The uncertainty was compounded by the fact the trade union representative, Mr Boyle, expressed surprise the claimant had gone off with stress over the

management issues when he had had far more serious things to deal with in his previous role. Further, the trade union representatives were reluctant to talk about the content of 28 January email and suggested the claimant's frame of mind was not known at this time.

101. Mr Cunningham cross examined each of the respondent's witnesses at length about the fact they must have known of the reasons for the claimant's absence because he had noted them in the email of 28 January. Each of the witnesses acknowledged the claimant had raised issues in the email, but they each maintained that with the passage of time, and in the absence of being able to discuss it with the claimant, they remained unsure that those were the reasons for absence.

102. The claimant's evidence at this Hearing regarding the reason for his absence was inconsistent. He at times insisted the issues set out in the email of 28 January were the reason for his absence; he on another occasion said he was not sure if the working practices set out in that email were the ones relied upon and on another occasion he said the reason for his absence was because he had felt undermined.

103. We, having had regard to all of the above, concluded the reason for the claimant's absence was not entirely clear but comprised some of the issues raised in the email, a feeling of being undermined and confidence being eroded and issues regarding the money and fingerprints being required. We could not accept Mr Lawrence's submission that the reason for the absence was clear. We accepted the evidence of the respondent's witnesses that the reason was not clear and remained unclear.

104. There was also a conflict between the evidence of the claimant and Mr Boyle regarding the reason why the claimant was not in attendance at the Stage 3 hearing. The claimant told the Tribunal he was not present because he had been told by the trade union that his presence was not required. Mr Boyle told the Tribunal that he understood the claimant had discussed it with Dr Palmer and, on his advice, took the decision he was not fit to attend. Mr

Boyle changed his position on this and later suggested the claimant was fit to attend.

105. We did not find the claimant's evidence regarding this matter to be credible or reliable. We found as a matter of fact the claimant was not fit to attend the hearing. This is what Mr Scarcliffe was told (by the trade union) and this is what Mr Boyle told the Tribunal when first asked the question.

106. There was a conflict between the evidence of the claimant and Ms Symes regarding payment of the 15% of salary not covered by the injury benefit. The claimant's evidence was that he understood the employing department made payment of the 15% of salary to avoid the absent employee being subject to any detriment. Ms Symes wholly rejected that evidence. We preferred and accepted her evidence.

Claimant's submissions

107. Mr Cunningham confirmed the claims pursued by the claimant were (i) direct discrimination; (Ii) discrimination arising from disability; (iii) indirect discrimination; (iv) reasonable adjustments; (v) unfair dismissal and (vi) breach of contract/section 13 Employment Rights Act. The claimant did not insist on the claim for notice pay, but reserved his position on the claim for notice pay as a head of loss under the Equality Act should any of the discrimination claims succeed. Mr Cunningham clarified that the claimant was not required to work the period of notice and he was placed on garden leave. If the Tribunal found there was a failure to make reasonable adjustments, and if the claimant could have returned to work following those adjustments, the Tribunal could award sick pay for the period of garden leave. It was further clarified that the breach of contract claim/section 13 claim related to the 15% of salary not paid when the claimant received Injury Benefit.

108. Mr Cunningham noted the respondent had accepted the claimant was a disabled person in terms of section 6 Equality Act. The disability was a

mental impairment arising from work related stress/anxiety/depression. The respondent became aware the claimant was a disabled person at the latest by 1 June 2015 when the occupational health report of that date stated "undoubtedly the disability provisions of the equality legislation apply here".

109. Mr Cunningham referred to section 20 Equality Act which sets out the duty on an employer to make reasonable adjustments. He submitted there was no onus on the employee to propose or otherwise identify adjustments (**Cosgrove v Caesar and Howie 2001 IRLR 663**).

110. Mr Cunningham referred to the cases of **Archibald v Fife Council 2004 ICR 954** and **Environment Agency v Rowan 2008 ICR 218** where the approach to be taken by the Tribunal to the question of whether an employer has breached the duty to make reasonable adjustments was set out.

111. The claimant identified two provision, criterion or practices (PCPs). The first was the way in which the contracts operated in the workplace and the pressures that those practices brought to bear on all employees. Ms Symes agreed largely with the issues raised in the email of 28 January, and confirmed there had been a lot of moaning about it. Everyone had been under pressure, but a disabled person was more likely to be affected by this.

112. The second PCP was the respondent's Attendance Management Policy, and in particular the way in which it was applied to the claimant insofar as he was required to identify a return to work date with a clarity that he was unable to do.

113. The PCPs put the claimant at a substantial disadvantage as he was likely to be dismissed.

114. Mr Cunningham submitted the duty to make reasonable adjustment had arisen by the date of the Stage 3 hearing on 10 December 2015, and, in any event by the date of the appeal hearing on 11 February 2016.

115. The proposed reasonable adjustments were:-

- reduced hours;
- late starting time;
- no late shifts;
- time to re-familiarise himself with the working environment and colleagues;
- retraining;
- keeping away from frontline duties;
- no management duties until return to full duties;
- initially dealing with emails, e-learning and attending briefings;
- management use of tools such as the health and safety stress assessment toolkit;
- working in the freight department;
- desk duties;
- assurance work;
- freight team;
- close monitoring of the claimant upon his return;
- phased return;
- no shift roster and
- coping skills.

116. Mr Cunningham submitted that whether an adjustment was reasonable was an objective test, and a matter of fact for the Tribunal to determine. The Tribunal could substitute its view for that of the employer.

117. The respondent wanted a real prospect/certainty of a return to the role of Higher Officer, but it was submitted there was a much lower threshold and a return to work meant a return to the workplace with adjustments and an opportunity to build up to the previous role or an alternative role. The claimant had identified the potential steps that should have been taken by the respondent, and it fell to the respondent to prove that it would not have been reasonable for the employer to have taken those steps.

118. Mr Cunningham submitted that in addition to the above, the respondent should have adjusted the Attendance Management Policy to allow the claimant to return to work on a phased basis.

119. The complaint of direct discrimination was based on less favourable treatment insofar as the respondent had made stereotypical assumptions about the ability of the claimant to deal with the respondent's working practices because he was a disabled person. Such assumptions would not have been made about a non-disabled person. There was no certainty the claimant would achieve a full functioning in the Higher Officer role. However, the claimant is not required to prove this, and Dr Palmer had been positive about the claimant's progress. The respondent made an assumption that because of mental health issues the claimant would not achieve it.

120. The complaint of discrimination arising from disability was focussed on the less favourable treatment of having been dismissed because of his absence from work. The claimant was absent from work because of his disability. Therefore, it was submitted, the claimant was dismissed because of something arising in consequence of his disability. The respondent dismissed the claimant because he was unable to identify the trigger that caused him the stress that gave rise to the disability and his absence from work. He was absent from work in consequence of his disability.

121. Mr Cunningham submitted the PCP relied upon in respect of the complaint of indirect discrimination was the respondent's working practices. Those

working practices were applied to everyone, but had an adverse effect on disabled employees because they were more likely to suffer stress, absence from work and dismissal.

122. Mr Cunningham submitted the discrimination claims were subject to section 136 Equality Act, and if there are facts from which the Tribunal could decide, in the absence of any explanation, that there has been an act of unlawful discrimination, the burden of proof shifts to the respondent to show, on the balance of probabilities, that there was in fact no discrimination (**Igen v Wong 2005 ICR 931).**

123. It was submitted that if the Tribunal finds the dismissal was an act of discrimination then dismissal will be unfair in terms of section 98 Employment Rights Act. However, even if the dismissal was for a potentially fair reason, it was still unfair because it fell outside the band of reasonable responses in the circumstances of this case. The respondent appeared to allow a year's absence, and extended this to 2 years in the claimant's case. It was submitted that having waited that long, it was not reasonable to dismiss when the claimant would have been fit to return in a short period of time.

124. Mr Cunningham invited the Tribunal to find Mr Scarcliffe had already made up his mind that the respondent had taken all reasonable steps to try to get the claimant back to work before he had heard submissions from the claimant's representatives. Further, he opted out of making a decision regarding compensation and handed this to the Director of HR.

125. Mr Scarcliffe failed to give sufficient weight to the report dated 3rd December 2015 by Dr Palmer. Mr Cunningham noted Mr Scarcliffe told the Tribunal he had attached more weight to Dr Palmer's report, but submitted that he had in fact attached more weight to the occupational health report. No reasonable employer would have done that, particularly when Dr Palmer was the claimant's Consultant Psychiatrist, who had been treating the claimant for some time.

126. Mr Scarcliffe also applied the wrong test in focussing on the time by which the claimant could return to full operational duties in his previous role. That ignored the question of redeployment which he was required to investigate. Furthermore, his focus on the claimant's lack of contact with the respondent during his absence was considered unreasonable on appeal. It was submitted this demonstrated Mr Scarcliffe's mindset was tainted: he appeared to focus on what the claimant could not do, instead of what he could.

127. Mr Cunningham submitted the appeal hearing was also fundamentally flawed because Mr MacMillan adopted the wrong approach when he reviewed the decision to dismiss, rather than re-hear the case. Furthermore, the claimant was in attendance at the appeal hearing and expressed his readiness to return to work. There was a report from Ms Cairns which stated the claimant was ready to return to work.

128. The complaint in terms of section 13 Employment Rights Act related to the fact Injury Benefit had paid 85% of salary. The claimant sought payment of the 15% of salary which had not been paid, and which he believed was usually paid by the employing department.

129. The breach of contract claim related to a claim for payment of sick pay during the period of garden leave, if the discrimination complaint/s were successful.

Respondent's submissions

130. Mr Gibson set out the findings of fact he invited the Tribunal to make. He considered there were three areas where there was a dispute in the evidence. The first related to the reason for the claimant's non attendance at the Stage 3 hearing on the 11th December. The claimant said he was fit to attend, but was told by the trade union that he would not be required. Mr Boyle said the claimant did not attend on the advice of Dr Palmer. Mr

Scarcliffe told the Tribunal that he had been told, at the outset of the hearing, that the claimant was not in attendance on the advice of Dr Palmer. Mr Gibson noted Mr Boyle had backtracked when pressed on the matter, but he invited the Tribunal to reject the claimant's evidence, and prefer the evidence of Mr Scarcliffe and Mr Boyle. Furthermore, the claimant's position that he was fit to attend was not supported by Dr Palmer's report of 3 December 2015. Mr Gibson suggested all the evidence pointed to the claimant not being fit to attend, and now seeking to play it down. It was also relevant in the context of weight Mr Scarcliffe was able to attach to the claimant's non attendance and how it impacted on the decision to dismiss.

131. The second dispute concerned the adverse impact the claimant's absence had on the organisation, both financially and in terms of service provision. Mr Gibson invited the Tribunal to accept the evidence of the respondent's witnesses, who had all been very clear regarding the financial cost and difficulties the absence caused. Ms Symes had been particularly cogent in this area, and had described in a lot of detail the accommodations which had to be made and the impact it had on the claimant's colleagues. There had been reference to the impact on the service, which included being an employee (Higher Officer) down for two years, the claimant's team having no leader and shrinking numbers dealing with an increasing workload. The costs included having another employee act-up in the claimant's position; the cost of paying the claimant sick pay; paying Injury Benefit; occupational health report costs; HR input and management time in managing the absence.

132. Mr Boyle sought to emphasise the lack of resources and how the organisation was stretched. He then suggested that the absence of one employee did not make much difference, and considered the cost of acting-up to be negligible. Mr Gibson invited the Tribunal to prefer the evidence of the respondent regarding this matter.

133. The third area of dispute related to the reasons the claimant gave for going off with what he said was work related stress. The claimant and Mr Boyle

both gave evidence which broadly mirrored the claimant's email of the 28th January. They both alluded to these issues having caused the claimant to go off. Mr Gibson submitted that this evidence would have been credible if they had not both said something entirely different at the dismissal and the appeal hearing.

134. Mr Gibson suggested the credibility of the claimant's evidence regarding this matter was further undermined by the fact Ms Symes could not identify why the issues raised in the claimant's email might be causing him such significant stress at that particular point in time. The issues were difficulties encountered by all staff and were the basis of general complaints from staff. Mr Gibson invited the Tribunal to accept Ms Symes' evidence that she did not know these issues were supposedly causing the claimant stress.

135. Mr Gibson submitted that if the Tribunal accepted Ms Symes evidence that the claimant's email came as a complete shock, that she had no idea he was under stress, and that he had been laughing and joking the day before, then we had to ask what was the real reason for the claimant going off work.

136. Mr Gibson submitted the real reason the claimant went off work was because of the theft of the money. The respondent did not dispute the claimant was under stress, or that he developed depression, or that he was a disabled person under the Equality Act. The claimant was clearly a very ill man for a significant period of time. However, the real reason behind that illness was not work related. Mr Gibson invited the Tribunal to find the claimant went off work on sickness absence for personal reasons.

137. Mr Gibson submitted this made sense when you looked at the timing and circumstances surrounding the claimant going off on the 28th January. It also explained why the claimant and Mr Boyle, at the dismissal and appeal hearings, back away from the email of 28th January. They knew it was nothing but a smokescreen to the real issues in the claimant's life. They did not wish that period of time to be looked at and analysed. They knew the email did not set out the genuine work place stressors.

138. The claimant stated the diagnosis was of work related stress. However, if the claimant did not reveal the real reason for his stress, and misled the medical practitioners, as he has sought to mislead the Tribunal, the medical practitioners can only take what the claimant says at face value.

139. Mr Gibson submitted this evidence was highly relevant because it goes to the question of why Mr Scarcliffe and Mr MacMillan had issues about a phased return to work in the absence of a definitive position on what caused him to go off in the first place. If the claimant and Mr Boyle had given the evidence they gave to the Tribunal to Mr Scarcliffe and Mr MacMillan, then there may have been more confidence in a phased return to work. It was submitted that given the claimant and Mr Boyle's inconsistent position between evidence at the internal hearings and evidence at this hearing, Mr Gibson invited the Tribunal to treat the apparent work related stressors with extreme caution and accept the respondent witnesses' evidence that they found it very difficult to give consideration to a phased return to work in an information vacuum.

140. Mr Gibson next made submissions in respect of each of the complaints. He submitted, with regard to the complaint of direct discrimination, that the claimant had failed to aver a real or hypothetical comparator. The claimant argued the respondent dismissed him because of his disability and the respondent's assumptions regarding the impact that could have on both the claimant and the respondent going forward. The claimant did not however aver the respondent treated the claimant less favourably than it did, or would, treat a real or hypothetical comparator who did not have the claimant's disability. Mr Gibson submitted there was no real comparator in this case. Further, the correct hypothetical comparator would be an employee with a different disability, who had the same attendance record and prospects of return to work as the claimant. Mr Gibson submitted that if that hypothetical situation was to arise, the respondent would have dismissed with notice on the grounds of capability.

141. Mr Gibson submitted the claimant's position that the respondent made stereotypical assumptions about the impact of the claimant's disability going forward, was not supported by the evidence. No such assumptions were made: the respondent did not need to make assumptions. They looked at the length of the absence, the unwillingness to engage in a discussion about the reasons behind the absence and all the medical evidence and they reached an informed view that the claimant was to be dismissed on grounds of capability.

142. The claimant's belief that it was clear from the medical evidence that as at the date of the dismissal (18 December) and certainly by the date of the appeal (25 February) that he was expected to make a return to work shortly after was, it was submitted, simply false. Dr Freer, Dr Palmer and Ms Cairns said no such thing. A return to work is not a phased return over a few months. A return to work is a return to full time, front line, shift working, managerial work which the claimant was paid to do. The claimant himself acknowledged that he would still be treated as sick absence during a phased return.

143. The medical practitioners did not say the claimant would be fit to return to the kind of work for which he was employed to do shortly after 25 February. The respondent did not have to make any assumptions: they relied on the facts. The claimant was not dismissed because he suffered from depression: he was dismissed because his depression rendered him incapable of performing his role for health reasons.

144. Mr Gibson submitted, with regard to the complaint of discrimination arising from disability, that the respondent accepted they treated the claimant unfavourably because of something arising in consequence of his disability by dismissing him on the grounds of capability. Mr Gibson however submitted that dismissal with notice was a proportionate means of achieving a legitimate aim. The legitimate aim of the respondent was to provide the public with an efficient and effective customs and excise service at the UK border. In order to achieve that legitimate aim the respondent required

Higher Officers to attend work regularly and carry out their duties. If a Higher Officer was unable to do that, then dismissal in order to free up a post to allow the organisation to hire someone who could, was a proportionate means of achieving the legitimate aim.

145. The dismissal of the claimant was, in particular, proportionate because of the past and future impact his ongoing sickness absence had and was going to have on the ability of the organisation to achieve its legitimate aim.

146. Mr Gibson noted the dismissal had been due, in part, to the fact the claimant was unable to identify the cause of the disability. In his evidence to the Tribunal, the claimant backed away from this position and said he did specifically identify the cause of his disability. In any event it was proportionate to dismiss in light of the fact the claimant did not engage in a discussion around what had caused him work related stress and what could be done to alleviate that stress if he was to return to work.

147. The claimant had, in his evidence described the opinion of Dr Freer as "questionable at best". It was submitted that there was absolutely nothing to back up this claim. Dr Freer is a Consultant Occupational Physician. She would have a professional duty to give her honest and expert opinion on the situation. No evidence had been led to call into question her expertise, her independence, her knowledge of the situation or her approach. The claimant saying he did not get on with her and felt ambushed was simply a result of her saying things he did not want to hear.

148. The claimant argued Mr Scarcliffe and Mr MacMillan should have ignored the report from Dr Freer. Mr Gibson submitted this was a ridiculous and unsubstantiated averment to make. It was clear both decision makers took into account all of the evidence. Mr Scarcliffe was clear he considered the position from the most positive viewpoint, which was fitness to engage in a discussion about a return to work in very early 2016, when he made his decision. Mr MacMillan took into account the new occupational health view and did not feel that a graded return over a few months with generic

adjustments was enough to convince him to overturn Mr Scarcliffe's decision and embark on a phased return. In any event Mr Gibson invited the Tribunal to reject the claimant's position that evidence had been ignored.

149. Mr Gibson referred the Tribunal to the case of **Monmouthshire County Council v Harris 2015 WL 6395301** where the EAT held that in determining whether dismissal was a proportionate means of achieving the legitimate aim accepted by the Tribunal, it was entitled to take into account the respondent's past failure to comply with an obligation to make reasonable adjustments, but was also bound to have regard to its own finding that there was no continuing obligation. Further, to the extent that it found the respondent's failure to consider up-dated medical evidence to be relevant, the Tribunal was also bound to have regard to the fact that the evidence in question had continued to provide an uncertain and pessimistic prognosis in terms of the claimant's ability to return to work. Mr Gibson submitted that even if the Tribunal was to find that the respondent ignored medical evidence, it was still bound to have regard to the fact that the evidence was uncertain. A graded return over a few months with generic suggestions for reasonable adjustments was not enough.

150. Mr Gibson submitted, with regard to the complaint of indirect discrimination, that the respondent accepted that as people with depression might be expected to on average have a poorer attendance record to those without depression, then they would be placed at a particular disadvantage compared to others by the existence of an Attendance Management Policy. Further, as the claimant was a person with depression, and more likely to have a poorer attendance record to those without depression, then he was put to that disadvantage.

151. Mr Gibson submitted, however, that the Attendance Management Policy was a proportionate means of achieving a legitimate aim. The legitimate aim was to ensure the regular attendance at work of employees to do the work they were being paid to do. Long term sickness absence has a financial, service provision and management impact, and it is a legitimate aim of any

business to manage this impact and if necessary to dismiss employees who are incapable of returning to the kind of work for which they are employed to do.

152. It was submitted the respondent had shown that the claimant's dismissal with notice on the grounds of capability was reasonably necessary in order to achieve the legitimate aim of limiting the financial, service provision and management impacts of long term sickness absence on the business. There were no less discriminatory means which the respondent could have used to achieve the same objective.

153. Mr Gibson next addressed the complaint of failure to make reasonable adjustments. Mr Gibson accepted the claimant was placed at a substantial disadvantage by the application of the Attendance Management Policy in circumstances where he was dismissed.

154. The respondent did not however accept the claimant was placed at a substantial disadvantage by the application of the respondent's working practices. The claimant had, it was submitted, been vague in defining what "working practices" actually meant, and had completely failed to define the provision criterion or practice in that regard. If the claimant relied on the issues raised in the email of 28 January, it was submitted he was not placed at a substantial disadvantage by those working practices because they were applied to him prior to him becoming a disabled person. Further, the working practices were issues to which all staff were subjected. They did not place people with depression at a substantial disadvantage. They caused frustrations amongst all staff, and that was the evidence before the Tribunal.

155. Mr Gibson submitted there had been no failure on the part of the respondent to make reasonable adjustments. The focus of the claimant's evidence and cross examination had been on what adjustments could have been made if the claimant returned to work. The respondent had no issue with this, and fully accepted that adjustments could have been put in place. In fact the

respondent was the one to suggest these adjustments. That adjustments could have been put in place was not the issue.

156. The issue was whether in making these reasonable adjustments, it would have removed the substantial disadvantage. The claimant argued that a failure to delay the decision to dismiss until such time as a view could be sought from the claimant's treating physician on his state of health and whether it was likely he was fit to return to work, was a failure to make a reasonable adjustment. Mr Scarcliffe noted that both medical reports said the claimant was unfit for work: accordingly there was no duty to make reasonable adjustments. No further medical evidence was necessary. The claimant produced a report from Dr Palmer dated 3rd December which stated he was unfit for work but would be fit to engage with his employer in January 2016 to discuss a return to work. It was submitted that delaying a decision to obtain further medical evidence was not a reasonable adjustment given a report was already available. The claimant's entire case was based on an argument that after 23 months absence, the respondent should have waited and waited and waited some more just to see if the claimant, at some undefined point in the future, might be able to attend a meeting to discuss a possible return to work.

157. The claimant also claimed that denying him the opportunity to return to work on a gradual and phased return was a failure to make a reasonable adjustment. Mr Gibson submitted there was no failure to make a reasonable adjustment in circumstances where the claimant was not fit to return to work on a gradual and phased basis at the time of his dismissal. The medical evidence was entirely clear and Mr Scarcliffe could not be criticised for denying the claimant an opportunity to return to work on a gradual and phased basis when at the date of dismissal the claimant was not medically fit to take up that opportunity.

158. Mr Gibson referred to the case of **NCH Scotland v McHugh UKEAT 001/06** where the EAT held that the trigger point for the duty to make reasonable adjustments is when the employee indicates s/he will be returning to work.

There was no duty to make reasonable adjustments in this case because, at the time of dismissal, there was no indication when the claimant would return to work. This point had been confirmed in the case of **Doran v Department of Work and Pensions** where it was held that there was no duty to make reasonable adjustments where the employee was unfit to work and no indication had been given of a date to return to work.

159. Mr MacMillan was in possession of a report from Ms Cairns dated 14 January 2016, which did suggest the claimant was ready to return to work in a graded manner with adjustments over a period of a few months. Mr McMillan considered this information and decided it did not support upholding the appeal, taking into consideration the fact that the claimant had been off work for two years, there being no information as to how long a phased return would take or whether/when the claimant would be able to give full and effective service The adjustments suggested were not reasonable adjustments because they would not have removed the substantial disadvantage. Mr Gibson submitted it was not reasonable to say the respondent discriminated against the claimant by denying him the opportunity to return to work on a gradual and phased basis given the impact this uncertain, unspecified, vague in its time frame phased return would have had on the business particularly in light of the impact the previous two years absence had had on the business.

160. Mr Gibson next addressed the complaint of unfair dismissal. Mr Gibson submitted the claimant had been dismissed for reasons of capability. The claimant suggested he had been dismissed because he could not specify the cause of his disability and/or because the respondent assumed the claimant would be unable to sustain his attendance at work because of his disability. Mr Gibson submitted the claimant's evidence regarding the cause of his disability was inconsistent: on the one hand, and when referring to the indirect discrimination and failure to make reasonable adjustments claims, he referred to the working practices as causing his disability; however, on the other hand, when referring to the unfair dismissal claim, he stated he

was not able to identify a cause. The claimant appeared to argue what best supported his position at any given time.

161. Mr Gibson invited the Tribunal to reject the second reason advanced by the claimant because the respondent did not need to make any assumptions regarding the claimant because they had the medical evidence in front on them to rely upon.

162. Mr Gibson submitted the reason for the dismissal was capability, which related to the capability of the claimant for performing work of the kind for which he was employed to do. The claimant was employed as a Higher Officer and the Tribunal had heard evidence regarding the work and responsibilities of that role. It was a demanding role. Mr Scarcliffe took the decision to dismiss because the claimant was unable to return to work within a reasonable timescale. The claimant was not fit enough to attend the Stage 3 hearing with Mr Scarcliffe. He had not been fit enough to attend work for the past 23 months. He would not be fit enough to engage in discussions with his employer regarding a return to work until early in the new year. He was too ill to be in a position where realistically he would even return to the kind of work for which he was employed to do.

163. The next question for the Tribunal was whether the respondent had acted reasonably in treating the claimant's capability as a sufficient reason for dismissing him. Mr Gibson submitted the Tribunal should have regard to the following factors when considering this matter: (i) the nature of the claimant's illness. The claimant had been diagnosed with depression and had been unable to work for 23 months. There had been a suicide attempt in November 2014. The claimant was not fit enough to attend the Stage 3 hearing. The claimant would be returning to a stressful job and a disciplinary investigation. In the circumstances the respondent acted reasonably in taking the view that the nature of the illness suggested that, as Dr Freer had commented "it is unclear whether his mental health will recover enough that he is able to return to previous high functional levels."

(ii). The prospects of the employee returning to work and the likelihood of recurrence of the illness. The prospects of the claimant returning to his previous role were unrealistic. Further, the claimant's ability to render reliable service in the future were dependent on an ongoing recovery which was not potentially progressing as positively as the psychiatrist had hoped for.

(iii). The need for the employer to have someone doing the work. The Tribunal had heard evidence as to what the respondent had done to ensure the claimant's work was performed during the 23 month absence.

(iv). The effect of the absences on the rest of the workforce: Ms Symes had given evidence regarding the fact that during the first months of the claimant's absence, his team had not had a leader.

(v). The extent to which the employee was made aware of the position – the claimant had been kept informed at all stages and made no complaint about this.

164. Mr Gibson submitted it was also relevant to have regard to the employee's length of service and for how long the employer could be expected to keep the claimant's job open. Mr Gibson referred to the case of **BS v Dundee City Council 2013 CSIH 91** where it was held that in considering how long an employer may be expected to wait for an employee to return, it may be relevant to consider the availability of temporary cover; the fact the employee has exhausted his sick pay; the administrative costs that might be incurred in keeping the employee on the books and the size of the organisation.

165. Mr Gibson submitted the most pertinent fact in determining how long the employer may be expected to wait in this particular case, was the fact the claimant had already been off sick for 23 months. The decision of the

employer to dismiss in those circumstances fell within the band of reasonable responses.

166. Mr Gibson acknowledged that in respect of the procedure followed by the employer in dismissing the claimant, there had been focus upon whether the appeal had been a re-hearing or a review. The respondent's policy had been produced, but there was uncertainty whether the policy produced was the one that had been in force at the time. In any event Mr MacMillan had permitted new evidence to be produced for the appeal and this would suggest that he did not merely carry out a review.

167. The claimant had also raised the issue of redeployment at this Hearing. Mr MacMillan's evidence had been to the effect that he had not been asked to consider redeployment, but if he had, he would have noted that if the claimant had been demoted, the stressors arising from the working practices would still have been present.

168. Mr Gibson noted the claimant suggested his condition had been caused by the respondent. In the case of **Royal Bank of Scotland v McAdie 207 EWCA Civ 806** the Court held that an employer who has caused or contributed to the incapability of an employee is not thereby precluded for ever from effecting a fair dismissal. The question is whether it was reasonable in the circumstances as they were at the time of dismissal, for that employer to dismiss the employee. Mr Gibson submitted that even if the Tribunal accepted the claimant's evidence that his condition had been caused by his working environment, these issues were not relevant to the question of a fair dismissal.

169. Mr Gibson noted, with regard to the complaint that the claimant should be compensated for 15% of his pay because injury benefit paid only 85% of his salary, that this had not been set out in the ET1 claim form. There had not been any fair notice of this complaint and it should not be allowed to proceed. In any event, it is for the claimant to prove he was entitled to this

payment and he had not brought forward any evidence to support his position. The complaint should be dismissed.

170. Mr Gibson reserved his position regarding the breach of contract complaint advanced as described by the claimant's representative in his submissions.

Discussion and Decision

171. We decided it would be appropriate to firstly consider the discrimination complaints brought by the claimant, before turning to consider the complaint of unfair dismissal and the monetary claims.

172. There was no dispute regarding the fact the claimant is a disabled person in terms of section 6 Equality Act. The respondent conceded the claimant had a mental impairment (depression) which had a substantial adverse impact on his abilities to carry out normal day to day activities, and that this was a long term condition.

173. The claimant brought four complaints of discrimination and we decided to consider the complaint of failure to make reasonable adjustments first; then the complaint of direct discrimination and then discrimination arising from disability and indirect discrimination.

Reasonable Adjustments

174. We had regard firstly to the provisions of section 20 Equality Act which provide that where a provision criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

175. We were referred to the cases of **Archibald v Fife Council 2004 ICR 954** and **Environment Agency v Rowan 2008 ICR 218.** We had regard to the guidance set out in those cases and in particular where the EAT in the latter

case gave guidance on the approach to be adopted in reasonable adjustment claims. It was stated the Tribunal must consider:-

- the PCP applied by or on behalf of the employer;
- the identity of the non disabled comparators (where appropriate) and
- the nature and extent of the substantial disadvantage suffered by the claimant.

176. We also had regard to the case of **Project Management Institute v Latif 2007 IRLR 579** where the EAT expressly approved guidance on the application of the burden of proof in reasonable adjustment cases. It was stated that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.

177. The claimant identified two PCPs said to have been applied and which put him at a substantial disadvantage. The first PCP was said to be the way in which the contracts operated in the workplace and the pressures that those practices brought to bear on all employees. The second PCP was the respondent's Attendance Management Policy.

178. Mr Gibson challenged the first PCP on the basis the claimant had been vague about what was actually meant by the term "working practices" and had failed to define the PCP in that regard. We considered there was merit in Mr Gibson's challenge. The onus is on the claimant to identify the PCP. The claimant's evidence regarding the issue of working practices was not at all clear or consistent. The claimant told the Tribunal the issues which had caused him to go off were the ones set out in the email of 28 January. The claimant was subsequently asked in cross examination whether the working practices relied on were those set out in the email of 28 January, and he responded to the effect that he was not sure. Further, Mr Cunningham in his

submission, did not refer to work practices: he referred to the way in which contracts operated in the workplace, without more to explain what he meant by this.

179. We acknowledged the claimant raised a number of issues in the email of the 28 January – the annualised hours allowance; targets; dual training and rosters. However, there was no evidence to inform the Tribunal (or indeed the employer) whether one, some or all of those issues were the PCP; and furthermore, what was it that was being applied and which placed the claimant at a substantial disadvantage in comparison with persons who were not disabled.

180. The onus on the claimant is to state with some degree of certainty and clarity what the PCP is which is being applied and causing substantial disadvantage. An employer needs to know this in order to understand what adjustments may be required to remove or reduce that disadvantage. We concluded that a reference to "working practices" in circumstances where the claimant's evidence was that he was not sure if the matters set out in the email of 28 January were the working practices relied upon, was too vague. We decided the claimant had not identified the first PCP relied upon.

181. We should state that if we had found the PCP applied was the working practices set out in the email of 28 January, we would have had to consider whether those working practices put the claimant at a substantial disadvantage in comparison with persons who are not disabled. We, in considering this matter, firstly noted the claimant was not a disabled person in January 2014 when he wrote the email. Furthermore, the clear evidence of Ms Symes was that the claimant was not the only employee who had found the working practices difficult. The evidence was that all of the employees at the claimant's grade "moaned" regularly about the practices. We were, accordingly, not satisfied that the claimant was put at a substantial disadvantage in comparison with persons who were not disabled. Mr Cunningham, in his submission, invited the Tribunal to accept the general proposition that disabled employees were more likely than not to be

disadvantaged by the working practices. There was no evidence to support that general proposition and in fact, the only evidence available to the Tribunal, was that all employees (disabled employees and employees who were not disabled) were placed at a disadvantage by the working practices. We accordingly could not accept Mr Cunningham's submission on this point.

182. We secondly noted that Mr Cunningham, in his submission, identified the substantial disadvantage as being that the claimant was likely to be dismissed (because of absence).

183. We next would have had to consider the duty to make reasonable adjustments. Mr Gibson, in his submission, referred the Tribunal to the authorities regarding the issue of when the duty to make reasonable adjustments arises. We, prior to considering this, noted the medical information obtained by the respondent regarding the likelihood of a return to work.

184. The respondent, prior to the Stage 3 hearing, obtained an updated report from occupational health. The report, dated 12 October 2015 (page 190) was from Dr Freer, Consultant Occupational Physician. The report noted two reports had been received from the claimant's Specialist in May 2015 and September 2015, and Dr Freer had noted the content of these reports.

185. Dr Freer noted the perceived stress of having to attend the occupational health appointment and think about work, had triggered a deterioration in the claimant's mental health. It was further noted the claimant was still having "fairly intensive psychological input" and remained under monthly review with his consultant psychiatrist. Dr Freer noted the claimant was trying extremely hard to recover from his severe depression, but that he still suffered significant symptoms that meant Dr Freer would still consider him to remain unfit for his role as a Higher Officer.

186. Dr Freer considered it likely to be a period of at least 4 – 6 months before the claimant's mental health may improve enough that he could engage with

his employer and may be fit for some form of work. Dr Freer expressed concerns with regard to the claimant's longer term capacity to return to his role as a Higher Officer. Dr Freer noted the claimant's psychiatric report was generally positive with regards to recovery, but she questioned whether it was realistic that he would return to previous high functional levels based on the severity of the depressive episode and the length of time for recovery.

187. The claimant's Consultant Psychiatrist also provided a report dated 3 December 2015 (page 194) in which he noted the claimant had made good but slow and steady progress in terms of responding to treatment. The claimant currently remained unfit for work and Dr Palmer stated it was his view that it was likely that the claimant would be fit to engage with his employer very early in 2016 with a view to discussing the implementation of a phased return to work plan. Dr Palmer noted the claimant was also likely to need to discuss adjustments to his working arrangements prior to any return to work, again on a phased basis.

188. The issue of when the duty to make reasonable adjustment arises, was addressed in the case of **NCH Scotland v McHugh EAT 0010/06** where the EAT held that the duty is not triggered unless and until the claimant indicated that s/he was intending or wishing to return to work. His Honour Judge McMullen commented that "*We agree that a managed programme of rehabilitation depends on all the circumstances of the case, but it does include a return to work date. And certainly, if additional management and supervision is to be required, they must be arranged in advance and not in a vacuum".*

189. We had regard to the fact another division of the EAT, in the case of **London Underground Ltd v Vuoto EAT 0123/09** suggested there was no general proposition of law that the employer's duty to make reasonable adjustments does not arise until the disabled employee indicates when s/he will be able to return to work. The EAT in that case noted the medical evidence showed the employee's absence was, in part, caused by stress arising from the employer's treatment of him and on that basis the

Employment Tribunal had been entitled to find that the employer had come under a duty to consider any reasonable adjustment that would have alleviated that stress and thus eased the path of the employee towards his return to work.

190. The issue of when the duty to make reasonable adjustments is triggered was settled by the case of **Doran v Department for Work and Pensions** where the EAT held there was no duty to make reasonable adjustments when the claimant was certified as unfit for any work, and had given no indication of when s/he might be able to return to work.

191. The claimant was, as at the date of the Stage 3 Hearing, certified as unfit for work. There was a dispute regarding firstly which medical report should be preferred and secondly whether Dr Palmer's report meant the claimant was fit to return to work early in the New Year. We accepted Mr Gibson's submission that the material fact, notwithstanding whose report was preferred, was that the claimant was not fit for work (both reports confirmed this). The difference in the reports lay in the projected timeframe for when the claimant may be fit for work.

192. Mr Scarcliffe preferred the report of Dr Palmer because it was the most recent report. We acknowledged Mr Scarcliffe was uncomfortable at having conflicting reports. We accepted however that preferring the most recent report was a reasonable decision and one that he was entitled to make.

193. Dr Palmer's report stated the claimant (i) currently remained unfit for work and (ii) will be fit to engage with his employer very early in 2016 with a view to discussing the implementation of a phased return to work. Dr Palmer did not state the claimant would be fit to return to work early in the New Year.

194. This was not a straightforward case where the claimant could return to work on a phased basis, on light duties, once declared fit to do so. This was a case where the claimant had been absent for 23 months; he had experienced a severe depressive episode and had tried to commit suicide.

The claimant had not spoken to a member of management during his absence. Dr Palmer's report was careful, in the opinion of this Tribunal, to draw the distinction between being fit to return to work and being fit to engage with management about a return to work. They are two wholly different things. The claimant would still be required to engage in those discussions, reach agreement about a phased return and other adjustments and then be declared by Dr Palmer as being fit to return to work.

195. There was no evidence to suggest that if Mr Scarcliffe had put in place the adjustments suggested that the claimant could then have been fit to return to work. In other words, there was no suggestion that the failure of Mr Scarcliffe to put adjustments in place prevented the claimant from returning to work. The reason why the claimant could not return to work was because he was not fit to do so.

196. We did consider whether the fact Dr Palmer indicated the claimant would be fit, early in the New Year, to engage in discussions about a return to work, was sufficient to trigger the duty to make reasonable adjustments. We concluded, in the particular circumstances of this case, that it was not sufficient. We reached that conclusion because (i) the respondent was not sure of the cause of the claimant's absence and (ii) although there had been some discussion about the "usual" adjustments made in cases following long term absence, the respondent was not aware specifically of the adjustments the claimant would require. They could not know this unless and until they knew what had caused the absence.

197. Mr Cunningham invited this Tribunal to accept the respondent did know the cause of the claimant's absence because he had set it out in his email of the 28th January 2014. We could not accept that submission. There is no doubt the claimant sent the email of 28 January and then commenced sickness absence. There was also no dispute regarding the fact that the issues set out in the claimant's email were bones of contention for a number of staff and issues about which they moaned on a regular basis. However, Mr Cunningham's submission failed to have regard to the fact the claimant had

been absent for 23 months and, during that time, he had tried to commit suicide.

198. We considered that notwithstanding the fact the respondent was aware of the issues set out in the claimant's email of the 28 January, they were entitled to explore, and gain some understanding of, the causes of stress for the claimant. The respondent needed to know whether any, or all, of the issues referred to in the email were sources (or potential sources) of stress and whether the sources of stress had changed in the intervening 23 month period. The claimant had been absent from work for a very lengthy period of time and there had been no contact with management during that period. We considered it entirely reasonable for the respondent to want to learn and understand what the issues were for the claimant and how they could be addressed.

199. We considered that the duty to make reasonable adjustments in this case would not have been triggered until the discussions had taken place with the claimant to establish when he might be fit to return to work, the reasons for the absence and what adjustments may be required on a short and long term basis.

200. We, in conclusion, decided the claimant had failed to identify the PCP said to have been applied by the respondent, with sufficient clarity. Further, if the PCP was the application of the respondent's working practices as set out in the email of 28 January, there was no failure on the part of the respondent to make reasonable adjustments because the duty had not yet been triggered.

201. The second PCP identified by the claimant was the respondent's Attendance Management Policy. Mr Gibson, in his submission, accepted the claimant had been dismissed by application of the policy and he accepted this had placed the claimant at the substantial disadvantage of being dismissed.

202. Mr Cunningham submitted the Attendance Management Policy ought to have been adjusted to allow the claimant to return to work on a phased basis. We noted there was no evidence to support the suggestion the application of the Attendance Management policy prevented a phased return. There was also no evidence to suggest the respondent would not have allowed a phased return to work. The evidence of Ms Symes is that a phased return to work is considered a "usual" adjustment for employees returning from lengthy sickness absence.

203. The issue to be determined is whether, if the adjustment of a phased return to work had been put in place, it would have removed the substantial disadvantage of dismissal. We have set out above in detail when we considered the duty to make reasonable adjustments is triggered. We concluded the duty to make reasonable adjustments had not been triggered in this case because the claimant was not fit to return to work.

204. Mr Gibson, in his submission, identified (correctly in the opinion of this Tribunal) that a great deal of the claimant's cross examination and submissions focussed on what adjustments could have been put in place if the claimant was to return to work. Mr Gibson noted the respondent had no issue with this and fully accepted that adjustments could have been put in place. In fact the respondent was the one who had suggested a number of the adjustments. We accepted Mr Gibson's submission that adjustments could have been put in place was not the issue.

205. The claimant, in the claim form (although not in the submission) suggested that it would have been a reasonable adjustment to delay the decision to dismiss until such time as a view could be sought from the claimant's treating physician on his state of health. We could not accept this suggestion because (a) there was no evidence of a PCP which had been applied by the respondent regarding this matter – it was not suggested, for example, that this was not provided for in the respondent's policy; (b) the respondent had an up-to-date report from Dr Palmer. His report was dated 3rd December and the Stage 3 hearing took place on the 10th December and (c) the claimant

had an opportunity to present another report from Dr Palmer to the appeal hearing.

206. We decided, for all of the above reasons, to dismiss the complaint of failure to make reasonable adjustments.

Direct Discrimination

207. We had regard to the terms of section 13 Equality Act which provides that a person (A) discriminates another (B) if, because of a protected characteristic, A treats B less favourably than he treats or would treat others.

208. The claimant argued he had been treated less favourably when (i) the respondent made stereotypical assumptions about his ability to perform his role as a Higher Officer because of his disability and (ii) he was dismissed.

209. Mr Cunningham, in his submission to the Tribunal, did not explain in detail the stereotypical assumptions he considered the respondent had made about the claimant's ability to perform his role as a Higher Officer, beyond a reference to the respondent thinking people with mental health issues would not be able to carry out the Higher Officer role. The submissions appeared to be focussed on the reservations expressed by Dr Freer and the respondent regarding the ability of the claimant to return to his role.

210. We could not accept the submission that the respondent had made stereotypical assumptions regarding the claimant's ability to perform his role. There was no evidence of this, and the respondent did not voice assumptions: they took advice from occupational health and the claimant's consultant psychiatrist. Dr Freer questioned how realistic it was that the claimant would return to the high functional levels required for his previous role, and she based that question on the fact of the severity of the depressive episode, the length of time for recovery, and her medical expertise and experience.

211. The respondent had sought advice from occupational health and were entitled to have regard to that advice. The fact was that the claimant had had a very serious depressive episode and there was uncertainty regarding the extent of his recovery. There was a risk he would not return to the functional level required to carry out his role. This was not an assumption because he had depression: it was a medical opinion based on the severity of the condition and length of time to recover.

212. We next considered the claimant's submission that he was treated less favourably because of his disability when he was dismissed. The key to establishing direct discrimination is a comparative exercise. The claimant is required to show that he was treated less favourably than someone who does not share his protected characteristic: he must compare his treatment to the treatment of someone who was not disabled.

213. The claimant did not lead any evidence, or cross examine the respondent's witnesses, regarding the treatment of employees on long term sickness and dismissal. The only relevant information came from the respondent's Attendance Management policy which provided for a Stage 3 hearing (to consider dismissal) after the period of one year. The claimant had been permitted an absence of almost two years.

214. There was no evidence before the Tribunal to suggest that an employee, who was not disabled, but who had been off on long term sickness absence for the same period of time as the claimant would not have been dismissed. In other words, a hypothetical non-disabled employee in the same, or similar circumstances to the claimant, would also have been dismissed: in fact, according to the policy they would have been dismissed a year prior to the claimant. We concluded the claimant had not demonstrated the respondent treated him less favourably because of disability, than it treated, or would have treated others.

215. We decided to dismiss this complaint.

Discrimination arising from disability

216. Section 15 of the Equality Act provides that 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 the treatment is a proportionate means of achieving a legitimate aim.

217. The claimant maintained he had been treated unfavourably by the respondent when he was dismissed. The claimant submitted he had been dismissed because of his absence, and his absence was a consequence of his disability. Mr Cunningham, in his submission, went on to say the claimant was dismissed because he was unable to identify the trigger that caused the stress that gave rise to the disability and his absence from work. We could not accept Mr Cunningham's submission because it did not accurately reflect either the reason for the dismissal or the evidence before the Tribunal. We acknowledged the respondent wished to know the reason for the absence, but the claimant's inability to identify this did not cause his dismissal, although it was a factor considered by the respondent.

218. Mr Gibson conceded the respondent had treated the claimant unfavourably when it dismissed him because of something arising in consequence of his disability. The respondent sought to defend their position on the basis the dismissal had been a proportionate means of achieving a legitimate aim.

219. We, in considering the respondent's defence, firstly noted the guidance from the EHRC Employment Code, where it states that for an aim to be legitimate, it must be legal, should not be discriminatory itself and it must represent a real, objective consideration. We also noted that a wide range of matters are capable of amounting to legitimate aims, including business needs and economic efficiency.

220. The legitimate aim of the respondent was identified as being the provision of an efficient and effective customs and excise service at the UK border. The respondent maintained that in order to achieve that legitimate aim it required

Higher Officers to attend work regularly and carry out their full duties. We were satisfied this aim was legal, not discriminatory and represented a real, objective consideration for the respondent which is a public body.

221. We next considered whether the dismissal of the claimant was a proportionate means of achieving that aim. We noted the guidance from the Employment Code provides that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective.

222. Ms Symes gave evidence regarding the impact of the claimant's absence on the respondent's service. Her evidence was largely uncontested. We accepted there were 10 Higher Officers in the West of Scotland at the time of the claimant's absence, and this number was less than had previously been employed (13 in 2013/14). The Higher Officers were responsible for teams of staff comprising between 6 – 10 employees, and were responsible for deploying those employees effectively. The Higher Officers also carried out some HR functions and were responsible for being the airport Duty Manager at certain times each week.

223. We concluded from this evidence, that the role of Higher Officer was a key role within the respondent's organisation. The employees filling these roles were experienced members of staff. We acknowledged the respondent employed a number of agency staff to fulfil roles carried out by team members, but noted the respondent did not fill Higher Officer roles with agency staff.

224. The claimant's role was not filled during the first 6/8 weeks of his absence, and in that time, the team operated without a manager. The respondent subsequently appointed a team member to act-up in the claimant's role, but this left the team being an employee short. We accepted Ms Symes' evidence that she had to take on aspects of the claimant's role, such as writing reports, and she had to spend time supporting the member of staff

who was acting up in the role. There was also a cost involved in paying the member of staff to act up.

225. We also accepted that during this particular time there was additional pressure on the respondent due to the Commonwealth Games, and the fact there had been a budget cut but an increase in work due to increased passenger numbers.

226. The claimant was absent for a period of 23 months. This was almost twice the length of time provided for in the respondent's Attendance Management policy (which provides for a Stage 3 hearing after 12 months' absence).

227. We next asked whether there were any less discriminatory measures which could have been taken to achieve the aim of running an efficient and effective service. The only alternative put forward by the claimant was to allow him to return to work with reasonable adjustments. We acknowledged this proposition would have been an alternative if the claimant had been fit to return to work in his role. However, the evidence was that when the claimant was fit to return to work, he would not initially have returned to the role of Higher Officer. Furthermore, there was some doubt about whether the claimant would ever have been able to return to that role.

228. The claimant argued the medical evidence of Dr Freer had been "questionable" and that the respondent had ignored the medical evidence presented by the claimant. We could not accept either of these arguments. We acknowledged the claimant did not like Dr Freer and considered her approach to have been hostile; however there was nothing to suggest the opinion of Dr Freer, who is a Consultant Occupational Physician, was unreliable, or that it should have been disregarded by the respondent. The report of Dr Freer was, in any event, only one of a number of reports which the respondent had obtained and considered. The clear evidence of Mr Scarcliffe was that he had placed more weight on the report from the claimant's Consultant Psychiatrist than on the report from Dr Freer, because the report from the Consultant Psychiatrist was the most up-to-date and had

been prepared by the Consultant Psychiatrist who had been treating the claimant for some time.

229. We could not accept the claimant's position that the respondent had ignored the medical evidence presented by him. There was no dispute regarding the fact the respondent had all of the relevant medical information at the time of the dismissal and appeal hearings. Mr Scarcliffe considered the position from the most positive viewpoint taken from the report of Dr Palmer, to the effect the claimant would be fit to engage in discussions about a return to work in early 2016. Mr McMillan took into account the new occupational health report from Ms Cairns and the further report from Dr Palmer. The medical information was not ignored: the respondent clearly had regard to, and were guided by, the medical information when reaching their decision.

230. The issue in this case is that the parties had a different view of the meaning of the medical information. The claimant, referring to Dr Palmer's report of 14 January 2016, considered it meant he was fit to return to work in January 2016. He also, having regarding to Ms Cairns' report, considered it supported the fact he was fit to return to work with reasonable adjustments.

231. The respondent took a different view. Mr Scarcliffe and Mr McMillan, having had regard to Dr Palmer's report, believed it meant the claimant would be fit, in January 2016, to start having discussions with management regarding a return to work. The issue for the respondent was that this statement did not provide any certainty regarding when the claimant may actually return to work and in what capacity.

232. The respondent had regard to the fact the claimant had been absent from work for two years and, during that time, he had had no contact with management. Mr McMillan accepted there had been no contact with management because that had been on the recommendation of the claimant's Consultant. However, the fact remained that the claimant had not been sufficiently fit to either attend at work, or have discussions with management.

233. Mr Scarcliffe and Mr McMillan had regard to the fact that there required to be discussions between the claimant and management regarding a return to work, in order to discuss the claimant's health, his capabilities, what had caused the claimant to go off sick, what adjustments he may require and the prospects of a return to his role as Higher Officer. The respondent had very little information regarding these matters and no information to guide them regarding whether, if the claimant was fit to return to work, how long a return to work "in a graded manner" may last and the prospects of the claimant being able to return to the Higher Officer role.

234. Mr MacMillan considered the further reports produced by the claimant at the appeal (being the letter from Ms Cairns, Occupational Therapist and the letter from Dr Palmer). However, Dr Palmer – whilst agreeing with the suggestions of Ms Cairns regarding a phased return to work – reiterated his opinion that the claimant was fit to engage in discussions with his employer regarding a return to work. Dr Palmer did not state the claimant was fit to return to work, and Mr MacMillan did not have before him a Fit Note signing the claimant off as being fit for work.

Mr MacMillan has regard to these extra reports during the appeal process, but he concluded dismissal had been a reasonable decision in the circumstances given all of the other issues set out above.

235. The claimant argued that the respondent was aware of the reasons for his absence because he had set them out in the email of 28 January. We acknowledged the claimant had, in that email, set out a number of matters of concern, however, that had been two years earlier, and there had been no discussion with the claimant regarding this matter in the intervening period. We considered it was not sufficient for the claimant to simply point to the email of 28 January. The claimant had been absent for two years and, during that time, he had been very seriously ill. We accepted the respondent's position that they wished to understand from the claimant the trigger/s for his stress in order to allow them to properly consider what

adjustments were reasonable in order to remove the trigger/s. This was particularly so in circumstances where (a) there appeared to be some uncertainty whether the email of 28 January set out the real reasons for the claimant's stress and absence; (b) the issues set out in the email were wide-ranging and the respondent needed to understand whether all of the issues were triggers and (c) the respondent had concerns regarding a potential disciplinary investigation and whether this had influenced the claimant's absence.

236. We concluded, having had regard to all of the above points, that the respondent did not ignore the medical evidence produced by the claimant. The respondent had regard to the medical evidence: they took it into account and balanced it against a number of other factors (as set out above) prior to reaching their conclusion.

237. We decided the dismissal of the claimant was a proportionate means of achieving a legitimate aim. We decided to dismiss the complaint of discrimination arising from disability.

Indirect Discrimination

238. Section 19 Equality Act provides that a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. A PCP has this effect if the following four criteria are met:

- A applies or would apply, the PCP to persons with whom B does not share the characteristic;
- The PCP puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;
- The PCP puts, or would put, B at that disadvantage and

- A cannot show it to be a proportionate means of achieving a legitimate aim.

239. We had regard to section 6(3)(b) Equality Act. We noted that indirect discrimination is established where a policy that an employer applies puts those who share a protected characteristic at a particular disadvantage when compared with those who do not share it. Section 6(3)(b) clarifies that in relation to disability, a reference to persons who share a protected characteristic is a reference to persons who have the same disability. Accordingly, the "particular disadvantage" must affect those who share the claimant's particular disability.

240. The claimant, in bringing an indirect discrimination complaint, must show not only that the employer applied, or would apply, a PCP to persons with whom the claimant does not share a protected characteristic, but also that that PCP puts people who have the same disability as the claimant, at a particular disadvantage. The claimant did not lead any evidence regarding these matters. We do not know, for example, whether any other Higher Officer employees have anxiety/depression, or whether they have been affected by the respondent's working practices, or the application of the Attendance Management policy. The claimant's case was advanced on the basis that it was obvious others with anxiety/depression would be put to particular disadvantage by the application of the PCP. We, however, concluded that this is not sufficient and it cannot be assumed that others with the same disability as the claimant would have been put to a particular disadvantage by the application of the PCP.

241. Mr Cunningham submitted the complaint of indirect discrimination was based on the way in which the working practices were applied to all workers but had an adverse effect on disabled employees because they were more likely to suffer stress, go absent and be dismissed. He further submitted the PCP included the way in which the Absence Management policy had been applied to the claimant insofar as a return to work date had to be identified with a clarity that the claimant was unable to achieve.

242. We have set out above our conclusion that a PCP regarding the respondent's working practices was vague and uncertain and in those circumstances the claimant had failed to identify the PCP applied by the respondent. We make the same finding, for the same reasons, in respect of the complaint of indirect discrimination.

243. The claimant also argued the PCP was the application of the respondent's Attendance Management policy. Mr Gibson, in his submission, accepted the application of the respondent's Attendance Management policy may put people with the same disability as the claimant, at a particular disadvantage compared to others because people with the claimant's disability may be expected to have, on average, a poorer attendance record compared with employees who do not have the same disability as the claimant. The respondent also accepted the claimant was put to that disadvantage because he was dismissed.

244. Mr Gibson invited the Tribunal to find that the application of the respondent's Attendance Management policy was a proportionate means of achieving a legitimate aim. We have already considered this issue (above) and we decided, for the same reasons as set out above and not repeated here, that the application of the Attendance Management policy was a proportionate means of achieving a legitimate aim. We accordingly decided to dismiss this complaint.

Unfair dismissal

245. We had regard to section 98 Employment Rights Act, which sets out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages:

- first, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in section 98(1) and (2) and

- if the employer is successful at the first stage, the Tribunal must then determine whether the dismissal was fair or unfair. This requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.

246. The respondent accepted it had dismissed the claimant and asserted the reason for the dismissal was capability (defined as capability of the employee for performing work of the kind which he was employed to do) in terms of section 98(2)(a) Employment Rights Act.

247. The claimant invited the Tribunal to find the reason for the dismissal was because of the claimant's disability. We did not uphold this argument and our reasons for doing so are set out above.

248. The claimant also argued that the reason for the dismissal was because of the claimant's inability to specifically identify the cause of his disability, and because the respondent made stereotypical assumptions about the ability of the claimant to return to the Higher Officer role following his absence for depression. We have dealt with both of these arguments above, and do not repeat our reasoning for not upholding either of the arguments. We did acknowledge the fact the claimant could not – or would not – specifically identify the cause of the disability was a factor which the respondent took into account when determining the claimant's case, but it was not the reason for the dismissal.

249. We were entirely satisfied that the reason for the dismissal of the claimant was because of his capability for performing work of the kind which he was employed to do. The claimant had been absent for a period just short of two years at the time of the dismissal. The claimant was not fit to return to work: the medical report from Dr Palmer identified the claimant would be fit to engage in discussions with the employer early in the New Year, to discuss a return to work. Further, the claimant was not fit to return to the role of Higher Officer, and there was some doubt whether he would ever achieve fitness to return to that role. These reasons caused the respondent to dismiss the

claimant. The reason for the dismissal was capability in terms of section 98(2)(a): this is a potentially fair reason for dismissal, and the Tribunal must now continue to consider whether dismissal for that reason was fair.

250. We were referred to the case of **Spencer v Paragon Wallpapers Ltd 1977 ICR 301** where the EAT held that in the case of a dismissal on the ground of absence due to ill health, there should be some form of communication between the employer and the employee before the employee is dismissed for incapacity and that usually the communication should be a discussion between the parties so that the situation could be weighed up bearing in mind the employer's need for the work to be done and the employee's need for time in which to recover his health. The EAT identified the basic question to be determined in each case as whether, in all the circumstances, the employer can be expected to wait any longer, and if so, how much longer.

251. We also had regard to the case of **BS v Dundee City Council 2014 IRLR 131** where the Court of Session expressly addressed the question of whether an employer should be expected to wait any longer. It was held that it is for the Tribunal to balance all of the relevant factors in the case, and such factors include –

- whether other staff are available to carry out the absent employee's work;
- the nature of the employee's illness;
- the likely length of the absence;
- the cost of continuing to employ the employee and
- the size of the employing organisation.

252. The Tribunal must, against those factors, balance the "unsatisfactory situation of having an employee on very lengthy sick leave". In addition to the above, the Tribunal must also have regard to whether a fair procedure has been followed which, essentially, involves:-

- consultation with the employee;
- a thorough medical investigation (to establish the nature of the illness and its prognosis) and
- consideration of other options, in particular, alternative employment within the employer's business.

253. We had regard firstly to the issue of consultation and noted that proper consultation for the purposes of unfair dismissal should include:-

- discussion at the start of the illness and periodically throughout the duration and informing the employee if the stage when dismissal may be considered is approaching;
- personal contact between employer and employee;
- consideration of the medical evidence;
- consideration of the employee's opinion on his condition;
- consideration of what can be done to get the employee back to work;
- consideration of offering alternative employment, if any, in the employer's business and
- consideration of an employee's entitlement to enhanced ill health benefits if available.

254. There was no dispute regarding the fact the claimant indicated in his email of 28 January that he wished to be left alone and to not have contact with the respondent. We accepted the evidence of Ms Symes that she had, initially, respected the claimant's wishes to be "left alone" and for there to be no contact. Ms Symes made no contact with the claimant for approximately 4 weeks following the start of his absence.

255. Ms Symes then made contact with the claimant to enquire after his health, inform him of the need for contact in terms of the respondent's policies and procedures and to provide him with an update regarding colleagues. The claimant was also informed when the respondent reached the stage of considering dismissal.

256. We noted it was a feature of this case that the claimant did not wish to have contact with the respondent. The respondent accepted this was initially the claimant's decision, but that it was subsequently supported by the claimant's Consultant Psychiatrist. This meant the respondent had no personal contact with the claimant prior to the appeal hearing. We make no criticism of the respondent given the wishes of the claimant which were supported by his medical practitioner; however, the practical effect of this was that the respondent had no opportunity to see/hear from the claimant directly until after his dismissal.

257. We next considered whether the respondent obtained and considered medical evidence. There was no dispute regarding the fact the respondent obtained regular occupational health reports, and these were supplemented by the provision of reports from Dr Palmer, Consultant Psychiatrist. We were satisfied the respondent considered all of the medical reports and had a clear understanding of the state of the claimant's health and any improvements in his condition.

258. One issue which was in dispute between the parties related to the cause of the claimant's condition. The claimant, at this Hearing, maintained the respondent knew of the cause of his depression, because it was set out in the email of 28 January. We could not accept that position because we did not consider it disclosed the entire picture. The content of the email of 28 January was questioned by the respondent for three reasons: (i) because the claimant had not ever – with the exception of a general moan – spoken to Ms Symes about the matters he raised in the email. Ms Symes acknowledged the issues raised in the email were bones of contention for all Higher Officers, and the claimant was no different in this respect. (ii) Ms

Symes knew the claimant well and had worked with him for 16 years. Ms Symes did not detect any sign of stress in the claimant prior to him going off sick. And (iii) the claimant's trade union representative appeared to question whether the issues set out in the email were truly the reason for the absence. Mr Boyle suggested the claimant had dealt with much more difficult issues in his previous role, and he questioned whether the issues in the email had truly caused such anxiety for the claimant.

259. We also had regard to the fact the content of the email was two years old by the time the claimant engaged with the respondent at the appeal hearing. We considered that given the length of time which had passed, and the fact the claimant's condition had, in that time, been life-threatening, the respondent was entitled to question and consider the full reasons for the ill health and absence. We considered it too simplistic simply to point to an email which was two years old and where there was doubt in the mind of the employer that the email disclosed the full, or real, reasons for the claimant's condition.

260. The respondent's desire to understand was overlaid by the fact there was a disciplinary issue to be investigated with the claimant upon his return to work. We accepted the claimant was not aware of this until this Hearing, but the fact remained that the respondent wished to know whether, and to what extent, the absence had been caused by the request to visit the police station and provide fingerprints.

261. The claimant's position regarding the cause, or trigger/s, for his condition was somewhat confused. He, on the one hand, invited the Tribunal to simply accept the email of 28 January set out the cause of his condition; but on the other hand, he maintained he could not specify what had caused his condition. The claimant was, in the opinion of this Tribunal, reluctant to engage in discussion about what had caused his condition. He was irritated when questioned about this.

262. We were entirely satisfied that an employer must have an understanding of the issues which have, or may have, triggered the stress reaction in order to be able to consider and make adjustments. We concluded the issues set out in the email of 28 January were the starting point, however, given the time which had passed, the severity of the claimant's condition and the questions which the respondent had surrounding this matter, the claimant's reluctance to address it undermined his position.

263. The respondent, at the Stage 3 hearing, had medical evidence from occupational health (Dr Freer) and the claimant's Consultant Psychiatrist, Dr Palmer. The claimant, and his trade union, wished the respondent to prefer the report of Dr Palmer because it was more favourable to the claimant in terms of when he may be fit to return to work. Mr Scarcliffe decided to place more weight on Dr Palmer's report because it was the most recent report and Dr Palmer had been the claimant's Consultant Psychiatrist for a lengthy period of time. Mr Scarcliffe however, did not ignore Dr Freer's report: he took it into account as one of the factors to which he should have regard in reaching his decision.

264. The claimant was critical of Mr Scarcliffe for not ignoring the report of Dr Freer. However, the only basis put forward by the claimant to support his position was that (i) he had not liked Dr Freer, who had adopted a less sympathetic approach compared to others and (ii) her report was less favourable in terms of when the claimant may be fit to return to work and whether he would be fit to return to the role of Higher Officer.

265. We, having had regard to the above points, concluded the approach taken by Mr Scarcliffe was one which fell within the band of reasonable responses which a reasonable employer might have adopted when faced with medical reports which reach different conclusions regarding timescales for a return to work. We were entirely satisfied that the fact the claimant did not like Dr Freer, and found her approach less sympathetic, was no basis for ignoring her report. Dr Freer is a Consultant Occupational Physician and she had before her reports from Dr Palmer, to which she had regard when making

her report. Furthermore, Dr Freer and Dr Palmer agreed on one key point which was that the claimant was not fit to return to work. The difference in the reports lay in the probable timescale for fitness to return to work, and that must be seen in the context of the fact Dr Palmer concluded the claimant would be fit to engage in discussions early in the new year regarding a return to work, and not that he would be fit to return to work early in the new year. We concluded that when the reports are viewed in that context, they are not so very different.

266. We concluded, having had regard to all of the above points, that Mr Scarcliffe gave full and proper consideration to the medical reports before him and adopted an approach that fell within the band of reasonable responses when he decided to place more weight on Dr Palmer's report, whilst not ignoring Dr Freer's report.

267. The next factor to consider is whether consideration was given to the employee's opinion on his condition. The claimant did not attend the Stage 3 hearing before Mr Scarcliffe because he was not fit to do so. The claimant had, however, briefed his trade union representatives, and Mr Scarcliffe had the benefit of hearing from them. The trade union advanced the argument that Dr Palmer's report meant the claimant was fit to return to work early in the New Year. Mr Scarcliffe, however, did not accept that position. He understood Dr Palmer's report meant the claimant would be fit, early in the New Year, to meet with the employer to enter into discussions about a return to work.

268. We concluded the decision of Mr Scarcliffe regarding Dr Palmer's report was correct given not only the wording of the report which was very clear, but also the fact that the claimant had not had personal contact with his employer during the course of his absence (that is, a period of two years). The issue of contact with the employer was, clearly, a major issue for the claimant to address. The claimant, for example, viewed the meeting with Dr Freer, occupational health physician, as a meeting with the employer and it is recorded that he experienced a negative impact on his condition following

that meeting. We concluded that given the length of time which had passed and the fact the meeting with occupational health had triggered a negative reaction in the claimant, Dr Palmer adopted a step-by-step approach to the claimant's return to work. The first step was for the claimant to meet with the employer to discuss a return to work: Dr Palmer considered the claimant would be fit to do this early in the New Year.

269. Mr MacMillan further considered the medical reports, the additional reports from Ms Cairns and Dr Palmer and the claimant's arguments at the appeal hearing. Mr MacMillan acknowledged Ms Cairns, in her letter of 14 January 2016, stated that in her opinion the claimant was ready to return to work in a graded manner. However, Dr Palmer reiterated his view that the claimant was fit to engage with the employer to discuss the implementation of a phased return to work.

Mr McMillan noted the claimant was not fit to return to work and, whilst all agreed a phased return to work would be necessary, the employer did not know when this would start, how long it would last and whether the claimant would be fit to carry out the duties of his role.

Mr McMillan gave consideration to the claimant's opinion regarding his condition, but balanced this with the fact the claimant had had a negative reaction following the consultation with Dr Freer (which the claimant regarded as his first contact with management) and he was not signed off as being fit to return to work.

270. The next factor for the respondent to consider is what can be done to get the claimant back to work. There was no dispute regarding the fact there are a number of adjustments which the respondent would make almost as a matter of course for the return of an employee who had been off on long term sick. Ms Symes spoke of a phased return to work, reduced hours, no shift working. We considered Mr Gibson's submission was well made when he said the issue is not about what reasonable adjustments the respondent could have made, but (a) whether the duty to make reasonable adjustments

arose and (b) what adjustments were reasonable and required to remove the substantial disadvantage.

271. The issue of reasonable adjustments was considered by Ms Symes, during the stage 1 and 2 hearings and by Mr Scarcliffe at the stage 3 hearing. There was no dispute regarding the fact the respondent could have made a number and range of adjustments. Mr Scarcliffe however concluded the respondent was not yet at the stage of having to make reasonable adjustments because the claimant was not yet fit to return to work. Mr Scarcliffe concluded that notwithstanding the fact the claimant may be fit early in the new year to discuss a return to work, those discussions still had to take place, agreement still had to be reached on a return to work which suited the respondent and the claimant and the claimant still had to be signed off as fit to return to work by Dr Palmer. Mr Scarcliffe considered there was no timescale for the above points to be completed, and no guarantee that at the conclusion of those discussion the claimant would be fit to return to work.

272. Mr Scarcliffe also had regard to the fact that in Dr Freer's report, she had expressed uncertainty regarding the chances of the claimant being fit to return to the role of Higher Officer.

273. We concluded the respondent did consider what could be done to get the claimant back to work.

274. The next issue is consideration of alternative employment. Mr Scarcliffe did not give consideration to the issue of alternative employment beyond acknowledging the occupational health reports (and Ms Symes) had focussed on the claimant returning to carry out lighter duties for an unspecified period of time once fit to return to work. We formed the impression from Mr Scarcliffe's evidence that his experience of alternative employment was in the disciplinary context of downgrading, and he would not have given consideration to alternative employment unless requested to

do so by the claimant's representative. We noted there was no suggestion the claimant move on a permanent basis to another role.

275. The respondent also had regard to the fact the claimant had been absent for a period of two years. The respondent's policy provides for the stage 3 hearing to take place after one year's absence. The claimant's position was being covered by a team member acting up. Mr Scarcliffe also had regard to the fact there was no certainty when the claimant would be fit to return to work and whether he would be able to return to his role of Higher Officer.

276. Mr Scarcliffe, having consulted with the claimant's trade union representatives and considered the medical and all other evidence available to him, decided to dismiss the claimant with notice on 18 December 2015.

277. The claimant appealed against the decision to dismiss. The appeal was heard by Mr MacMillan. The claimant attended the appeal hearing and produced two additional letters from Dr Palmer and Ms Cairns.

278. Mr MacMillan decided to dismiss the appeal for a number of reasons which included:-

- the respondent still had no understanding of the stressors which had had such an impact on the claimant. The claimant did not want to address this, but Mr MacMillan considered that in order for the respondent to manage the claimant effectively in the future, they needed to know what had caused or contributed to the condition in the first place.

- The additional medical evidence did not address the level of functioning in the future: there was, accordingly, still uncertainty whether the claimant would be fit to return to his role of Higher Officer in the future.

- The additional medical evidence discussed the need for a phased return to work and adjustments, but gave no indication for how

long these would need to last or the likelihood of a successful return to work or its impact on the claimant. There was also no indication how long the discussions between the claimant and the respondent regarding a phased return to work, would take nor the impact on the claimant. The claimant had not been signed off as fit for work.

- The operation in Glasgow airport is entirely front-facing and there is no back office. The respondent could sustain a short term move away from front-facing duties, but thereafter there would be little/nothing to do.

- The claimant had been absent for two years and during his absence his post had been covered by a team member obtaining a temporary promotion. This has a cost to the business as well as issues regarding continuity.

279. We next asked ourselves whether the respondent's decision to dismiss the claimant for reasons of capability was fair or unfair in terms of section 98(4) Employment Rights Act. We, in considering this question, had regard to firstly the nature of the claimant's illness and the fact the claimant had been unfit to work for two years at the time of his dismissal. The claimant was diagnosed with depression and the severity of his condition was not in dispute.

280. We secondly had regard to the fact the respondent had obtained medical information which confirmed the claimant would be fit, in the early new year, to enter into discussions regarding a return to work: there was no indication when the claimant would actually be fit to return to work. The report of Dr Freer also indicated the prospects of the claimant being able to return to the role of Higher Officer were unrealistic. The further report of Dr Palmer (January 2016) obtained by the claimant for the appeal hearing reiterated the opinion that the claimant was fit to engage in discussions regarding a

phased return to work: Dr Palmer did not state the claimant was fit to return to work.

281. We thirdly had regard to the fact there was a need for the respondent to have someone fill the claimant's role of Higher Officer. The role is a pivotal role in the respondent's organisation.

282. We fourthly had regard to the fact the respondent consulted with the claimant whenever possible. The reality of the situation was that there was no personal contact between the claimant and the respondent for two years.

283. We fifthly had regard to the fact the claimant had a lengthy period of service with the respondent.

284. We sixthly had regard to the claimant's argument that the respondent could have waited longer before dismissing him, particularly when the medical evidence showed he was improving and working towards a return to work. We did acknowledge the frustrations of the claimant who had worked hard to recover from the condition but had had his employment terminated. However, against those frustrations, there was no certainty when the claimant would be fit to return to work or whether he would ever be fit to return to his role; and, the respondent had had to manage initially with no-one to cover his post and duties and thereafter to have a team member temporarily promoted into the post. This, however, was a temporary solution and not a long term solution. It was a also an additional cost to the respondent.

285. We lastly had regard to the procedure followed by the respondent when dismissing the claimant. Mr MacMillan accepted that in terms of the respondent's policies and procedures, his role at the appeal is to re-hear the case rather than review it. Mr MacMillan further accepted that he had reviewed Mr Scarcliffe's decision and considered the additional evidence, rather than re-hear the case. Mr Cunningham submitted this error rendered the dismissal unfair.

286. We, in considering Mr Cunningham's submission, firstly noted there was no evidence to inform the Tribunal what format a re-hearing would have taken in contrast to the review carried out by Mr MacMillan. We noted there was no suggestion that a re-hearing would have allowed an opportunity for something not permitted at a review.

287. We secondly noted that previous case authorities regarding appeal hearings and the curing of defects at earlier stages had focussed on whether the appeal hearing had been a rehearing (which could cure earlier defects) or a review (which could not cure earlier defects in procedure) (**Whitbread and Co plc v Mills 1988 ICR 776)**. However, the Court of Appeal in the case of **Taylor v OCS Group Ltd 2006 ICR 1602** stressed the Tribunal's task under section 98(4) is to assess the fairness of the disciplinary process as a whole, and where procedural errors occur at an early stage, the Tribunal should examine the subsequent appeal hearing, particularly its procedural fairness and thoroughness, and the open-mindedness of the decision-maker.

288. We, having had regard to the above case authorities, decided to adopt the same reasoning in this case. We could not accept Mr Cunningham's submission that simply because an appeal hearing was a review rather than a re-hearing, it was a procedural error such as to render the dismissal unfair, when there was nothing to support that submission. We considered our function is to examine the whole process – rather than the labels placed on hearings – and consider the fairness and thoroughness of the appeal procedure and the open-mindedness of Mr MacMillan.

289. We decided, having adopted that approach, that the claimant had an opportunity to make all of the points of appeal which he wished to make and he was permitted to introduce new material from Dr Palmer and Ms Cairns. There was no suggestion that Mr MacMillan had not been open-minded and we were entirely satisfied that he gave consideration to all of the points raised by the claimant and the new material he introduced. We were,

accordingly satisfied that Mr MacMillan adopted a fair procedure at the appeal stage of the disciplinary process.

290. Mr Cunningham further submitted there had been a flaw in the procedure as evidenced by the fact Mr Scarcliffe noted, at the start of the Stage 3 Hearing, that he was satisfied the respondent had followed the procedure and done all it could to get the claimant back to work. Mr Cunningham submitted this demonstrated Mr Scarcliffe had made up his mind before hearing from the claimant. We could not accept that submission because we preferred Mr Scarcliffe's evidence and explanation of what had been meant by those words. We accepted Mr Scarcliffe was simply recording the fact he was satisfied the respondent's policy and procedure had been followed to date: there was nothing to suggest Mr Scarcliffe erred in saying this.

291. Mr Cunningham also suggested that Mr Scarcliffe erred when he delegated responsibility to the HR Manager to make the decision regarding the reduction to the compensation payment. We could not accept that submission because we did not accept it accurately reflected the evidence. We accepted Mr Scarcliffe referred the issue of the reduction to the compensation payment to the HR Manager, but having done so, it was then for him to accept or reject the advice he was given. Mr Scarcliffe accepted the advice, and we acknowledged that due to his inexperience in these matters, he was always going to accept the advice of the HR Manager. We were however satisfied that Mr Scarcliffe retained responsibility for making the decision albeit, the decision was based on the advice of the HR Manager.

292. We concluded, having had regard to all of the above points, that the respondent had regard to all of the matters set out above and that they followed a fair procedure when dismissing the claimant. We asked whether the decision of the respondent to dismiss the claimant for reasons of capability in those circumstances, fell within the band of reasonable responses which a reasonable employer might have adopted. We decided that given the length of the absence and the fact there was no certainty

regarding either when the claimant may be fit to return to work or whether he would be fit to return to his role of Higher Officer, the employer could not be expected to wait any longer for the claimant to return to work. We decided the decision to dismiss fell within the band of reasonable responses, and was fair. We decided to dismiss the complaint of unfair dismissal.

Pay claims

293. Mr Cunningham clarified, in his submissions, that the claimant did not insist on the breach of contract claim in respect of notice pay. The claimant reserved his position regarding a claim for notice pay as a head of loss should any of the discrimination claims succeed. The discrimination claims have not succeeded and accordingly this element of the claim is dismissed.

294. The claimant also made a claim in respect of 15% of salary being the difference between the amount of Injury Benefit (85% of salary) and his full salary. The claimant, in his evidence told the Tribunal he understood the department which employed the absent employee made up the difference in salary. Ms Symes totally rejected this suggestion, and we accepted her evidence.

295. The onus is on the claimant to demonstrate that the wages paid were less than the total amount properly payable. The claimant could have brought forward evidence to support his position that it is the practice of the respondent to "top up" the payment of Injury Benefit to ensure full salary is paid in cases of long term absence, but he did not do so. We accordingly decided to dismiss this complaint.

296. We, in conclusion, decided to dismiss the claim.

Employment Judge: Lucy Wiseman
Date of Judgment: 02 May 2017
Entered in register: 03 May 2017
and copied to parties