Reserved judgment

Between:

Claimant: **Mr N Wingfield**

Respondent: **British Telecommunications plc**

Heard at London South Employment Tribunal on 21-23 May 2018

Before Employment Judge Baron

Lay Members: **Ms Y Batchelor and Mrs V Blake**

Representation:

Claimant: **Smair Soor – Counsel**

Respondent: **Carolyn Brown - Solicitor**

JUDGMENT

It is the unanimous judgment of the Tribunal as follows:

1 That the claims by the Claimant under the provisions of the Equality Act 2010 are dismissed;

2 The Claimant was unfairly dismissed by the Respondent contrary to the provisions of section 94 of the Employment Rights Act 1996.

REASONS

Introduction

1 On 24 March 2017 the Claimant presented a claim form to the Tribunal. He stated that he had been employed by the Respondent (wrongly referred to as BT Group plc) from July 1983 until 28 December 2016. The Claimant ticked the boxes in section 8.1 of the claim form to indicate that he was claiming that he had been unfairly dismissed, and also that he was making claims under the Equality Act 2010 based on the protected characteristics of age and disability. In the response the Respondent admitted that the Claimant had been dismissed and said that the dismissal related to the Claimant's capability. That is of course a potentially fair ground for dismissal. The Respondent did not accept that the Claimant was a disabled person within the 2010 Act, and further denied any discrimination.

2 At the outset of the hearing Mr Soor helpfully clarified that the only claims being pursued were those of 'ordinary' unfair dismissal under the Employment Rights Act 1996, and also under sections 15 and 20 (and

associated provisions) of the 2010 Act based upon the protected characteristic of disability.

3 There was a preliminary hearing on 19 June 2017 at which the factual and legal issues to be decided by the Tribunal were clarified, and the Claimant was ordered to provide certain further information. It was recorded that the impairment upon which the Claimant relied for the purposes of the 2010 Act was stress and depression.

4 We heard evidence from the Claimant, and from Lee Bird and Paul Robinson on behalf of the Respondent. They were the Claimant's Second and Third Line Manger respectively. We were provided with bundles containing over 600 pages. We have only taken into evidence those documents to which we were referred.

The facts

5 We make findings of fact insofar as they are material to the remaining issues before us. We are not recording all the evidence which we heard.

6 The Claimant started work for the Respondent (in the form in which it then was) as long ago as 1983. He had various roles from time to time, but from January 2016 had been working in Openreach in a department called 'Repayments'.[1] The alternative title of 'Roadworks' is more illuminating. The work involves the 'project management of removal and reinstallation of existing BT plant, both civil works and cabling'. Openreach vehicles are a common sight in town and country.

7 The Claimant had previously worked in Repayments for a good number of years until 2009 but had then moved to another department. A vacancy in Repayments arose in late 2015 and the Claimant applied for it. He was successful and he started back in January 2016 as a Repayment Project Engineer ('RPE'). Immediately before then the Claimant had been in the Transition Centre undertaking very mundane tasks. He had become surplus to requirements in his previous role and was effectively redundant. He was in the Transition Centre awaiting a post suitable for him becoming available.

8 Mr Bird was responsible for recruiting the Claimant and another person into the RPE role. His immediate line manager was Lawrence Robotham. The Claimant was to be based in Crayford in Kent but almost exclusively responsible for arrears of work which had built up in the Tunbridge Wells office due to the sickness absence of Mr Evans, one of the two RPEs based there. Mr Evans had been away on long-term sickness absence caused by stress for some five or six months.

9 The evidence was not entirely clear but on a balance of probabilities we find that during discussions with the Claimant about the change of role Mr Bird mentioned the possibility of a more senior role of Repayments Project Manager becoming available shortly thereafter. That new role was advertised almost immediately in January 2016 and the Claimant applied for it on 20 January 2016. He was not successful at the initial sift stage

[1] That appears to us to be wholly misleading title.

The details of the subsequent reallocation of staff were provided to us, but they are not relevant save that from April 2016 Gavin Dixon became the Claimant's direct line manager. The process undertaken by the Respondent which resulted in the appointment of Mr Dixon is a recurring theme in these proceedings. That process was never explained to the Claimant during his employment, and was first explained at this hearing.

10 In April 2016 the Claimant complained to Mr Robotham about the high volume of work he had to undertake. The Claimant was then in addition expected to undertake some of the Crayford work, but he ceased do Tunbridge Wells work from late May after Mr Evans had returned to work on a full-time basis. Mr Evans had previously been working on a phased return basis.

11 The workload then changed dramatically, and after Mr Evans had returned the overall volume of work which the Claimant had to undertake reduced substantially. That was not solely due to the return to work of Mr Evans. There was also a reduction in general customer demand. The Claimant became concerned that he would effectively become redundant again and so have to return to the Transition Centre Undertaking menial tasks.

12 The Claimant became stressed and suffered from sleepless nights. The Claimant completed an online STREAM questionnaire shortly before 17 May 2016. The document in the bundle is not entirely self-explanatory, but the 'diagnosis' was that the Claimant was under 'significant stress'. The process provides a copy of the report to the individual's line manager, in this case Mr Dixon who had taken over as the Claimant's line manager as already mentioned.

13 The Claimant and Mr Dixon met on 17 May 2016. The Claimant said that the main factor which had caused him to feel stressed initially was because of the manner in which the various roles had been reallocated earlier in the year. He felt that he had not been treated fairly, and that Lee Bird had not followed the correct recruitment process in appointing Mr Dixon to the post he held. The Claimant also expressed a wish to move to London because he wanted a proper workload and job security. The Claimant had already mentioned that matter to Mr Robotham.

14 Mr Dixon agreed to raise with Mr Bird and Mr Robotham the issues the Claimant had discussed with him. Mr Dixon them met the Claimant again on 1 June 2016. Mr Dixon had ascertained that a move to London was not possible at that time. The Claimant was told that his application for promotion had not passed the sift stage and, importantly, that that had been carried out as a HR function separate from line management. Thus Mr Bird had not been involved in the failure of the Respondent to consider the Claimant further for promotion. The Claimant reiterated to Mr Dixon that he had had excessive work previously. He left the meeting because he was stressed. The Claimant then approached the Respondent's Employee Assistance Programme and obtained the services of a counsellor.

15 It appears that Mr Dixon may have suggested that the Claimant meet with Mr Bird because there is an email from the Claimant of 3 June to Mr Dixon

in which he said that his counsellor had advised that that may cause him more anxiety. Mr Dixon replied on 6 June again suggesting a meeting with Mr Bird to discuss the issues causing the Claimant's anxiety, and in order to seek closure.

16 The first relevant medical record we have is in the Claimant's GP's notes which record that on 7 June 2016 a form Med3 was issued for one month with a diagnosis of 'stress at work'.[2] The Claimant was off work from that date until the termination of his employment.

17 On 14 June 2016 the Claimant replied to Mr Dixon's email of 6 June listing five numbered points, saying that he had 'explained the problem time and time again'. We consider this to be good contemporaneous evidence of the Claimant's concerns at the time. The first three points all relate to the process for the appointment of the Repayments Project Manager mentioned above. Clearly the Claimant still felt very aggrieved about the matter. We emphasise that the Claimant's concern was not about him not having been promoted but about the process which had been adopted. Mr Bird later misinterpreted the concern to be about the lack of promotion. The fourth matter related to the excessive workload the Claimant had previously experienced, and the Claimant asked, perhaps rhetorically, why he had been overloaded without there having been any discussion with him. The final point was that the Claimant said that he later had very little work and his request to move to London had not been fairly considered. That was again a concern about the process.

18 Mr Dixon then contacted the Claimant by telephone and said that he needed to have a meeting with him, which was referred to as a 'Home Visit' although it took place at a BT building separate from the Claimant's place of work. The meeting was on 21 June 2016. What occurred was recorded by Mr Dixon on a form. Mention was made of the same three matters stated by the Claimant in his email of 6 June 2016, being described on the form as 'barriers preventing the employee from returning to work'. It was noted that the Claimant was obtaining support from a counsellor, and that he did not at the time have any date in mind when he expected to be able to return to work. Mr Dixon marked the form to the effect that mediation was not appropriate at that stage.

19 During cross-examination Mr Bird confirmed that by the time of the second line manager's review on 19 July 2016 mediation had become entirely appropriate and he asserted that Mr Dixon would have offered it to the Claimant on that occasion. That is speculation and we are not prepared to accept the evidence for that reason. Mr Bird said that he did not offer mediation when he became involved later because the Claimant was having counselling sessions.

20 On 18 July 2016 the Claimant sent an email to Mr Dixon saying that he was by then willing to take up the offer of a referral to the Occupational Health service saying:

> I am in a health situation now where I am willing to try anything to help myself.

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[2] We cannot trace having been referred to this document which was at page 130 in the bundle.

21 The Claimant saw an Occupational Health Advisor on 27 July 2016. The Claimant reiterated the three issues identified above. The report made it clear that the Claimant felt that none of those issues had been addressed and it was stated that a return to work was unlikely until they were addressed. There is a document of uncertain provenance at page 285 of the bundle immediately after the OH report headed 'Resolution check list for specialists' which states the following in bold characters:

> **Cannot give a RTW and the 3 barriers which are preventing a return to work by Neil which cannot be resolved so moving to Resolution. Unsatisfactory attendance**

22 Before the OH consultation the Claimant had a 'Second line manager review meeting' with Mr Bird on 19 July 2016, and Mr Bird completed another pre-printed form. The Claimant was accompanied by his trade union representative, Mr Coffey. Unsurprisingly the contents of the form are to all intents and purposes largely the same as the OH report. It also records that Mr Bird said that he could consider moving the Claimant back to the role he had immediately before re-joining the Repayments Team. The Claimant was not interested. At that meeting Mr Bird asked the Claimant several times when he would be returning to work.

23 After the meeting Mr Bird then had a private meeting with Mr Coffey which was not mentioned in his witness statement. In cross-examination he said that he wanted to impress on Mr Coffey the seriousness of the Claimant's position, and that his dismissal was a possible outcome.

24 The context is not entirely clear, but we do know that by 2 August 2016 Karen Dodgson, High Performance and Case Consultant, was looking to involve a specialist at advise . . . further.' – see bundle page 303.

25 Mr Bird sent a letter to the Claimant on 5 September 2016 recording the fact of the Claimant's absence. He said that he wanted to meet the Claimant on 15 September and said that one of the considerations was the termination of the Claimant's employment on the grounds of unsatisfactory attendance. The Claimant was referred to the Attendance Procedure. There were different policies in the trial bundle but it appears that it is the one at page 74 which was relied upon. Various aspects of the policy were highlighted to us, and we return to that matter below. Mr Bird accepted that his letter did not strictly comply with the requirements in the procedure in that it did not make reference to being accompanied at the meeting. He accepted that he could have spelled out more clearly the notion that there were three immoveable barriers preventing the Claimant from returning to work.

26 The meeting was held on 19 September 2016 in the end. It was recorded and we have a transcript of it. The Claimant was accompanied by his union representative, Mr Coffey. The Claimant reiterated his concerns about the three issues referred to above. He said that he was taking medication for stress and related depression. He added that he was keen to get back to work. The Claimant was asked for a likely return to work date. Some exchanges are particularly important. The extracts below are not the only mention of the possibility of the Claimant returning to work.

NW	At this moment no I haven't, I am on the drugs, I am taking it about four weeks at least for the drugs to kick in, that's what the doctors told me, the doctor then wants to review it see what it's like, see if the drugs are working, she has talked about extending it possibly upping the dosage and what have you. So it's something that will hopefully take about four weeks to kick in and then I will have a better idea of where I am. It won't be something as simple as coming straight off the drugs, that's it. Yeah I am really keen hopefully in a month's time I will know where I am.
LB	Right, okay so with regards then to return to work plan or a phased return to work plan is that something that you would want to look at now?
NW	Ermm, certainly we could look at it yeah, but I don't know whether it would be useful at this stage. Hopefully you know in four week's time when the doctor says yeah you are good to go and what have you, I am hopeful that that might happen, but I've got to go on what the doctor says to me and whether she wants to up my medication even more or she is quite happy to meet come off it or she says good to go. So yeah I am really keen to get back.
LB	Has the GP made any reference to a possible phased return to work?
NW	I haven't discussed a phased return yet no. I can discuss that with her, I've got a meeting with her this week so I can talk to her about it then.
LB	Your current sicknote expires the 26th is it?
NW	Yeah I think it does.
LB	The 26th, so that is when you will be having the conversation with your GP?
NW	No I've got a meeting on Thursday the 23rd yeah this Thursday
LB	Right okay, so and you will be looking then, what, you will ask your GP about a possible return to work on restricted duties or a phased return to work.
NW	I haven't even spoken to her about it to see whether she thinks I am fit enough to go back to work because I have only just started the drugs, I would be surprised if she said yeah, you are ready to go now because the drugs themselves take at least four weeks to kick in and then that's if the dosage is high enough, I need to speak to her about where I am so she probably will not have any idea of where I am Thursday as I have just started but I can talk to her about if things go well, what about phased return and either, see what duties there are any what have you and see what she thinks.
LB	Okay so that is all, that all sounds positive, so with regards and I am not trying to set this phased return to work plan now but with regards to it, obviously the three issues that were raised that contributed towards the stress are still there.

NW	Yeah

27 The conversation then continues and the Claimant and Mr Bird discuss the three matters concerning the Claimant. Later on the Claimant again says that he is getting better. Mr Bird and Mr Coffey then have the following exchange:

SC	I have just been looking at the notes from the last meeting and I think we have kind of got more positive now because obviously at the last meeting there was no sort of light at the end of the tunnel, there was no end game in there at all, but now Neil is on medication, he did resist that, he said he did not want to be on medication but after a discussion at the GP he's on that, as you said the GP said it could take a few weeks for that to kick in so hopefully we have, we are not completely open ended now. I think which we were the first meeting, there was no, there was going to be no end to it. I think we are sort of coming slowly towards an end sort of game if you know what I mean.
LB	I see your point, so what I've got in my head is, we've got a possible four weeks but then for me there is still no end because I haven't got a fixed date.
SC	No I appreciate we haven't got a fixed date and I think that would be impossible to give at the moment but there is a much higher likelihood of return to work now than I think that there was at the first meeting because the medication is in place and NHS counselling is waiting obviously but I think the medication will be a big thing.
LB	Yeah obviously yeah, the positive is taking the medicine, well not positive taking the medicine, but the steps we have made there, we've got this four-week period, I am not too sure what that means if I am honest, whether we are going to get to the four weeks and then we are going to have another extended period and then we will be back here another five weeks because we have not had a return to work, it is still very open ended for me although it is more positive than the last meeting when there was essentially nothing happening really. Ermm so yeah I would agree with that Steve but with regards to seeing an end to it, I currently still do not see an end to it. Anything else.
SC	No that's it from me.
LB	Okay, so Neil just one thing I want to make clear, and it is part of the process so I will just read this out to you. All possible outcomes from today's meeting, (1) I could continue to accommodate the absence or adjusted duties so that would be the absence, (2) identify adjustments to support a sustained return to work, (3) termination of employment on grounds of unsatisfactory attendance or (4) exceptional circumstances may refer to OHS for further advice. So they are the four kinds of options available to me at this stage which is where we are in the process. I will need to go away and speak to the case adviser, review the recording and take advice from those guys as to what the next steps are. I guess I will be getting an answer to you in the next 7 days. Anything else you would like to add?

MW	I know the doctor doesn't want me to return to work at this stage. She's positive, I am positive. Drugs will help, I am hopeful, I don't want my life to go on like this, I just don't understand why the company is being like this. I don't understand why why they have a promotion problem, a promotion treatment where they treat people like dirt.

28 On the following day the Claimant sent an email to Mr Dixon asking about the possibility of having further counselling sessions. He was also provided with a further form Med3 by his GP advising that he was not fit for work, and would not be for a further six weeks.

29 Mr Bird then wrote to the Claimant on 3 October 2016 dismissing him on notice. The relevant paragraph is as follows:

> I have taken into consideration the points raised at the interview together with your previous employment history with BT and have concluded that it would not be reasonable to keep your job open any longer. I have therefore authorised the termination of your employment on the grounds of unsatisfactory attendance, in accordance with the Attendance Procedure.

30 Of more importance and interest is a document headed 'Rationale for Resolution' completed by Mr Bird setting out his reasons for dismissing the Claimant. Mr Bird referred to the three issues of concern to the Claimant again describing them as 'barriers', being the failure to promote the Claimant, the workload being too high, and the Claimant's desire to move to London.

31 We quote two paragraphs:

> At the resolution meeting, when we discussed them, you did not seem to be too concerned about these 3 barriers that are stopping you from returning to work, saying that you were feeling better and enjoying the volunteering that you are doing and the fact that your wife has given you a list of jobs to do. However, it was evident that you were still aggrieved that you did not get the role on promotion, as you implied that you felt that you had the most experience and spent a good part of the meeting discussing this and the unfairness of the situation.
>
> The OHS you attended have recommended that you could return to work once these perceived work related issues have been resolved. As I cannot resolve or remove these barriers I cannot see an end to the current absence and still you were unable to give a return to work date.

32 At the end of the document Mr Bird twice again noted that there was no end date to the absence.

33 Mr Bird accepted in cross-examination that the Claimant had said at the meeting on 19 September 2016 that he might be able to return within a month. He added that it had been agreed that the Claimant would ask his GP about a phased return to work, but that that conversation did not take place. Instead the Respondent had received a form Med3 for a six week period and Mr Bird had felt that the Claimant did not have any intention of returning to work, and he (Mr Bird) had no confidence that he would not be presented with another form Med3 at the end of the six week period.

34 It is apparent that the Claimant appealed although we cannot trace any appeal document. The appeal hearing was held on 14 November 2016 by Mr Robinson. The Claimant was represented by Mr Coffey of the CWU. The principal point made by Mr Coffey was that he had never known someone with 33 years' experience with the Respondent being dismissed

after three months' absence and that other people who had a physical illness had been allowed a much longer period of absence. Further, said Mr Coffey, the Claimant should have been provided with more time to allow his medication to take effect. As Mr Robinson put it, Mr Coffey felt 'that a call was made too early in three months.'

35 There was then a discussion about the concerns the Claimant had, and in particular the issue about the promotion of Mr Dixon. The Claimant asked if he could be told more about how the promotion came about, and then commented that that was really a grievance. Mr Robinson agreed to look into those concerns. The other point to be noted is that the Claimant said that the threat of dismissal, and then the dismissal had had a detrimental effect on his mental health. The Claimant used the word 'devastated' in his witness statement.

36 Mr Robinson dismissed the appeal and wrote to the Claimant on 1 December 2016 to inform him. A document setting out the rationale for the decision was also provided. It dealt with the three points of concern to the Claimant. We were not impressed by the evidence of Mr Robinson on these matters. There was an issue about whether or not Mr Bird had offered to review the Claimant's c.v. following on from the appointment of Mr Dixon. Mr Robinson simply relied on Mr Bird on that point, and accepted his assurance that the process for the appointment of the Repayments Project Manager had been fair.

37 In the rationale document Mr Robinson stated that he could not understand why the Claimant wished to work in the London office, when the workload in the Crayford office was one of the reasons for his absence. In cross-examination Mr Robinson accepted that the Claimant's concerns about a heavy workload at Crayford and Tunbridge Wells were historic and that the workload had dropped off. The document states that Mr Bird had said that the Claimant 'hadn't picked up the range of the duties of the role.' Again Mr Robinson accepted that he had not discussed that with the Claimant, and had simply relied on Mr Bird.

38 The final point made in the rationale document was that the Claimant had not suggested a date when he would be able to return to work. When asked why not, Mr Robinson replied that the appeal was taking place after the dismissal had taken effect.

39 The Claimant's employment terms included provision for six months' sickness absence on full pay, and then six months' on half pay.

40 The Attendance Policy is sixteen pages long of dense print and we can of course only summarise it and record some specific points. There is a section towards the beginning setting out the guiding principles. They refer to acting sensitively, being consistent and fair and having a return to work as the primary objective. There is then a section setting out the roles and responsibilities of different levels of manager. It is the responsibility of first line managers, amongst others, to 'seek advice from their case advisor and the OHS as required in support of achieving a successful return to work'. It is the final point about a return to work which is material. There

are then provisions setting out the duties of second and third line managers.

41 There is a section headed 'Extended absence', which is separate from a section dealing with repeated absences. It is provided that managers must keep in regular contact during the absence, and that a rehabilitation plan should be discussed. Such plan could involve temporary adjustments lasting no longer than one month in most cases, but sometimes extending to six months or more. The final paragraph in this section is as follows:

> If a spell of absence becomes extended to the point where it is operationally unacceptable or permanent adjustments are required to effect a return to work and neither these nor alternative duties of viable, then termination of employment must be considered. Such action requires most careful consideration which must include appropriate input from HR Case Management Team and the OHS. Specialist input can help line managers not only with the decision-making process but also with advice on associated issues such as pension or benefit entitlement and how best to communicate messages of particular sensitivity.

42 Finally there is a section headed 'Termination of employment' which provides as follows:

> The individual must be given written notification that termination of employment is being considered. This should include:
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> - the grounds on which termination is being considered
> - the circumstances and evidence leading to the decision stage being reached
> - a statement of the pension implications where retirement is under consideration and will involve immediate payment of pension and/or a lump sum
> - a reminder of the availability of the OHS/Employee Assistance
> - an invitation to attend an interview to put forward their case, with a reminder of their right to be accompanied by a 'friend', for example, an accredited trade union representative or a BT employee.

43 There was no evidence before us that the Claimant's absence had become 'operationally unacceptable' to use the wording in the policy. All that Mr Bird said on the matter was in paragraph 31 of his witness statement:

> It can take up to a year to train someone in repayments. As no return was foreseeable, I considered it to be in the best interests of the others in the team to dismiss at that stage to allow a replacement to be recruited as soon as possible, in order to ensure the workload was evenly distributed.

Discussion and conclusions

Disability

44 We will deal first of all with the question as to whether the Claimant was at the material time a disabled person within the meaning of section 6 of the 2010 Act, as supplemented by Schedule 1 to the Act.

45 We had before us the impact statement prepared by the Claimant for the purposes of this litigation, and also a copy of his GP's notes. In the impact statement the Claimant referred to the development of his stress, resulting in sleeping difficulties, headaches, panic attacks, constant anxiety, lack of interest in anything and a low sex drive. He referred to his condition having improved as a consequence of the taking of medication. The Claimant

said in his witness statement that he was not able to enjoy everyday pastimes and that he felt debilitated.

46 The records in the bundle from the Claimant's GP commence with the first form Med3 being issued on 7 June 2016. The notes cover the period to 15 December 2016. They record that the Claimant was suffering from 'stress at work' as stated on the forms Med3, and they also record the levels of Citalopram prescribed from time to time. There is mention of a 'chat' on 26 August 2016 when the Claimant is recorded as saying that he was finding counselling useful, and also that antidepressants were discussed. We note one entry of 4 October 2016:

> Medication requested – wondering if might need more Citalopram – discussed – has had a shock and normal reaction to shock – may not need extra

47 The Claimant was cross-examined on the issue of disability. It concentrated on the fact that the Claimant's GP had referred in the forms Med3 to 'stress at work' and not anxiety, and also that no mention had been made of depression until 10 August 2017. There was very little evidence before us relating to the ability to carry out normal day-to-day activities. No reference was made by either Mr Soor or Miss Brown to the statutory Guidance issued under section 6(5) of the 2010 Act.

48 Mr Soor submitted that what was important was the effect on the individual rather than the label put on the impairment. He (correctly) pointed out that the Tribunal must consider the matter absent any medication. He submitted that the constant headaches and palpitations to which the Claimant had referred in oral evidence were serious matters. Mr Soor addressed the issue of any adverse effects being long-term. He submitted that the stressors had commenced in January 2016 and that, on the balance of the evidence, it was from that date that the Claimant was depressed, and it could well have been the case that the effect would have lasted for more than 12 months.

49 Miss Brown submitted that there was no evidence that the Claimant had either clinical anxiety or clinical depression between May and December 2016, and she pointed out that the Claimant had not referred to 'depression' in the claim form, but only to stress, and that the first mention of 'depression' was in a form Med3 dated 10 August 2017. Miss Brown submitted that the Claimant's condition was a reaction to life events, and not a clinical condition. We were referred to the decision of the Employment Appeal Tribunal in *Herry v. Dudley Metropolitan Council* UKEAT/0100/16. We cite a substantial portion of the judgment because of its relevance to the current case and it is a recent authority.

> **[53]** The Employment Judge quoted at some length from *J v DLA Piper UK* [2010] ICR 1052. In one important passage his conclusions are framed by reference to it. It is therefore convenient to quote from it and discuss it now. In that case the EAT was concerned with the question whether conditions described as "depression" will amount to impairments.
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> **[54]** Underhill P said:
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> > "42. The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at para 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and

> anxiety. The first state of affairs is a mental illness - or, if you prefer, a mental condition - which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or - if the jargon may be forgiven - "adverse life events". We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians - it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case - and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long-lived."

[55] This passage has, we believe, stood the test of time and proved of great assistance to Employment Tribunals. We would add one comment to it, directed in particular to diagnoses of "stress". In adding this comment we do not underestimate the extent to which work related issues can result in real mental impairment for many individuals, especially those who are susceptible to anxiety and depression.

[56] Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An Employment Tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an Employment Tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an Employment Tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the Employment Tribunal to assess.

[57] Underhill P also confirmed (para 40) that it remains good practice in every case for a Tribunal to state conclusions separately on the questions of impairment, adverse effect, substantiality and long-term nature - see *Goodwin v The Patent Office* [1999] IRLR 4. The Employment Judge specifically referred to *Goodwin*.

[58] Underhill P then said, in a passage on which Mr Grant places reliance:

> "(2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in para 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings."

[59] In para 38 Underhill P had suggested (as he repeated in para 42, which we have quoted) that an Employment Tribunal might start with the question whether the Claimant's ability to carry

> out normal day-to-day activities had been impaired. This would assist it to resolve, in difficult cases, whether an impairment existed.

50 Miss Brown submitted that the Claimant did not have a clinical condition, but rather his condition was a reaction to adverse life events. Further, the Claimant's condition did not have a substantial adverse effect on his ability to carry out normal day-to-day activities, and any adverse effects were not long-term or likely to reoccur. We comment on the reference to clinical condition. We note that the requirement originally in the Disability Discrimination Act 1995 that there need be a 'clinically well-recognised illness' was removed in 2005. The emphasis is on the effect as stated by Underhill J in paragraph 38 of *DLA Piper*:

> **38** We can go much of the way with [counsel for the Claimant's] submission. There are indeed sometimes cases where identifying the nature of the impairment from which a claimant may be suffering involves difficult medical questions; and we agree that in many or most such cases it will be easier--and is entirely legitimate--for the tribunal to park that issue and to ask first whether the claimant's ability to carry out normal day-to-day activities has been adversely affected - one might indeed say "impaired" - on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common sense inference that the claimant is suffering from a condition which has produced that adverse effect - in other words, an "impairment". If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve difficult medical issues of the kind to which we have referred.

51 No two cases are the same, and the facts giving rise to the judgments in *DLA Piper* and *Herry* are different from those in this case. This is not a case where the Claimant was 'susceptible to anxiety and depression', nor is it a case where he was refusing to return to work. The Claimant was concerned to get back to work, and wanted to get better to enable him to do so. However the judgments in those cases provide helpful guidance.

52 The burden is on the Claimant to show that he was a disabled person. We find as a fact that he has not done so. The relevant paragraphs in the Guidance relating to day-to-day activities are D2 and D3, together with the Appendix.

> **D2. The Act does not define what is to be regarded as a 'normal day-to-day activity'**. It is not possible to provide an exhaustive list of day-to-day activities, although guidance on this matter is given here and illustrative examples of when it would, and would not, be reasonable to regard an impairment as having a substantial adverse effect on the ability to carry out normal day-to-day activities are shown in the Appendix.[3]
>
> **D3.** In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

53 As we hope is apparent from our findings above, our conclusion is that the Claimant remained frustrated about the failure of the Respondent to explain what had occurred in connection with the promotion process in

[3] The Appendix is too voluminous to be reproduced here.

early 2016 and what he saw as a helpful proposal to assist the Respondent by undertaking work in London. Those matters, combined with a reduction in workload, caused him to become stressed. That is not the same as having a mental impairment.

54 Further, we did not have evidence that such stress had a substantial (meaning more than minor) adverse effect on the Claimant's ability to carry out normal day-to-day activities. We know that the Claimant was taking medication before his dismissal and that his condition was improving. Without medical evidence we are not prepared to speculate as to what the Claimant's condition would have been absent that medication.

55 We are also not persuaded that any stress and adverse effects were long-term within the meaning of the 2010 Act. We understand that following the Claimant's dismissal his condition deteriorated and his medication had to be increased, but that appears to be as a result of the prospect of dismissal and then the dismissal itself. We are primarily concerned with matters up to and including the dismissal, although there is the question of the appeal. The first mention of stress in a medical context was in the form Med3 of 7 June 2016. The Claimant was dismissed on 19 September 2016, only just over three months later. Again, without medical evidence we are not speculating as to when the Claimant would have recovered.

56 For those reasons we find that the Claimant was not a disabled person, and so it is not necessary to consider the provisions of sections 15 and 20 of the 2010 Act.

Unfair dismissal

57 We were not referred to any authorities in detail, but the law in this area is well established. A dismissal relating to the capability of an employee to fulfil his role is of course a potentially fair reason for dismissal. Once that has been established as the reason for the dismissal then the Tribunal must consider whether it was actually fair within the criteria in section 98(4) of the Employment Rights Act 1996. In our view there are two matters to be considered. The first issue is whether the employer can reasonably be expected to wait any longer for the employee to return to work. What is reasonable will depend on all the circumstances of the particular case. The second matter is whether overall a fair procedure was adopted.

58 Ms Brown provided written submissions on behalf of the Respondent and added oral submissions. She submitted that Mr Bird had investigated the reason for the Claimant's absence and his ability to provide regular and reliable attendance, and had concluded that continuing employment was unsustainable. She added that length of service was irrelevant in determining the reasonableness of any investigation. We do not disagree with that proposition. Ms Brown submitted that it was reasonable for Mr Bird to dismiss the Claimant as there was no foreseeable date for a return to work at the date of dismisal, and his absence was having a detrimental effect on his colleagues.

59 Ms Brown further submitted that Mr Bird and Mr Robinson had followed the Respondent's procedure which, she said, was a fair procedure. The

Respondent was considering alternatives to dismissal, being a phased return and redeployment of the Claimant to his previous role. The Claimant did not raise any new issues and Mr Robinson had investigated all the issues which were raised at the appeal.

60 Mr Soor made substantial oral submissions. He identified the real issue as being whether the Claimant would have recovered within a reasonable time. He pointed out that at the meeting on 19 September 2016 which resulted in the Claimant's dismissal the Claimant had said that counselling was helping, he was making progress and had started taking medication. Mr Soor submitted that a reasonable decision maker would in those circumstances have waited at least a month to ascertain the effect of the medication.

61 Mr Soor submitted that the attendance procedure had been used as an excuse to dismiss the Claimant, but also that there had not been compliance with the procedure. The procedure referred to compassion, but a purely mechanistic approach had been taken. Mr Bird had kept insisting on a return to work, ignoring the reference to the promotion of rehabilitation in the procedure, which would include allowing time away from work. This was a case, he said, which was crying out for mediation but that was not considered.

62 Mr Soor referred to Mr Bird's rationale for the dismissal, which he described as being fundamentally flawed. Mr Bird and the OH report had wrongly concluded that there were 'barriers' which was not something the Claimant had ever said. The Claimant had never insisted that these matters be dealt with, said Mr Soor, and that perceived requirement had been created by the management.

63 Mr Soor mentioned the following additional points. The first was that the Claimant had been a long-serving employee. The second was that the Claimant was saying he was committed to a return to work, but that was not being accepted by the Respondent. The third was that the Claimant's contract of employment allowed for twelve months' employment in total with sick pay, and allied to that point was the fact that other members of staff had been away ill for much longer than the Claimant had been. Finally, said Mr Soor, the Claimant had said that he would do anything but that there had not been a search for alternative employment.

64 We were provided with a material amount of detail other than that recorded above and, as already stated, we have made findings on matters which we consider to be material.

65 There is no dispute that the Claimant was dismissed as a result of his absence from 7 June 2016. What we must do is consider the position as at the date of the decision to dismiss the Claimant, which was towards the end of September 2016. Whatever has been the state of the Claimant's health since then is not relevant to the fairness of the decision at the time it was made. It may be relevant to any remedy for the Claimant, but that is another matter. The reason for the dismissal related to the capability of the Claimant, and the dismissal was therefore potentially fair.

66 The first question is whether the Respondent could reasonably have been expected to wait any longer. Our function is that of an industrial jury, and we are conscious that it is not our function to make the decision for the Respondent. It is our unanimous decision that it was not reasonable for Mr Bird to dismiss the Claimant when he did.

67 There are various elements which lead us to that conclusion which we mention in no particular order. There was no evidence, at least not of any substance, of any material adverse effect on the repayments function of the Respondent. Mr Bird simply said that he considered it was in the best interests of the team. There was no analysis undertaken.

68 The Claimant was a very long-standing employee. He was just short of 52 when he was dismissed, and he started when he was 18. The Claimant had a very good absence record. There was a contractual entitlement to sick pay for a total period of twelve months, of which six were at full pay. The Claimant gave unchallenged evidence that Mr Evans had been away from work for some six months because of stress, and yet he had not been dismissed. No effort had been made by Mr Bird to obtain medical advice from the Claimant's GP. There were no reasonable grounds for Mr Bird to have concluded that the Claimant would not return to work within a relatively short time.

69 Further, Mr Bird had assumed that there were three barriers which had to be overcome before the Claimant could return to work. That was never the Claimant's position. True it is that those three matters had combined to cause him to be away with stress, but they were not barriers. The concept of barriers was constructed by one or more individuals in the Respondent.

70 Of greatest importance is the fact that at the meeting on 19 September 2016 the Claimant referred on many occasions to feeling better, starting medication and having to wait to see the effects of that that medication. Mr Bird kept insisting that the Claimant provide a specific date for a return to work, which he was not able to provide at that time. There was no evidence that the Claimant's absence was causing the Respondent to have problems coping with the workload, and indeed one of the stressors was that the workload had suddenly diminished causing the Claimant to be concerned about having to go back into the Transition Team. We see absolutely no reason whatsoever why Mr Bird could not have arranged another meeting some four to six weeks later following a further OH report or a report from the Claimant's GP. The dismissal decision was hasty, premature and unreasonable. Mr Bird did not comply with the guiding principles underlying the Procedure.

71 We can deal with the appeal fairly briefly. In some circumstances an appeal can remedy what had been an initially unfair dismissal. Such circumstances do not prevail here. Mr Robinson recorded that the Claimant still had not offered a date for a return to work, and added that he thought that the Claimant was not committed to returning to the role and that none of the issues was resolvable. He adopted much the same approach as Mr Bird. There was no effort to look at the matter afresh.

72 Section 112 of the Employment Rights Act 1996 provides that where there has been a finding of unfair dismissal then the Tribunal shall explain to the Claimant the remedies which are potentially open. This I now do. The summary below is not intended to be an exhaustive exposition of the law, but merely a guide.

73 The first remedy is that of reinstatement. The effect of such an order is that the Respondent is to treat the Claimant in all respects as if he had not been dismissed. The second order is that of re-engagement. The effect of that order is that the Claimant is re-employed by the Respondent in such post, from such date, and on such terms as the Tribunal may order. The post is to be comparable to the post from which the Claimant was dismissed or other suitable employment. The Tribunal has a discretion as to whether to make either of such orders and in exercising that discretion the Tribunal must consider whether it is practicable for the Respondent to comply with such order, and also whether the Claimant caused or contributed to the dismissal. The Claimant is not entitled to either of such orders as a matter of right.

74 The final order is that of compensation which comprises a basic award, and a compensatory award. The basic award is an arithmetical calculation based upon the Claimant's age, length of service and salary subject to a statutory maximum. The amount may be reduced where the Tribunal considers that it is just and equitable to make such reduction due to any conduct of the Claimant. The principal provisions as to the amount of the compensatory award are in sections 123(1) and (6) as follows:

> **123 Compensatory award**
> (1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
> (2) – (5) . . .
> (6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

75 The Claimant is requested to inform the Tribunal and the Respondent within 14 days of the date upon which this document is sent to the parties as to whether he wishes to apply for an order for (a) reinstatement or re-engagement, or (b) compensation. If he is to seek reinstatement or re-engagement then a preliminary hearing to be held by telephone will be arranged to discuss the appropriate case management orders. If the Claimant elects for compensation then the parties are requested to inform the Tribunal of dates of unavailability from a date commencing six weeks from the date when this document is sent to the parties. I will then have the case listed for a remedies hearing and make case management orders. In connection with availability and listing, this matter is to be treated as being part-heard and therefore to take priority over 'new' cases.

Employment Judge Baron
Dated 28 September 2018