EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
(1) MR M TURNER	**V**	**ROYAL MAIL GROUP LTD**
(2) MR C THOMAS		

HELD AT: **HAVERFORDWEST** **ON:** HEARING: 1, 2, 3, 4, 5, 11, 12 JULY 2019
13, 14, 15 & 16 JANUARY 2020
CHAMBERS 17 JANUARY 2020

BEFORE: **EMPLOYMENT JUDGE: N W BEARD MEMBERS : MRS MANGLES**
MRS WILLIAMS

Representation:

For the first claimant: In Person
For the second claimant: In Person

For the Respondent: Mr hartley (Solicitor)

JUDGMENT

Upon hearing the parties I make the following orders.

Mr Turner's Claims

1. The first claimant's claims of disability discrimination pursuant to section 15 of the Equality Act 2010 are not well founded and are dismissed.
2. The first claimant's claims of disability discrimination pursuant to sections 20 and 21 of the Equality Act 2010 are not well founded and are dismissed.
3. The first claimant's claim of unfair dismissal is well founded.

Mr Thomas' Claims

4. The tribunal has no jurisdiction to deal with the second claimant's claims pursuant to section15 of the Equality Act 2010 as they have been presented outside the time limit for such claims and it is not just and equitable to extend time for presentation.

5. The tribunal has no jurisdiction to deal with the second claimant's claims pursuant to section 26 of the Equality Act 2010 as they have been presented outside the time limit for such claims and it is not just and equitable to extend time for presentation.
6. The second claimant's claims pursuant to sections 20 and 21 of the Equality Act 2010 related to meetings in 2016 are not well founded and are dismissed.

7. The second claimant's claim of unfair dismissal is well founded.

Both Claimants

8. At the first open date there shall be a preliminary hearing by telephone to give case management orders for the listing of and the preparation towards a remedy hearing.

REASONS

Preliminaries

1. Both claimants bring claims of disability discrimination and unfair dismissal. Mr Turner, the first claimant, presented his claim on 20 November 2017 having engaged in ACAS conciliation between 23 October 2017 and 9 November 2017. Mr Thomas presented his claim on 14 December 2017 having engaged in ACAS conciliation between 23 October 2017 and 14 November 2017.

2. Mr Clive Thomas the second claimant shall be referred to as Mr Thomas throughout this judgment, his witness David Thomas shall be recorded as DT, no discourtesy is intended but this will aid the readers identification of individuals. Both Mr Thomas and Mr Turner have brought claims of disability discrimination and unfair dismissal. Mr Turner's disability discrimination claims have been set out in a schedule (pp. 30 to 59), this identifies the issues on those claims. Mr Thomas' disability discrimination claims have been recorded by Employment Judge Howden-Evans in her order of 21st December 2018 (pp 118-3 to 118-5) and the issues in his discrimination claims are identified there. At the outset of the hearing Mr Hartley also made it clear that, in respect of the claims pursuant to sections 15 and 21 of the Equality Act 2010 by both claimants, justification was raised as a defence for some. These were those numbered 11, 12, 14, 18 and 26 of the schedule setting out Mr Turner's claims and those set out at paragraph 12 of the Order identifying Mr Thomas' claims.

3. At a preliminary hearing it was held that Mr Turner was a disabled person from September 2016. The respondent conceded that Mr Thomas was a disabled person from April 2016, however the respondent contends that the respondent did not have actual or constructive knowledge of his disability at that early stage.

4. On the unfair dismissal question both claimants identified three issues as relating to substantive unfairness, first, that the respondent was responsible for their absence by failing to follow recommendations as to the management structure at the Cardigan sorting office where they worked; secondly both contend that they had indicated to the respondent that they were prepared to return to work; finally both argued that the respondent failed to consider an alternative form of dismissal, which involved ill health retirement for which the respondent had a specific procedure.

5. The claimants also relied upon a number of procedural failings which they argued made their dismissals unfair. Those were as follows: that the letter inviting them to a dismissal meeting lacked the necessary wording to advise them that it was a

formal meeting; that the meetings held did not follow procedure in particular the presence of a notetaker was a breach; that the decision maker bullied them during the meeting and did not take account of their mental health disabilities; that the medical reports used at the meetings were nearly three months old and therefore out of date; that there was no attempt to obtain medical evidence from each claimant's GP; that the dismissal meetings should have been reconvened probably with a different decision maker; that the appeal should have stood in the stead of a reconvened meeting and the respondent should have permitted a further appeal from the appeal decision; that the complaints raised by the claimants about the decision maker should have been considered before or, alternatively, as part of the appeal.

6. The tribunal was provided with a bundle of document in excess of 1000 pages. The tribunal informed the parties at the outset of the hearing and again before submissions that the tribunal would only take account of documents that were referred to during the course of evidence, referred to by page number in a witness statement or referred to during closing submissions. We heard oral evidence from the following witnesses for the respondent Mr Tamlin, the manager at Cardigan appointed during the course of the claimants' sickness absence; Paul Williams who's status was a matter of dispute; Mark Owen, who conducted a meeting with Mr Thomas shortly after the commencement of his absence; Gareth Stuckey, a manager who was involved in a meeting with Mr Thomas under the absence procedure; Darren Dyke, a manager who dealt with Mr Thomas' return to work following a suspension and was later involved processes involving both claimants; Nicola Smith a manager involved in the absence procedure relating to Mr Turner; Mr Fisher a notetaker who attended the dismissal meetings; Mr Press a manager who dismissed both claimants and Jan Mullins who conducted the appeal process and dealt with complaints about Mr Press. The claimants each gave oral evidence and Mr Thomas called David Thomas a CWU representative Mr Turner calling Les Evans also a CWU representative, albeit at a more senior level.

7. Mr Thomas indicated at the outset of the hearing that, because of his condition he would need frequent breaks. The tribunal allowed all of the breaks he requested as he requested them. In addition, the claimants both indicated that they were not legally qualified and felt disadvantaged, the Employment Judge intervened where necessary to give descriptions of the relevant law and examples (unconnected with the facts) to assist them. Further to this the tribunal was impressed with the co-operation between the parties in the running of the case and in particular the way in which Mr Hartley accommodated applications made by the claimants.

8. There are a number of facts which connect both cases. The factual narrative below will not distinguish their legal cases but take the form of a, generally, chronological account. The analysis below will deal with each case separately.

The Facts

9. In or around 2015 the atmosphere at the Cardigan sorting office where both claimants worked became soured. The tribunal have heard evidence about the

method of appointment of Paul Williams to a particular role (considered by the claimants to be a promotion) being irregular. Whatever the truth of that evidence it is our finding that the perception of that irregularity led to a fracturing of relationships and a degree of factionalism in the office. It is unnecessary for us to describe this further as the factual matters that lead to the claimants' claims begin in these conditions but are not, in our judgment, relevant to the claims made. We have also come to the conclusion that the claimant's assertions about the status of Mr Paul Williams and the respondent's denial of that status is a dispute we do not need to resolve for the purposes of this judgment. This should become self-explanatory from the findings that form the remainder of this judgement.

10. During all of the meetings and processes in which the claimants were engaged with the respondent, apart from one, the claimants were represented by and supported by their union. On most occasions that was with a relatively senior representative. The one occasion, on 6 June 2017, when they were not so represented, we deal with in detail below. In addition to this the claimants were perfectly capable of and did complete complex written factual descriptions of events which they relied upon as part of their complaints to the respondent about the conduct of various individuals.

11. Mr Thomas was suspended for some eight weeks in the early part of 2016. We heard evidence from the claimants' witnesses that the approach taken to the type of disciplinary matter which led to Mr Thomas' suspension were not unusual in Cardigan. Others had been suspended for similar matters. The approach taken was, however, the wrong one under the respondent's policies. When the matter came before a more senior manager, Mr Dyke, he recognised this and ended Mr Thomas' suspension and reduced the disciplinary charges. Following this Mr Dyke said that Mr Thomas should return to work in Cardigan on his usual route. Mr Thomas was told there would be minimal contact with Mr Chris Williams the manager in Cardigan and Mr Paul Williams following his return. Mr Thomas was reluctant to return to work and this was in order to smooth his return. In our judgment Mr Thomas was at this stage showing early signs of the medical condition which would later develop and that would lead to the employment of Mr Paul Williams at Cardigan as a barrier to his recovery. This is borne out by Mr Thomas' irrational response to being invited into the office on his return, where words of welcome were used by Mr Chris Williams. In our judgment Mr Thomas' reaction, borne out by text messages sent by him that day, that this amounted to harassment lacked any sense of proportionality. Within days of this event Mr Thomas was signed off sick with work related stress by his GP, this absence was precipitated by the events set out below.

12. A series of events led to Mr Thomas and Mr Turner working together in a post office van on 29 March 2016; the tribunal was not able from the evidence to clearly understand how, exactly, this had come about. However, the working arrangement related to Mr Turner being suspended from driving because of a minor accident. Its importance as an event is that it led to Mr Thomas and, a little later, Mr Turner reporting sick. Both claimants were accused of not wearing seatbelts and a meeting was arranged for the following day. Mr Thomas did not attend the meeting and reported sick, Mr Turner did attend but reported sick after that meeting. Both claimants viewed the encounter on 29 March 2016 as

harassment. They considered that Mr Chris Williams and Mr Paul Williams, acting together, were following the claimants. The claimants presumed that they were doing so either to intimidate the claimants or to find evidence of wrongdoing. The truth or otherwise of this perception is irrelevant to the issues we have to decide. However, in our judgment, this was clearly the honest perception of both claimants.

13. Mr Thomas was unwilling to explain the basis of his absence, which was identified as stress at work, to Chris Williams. On 4 April 2016 Mark Owen was told about this stance. The respondent approaches stress at work as an urgent matter. This is because the respondent seeks to remove any work-related stresses, if possible, as soon as possible. Mr Owen sent a letter to Mr Thomas inviting him to attend a meeting on 7 April 2016. This was arranged in order to find out the root of the claimant's difficulty at work.

14. Mr Evans and Mr Thomas attended the 7 April 2016 meeting. They describe Mr Owen's approach to the meeting as bullying the claimant. We reject that account.
    14.1. Mr Thomas' account of the meeting does not accord with either that of Mr Owen or Mr Evans in respect of detail.
    14.2. Mr Evans' witness statement makes no reference to the meeting on 7 April. However, he gave oral evidence about the meeting. He did not say anything about having told Mr Owen to calm down.
    14.3. Mr Thomas' account was that Mr Evans had to tell Mr Owen to calm down because of his attitude.
    14.4. Instead Mr Evans' evidence was that the bullying arose from Mr Owen asking the claimant about the reasons for his stress when the claimant clearly did not want to tell him. Mr Evans told us that Mr Owen wasn't entitled to this information under the respondent's policies. His position is based on Mr Thomas having raised a bullying and harassment complaint.
    14.5. As of the 7 April 2016 no complaint had been lodged, this happened, at the earliest, on 9 April 2016. The logic of Mr Evans' position was that a bullying complaint entitles the individual to confidentiality.
    14.6. However, there is also a requirement for a manager at an early absence meeting to discover the cause of stress. In this case those two principles were apparently in conflict.
    14.7. In our judgment there could be nothing wrong with Mr Owen exploring these matters as his intention was to remove barriers and to reduce stress.
    14.8. Having heard from Mr Owen we did not consider the description of his conduct at the meeting fitted a description of bullying.
    14.9. We did not accept Mr Thomas' assertion that Mr Owen was told to calm down. If it was necessary for Mr Evans to intervene, we find it astonishing that this would not have led to a complaint by the claimant supported by Mr Evans.
    14.10. Further the lack of contemporaneous reporting leads us to doubt the reliability of Mr Thomas' account about this event. This is not to say that Mr Thomas has been deliberately misleading but throughout his evidence it was a cause of concern that we found it difficult to obtain a clear understanding of what he was attempting to convey. There is a degree of confusion in his recollection which makes his evidence unreliable when unsupported.

14.11. We consider that this questioning was not unfavourable to the claimant but was designed to remove a disadvantage.

14.12. The claimant also complains that he was required to travel to this meeting at a distance of 60 miles round trip. The evidence Mr Thomas gave before us was that the difficulty of travel did not relate to his disability, but his ability to obtain a lift on any specific occasion. In short, he did not tell us that he had difficulty leaving his house at that time, nor did he say that to Mr Owen. Neither did Mr Thomas make any complaint about the distance involved at the time.

15. Mr Thomas raised a grievance dated 9 April 2016 under the respondent's bullying and harassment process. The complaints were about the conduct of Messrs. Chris and Paul Williams. Mr Turner raised a grievance in similar terms on 4 April 2016. We heard that Chris Williams, one of the individuals, had been moved from the managers role at Cardigan by, at the latest, the end of April 2016. There is no evidence that Paul Williams had been engaged in any acts of misconduct up to this point. The claimants' perceptions about being harassed by him are not borne out in the findings by the respondent in their later investigations.

16. Mr Thomas attended a grievance meeting conducted by Mr Jenkins on 6 May 2016. Mr Turner attended a meeting with Mr John who conducted the grievance investigation, on 13 May 2016. Mr Turner was sent an outcome of his grievance on 24 June 2016, this upheld parts of the matters about which he complained. Mr Thomas was sent an outcome of his grievance on 28 June 2016 and this again upheld some of his complaints. Neither were satisfied with the outcomes and both appealed. This became a pattern of behaviour for both the claimants. They would complain not just about the outcomes of meetings but also, in a number of cases, raised further grievances about the individuals who had conducted meetings with them. We do not intend to record in this judgment each occasion where this happened unless it forms part of the specific claims made. However, two conclusions that we have reached arising from this pattern are: one that both claimants had become entirely entrenched in their view and that nothing less than a complete acceptance of all of their complaints and of their factual accounts would be acceptable to them: second that they were intent throughout, that Paul Williams should be removed from the post which they perceived he had been appointed to in an irregular manner.

17. A series of occupational health reports were prepared in respect of both claimants that relate to this period of absence.

17.1. The first for Mr Thomas was dated 11 April 2016; the report concludes that the claimant suffered stress and anxiety, that these symptoms related to his complaints at work, that he felt unable to return until the complaints were dealt with, that he was unable to work at that time, that a return to work at a different office might be beneficial but that Mr Thomas' did not agree to a move because he was "not guilty", that counselling had been arranged and that in the opinion of the writer the claimant was not covered by the Equality Act.

17.2. Mr Turner's first occupational health report is dated 15 April 2016. The opinion expressed is that Mr Turner had a reactive response to events at

work not an underlying mental health condition. That there was a prospect of Mr Turner returning to work if emotional wellbeing stabilised and that should take four to six weeks. It records that Mr Turner did not consider he could return whilst Mr Chris Williams and Paul Williams remained at Cardigan. Again, the opinion expressed is that Mr Turner is not covered by the Equality Act.

17.3. There is an interim report on Mr Thomas dated 26 April 2016. That report amounts, essentially, to a summary of the contents of the first report.

17.4. An interim report on Mr Turner on 5 May 2016 indicates that his condition is not medical but operational in form.

17.5. There was then a report on 24 June 2016 about Mr Turner, that report refers to acute stress and that Mr Turner was not fit to work and would not be able to do so until the complaints process was complete.

17.6. The next report for Mr Thomas was dated 27 June 2016, that sets out that there was no significant change in his psychological state, that he was unable to work, and that resolution of the complaints process was necessary.

18. Mr Thomas complains about a meeting with Mr Dyke in July of 2016. The claimant raised this as part of a complaint on 7 September 2016. Following an investigation his complaint about an aggressive approach from Mr Dyke was upheld along with other parts of that complaint. Mr Dyke told us that he did not behave as alleged by the claimant and in particular did not lose his temper as the claimant alleged. However, he did admit that he had approached the meeting less formally because it was long term absence and used language that he would not have used in other types of meeting. We can quite see how, whether Mr Dyke intended that impression or not, that the use of inappropriate language by a senior manager during a formal meeting could result in the subject of the meeting feeling oppressed. Whether there was an actual loss of temper is less important than whether that was an impression that could be gleaned. We consider that the claimant's impression was that Mr Dyke lost his temper and that was a reasonable conclusion in the circumstances. The meeting did not lead to any specific outcome at that stage.

19. On 11 August 2016 Mr Stuckey met with Mr Thomas and as a result of that meeting stopped Mr Thomas' pay (his pay was reinstated within a short time afterwards). The reason for that decision was that although Mr Thomas was absent due to his disability, Mr Stuckey did not believe him to be ill.

19.1. Mr Stuckey had available to him the medical reports referred to above. Mr Stuckey told us that he believed that the claimant did not have a disability.

19.2. The reports relied on by Mr Stuckey to make the decision to stop the claimant's pay were, in our judgment, skeletal in content.

19.3. The 11 April report was prepared by someone who describes themselves as a "clinical case manager" there is no indication of medical qualifications or that the individual has mental health experience.

19.4. The second report is by the same individual and simply reports no change.

19.5. The third report is even less informative simply closing the case.

19.6. Mr Thomas was providing GP certificates with a diagnosis of stress at work, the most recent to this meeting being dated 1 August 2016 and setting out that Mr Thomas would be unfit for work for four weeks.

19.7. Mr Stuckey relied on the fact that the occupational health reports indicated that the claimant would be fit once the internal process had been concluded.

19.8. However, those processes had been concluded by the time of that meeting as far as Mr Stuckey was aware, but Mr Thomas remained ill according to his GP. On that basis the result predicted in the occupational health reports had not happened.

19.9. We do not consider that Mr Stuckey applied his mind at that stage as to whether the claimant could be a disabled person, he ought to have done, in our judgment he relied entirely on the conclusion in the report of 27 June 2016 that the claimant was not disabled. He gave no convincing reasoning for his conclusion otherwise, and in our judgment his witness statement setting out reasoning was created in retrospect.

19.10. In our judgment he simply gave no thought to whether the claimant might have been disabled. On the information before him, he should have considered obtaining a further report from someone demonstrating specific mental health expertise.

19.11. On that basis we conclude that the respondent ought to have known that the claimant was disabled at that stage, if it had applied an appropriate approach instead of not considering the issue of disability at all.

20. In February of 2017 Mr Turner received a letter from Nicola Smith. She was dealing with the claimant under the respondent's absence policies. That policy called for certain steps to be taken and meetings held. However, it is clear that the policy provides decision makers with a considerable amount of leeway as to what decision should be taken in any particular case. Ms Smith had read a medical report prepared by an occupational health physician. That report indicated that Mr Turner was not suffering from any significant illness, and that no further medical intervention was required. On that basis she was considering whether the claimant's absence was due to a genuine illness. Mr Turner drew our attention to a report prepared by his GP in December 2016 showing that he was suffering from considerable psychological symptoms, which were being treated with medication.

20.1. Mr Turner informed Mrs Smith that he was too unwell to attend the meeting which the letter outlined on the date set.

20.2. Mrs Smith wrote again indicating to Mr Turner that she would hold a meeting on 20 February 2017 and that Mr Turner could provide written evidence if he was unable to attend.

20.3. Mr Turner had obtained a further letter from his GP indicating that he was not well enough to participate in any meeting.

20.4. Despite this Mr Turner attended the meeting on 20 February 2017 and it was not until that meeting was underway that he provided Mrs Smith with both the letters from his GP.

20.5. That meeting appeared to be successful, Mr Turner agreed to return to work. Certain adjustments were agreed to be put in place.

20.6. However, Mr Turner visited his GP after this meeting; he told us that the GP said he could not allow the claimant to return to work because the claimant had told him that Paul Williams was still in place at the sorting office and that was still a barrier as far as the claimant was concerned.

21. Both claimants complain that Mr Press unnecessarily included in a letter, 18 May 2017, an assertion that the claimants were costing the business money.
    21.1. Mr Press was writing to the claimants with the intention of arranging a meeting with each of them to discuss their ongoing absence. He considered that matters had reached a stage where termination of their employment should be considered.
    21.2. As a result, his letter contains an indication of a number of factors which could be taken account of in coming to a conclusion on that question.
    21.3. The tribunal consider that the information that Mr Press included in his letter about various costs to the respondent of maintaining the claimants on sickness absence (in both cases by this stage absence extending beyond one year) were necessary to inform the claimants of matters which they might need to address in the meeting.
    21.4. There was a cost to the respondent in maintaining the claimants in employment. The respondent could not avoid the requirement for daily deliveries and could not, therefore, other staff had to carry out the work the claimants would have done. That would generally be on the basis of overtime because the respondent did not recruit staff unless there was a vacancy.

22. In addition to this Mr Turner alleged that following his indication that he would not be able to attend the arranged meeting because of his health, Mr Press said that Mr Turner had declined to attend the meeting in a letter rearranging the meeting. Mr Turner contended that this insinuated that he had no intention of attending the meeting and was refusing rather than unable to attend. In our judgment this exemplifies the extreme sensitivity of Mr Turner. The letter was no more than an invitation to a further meeting. It was no pejorative in any sense. It certainly did not carry the connotations that Mr Turner perceived it did.

23. The claimants were each invited to attend an attendance meeting with Mr Press on 6 June 2017. The letters of invitation to that meeting set out that it was being held under the respondent's attendance policies. The letters included a warning that the claimants might each be dismissed. The claimants each contend that they did not consider that letter to be inviting them to a formal meeting because the letter did not include the heading "Formal Meeting". It was pointed out in cross examination that other formal meetings were held where the claimants had raised no objections, despite the heading not being included. In any event the tribunal do not consider that Mr Turner and Mr Thomas were being honest in their answers on this issue. We consider that no person, however inexperienced, could consider that this was an invitation to an informal meeting. Mr Turner and Mr Thomas were not inexperienced. They had, each, received invitations to meetings of a formal nature on several occasions. As we explain below, we consider that it was their intention from the outset to disrupt the particular meetings with Mr Press in the hope that they would not go ahead.

24. For the first time at these meetings with the respondent on 6 June 2017 the claimants did not have union representation. The reason advanced by the claimants was that Mr Nash a CWU representative was unavailable.
    24.1. It is clear from other evidence that unavailability of a representative for a formal meeting would generally lead to its postponement on request of the

employee. In fact, the respondent appears to liaise with the CWU to ensure representation is available.

24.2. In addition to that DT, another CWU representative who had previously represented both claimants, was at the venue where the meeting was held at the relevant time.

24.3. However, despite this, both claimants decided that they would represent one and other at their respective meetings.

24.4. The approach they took in each meeting was to object to the presence of a notetaker. The tribunal reject the complaint that they were not warned that there would be a notetaker as a valid reason for their objections.

24.5. This was, as we have found above, a formal meeting where termination of employment might occur. There was no specific objection to Mr Fisher as a notetaker, just the principle of the presence of a notetaker.

24.6. We are bolstered in our conclusion that these objections were raised to cause obstruction because when Mr Press indicated that he would take his own notes, the objection was maintained about him taking notes; the claimants were seeking any means possible to ensure that the meeting did not progress.

24.7. We conclude this was a deliberate and pre-planned, albeit irrational, approach by both claimants.

24.8. This approach was maintained when later that day Mr turner represented Mr Thomas in his meeting with Mr Press. At this meeting Mr Fisher did take notes. Mr Thomas alleges Mr Press said that he would continue to bully and harass him. The notes do not bear that out. We prefer Mr Press' evidence that he did not say this: firstly it would be an outrageous thing to say and we do not accept that a manager of Mr Press' seniority would be likely to say such a thing; secondly we considered Mr Fisher an accurate and helpful witness and accept that his notes properly reflect what was said; finally, we consider that given our finding about the claimants' intention to disrupt the meeting is reflected in the note where it is Mr Turner alleging that Mr Press has said that he would continue to bully and harass Mr Thomas.

25. The last medical report available on each claimant had been prepared in March 2017. The respondent's policies indicate that, ideally, a medical report should not be more than three months old.

25.1. Both claimants had, at different points in time, agreed with the respondent that the respondent could contact their respective GP's.

25.2. Both were maintaining that they were too ill to work because of a mental health illness.

25.3. The meetings with Mr Press were organised and held on 6 June 2017. Mr Press did not finalise a decision to dismiss the claimants until the 19 July 2017.

25.4. The reason for dismissal in both cases was that there was no prospect of the claimants returning to work in the foreseeable future.

25.5. The respondent has a number of options available to it in respect of dismissal in circumstances where someone is too ill to work.

25.5.1. The employee can be dismissed on the basis of lack of capability pursuant to the ordinary law

25.5.2. The respondent also has agreement with the CWU that where someone is too ill to work the possibility of ill health retirement is available in two forms:

25.5.2.1. Frst where someone is incapacitated from working at all an early retirement under the pension scheme is available;

25.5.2.2. Second, where someone cannot continue to work for the respondent but might be able to work elsewhere in the future a lump sum payment of 34 weeks pay is available.

25.6. Mr Press did not consider that ill health retirement was an option in the claimants' cases and dismissed on the basis of capability. With notice Mr Thomas' date of termination was 20 October 2017 and Mr Turner's date of termination was 16 October 2017.

26. Mr Press had a report on Mr Thomas dated 22 March 2017, prepared by an Occupational Physician, which set out the following "*Mr Thomas indicates that he has become increasingly frustrated and disaffected by the way he has been treated and relates that he has felt unsupported by management and is now mistrustful of RMG as a whole. The outstanding issues with regards to the appeal for his grievance is acting as an ongoing barrier to his recovery and it is likely in my view that until the appeal situation is addressed this situation will be unchanged*" and also in respect the claimant being able to return when the appeal was dealt with and referring to a resolution being to the claimant's satisfaction along with an adjustment of medication it also set out "*there is, however, no guarantee of this occurring"*.

27. Mr Press also had a report in respect of Mr Turner from 9 March 2017, prepared by an Occupational Health Advisor (there is no indication of the individual's qualifications). That report refers to physical fitness to return to work, despite the reason for absence being Mr Turner's mental health. The report sets out that the claimant's GP has diagnosed depression and anxiety and that the claimant was prescribed medication for this. The report also refers to the claimant receiving counselling funded by himself. The report indicates that the claimant disputes the occupational health assessment and relies on his GP's position. Both claimants had provided GP certificates. Mr Turner's certificate date 13 April 2017 indicated that he was unfit to work for a period of three months.

28. The claimants each complained about Mr Press and the way in which he had conducted the dismissal meetings. These complaints were raised as grievances, the grievances were raised prior to the decision to dismiss was made by Mr Press. The respondent had rejected the claimants' bullying and harassment complaints as not fitting within policy. Both claimants also appealed the decision to dismiss them. Ms Mullins was appointed to deal with the appeal. She concluded that part of the basis for the appeal was the grievance about the manner in which Mr Press had conducted the dismissal meetings. She saw this as a separate grievance and although it had been rejected previously considered that it should be dealt with as a grievance. However, she decided to hold the grievance investigation and consider the outcome after she had concluded the dismissal appeals. Her basis for this decision was that she was going to hold a complete rehearing of the claimants' cases as a result making her own decision as to whether they should be dismissed.

29. Ms Mullins told us that she approached the question of the claimants' appeals entirely afresh. However, Ms Mullins did not obtain any up to date medical evidence on either of the claimants' respective health condition. Therefore, she approached the matter on the basis of the same medical evidence that Mr Press relied upon from March 2017 this is despite the fact that her appeal was held in October 2017. Her evidence was that the early retirement provision did not apply to either claimant. Her decision in respect of Mr Thomas was that he had not fully engaged with the respondent in the processes around his sickness absence. She concluded that ill health retirement was not appropriate because the medical report dated 22 March 2017 did not suggest it. She applied similar considerations to both claimants. What was apparent is that she considered in respect of both of them that there was no real prospect of them returning to work and she related this to attitudes from both claimants towards the Paul Williams situation and their inability to accept the decisions made, even those in their favour, during the respondent's internal processes.

30. As part of her decision on the grievance taken after the appeal dismissal Ms Mullins considered that Mr Press should have considered that the claimants had mental health conditions and re-arranged the 6 June meeting given the manner in which those meetings had progressed.

31. For completeness we should indicate that the issue of relocation had been raised with both claimants by the respondent at points during these processes. For reasons related to the health of his wife Mr Turner would not contemplate relocation. Mr Thomas did not consider it was practical for him to relocate.

The Law

30. With regard to unfair dismissal, the relevant legislation begins with section 98 of the Employment Rights Act 1996, which provides:

> *1) in determining for the purposes of this part, whether the dismissal of an employee is fair or unfair, it is for the employer to show*
> *a) the reason (or, if more than one, the principal reason for the dismissal, and*
> *b) that is ----- a reason falling within subsection 2 ----.*
> *2); a reason falls within this subsection if it ---*
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do, ----------*
> *(3) In subsection (2) (a) "capability", in relation to an employee, means his capability assessed by reference to ----- health or any other physical or mental quality, ----- ------*
> *4) in any other case where the employer has fulfilled the requirements of subsection 1, the determination of the question of whether the dismissal is fair or unfair (having regard to the reason shown by the employer)*

a) depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
b) shall be determined in accordance with equity and the substantial merits of the case.

The respondent is required under Section 98 of the Employment Rights Act 1996 to prove the reason for dismissal. Thereafter, the burden of proof is equal between the respondent and the claimant in respect of the fairness of dismissal.

32. The respondent in this case relies on capability which is a potentially fair reason. The tribunal therefore is required to examine the process by which the decision to dismiss was taken. The tribunal recognise that the decision of the Employment Appeals Tribunal in the case of **East Lindsey District Council -v- Daubney [1977] IRLR 181** sets out with some clarity a summing up of the law in respect of dismissals arising out of capability:

'We turn to the second reason relied on by the tribunal. There have been several decisions of EAT in which consideration has been given to what are the appropriate steps to be taken by an employer who is considering the dismissal of an employee on the ground of ill health. Spencer v Paragon Wallpapers Ltd and David Sherratt Ltd v Williams are examples. It comes to this. Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employers' medical advisers, will cause them to change their opinion. There are many possibilities. Only one thing is certain, and that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done.'

33. With regard to disability discrimination, disability being a protected characteristic under the Equality Act 2010 the relevant aspects of the legislation begin with section 15 which provides:

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

34. Section 20 deals with the Duty to make adjustments and provides:

(1)Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2)The duty comprises the following three requirements.
(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

35. Section 21 deals with the Failure to comply with the duty and provides

(1)A failure to comply with the first, ---- requirement is a failure to comply with a duty to make reasonable adjustments.
(2)A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

35. Section 123 deals with Time limits

(1)---------- a complaint within section 120 may not be brought after the end of—

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

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

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(3) For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;

(b)failure to do something is to be treated as occurring when the person in question decided on it.

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

(a) when P does an act inconsistent with doing it, or

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

36. We are required to consider time limits, in respect of the discrimination claims. It is clear that some of the omissions complained of occurred more than 3 months before the presentation of the claim. We are required to consider first whether the incidents constitute an act or omission extending over time. We have to judge whether there is a continuing act as set out in **Hendricks v Metropolitan Police Comr. [2002] EWCA Civ 1686, [2003] 1 All ER 654**. The claimants need to establish a nexus between the various events. That nexus does not necessarily mean that the same individuals are involved in each event or that the events follow on from a specific policy. The nexus must, however, be established by demonstrating that there is a state of affairs in existence throughout that period, a connection whereby for instance a particular workplace culture is shown.

37. If there is no continuing act or omission we have to consider whether it is just and equitable to extend time for the presentation of the claim. In deciding whether it is just and equitable we are required to apply the decision in **Robertson v Bexley Community Centre [2003] IRLR**. That case makes it clear that there is no presumption that the tribunal should exercise its discretion to extend time. The onus is always on the claimant to convince the tribunal to do so. Auld LJ indicates that the exercise of the discretion is the exception rather than the rule. In addition, when deciding whether it is just and equitable to extend time, we must consider the explanation given by the claimant or any inferences that can properly be drawn from the facts which show an explanation as to why the claim was not made at an earlier stage see **Abertawe Bro Morgannwg University Local Health Board -v- Morgan [2014] UKEAT 0305/13**.

38. Section 15 requires no comparator; we are concerned with unfavourable treatment, not less favourable treatment. Unfavourable treatment is treatment that is disadvantageous to the claimant see **Swansea University v Williams [2018] UKSC 65** anything done which is advantageous, even if less advantageous than it might be if not for the consequence of the disability, is not unfavourable. The tribunal must consider two distinct elements of causation. Firstly, what is the something caused by the disability, what arises as a consequence of the disability? This must not be considered narrowly, there can be a number of links in this chain of causation. Secondly, we must consider whether that “something” has caused the respondent to treat the claimant unfavourably; the something must be a significant or effective cause of treatment it need not be the sole or even principal cause. anything done which is advantageous, even if less advantageous than it might be if not for the consequence of the disability, is not unfavourable.

39. In terms of disability discrimination relating to a failure to make reasonable adjustments, the Tribunal has in mind the decision of the Employment Appeal Tribunal in the **Environment Agency v Rowan UK EAT/0060/07/DM**, it is indicated that a Tribunal must identify the provision criterion or practice applied by or on behalf of an employer, the identity of non-disabled comparators where appropriate, and the nature and extent of the substantial disadvantage suffered by the Claimant, indicating that it is clear that the entire circumstances must be looked at, including the cumulative effect of the provision criterion or practice, before going on to judge whether an adjustment was reasonable. The Tribunal are aware that it is its duty in the light of the decision in **Rowan**, to identify the actual provision criterion or practice on the facts of the case.

Analysis

40. Dealing first with Mr Turner's claim. Mr Turners claims were numbered in the Scott schedule as items 11, 12, 14, 15, 16, 18, 20, 22, 23, 24, 25 and 26, the tribunal shall follow that numbering scheme.

41. Item 11 relates to a letter sent to Mr Turner in February 2017 from Nicola Smith. The letter invites the claimant to attend a meeting, but also includes an indication that consideration would be given to ending the claimant's employment and stating that the reasons would be that the claimant's illness was not genuine. The letter also set out that sick pay would also be considered.
    41.1. Dealing first with the respondent's knowledge of the claimant's disability.
        41.1.1. Miss Smith had read a medical report which set out that Mr Turner was not suffering from any significant illness. The report prepared by Mr Turner's GP in December 2016 and a further letter indicating Mr Turner was unfit to attend a meeting. Mrs Smith was not shown either letter before the meeting.
        41.1.2. The medical evidence received by the respondent prior to the GP reports indicated that Mr Turner had a mental impairment. However, nothing in those reports indicated that it was long term in nature. The last medical report received before the sending of the letter indicated that whatever illness had existed was no longer in place. The claimant's GP certificates recorded stress at work and there was nothing further to indicate to the respondent the nature of the claimant's condition from medical sources.
        41.1.3. There was nothing provided to the respondent about Mr Turner's day to day activities at that stage which would have put the respondent on notice of specific difficulties. At the meeting, Mr Turner agreed to return to work with certain adjustments.
        41.1.4. Up until that point there was insufficient information to put the respondent on notice that that the claimant had a disability. The respondent took steps to ascertain the claimant's medical condition from appropriate experts and Mrs Smith had applied her mind to the question of the claimant's condition on the information she had. In our judgment the respondent neither knew or ought to have known that the claimant was disabled.

41.2. Providing an employee with the relevant information as to what might be considered by the respondent at a relevant absence meeting is not, in our judgement a disadvantage to the employee, but an advantage in dealing with the meeting. On that basis Mr Turner was not treated unfavourably in the information that was given to him in the letter.

41.3. Even if we were wrong about the respondent's knowledge and unfavourable treatment we consider that writing the letter was justified.

41.3.1. Mr Turner was absent from work for approaching 11 months by this stage. Clearly, he was absent because of his disability and the letter was written in consequence of his absence.

41.3.2. However, the respondent has a legitimate aim in maintaining an efficient workforce and only paying sick pay to those who are genuinely unable to work through illness. It was reasonably necessary in the claimant's case, given the state of the evidence the respondent had at that stage to meet with the claimant to discuss his absence. In the circumstances a respondent that did not point out that there were potentially serious outcomes to the meeting depending on the view taken by the employer would be acting unfairly to an employee. On that basis it is reasonably necessary to outline those potential outcomes to an employee who is being reasonably invited to a meeting.

41.3.3. On that basis also, we consider that the claimant's claim pursuant to section 15 is not well founded.

41.4. Mr Turner's claim was presented out of time.

41.4.1. The various meetings and processes Mr Turner was involved in were conducted by a variety of individuals. Nothing in the evidence led us to consider that any of these individuals were following a cultural approach which was antagonistic to employees with mental impairments.

41.4.2. Although the policies, such as the absence policy, was what was being applied by all, there is significant discretion given to decision makers applying the policies. On that basis we did not consider that there was a nexus between this letter and meeting with Ms Smith and later meetings.

41.4.3. Mr Turner was represented by his union through most of these events. He was certainly represented at this stage. There was nothing in the evidence which pointed to Mr Turner being unable to research or bring a claim within the time limit in relation to February 2017. He was capable of pursuing detailed grievances at work.

41.4.4. There is significant prejudice to the respondent in the claimant being permitted to bring this claim. Although Ms Smith was an excellent witness, nonetheless, her memory was not perfect about these events. In our judgment it is not just and equitable to extend time for the claimant to bring his complaint under item 11.

41.4.5. For the purposes of brevity similar reasons apply to the time limit issues we deal with below.

42. Mr Turner's claim under item 12 has no factual foundation. The complaint is that the respondent did not heed the claimant's GP letter.

42.1. Ms Smith was not aware of the claimant's GP letter prior to sending her letter.

42.2. In addition, the claimant attended the meeting and agreement was reached, Mr Turner had no complaint about the manner in which Smith conducted the meeting.

42.3. In any event the matters set out for item 11 have equal force here. The respondent did not have the requisite actual or constructive knowledge of Mr Turner's disability. The respondent was justified in sending the letter. Mr Turner has brought the claim ought of time. There is no indication that this is a continuing act connected with a claim brought within the time limits. It would not be just and equitable to extend time: the claimant has not provided any evidence for a reason to extend time; there was nothing preventing the claimant bring his claim earlier; the balance of prejudice weighs in the respondent's favour.

43. Mr Turner's complaint under item 14 is about a letter sent by Mr Press in May 2017. The complaints are similar to those made about the letter sent by Ms Smith.

43.1. The respondent by this stage has constructive knowledge, if not actual knowledge, of the claimant's disability. The claimant had been absent from work for more than one year at this stage with no indication of a return to work. There was a cost to the business of this.

43.2. Providing an employee with the relevant information as to what might be considered by the respondent at a relevant absence meeting is not, in our judgement a disadvantage to the employee, but an advantage in dealing with the meeting.

43.3. On that basis Mr Turner was not treated unfavourably in the information that was given to him in the letter.

43.4. The respondent was justified in setting out to Mr Turner what considerations it would have in mind when dealing with the claimant at a long-term absence meeting and cost was amongst them. In our judgment the claimant's contention that this amounts to blaming him for the cost of his absence is not justified by the contents of the letter.

43.5. Mr Turner has brought the claim ought of time. There is no indication that this is a continuing act connected with a claim brought within the time limits. It would not be just and equitable to extend time: the claimant has not provided any evidence for a reason to extend time; there was nothing preventing the claimant bring his claim earlier; the balance of prejudice weighs in the respondents' favour.

44. Item 15 in the tribunal's judgment: there is no factual foundation to this complaint. The claimant has read into the communication something that is not borne out by the wording.

44.1. In any event the use of the word decline was not a consequence of the claimant's absence or his inability to attend a meeting it was a choice of words for indicating that a meeting had not taken place. We considered that it could not be read, in the context of the whole letter, in the way Mr Turner has indicated he understood the word to be used.

44.2. In our judgment Mr Turner did not genuinely believe the respondent to have written this to indicate that he was deliberately choosing not to attend the meeting.

44.3. Mr Turner has brought the claim ought of time. There is no indication that this is a continuing act connected with a claim brought within the time limits. It would not be just and equitable to extend time: the claimant has not provided any evidence for a reason to extend time; there was nothing preventing the claimant bring his claim earlier; the balance of prejudice weighs in the respondent's favour.

45. Item 16 is claimed as a failure to make reasonable adjustments claim alongside a discrimination arising in consequence claim.
    45.1. The way in which the meeting developed, in our judgment, cannot be said to be the responsibility of the respondent. Mr Turner was intent on disrupting it.
    45.2. We consider that nothing that nothing that Mr Press did at this meeting was done in consequence of something arising from Mr Turner's disability he was reacting to an approach by both claimants which was intended to disrupt the meeting.
    45.3. In our judgment there was no disadvantage to Mr Turner in having a notetaker present and certainly no disadvantage arising from this disability which would have been alleviated by having no notes taken.
    45.4. Mr Turner has brought the claim ought of time. There is no indication that this is a continuing act connected with a claim brought within the time limits. It would not be just and equitable to extend time: the claimant has not provided any evidence for a reason to extend time; there was nothing preventing the claimant bring his claim earlier; the balance of prejudice weighs in the respondent's favour.

46. Item 18 the claimant complains that in the letter of dismissal Mr Press's indication that the claimant could have taken actions to assist with a return to work.
    46.1. The letter of dismissal was written because the claimant was dismissed for absence. The claimant was absent because of his disability. It is open to question whether part of the explanation for the decision to dismiss was a consequence of the claimant's absence but approaching matters as if it does we consider the respondent was justified.
    46.2. The letter of dismissal of necessity requires a decision maker to explain the reasons for dismissal. Including those reasons in the letter was therefore reasonably necessary.
    46.3. If we have read the claimant's complaint wrongly and he is contending that Mr Press' reasoning itself is the cause for complaint then that is a consequence of the claimant's disability.
    46.4. Providing an employee with the relevant information as to what might be considered by the respondent at a relevant absence meeting is not, in our judgement a disadvantage to the employee, but an advantage in dealing with the meeting. On that basis Mr Turner was not treated unfavourably in the information that was given to him in the letter.
    46.5. Once again, we consider the respondent was justified. Mr Turner had made an unwarranted request which the respondent could not comply with. That was to remove Mr Paul Williams from his position. It was clear that there was no evidence of specific wrongdoing on Paul Williams part and that he

had held a post for a number of years, moving him from that post without his agreement could have led to a constructive dismissal claim.

46.6. Mr Turner has brought the claim ought of time. There is no indication that this is a continuing act connected with a claim brought within the time limits. It would not be just and equitable to extend time: the claimant has not provided any evidence for a reason to extend time; there was nothing preventing the claimant bring his claim earlier; the balance of prejudice weighs in the respondent's favour.

47. The allegations in items 20, 22, 24 and 25 must fail. The claimant is complaining about evidence gathered during the course of investigations. Mr Turner's real complaint is that he does not believe what is the witness reported to be true.

47.1. The investigation reported the evidence gathered and the conclusions that the investigator had drawn from it. There is simply no indication that the reason that evidence was given was because the claimant was absent. There is no other consequence of the claimant's disability that has been drawn to our attention in evidence other than absence.

47.2. Even if we concluded that there is a chain which connects the evidence given with Mr Turner's absence because it forms part of an investigation which looks at his absence it does not assist Mr Turner. The claimant appealed the decision to dismiss him and raised a grievance. The respondent has a legitimate aim in investigating such matters so as to obtain evidence upon which to make its decisions.

47.3. In such an investigation it is reasonably necessary to allow witnesses to give the relevant evidence they want to on the issues raised. It is then reasonably necessary to record that evidence and the way in which that evidence has been treated.

47.4. Providing an employee with all that information is not, in our judgement a disadvantage to the employee. On that basis Mr Turner was not treated unfavourably in the information that was given to him.

47.5. If we were wrong about that we consider that the respondent has the defence of justification. There was clearly the legitimate aim set out above and in our judgement, it is reasonably necessary for the respondent to set out honestly what has been reported to it and the conclusions that have been drawn.

48. Item 26 relates to Mr Turner's concern that the grievance was not dealt with prior to the dismissal appeal.

48.1. Mr Turner had been dismissed because of absence, the appeal was because of the dismissal therefore the appeal itself could be said to arise out of something caused by Mr Turner's disability.

48.2. However, the reason for Ms Mullins decision to separate the appeal from the grievance process did not arise out of the claimant's disability. Her approach was based on her view as to her decision-making process, that did not arise in consequence of Mr Turner's absence. The chain of causation is too remote.

49. On our findings therefore, the claims of disability discrimination pursuant to sections 15 and 20/21 of the Equality Act are not well founded and are dismissed.

50. We consider that Mr Turner was unfairly dismissed: it was unreasonable for this employer to dismiss Mr Turner for capability rather than consider dismissing for early retirement.
    50.1. We consider that, given the mental health condition of Mr Turner, Mr Press in June 2017 should have given some consideration to whether the irrational behaviour displayed could have been connected with that condition. It was procedurally unfair to continue to make a decision to dismiss without that being done.
    50.2. This is because a reasonable employer would question the reaction. This in light of the most recent occupational health report examination taking place almost three months prior to the hearing in June 2017, raised a concern about the claimant's state of mind that no reasonable employer would ignore
    50.3. . In Mr Turner's case this problem is exacerbated by the fact that the report from March 2017 does not address the claimant's mental health at all. This is particularly important given that Mr Press did not make a decision until some six weeks after the meeting, and therefore by the stage of his decision, even under the respondent's policy that reports should not be more than three months old, was woefully out of date.
    50.4. Further, Mr Turner had granted the respondent permission to contact his GP. Given that there appeared to be a conflict between the GP's conclusions and, at least some of, the occupational health advice no reasonable employer would have made the decision to dismiss without considering the options of obtaining further medical evidence.
    50.5. In addition, we consider that there was unfairness in the approach taken to early retirement. There were forms of dismissal available to the respondent, the reasons underpinning those forms related to the ability of the claimant to work for the respondent.
    50.6. The respondent had information from the Mr Turner's GP about the claimant's health and his difficulties in working for the respondent given the existing conditions. Given that the medical report did not address Mr turner's mental health and the respondent was making a choice between different types of dismissal it was unfair to make the decision that the claimant's absence didn't fall into the category that attracted early retirement of either sort.
    50.7. No reasonable employer would have made that decision on the available evidence. The claimant's claim is well founded.
    50.8. The appeal conducted by Ms Mullins did not address these procedural failings. She did not obtain any further medical evidence. Although this was described as a rehearing the investigation did not revisit the medical position as to the claimant's state of health. The appeal did not correct the defects we have identified. In our judgement the procedure looked at in the round was not one a reasonable employer would have adopted in all the circumstances of the case.
    50.9. The matter of remedy shall be considered at a further hearing. The tribunal make it clear that we have made no decision as to issues of contribution or whether the claimant would have been dismissed for capability in any event if a fair process had been followed.

51. Mr Thomas' claims of disability discrimination are identified in the order of Employment Judge Howden Evans dated 21 December 2018 the tribunal shall deal with the complaints pursuant to sections 15 and 26 together and then consider the complaint pursuant to sections 20/21. Finally, we will deal with the issue of unfair dismissal.

52. Mr Thomas identified four meetings which he alleged were conducted in a bullying manner as discrimination pursuant to sections 15 and 26 of the Equality Act 2010.
    52.1. Those meetings were each held under the respondent's absence process. However, nothing else connects the meetings, they are held by different individuals, the behaviour alleged is different in each case.
    52.2. Mr Owen's alleged bullying on 7 April 2016 is seeking of information about the cause of the claimant's stress; Mr Dyke used inappropriate language and appeared to lose his temper in the July 2016 meeting; Mr Stuckey ought to have known the claimant was disabled but approached the meeting on the basis of an occupational health report at the meeting on 11 August 2016, but he applied policy on the basis the claimant was fit to return to work but was unwilling to do so; Mr Press' reaction to the disruptive behaviour of the claimants at the meeting with Mr Thomas (in addition Mr Press did not use the words alleged.
    52.3. On that basis awe do not consider that there is any indication of a continuing act of discrimination, there is no real nexus between the conduct at each of these meetings. Mr Thomas's claim is out of time even if these meetings amounted to an act of discrimination extended over a period.
    52.4. Mr Thomas was represented through most of the processes in which he was involved. He had no difficulty in raising complaints in a detailed manner. No specific reason has been advanced as to why he did not bring these complaints within time.
    52.5. The passage of time presents a clear disadvantage to the respondent. The latest claim in June 2017 is without factual foundation, Mr Press did not use the words that the claimant alleges and his approach to the meetings was a reaction to the deliberate disruption by Messrs. Thomas and Turner. The earlier meetings were in 2016 and the passage of time is bound to affect the quality of the respondent's witnesses' evidence.
    52.6. On that basis, in our judgment, it would not be just and equitable to extend time for the presentation of the claims pursuant to sections 15 or 26 of the Equality Act 2010.
    52.7. The tribunal has no jurisdiction to deal with Mr Thomas' claims pursuant to the above sections as they have been presented outside the time limit for such claims and it is not just and equitable to extend time for presentation.

53. Mr Thomas complains about a failure to make reasonable adjustments. Two of those adjustments relate to April 2016. For the reasons we outlined above in respect of time limits we do not consider it would be just and equitable to extend time for Mr Thomas to bring these two complaints.

54. Mr Thomas complains that a policy required him to return to work at the Cardigan sorting office. This is not borne out by the evidence. Discussions involving the

respondent and Mr Thomas and similar discussions with Mr Turner indicate that the respondent applied no policy as to place of work and that it would discuss the possibility of relocation with individuals. Even if we were to consider that a PCP the claimant argues that it would have been a reasonable adjustment to relocate Chris and Paul Williams. In respect of Chris Williams that had already taken place. In respect of Paul Williams, the respondent could not do that without Paul Williams volunteering to move. The respondent's investigations had found no wrongdoing on his part, it was not, therefore in a position to begin a disciplinary process against him which would have been the only fair way of compelling him to relocate. It would not therefore have been a step it would have been reasonable for the respondent to have to take.

55. Mr Thomas contends that there was a policy requiring a certain level of attendance. The respondent argued that the policy referred to did not apply in this case because Mr Thomas was not attending work at all. We consider that this is incorrect, the respondent had a policy of requiring employees to attend work and if they did not then it would apply an absence process to the employee. This is what it did in Mr Thomas' case. The application of that policy was to Mr Thomas' disadvantage as it would have been to anyone with his disability which prevented him from working. However, the adjustments sought are to disapply the policy and discount his absence, or apply adjustments that Mr Dyke agreed in March 2016. In our judgment none of those adjustments would have resulted in the claimant being able to return to work. His problem with returning was that Paul Williams occupied a post. It would not have been reasonable to relocate Mr Williams for the reasons outlined above, Mr Thomas did not want to relocate as it was not practical for him to do so. Adjustments are put in place in order for a disabled employee to be able to work. It would not have been reasonable for the respondent to have to make the remaining adjustments because they would not have allowed the claimant to return to work.

56. Mr Thomas' claims pursuant to sections 20 and 21 of the Equality Act 2010 related to meetings in 2016 are not well founded and are dismissed.

57. We consider that Mr Thomas was unfairly dismissed: it was unreasonable for this employer to dismiss Mr Thomas for capability rather than to consider dismissing for early retirement.
    57.1. We consider that, given the mental health condition of Mr Thomas, Mr Press in June 2017 should have given some consideration to whether the irrational behaviour displayed could have been connected with that condition. It was procedurally unfair to continue to make a decision to dismiss without that being done.
    57.2. This is because a reasonable employer would question the reaction. The most recent occupational health report examination taking place almost three months prior to the hearing in June 2017 had nonetheless pointed to Mr Thomas' state of mind. No reasonable employer would ignore the irrational conduct given what was set out in that report.
    57.3. In Mr Thomas' case the report from March 2017 indicates that there is a mental barrier to the claimant returning to work and that his condition had progressed to mistrusting the respondent's organisation as whole. The report went on to indicate that even treatment might not be able to overcome this

aspect of his condition. No reasonable employer would have decided that the early retirement provision did not apply in these circumstances without further medical information.

57.4. Mr Press did not make a decision until some six weeks after the meeting, so that by the stage of his decision, even under the respondent's policy that reports should not be more than three months old, the report was considerably out of date.

57.5. Further, Mr Thomas had also granted the respondent permission to contact his GP no reasonable employer, having seen the March report would have made the decision to dismiss without considering the options of obtaining further medical evidence from the GP or occupational health specifically questioning Mr Thomas' ability to work for the respondent because of his medical condition.

57.6. In addition, we consider that there was unfairness in the approach taken to early retirement. There were forms of dismissal available to the respondent, the reasons underpinning those forms related to the ability of the claimant to work for the respondent. The respondent was making a choice between different types of dismissal it was unfair to make the decision that the claimant's absence didn't fall into the category that attracted early retirement of either sort, without specifically addressing the question with medical adviser's.

57.7. No reasonable employer would have made that decision on the available evidence. The claimant's claim is well founded.

57.8. The appeal conducted by Ms Mullins did not address these procedural failings. She did not obtain any further medical evidence. Although this was described as a rehearing the investigation did not revisit the medical position as to Mr Thomas' state of health. The appeal did not correct the defects we have identified. In our judgement the procedure looked at in the round was not one a reasonable employer would have adopted in all the circumstances of the case.

57.9. The matter of remedy shall be considered at a further hearing. The tribunal make it clear that we have made no decision as to issues of contribution or whether the claimant would have been dismissed for capability in any event if a fair process had been followed.

Judgment posted to the parties on
18 February 2020
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For the staff of the tribunal office

EMPLOYMENT JUDGE W BEARD

Dated: 18 February 2020

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