EMPLOYMENT TRIBUNALS

Claimant: Mr S Forbes

Respondent: GMB General Union

Heard at: Manchester **On:** 25-28 September 2018

Before: Employment Judge Slater
Mrs P J Byrne
Mr K Lannman

REPRESENTATION:

Claimant: Mrs J Ferrario, Counsel
Respondent: Mr D Dyal, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of unfair dismissal is well founded.

2. The complaint of direct disability discrimination is not well founded.

3. The complaint of discrimination arising from disability is well founded.

4. The complaints of failure to make reasonable adjustments are not well founded.

5. There will be a remedy hearing on 24-25 April 2019.

6. There will be a case management preliminary hearing by telephone on a date to be notified.

REASONS

1. The parties agreed that the complaints and issues to be determined at this final hearing remained as identified at a preliminary hearing on 30 January 2018.

2. The claimant brought complaints of unfair dismissal contrary to sections 94 and 98 of the Employment Rights Act 1996, direct discrimination because of disability

contrary to sections 13 and 39 of the Equality Act 2010, discrimination arising from disability contrary to sections 15 and 39 of the Equality Act 2010, and failure to make adjustments contrary to sections 20, 21 and 39 of the Equality Act 2010.

3. The agreed issues in relation to liability were as follows:

Unfair Dismissal

4. It was common ground that the respondent dismissed the claimant. The Tribunal was to determine the following issues:

(1) Can the respondent prove that the sole or main reason for the claimant's dismissal was the respondent's belief that he was medically incapable of maintaining satisfactory attendance and fulfilling the requirements of his role? (The claimant had contended that the real reasons were the respondent's desire to change the claimant's role to a recruiting based role and the respondent wished no longer to have a full-time Branch Secretary).

(2) If so, did the respondent act reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant?

Direct Disability Discrimination

5. There was no dispute that, from 20 February 2016, the claimant was disabled by reason of a spinal cord injury suffered on that date and his subsequent stroke of 24 March 2016. The complaint was in relation to the claimant's dismissal. The only issue which arose for determination: was the claimant dismissed because of his disability? The claimant's case was that the respondent made stereotypical assumptions about the claimant's abilities based on his disability rather than considering what the claimant could actually do.

Discrimination arising from Disability

6. It was agreed that the respondent treated the claimant unfavourably by dismissing him. It was common ground, although for slightly different reasons, that a material reason for the claimant's dismissal arose in consequence of the claimant's disability. Knowledge of disability was not in issue. The issue for the Tribunal to determine was whether dismissal was a proportionate means of achieving a legitimate aim. The respondent relied on four aims:

(1) Complying with its duty to protect the health, safety and welfare of the claimant and its other employees.

(2) The provision of consistent, efficient, timely and cost effective services to its members.

(3) The maintenance of an effective membership recruitment programme.

(4) Ensuring that it employed individuals capable of carrying out their primary job functions.

7. The claimant accepted that all four aims were legitimate and that dismissing him was a means (albeit an unacceptable means) of achieving those aims. The only question for the Tribunal, therefore, was whether the means were proportionate.

Duty to make Reasonable Adjustments

8. The claimant relied on two PCPs:

(1) That the claimant attend work;

(2) That the claimant must spend five days per week on recruitment activities.

9. In relation to the first requirement, it was undisputed that the requirement existed and that it put the claimant to a substantial disadvantage because he had to take prolonged sick leave. The adjustments sought were a phased return to work and/or a trial period in the claimant's role. The respondent conceded knowledge of disability and knowledge of the disadvantage. The Tribunal had to determine whether or not it was reasonable for the respondent to have to make those two adjustments. In closing submissions, Mrs Ferrario suggested that there should have been some other form of reasonable adjustment made. However, the Tribunal did not understand from the explanation what adjustments were being suggested. In any event, the Tribunal did not consider that the respondent could fairly be expected to meet a different case at the stage of closing submissions.

10. In relation to the second PCP, it was the claimant's case that the adjustments should have been put in place in January 2017, or alternatively in “May to June” 2017 when the claimant was fit to return to work. The Tribunal had to decide:

(1) Whether the PCP existed;

(2) Did it put the claimant to the alleged substantial disadvantage?

(3) Was it reasonable for the respondent to have to modify or remove the duties of the claimant’s role?

(4) Whether the respondent failed in its duty to make those adjustments by refusing them, acting inconsistently with the duty to make them or by failing to put the adjustments in place within a reasonable time.

11. The Tribunal also had to consider a time limit issue in relation to the second PCP.

Scope of initial final hearing

12. At the preliminary hearing, it had been ordered that this final hearing deal only with liability and an issue of whether the ACAS Code of Practice on Discipline and Grievance applied to the dismissal and, if so, whether the respondent unreasonably failed to comply with it. In closing submissions, Mrs Ferrario, for the claimant, accepted that the ACAS Code does not apply to a capability dismissal so this ceased to be an issue to be determined by the tribunal.

The Facts

13. The respondent is a well-known trade union and is a large employer. The claimant's employment with the respondent began on 1 April 2000. The claimant worked from an office in Barrow. The respondent had two other offices in Cumbria, in Whitehaven and Carlisle, although we were told that no one was based in Carlisle.

14. Prior to the claimant's injury, he was assisted in the Barrow office by Clare Paterson, a secretary. Ms Paterson worked 10.00am to 2.00pm until June 2016 when she increased her hours whilst the claimant was on sick leave. Prior to th increase in her hours, Clare Paterson answered the phone in the Barrow office until 2.00pm. We accept the claimant's evidence that he answered the phone if he was in the office after 2.00pm once Clare Paterson had left for the day. From 2015, a loop was installed so that, if the phone was not answered, calls were diverted first to Whitehaven and then to Newcastle. We accept that the claimant still answered the phone if he was in the office and that there had been problems with the loop.

15. On 11 June 2007, the claimant was issued with a contract of employment as a full-time Branch Secretary. At some time previously, there had been a dispute between the respondent and full-time Branch Secretaries as to whether they were employees. In relation to duties, the contract included the following:

> "Your key duties are as set out in rule 39 and in addition you will carry out such organisational, representative, political and administrative work as required by the Regional Secretary or his/her duly authorised representative."

16. Rule 39 was superseded by rule 37 in the 2016 Rules. The rules are of similar effect so we refer only to rule 37:

(1) Rule 37(1) relates to keeping the branch's books, accounts and documents, carrying forward in the contribution book and on members' cards or contributions members have not yet paid, dealing with all correspondence and reading it to the members of the branch, and taking part in all branch committee meetings and keeping a record of them.

(2) Rule 37(2) referred to handing over money and a quarterly sheet of the Branch's income and spending to the region.

(3) Rule 37(3) related to sending a financial report signed by auditors and the President to the National Administration Unit.

(4) Rules 37(4) and (5) also related to the balance sheet and auditors.

(5) Rule 37(6) related to obtaining authorities for transfer of members between branches.

(6) Rule 37(7) related to reporting to the Regional Secretary any case where a collecting steward had failed to carry out their duties.

(7) Rules 38(8) to (11) set out powers and obligations.

17. There was a dispute between the parties as to the amount of time required to carry out the rule 37 duties. The respondent estimated this as being one day per quarter and the claimant estimated this as being one day per week on average. Having regard to the nature of the duties set out in rule 37, we consider it likely that the average time spent was somewhere between the two estimates but probably not more than a day per month on average. Some weeks would require very little time and other weeks, e.g. when preparing the quarterly sheet, would require more time spent on these duties.

18. Although no hours of work were specified in the contract, the claimant accepted that he normally worked office hours, Monday to Friday, plus additional hours evenings and weekends as required.

19. Apart from his rule 37 duties, the claimant's work in the office was related to giving advice to members and representation and recognition work. Some, but not all, of this work would require the claimant to attend members' workplaces, for example to represent in disciplinary and capability hearings and in connection with recognition work. The claimant had approximately 3,800 members in around 290 different workplaces. The claimant also did work out of the office on recruitment. The claimant dealt with members in a wide variety of workplaces including shipyards, schools and care homes.

20. On the basis of the evidence before us, we are unable to make any precise assessment of the amount of time the claimant spent out of the office compared to in the office. However, it is clear that the claimant spent a substantial amount of time going out to workplaces for recruitment, representation or recognition matters and that quite a lot of the work that he did within the office was ancillary to field work e.g. preparing for attending disciplinary hearings with members. Telephone calls received by the claimant might turn out to be something which could be resolved on the telephone or might require the claimant to attend a meeting with the member or to accompany the member to a meeting in the member's workplace. We think it unlikely that there were many, if any, occasions of the nature described by Mr Tomkinson where, on receiving a call, the claimant immediately had to leave the office to visit a workplace. In our experience, employees are normally given notice of disciplinary or capability meetings and meetings may be rearranged if, as is often the case, a trade union representative is not available on the first date set.

21. The claimant accepted that, apart from his additional rule 37 duties, he did the same work as the two regional organisers in the Cumbria area, Dan Gow and Ian Mackenzie.

22. In accordance with his contract, the claimant was paid on a percentage of membership fees subject to a minimum of National Minimum Wage plus £1 x 32.5 per week.

23. Joan Anderson thought there had been a further agreement to pay the claimant a minimum of £8,250 per quarter. However, she could not point us to any document showing this and the claimant said he was unaware of any such agreement.

24. The claimant was the only full-time Branch Secretary in the region. He had previously worked in the Lancashire region before a reorganisation brought him within the Cumbria region. Under his contract he received less favourable terms in

some respects than regional organisers. For example, he was a member of a less favourable pension scheme and did not have a car provided.

25. From 2008, regional GMB policy required the claimant to spend two days per week on recruitment consolidation. The claimant raised a formal grievance against this requirement but his grievance was not upheld. He accepted that the grievance was dealt with properly. From that time on, the claimant carried out the requirement to spend two days per week on recruitment consolidation.

26. In 2013 Joan Anderson, Senior Organiser, became the claimant's line manager. Joan Anderson is the partner of Billy Coates, the Regional Secretary.

27. On 20 February 2016, the claimant suffered a serious spinal cord injury. This was followed by a stroke on 24 March 2016. The claimant's condition was very serious and he remained in hospital until he was discharged to continue rehabilitation at home on 1 July 2016.

28. In June 2016, an increase in hours was agreed for Clare Paterson from 10.00am to 2.00pm to 9.00am to 4.30pm. The claimant accepted in cross examination that Clare Paterson did not assume any significant amount of his duties during his absence. However, we find that she picked up calls from 2.00pm onwards which the claimant would have taken had he been in the office.

29. In late 2016, the Regional Secretary, Billy Coates, instructed every full-time GMB organiser to work on recruitment of new members five days per week unless given dispensation by a senior organiser to carry out other tasks. We were told that a verbal announcement to this effect was given at the annual GMB officers seminar. There appears to have been nothing in writing recording this instruction.

30. We accept that covering the claimant's duties during his absence caused the respondent some difficulties. In the period following the claimant's accident until around July 2016, the claimant's organiser duties were covered by the two regional organisers, Dan Gow and Ian Mackenzie, in addition to their own duties. Clare Paterson received calls in the Barrow office requiring help and support on various issues from Joan Anderson and the other two organisers within the team.

31. The claimant's branch had a number of workplaces with no GMB workplace representative. If any GMB members in the workplaces where the GMB was not recognised contacted the respondent needing representation, one of the GMB organisers, who already had their own full workload, had to represent those members. The claimant's branch mainly covered the South Lakes area of Cumbria. The organisers covering that area had additional commuting from their normal bases.

32. Ian Mackenzie resigned in around August 2016. This left only one full-time organiser in the Cumbria area, Dan Gow, who lived in Penrith and was based in the respondent's Whitehaven office, 45 miles drive from the Barrow office. When Ian Mackenzie left, Stuart Gihespy, an organiser and a relatively new GMB officer from the ROT team which was normally focussed on the recruitment of new members, was brought over to Cumbria to help Dan Gow cover the claimant's duties in his ongoing absence, and to pick up Ian Mackenzie's work. Stuart Gihespy lived in Newcastle so this entailed considerable travelling time and some overnight stays in

hotels. We accept that considerable demands were placed on Stuart Gihespy and Dan Gow in covering for the claimant in addition to dealing with their own workloads.

33. In around June 2017, Oli Slack, an organiser previously based in the ROT team in Newcastle, started working in the area, helping to cover organiser work previously carried out by the claimant.

34. On 13 September 2016, the claimant was invited to a sickness absence review meeting. This was the first in a series of sickness absence review meetings and took place on 29 September 2016. This and subsequent meetings were conducted by Joan Anderson with contributions from Bill Moran, a Regional Health and Safety and Human Resources Officer, who also took notes of the meetings. The notes are agreed not to be a verbatim record of the meetings and to have missed out many things that were said. However, Mr Moran made an attempt to capture the significant points. We heard evidence that various things were said which are not recorded in these notes. Where a matter is in dispute, we treat the evidence that something was said with caution if it is unsupported by the notes taken by Mr Moran or by any other document, given the fallibility of memory and the passage of time since the meetings. If a point was particularly significant, we consider it more likely than not that it would be reflected in some way in the notes taken by Mr Moran, even if a full record of what was said was not made.

35. At the first sickness absence review meeting on 29 September 2016, the claimant was expressing a wish to come back to work, suggesting he could do some work at home. There was no suggestion that the claimant was fit to return to work other than possibly doing some work at home at that stage.

36. At some point in the sickness review meetings, it is agreed that the claimant mentioned that he had fallen. The claimant says he mentioned only once that he had fallen twice at home within the first month of coming out of hospital. The claimant accepts that he told them he was nervous of falling. Mrs Anderson said that the claimant mentioned on many occasions that he had fallen. We consider that if the claimant had said something so significant as that he kept falling, this would be recorded at some point in the notes. We find, on the balance of probabilities, that the claimant only told the respondent once about falling.

37. At one of the meetings held in the office, it is agreed that the claimant tripped and steadied himself against the wall.

38. On 3 November 2016, the second sickness absence review meeting was held. The claimant reported positive progress. Mrs Anderson expressed a wish to have the claimant back at work. The claimant spoke about needing to plan things and needing a couple of hours to get up in the morning but said he could do some work.

39. The respondent organised an Occupational Health report. The respondent used its usual Occupational Health advisers. Although the respondent's capability policy refers to the GMB retaining the services of an occupational doctor, the person who provided the two reports in this case, Mr Humphrey, is a registered nurse rather than a doctor. Mr Humphrey holds various relevant qualifications and has considerable experience in the Occupational Health field. We accept that he was well qualified and experienced to provide Occupational Health advice.

40. An Occupational Health report dated 24 January 2017 was produced following an assessment at the claimant's home. In the section under “History and Condition Management” Mr Humphrey wrote:

> “Stephen is now able to walk again. However, activity, and especially mobilising, does create fatigue with Stephen currently able to walk distances without needing to take a rest break estimated at between 10 and 75 metres. It should also be noted that there is a risk of Stephen falling when mobilising due to the damage to his central nervous system. In essence, on occasions, the signal sent by his brain to parts of his body which enables movement such as walking, via his nervous system, do not get through due to the damage from the accident, with the result being Stephen potentially falling over.
>
> “Stephen has now regained full mental capacity and has the capability to focus and concentrate. However, the extreme tiredness and need to do things slowly does of course have an impact on him. Stephen also stated that his balance is impacted also, which can lead to him being further unsteady on his feet at times.
>
> “Therefore, there remains a significant risk of Stephen experiencing a degree of memory loss; fatigue; and loss of power when using his limbs.”

41. The report noted that the claimant had a current fit note declaring him unfit for work until the end of March 2017. Mr Humphrey wrote:

> “Beyond that, and certainly not before that time, Stephen may be in a position to seriously contemplate a return to work. However, no timescale can be put on this currently.
>
> Returning to work is wholly dependent on Stephen’s condition improving. If he retains his current level of generalised functioning without further improvement, he is highly unlikely to be able to return to work at all.
>
> Therefore, there are no guarantees around a return to work, nor is it feasible to predict any sort of realistic of likely timescale at this point.”

42. In the section “Will the employee be fit to return to their normal duties at work?” Mr Humphrey wrote:

> “Stephen and I agreed that he would inform the organisation if and when he feels able and confident to undertake a trial period at work.
>
> “This, should it occur, will not be before April 2017, and may be a considerable period beyond that. The trial period was mutually agreed to be for three months initially, and will take the format of Stephen not making up any specific role within the team, or being responsible for any degree of work or caseload.
>
> “He will trial the driving to and from work, remain in situ when he feels up to attending, and for as long as he is able to carry on. He will explore the potential for, and use of working from home on occasions when appropriate also.

> "Following this trial period, if it happens, I would advocate that Stephen is referred to an employee wellbeing service to assess how the trial went, its successes and failures, whether Stephen should continue in employment with GMB, and to develop a professional rehabilitation plan if the trial proves successful."

43. The report commented that what the claimant had achieved in well under a year since his accident was remarkable. However, the journey had not reached the point where any form of a return to work was feasible at the time of the assessment.

44. Mr Humphrey concluded that potentially the claimant may be able to conduct the trial advocated to see how he is able to cope with, commute and manage to make a valuable contribution to the organisation once more. He wrote:

> "However, this trial will need to take the form of being entirely experimental with no challenging targets or expectations during the three month period which should remain fluid and flexible in its nature."

He also wrote:

> "The trial period should only go ahead if there is a minimal risk with regards to Stephen being maintained within a safe environment, where further injury, for example, can be avoided with a fair degree of certainty."

45. In January 2017, the respondent agreed to an extension of the claimant's full sick pay for a further six months beyond the initial 12 months' absence.

46. A third sickness absence review meeting was held on 1 February 2017. This noted improvements but that fatigue was a huge factor. In response to a question as to whether he was capable of coming back to work, the claimant is recorded as saying, "Nearer time – conversation", which we understand to mean he was suggesting that they would have a conversation about this nearer the time.

47. There was a fourth sickness absence review meeting on 2 March 2017. The claimant reported that the hospital had been pleased with his progress at his 12 month review. The claimant spoke about fatigue and everything taking three times longer than usual. Joan Anderson spoke about the claimant being missed and there being a "hole to fill". There appears to have been a suggestion that, when the claimant was ready, he should try a day a week at work.

48. The fifth sickness absence review meeting took place on 5 April 2017. The claimant reported that his muscles were stronger. He reported being able to walk longer; 200-300 yards with rest. The claimant said he would have to wait to see if he could do the full job. Joan Anderson asked when a trial might take place and the claimant said he would bring a proposal to the next meeting.

49. The sixth absence review meeting took place on 10 May 2017. In preparation for this, Bill Moran and Joan Anderson prepared a workplace capability assessment. They recorded tasks, physical effort needed, mental effort needed, duration, present ability, level of risk to perform job with the certainty of risk to safety and progress since the first meeting in September 2016. In relation to present ability, they took information that had been provided by the claimant in previous meetings. They assessed the level of risk to perform representation of members and recruitment as

"high", and office based branch activities as "medium". Although the table they prepared did not explain why they had reached the assessment of risk which they did, from the evidence we have heard, this appears to relate to concern about the claimant falling and suffering serious injury. The risk of him doing so in locations other than the respondent's office was assessed as "high" because they did not know what type of environment he might face in getting to the workplace from wherever he could park the car and then what the circumstances would be within the third party's workplace.

50. At the sixth absence review meeting on 10 May 2017, Joan Anderson and Bill Moran handed the claimant a copy of the capability assessment to take away with him. The notes at the meeting record that there was a discussion about the assessment, although there is not a full record of this discussion. We find that, if the claimant had expressed disagreement with the assessment, this would have been recorded in the notes. There is no record of the claimant expressly disagreeing with the assessment at this meeting or at any time thereafter.

51. During the meeting, the claimant said that he was now confident to drive to Carlisle. He spoke of there still being a problem with fatigue and with walking. The claimant is recorded as saying that shipyards were not a problem. Shipyards were some of the work locations where members at the claimant's branch were based. Joan Anderson asked whether, looking to the future, the claimant would be able to fulfil his tasks properly. The claimant is recorded as saying:

> "No guarantees. Nerve damage might not repair. Progress is good – six months might determine."

52. Joan Anderson noted in the meeting that, in August, the claimant would move to no pay.

53. The claimant suggested that in two months' time, after a planned visit to a convalescent home in June, he should come in for a couple of hours on a couple of afternoons then possibly do a three month trial. Joan Anderson informed the claimant that he needed to fulfil his job description and that there was no administrative role for him. The claimant asked about reasonable adjustments. He referred to a duty of care.

54. The seventh sickness absence review meeting was held on 22 June 2017. The claimant spoke of a concern about falling over and not getting up. He said he was doing exercises with his crutch to help get up. He referred to needing sticks for security and having difficulty with stairs. He spoke about a problem carrying recruitment materials. There was some discussion about a possible trial period. The notes do not capture the discussion fully but the claimant is recorded as saying he did not know until he gave it a go. Joan Anderson is recorded as saying that it was still high risk and they could not send him into workplaces carrying things. She asked if he could come back and do the job. The claimant replied that he would have to give it a go; he could not do it all, not today; there could be an assessment and he could build up. There was a reference to Joan Anderson explaining the branch role. She raised the possibility of termination. The claimant was given a further copy of the capability assessment. Although Joan Anderson made reference in the meeting, as evidenced in the note, to high risk, the claimant did not expressly disagree with this assessment of risk.

55. The respondent referred the claimant for a further Occupational Health report. The referral form was signed by the claimant to indicate his consent to the assessment being obtained. The claimant would, therefore, have seen what the respondent wrote under the heading about any specific areas of concern. This included:

> "GMB feel that working in the office or at home will not assess Stephen's ability to perform his main functions, which are mainly centred on visiting workplaces. At the moment it is felt that the risk to Stephen's safety is too high to maintain a safe working environment and ensure risk of further injury in visiting workplaces. We are now at a juncture where a definitive return to work date is required."

56. Mr Humphrey carried out an assessment of the claimant in the respondent's Barrow office before producing the second Occupational Health report dated 5 July 2017. Mr Humphrey recorded an improvement in mobility, generalised movement, focus and concentration. He wrote:

> "However, Stephen is unable to predict with any certainty or accuracy whether he has reached a point where working on a full-time basis in his current job role is a realistic option in the longer term. This is the sole reason why a trial period is necessary to ascertain his capability. The trial period, even if it is shortened from my original recommendation of three months at my last assessment, should commence at the earliest mutually agreed point."

57. Mr Humphrey reported a huge improvement in the claimant's ability to get around in the car compared to the previous assessment, the claimant having driven to Scarborough, approximately 165 miles distance, and managed a round trip to Blackpool in one day. Under "Likely date of return to work" Mr Humphrey wrote:

> "Stephen's current fit note declaring him unfit for work is due to expire during August 2017. These are likely to continue until such time as Stephen declares his intent, following a trial period, to return to work with a rehabilitation plan.
>
> At the assessment, Stephen was unable to fix a target return to work date, due to currently having no clear idea of his capability to do so."

58. Under the heading, "Will the employee be fit to return to their normal duties at work?" Mr Humphrey wrote:

> "The trial period will determine the outcome and objectives of this. Currently it is reasonable to expect Stephen to have better days, and not so good days."

59. Mr Humphrey wrote that the trial period would determine whether the claimant was capable of working full-time and satisfactorily undertaking the tasks as laid out within his job description. Mr Humphrey referred to adaptations which the claimant had made himself to his vehicle and laptop but recommended the respondent consider determining reasonable adjustments such as flexible starting and finishing times, a review of the workload and the specific expectations of what the organisation was looking for from the claimant. He wrote that this may involve the need to mutually agree changes to the claimant's job description. He wrote that sickness absence would continue until the trial period had determined whether the

claimant could exhibit fitness for work that would complement a full-time commitment going forward.

60. Mr Humphrey referred to the claimant having endured a fair degree of stress since his accident which was natural given the extent of his injuries. He recommended that the claimant was supported to avoid particularly stressful scenarios for a minimum of the next three months which would assist him in maximising his outcome from the trial period.

61. Mr Humphrey wrote:

> "I would advocate that an exercise is supported to assess the risks to Stephen, colleagues, the general public, clients, and the organisation before the trial period commences. Any identified and/or potential hazards, and their associated risks should be assessed, with control measures determined to minimise the risks to all involved.
>
> "From a health and safety perspective, the level of risk determined from this exercise will conclude in informing the organisation whether or not it is able to support Stephen in commencing the trial period."

62. In his conclusions Mr Humphrey wrote:

> "At the assessment, I clearly appreciated the improvement and progress that Stephen exhibited in his mobility, general movement and ability to focus and concentrate when compared to my last assessment during January 2017.
>
> "However, caution has to be exercised due to the environment that I assessed Stephen within. A typical day's work is likely to involve him driving to and from multiple locations during the day, plus having to mobilise within clients' premises that are likely to differ in respect of disabled facilities and equipment in situ.
>
> "It is for this reason that my proposals highlighted above have been made for the consideration of the organisation that will determine Stephen's capability to achieve the challenges of the role that both he and the organisation seek to meet."

63. By a letter dated 18 July 2017 the claimant was invited to a formal sickness/absence case review meeting. Joan Anderson wrote in the letter:

> "I must inform you that the possibility of termination of your employment due to ill health may be considered as an outcome of our discussions at this meeting."

64. The claimant accepted in evidence that he understood that an outcome of the meeting in August could be the termination of his employment.

65. On 3 August 2017, the eighth and final sickness absence review meeting took place. Joan Anderson and Bill Moran went through the capability assessment again with the claimant to see if there was any improvement. We find that the claimant did not express disagreement in this meeting with the assessment of risk. Had he done so, we think something as important as this would have been recorded in the notes.

66. The claimant said he was still only walking 70-100 metres before he got tired. The claimant said he used one or two sticks depending on how far he had to walk. He kept both sticks in the car. He said he was learning all the time to cope with situations about minimising risk. Joan Anderson asked whether, if he fell, he could he get up ok. The claimant said that, after a massage at home, he had managed to get up a couple of times on his own. The claimant said he had difficulty with stairs. We find from the notes this was not limited only to difficulty with stairs when carrying things. The claimant said that carrying weight was a problem. He could carry a little haversack. The notes indicate there was a discussion about the levels of risk in the workplace assessment and that Joan Anderson asked the claimant whether there was any addition or amendment to consider with regard to the risk assessment. The claimant is recorded as saying "no".

67. The claimant suggested he could come into the office and "do bits and pieces office based two days a week for a month or so". This part of the notes is unclear as to whether he was saying he could do this now for a month or so, or in a month or so's time. However, further on, the notes record that he was asked how many days he thought he could do now, and the claimant said, "difficult to say, couple of days". Joan Anderson's notes written as a response to the claimant's appeal record the claimant's proposal at that meeting to be to work in the Barrow office for a couple of days a week for a few hours doing bits and pieces without saying that this was not to start for a month or so. However, the dismissal letter records that the claimant proposed to commence work "in a month or so". We find, on a balance of probabilities, relying on the two entries in the notes of the meeting, that the claimant was saying he could do a couple of days a week from that point on rather than saying that, in a month or so, he could start to do a couple of days a week.

68. Joan Anderson asked the claimant about workplaces, by which we understand her to mean attending members' workplaces. The claimant said that he would be able to do some meetings out of the office. When asked about recruitment and representation, he is recorded as saying, "would depend on how I feel, either could or couldn't do job". The claimant said he would need flexibility to manage his own diary and referred to how he felt on the day.

69. Joan Anderson and Bill Moran adjourned the meeting for 15 minutes before reconvening and informing the claimant that his employment was being terminated.

70. Joan Anderson referred to the tasks in the office being "medium" risk but recruitment and representation being "high" risk and that a lot could go wrong. She is recorded as saying this was not an office job and 80% of the job was in the field. In relation to a possible trial period, she said that working in the office was not a true assessment. There was nothing to say that he could come back to work in the near future. The notes record:

> "Phased return not an option, to work in office cannot gauge if he can do job. Major health concern about doing job out and about."

71. Joan Anderson referred to Clare Paterson doing the office work. She said they could not wait any longer to bring the claimant back. She concluded, as recorded in the notes:

> "Regrettable but risks are far too high for him to come back to work. Can't guarantee a safe environment."

72. The claimant is recorded as disagreeing that 80% of his work was in the field. Mr Moran advised the claimant of his right of appeal.

73. The claimant was dismissed with effect from 3 August 2017, being given 12 weeks' pay in lieu of notice. Joan Anderson confirmed the claimant's dismissal by a letter dated 7 August 2017. She wrote in the letter that the claimant had accepted the risk evaluation in relation to performing his duties in the workplace capability assessment form. The claimant later disagreed with this in his appeal. Joan Anderson wrote:

> "Your only proposal was to commence work in a month or so and to do work in the office for two days per day with a degree of flexibility. I rejected this offer as not a reflection of your role which is predominantly visiting workplaces and as a trial would not assess your capability to perform your job role.
>
> "I informed you of the operational problems and pressure we are under covering your job due to your lengthy absence which is now 17 months, that there is no alternative employment working in the office and the administration tasks are performed by the secretary and the phased return to work offered by you is not an option."

74. She wrote that the claimant had said nothing at the meeting which indicated that he was in a position to return to work in the near future.

75. The claimant appealed against his dismissal by a letter dated 11 August 2017. Grounds of appeal included:

- That the respondent had not tried to put in place any reasonable adjustments;
- The respondent had not agreed to a trial period as recommended in the occupational reports;
- That the risk evaluation was not accepted as stated in the dismissal letter and was never agreed.

76. The claimant asserted that his job title was full-time Branch Secretary and his key duties were set out in the rule book. The claimant wrote:

> "The GMB could allow me to return to work and manage my own diary as stated in the occupational report of 5 July 2017. Rather than insisting on five days a week recruiting, this in my opinion would be seen as reasonable adjustments and enable me to perform my duties in the same manner as I have since April 2000."

77. The claimant referred to the admin clerk having increased her hours from 10.00am-2.00pm to full-time 9.00am until 4.30pm since his accident. The claimant wrote:

> "I believe I could continue to work as the full-time Branch Secretary with a degree of flexibility and give the Barrow 5 members the help and support they have received for the past 17 years."

78. The appeal was heard by Stephen Thompkins. Stephen Thompkins is on the same level as Joan Anderson. He reports to Bill Coates. As previously noted, Joan Anderson is Bill Coates' partner. Joan Anderson produced written notes in response to the claimant's appeal points which she read out at the appeal hearing. The claimant had an opportunity to question her and Mr Moran. In accordance with the claimant's wishes, Joan Anderson and Bill Moran then left the appeal hearing which continued with the claimant, Mr Thompkins, an HR person and the claimant's representative from Unite. In the course of the meeting, the claimant asserted that Joan Anderson had made an assumption about the risk of the claimant going out to workplaces and saying he was not capable of carrying out the risk assessment because he was disabled. He questioned why he could not carry out a risk assessment when an able bodied person could. Mr Thompkins asked the claimant about the reference to stress on the medical reports. The claimant said he could alleviate stress with reasonable adjustments.

79. By a letter dated 25 August 2017, Mr Thompkins rejected the appeal and upheld the dismissal. His letter included the following:

> "At no point did you provide any suggestions other than working in the office on a trial period for up to two days per week. As you know this adjustment was not considered as your job is fundamentally field based and therefore this trial would not give us an accurate reflection of your capability and the risks associated to your role."

80. Mr Thompkins did not write that he understood that the claimant was not suggesting that the trial period could start immediately but only in a month or two.

81. Mr Thompkins referred to the two Occupational Health reports, writing that they stated:

> "The trial was only recommended if we could ensure there was minimum risk to your health and that we could guarantee you would not suffer any further injury."

82. This appears to be a gloss on the Occupational Health reports which was not expressed in terms that they had to guarantee the claimant would not suffer any further injury.

83. Mr Thompkins continued:

> "The report also states that the period should be entirely experimental with no challenging targets or expectations and should remain fluid and flexible in nature. As said above, this would not be a reasonable adjustment as it would not assist in integrating you back into your normal job role and at this point you did not indicate you were ready to return to work as you were still on long-term sick."

84. Mr Thompkins concluded that the claimant had never challenged the content of, or disagreed with, the risk evaluation. He recorded the claimant having said in the

appeal that he had never agreed but noted the contents of the evaluation. Mr Thompkins wrote:

> "I consider that as you are an experienced trade unionist if you were unhappy with the assessment you would have raised this in the reviews. I therefore find that you did accept the assessment."

85. Mr Thompkins referred to the trial period having been refused based on the workplace capability assessment deeming the risk to the claimant's health to be too high.

86. Mr Thompkins referred to the claimant's responsibilities as a Branch Secretary being:

> "…To carry out recruitment, organising the branch, representing members, deal with branch complaints and furthermore complete any requests or requirements made by the Regional Secretary. Only a small proportion of this role requires administration work. You stated within the appeal that you considered allowing you to carry out just this role would be a reasonable adjustment, however I consider that this role mirrors that of a full-time official."

87. Mr Thompkins wrote:

> "The concerns based on the workplace capability assessment were that allowing you to return to work even for a trial would pose a serious risk to your health."

88. In relation to Clare Paterson increasing her hours, Mr Thompkins wrote:

> "At the hearing Joan informed you that her hours were increased for personal reasons and were not related to your absence. I cannot provide any further comment on this matter."

89. Mr Thompkins concluded:

> "In summary and having reviewed all of the evidence presented I consider that since your accident in early 2016 GMB has throughout this period supported your absence by carrying out regular case reviews and also extending sick pay. I appreciate that you feel you would be able to complete some aspects of your role, however the medical evidence and the capability assessments lead me to believe that you would not be in a position to return to work in any capacity in the near future. Therefore my decision is to uphold the dismissal."

90. From the evidence of Mr Thompkins to this Tribunal, it appears that a factor in his decision was his own assessment that the claimant would not be able to cope with the stress of the role. However, the assessment of risk which led to the original decision to dismiss was not based on an assessment of risk due to stress but only on physical risk to the claimant.

91. On 11 September 2017, the claimant started the ACAS early conciliation process. The ACAS early conciliation certificate was provided on 11 October 2017. The claimant presented his claim to the Employment Tribunal on 24 November 2017.

92. Following the claimant's dismissal, a new branch secretary was elected, who is not a full-time GMB representative. He carries out the branch secretary role in addition to his full-time job for another employer, with facility time of one day per quarter for his branch secretary rule book duties. He also does some representation work for members in his own workplace and elsewhere. Oli Slack, Dan Gow and Stuart Gihespy continued to cover Organiser work in the Cumbria Area. New employees were taken on in the ROT team to backfill for Stuart Gihespie and Oli Slack who were moved from that team to the Cumbria team.

Submissions

93. Both representatives produced detailed written submissions which the tribunal read before the representatives made additional oral submissions. We do not seek to reproduce these submissions or provide a summary of all the points made. We summarise the principal points.

Submissions for the respondent

94. Mr Dyal, for the respondent, submitted that the dismissal was fair. He submitted that the respondent had shown that the dismissal was for the potentially fair reason of capability. He referred to *BS v Dundee City Council [2014] IRLR 131,* for three questions which needed to be answered in an ill-health capability dealing with long term absence:

(1) Can the employer be expected to wait longer;

(2) There is a need to consult the employee and take his views into account. If the employee does not know when he can return that is a significant factor operating against him.

(3) There is a need to take steps to discover the medical position.

95. Mr Dyal referred to *Daubney v East Lindsey District Council [1977] IRLR 181,* quoted at paragraph 25 of *BS:*

> *"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 employer's 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."*

96. Mr Dyal submitted that the respondent believed the claimant was and remained unfit to return to work and fulfil the requirements of his role. His absence created a great strain on the business and the interim arrangements were unsustainable. He submitted that the ulterior motives alleged were all implausible.

97. Mr Dyal submitted that the respondent could not be expected to wait longer. The claimant was unfit to cover his duties. At best, he could have begun a "toe in the water" trial in which he was not fulfilling any particular role but simply doing "bits and bobs" that he felt he could manage. There was no prospect of the claimant fulfilling his core duties in the foreseeable future. There was an insurmountable difficulty in having a trial: the only sort of trial that was useful to the respondent required the claimant to do field work and the risk of him doing that was, properly and reasonably, assessed as high. It did not fall within the parameters set in OH advice and was not at a level that the respondent could accept.

98. Mr Dyal submitted that there was rigorous consultation with the claimant across eight capability meetings and an appeal hearing. The medical position was well known. The claimant passed on medical advice. There was occupational health advice; although Mr Humphrey was a nurse rather than a doctor, he had ample experience of occupational health and was well placed to advise. The claimant was signed off work sick by his GP.

99. The claimant had every opportunity to understand and make representations about the Work Capability Assessment. It would be overly literal to construe the respondent's policy as meaning that it was an absolute requirement of the policy for the advisor to be a medical doctor. If there was a breach of the policy, it was a technical one; there was no suggestion that the advice was wrong.

100. In relation to direct discrimination, Mr Dyal submitted that there was nothing whatsoever to suggest that the claimant was dismissed because of his disability as distinct from his inability or perceived inability to fulfil his job description in light of matters arising in consequence of his disability. He submitted that stereotypical assumptions were not made. Rather, reasoned conclusions were drawn from a thoughtful and careful analysis of a wide range of evidence. There was nothing to suggest that a hypothetical comparator who circumstances with the same or not materially different would have been treated more favourably. Mr Dyal submitted that, looking at the reason why the claimant was dismissed, resolves this complaint.

101. Mr Dyal submitted, in relation to discrimination arising from disability, that dismissal was a proportionate means of achieving the four aims relied upon, the existence of which nor the legitimacy of which were in dispute. Mr Dyal referred to the test of proportionality, summarised by HHJ Eady QC in *Birmingham City Council v Lawrence EAT June 2017: "Justification of such treatment requires there to be an objective balance between the discriminatory effect and the reasonable needs of the employer."*

102. In relation to the complaint of failure to make reasonable adjustments, it was accepted that the requirement to attend work put the claimant at a substantial disadvantage. Mr Dyal referred to *Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664,* for the proposition that failures of consultation or assessment, whether with the employee or with medical advisers such as occupational health, are not in themselves a breach of the duty to make reasonable adjustments. He submitted that

a trial period is a procedural step that might be taken to determine what reasonable adjustments ought to be made but they are distinct from reasonable adjustments themselves i.e. the substantive steps that might be taken to remove a substantial disadvantage. He quoted from *Salford NHS Primary Care Trust v Smith unreported EAT 2011:*

> *"49. Adjustments that do not have the effect of alleviating the disabled person substantial disadvantage as we have set it out above are not reasonable adjustments within the meaning of the act. Matters such as consultations and trials, exploratory investigations and the like do not qualify."*

103. Mr Dyal submitted that the employer cannot be said to have breached the duty to make reasonable adjustments by failing to bring about some particular state of affairs on a third party's premises.

104. Mr Dyal submitted that, in the light of the *Salford* case, having a trial period is not capable in law of amounting to a reasonable adjustment. Even if it was capable in principle of amounting to a reasonable adjustment, it did not in fact. The primary reason is that, following a suitable and sufficient risk assessment, it was determined that the risk of holding a meaningful trial, one involving fieldwork, was too high. That risk assessment had to be benchmarked against the occupational health advice. The risk was not minimal and the environment could not be controlled to maintain its safety. There was an unacceptable risk of falling and thus further injury.

105. In relation to the PCP that the claimant must spend 5 days per week on recruitment activities, Mr Dyal submitted that this PCP was never applied to the claimant. Mr Dyal submitted that this complaint was out of time, since the claimant's case was that adjustments ought to have been made in January 2017 or in May to June 2017. He submitted that it was not just and equitable to extend time; no explanation had been given for the late presentation of the claim.

Submissions for the claimant

106. Mrs Ferrario, for the claimant, submitted that the respondent had not proved that the sole or main reason for the claimant's dismissal was the respondent's belief that he was medically incapable of maintaining satisfactory attendance and fulfilling the requirements of his role. She submitted that, if the respondent had shown the dismissal was for capability, the dismissal was not reasonable in all the circumstances. Matters relied upon included a submission that the respondent's assessment of the high and medium risks associated with a trial period were not supported by medical evidence. She noted that, at no time, did the respondent consult with the claimant's GP. Mrs Ferrario submitted that the respondent could not possibly have reached a fair decision as regards the claimant's ability to carry out his role without first being afforded the opportunity of a trial period.

107. Mrs Ferrario submitted that the respondent failed to follow a fair procedure in carrying out the dismissal. This argument was based on the appeals procedure: it was unfair for Stephen Thompkins to act as appeals officer when he was asked to consider a decision made by his boss's partner; Stephen Thompkins inappropriately adopted his own personal experience of a regional organiser's duties and imposed them on the claimant; Stephen Thompkins did not explore the medical evidence with Joan Anderson but treated the appeal as a "rubber stamping exercise"; Stephen

Thompkins replaced the reason for the claimant's dismissal with his own reason on account of the stress that would be caused to the claimant if he returned to work and, by doing so, acted outside of the jurisdiction of an appeals officer.

108. In relation to direct discrimination, Mrs Ferrario submitted that the respondent did not base their conclusions on cogent evidence but on assumptions: that he was liable to fall, whereas the OH report said there was a risk of him falling; that the claimant fell at home quite often; that the risk of any workplace to which the claimant might be required to attend would be high. Mrs Ferrario submitted that the hypothetical comparator is a non-disabled person and that a non-disabled person in the claimant's situation would have been treated more favourably in that they would have been afforded a trial period.

109. In relation to discrimination arising from disability, Mrs Ferrario submitted that the respondent had not produced any evidence to support their claim that the dismissal of the claimant was a proportionate means of achieving a legitimate aim. Submissions made in support of this argument included that the health, safety and welfare of the claimant had been assessed on incorrect assumption and in the absence of any medical evidence from an occupational doctor as required by the respondent's capability policy. At the time of dismissal, neither the claimant nor the respondent knew whether the claimant was capable of carrying out his primary role. Mrs Ferrario invited the tribunal to find that the respondent was not in a position to determine this as the stage of dismissal.

110. In relation to the complaint of failure to make reasonable adjustments, Mrs Ferrario questioned why, when the respondent placed the office and field based work at medium and high risk, why did the respondent not consider reasonable adjustments to reduce the risk. The submissions suggest that reasonable adjustments should have been made either to enable a phased return or for a trial period. To the extent that Mrs Ferrario was suggesting that reasonable adjustments, other than a trial period/phased return to work, should have been made, she did not identify what such adjustments should have been. Mrs Ferrario submitted that the respondent was acting contrary to the Equality Act 2010 in placing the onus upon the claimant to propose a phased return or trial period date. She referred to *Archibald v Fife Council 920040 IRLR 651, HL,* arguing that its relevance was that the employer in *Archibald* did not comply with the duty to make reasonable adjustments even where retraining had been provided and redeployment had been attempted, so how could the respondent in the claimant's case have satisfied the duty if it did not consider reducing the risk that it had assessed for the claimant by introducing some reasonable adjustments and allowing a phased return or trial period?

111. In relation to the second PCP (the 5 day recruitment), Mrs Ferrario submitted that this existed; the risk assessment that the respondent carried out for a phased return or trial period was based upon 5 days per week of recruitment. This put the claimant at a disadvantage. The respondent failed to make reasonable adjustments. Mrs Ferrario invited the tribunal to find that it has jurisdiction, although the claim relates to matters that pre date 3 months prior to the issuing of the claim. No prejudice was caused to the respondent in taking this complaint into consideration.

The Law

112. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 94(1) of this Act provides that an employee has the right not to be unfairly dismissed by his employer. The fairness or unfairness of the dismissal is determined by application of Section 98 of the 1996 Act. Section 98(1) of this Act provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Capability is one of these potentially fair reasons for dismissal.

113. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, depends on whether, in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and this is to be determined in accordance with equity and the substantial merits of the case. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed and the penalty of dismissal were within the band of reasonable responses. The burden of proof is neutral in deciding on reasonableness.

114. Section 13(1) of the Equality Act 2010 (EqA) provides: "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others". Section 4 lists protected characteristics which include disability.

115. Section 23(1) EqA provides that "on a comparison of cases for the purposes of section 13….there must be no material difference between the circumstances relating to each case."

116. Section 15 EqA provides:

> "(1) A person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

117. Section 20 EqA and Schedule 8 contain the relevant provisions relating to the duty to make adjustments. Schedule 8 imposes the duty on employers in relation to employees. Section 20(3) imposes a duty comprising "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."

118. Section 136 provides:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

119. The tribunal makes findings of fact, having regard to the normal standard of proof in civil proceedings, which is on a balance of probabilities. A party must prove the facts on which they rely. A claimant must prove he suffered the treatment alleged, not merely assert it.

120. Once the relevant facts are established, the tribunal must apply section 136 in deciding whether there is unlawful discrimination.

121. The Court of Appeal in *Ayodele v CityLink Ltd and another [2017] EWCA Civ 1913,* has reaffirmed that there is an initial burden of proof on the claimant; the claimant must show that there is a prima facie case of discrimination which needs to be answered. The Court of Appeal concluded that previous decisions of the Court of Appeal, such as *Igen Ltd v Wong [2005] IRLR 258,* remained good law and should continue to be followed by courts and tribunals. The interpretation placed on section 136 EqA by the EAT in *Efobi v Royal Mail Group Limited (UKEAT/0203/16)* was wrong and should not be followed.

122. The effect of the authorities is that the tribunal must consider, at the first stage, all the evidence, from whatever source it has come, in deciding whether the claimant has shown that there is a prima facie case of discrimination which needs to be answered.

123. A finding of bad treatment, will not be enough to satisfy the tribunal that a claimant has suffered less favourable treatment: *Essex County Council v Jarrett EAT 0045/15.*

124. A finding of less favourable treatment, without more, is not a sufficient basis for drawing an inference of discrimination at the first stage: *Madarassy v Nomura International plc [2007] ICR 867, CA.* In *Dedman v Commission for Equality and Human Rights and others [2010] EWCA Civ 1279 CA,* Lord Justice Sedley said that "the 'more' which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred."

125. The fact that a claimant has been subjected to unreasonable treatment is not, of itself, sufficient as a basis for an inference of discrimination so as to cause the burden of proof to shift: *Glasgow City Council v Zafar [1998] ICR 120 HL.* In that case, the House of Lords held that a tribunal had not been entitled to infer less favourable treatment on the ground of race from the fact that the employer had acted unreasonably in dismissing the employee.

126. If the claimant establishes facts from which the tribunal could conclude there was unlawful discrimination, the burden passes to the respondent to provide an explanation for its actions. The tribunal must find that there was unlawful

discrimination unless the respondent provides an adequate, in the sense of non-discriminatory, explanation for the difference in treatment.

127. Less favourable treatment will be because of the protected characteristic if the characteristic is an "effective cause" of the treatment; it does not need to be the only or even the main cause. The motivation may be conscious or unconscious: *Nagarajan v London Regional Transport [1999] IRLR 572 HL.*

128. In some cases, particularly those involving a hypothetical comparator, it may be appropriate for the tribunal to proceed straight to the second stage, considering the reason why the respondent acted as it did. In *Laing v Manchester City Council [2006] ICR 1519 EAT,* Mr Justice Elias commented: "it might be sensible for a tribunal to go straight to the second stage…where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator – whether there is a prima facie case – is in practice often inextricably linked to the issue of what is the explanation for the treatment."

129. Section 123 EqA provides that proceedings may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. Section 123(3) provides that conduct extending over a period is to be treated as done at the end of the period.

130. Time limits are extended to take account of time spent in the early conciliation process with ACAS, if notification to ACAS is made within the normal time limit.

Conclusions

Direct disability discrimination

131. There is no actual comparator in this case. Identification of the features of an appropriate hypothetical comparator would require identification of the relevant material circumstances. This is difficult to do without deciding on the reason why the claimant was dismissed. It appears to us, therefore, that this is an appropriate case in which to move straight to the issue of the reason for dismissal, whether or not the claimant has proved facts from which we could conclude that there was unlawful discrimination. We conclude that the respondent dismissed the claimant because Ms Anderson believed the claimant was not medically fit to do his job and she did not consider they could wait any longer to see if the claimant would recover sufficiently to do the job. It was not because he was disabled, although the reason he was not able to return to his job at the time was linked to his disability. We do not consider this is a situation correctly characterised as direct disability discrimination. We conclude that the complaint of direct disability discrimination is not well founded.

132. The complaint is better characterised as one of discrimination arising from disability to which we now turn.

Discrimination arising from disability

133. It was not in dispute that the respondent treated the claimant unfavourably by dismissing him and that a material reason for the dismissal arose in consequence of the claimant's disability. Knowledge of disability was not in issue. The only issue for

the tribunal to determine was whether the dismissal was a proportionate means of achieving a legitimate aim.

134. The four aims relied upon were:

(1) Complying with its duty to protect the health, safety and welfare of the claimant and its other employees.

(2) The provision of consistent, efficient, timely and cost effective services to its members.

(3) The maintenance of an effective membership recruitment programme.

(4) Ensuring that it employed individuals capable of carrying out their primary job functions.

135. The claimant accepted that these were all legitimate aims. The remaining question for the tribunal was whether dismissing the claimant was a proportionate means of achieving a legitimate aim.

136. In relation to the first aim, there has been no evidence that the claimant, by undertaking a trial period or returning to work in a full capacity, would be a risk to any other employees.

137. Covering the claimant's absence had proved a stretch for other employees but, by the time the claimant was dismissed, the situation had been alleviated by Oli Slack moving to assist in Cumbria from around June 2017. Although the moves of Stuart Gihespie and Oli Slack were not made permanent, and their positions in the Newcastle team backfilled, until after the claimant's dismissal, by the time of the claimant's dismissal in August 2017, the team in Cumbria was as it continued after his dismissal, with the exception of the appointment of a new elected branch secretary, who was not an employee of the respondent. The strain on other employees was not, therefore, as acute as earlier in 2017.

138. The respondent's main concern, leading to the decision to dismiss the claimant, was the risk to the claimant's own health, safety and welfare of allowing him to return even in a trial capacity. The other three legitimate aims relied upon were important aims but were not matters which, leaving aside the perceived risk to the claimant, would have caused the respondent to dismiss the claimant without having first given the claimant an opportunity to undertake a trial period.

139. The respondent conducted their own risk assessment of potential risk to the claimant of working in the office and in other environments. Ms Anderson and Mr Moran assessed the risk as medium for the office and high for other environments. Although they had sought Occupational Health advice, the advice from the occupational health nurse did not provide any medical assessment of risk to the claimant of working in the respondent's office or any other environment. The occupational health report does not make any assessment of risk, even though the last assessment was conducted with the claimant in the respondent's office. The respondent could have gone back to the Occupational Health advisor and the Occupational Health advisor could have sought medical evidence from the claimant's GP and/or specialists which would have allowed a proper assessment to be done of the likelihood of, for example, the claimant falling in different environments and the

likely consequences if the claimant did fall. This would have allowed a proper assessment of risk to be carried out. We do not doubt the sincerity of the concerns held by Ms Anderson and Mr Moran but consider that they made assumptions about what the claimant would have difficulty with and consequent risks, without having proper medical information on which to base that assessment. We heard evidence that the claimant represented members and carried out recognition work in a variety of workplaces; as well as industrial settings, such as shipyards, these included schools and care homes. It was a sweeping generalisation to assess the risks to the claimant of working anywhere outside the office as high.

140. The discriminatory effect of dismissal on the claimant was substantial; he lost the opportunity to undergo a trial period which could have led to him returning to his job, albeit with some possible adjustments. The respondent's needs, as expressed in the legitimate aims, were real. However, we do not consider that allowing the claimant a trial period, during which he could try initially some work in the office and then some work elsewhere, would have had such a serious adverse effect on the respondent as refusing it had on the claimant. If the trial had been attempted and was not successful, then the respondent would have been justified in dismissing the claimant at that point. Conducting the necessary balancing exercise between the discriminatory effect of the dismissal on the claimant and the reasonable needs of the employer, we conclude that the respondent has not shown that dismissing the claimant at the point it did, without allowing a trial period, was a proportionate means of achieving a legitimate aim.

141. We conclude that the complaint of discrimination arising from disability is well founded.

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

142. The first PCP relied upon is the requirement to attend work. It was common ground that this requirement existed and that it put the claimant to a substantial disadvantage because he had to take prolonged sick leave. Knowledge of disability and disadvantage were not in issue. The claimant said he should have been given a phased return to work and/or a trial period in his role. As noted in the section on claims and issues, there was a suggestion in closing submissions that some other adjustments should have been made but these were not clearly identified and the tribunal did not think it fair that the respondent should be expected to deal with a different case at such a late stage in proceedings. We deal, therefore, with the case as explained at the preliminary hearing.

143. We do not consider, from the evidence and submissions, that the claimant was suggesting that he could do his full role immediately, if he was given reduced hours, increasing over time, which is the usual meaning of a phased return. We consider that, in effect, the claimant meant the same thing by a phased return as by a trial period: an opportunity to see, on a gradual basis, what duties he was able to perform, first in the office and then trying some visits to other workplaces. It was, as anticipated in the occupational health report, a form of experiment; the claimant not being able to tell what he would be able to do without trying it.

144. Without authority to the contrary, the tribunal would have been inclined to consider that giving a trial period would be a reasonable adjustment; it would be something which had the possibility of leading to a successful return to work. Indeed,

this would appear analogous to the situation in *Smith v Churchill Stairlifts*, in which Employment Judge Slater, with different colleagues, found that trialling a different way of selling a radiator was a reasonable adjustment pursuant to section 6 of the Disability Discrimination Act 1995. Although the Court of Appeal, [2006] ICR 524, held that it had been open to the tribunal to find that this was a reasonable adjustment, the issue on appeal, as Mr Dyal noted in his submissions, was whether that finding could stand in light of the tribunal's finding that there was no disability related discrimination because the refusal to permit the proposed trial was justified. The question of whether or not a trial could amount to a reasonable adjustment at all was not before the court.

145. The *Smith v Churchill Stairlifts* case pre-dates *Tarbuck v Sainsbury's Supermarkets Ltd {2006] IRLR 664* and *Salford NHS Primary Care Trust v Smith unreported EAT 2011,* although neither of the EAT decisions refer to the *Smith v Churchill Stairlifts* case*.* We consider the judgment in the *Salford* case to cover unequivocally the proposed reasonable adjustment in this case, where HHJ Serota QC says

> *"49. Adjustments that do not have the effect of alleviating the disabled person substantial disadvantage as we have set it out above are not reasonable adjustments within the meaning of the act. Matters such as consultations and trials, exploratory investigations and the like do not qualify.*

146. In the light of the authority of the EAT, we consider ourselves bound to conclude that a trial period is not capable of constituting a reasonable adjustment. Unless and until this situation is considered by a higher court, we conclude, with reluctance, that this is the current state of the law.

147. We conclude, therefore, that, in relation to the first PCP, the respondent did not fail in its duty to make reasonable adjustments.

148. The second PCP relied upon is a requirement that the claimant must spend 5 days per week on recruitment activities. We conclude that this PCP was not applied to the claimant. It is possible that the respondent may have tried to apply it to the claimant, as it did with the requirement to spend 2 days per week on recruitment activities in the past, but that time had not come. For this reason, we conclude that this complaint of failure to make reasonable adjustments would fail on its merits. There is also a time limit issue in relation to this PCP. We are unsure why the claimant put the case on the basis that this requirement was applied in January 2017 or alternatively in "May to June" 2017, but this is how he puts the case. Since the claim was presented in November 2017 and the early conciliation period adds a month (assuming the application of the PCP applied at least until 11 June 2017), the complaint is out of time and the tribunal does not have jurisdiction to consider the complaint unless it considered it just and equitable in all the circumstances to consider it out of time. Since we would dismiss this claim on the merits, we do not consider it necessary to decide the just and equitable point.

149. We conclude that, in relation to the second PCP, the complaint of failure to make reasonable adjustments is not well founded.

Unfair dismissal

150. We conclude that the respondent has shown that the reason for dismissal was because the respondent believed that the claimant was medically incapable of maintaining satisfactory attendance and fulfilling the requirements of his role. We do not consider that the evidence supports the contention of the claimant that there was another motive: the respondent's desire to change the claimant's role to a recruiting-based role and the respondent's wish no longer to have a full-time branch secretary.

151. We turn, therefore, to the issue of whether the respondent acted reasonably or unreasonably in all the circumstances in dismissing the claimant when it did.

152. The claimant was dismissed at the point when he was ready to attempt a trial period. The respondent dismissed him because they considered that a meaningful trial period would have to involve going out in the field as well as working in the office and the respondent considered the risks of such a trial to be too high.

153. Although the claimant was anticipating starting off with some work in the office, he did say in the final review meeting that he would be able to do some meetings out of the office.

154. As noted above, we do not doubt the sincerity of the concerns held by Ms Anderson and Mr Moran but consider that they made assumptions about what the claimant would have difficulty with and consequent risks, without having proper medical information on which to base that assessment. We heard evidence that the claimant represented members and carried out recognition work in a variety of workplaces; as well as industrial settings, such as shipyards, these included schools and care homes. It was a sweeping generalisation to assess the risks to the claimant of working anywhere outside the office as high.

155. We refer back to what we have said about medical evidence when dealing with discrimination arising from disability. We do not take issue with the respondent seeking advice from an occupational health adviser who was a nurse rather than a doctor. It is unfortunate that the respondent's policy refers to doctors when, in practice, not unusually, the occupational health adviser may, although well qualified, not be a doctor; the respondent may wish to revise the wording of its policies to reflect the reality of the situation. This technical variance from the strict wording of the policy would not be sufficient to take the respondent's actions in relying on the advice of the occupational health adviser outside the band of reasonable responses.

156. The claimant had made remarkable progress and showed a will to return to work and a readiness to attempt a trial period. This trial period would have to involve going out in the field at some point. The claimant said at the final review meeting that he would be able to do some meetings out of the office. We consider it would be reasonable that the claimant be allowed to start with some work in the office but then move on to making visits out of the office. If he proved unable to do this, the trial period could have been terminated and a decision made at that point about the claimant's continued employment. We conclude it was outside the band of reasonable responses to refuse to allow the claimant to attempt such a trial period. We conclude that the dismissal was unfair.

157. Whether the trial period would have resulted in the claimant being able to return to his job, albeit perhaps with some adjustments, within a reasonable time frame, or whether it would have demonstrated that the claimant was not able to do so and resulted in a fair dismissal after the trial period, is a matter which will need to be considered at the remedy hearing.

158. Whilst the tests for unfair dismissal and discrimination arising from disability are different, it appears to us that it will be a rare case, if any, where an employer is held to be acting reasonably in dismissing an employee where that dismissal is an act of discrimination arising from disability. We gain support for our conclusion that dismissal was outside the band of reasonable responses and, therefore, unfair, by our conclusions in relation to discrimination arising from disability.

159. We conclude that the complaint of unfair dismissal is well founded.

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Employment Judge Slater

Date: 15 October 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

31 October 2018

FOR THE TRIBUNAL OFFICE