EMPLOYMENT TRIBUNALS

Claimant: Mr R Evans

Respondent: Jaguar Land Rover Ltd

Heard at: Birmingham (by CVP) **On:** 1, 2, 3, 4 & 5 March 2021

Before: Employment Judge Miller
Ms S Outwin
Mr D Faulconbridge

Representation
Claimant: Ms F Almezidi – Solicitor
Respondent: Mr C Crow - Counsel

RESERVED JUDGMENT

1. The claimant's claim that he was unfairly dismissed is well founded and succeeds.

2. The claimant's claim that he was discriminated against because of something arising in consequence of his disability under section 15 Equality Act 2010 is unsuccessful and is dismissed.

3. The claimant's claim that the respondent failed to make reasonable adjustments in accordance with sections 20 and 21 of the Equality Act 2010 is unsuccessful and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as a production operative from 15 July 2014 until his dismissal with effect on 19 August 2019.

2. The claimant commenced a period of early conciliation on 30 September 2019 and that finished on 30 October 2019. On 7 November 2019 the claimant presented a claim to the employment tribunal for unfair dismissal and disability discrimination. The claimant's claims of disability

discrimination were later clarified at a case management hearing before Employment Judge Cookson and were identified as

3. EQA, section 15: discrimination arising from disability

    3.1. Did the following thing(s) arise in consequence of the claimant's disability:

        3.1.1. The claimant's asthma related absences from work which led or contributed to his dismissal

    3.2. Did the respondent dismiss the claimant because of that sickness absence?

    3.3. If so, has the respondent shown that the dismissal was a proportionate means of achieving a legitimate aim?

    3.4. Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?

4. Reasonable adjustments: EQA, sections 20 & 21

    4.1. Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?

    4.2. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

        4.2.1. Requiring the claimant to work rotating day, morning and afternoon shifts [clarified in the hearing to night shifts]?

    4.3. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that the rotating shifts make it difficult for the claimant to manage his medication which affects his sleep patterns and makes it more difficult to manage the severity of asthma symptoms?

    4.4. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

    4.5. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

        4.5.1. Allowing the claimant to work fixed morning shifts

4.6. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

5. The claimant also identified a claim of harassment related to disability but that claim was subsequently withdrawn on 10 June 2020.

6. The respondent's response was that the claimant was fairly dismissed for a reason relating to capability as the claimant had a significant number of absences amounting to a significant period of time over his working life with the respondent or in the alternative for a reason relating to conduct in relation to the claimant's alleged failure to notify the respondent of all of his absences and the reasons for them.

7. In respect of the disability discrimination claims, the respondent initially denied that the claimant was disabled or, in the alternative, that the respondent had any knowledge of his disability if he was disabled. However, by the date of the final hearing the respondent had conceded both that the claimant was disabled and that they had knowledge of that disability at the relevant time. The disability that was both pleaded and conceded was asthma. We record that the claimant has a serious and severe form of asthma called brittle asthma and that he had had a significant number of hospital admissions as a result of that. It clearly had, when bad, a significant impact on him. It did not seem to be contentious that in between periods when the claimant asthma was affecting him badly, the asthma had little or no impact on him on a day-to-day basis.

8. The respondent did not concede either that the claimant was disabled or that they had knowledge of that until 25 February 2021, just two working days before the start of this hearing.

9. Before the tribunal, the respondent sought to rely on the legitimate aims of maintaining quality, maintaining timescales/production, reducing absence to competitive levels, and avoiding redundancies in respect of the section 15 claim. This was not pleaded in the respondent's response and nor did they, as far as we are aware, take advantage of Employment Judge Cookson's decision to allow them to provide an amended response by 4 June 2020 setting out such pleadings. However, the claimant did not take any issue with the introduction of these legitimate aims at such a late stage and on enquiry from the tribunal, the claimant's representative confirmed that she was prepared to address the legitimate aims as required.

10. In respect of the reasonable adjustments claim, the respondent also said that the claimant did not request any such adjustments. Of course, the claimant is not required to request adjustments: once the respondent is fixed with knowledge of both the disability and the disadvantage, it is up to them to make such adjustments as appropriate. However, the adjustments contended for at this stage by the claimant were a change to his shift patterns so that he works mornings only to reduce the impact of a rotating shift pattern on his medication.

The hearing

11. Due to the ongoing Covid-19 pandemic, the hearing was conducted remotely by video using CVP.

12. We were provided with an agreed joint bundle of 236 pages and the respondent produced a further supplementary bundle of 70 pages, albeit that it did include one additional document from the claimant. In the course of the hearing the respondent also produced two further sets of documents each of two pages, one being calendar entries for the PGC meeting at which the decision to refer the claimant to final stage of the sickness process was made, and another one being a list of appointments from its occupational health advisor's computer system.

13. We admitted these documents with the agreement of the parties but we acknowledge that this caused additional difficulties for the claimant. We are grateful to Ms Almezidi for accommodating this late disclosure. The respondent has provided no good explanation as to the very late disclosure of these documents.

14. The claimant produced a witness statement and attended and gave evidence. The respondent relied on three witnesses, Mr Sanel Hajdarevic the claimant's line manager, Mr Peter Langford manager who conducted the dismissal meeting and Ms Sue Ford the manager who conducted the appeal meeting. All the respondent's witnesses produced witness statements and attended to give evidence.

Findings of fact

The claimant's role and contract

15. The claimant's employment with the respondent started on 18 July 2015. Throughout the period we are considering, the claimant occupied an inspection role, specifically checking for door rattling. Mr Hajdarevic said that the claimant was particularly good at his job. The respondent is the manufacturer of premium cars so that the quality of the finished product is particularly important to it.

16. The claimant was employed under a contract of employment that included terms in relation to sickness. Specifically, that in the event of sickness absence the clamant was required to comply with company notification and certification rules. These rules are set out in the company handbook and relate to notifying the respondent when the claimant is too sick to attend work and certifying his sickness. Entitlement to the company sick pay scheme was dependant on complying with these requirements as well as the respondent's attendance management and capability procedures. Company sick pay is paid for up to 2 years and is paid at 50% of salary after one year's service rising eventually to 100% of salary after 3 years' service.

The attendance management and contact procedures

17. The relevant rules referred to above are the respondent's attendance management procedure (AMP) that was in effect from April 2017.

18. The AMP sets out a process to be applied to employees who are absent through sickness. It has a number of stages depending on the levels of absence and the time since the last absence period. There are five stages.

19. The first stage is called counselling and the employee reaches this is they are absent on two occasions or one occasion lasting for a full working week (whether five day shifts or 4 night shifts) within a 12 month period.

20. The next stage is stage 1. The way in which employees progress through the AMP is not completely clear and it appears that Mr Hajdarevic's understanding did not necessarily accord with that of the respondent generally. However, the evidence that we had was that if an employee has a further two occasions of absence or seven days absence within 12 months of being put on the counselling stage they would then progress to stage 1. Mr Hajdarevic's understanding was that the seven absence days can in fact be made up of four night shifts (which is the equivalent to 5 day shifts) plus 2 further days. Progress to stage 2 is on the same basis. If an employee has no further occasions of sickness once on stage 2 within a period of 12 months they then go back to stage 1. An employee on stage 1 is to maintain a clear sick record for 18 months before being put back onto counselling.

21. The final two stages are "final counselling" which an employee will get to from stage 2 with one more occasion of absence within 12 months and then the final stage is employment review which the employee will get to with one more absence. Employment review is the final stage and comprises a meeting at which an employee may be dismissed.

22. In respect of reporting, the absence management process said the employee is required to contact their immediate supervisor (in the claimant's case Mr Hajdarevic) before their working start time on the first day of their absence. It said local guidelines on arrangements would be provided for each site.

23. Further on, it says that a failure to make initial contact by the specified deadline and establish reasonable ongoing contact with an employee's supervisor may result in suspension of company sick pay.

24. Mr Hajdarevic said that he adopted a flexible contact policy under these arrangements. Although he said in his witness statement at paragraph 17 that the claimant "should not have been texting me to inform me of his absence, the procedure requires employees to phone in" he said that he did accept other forms of communication. There was evidence in the bundle

that he did. When asked where the purported requirement to phone in, rather than use other forms of communication such as text or email, was set out Mr Hajdarevic said he was unable to point to a policy document but that he had been trained on that and that was the policy as he understood it.

25. We prefer the oral evidence that Mr Hajdarevic gave about his practice which was that the form and frequency of contact varied depending on the nature of the reason for the employee's absence. He said where an employee was off long-term sick he would probably only require weekly contact whereas if someone was off with something like flu or a relatively short-term illness he would be more likely to require daily contact. He said, and we so find, that he did accept contact by text or via a third party (namely the claimant's girlfriend) when appropriate.

26. The absence certification procedure requires self-certification for the first week and then a GP fit note for absences of 8 days or longer. Nothing turns on this.

The claimant's historical sickness absences

27. The claimant had a number of periods of sickness absence during his employment starting in 2015. The first series of absences were as follows:

- from 13 August 2015 to 14 September 2015; thumb joint dislocation
- 20 November 2015 to 1 December 2015; Asthma
- 13 June 2016 to 20 June 2016; asthma
- 31 October 2016 to 14 November 2016; asthma
- 27 January 2017 to 6 February 2017, sickness
- 20 February 2017 to 2 March 2017; asthma exacerbation

28. We were shown no detail about those periods of illness and the respondent gave the claimant a clean slate, they said, in terms of the AMP from April 2017.

29. There was a degree of confusion about when and in what circumstances the claimant had been put back to the start of the process. This was referred to throughout the hearing as the claimant being given a clean slate or wiping the slate clean. Prior to Mr Hajdarevic taking over management of the claimant from April 2017, the claimant had been at an advanced stage of the AMP. It was decided that there was a problem about the way in which the claimant had moved through the stages of the AMP. The consequence of this was that the respondent then reinstated the claimant to the first counselling stage as at April 2017. The claimant was not given any information about this in writing and does not appear to have been informed in detail of the outcome. However, it is clear from the return to work

interview form of 11 July 2017 that as at that date the claimant was on first counselling despite the fact that the previous absences recorded up to that date indicated that he should have been on the final counselling stage or an employment review in consequence of that sickness absence were it not for the fact that there had been an adjustment to the AMP process.

30. Of these 6 periods of absence, 4 of them were related to asthma. The claimant was line managed by Mr Hajdarevic from April 2017 and he was responsible for "wiping the slate clean". We find that on the balance of probabilities, Mr Hajdarevic was aware that the claimant suffered with asthma and this caused him serious ongoing problems from when he took over managing the claimant or very soon thereafter. The periods of absence attributable to asthma during this early period were substantial.

31. We consider that Mr Hajdarevic's reference in his witness statement to him finding out about the claimant having asthma through conversations while he and the claimant were smoking to be cynical and a deliberate attempt to paint the claimant in a bad light. Mr Hajdarevic said that this was when he first found out about the claimant's asthma but there is no indication of any time period for these alleged events. There is simply no justification for referring to the claimant smoking and it can have been for no other reason than to seek to try to discredit the claimant.

2017 absences

32. On 3 July 2017 to 11 July 2017 the claimant was absent again.. The claimant attended a return to work interview with Mr Hajdarevic on 11 July 2017 about this absence. At that meeting Mr Hajdarevic recorded that the claimant had a skin reaction to an insect bite. We were invited to find that this absence was related to the claimant asthma on the basis of a letter from a consultant called Dr Mansur dated 28 July 2019. The letter says, as far as is relevant "This is to confirm that Reiss has got a severe form of asthma which is very allergic. It is also associated with skin problems in the form of eczema". We also note that in the return to work notes the claimant said that he had a skin reaction and was prone to infections.

33. In our view, it is possible that this was connected to the claimant's allergic asthma but there was insufficient medical evidence for us to positively draw that conclusion. We find, therefore, that on the balance of probabilities the claimant has not shown that this absence was related to his asthma.

34. The return to work interview is part of the respondent's absence management process. It is recorded on a pro forma which includes a number of set questions. The first question is about the reasons for absence, the second is "How is the employee feeling now and how do they feel about being back in work". The response to this question is 'feel good and ready for work'.

35. The other questions asked, as far as is relevant, are whether the employee has seen their GP or Occupational Health, what steps the employee has

taken to prevent recurrence of the absence and if there is any further support or guidance the company can provide, to which Mr Hajdarevic has recorded no. It was part of the claimant's case that in addressing the question set out in the winter and work forms Mr Hajdarevic was merely "ticking boxes" and had no genuine concern for the claimant's well-being. In the case of this return to work meeting the responses from the claimant recorded in the form indicates that he has answered questions fully and appropriately, indicating that there was a degree of dialogue about the claimant's health and his return to work. We find that Mr Hajdarevic undertook this interview in good faith and addressed relevant questions about the claimant's welfare and his return to work.

36. The next period of absence was from 13 to 27 November 2017 and the result of a knee injury that the claimant sustained playing football.

37. The claimant said that while his asthma can be serious, in between bad periods he is otherwise fit and active. This absence was unrelated to the claimant's asthma.

38. There was a return to work interview on 27 November 2017 and the claimant was put on stage 1 of the AMP. In this return to work form, as in the previous one, Mr Hajdarevic recorded that the claimant had complied with the correct contact procedure even though, in his witness statement, he said that the claimant did not do so. He said that he had made a mistake in ticking the box on the form. We do not consider this to be material.

39. We note that in response to the question as to whether there was any support or guidance the company could provide, Mr Hajdarevic has said "would like some support from OH, may be some physio". In respect of the question about how the claimant was feeling about being back in work it is recorded that he said "feel fit for work just can't run around until full recovery".

40. Again, we find that Mr Hajdarevic undertook this interview in good faith and addressed relevant questions about the claimant's welfare and his return to work.

41. In November 2017, the claimant's position on the AMP was altered again so that he was back at the Counselling stage, rather than stage 1. The error was corrected in the claimant's favour.

2018 absences

42. The claimant then went off sick with asthma on 12 March 2018 and he returned to work on 19 March 2018. In the return to work interview, Mr Hajdarevic records that the claimant was off with Asthma related problems with breathing. He records that the claimant said he was feeling a lot better when asked about how he is feeling now and about returning to work. There is reference to the claimant's course of steroids and when asked if there is any further support or guidance the company could provide, it is recorded

that the claimant said no. The claimant remained on Stage 1 of the AMP. Mr Hajdarevic again undertook this interview in good faith and addressed relevant questions about the claimant's welfare and his return to work.

43. This was the fifth absence relating to asthma (or sixth including the skin reaction absence) in three years. There was no referral to occupational health at this point

44. On 13 August 2018, the claimant commenced a further period of sickness absence. The claimant did not initially contact the respondent to let them know why he was off but it was with depression. Mr Hajdarevic contacted the claimant on 30 August 2018 (we have not seen that correspondence, but it was agreed) and 12 September 2018. The second letter said that there had been no contact from the claimant and a meeting had been arranged for 17 September for him to explain his absence. The letter did not refer to stopping pay or other sanctions although it did warn of the possibility of disciplinary action if the claimant did not attend. In the meantime, there had been a referral to occupational health on 21 August 2018. The claimant said he would have spoken to Mr Hajdarevic during this period of absence. Mr Hajdarevic confirms in paragraph 8 of his witness statement that he was having to contact the claimant repeatedly at this point. We conclude, therefore, that the occupational health referral must have been agreed in one of these conversations. The claimant also confirmed that he was aware that he needed to keep in regular contact with Mr Hajdarevic and he agreed that he had not been doing so.

45. There does not appear to have been a meeting on 17 September but the claimant attended the occupational health appointment on 4 October 2018, although it is not clear whether this was in person on the telephone, and it is recorded there that the reasons for his absence is mental health symptoms which are likely associated with factors outside of work. The claimant said that his mental ill health was as a result of the impact of his serious, chronic and ongoing physical health problems resulting in a lack of sleep and tiredness. It says in that report that he is signed off until 15 October and is hopeful for a return to work then. The date of the next meeting is recorded in the report as 16 October but the claimant did not receive a copy of it.

46. We find that the claimant's mental health problems at this date were associated with his asthma, although it was not identified by the occupational health advisor at the time. This is consistent with the medical evidence and is the claimant's clear evidence. In our view, the claimant's significant mental health problems – anxiety, panic and suicidal ideas on occasion – arise from his serious asthma.

47. The claimant did not attend the next occupational health meeting scheduled for 16 October. The claimant said that he was not aware of it. The claimant was told about it in his consultation on 4 October but he was not sent any written confirmation of it. The claimant was mentally unwell at the time. It is unclear why no written confirmation of the time of the next appointment was

sent to the claimant. The claimant said that he attended all the occupational health appointments he was aware of. On balance we think he probably forgot about it but we are at a loss to understand why the appointment would not have been followed up in writing. The claimant did not return to work at this point.

48. There was then a Long Term Absence review meeting on 2 November with the claimant, Mr Hajdarevic, an HR case management advisor and the claimant's trade union representative, Mr Riddiford.

49. Mr Hajdarevic says this meeting was about the claimant's stress and anxiety as this was the reason he had been absent, not his asthma. He said that he genuinely enquired after the claimant's wellbeing in this meeting. He was not following a script. The purpose of this meeting he says was predominantly a welfare meeting. He says he encouraged the claimant to attend OH having missed the last appointment and to consider how to help the claimant back to work. He said he recalls there was some discussion of light duties.

50. In his witness statement, the claimant says that at this meeting the only concession was a phased return. He said that he wanted to come off the rotating shifts because he found them hard to cope with. He refers to this meeting.

51. In evidence the claimant could only remember that he raised this issue about rotating shifts in 2018.

52. Although Mr Hajdarevic did make some enquiries at that meeting about the claimant's health, he did not discuss in any detail the impact of the claimant's job on his health or vice versa. The notes of the meeting are brief and Mr Hajdarevic focusses predominantly on the claimant's failed contact and missed occupational health appointment. He does not ask the claimant why he struggled with contact or why he missed the appointment. In our view, he was obliged to do so. It is not sufficient to say that the claimant did not ask for anything. Mr Hajdarevic was on notice at that meeting, from the occupational health report, that the claimant was having difficulties. He was therefore obliged to find out more about those difficulties and he did not do so.

53. It was perfectly clear from the evidence we heard that Mr Hajdarevic had had no training on disability and relied wholly on Occupational Health to tell him explicitly if an employee is disabled and , if they are, what he should do about it.

54. It was also perfectly clear that this is because this is the practice at the respondent – if not the official policy - to rely on occupational health to make decisions about employees' disability and any adjustments required if an employee is disabled. The claimant gave clear evidence to the tribunal, when asked, that his mental health problems were related to his asthma, he explained that he had at times felt suicidal, and he explained that using the

telephone to contact the respondent exacerbated his stress. He said that he did not want to disclose such personal details in a formal meeting. It was put on behalf of the claimant that the meetings were, effectively, paying only lip service to the claimant's welfare.

55. Although Mr Hajdarevic said he had a genuine concern for the claimant's well-being when asking after it in the return to work meetings, we are inclined to agree with the claimant that even if Mr Hajdarevic did have a genuine interest in the claimant's well-being, this was not reflected in the content or record of the meeting on 2 November 2018. Had that meeting been conducted more sensitively and had there been even slightly more probing by Mr Hajdarevic, the claimant would, we think, have disclosed more of his problems to the respondent as he did in the Tribunal. The claimant's absence was of a different character at this time from what it had been on previous occasions. The claimant had been off for a lengthy period with mental health problems.

56. We do note, however, that the claimant did say in this meeting that he just wanted to get back to work. While, therefore, it would have been better if Mr Hajdarevic had taken more account of the occupational health report and be more probing in his discussions with the claimant we can also understand why he might have taken at face value the claimant's response. The claimant did not at this meeting ask about any changes to his shifts. We were referred to the discussion between the claimant, and Mr Hajdarevic about the claimant being put on "WES". It was suggested that the suggestion by Mr Ridiford in this conversation that there was a potentially different role available for the claimant related to a change in his shift pattern. We do not find that this was the case. Mr Hajdarevic explained that "WES" referred to updating process documents on the computer working on cars. This is consistent with the earlier reference in that conversation to the claimant saying that, effectively, he was worried about missing things in the checking. The claimant was a quality inspector, and the suggestion by Mr Hajdarevic was that he could come off the production line and update process manuals for a short period, the natural inference being that the claimant was anxious about making a mistake in his substantive role.

57. The claimant attended a further occupational health meeting three days later on 5 November 2018. The brief report produced from that meeting provides for a phased return to work from 12 November and a further Occupational Health appointment on 3 December 2018.

58. The claimant returned to work on 19 November and there was a further return to work meeting on that day. In response to the question how is employee feeling, it is recorded "not 100% but trying to keep busy and get on with it". It is recorded that there is no further support or guidance that the company can provide. We find that none was offered and no detailed enquiries were made, in this meeting and, in light of comments in respect meeting on 2 November 2018, about the real impact of the claimant's health on his work (or vice versa). This was a more equivocal statement of feeling

well by the claimant and this also ought to have prompted further enquiries by Mr Hajdarevic. However, we do recognise that the claimant said that he wants to get on with it and also that he said in his evidence to the tribunal that he did not feel comfortable discussing his mental health problems in the context of a return to work meeting. While we consider that Mr Hajdarevic ought to have probed further in this meeting, we can equally understand why he did not.

59. The claimant did not ask at this meeting to go on permanent day shifts. He said, that he had asked for permanent day shifts previously and been told no so didn't think there was much point asking again. The claimant said that he had mentioned this to occupational health and specifically that they knew he had night and morning tablets. Mr Hajdarevic said in cross-examination that on no occasions did the claimant ask him to change his shift patterns. We prefer the evidence of Mr Hajdarevic on this point. Further, although the occupational health reports are brief, they do deal with relevant matters. We consider it likely that had the claimant mentioned anything in this consultations with the occupational health advice about problems operating on a rotating shift, it would have been recorded somewhere. It consistently was not.

60. On his return to work the claimant had been absent for 70 days/65 shifts during this period and was moved on to stage 2 of the AMP.

61. The claimant said in his witness statement that in March 2019 he spoke to Mr Hajdarevic and "explained again that he found the shift pattern very difficult and was aware that whole shifts that do not rotate in the same way were allocated to some employees and he explained that this would be better for him in terms of his Brittle asthma as he would not get so run down and he would be much better off medication wise with fixed shifts that allowed him to take the medication at more appropriate times in the day".

62. Mr Hajdarevic denied that such a conversation had happened**.** Although the claimant was not challenged on this evidence in his witness statement, we prefer the evidence of Mr Hajdarevic. The claimant's oral evidence to the tribunal was that all he could recall was that he had asked about working fixed shifts in 2018. This is wholly inconsistent with the claimant's witness statement. Although it is *possible* that the claimant may have mentioned, possibly even in passing, at some point in 2018 that he would prefer to work on a fixed shift pattern we do not consider that this was in the context where the claimant either made explicit or Mr Hajdarevic could have reasonably concluded that this request (if it was such) was in any way related to the claimant asthma.

2019 absences

63. The claimant's next period of absence started on 11 March 2019. There was no initial contact from the claimant as required under the AMP. On 13 March 2019, Mr Hajdarevic sent the claimant a no contact letter informing

him that his pay had been suspended. On the same day, after it was sent, the claimant sent Mr Hajdarevic a text saying "hi mate I will call you in half an hour I've just got to have a nebuliser I'm really struggling to breathe/speak". Mr Hajdarevic said that in those circumstances notification by text was acceptable and we find that Mr Hajdarevic did accept that notification as complying with the AMP. We had no evidence or representations as to whether pay had actually been stopped or later reinstated in respect of that period.

64. The claimant remained absent and on 18 March 2019 he sent a further text to Mr Hajdarevic saying that he'd been signed off until Wednesday (20 March 2019) at which point he would call Mr Hajdarevic. However, the next contact that we were aware of was on 26 March 2019. It is clear from that text the claimant had been to the doctors and it said that he was signed off sick until the following Monday (1 April 2019).

65. The claimant attended a further occupational health meeting on 27 March 2019. The occupational health advisor records that the claimant will be fit to return to work on 1 April 2019 which is consistent with the claimant's previous text. We find, on the balance of probabilities, that the occupational health advisors tend to indicate that the claimant will be fit to return to work on the day that he says he will be.

66. The occupational health advisor also records the following: "He has a respiratory impairment that has a substantial and long term negative effect on his ability to carry out normal daily activities during exasperation of symptoms of condition. This is likely to be the case for the long term. I would recommend the above adjustments [phased return] to support the employee in the workplace, however it is a management decision as to whether these adjustments can be accommodated. HR/management to discuss perceived organisational factors with employee pertaining attendance worries and discuss/agree plan of action".

67. Beyond the phased return, the occupational health advisor does not mention any potential adjustments or discuss anything that could amount to a substantial disadvantage for the claimant in relation to his need to work rotating shifts. We heard no evidence at any point as to what was meant by "attendance worries" except that the claimant was worried about returning to work – there was no explanation why this might be the case. A copy of this report was provided to Mr Hajdarevic. There is no mention in this report of any of the claimant's mental health difficulties and nothing to link them to asthma.

68. The claimant attended a further return to work meeting on 1 April 2019 when he returned to work. It is apparent from the notes of that meeting that Mr Hajdarevic did not pick up on the reference to the claimant having a long-term impairment with a significant impact on his daily activities. He did not make any further enquiries of occupational health or human resources which one might have expected. Although Mr Hajdarevic said that he had

no specific training on the equality act, he did say that he had had occupational health training. We note also that he had been working for the respondent for seven years and that he managed 95 people. He says in his witness statement he has a lot of experience dealing with day-to-day people issues, disciplinary matters absent management and grievances. In cross-examination when asked about the significance of the occupational health advisor's findings, Mr Hajdarevic did not identify the link between them and the definition of disability under the Equality Act 2010. We find it inconceivable that Mr Hajdarevic working in such an environment for such an employer would not have identified the significance of the occupational health advisors findings. Consequently, again, we find the Mr Hajdarevic should have been more inquisitorial in this meeting as to whether there were any problems for the claimant in attending work as a result of his asthma. Again, the claimant's statement that "I can cope" is equivocal and invited further exploration.

69. As a result of the latest instance of sickness absence, the claimant was moved onto the "final counselling" stage of the AMP at this meeting.

The claimant's final period of absence

70. The claimant remained at work until 24 May 2019. He did not go into work on this date and did not make any contact with the respondent. The first contact of which we are aware text sent on 3 June 2019 in which the claimant says "try to call. I won't be in work tonight, I have been signed off due to personal reasons". There is a fit note dated 3 June 2019 signing the claimant off for two weeks until 17 June 2019. He was signed off with stress and anxiety. The claimant said in this witness statement that he was feeling overwhelmed by anxiety and panic felt the build up to what he describes a near fatal asthma attack in July 2019.

71. The next contact from the claimant was on 5 June when he cancelled his holiday.

72. Mr Hajdarevic must have agreed contact arrangements with the claimant but they were not maintained so he sent out no contact letters on 7 and 10 June 2019. The first one indicated that the claimant's pay had been suspended and the second invited him to a meeting to explain his absence on 13 June 2019. We find that it was reasonable for Mr Hajdarevic to send these letters in the circumstances. The claimant did attend the meeting on 13 June 2019.

73. Before the meeting the claimant had sent a text to Mr Hajdarevic to ask for a trade union representative's number and then a further text thanking him for his help. At this meeting Mr Hajdarevic asked the claimant how he was to which the claimant replied "not great, in a bad place. Lots of different illnesses past few years and recently have more problems. It's getting too much for me to cope with". Mr Hajdarevic then asked if this was affecting the claimant's mental health which the claimant replied yes.

74. We find that this was a genuine enquiry as to the claimant's well-being by Mr Hajdarevic. We also find that at this meeting as a result of this conversation the claimant set out a clear link between his general health conditions – the claimant's asthma and associated conditions – and his mental health and that Mr Hajdarevic was then aware of this. The claimant confirmed at this meeting that his sicknote would expire on 17 June 2019 but that he was expecting to see his GP on that day followed by a later occupational health appointment on the Wednesday. Mr Hajdarevic asked the claimant to call him after his GP appointment to let him know what the GP recommended.

75. The claimant did then contact Mr Hajdarevic on 17 June by text (which said he had first tried to call) and said that he had been signed off for a further three weeks which would be 8 July 2019. We note, however, that the relevant fit note in fact signed the claimant off for three months until 16 September 2019.

76. The claimant then attended a further occupational health meeting on 19 June 2019. The outcome of the occupational health meeting was that the Occupational Health adviser's opinion was that the claimant was likely to be fit for work from 8 July 2019. We find that the reason this date was given was because the claimant told the occupational health advisor, mistakenly, that his doctor had signed him off sick until 8 July 2019. The occupational health advisor also records "he also reported recent heightened anxiety symptoms attributable to his long-standing breathing problems and his doctors have since prescribed medical management referred him onto the external therapeutic intervention support with him is engaging appropriately". We find, therefore, that as a result of the findings of this report the respondent knew by this date, if not previously, that there was a clear link between the claimant's asthma and his anxiety.

77. On 20 June 2019 the claimant was invited to attend an absence review meeting on 4 July 2019.

78. On 1 July 2019 the claimant sent a further text to Mr Hajdarevic saying that he realised he was meant to call Mr Hajdarevic but had not done so and would call tomorrow.

79. The claimant did not attend the meeting on 4 July 2019 so the respondent phoned him and the claimant said that he had misunderstood and thought the meeting was in the afternoon. The meeting was therefore conducted by telephone. Mr Hajdarevic asked the claimant how he was and we again find that this was a genuine enquiry. The claimant said that he had been seeing a counsellor but has been staying in and not really doing anything. At this meeting there is some more probing questions by the HR representative, Ms Al-Dabbagh . She also asks where the claimant thinks he is on the AMP process and the claimant says that he doesn't understand what that means. The HR representative explained that if he is towards the end of the AMP process then he might end up at an employment review. Ms Al-Dabbagh

does not say that that is the point at which dismissal might be an option but the claimant does reply "I understand I can't help being ill". Mr Hajdarevic then re-emphasises the importance of the claimant staying in touch. We note that the claimant is again reluctant to divulge details of his mental health problems at that meeting.

80. Mr Hajdarevic says that the occupational health report says that the claimant will be fit to return to work on 8 July 2019 and that he is expected back at work on that day. We find, for the sake of completeness, that there is no reference in the meeting to any need to change the claimant's shift patterns.

81. We were referred to a document called "FA 2 absence tracker" which records that the claimant called his doctor and then called Mr Hajdarevic to say that he had spoken to his doctor who confirmed that in fact his fit note that he provided on 17 June 2019 signed him off for three months rather than three weeks. The evidence given by the respondent was that that fit note was sent to the payroll department to facilitate payment of sick pay so it is possible that the people involved in managing the claimant sickness absence did not have copies of the sicknote. Nonetheless, by this date it was clear that there was no good reason for the claimant to think that he would be fit to return to work on 8 July or for the respondent to expect him back on that date. The occupational health report and the sickness absence meeting on 4 July 2019 had been based on a misunderstanding of when claimant's doctor thought that the claimant would be fit to return to work.

82. After that meeting the claimant's case was referred to the Plant Governance Committee (PGC). This referral also refers to the occupational health advisor advising a return to work from 8 July 2019. He concludes "Mr Evans disputed this and has failed to return to work as requested". The pGC is a regular weekly meeting at which cases of sickness absence are reviewed and a decision is made whether to refer them to the next stage of the AMP – in the claimant's case, employment review.

83. The information that was before the PGC, was still that the claimant was reasonably expected to return to work on 8 July 2019. Regardless of whether the particular managers who were managing the claimant's sickness absence have copies of his fit note, it was in the possession of the respondent. It was clear that the claimant was signed off sick until September, and not 8 July, and the wording of the information put before the PGC was misleading. No reasonable employer would request or expect an employee to return to work while they were still signed off sick by their GP. It must, therefore, be that the person who referred the case to the PGC had not considered sicknote and did not believe the claimant.

84. On 9 July 2019, the claimant was admitted to hospital follwing a very serious near fatal asthma attack. Unsurprisingly, the claimant was unable to phone the respondent to inform them of this and he asked his girlfriend to do so on his behalf. This contact was accepted by Arny Moon who was at

that point then managing the claimant rather than Mr Hajdarevic. The claimant was not subject to any sanctions as a result of this.

The claimant's dismissal

85. On 17 July 2019, the PGC considered the claimant's case and decided to refer it to an employment review. The respondent brought evidence to show that the PGC was held on 17 July 2019 rather than 10 July 2019 and we accept that evidence. By 17 July 2019, it ought to have been apparent to the PGC that the referral information included a mistake, namely that the claimant had been deemed fit for work from 8 July 2019. By this point the respondent had had a communication from the claimant that the fit note in fact extended to September 2019 and they had in their possession a copy of that fit note. There was no reason therefore to suggest that the claimant had "failed" to return to work on 8 July 2019. To expect the claimant to return to work in these circumstances was clearly unreasonable.

86. The members of the PGC were senior members of the respondent's management team, Senior occupational health advisers, senior trade union members and relevant managers of the employees whose cases were being considered. Mr Langford confirmed that at that meeting members of the committee had before them the occupational health reports. When questioned about the wording of the occupational health report from 27 March 2019 (He has a respiratory impairment that has a substantial and long term negative effect on his ability to carry out normal daily activities during exasperation of symptoms of condition. This is likely to be the case for long term) Mr Langford professed to not recognise this as a description of someone who was potentially disabled under the Equality Act 2010. We do not believe Mr Langford on this point. Mr Langford was a more senior and more experienced manager than Mr Hajdarevic and he had been on training about matters relating to sickness absence and equalities. In any event, there were senior occupational health advisers at that meeting. It was, in our view, perfectly obvious to any person at the PGC who saw this occupational health report that the claimant was potentially a disabled person. There is no evidence that any consideration at all was given to this before the decision to refer the claimant to the employment review was taken.

87. The employment review meeting was originally scheduled for 25 July 2019 but the claimant was too ill to attend so it was rearranged for 12 August 2019. It is clear from the letters requiring the claimant to attend meetings that the matters to be considered and which may lead to the claimant's dismissal were his absence history under the AMP.

88. The employment review meeting was the final stage in the AMP process. It was conducted by Mr Langford who was accompanied by an HR officer. The claimant had representation from two trade union representatives, Mr Flanagan and Mr Ridiford.

89. The note of that meeting records very little actual discussion. Mr Langford asks the claimant to confirm that his current absence is for stress and anxiety which the claimant confirms. He then says "these are the absence cases but there is also a big question around contact not being kept. Arny (Moon) has had difficulty getting hold of you and you have not been making contact with him, as a result, you've not been paid". The claimant then says that it is shut down so he didn't call him. The claimant confirms that he went into hospital (9 July 2019) and that his girlfriend got in touch. Then the HR representative checks whether the claimant was absent with asthma or stress and anxiety stress and anxiety to which the claimant had a bit of both but then confirms that stress and anxiety is on the sick note. The HR representative then says that although the claimant had an issue with his asthma that wasn't the reason he went off. The trade union representative requested an adjournment for the claimant to obtain medical records.

90. In closing the meeting Mr Langford then says:

"I've gone through all your records. Your absence is very poor and back in 2017 you should have been at this stage then but because the file had not been managed properly you were given a clean sheet, a fresh start. You've demonstrated poor attendance and poor contact. I do recognise the reason you are off so I won't make a decision today, I'd like to give you the opportunity to get medical documents that would help me make a decision on where we should go. SA has already set up the reconvened meeting".

91. At this meeting Mr Langford does not make any enquiries of the claimant about the impact of his ill-health on his attendance of work or vice versa. We think, on the balance of probabilities, that Mr Langford did have the claimant's disability in mind at this meeting and in all the circumstances the decision to adjourn the meeting to obtain further medical evidence was reasonable. He did not only rely on the claimant to produce medical evidence he also referred the claimant for a further occupational health assessment. We consider that this is evidence that the decision at the PGC, although made on the basis of misleading information, was a genuine one to refer the claimant the consideration of his case at the employment review meeting. The decision to dismiss the claimant was not a foregone conclusion that had been made at the PGC meeting.

92. The claimant was assessed by an occupational health advisor by telephone on 14 August 2019. This report was provided by a new occupational health provider.

93. Unlike the previous occupational health reports this report includes the terms of the referral. They are

93.1. mental health support is required

93.2. employee has failed to return to work in line with OH guidance and has advised the change in their condition, a further update is now required

93.3. advice required on any necessary work adjustments (hours and/or duties/medical)

94. The second term of reference shows that account had still not been taken at this point of the fact that the claimant was then signed off sick by his GP until September.

95. The relevant findings of the occupational health report are that it confirmed that the claimant was admitted to hospital for three days from 9 July 2019. It also records that the claimant said he was anticipating returning to work on 8 July 2019, but unfortunately became quite unwell with his asthma. We do not consider that this is inconsistent with the claimant previously stating that his fit note was until September. The claimant was anticipating returning to work on 8 July 2019 but this was based on his own misunderstanding of what his GP had said. He was also then subsequently taken very ill which did, in any event, prevent his return to work.

96. In this report it is confirmed again that the claimant's anxiety is exacerbated by his asthma. It is also even clearer than the report from 27 March 2019 as to the claimant's status under the Equality Act. It says "in my opinion it is likely that both the asthma and anxiety would meet the requirements of the Equality Act 2010. However, ultimately this would be a legal and not a medical decision".

97. Despite the clarity of this statement, Mr Langford still denied in cross-examination recognising this as the identification of a person who was potentially, or even probably, disabled by reason of both asthma.

98. The report concludes "in my opinion this gentleman is fit to return to work from Monday, 19 August 2019 once this meeting has taken place" (a reference to the resumed employment review meeting on 19 August 2019). This occupational health report was provided to Mr Langford along with some medical evidence provided by the claimant. We have already referred to that evidence and, beyond confirming the severity of the claimant's asthma, we do not consider that it adds any additional relevant information. That information does confirm the importance of the claimant sticking to his medication regime but it does not say that any of the medication needs be taken at any particular time of day, whether that is before bed or on waking, and neither does it explain the consequences of departing from that regime. As previously noted, it does not provide any conclusive evidence of a link between the claimant asthma and the skin infection from 2017.

99. The employment review meeting on 19 August 2019 is attended by the same people as the meeting on 12 August 2019. It is, if anything, even more brief than the first meeting. After the introductions the claimant said that he brought a letter from his asthma consultant and a discharge letter from the hospital. Mr Langford asked the claimant to confirm if he was still signed off with asthma or stress. The claimant's trade union representative confirmed that the claimant's GP is signing him back to work next week and

that she thinks the claimant is fit enough to work. He says he believes is over the worst of the anxiety, he had a bad run and has a serious illness. The trade union representative concluded by saying "obviously if he has any other absences, he knows that there's not a lot I can do at the next meeting. It's a good job - no one wants to give that up". Mr Langford then asked if the claimant has anything to add and he did not. After a 10 minute adjournment Mr Langford returned and said

"After going through your mitigations I've assessed your overall employment case. You've got 4 years' service and you been taken to AMP already, over 105 shifts lost, you already hit AMP previously but because it wasn't managed properly you were given a clean slate so this was a further opportunity. You're still off work and you went through return to work dispute last on LTA getting up to stage 2. I don't have confidence that you will sustain your return to work. I've taken into account what has been said today, your past history and I will be ending your employment today. You have the right to appeal. If you wish to appeal do so in writing in five working days".

100. In oral evidence Mr Langford confirmed that he did not ask the claimant whether he was fit to return to work, he did not ask how long it would be before he could return to work and he made no enquiries at all about the impact of the claimant's disability on his employment or vice versa. There was no discussion at all at this meeting of anything to do with the claimant's contact with the respondent during his absences.

101. We find that Mr Langford did not undertake the enquiries that would reasonably be expected in a meeting at which the potential dismissal of an employee was being considered. He did not make any attempt to understand the nature of the claimant's difficulties, any barriers to work or if there was anything that might be offered by the respondent to help overcome any such barriers. He did not give any consideration as to whether the process leading up to the employment review had been followed properly and it is clear that he did not give any consideration to the evidence that the claimant would be able to return to work within a week.

102. Mr Langford wrote to the claimant on 19 August 2019 with the formal outcome of the employment review meeting confirming that his employment ended on 19 August 2019. The claimant would be paid pay in lieu of notice. The letter effectively repeated the reasons given at the meeting on 19 August except that it also said "you have also failed to make contact during periods of your current absence and I have no confidence of you returning to work in the near future and sustaining that return to work and a reasonable level of attendance".

103. Although the contact issue was mentioned at the meeting on 12 August 2019, the claimant was not given an opportunity to respond to those allegations in any detail and the matter was not addressed at all, on 19 August 2019.

104. We note that the claimant's representative put to Mr Langford that he should have sought copies of the claimant's medical records from his GP or hospital doctors. We do not think that would have been necessary or appropriate. The final occupational health report provided a great deal of relevant information – it confirmed that the claimant was likely to be disabled and identified a potential return to work date. It is difficult to see what further information could have been provided that would have been of use.

The claimant's appeal

105. The claimant appealed against the decision to dismiss him on 22 August 2019. He did not raise any issues relating to reasonable adjustments (whether in relation to shift working or otherwise) in his appeal. He said "The grounds my unfair dismissal are due to the amount of absences I have had which I feel are all connected. I have severe depression due to my consistent admissions into hospital and my regular regular appointment with my asthma". He says that the absences were not his choice and that he should be given the opportunity to come back and work for the respondent. Ms Ford, the appeals officer, accepted in evidence that the claimant had identified a link in this letter between his absences related to his mental health and his asthma.

106. The claimant attended an appeal hearing on 16 September 2019. He was represented by Mr Ridiford that hearing. The appeal was heard by Sue Ford and she was accompanied by the same human resources adviser who had been at the employment review meeting.

107. Ms Ford asked the claimant to summarises grounds of appeal and he said "I've lost a few shifts but I had a bad spell with my asthma. It was really bad and stress and anxiety crept in. I went to hospital with it as well. I went to the doctors and was signed off. I feel better myself now, I feel I deserve another chance".

108. Ms Ford's response that was that the issues he raised have all been addressed throughout all of his absences and he had been supported with them. There was nothing new that he was adding. She also said he had a history of not engaging while off and failed to make contact throughout. The trade union representatives disputed this and effectively said that the claimant has had a bad asthma attack and he has some mental health issues. If she took those things into account he would come back to work and get on with it and show that he was worthy of a second chance. Ms Ford then asked the claimant if he had undertaken any paid work while he was absent from JLR and he said "paid work, no".

109. In oral evidence, Ms Ford said that she had heard rumours - gossip effectively - to the effect that the claimant had been seen working with his family. The claimant's evidence, which we unhesitatingly accept, is that he did accompany his father to work in his van on occasions but that that was

because while he was off sick his father was concerned that he would attempt suicide which is something that happened previously. The union representative then concluded by saying that there were sanctions short of dismissal that could be applied to the claimant and the claimant would like those to be considered. Ms Ford then adjourned for seven minutes to consider the claimant's appeal.

110. Ms Ford did not uphold the claimant's appeal. She said that she had taken on board what was said but that looking through the claimant's file this was the second time that he had been in this position. We note that there is in fact nothing to suggest that the claimant had ever been through the employment review process previously. She referred to the wiping of the slate clean in 2017 and that that was a second chance but now they were right back at the same place again. She then said "we could give you yet another chance but that is just prolonging the inevitable, we will be back here again won't we?" to which the claimant replied 'yes'.

111. The claimant said that it was only because of his asthma and that he has to go to hospital – that's all the absences were. The HR adviser said that absences that resulted in hospitalisation would be exempt and had not been counted and the claimant said that the most recent one (9 to 11 July 2019) had been counted. The HR adviser said that as the claimant went to hospital for asthma during his period of stress and anxiety that hospitalisation was not exempt.

112. Ms Ford then confirmed that she was not upholding the appeal and that the claimant remained dismissed. There was a further right of appeal but the claimant did not exercise it.

113. Ms Ford wrote to the claimant on 19 September 2019 confirming the outcome of his appeal. She said "at the appeal meeting I asked you to provide any further or new information that you wish to be considered in the appeal. He did not offer any new information and again stated that you had asthma and that this resulted in some absences". She said "I could not see that given your attendance record to date, you would change your approach to attending work on a regular basis and that the trust on this point had broken down".

114. In our view, this final sentence was particularly offensive. Had Ms Ford considered the evidence available to her, including the most recent occupational health report, the claimant's discharge letters, and what the claimant was saying it should have been perfectly obvious to her that the claimant was not *choosing* not to attend work. There is no suggestion, despite Ms Ford's unsubstantiated suggestion that the claimant had been working, that the claimant's absences were anything other than the genuine result of a very severe illness.

115. Ms Ford was asked in evidence before the tribunal whether she had made any enquiries at all in the meeting of the claimant about his illness, about

the impact of his illness on work or vice versa, what any barriers might be to his attending work what the chances of remaining at work were and she said that she had not. In our view, Ms Forde's approach this appeal can be summed up in the oral evidence that she gave at the tribunal: "I was only going to look at new information and there wasn't any".

116. It is clear, therefore, that Ms Ford did not undertake proper review, or in fact any review, of the process leading up to the claimant's dismissal and nor did she consider anything the claimant had to say about what happened so far.

Other matters

The relevance of medical records

117. The claimant's case appeared to be put on the basis that the respondent ought to have, in one way or another, obtained the claimant's medical records at various points throughout the AMP and that failure to do so was a fundamental flaw in the process. We do not agree. The respondent had adequate medical evidence before it in the form of its occupational health reports and, latterly, claimant's limited medical evidence that he had provided. Despite this substantial amount of evidence identifying that the claimant was disabled and that there was a link between his mental health problems and his asthma and that he clearly had ongoing problems attending work, the respondent still failed to take adequate steps to address the claimant's problems. Further medical evidence in the hands of the respondent at the time was unlikely, in our view, to have made any difference to the outcome.

The impact of the rotating shift pattern

118. In respect of the reasonable adjustments claim, we were told, and it was not disputed, that the respondent operated a rotating shift pattern where operatives worked either morning, afternoon or night and this varied from week to week.

119. We did not hear or see any medical evidence that rotating shift patterns impacted on the claimant – either in respect of his asthma, the efficacy of his medication or his mental health. There were reference sin the claimant's witness statement, but they were unspecific and, in fact, related to the claimant allegedly telling Mr Hajdarevic about his problems. At its highest, the claimant's evidence was in paragraphs 10 and 11 of his witness statement. He said:

"One of the reasons that I felt this way was that I had asked many times if I could come off the rotating shifts comprising of day morning and afternoon shifts and had explained to Sanel that my medication made it hard for me to manage these shifts and the shift set up made me more tired and I found that I frequently struggled and did not feel good.

Just before March 2019 I did speak again to Sanel and I explained again that I found the shift pattern very difficult and was aware that whole shifts that do not rotate in the same way were allocated to some employees and I explained that this would be better for me in terms of my Brittle asthma as I would not get so run down and I would be much better off medication wise with fixed shifts that allowed me to take the medication at more appropriate times in the day".

120. We have found that the claimant did not, in explicit terms, tell Mr Hajdarevic about problems with working shifts.

121. It was clear from documents we were shown in other contexts that the claimant was prescribed medication to take at specific times of day and that his doctors had emphasised the importance of sticking to his drug regime. However, we heard no evidence about what this meant, what the impacts would be of not adhering to the drug regime. The claimant also agreed that he was never prevented from taking medication while at work, on any shift.

122. In cross examination, the claimant did say that he had been having sleepless nights and that he had mentioned, in genera conversation, to Mr Hajdarevic that health wise it might help having different sleeping patterns,

123. In the absence of any specific evidence, whether from the claimant or otherwise, of the actual problems arising from working rotating shifts and how, if at all, they are related to the claimant's disability or medication or both, we have to conclude that the claimant has not shown that working a rotating shift pattern caused him any problems in relation to his asthma or his mental health beyond the potential sleep disruption that would affect anyone who was working on different shifts form week to week.

The timing of the reasonable adjustments claim

124. In respect of when the claimant brought his claim, again there was no evidence in the claimant's witness statement about why he did not bring a claim within three months of the alleged failure to make reasonable adjustments. In cross examination in answer to a question as to why he had not brought a claim earlier, the claimant said "I hadn't been sacked then".

The respondent's aims

125. In respect of the identified legitimate aims, evidence was given in support of each of them by Mr Hajdarevic, Mr Langford and Ms Ford. None of that evidence was challenged.

126. One of the aims is maintaining quality. The respondent describe themselves as a manufacturer of premium cars. The claimant's role was a quality inspector. Mr Hajdarevic said that using temporary, cover employees or workers to undertake the inspections has a detrimental impact on both speed and quality of the inspection work. We find that the respondent

needed an experienced and regularly attending workforce to properly undertake quality inspection role that the claimant did.

127. The next aim is maintaining timescales/production. Again we refer to the witness evidence of Mr Hajdarevic. It is apparent that the need to train and use less experienced and less skilled staff will result in delays to the production timescale.

128. The third aim is reducing absence to competitive levels. This is reflected in the respondent's absence management policy and we accept that sickness absence carries an inevitable cost for any employer.

129. The final aim relied on is the avoiding of redundancies. We accept that, given the respondent's sick pay policy which provides for the payment of full pay for up to 2 years sickness absence, unusually high levels of sickness absence could have a noticeable financial impact on the respondent which, combined with other economic factors, could result in increased redundancies and, conversely, reducing sickness absence will reduce the risk of redundancies, albeit potentially only marginally.

The law

Unfair dismissal

130. An employee has the right under section 94 of the Employment Rights Act 1996 (ERA) not to be unfairly dismissed. Section 98 ERA provides

> 98 General
>
> (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 it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> (2) A reason falls within this subsection if it—
> (a) relates to the capability or qualifications of the employee for
> (b) relates to the conduct of the employee,
> (3) In subsection (2)(a)—
> (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
> (4) [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)—
> (a) 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 dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

131. In *Abernethy v Mott Hay and Anderson* [1974] IRLR 213, [1974] ICR 323, it was held that:

''A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'.'

132. In the case of a sickness dismissal, in *O'Brien v Bolton St Catherine's Academy (CA)* [2017] ICR Underhill LJ cited *Spencer v Paragon Wallpapers* [1976] IRLR 373:

"Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer? Every case will be different, depending upon the circumstances."

133. He further noted, at para 12, that the relevant circumstances include *"the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do"*. In *Polkey v A E Dayton Services Ltd* [1987] IRLR 503 this is concisely summarised as *"Thus, in the case of incapacity, the employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to mend his ways and show that he can do the job".*

134. The respondent relies also on conduct as a potentially fair reason. In *British Home Stores v Burchell* 1980 ICR 303, the EAT held that, in establishing that the dismissal was for a potentially fair reason and fair in the circumstances, the employer must believe that the employee was guilty of the relevant misconduct; that the employer had in his mind reasonable grounds upon which to sustain that belief and that the employer had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

135. In deciding whether the dismissal was fair or unfair, the tribunal must not substitute its own decision but must consider whether the decision to dismiss the employee was within the range of reasonable responses of a reasonable employer.

136. If the Tribunal finds that the respondent has failed to take the steps in respect of a conduct or capability dismissal referred to above in coming to the decision to dismiss the claimant, we are not entitled, when addressing the question of reasonableness under s 98(4) to as whether it would have made any difference if the correct steps had been taken or not. This question only becomes relevant if the claimant's claim is successful. If the tribunal considers that had different or appropriate steps been taken there was a chance that the claimant would have been dismissed, or dismissed at some point, in any event, then any award may be reduced accordingly. (*Polkey v A E Dayton Services Ltd* [1987] IRLR 503).

Discrimination arising from disability

137. Section 15 of the Equality Act 2010 (EQA) provides, as far as is relevant:

> (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.

138. The primary issue in dispute in respect of the section 15 claim is justification under subsection (2) – was the decision to dismiss the claimant a proportionate means of achieving a legitimate aim.

139. The burden is on the respondent to show that any discrimination is a proportionate means of achieving a legitimate aim.

140. The question of whether an aim is legitimate is one for the tribunal to decide. The Equality and Human Rights Commissions Code of Practice on Employment says, at paragraph 4.29, that although reasonable business needs and economic efficiency may be legitimate aims, an employer solely aiming to reduce costs cannot expect to satisfy the test.

141. In *Woodcock v Cumbria Primary Care Trust* [2012] I.C.R. 1126, Lord Justice Rimer recognised that almost every decision taken by an employer is going to have regard to costs. He then went on to say

> *"Accepting, as I make clear I do, that the guidance of the Court of Justice is that an employer cannot justify discriminatory treatment "solely" because the elimination of such treatment would involve increased costs, that guidance cannot mean more than that the saving or avoidance of costs will not, without more, amount to the achieving of a "legitimate aim"."*

142. The respondent must bring evidence of the legitimate aims. In *O'Brien v Bolton St Catherine's Academy* [2017] EWCA Civ 144, the respondent was a school and its aims were pleaded as "the efficient running of the school, the reduction of costs and the need to provide a good standard of teaching". In the EAT Judge Serota observed that it was obvious that the absence of a senior head of department in a school that was having problems would have a significant effect on the school. In the Court of Appeal, Lord Justice Underhill said

> *"In principle the severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness absence must be a significant element in the balance that determines the point at which their dismissal becomes justified, and it is not unreasonable for a tribunal to expect some evidence on that subject. What kind of evidence is appropriate will depend on the case. Often, no doubt, it will be so obvious that the impact is very severe that a general statement to that effect will suffice but sometimes it will be less evident, and the employer will need to give more*

particularised evidence of the kinds of difficulty that the absence is causing. What kind of evidence is needed in a particular case must be primarily for the assessment of the tribunal, and the fact that Judge Serota, or I, might think that in this case the impact on the school of the claimant's absence was obvious does not mean that the tribunal erred in law in taking a different view".

143. It is clear that there must be some evidence of the legitimate aim pursued. It is not enough for a respondent to baldly state a legitimate aim in its pleadings or, as in this case, its list of issues without anything else. However, the nature and extent of the evidence required in each case will vary and will be a matter for the Tribunal to consider. It is clear from the judgment of Lord Justice Underhill that the tribunal will be entitled to take account of its knowledge and experience. The tribunal has the benefit of its lay members who bring significant amounts of industrial knowledge and experience and that must also be something on which the Tribunal can rely.

144. Having identified, and given evidence of, legitimate aims, it is for the respondent to show that the discriminatory act was a proportionate means of achieving those aims.

145. The test for the tribunal is an objective one and the task for the Tribunal is to balance the interests of the employee against the legitimate aims pursued by the company. In *City of York Council v Grosset* [2018] IRLR 746, in the Court of Appeal, Lord Justice Sales said

"In my judgment, the ET and the EAT have made a lawful assessment of the position in relation to this defence and the appeal in respect of this issue should also be dismissed. Contrary to Mr Bowers' submission, and as the EAT rightly held, there is no inconsistency between the ET's rejection of the claimant's claim of unfair dismissal and its upholding his claim under s 15 EqA in respect of his dismissal. This is because the test in relation to unfair dismissal proceeds by reference to whether dismissal was within the range of reasonable responses available to an employer, thereby allowing a significant latitude of judgment for the employer itself. By contrast, the test under s 15(1)(b) EqA is an objective one, according to which the ET must make its own assessment: see Hardy & Hansons plc [2005] EWCA Civ 846, [2005] IRLR 726, [31]–[32], and Chief Constable of West Yorkshire Police v Homer [2012] UKSC 15, [2012] IRLR 601, [20] and [24]–[26] per Baroness Hale of Richmond JSC, with whom the other members of the Court agreed".

146. As Mr Crow submitted on behalf of the respondent, this means that a respondent can escape liability for discrimination if the tribunal determines that objectively the treatment was a proportionate means of achieving a legitimate aim even if the individuals involved gave no consideration to the impact of their decision on the claimant as a disabled person at all.

147. We were referred to *O'Brien* (above) as authority for the proposition that the considerations under the test of proportionality under section 15 Equality Act 2010 are likely to be the same as those under s 98(4) Employment Rights Act 1996 in respect of the fairness of a dismissal.

148. Specifically, Lord Justice Underhill said at paragraph 53

"*On the one hand, it is well established that in an appropriate context a proportionality test can, and should, accommodate a substantial degree of respect for the judgment of the decision-taker as to his reasonable needs (provided he has acted rationally and responsibly), while insisting that the tribunal is responsible for striking the ultimate balance; and I see good reason for such an approach in the case of the employment relationship. On the other, I repeat - what is sometimes insufficiently appreciated - that the need to recognise that there may sometimes be circumstances where both dismissal and "non-dismissal" are reasonable responses does not reduce the task of the tribunal under section 98(4) to one of "quasi-Wednesbury" review (Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223): … Thus in this context I very much doubt whether the two tests should lead to different results*".

149. However, as is clear from *Grosset*, it is possible to have different outcomes for an unfair dismissal and a section 15 EQA (discrimination arising from disability) claim arising out of the same facts. A lack of consideration by the decision maker on the impact of their decision on a disabled employee may be evidentially relevant to the proportionality of a legitimate aim – particularly it may be harder for a respondent to show that there were no more proportionate options available short of dismissal where none have been considered. However, a complete failure to consider the claimant's disability need not of itself be determinative.

150. In *O'Brien*, Lord Justice Underhill said that respect should be afforded to the judgement of the decision taker provided they are acting rationally and responsibly. This further confirms that an employer might be able to retrospectively bring evidence of objective justification despite not acting rationally or responsibility (or within the band of reasonable responses of a reasonable employer) at the time the decision to dismiss the employee was made.

Failure to make reasonable adjustments

151. Section 20 EQA provides as far as is relevant:

    (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.

152. Section 21 EQA provides as far as is relevant:

    (1) A failure to comply with the first, second or third 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.

153. Schedule 8 EQA provides as far as is relevant:

154. Paragraph 2 (3)

> (3) In relation to the first and third requirements, a relevant matter is any matter specified in the first column of the applicable table in Part 2 of this Schedule

155. Paragraph 5 (1) provides that a relevant matter in respect of an employee is employment by A

156. Paragraph 20

> (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—
>
> …
>
> (b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement. (our emphasis)

157. The key disputed issues in this case in relation to the reasonable adjustments claim are the actual existence of a disadvantage arising from the claimant being required to work rotating shifts and, if there is such a disadvantage, whether the respondent knew or ought reasonably to have known of that disadvantage.

158. In terms of disadvantage, Mr Crow submitted that any disadvantage must flow directly from asthma which, he says, is a stricter test than "something arising in consequence of" under section 15. Section 20 (3) says "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". In our view, this is clearly wide enough to encompass disadvantage arising from the symptoms of a disability – in the claimant's case potentially anxiety and other mental health problems. The question is simply whether the claimant is put at a substantial disadvantage compared to people who are not disabled. It is a question of fact for the Tribunal whether the symptoms of the claimant's disability are such that the relevant PCP puts the claimant at a substantial disadvantage compared to other non-disabled people.

159. Mr Crow also placed significant reliance on "relevant matter" and the fact that the substantial disadvantage must be in relation to his employment. We understood him to be asserting that the disadvantage must impact, in some specific way, directly to the claimant's ability to undertake his work. He said, for example (although not pleaded) that being prevented from taking medication was not a relevant matter as defined. We do not agree. "In relation to" is a wide phrase and in our judgment is certainly wide enough to include circumstances where the working arrangements impact adversely on an employee's health or well-being without *actually* preventing them from carrying out their job.

160. If we found that the rotating shift pattern adversely impacted on the claimant's sleep and caused exacerbation of his mental ill health (for example) but he was still able, with a significant effort of will, to get to work and perform his role this *could* in our view amount to a disadvantage.

Time limits

161. Section 123 EQA provides:

> (1) Subject to section 140B, proceedings on 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.
>
> …
>
> (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.

162. Although the tribunal has a discretion to extend time, it is well established that time limits are to be interpreted strictly and the burden of proof is on the claimant to show why time should be extended. Factors that the tribunal may take into account in deciding whether to extend time include:

- the length of, and reasons for, the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- the extent to which the party sued has cooperated with any requests for information;
- the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and
- the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

ACAS uplift

163. If the claimant is successful in his claims, any award may be subject to an increase or decrease for a failure by a party to follow a relevant code. As far as is relevant, s 207A Trade Union and Labour Relations (Consolidation) Act 1992 provides

> (1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.
>
> (2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

(3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employee has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.

(4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes.

164. All the claims before the tribunal in this case are listed in schedule A2 to the act and the relevant code is the CAAS Code of Practice 1: Code of Practice on Disciplinary and Grievance Procedures.

Conclusion

165. We address each of the issues in the order suggested by Mr Crow as it flows most naturally both chronologically and in terms of the interaction of the issues.

Reasonable adjustments

166. Returning to the list of issues identified above, the following matters were agreed – the respondent had a PCP of requiring its employees in roles like the claimant's to work rotating morning, afternoon and night shifts. This PCP applied to the claimant.

167. It was agreed that the claimant was disabled by reason of asthma and that the respondent had knowledge of the claimant's disability throughout his employment with the respondent.

168. In respect of the disadvantage, it is clear from our findings of fact that we have found that the claimant did not demonstrate that being required to work on this rotating shift pattern caused him substantial disadvantage. It is easy to imagine circumstances in which a rotating shift pattern could cause the claimant difficulties but we were not provided with any evidence from which we could draw the conclusion that the claimant actually did experience any difficulties because of, or even arising from, working rotating shifts. In so far as the claimant's evidence was that he experienced difficulties sleeping, we have heard no evidence to show that these difficulties were any different to those which any person who worked differing shifts might experience.

169. Even if working rotating shifts actually did cause the claimant problems amounting to a substantial disadvantage – and we note again that this could potentially include an adverse impact on his asthma or mental health – the respondent did not know about this and could not reasonably have been expected to know about it.

170. We have found that at no stage did the claimant say to Mr Hajdarevic, Mr Langford and Ms Jones that working on the rotating shifts caused him any problems. Similarly, there is no evidence that he said anything about this to any of the occupational health advisors he saw. In the absence of some indication from the claimant that shift working was causing the claimant problems there was no reason for the respondent to infer the existence of any such problems form the information they had.

171. We note that the claimant might have mentioned a preference for a fixed day shift in passing to Mr Hajdarevic but we think that if he did, Mr Hajdarevic did not interpret it as a reference to any problems arising from the claimant's asthma (or mental health problems).

172. The respondent did not know, whether actually or constructively, that the claimant was experiencing a substantial disadvantage from shift working (if in fact he was).

173. Finally, in any event, the Tribunal does not have jurisdiction to hear the claimant's claim for reasonable adjustments. The claimant's case was that his request to work on a fixed shift was made in 2018 and it was refused. The claimant's evidence about this was vague but in reality the latest this could reasonably have been was in or around November 2018. In accordance with the claimant's case this request was definitively refused by then so that for the purposes of section 123 (3)(b) EQA this was the time from which time to bring a claim started running. The claimant has provided no good reason for any delay in bringing his claim and an application to extend time was not pursued in any detail or with any force by the claimants representative in submissions.

174. It is also apparent from our findings that the claim for failure to make reasonable adjustments had little prospects of success on the claimant's

evidence so that it would not be just and equitable to extend time to allow the claimant to bring his claim for failure to make reasonable adjustments.

175. For these reasons the claimant claims under sections 20 and 21 of the Equality Act 2010 are unsuccessful and are dismissed.

Section 15 EQA - discrimination arising from disability

176. We refer again to the list of issues set out in the order of employment Judge Cookson and repeated above. It is clear, and in reality was not contested by the respondent, that the majority of the claimant's absences from work arose in consequence of his asthma. Our findings are that the claimant's mental health problems were caused by or exacerbated by his asthma and the two problems were obviously very closely linked. All of the claimant's absences, therefore, except the absence from 13 August 2015 to 14 September 2015 relating to thumb joint dislocation; possibly the one from 27 January 2017 to 6 February 2017 which is recorded as sickness; possibly the one from 3 July 2017 to 11 July 2017 relating to the insect bite and the absence from 13 November 2017 to 27 November 2017 relating to a knee injury were in consequence of the claimant asthma. There was therefore a total of eight periods of absence relating to the claimant's disability including two very long periods of absences the second of which ended with the claimant's dismissal.

177. It was only after the final extended period of absence which followed reasonably shortly from recent additional periods of disability-related absences that the claimant was dismissed. Had the claimant not had these absences, it is clear that his previous absences would not have led to his dismissal.

178. We find therefore that the claimant was treated unfavourably because of something arising in consequence of his disability namely, he was dismissed because of his sickness absences.

179. It was conceded, for the avoidance of doubt, that the claimant's asthma was a disability and, again, that the respondent had knowledge of it throughout the whole of the claimant's employment with them.

180. The substantive matter of dispute in respect of the section 15 claims was whether the claimant's dismissal was a proportionate means of achieving a legitimate aim.

181. We have found that the respondent did have the aims pleaded namely

    181.1. Maintaining quality

    181.2. Maintaining timescales/production

    181.3. Reducing absence to competitive levels

    181.4. Avoiding redundancies

182. As found above, the evidence on this was not challenged by the claimant and in fact in submissions the claimant did agree that these could amount to

legitimate aims. As noted in *Woodcock v Cumbria Primary Care Trust* [2012] I.C.R. 1126, all decisions made and aims pursued by businesses are likely to have a cost element to them. That is because the only reason for the existence of a business is to make money. However, the aims identified above have wider implications namely the protection of the respondent's prestige brand, the reduction of redundancies and the continued existence of the business. We find, therefore, that the aims identified are legitimate aims for the purposes of sections 15 EQA.

183. We had some difficulty with the proportionality. We note that the test as to whether the means of achieving the legitimate aims was proportionate or not is an objective test. As will be seen under 'unfair dismissal' below, we do not think that the respondent acted well in the way in which it decided to dismiss the claimant. It is perfectly clear from our findings that neither Mr Langford nor Ms Ford gave any consideration to the claimant's disability, of which they were both aware, before taking the decision to end his employment.

184. However, we must reluctantly conclude that the decision to dismiss the claimant was a proportionate means of achieving the legitimate aims. The claimant had a poor sickness record. His absence was between 25% and 45% of his available working time depending on which period of time the respondent chose to use as a reference point but in either case it was high. Clearly this was having an impact on the business. In determining whether the decision was proportionate we considered whether there were any other steps the respondent could have taken short of dismissing him that would help to achieve those aims. Ultimately, having regard to the claimant's agreement in the appeal meeting that it was likely that he would be back there again in due course, and that no steps have been identified by the claimant we think that dismissal was proportionate.

185. We have taken into account the continuing impact on the aims of the claimant's unpredictable attendance. The need to find other people to do the claimant's job while he was off and the impact on production and quality means that on any future occasion the claimant was absent the respondent's aims would be frustrated.

186. We note Mr Crow's submissions that a respondent can "accidentally" defend a section 15 claim and we very much feel that that is what has happened in this case. The fact that Mr Langford and Ms Ford gave no consideration to whether any further steps could be taken short of dismissal and that neither of them made any proper enquiries into the nature of the claimant's absence, the likelihood of its recurrence or what could be done to help avoid it at the time does not impact on our objective assessment of whether any such steps might have helped.

187. On balance, we reluctantly conclude that on the basis of the evidence we have heard, much of which was not before Ms Ford or Mr Langford, there were no other steps the respondent could reasonably take that would help achieve its legitimate aims and dismissal was proportionate.

188. For those reasons the claimant's claim of discrimination arising from disability under section 15 Equality Act 2010 is unsuccessful and is dismissed.

Unfair dismissal

189. Dealing finally with the claimant's claim of unfair dismissal, we find that the primary reason for the claimant's dismissal was capability. This is a potentially fair reason under section 98 ERA.

190. It is clear from the dismissal letter from Mr Langford that he also took into account the claimant's conduct in the form of the allegations of lack of contact. However, we find that on the balance of probabilities were the non-contact the only issue the claimant would not have been dismissed for it. There is an instantaneous sanction for non-contact which is the withholding of pay and Mr Hajdarevic did adopt a sensible and pragmatic approach to contact. It might be that had the claimant's contact continued to be unsatisfactory this may have resulted in disciplinary action at some point in the future.

191. It is clear, however, that were it not for the claimant's sickness absence firstly he would not have been in the position where he was being required to make contact and secondly his case would not have progressed to the extent that it did.

192. We do not think that the decision to dismiss the claimant was fair in all the circumstances under section 98 (4) ERA. As should be clear from our findings of fact and our decision under section 15 above, the respondent took no proper steps to investigate the claimant's absence or his likelihood of return before taking the decision to dismiss him. Both Mr Langford and Ms Ford indicated that they did not review what had happened previously but were only interested in new evidence before them. Neither of them asked the claimant when he was likely to return to work and neither of them asked the claimant if there were any steps they could take to help facilitate his return to work and sustain it thereafter.

193. We note also that the tone of the referral to the employment review meeting from the Plant Governance Committee was set on the basis of a misunderstanding by the claimant when his fit note ran out. The references to the claimant being fit to return to work on 8 July 2019 and him then failing to do so are clearly indicative of an assumption on the part of the respondent that the claimant was either unreliable or disingenuous.

194. The fact that Ms Ford referred to the claimant's absences in terms which could easily and sensibly be read as affording blame to the claimant for his absences, the reference in the appeal meeting to the claimant being alleged to be working and the references in Mr Hajdarevic's statement to the claimant being a smoker are all indicative to us of an attempt to paint the claimant in a bad light and blame him for his absences. This indicates that the respondent was unsympathetic to the claimant's sickness and did not give any proper consideration to why he was off or what could be done to help facilitate his return.

195. We note also that the claimant was not given a proper opportunity to comment on the extent of his failure to contact the respondent or the reason for it in the employment review meeting. It was not mentioned at all in the appeal. Insofar as the respondent seeks to rely on conduct as a reason or partial reason for the claimant's dismissal it has manifestly failed to address the issues in *Burchell* insofar as it did not conduct proper investigation and did not give the claimant the opportunity to comment on the allegations before taking his alleged misconduct into account.

196. All of these actions are outside the range of reasonable responses of a reasonable employer. We fail to see how any employer could dismiss an employee for sickness absence without taking the very simple step of at least first asking them when they thought they were likely to come back to work and if there was anything that the employer could do to help ensure they stayed at work. This goes to the very heart of the tests set out in *Spencer v Paragon Wallpapers*.

197. We find, therefore, that the claimant was unfairly dismissed and his claim for unfair dismissal succeeds.

198. We have also considered *Polkey.* We have taken into account the fact that the claimant did indicate to Ms Ford that he accepted he might have future sickness absences and the claimant's manifest reticence in communicating with the respondent about the true extent of the problems he was experiencing. On the basis of the evidence we have heard we find that had the respondent not unfairly dismissed the claimant, there was nonetheless a 50% chance that the claimant would be dismissed within a further year for sickness absences. Aside from this, we do not find that the claimant contributed to his own dismissal in any significant way at all.

199. Finally, we were asked to consider whether there has been any breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures. The claimant relied on paragraphs 19 and 20 which say:

    19. Where misconduct is confirmed or the employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A further act of misconduct or failure to improve performance within a set period would normally result in a final written warning.

    20. If an employee's first misconduct or unsatisfactory performance is sufficiently serious, it may be appropriate to move directly to a final written warning. This might occur where the employee's actions have had, or are liable to have, a serious or harmful impact on the organisation.

200. The respondent submitted that any failure to follow these paragraphs of the code of practice would be a matter relating to the substantive fairness of a dismissal so that any additional uplift for a failure to follow the code in these specific ways would amount to double recovery of compensation.

201. The failure to consider alternative options short of dismissal, including a warning, is an inherent part of our decision that the claimant's dismissal was unfair. However, we do not consider that allowing for an uplift where the unfairness of the employer's actions also results in a breach of the code

would result in double recovery. It will very often be the case that a failure ot follow the code contributes to the unfairness of a dismissal. To disregard code breaches in those circumstances would be to undermine the purpose of the uplift provisions.

202. There has, in our view, been a failure to follow paragraphs 19 and 20 of the ACAS code and the respondent has not provided any reason for doing so. However, this is not a case where there has been a wholesale failure to follow the code in any way at all. We therefore find that an uplift of 10% on any award is appropriate.

Employment Judge Miller

11 March 2021