Case Nos. 2410662/2019
and 2400136/2020
CODE V

EMPLOYMENT TRIBUNALS

Claimant: Mr P McCool

Respondent: Unilever UK Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: Manchester **ON:** 19-23 October 2020
14 & 22 December 2020
(and in chambers on 2 & 3 March 2021)

BEFORE: Employment Judge Batten
Mr D Lancaster
Mr D Mockford

Representation
For the Claimant: Ms C Casserley, Counsel
For the Respondent: Mr B D Williams, Counsel

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1. the complaint of unfair dismissal is well founded; and

2. the claimant suffered unlawful discrimination by the respondent's failure to make reasonable adjustments.

3. The complaint of breach of contract is dismissed upon withdrawal by the claimant.

4. The claim shall proceed to a remedy hearing on a date to be fixed.

REASONS

1. This claim was originally listed for 5 days from 19 to 23 October 2020. The hearing proceeded but the evidence was not completed in the time available due to a number of technical IT difficulties which, on the third day, led to the hearing being moved to another building. The hearing was adjourned, part-heard, and was listed for a further 2 days on 14 and 22 December 2020, when the evidence was completed. As the oral evidence and submissions were completed only at the very end of the seventh hearing day, the Tribunal reserved its judgment.

Background

2. By a claim form dated 7 August 2019 the claimant presented a claim of disability discrimination. The respondent presented a response in which it disputed that the claimant was disabled. Following the termination of his employment, the claimant applied to amend his first claim to include unfair dismissal and breach of contract and subsequently also presented a second claim, comprising of unfair dismissal and breach of contract. The respondent responded to all the complaints pursued.

Evidence

3. An agreed bundle of documents was presented at the commencement of the hearing in accordance with the case management Orders. In the course of the hearing, copies of the occupational health referral forms, an unredacted copy of the respondent's Ill-Health Retirement Application Process flowchart, 2 job descriptions, sundry emails and a 'Theory Test' undertaken by the claimant on 1 April 2019 were added to the main bundle. The respondent then produced a supplementary bundle which included the respondent's sickness absence policy and a secondary bundle which included copies of the claimant's fit notes. References to page numbers in these Reasons are references to the page numbers in the bundles.

4. The claimant gave evidence from a witness statement. In addition, the claimant called his wife, Ms Debra McCool, to give evidence from a witness statement. The respondent called: Ms Linda Rowan – warehouse leader and the claimant's line manager; Ms Caroline Hawthorne – HR manager; and Ms Lisa Foley – operations manager. Each of the respondent's witnesses gave evidence from witness statements. All the witnesses were subject to cross examination.

Issues to be determined

5. At the outset, the Tribunal reviewed the list of issues prepared by Counsel. It was agreed with the parties that the issues to be determined by the Tribunal were as follows: -

Unfair dismissal

1. **Was the claimant dismissed for a potentially fair reason? The respondent asserts capability;**

2. **If so, did the respondent act fairly in doing so, in all the circumstances?**

Disability

3. **Does the claimant have a physical or mental impairment? The claimant relies upon and anxiety and depression;**

4. **If so, was there a substantial and long-term adverse effect on his normal day-to-day activities?**

5. **If the claimant is a disabled person, did the respondent know the claimant was disabled at the relevant time(s)?**

6. **If not, ought the respondent be reasonably expected to have known of the claimant's disability at the relevant time(s)?**

Reasonable adjustments

7. **The claimant relies on the following PCPs:**

   7.1. **Requiring the claimant to take the FLT exam on his first day back to work and within a week of returning;**

   7.2. **Requiring the claimant to return to a full shift pattern within a set period;**

   7.3. **Requiring the claimant to work within a different shift team to his original shift team;**

   7.4. **Requiring the claimant to work independently on a return to work;**

   7.5. **Requiring the claimant to carry out his full duties on his return to work;**

   7.6. **Requiring the claimant to carry out SOP on his immediate return to work;**

   7.7. **Requiring the claimant to maintain a certain level of attendance at work;**

7.8. Requiring the claimant to return to the same role within the same factory;

7.9. Requiring the claimant to resume his duties within a limited phased return.

8. Did or would the respondent apply any of these PCPs to the claimant, which it would also apply to employees who do not share the claimant's alleged disability?

9. In respect of the alleged PCPs, did that PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

10. The substantial disadvantage relied upon by the claimant are:

10.1. As a result of his disability, he was unable to complete the FLT exam on his return to work and unable to fulfil his contractual role;

10.2. As a result of his disability, he was caused significant stress, and suffered a detrimental impact on his health causing him to be absent and subjected to absence management and loss of pay;

10.3. As a result of his disability, he was caused anxiety and distress, leading to a further relapse which prevented him from doing his job and is liable for dismissal.

11. Did the respondent take such steps as it was reasonable to have to take to avoid the disadvantage?

12. In respect of the PCPs alleged, the claimant alleges that the following adjustments should have been made:

12.1. Not required the claimant to take the FLT exam on his immediate return to work and to have agreed with him when he was ready to take the test;

12.2. Provide the claimant with support on his return to work and provide him with the opportunity to work shadow while he rebuilt his confidence;

12.3. Provide the claimant with a longer phased return to work;

12.4. Acknowledged the claimant's mental health condition and put support and coaching measures in place to ensure his successful return to work;

12.5. Not require the claimant to immediately carry out a technical and difficult task;

12.6. Allow the claimant to return to his original shift team so he had familiarity with colleagues;

12.7. Given the claimant a named contact to whom he could have turned if he was not coping;

12.8. Reduced the claimant's duties on his return to work as part of a phased return;

12.9. Allowed the claimant to return to an alternative role and provided training and support.

13. Did the Respondent take such steps as it was reasonable to have to take to avoid the disadvantage?

Findings of fact

6. Having considered all the evidence, the Tribunal made its findings of fact on the basis of the material before it, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities, taking into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts. The Tribunal noted that Ms D'Henin of the respondent's HR team had played a significant role in managing the claimant's absence and return to work, although the respondent did not call her to give evidence. In her absence, the Tribunal was bound to accept the claimant's evidence on a number of key events involving Ms D'Henin and about which the respondent's other witnesses could not assist. The Tribunal's findings of fact relevant to the issues to be determined are as follows.

7. The claimant was employed by the respondent from 21 October 1997 as a warehouse technical operator at the respondent's site in Port Sunlight, Wirral. He worked on a rotating shift pattern equivalent to 40 hours per week, working 12 hours for 2 days, followed by12 hours for 2 nights and then having 4 or 6 days off. It is a requirement of the warehouse technical operator role that employees operate a fork lift truck ("FLT") for which a licence was required and employees were required to undertake regular refresher training. The claimant had a fork lift truck licence. FLT work comprised a substantial and essential part of the work of a warehouse technical operator.

8. The claimant was a disabled person at the material time by reason of depression and anxiety – the respondent conceded that the claimant was a disabled person in closing submissions on the afternoon of day 7 of the final hearing.

9. The respondent has a Code of Business Principles which includes a section on 'respect, dignity and fair treatment'. However, surprisingly for such a large employer, there was no evidence of an equal opportunities policy or a policy referable to the Equality Act 2010 ("EqA"). The Tribunal heard that training for HR officers was not structured and consisted of attendance on ad hoc courses run by local solicitors.

10. The respondent has a Sickness Absence policy. This provides that, where sickness benefits, called 'SIIBs', expire, available options are listed as:

    - *Termination of employment on the grounds of medical severance, serious ill-health retirement, permanent incapacity or incapability. This would occur via the respondent's Ill-Health Retirement Board.*
    - *Extension of SIIBs, authorised by local HR, for a specific period.*
    - *Continuing employment without extension of SIIBs for a specific period prior to resumption of work, on unpaid leave of absence.*

11. In cases of long-term sickness, the Sickness Absence policy provides that all cases should be discussed in full by the line management with local HR. Any recommendation for discharge on health grounds, must be supported by up-to-date medical advice and "must be facilitated through the respondent's Ill-Health Retirement Board".

12. The respondent has a policy for 'serious ill-health retirement' which forms part of the respondent's pension scheme documentation. "Serious Ill-Health" is defined by the Pension Trust Deed and Rules as:

    In the opinion of [the respondent], that

    (a) The contributor is suffering from

    (i) Serious ill-health of a permanent nature, or
    (ii) Is permanently incapacitated,

    and

    (b) Because of the contributor's state of health, the contributor is clearly unfit for work other than work which is not comparable to the contributor's current duties and the contributor has a severely impaired ability to generate occupational earnings.

13. The serious ill-health retirement application process starts with an application form which must be completed by the line manager or HR. The

employee is then seen by occupational health for a specific Ill-health retirement ("IHR") assessment, medical records are gathered and the occupational health physician appointed then writes a report which is submitted together with the case file containing all medical evidence gathered, to the respondent's IHR panel. The employee has a right of appeal against an adverse decision.

14. In August 2017, the claimant was diagnosed with long-term hearing loss. As a result, the respondent consulted its occupational health physician who reported on the claimant's hearing on 14 August 2017. In the months that followed, the claimant developed tinnitus and began to experience difficulties in sleeping which led to a lack of sleep, which in turn began to affect his concentration. In September 2017, the claimant was prescribed anti-depressants.

15. On 11 Dec 17, the claimant was signed off work, sick, due to experiencing what he described as unbearable noise levels, tinnitus and hearing loss.

16. On 10 January 2018, the respondent's occupational health physician reported on the claimant's hearing loss and tinnitus. The report mentioned that the claimant was experiencing a loss of psychological well-being and suggested that this could be work-related. Sick notes tendered in respect of February, March and April 2018 also recorded the claimant's low mood and lack of energy, including insomnia.

17. On 22 January 2018, Ms D'Henin of the respondent's HR team convened a meeting to discuss the recent occupational health report on the claimant. Ms D'Henin recorded that the claimant "does not have any mental health issues" but then proceeded to ask the claimant about what was having an impact on his psychological well-being.

18. On 23 February 2018, a further occupational health report confirmed that the claimant was suffering from severe tinnitus and recommended seeking an alternative working environment. In addition, the report stated that the claimant continued to suffer from difficulties sleeping and suggested a course of Cognitive Behavioural Therapy.

19. On 4 May 2018, the claimant met with HR and one of the line managers from the warehouse. The respondent produced a list of current vacancies, from which it had identified that the only "non hearing role" that it considered would not affect the claimant's hearing, was 2 grades lower than his current role. Other roles at higher grades were available. However, the claimant was told that he would have to apply and compete with others for these higher-grade roles. The HR manager present, Ms D'Henin, gave her view that the claimant had little chance of succeeding with an application based

on what she believed would be the standard and experience of the likely other candidates. The claimant asked for support to return to work in his current role. He indicated that he wanted to return to work at the end of May 2018 and HR said it would need a physical workplace assessment.

20. The meeting on 4 May 2018 led to a further occupational health referral. In the referral form, completed by Ms D'Henin of HR, there is an option to tick a box to ask occupational health whether the claimant's case might be covered by "disability legislation" although this option was not ticked by Ms D'Henin. The questions she posed to occupational health focussed on the claimant's hearing loss and potentially offering a role at lower grade in a 'no hearing protection' area.

21. The occupational health report which resulted, dated 22 May 2018, stated that the claimant felt his mental health had deteriorated significantly in recent weeks and that his current role was not appropriate. Occupational health also volunteered an opinion that the claimant's case "may be covered by disability legislation" even though it had not been asked about that aspect. The respondent did not follow up on this opinion.

22. In May 2018, the claimant was diagnosed with anxiety and depression.

23. By June 2018, the claimant's sick notes record that the reason for his absence is anxiety and depression. Tinnitus is not mentioned.

24. A further occupational health report, dated 20 June 2018, suggested that if the claimant returned to work, he should wear double hearing protection as a reasonable adjustment. The report also recommended a risk assessment on the noise levels in the respondent's factory.

25. On 31 July 2018, Ms D'Henin emailed managers at the respondent, about the proposed risk assessment, describing the claimant as "our employee with the Hearing Issue".

26. On 7 August 2018, the claimant met with his line manager and Ms D'Henin from the respondent's HR team about a return to work. At the meeting the respondent told the claimant what it had done to address noise levels on site and said that it did not have any vacancies in areas with lesser hearing protection. It was suggested that the respondent would need to assess the claimant by way of a bespoke risk assessment to establish whether it was viable and safe for the claimant to return to work. The typed notes of the meeting in the bundle at pages 169-170 are endorsed with further handwritten notes made by Ms D'Henin, of "Additional discussion points". No explanation was given for why these matters were not included in the

typed minutes. The handwritten notes record that the claimant was "now absent with stress and anxiety" and that he had been prescribed anti-depressants. It also records that the claimant and his trade union representative were saying in effect that the claimant was too ill with his mental health to undertake the risk assessment at that time. The trade union representative also enquired about the respondent's IHR policy but he was told, by Ms D'Henin, that this was discretionary and not an entitlement.

27. On 14 September 2018, occupational health reported that the claimant's main issues at the time were related to anxiety and depression but that, despite what is described as "very poor mental health", it was envisaged that he would be able to cooperate with a bespoke risk assessment.

28. As a result, on 9 October 2018, a meeting took place to undertake a bespoke risk assessment on the claimant. This had been rearranged from 1 October 2018 as the claimant had not then attended and he had written to the respondent to say that he could not attend "due to ongoing health matters as evidenced by [his] sicknotes". The Tribunal understood this to be a reference to the claimant's anxiety and depression. The claimant struggled to participate in the meeting and was unresponsive. He told Ms D'Henin that he was not in a good place and his trade union representative submitted that the claimant felt under pressure to be there and that he was not in fact fit to be there. Despite the claimant's obvious difficulties, Ms D'Henin persisted in questioning the claimant, telling him it was "key" that he contributed to the assessment and she sought to agree steps for the claimant's hearing protection.

29. On 18 October 2018, occupational health reported that the claimant was very low and depressed, that a return to work was not imminent, the barrier being the claimant's mental health and perceptions of the respondent. It was suggested that a stress risk assessment would be useful for all parties. The occupational health report suggested that "management resolution" was needed. Despite this, no immediate action was taken by the respondent.

30. On 19 December 2018, when the claimant had been absent from work for 12 months, Ms D'Henin invited the claimant to what the respondent's witnesses called a "capability meeting". She wrote stating that risk assessments had been done in terms of noise and that the respondent was "disappointed that despite the extensive efforts made to provide you with support to return to work, you are not prepared to work with us to enable a return to work in the foreseeable future". The letter makes no mention of the claimant's mental health beyond a reference to the claimant's "perceptions of work". The letter also warned the claimant that a possible outcome of the meeting was dismissal.

31. On 10 January 2019, a capability meeting took place, conducted by the respondent's operations manager, Mark Sumner, assisted by Ms D'Henin from HR. The purpose of the meeting is recorded as being to explore continued employment with the respondent. The claimant said he was feeling a little better after having sessions with a psychologist and that he willing and open to a return to work and to undertake a bespoke risk assessment, and that he does want to come back to work.

32. Following the meeting, Ms D'Henin wrote to the claimant about a bespoke risk assessment to assess and highlight the hazards, which she says "in this instance we know it is noise". There is no acknowledgment of the claimant's mental health issues or depression.

33. On 21 January 2019, the claimant's solicitors wrote to Ms D'Henin of the respondent, to point out that the claimant's mental health issues had not been appreciated or addressed. The solicitors specifically asked whether the claimant has been considered for IHR and, if not, they requested an explanation as to why not.

34. Ms D'Henin's reply, by email dated 24 January 2019, is curt and dismissive. She merely confirms that the parties were in discussion about a phased return to work and therefore the respondent did not consider it appropriate to enter into the discussion proposed by the solicitors.

35. On 1 February 2019, an occupational health report again raised the issue of the claimant's mental health and reported that the claimant was seeing a psychologist. The report suggested a return to work in a "slow step wise fashion" on 50% hours, "increasing these over a period of time" together with updating and training, and that occupational health should review the claimant's progress in week 2 of a phased return to work.

36. At the end of January 2019, Ms D'Henin sought and received copies of noise reports on the respondent's factory. In the bundle, at page 212, is the covering email sending the noise reports. The copy of the email is endorsed with Ms D'Henin's handwritten notes. These consist of notes which are all about hearing issues, with a single reference to the claimant's mental health confined to "impact on mood?" and a note saying "Stress Risk Ass" which is underlined.

37. The parties met on 19 February 2019. The meeting agreed that the claimant should return to work and a date was set for 1 April 2019. There was much discussion of how this would take place, on a phased return, starting at 50% of his working hours and initially on day shifts. The claimant's line manager

says that Refresher training could be arranged "in the first few weeks of days". The claimant requested to return to work on his old shift (green shift) where he thought he would feel more comfortable with people he knew. This was refused due to the changes in the team since the claimant had been off work and the claimant was assigned to a shift with a number of more experienced operators who could support him. It was also agreed that the claimant would take a period of holiday before his return date as his SIIBs had expired and he had significant accrued untaken holiday entitlement to use. Beyond the detail of the initial return, starting on shifts of 6 hours duration, and a review in the second week, little was actually agreed. However, Ms D'Henin was insistent that it would be a "Four-week phased return" effectively ignoring the advice of the occupational health team leader, that 4 weeks was a guideline and that the meeting should be mindful of the period the claimant had been away and undertake close monitoring. There followed a risk assessment of the claimant's hearing, in the factory, but there was no risk assessment of the claimant's mental health or stress risk assessment, nor any discussion of adjustments to take account of the claimant's mental health.

38. The agreement for the claimant's return to work is incorporated into a letter from HR to the claimant, dated 21 February 2019 which appears in the bundle at page 230. The letter confirms a return-to-work plan that is stated to be "a phased return basis starting at 50% of [the claimant's] shifts, 6 hours per day, with a view to completing this within a 4-week period". There is to be an occupational health referral for a review in the second week and it is said that the claimant's line manager will arrange a "FLT familiarisation session" when the claimant returned, that the claimant would work with his line manager to ensure that he is re–introduced into the work environment and that he has all the appropriate skills training to support him back into the workplace with a supply of agreed hearing protection.

39. On 1 April 2019, at 8.00am, the claimant attended work for his phased return to work. It did not go well. At 8.00am, when the claimant arrived at work, his line manager was not there and instead the claimant found a colleague who told him that he first had to go over to the FLT training centre to complete FLT theory and practical sessions with Chris Woods at 8.30am. The claimant's FLT course had been booked some time previously but the claimant had not been told about its timing - on the first morning of his return - before he returned to work and he was not expecting it so soon.

40. The claimant went to the FLT training centre. He was expecting a familiarisation session of around 30 minutes. However, the respondent's procedures had changed during the claimant's absence and he was presented with a theory "test paper" which he started but, after 40 minutes,

the claimant found that he could not go on. The claimant became distressed and felt unable to attempt the practical element. Mr Woods had noticed a change in the claimant and that he looked anxious about things. Mr Woods told the claimant that he could not force him to do the course but made him aware that without it the claimant would be unable to operate FLT. The claimant had not been told that there was a requirement to past certain tests before he could effectively work on shift. Discovering this served to heighten the claimant's anxiety surrounding his return to work. Mr Woods instructed the claimant to go back to the factory and said that he would report the situation. Mr Woods then phoned Ms Rowan, the claimant's line manager, to report that the claimant had not completed the fork lift truck tests.

41. Ms Rowan went to look for the claimant and found him having a drink in the despatch office. Ms Rowan asked the claimant to come and have a chat in a private office. The claimant was reluctant and so Ms Rowan was insistent; she told the claimant, in front of colleagues, to stop what he was doing and come to the office straight away, because she wanted to speak to him. The claimant felt that he was in trouble. In the office, Ms Rowan told the claimant that the FLT tests would need to be rescheduled for the next week and that, until the claimant had completed the FLT course, he would not be able to return to shifts. The claimant told Ms Rowan that he felt overwhelmed. A conversation followed about the claimant's phased return to work. Ms Rowan said the phased return to work should be completed over a 4-week period, with shifts of 6 hours in week 1, then 8-hour shifts in week 2, 10-hour shifts in week 3 and 12-hour shifts in week 4; i.e., the claimant was expected to be working his normal shifts by the fourth week. The claimant said that this was not what was agreed. Ms Rowan consulted HR and returned to say that the claimant would be working shifts of 6 hours for 2 weeks until occupational health had conducted a review. The claimant said to Ms Rowan that this was still not what was agreed and the claimant felt pressured to return to full duties in a short period and regardless of whether he was ready or able to do so. The claimant spent the rest of his first day back shadowing the operatives in the warehouse to familiarise him with the work environment. He did not speak to his line manager again that day.

42. On 2 April 2019, the claimant attended for work again and met with Ms Rowan and the H&S adviser. Ms Rowan said that she could not have the claimant "standing around" and then she put the claimant in an office to read, review and update the Safety Operating Procedures ("SOP") for the warehouse. The task required the claimant to go around the warehouse, observing the procedures in operation and asking questions of other employees, before he wrote up the procedures and any amendments. The claimant believed that he would struggle to complete the task due to the use

of IT required and the change of forms from that with which he had been familiar.

43. On 3 April 2019, at 5.50am, the claimant sent a text to his line manager to say that he was going back to his doctor that day and would not be in work. The claimant was signed off work, sick, and he never returned to work before the termination of his employment.

44. An occupational health appointment had been booked for 9 April 2019, to review the claimant's return to work. The claimant subsequently rearranged his appointment to 16 April 2019.

45. On 10 April 2019, HR wrote to the claimant about his failure to attend occupational health on 9 April 2019. The letter offered the claimant support in the form of the respondent's Employee Assistance Scheme. As an alternative, the claimant was invited to telephone HR for support while his line manager was on holiday. The letter then informed the claimant that his SIIBs entitlement would end on 17 April 2019 assuming he was not by then back at work.

46. On 23 April 2019, occupational health reported that the claimant felt he was not supported on his return to work and that the respondent was trying to get him back on shift without any flexibility in terms of his phased return to work.

47. At the end of April 2019, a new HR manager, Caroline Hawthorne, took over the claimant's case. She emailed occupational health on 26 April 2019, asking whether the claimant's health absence was as a direct result of the failed return to work or whether it was linked to the "original reason for his absence e.g., the tinnitus". In evidence to the Tribunal, Ms Hawthorne confirmed that she had been briefed that the claimant's case was one of hearing loss and that she had not been briefed on any mental health issues. However, occupational health replied to Ms Hawthorne to say that the claimant's absence was due to his "ongoing mental health issues" and not due to "anything particularly new – just a continuation of previous issues".

48. As a result, Ms Hawthorne resolved to set up a meeting with the claimant to "discuss the report and a potential return to work and explore his issued and how we move this forward." The respondent invited the claimant to a "Sickness Absence Case Conference" meeting with HR and his line manager. The claimant did not feel able to attend due to his mental health and he told the respondent how he felt, in an email dated 4 May 2019. The claimant also asked again about information on IHR and for the paperwork to commence an application.

49. On 7 May 2019, Ms Hawthorne emailed the claimant and explained that it was for the claimant's line manager and HR to complete the paperwork for an application for IHR "once we have medical information that suggests you meet the criteria" although she accepts that ultimately that was a decision for the IHR panel.

50. On 19 May 2019, the claimant emailed Ms Hawthorne asking about the outcome of the serious ill health application on the basis that he did not consider himself mentally fit enough to work again. Ms Hawthorne replied in a short email declining "the opportunity of entering into discussions". In so doing, she ignored the claimant's enquiries about an application for IHR which the respondent had not in fact then started.

51. On 9 July 2019, a Sickness Absence Case Conference took place. The claimant attended with his trade union representative. By this time, the claimant's mental health was deteriorating and he was under financial pressure due to his sick pay having ended. The claimant was asked what would be his ideal outcome from the meeting and the claimant said that this would be an invite to a capability dismissal hearing. The claimant was seeking to access his pension upon dismissal and was under the erroneous impression that his dismissal was required for him to do so.

52. On 26 July 2019, the respondent sent the claimant a letter about the Sickness Absence Case Conference meeting, which recorded that the claimant remained in low mood, taking anti-depressants and struggling with his sleep. At the time, the claimant's mother was also seriously ill with cancer and he was understandably distracted by that part of his life.

53. On 30 July 2019, an occupational health report suggested that the claimant would possibly not fulfil the criteria for IHR and stated that it is the prerogative of HR to refer the claimant for consideration if it was felt relevant. The report is particularly unhelpful in determining anything of substance with regards to an application for IHR or indeed the current state of the claimant's mental health.

54. On 16 August 2019, the respondent held a "capability hearing" chaired by Ms Lisa Foley, the respondent's operations manager, who was assisted by Ms Hawthorne from HR. The claimant attended with his trade union representative. After a very brief discussion, the operations manager adjourned to make her decision, which was to dismiss the claimant on 12 weeks' notice. In the course of the adjournment, the trade union

representative negotiated an ex-gratia payment to assist the claimant's finances, of a further 12 weeks' pay.

55. On 23 August 2019, Ms Foley wrote to the claimant to confirm his dismissal for capability due to health reasons on the basis that the claimant was unable to return to his role. Ms Foley also said there were no suitable alternatives that could be explored.

56. The claimant did not appeal his dismissal.

57. After his dismissal, when he drew his pension, the claimant found that his pension was significantly reduced because he had accessed it early.

The Law

58. A concise statement of the applicable law is as follows.

Reasonable adjustments

59. The duty to make reasonable adjustments, in section 20 EqA, arises where:

    (a) the employer applies a provision criterion or practice which places a disabled employee at a substantial disadvantage in comparison with persons who are not disabled; and

    (b) the employer knows or could reasonably be expected to know of the disabled person's disability and that it has the effect in question.

60. As to whether a "provision, criterion or practice" ("PCP") can be identified, the Equality and Human Rights Commission Code of Practice in Employment ("the Code") paragraph 6.10 says the phrase is not defined by EqA but "*should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one-off decisions and actions*".

61. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, section 212(1) EqA defines substantial as being "*more than minor or trivial*". In the case of Griffiths v DWP [2015] EWCA Civ 1265 it was held that if a PCP bites harder on the disabled employee than it does on the able-bodied employee, then the substantial disadvantage test is met for the purposes of a reasonable adjustments claim.

62. Even where a PCP gives rise to a substantial disadvantage, however, the duty does not arise if the employer did not know, and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the disadvantage in question by the PCP (EqA Schedule 8, paragraph 20). This is considered by the Code in paragraphs 5.13 – 5.19 and 6.19 - 6.22.

63. The Code advises that an employer must do all they can reasonably be expected to do to find out if an employee has a disability and should not simply follow the opinion of an occupational health physician that an employee was not disabled. A responsible employer must apply its own mind to deciding whether an employee is disabled under EqA in light of the facts known to it: Gallop v Newport City Council [2013] EWCA Civ 1583.

64. The importance of a Tribunal going through each of the constituent parts of that provision was emphasised by the EAT in Environment Agency –v- Rowan [2008] IRLR 20.

65. The duty is to take such steps as it is reasonable, in all the circumstances, to take to avoid the provision criterion or practice having that effect. The duty is considered in the Code. A list of factors which might be taken into account appears at paragraph 6.28, but (as paragraph 6.29 makes clear) ultimately the test of reasonableness of any step is an objective one depending on the circumstances of the case. An adjustment cannot be a reasonable adjustment unless it alleviates the substantial disadvantage resulting from the PCP – there must be the prospect of the adjustment making a difference. In Archibald v Fife Council [2004] IRLR 216, the House of Lords held that a reasonable adjustment might be transferring to fill an existing vacancy or appointing a disabled employee to an alternative post even at a higher grade and even if they are not the best candidate.

66. Under section 136 EqA, it is for an employer to show that it was not reasonable for them to implement a potential reasonable adjustment.

Unfair dismissal

67. Section 98 of the Employment Rights Act 1996 sets out a two-stage test to determine whether an employee has been unfairly dismissed. First, the employer must show the reason for dismissal or the principal reason and that reason must be a potentially fair reason for dismissal. The respondent contends that the reason for dismissal was the claimant’s capability. Capability is a potentially fair reason for dismissal under section 98 (2) (a) of the Employment Rights Act 1996.

68. If the employer shows a potentially fair reason in law, the Tribunal must then consider the test under section 98(4) of the Employment Rights Act 1996, namely whether, in the circumstances, including the size and administrative resources of the respondent's undertaking, the respondent acted reasonably or unreasonably in treating that reason, i.e. capability, as a sufficient reason for dismissing the claimant and that the question of whether the dismissal is fair or unfair shall be determined in accordance with equity and the substantial merits of the case.

69. In considering the reasonableness of a capability dismissal for ill-health absence, the employer must find out the true medical position and consult with the employee. A fair procedure is essential and must have regard to the nature and likely duration of the illness, its effect on the employee's performance, the possibility of varying contractual duties, and consideration of options such as alternative employment within the employer's business. An employee's entitlement, if any, to an enhanced ill-health benefit with also be relevant. Dismissal should be a last resort, once all other options have been considered.

70. The Tribunal must also consider whether the decision to dismiss fell within the band of reasonable responses open to a reasonable employer in the circumstances of the case: Iceland frozen Foods Ltd -v- Jones [1982] IRLR 439. The range of reasonable responses' test applies both to the decision to dismiss and to the procedure by which that decision is reached: Sainsbury's Supermarkets Ltd –v- Hitt [2003] IRLR 23.

71. In First West Yorkshire Ltd v Haigh UKEAT 0246/07 it was held that a reasonable employer should give proper consideration to an ill-health retirement scheme before it dismisses an employee for long term ill-health absence.

72. The ACAS Code of Practice on Disciplinary and Grievance Procedures contains guidance on the procedures to be undertaken in relation to a dismissal for capability. Although compliance with the ACAS Code is not a statutory requirement, a failure to follow the Code should be taken into account by a Tribunal when determining the reasonableness of a dismissal.

73. In the course of submissions, the Tribunal was referred to a number of cases by Counsel for each party, as follows:

- Project Management Institute v Latif [2007] IRLR 579
- Leeds Teaching Hospitals NHS Trust v Foster UKEAT 0552/10
- DWP v Alam UKEAT 0242/09
- Carreras v United First Partners Research UKEAT 0266/15

- DWP v Higgins [2014] ICR 341
- Jones v University of Manchester [1993] IRLR 218

The Tribunal took these cases as guidance but not in substitution for the statutory provisions

Submissions

74. Counsel for the claimant made a number of detailed submissions which the Tribunal has considered with care but do not rehearse in full here. In essence it was asserted that:- the respondent should have recognised the claimant's mental impairment as a disability, given the weight of evidence that the claimant was impacted by it; that in failing to do so, the respondent's approach to the claimant focussed on his hearing loss and engendered a belief that the hearing loss led to anxiety; that the claimant was pressurised to return to full duties/shifts too early and without reasonable adjustments being put in place; that the respondent did not behave as a reasonable employer would because it did not consider what had gone wrong in the claimant's return to work; nor did it consider that its expectation that the claimant would take the FLT course upon his return to work was a PCP, or that it put the claimant at a substantial disadvantage; that the respondent's witness evidence was contradictory especially in respect of whether there were vacancies or a recruitment freeze; that the respondent had no systems to deal with employees with mental health issues returning to work; and that it failed to consider the claimant for IHR, ignoring the claimant's requests for an application, and giving him incorrect information on the process.

75. Counsel for the respondent made a number of detailed submissions which the Tribunal has also considered with care but do not rehearse in full here. In essence it was asserted that:- the respondent was prepared to concede that the claimant was disabled at the time of his return to work on 1 April 2019; that a question remained as to when the respondent ought to have understood that the claimant was disabled by reason of his anxiety and depression; that the barrier to the respondent's knowledge was that regular reports from occupational health focussed on the claimant's hearing and not his mental health, so that the respondent was on notice of issues but not that such issues had a substantial long-term effect for the purposes of EqA; that there were so many PCPs contended for which it was submitted were not made out factually; that the return to work could have been handled better; that the claimant gave contradictory messages about whether he wished to return to work; that the respondent's approach overall to the claimant had been consistent in the efforts to get him back to work; that the claimant was fairly dismissed for capability at his request; that the claimant's case on unfair dismissal was weak because the claimant had refused at one

point to discuss the IHR application; and that the respondent did consider IHR but the claimant had no contractual right to it.

Conclusions (including where appropriate any additional findings of fact)

76. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

Disability

77. The Tribunal first considered the issue of disability. It was conceded by the respondent on the last day of the hearing, in submissions, that the claimant was a disabled person by reason of his anxiety and depression.

78. The Tribunal considered whether the respondent knew or ought to have known that the claimant was disabled at the relevant time. From early January 2018, occupational health reported that the claimant was experiencing a “loss of psychological well-being”. Sick notes tendered by the claimant first referred to “low mood” and then, from June 2018 onwards, gave the reason for the claimant’s absence as “anxiety and depression”. Occupational health reports obtained from mid-2018 also advised that the claimant’s case “may be covered by disability legislation” even though the occupational health physician had not been asked to consider that aspect. By 7 August 2018, the respondent knew that the claimant was taking anti-depressants. In meetings, in particular on 7 August 2018 and 9 October 2018, the claimant displayed obvious difficulties in engaging with the meeting and his trade union representative pleaded with HR that the claimant was not fit to be there due to his mental health. Given the medical information supplied to the respondent, and the surrounding circumstances, the Tribunal considered that the respondent’s HR personnel were alert to the facts of the claimant’s mental health disability even if they did not realise that those facts met the legal definition of disability. If in doubt, they should have sought further advice from occupational health or specialist advice. There was, for example, no effort to gather information from the claimant’s GP, who was treating the claimant for his depression and anxiety and who would have been in a good position to explain the claimant’s mental ill-health. The Tribunal were concerned that Ms D’Henin’s approach was one of focussing on the claimant’s hearing loss, as if she believed that, once the hearing loss was covered, the claimant’s anxiety would somehow sort itself out. This approach ignored the facts of the claimant’s disability.

79. The Tribunal noted that Ms Hawthorne accepted in evidence that the occupational health reports had commented on the claimant’s mental impairments and that the claimant had, in fact, had more time off where the

reason was depression and anxiety, than tinnitus. Paragraph 61 of Ms Hawthorne's witness statement suggested that it had not been her understanding, at the time, that the claimant's mental impairment might constitute a disability because she thought it arose from "relationship issues" with the respondent, subsequent to the failed return to work, rather than medical issues. Under cross-examination, Ms Hawthorne was taken through the definition of disability under EqA and she then accepted that causation was not relevant to the EqA concept of disability and that she was mistaken in her approach. Ms Hawthorne's evidence was that, when the claimant's case was referred to her to handle, she was told that it was about tinnitus, and she had perceived that the claimant's anxiety was secondary to the tinnitus. The approach of the respondent's senior and experienced HR personnel was tainted by a failure to consider and/or understand the claimant's depression and anxiety, in the face of ample medical evidence, and to treat the claimant's case as a case of tinnitus only. This approach was passed on, and adopted by the HR team. Counsel for the respondent conceded that, with hindsight, the claimant's return to work should have been handled differently. The Tribunal therefore accepted the claimant's submissions that the respondent's approach to the claimant was indicative of a failure to understand and appreciate mental health issues. In light of the above, the Tribunal had no hesitation in concluding that, whilst the HR managers and the claimant's line manager had failed to consider the claimant's depression and anxiety as a disability, they ought reasonably to have been expected to have known of this as constituting the claimant's disability at the relevant time.

Reasonable adjustments

80. The Tribunal examined the PCPs on which the claimant relies:

PCP 1: Requiring the claimant to take the FLT exam on his first day back to work and within a week of returning:

The Tribunal has found that the claimant was not aware that he would be required to take an exam on the morning of the first day of his return to work on 1 April 2019. He was only told about it when he arrived and was sent straight to the FLT centre. The claimant thought that he would be undertaking an "FLT familiarisation session" which is how it was described in the respondent's letter of 21 February 2019. In the period of the claimant's sickness absence, the Tribunal heard that the respondent had revised its processes to include a lengthier course and a test but the claimant was not told of these changes. The evidence was that the FLT exam was a requirement imposed by the respondent and that the claimant was expected to complete it at the start of his return to work. At the FLT centre, Chris Woods started off by telling the claimant that he was expected

to complete theory, practical and pre-use inspection tests, and made him aware that without completing the course, the claimant would be unable to operate FLT, which was a substantial part of the warehouse technical operator role. Mr Woods confirmed in an email (bundle page 383) that it was at this point he noticed that the claimant appeared "overwhelmed by the situation." The following day, Ms Rowan commented to the claimant that she could not have him standing around, effectively suggesting that without the ability to operate FLT the claimant would not have much to do and she then had to look for tasks to give to the claimant. The Tribunal accepted this as evidence that the FLT course requirement had been prioritised without reference to the claimant. When Ms Rowan found the claimant in the despatch office, she had told him that he could do the FLT exam next week. However, when she rang the FLT centre to rebook, Ms Rowan found that one-to-one sessions were booked up for a month. In those circumstances, the Tribunal considered that the claimant's session must have been booked sometime in advance of the claimant's return to work date - the Tribunal considered that there had been ample time to explain what would happen on the first day back and to prepare the claimant for this requirement as part of his return to work but that the respondent failed to do so.

PCP 2: Requiring the claimant to return to a full shift pattern within a set period:

The respondent's letter of 21 February 2019 says, "You will return on a phased return basis … with a view to completing this within a 4-week period." In fact, the Tribunal considered that the respondent's usual practice was for returning employees to undertake a 4-week phased return and that the respondent expected the claimant to be working a full shift pattern within 4 weeks. Ms D'Henin said as much in the meeting of 19 February 2019. The notes of the discussion on page 228 of the bundle show that the occupational health team leader comments that "Four weeks is the guideline, but we need to be mindful of the period you have been away". This is followed by a suggestion of a review at the end of week 1, but later Ms D'Henin is insistent upon a "Four-week phased return" without qualification or condition. This expectation was repeated to the claimant by Ms Rowan in their discussion on 1 April 2019, namely that the claimant was expecting to be working his normal shifts by the fourth week. The Tribunal noted that Ms Rowan's statement was made despite that there was to be a review of the claimant's phased return in the second week. In those circumstances, the Tribunal concluded that it was the respondent's practice of requiring a phased return to work to be completed in 4 weeks and that this was applied to the claimant.

PCP 3: Requiring the claimant to work within a different shift team to his original shift team:

The Tribunal found that composition of the claimant's team had changed during the almost 15 months that the claimant had been away from the workplace. Some employees had moved teams or left. That is to be expected over such a long period of time. Therefore, the claimant was put to work in a different team to his original team because it was not possible for the respondent to do otherwise. In fact, the respondent put the claimant into a team with several of the more experienced operatives who could support him and assist his return to work and did not require him to work in a different team as such – changes in the teams dictated the approach.

PCP 4: Requiring the claimant to work independently on a return to work:

The Tribunal did not consider that the claimant was in fact required to work independently on his return to work. The FLT exam was booked as a one-to-one session with Chris Woods and the evidence was that the claimant worked alongside Mr Woods until he felt unable to continue. In order to review the SOPs, the claimant was required to go around the warehouse, watching what colleagues were doing and asking them questions about the tasks they were undertaking.

PCP 5: Requiring the claimant to carry out his full duties on his return to work:

The Tribunal did not consider that the claimant had been required to carry out his full duties on his return to work. Following the meeting on 19 February 2019, it was agreed that the claimant would undertake a phased return to work on limited hours. FLT work comprised a substantial and essential part of the work of a warehouse technical operator. The claimant would therefore be unable to carry out his full duties, including FLT work, until such time as he completed the FLT familiarisation course and tests. In addition, the respondent's letter sent after the meeting on 19 February 2019, refers to the claimant being given "skills training" during the phased return to work. The Tribunal therefore concluded that the respondent had envisaged the claimant being reintroduced to aspects of his role, incrementally, over the phased return period.

PCP 6: Requiring the claimant to carry out SOP on his immediate return to work:

The Tribunal did not consider that the claimant had been required to carry out SOP work on his immediate return to work. In fact, the Tribunal has found that the work to read, review and update the SOP was something that Ms Rowan found for the claimant to do on his second day, and as an after-thought, once the claimant had felt unable to continue the FLT tests. Ms

Rowan's evidence was that the SOP work was introduced because she did not want the claimant to be standing around.

PCP 7: Requiring the claimant to maintain a certain level of attendance at work:

The working hours of the claimant's phased return are set out in the respondent's letter of 21 February 2019 to the extent that it says that the claimant was required to start his phased return by working "50% if your shift, 6 hours per day." The claimant completed 6 hours per day on each of 1 and 2 April 2019. It had been agreed that the phased return would be reviewed in the second week, which the tribunal understood to include a review of the number of working hours undertaken, to ensure that the claimant was coping. The respondent's letter is silent as to how and when the phased return hours might be increased towards full hours. However, in the claimant's conversation with his line manager, Ms Rowan, on the first day, she explained that her understanding was different and that she expected that the claimant would work increasingly longer shifts over a 4-week period. That is not set out in the letter of 21 February 2019, describing the phased return. The Tribunal considered that, if it had been envisaged that the claimant's working hours were to be fixed say each week, as Ms Rowan described, those hours would be set out in the respondent's letter and that one purpose of the review would be unnecessary. In the circumstances, the Tribunal considered that the respondent had not required the claimant to maintain a certain level of attendance at work over the phased return period and that his attendance and working hours would form part of the review in the second week. The tribunal considered that the fact there was to be a review indicated that the terms of the phased return might be altered if appropriate following the review.

PCP 8: Requiring the claimant to return to the same role within the same factory:

In considering this aspect, the Tribunal reviewed the evidence concerning efforts to look at suitable alternative employment for the claimant. Because the respondent's personnel were concerned about the claimant's hearing loss, they researched which areas of their operations might be best for his hearing. Alternatives were looked at, including 2 Planner positions at Trafford Park and working in other areas of the warehouse function. Eventually, it was confirmed that the warehouse in which the claimant had worked before was the place with the lowest noise record and which had been subject to noise reduction measures. However, the Tribunal did not consider that the respondent had required the claimant to return to the same role within the same factory; rather it concluded that it had been agreed between the parties that a return to the claimant's old role in the same

workplace was the most appropriate way to facilitate the claimant's return to work. That position was arrived at precisely because of the respondent's approach to the claimant's case, focussing on his hearing issues in the belief that, if the claimant's hearing loss was addressed, his anxiety would diminish and a return to work would be successful, rather than considering the claimant's mental health issues.

<u>PCP 9: Requiring the claimant to resume his duties within a limited phased return:</u>

As explained in relation to PCP2, the respondent's usual practice was for returning employees to undertake a 4-week phased return and the respondent expected the claimant to be working a full shift pattern within 4 weeks. The letter of 21 February 2019 refers to a 4-week period. In the meeting of 19 February 2019, Ms D'Henin is insistent upon a "Four-week phased return" without qualification or condition and despite the comment by occupational health as to being mindful of the length of time that the claimant had been absent. This expectation was repeated to the claimant by Ms Rowan in their discussion on 1 April 2019, when she explained that she expected the claimant to be working his normal shifts by the fourth week. In those circumstances, the Tribunal concluded that the respondent's personnel required the claimant to complete his phased return to work in 4 weeks and to resume his full duties by then.

81. The Tribunal has therefore considered that the respondent applied the PCPs numbered 1, 2 and 9 above to the claimant and the Tribunal also considered that the respondent would also apply PCPs 1, 2 and 9 to employees who do not share the claimant's disability. The Tribunal concluded that any employee returning to the warehouse technical operator role after a long absence would have been expected to take the FLT exam on their first day back to work. FLT work comprised a substantial and essential part of the work of a warehouse technical operator. As Mr Woods confirmed, the claimant was expected to complete theory, practical and pre-use inspection tests at the beginning of the phased return to work because, otherwise, the claimant would be unable to operate FLT. This supports Ms Rowan's view, that without the FLT course completed, the claimant would be in her view standing around without much to do and she then had to look for tasks to give to the claimant.

82. In addition, the evidence showed that it was the respondent's usual practice to arrange phased returns for employees over a limited 4-week period. Hence, in the meeting of 19 February 2019, the occupational health team leader comments that "Four weeks is the guideline" and the respondent's personnel proceeded with 4 weeks in mind, as the usual length for phased

returns to work and regardless of whether that was appropriate for the claimant.

83. In respect of PCPs 1, 2 and 9 above, the Tribunal considered that each of these PCPs put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. The Tribunal considered that putting the claimant into a test situation as the first activity on his first day back after such a long period of absence was ill-thought out, unreasonable and unnecessary, particularly in light of his depression and anxiety. Given the evidence of the claimant's mental health at the time, the Tribunal accepted that the claimant suffered substantial disadvantage in that he was unable to complete the FLT on his return to work and therefore unable to fulfil his contractual role and/or the respondent's expectations. Ms Rowan had to find him other work to do and she had not been prepared for this scenario because she and/or HR had not taken account of the claimant's disability when making arrangements for the claimant's return to work. The claimant suffered significant stress, and a detrimental impact on his health, causing him to be absent from 3 April 2019. The claimant was therefore unable to complete a phased return to work in line with the respondent's expectation that such would be completed in a 4-week period. The expectation of 4 weeks for a phased return to work also placed the claimant at a substantial disadvantage. The claimant's relapse led to a further period of ill-health absence resulting in the respondent subjecting the claimant to absence management and a consequent loss of pay, and ultimately his dismissal. The Tribunal therefore considered that the claimant's case as to substantial disadvantage is made out and the duty on the respondent employer to make reasonable adjustments was triggered.

84. In light of the Tribunal's findings of fact, and the above conclusions, it follows that the Tribunal has concluded that the respondent did not take such steps as it was reasonable to have to take to avoid the disadvantage(s) to the claimant, in particular in respect of the claimant's return to work and also in its handling of the claimant once the phased return had failed. As the Tribunal has found, the respondent had no regard to the claimant's disability. It closed its mind to the issue of whether the claimant's depression and anxiety constituted a disability and effectively ignored the weight of evidence in front of it for over a year.

85. The claimant has contended that a number of adjustments should have been made. The Tribunal accepted that the following were reasonable adjustments in the circumstances of this case and should have been made, in order to support the claimant and promote a successful return to work:

84.1 Not requiring the claimant to take the FLT tests on his immediate return to work and to have agreed with him when he was ready to take the tests – the respondent did not seek to argue that the FLT tests could not have been taken at a later date or in stages. The Tribunal considered that this should have been discussed and explored with the claimant in any event;

84.2 Providing the claimant with support on his return to work and provide him with the opportunity to work shadow while he rebuilt his confidence – the letter of 21 February 2019 says that “During this phased return you will work with Linda [Rowan] on ensuring that you are reintroduced into the work environment and have all the appropriate skills training to support you back into the workplace – the Tribunal wondered what this statement meant because in reality a gradual reintroduction with training and support simply did not happen, when it should have done. On the first day, nobody had arranged to meet and greet the claimant, there was no structure or clear plan for a gradual introduction to the work environment and no debrief at the end of the first day;

84.3 Providing the claimant with a longer phased return to work – there was no evidence of a flexibility in the respondent’s approach to the duration of the phased return and considerable misunderstanding between the parties as to what would happen and/or be expected of the claimant in what timescale. The respondent’s fixation with 4 weeks was never explained;

84.4 Acknowledged the claimant’s mental health condition and putting support and coaching measures in place to ensure his successful return to work – as explained at 84.2 above, the Tribunal considered that it would have been appropriate for the claimant to undergo a gradual reintroduction to the workplace, with training and support, including meeting and greeting the claimant, briefing him on the structure/plan for his phased return and a debrief at the end of the each day to check on his mood and well-being;

84.5 Not requiring the claimant to immediately carry out a technical and difficult task – the Tribunal took this to refer to the FLT tests and also to the SOP work, which was new and unfamiliar to the claimant. Ms Rowan’s witness statement, paragraph 29, had said that the claimant had not raise any issue with attending the FLT training upon his return to work. This was subsequently corrected at the start of Ms Rowan’s oral evidence when she amended her evidence and explained that the claimant had not been told that he would be doing the FLT tests immediately upon his return to work and that he had to

be directed to the FLT centre when he arrived for work on 1 April 2019. Ms Rowan candidly accepted that the matter of the FLT tests was a complete surprise to the claimant. In respect of the SOP, the Tribunal concluded that the claimant was put to the SOP task without support and without regard for his mental impairment, by Ms Rowan as an after-thought because the claimant had not completed the FLT tests as expected;

84.6 Giving the claimant a named contact of who he could have turned to if he was not coping – the Tribunal considered that the provision of a named peer contact or “work buddy” within the team would have been easy to arrange, to support the claimant and give him a reference point for any questions, whilst that individual could keep an eye on the claimant during the day and talk to him informally and confidentially about his progress. This was also important as the claimant was joining a new team with colleagues he may not have known beforehand and whom he may therefore have felt reticent about approaching if in difficulty;

84.7 Reducing the claimant’s duties on his return to work as part of a phased return – whilst the claimant’s hours were reduced to 6 per day, as opposed to a normal 12-hour shift, there was no evidence that any thought had been given to the nature of the duties that the claimant should be introduced to and when. Instead, by arranging the FLT tests for the first morning back, the Tribunal considered that the respondent intended the claimant to be doing his full duties from day 1, as evidenced by the fact that Ms Rowan thereafter had to find something for the claimant to do instead. If an agreed plan had been in place she would have been able to consult that, and the claimant would have known what else was expected of him. The Tribunal considered that the fact of the claimant being immediately put into the FLT tests and then given SOP work, caused him increased anxiety which could have been avoided if there had been a clear understanding between the parties, and thereby notice to the claimant, of what was to happen and when;

84.8 Allowing the claimant to return to an alternative role and provided training and support – case law supports the transfer of an employee to fill an existing vacancy, even where the employee concerned may not be the best candidate and even at a higher grade, without competitive interview and with training and support, as a reasonable adjustment. The Tribunal noted the respondent’s evidence showed that no serious consideration had been given to alternative roles for the claimant. For-example, the only vacancy discussed in meetings

was a job 2 grades lower than the claimant's role, although in the course of the hearing, the respondent disclosed 2 planner vacancies which the claimant could have done with training. However, Ms Foley's evidence was clear and the Tribunal took from it that the respondent was never going to consider the claimant for any move to an alternative role: when asked about the possibility of redeployment, Ms Foley's evidence was that she was not fully aware of the duty to make adjustments, that agreements with the respondent's recognised trade unions apparently precluded the transfer of a disabled employee into an alternative role and, when the possibility of a transfer/redeployment was put to her, she answered "why would you do that?".

86. The Tribunal did not consider that allowing the claimant to return to his original shift team would be a reasonable adjustment – see the list of issues at paragraph 5, number 12.6, above. The Tribunal heard that the team in which the claimant had worked before his absence had changed because several members of the team had moved or left the respondent and the team had since been populated by a number of new employees and/or agency staff with less experience. It was unclear if the claimant's original team could have been re-formed but in any event the Tribunal considered that such would place an unreasonable and disruptive burden on the respondent, even if it was possible. The respondent's approach of putting the claimant into a team with a number of experienced operatives seemed to the Tribunal to be a sensible way forward in the circumstances.

87. In light of all the above, the Tribunal finds that the claimant's complaint of disability discrimination, being a failure to make reasonable adjustments succeeds.

Unfair dismissal

88. The Tribunal accepted the respondent's assertion that the claimant was dismissed for capability, which is a potentially fair reason under ERA.

89. The Tribunal then considered whether the respondent acted fairly in dismissing the claimant for capability, in all the circumstances of this case. The essential question is whether the respondent acted reasonably or unreasonably in treating its reason, capability, as a sufficient reason for dismissing the claimant and, in determining such, the Tribunal shall have regard to the size and administrative resources of the employer. In this case, the respondent is a sizeable employer with a dedicated team of HR professionals and significant resources. The Tribunal's conclusion was that, in the circumstances of the case, the claimant had been unfairly dismissed for the following reasons.

90. First, the Tribunal has found that the failure of the respondent to have regard to the claimant's disability led to it failing to discharge its duty to make reasonable adjustments. This resulted in the claimant being unable to complete a phased return to work. The impact of that situation on the claimant was traumatic and led to his incapability. There was no attempt by the respondent to review the failed return to work with a view to understanding what had gone wrong nor to appreciate that the claimant had not been supported in many ways. Instead, the respondent concluded that the claimant was either unwilling or incapable of returning to work. On 10 April 2019, Ms Hawthorne wrote to the claimant about the failed return to work. Her evidence was that this was a standard letter. However, the Tribunal considered that the contents displayed a failure to understand the claimant's position – statements such as "you no longer felt well enough to attend work", "Unfortunately, you have not returned Linda's request to discuss your well-being over the phone" and "should your absence extend beyond 17 April 2019 you will no longer be eligible to receive SIIBs" are indicative of the situation being viewed as the claimant's fault and that he should take action to rectify matters and get back to work. There is no suggestion that the claimant's mental health was being considered, or that the respondent might need to review and/or change its approach to the phased return to work.

91. Likewise, there was no thought given to alternative roles or redeployment for the claimant. The respondent's evidence on this aspect was contradictory. Ms Hawthorne contended that she had looked for other jobs for the claimant, albeit that she admitted her search was limited to jobs on the site and did not include secondments and she accepted that the claimant had been deterred from other roles. Under cross-examination, Ms Hawthorne sought to justify her limited efforts by suggesting that the respondent may have had a global recruitment freeze at the relevant time. In contrast, Ms Foley's evidence was that there were a number of vacancies advertised and that she and HR were very open to finding a role for the claimant.

92. Further, if, as the respondent concluded, the claimant was not fit to work at all and would not be returning to work, the Tribunal considered that the respondent had a duty to facilitate the claimant's retirement for ill-health or at least to consider such before moving to dismiss him. The claimant, his trade union representative and also his solicitors all sought information on the respondent's IHR scheme from time to time. For reasons which were never properly explained, the claimant was denied sight of the IHR guidance and scheme flowchart despite his requests which were largely ignored and, indeed, the documentation was withheld and only fully disclosed in the course of the Tribunal hearing. It was apparent from the documentation that

an employee was unable to apply for IHR himself even though it appeared to the Tribunal, and the respondent did not disagree when this was raised, that the claimant met the definition of "Serious Ill-Health" as defined by the respondent's Pension Trust Deed and Rules – see paragraph 12 above. However, an application for IHR had to be instigated by HR, which acted not just as gatekeeper but behaved as if IHR was in their gift. For example, Ms D'Henin dismissed the claimant's enquiries in August 2018, saying that IHR was discretionary and not a contractual entitlement. Nevertheless, there was no evidence that any discretion was exercised in terms of considering the claimant for IHR. Instead, HR personnel wrongly suggested to the claimant that, before an application could be started, there first needed to be medical evidence in existence to demonstrate that he met the criteria for serious ill-health (bundle page 258) and later sought to deny that there was such evidence, seemingly based on comments in the occupational health reports in May 2019 and of 30 July 2019, that the claimant "possibly would not fulfil the criteria". That is not how the respondent's IHR scheme in fact works: an IHR application leads to the gathering of available medical evidence and the instruction of a specialist assessment of the employee against the IHR criteria, all of which evidence is then submitted to the respondent's IHR panel which makes the decision on whether an employee is eligible for IHR. As the occupational health report of 30 July 2019 advised, it is a matter for the respondent to refer the claimant for consideration of IHR.

93. Counsel for the respondent suggested that the respondent had invited the claimant in to discuss an IHR application and that the claimant had been given a number of opportunities to ask about IHR. The Tribunal has, however, found as a fact that the claimant did so ask and that his efforts were effectively thwarted. In light of the Tribunal's finding as to the impression the claimant had gained, that pursuing IHR was futile, the Tribunal rejected the respondent's submissions that the claimant's fate was sealed by his own failure to progress such an application or that the evidence pointed towards the claimant's application being unsuccessful. The Tribunal considered that these submissions simply reflect the respondent's continuing failure to acknowledge or understand the claimant's depression and anxiety as disabling conditions. In this regard, the Tribunal was mindful of the evidence of the respondent's witnesses, namely that IHR at the respondent tended to arise in cases of physical impairment – the Tribunal was told by Ms Hawthorne that she was only aware of 2 IHR cases involving mental health (across a large organisation over many years) and Ms Foley told the Tribunal that she understood that IHR was only given to "life-limiting conditions", underlining the deficit in understanding of mental impairment and mental disability which has informed the respondent's approach to the claimant throughout. As Ms D'Henin's note in July 2018 confirmed, the respondent's approach was to "our employee with the Hearing Issue".

94. Taking account of the history of the claimant's case and his efforts to explore IHR, viewed as a whole, the Tribunal considered that the numerous efforts by Ms Hawthorne and HR to avoid starting an IHR application and the misleading statements issued about the process, constituted a concerted effort to deny the claimant any consideration for IHR. Importantly, on 19 May 2019, the claimant asked Ms Hawthorne about the outcome of his IHR application because he thought one was being processed, when it had not even been started. Ms Hawthorne's response consisted of a brief statement, declining discussions, and she did not correct the claimant's misunderstanding by making it clear that no IHR application had ever been started. The Tribunal was concerned to hear Ms Hawthorne suggest, under cross-examination, that she was not in fact familiar with the IHR process and had not seen the IHR flowchart before the Tribunal hearing. The Tribunal found that suggestion was not credible in light of her actions and responses to the claimant at the relevant time and also in the context of the respondent's submissions that Ms Hawthorne had in fact tried to explain the IHR procedure to the claimant. The Tribunal therefore concluded that the respondent did not give proper consideration to IHR before dismissing the claimant for incapability.

95. By the time the capability procedure was embarked upon by the respondent, in July 2019, with the potential for dismissal of the claimant for incapability, the Tribunal considered that the claimant had in effect given up trying to pursue IHR. He had lost faith in the respondent. His mental health had significantly deteriorated and he had gained the impression that HR were not going to assist him. The claimant was also seized of the mistaken belief that he would be able to access a full pension if he was dismissed for incapability. The respondent made much in submissions of the claimant's conduct at the meetings on 9 July and 16 August 2019, in an effort to justify his dismissal for capability and to support its case that the claimant's dismissal was fair. The respondent contended that the claimant had accepted that he was no longer able to fulfil the role of warehouse technical operator, he had admitted he was no longer mentally fit to work and was seeking to be dismissed, he had not appealed his dismissal and he had accepted an ex-gratia payment on termination of his employment. The Tribunal rejected the submission that such matters should impact on the fairness or otherwise of the claimant's dismissal in the circumstances of the case. The Tribunal considered that such matters did not mean that the respondent no longer had a duty to make reasonable adjustments or that it did not need to consider the claimant's mental ill-health.

96. The Tribunal further considered that it would be illogical and perverse to hold that the claimant's dismissal could be fair and yet find that in the lead up to, and at the point of dismissal, the respondent failed to make

reasonable adjustments. If, and so long as, it would be reasonable for the respondent to make reasonable adjustments, it must follow that dismissal cannot lie within the range of reasonable responses. The Tribunal considered that such a position would only prevail once the reasonable adjustments, which it was the respondent's duty to seek to apply, had been tried and found to have failed.

97. In all the circumstances, the Tribunal decided that the complaint of unfair dismissal is well-founded and succeeds.

Remedy

98. As the claimant has succeeded in his complaints, the claim shall proceed to a remedy hearing on a date to be notified in due course.

Employment Judge Batten
19 March 2021

JUDGMENT SENT TO THE PARTIES ON:

23 March 2021

FOR THE TRIBUNAL OFFICE