Case No. 3400476/2016

EMPLOYMENT TRIBUNALS

Claimant: Mr Paul Haworth

Respondent: Unilever UK Limited

HEARD AT: Norwich ET **ON**: 21, 22 August 2017

23 August 2017 (in camera)

BEFORE: **Employment Judge Morron**

MEMBERS: **Mr R Allan; Ms R Kilner**

REPRESENTATION

For the Claimant: In person, assisted by his wife Mrs S Haworth
For the Respondent: Mr A Ohringer, Counsel

JUDGMENT

It is the unanimous decision of the Tribunal that:

1. The Claimant was unfairly dismissed.
2. The claims under the Equality Act 2010 are dismissed.

Note (1) A remedy hearing has been arranged for 27 November 2017.

(2) Further Orders of the Tribunal follow the Reasons and are at the end of this Judgment

REASONS

Background and Issues

1. This is a case in which there has been active case management. Whilst the Claimant was not represented at the hearing, he had been represented by Messrs Pattinson & Brewer Solicitors from the presentation of the ET1 until after the sending of a letter of clarification dated 7 November 2016. The Claimant's List of Issues (drafts 1-3) was prepared by Ms Tara O'Halloran of Counsel who also represented the Claimant at a Preliminary Hearing on 8 July 2016 and at a second Preliminary Hearing on 11 August 2016. The Respondent was represented on both occasions by Mr Ohringer.

2. At the first Preliminary Hearing the Respondent expressed concerns as to the manner in which the disability discrimination claims were pleaded. Many of these concerns were shared by Employment Judge Postle who directed that the second Preliminary Hearing be held to determine whether the PCPs relied upon pursuant to the claims of indirect discrimination under section 19, Equality Act 2010 and failure to make reasonable adjustments under section 20 "have any foundation in law." He further expressed doubt whether the claim for discrimination arising from disability under section 15 "can be advanced in law in any event." He described the PCPs "as pleaded at the present time" as "flawed." Following this hearing and prior to the Second Preliminary Hearing Counsel for the Claimant produced the third draft List of Issues dated 10 August 2016. We were handed a copy at the hearing as it was not in the Hearing Bundle.

3. At the second Preliminary Hearing on 11 August 2016, some progress appears to have been made in agreeing and settling the issues for determination; although the PCPs relied upon, which were said to be ten in number, were made the subject of a deposit order on the grounds that the claims under section 19 and 20 relying on those PCPs had little reasonable prospect of success.

4. Following the making of the deposit order of £150 (£15 per PCP) the Claimant's union paid a £60 deposit on his behalf and the solicitors wrote a letter dated 7 November 2016 stating that the Claimant now relied upon 4 PCP's only (hence the payment of £60). The letter offered clarification of which PCPs were still relied upon and how, following the second Preliminary Hearing and Case Management Discussion, the Claimant was pleading his case. Counsel also drafted a short further clarification entitled "Further Information" which is at page 65-6 of the Hearing Bundle. The Claimant's solicitors also drafted witness statements for him and his wife but subsequently ceased to represent him.

5. We have not found it easy to reconcile the issues (and PCPs) set out at the second Preliminary Hearing with the purported clarification letter dated 7 November 2016; but this is a matter to which we return in our determination of the issues.

6. In the meantime, it was agreed at the commencement of our hearing that the matters we had to determine were as set out in paragraph 13.1 to 13.11 of the record of the second Preliminary Hearing dated 11 August 2016. They can be found at pages 52-55 of the Hearing Bundle and we see no advantage in reproducing them here. We will address each in turn in the determination section of this judgment.

The Hearing

7. At the hearing we heard sworn evidence from the Claimant and his wife Mrs Susan Haworth. Their witness statements were signed and taken as read. They answered questions from Mr Ohringer and the Tribunal. The Respondent then called Mr Neill Allman, the Claimant's line manager; Mr Elliott Creak who made the decision to dismiss; and Mr Andrew Watts who upheld that decision on appeal. Each gave sworn evidence in which they relied upon their written witness statements, which Mr Allman and Mr Creak signed at the hearing; and answered questions from Mrs Haworth on behalf of her husband and from the Tribunal.

8. At the conclusion of the evidence Mr Ohringer made a closing statement in which he referred to an Outline Submission produced at the start of the hearing on 21 August. He also produced a bundle of authorities. The Claimant's wife also addressed us briefly.

9. We reserved our decision at the end of the second day and met in camera on the following day to reach our decision.

Findings of Fact

10. Mr Ohringer began his closing statement by submitting that "in terms of factual matters there is not a huge area of disagreement. The difference is as to what was meant or understood." We agree with that and in setting out the essential facts we propose to identify the limited areas of disagreement and differences of interpretation which are critical to these claims; and to make findings upon them. Where we do not identify a fact as falling within this category, it can be taken to be undisputed.

11. The Claimant began working for the Respondent/its predecessor on 28 August 2001. He has undertaken a variety of jobs. He was initially employed as a Production Operative. In 2003 he became a Storeman; and in 2005 he was appointed Material Supply Co-ordinator. On 1 November 2014 he was redeployed as part of a redundancy exercise as a Team Member and he signed a revised Statement of Terms and Conditions on 19 March 2015. In substance his position was that of a line operative.

12. The Respondent operates an annualised hours system incorporating rolled up holiday pay. The Claimant's Statement of Terms and Conditions (page 95 of Bundle) states at clause 8, which is headed Hours of Work,

> "You are employed under a 2151 hour annualised hours contract. 1900 hours are available to be worked, comprising of 1732 rostered hours and 168 reserve hours under the annualised hours agreement, plus 251 hours holiday entitlement."

13. We find that these constitute the Claimant's contracted hours; but as worded this does not transparently equate to a particular number of hours per week. The Claimant told the Tribunal that he had habitually worked 43 hours per week before going off sick in 2014 and that these were his rostered hours. Mr Watts in oral evidence in chief confirmed that the company operated a 43 hour roster and that additional hours could be required (coming out of the 168 reserved hours per person) but that this would only be compulsory if 2 weeks notice was given. It is not suggested by the Claimant that any such notice was given to him at a time material to this claim.

14. Mr Watts agreed that if 2 weeks notice were given, an individual's additional shift work can mean that he works 60 hours that week.

15. The Claimant's Statement of Terms and Conditions, paragraph 18, is headed "Disciplinary Procedure" but no copy of the Respondent's Disciplinary Procedure was made available to the Tribunal. Paragraph 19 refers to a Grievance Procedure.

16. In late 2013 the Claimant was selected for compulsory redundancy. Following an appeal he was redeployed into the Mill Team as a Team Member but he found this "very unsettling" and did not feel wanted by the two Team Leaders, Chris Moore and Wally Gilmore.

17. In April 2014 an incident took place in which the Claimant objected to the need to try on a new uniform. The incident led to a complaint which was investigated but the Claimant was not found to have been aggressive and no disciplinary action was taken.

18. The incident did upset the Claimant, however, and on 20 June 2014 he was signed off sick (certified as depression/anxiety) through to September 2014.

19. A further redundancy consultation exercise took place during this period and the Claimant was again told he was at risk on 21 August 2014. On 2 October 2014, however, he was told that no further reductions were required in the Days Team Member group and he was no longer at risk.

20. On 11 September 2014 the Claimant's GP issued a Statement of Fitness to Work in which he stated that he may be fit for work after one month on the basis of a phased return with altered hours (page 192 of Hearing Bundle).

21. This was confirmed in an email from the in-house Occupational Health nurse, Marsha Shaw, to the Claimant's Line Manager, Neil Allman, dated 15 September 2014. This stated that the Claimant "is now showing significant improvement in his symptoms" and was able to return on a rehabilitation plan lasting approximately six weeks with an anticipated return to normal hours and duties at the end of that time, "in principle". Specific hours and tasks during the phased return were to be agreed between the Claimant and his manager "with occupational health input if required." A further Occupational Health ("OH") appointment was arranged for 24 September 2014.

22. The phased return began as planed but the Claimant was unable to attend for work in week 2 "due to an increase in his medication and unpleasant side

effects" (OH report dated 1.10.14, Hearing Bundle page 195). He returned that week and worked 3 days. Apart from the hiccup in week 2, OH recommended essentially the same phased return over 6 weeks, with "regular occupational health appointments" to keep matters under review.

23. On 2 October 2014 Mr Allman wrote to the Claimant expressing concern that he had not attended for work and had not answered the phone when contacted. He had been absent from work for more than 7 days but had not provided a certificate from his GP. Mr Allman informed the Claimant in this letter that he would, from 29 September 2014, be paid SSP only and not the full sick pay under the company's SIIB scheme. He also sent the Claimant a copy of the Absent Without Leave Policy and asked him to contact the company within 5 days.

24. The Claimant was then off work for seven days from 2 October 2014 with a lymph gland infection. In a further OH report dated 8 October 2014, Marsha Shaw emailed Mr Allman to say that the Claimant had now been diagnosed with moderate depression but was "very keen to attempt a new rehabilitation return to work from next week." She stated that this would "need to be reviewed as an ongoing process and Paul is aware of this." He did, however, feel "well enough mentally to attempt a return." A new six week return to work plan was put in place similar to previous versions and a further OH appointment arranged.

25. On 25 November 2014 Ms Shaw emailed Mr Allman to say that the Claimant was now on his second rehabilitation plan and was now in week seven (because of absence interruptions the six weeks had been extended). "He reports that he feels he is continuing to progress both inside and outside of work. He is still anxious at times, especially regarding meetings but is trying to manage his reactions to these situations in a more controlled manner." She recommended a continuation of the return to work plan. The Claimant's GP had supplied a Fit Note "supporting reduced hours until 5 December 2014."

26. On 25 November 2014 Ms Shaw sent a further email in optimistic terms, suggesting "a more normal start time… in tandem with an increase in hours and a meeting" to close things off.

27. On 2 December 2014 Ms Shaw sent a further email to Mr Allman stating that they were now in week 8 and reporting that the Claimant "feels that progression continues within work and that he is establishing good working relationships with both the Mill Team and the Mustard Unit." She was hopeful that he would return to his full role in January 2015. She had arranged to speak to him while he was on leave the following week "for ongoing support."

28. The capability meeting was held on 3 December 2014. The Claimant was accompanied by his GMB representative. Mr Allman was accompanied by Helen Wooton from HR. The Claimant's absence record that year was reviewed. He had been absent for 10 days in January 2014 due to having dental treatment. He had then been absent for 55 days from 16 June to 12 September with depression and anxiety. He was absent for a further 7 days from 22-30 September, due to a negative reaction to an increase in medication. A further 7 days absence from 2-10 October 2014 (certificated retrospectively) was due to the lymph gland infection.

29. Mr Allman decided not to issue a verbal warning under the policy "as I acknowledge your efforts to come back to work." He stated that he would have given a warning normally for this pattern of absence.

30. The Claimant returned to work as planned on 5 January 2015 and according to a further report by Ms Shaw dated 18 March 2015 "completed a third attempt at a rehabilitation return to work plan" (Hearing Bundle page 237). He was still taking medication daily for depression. Although he had "made significant progress after a period of mental ill health to enable him to return to his role" she recommended an appointment with an occupational health physician to advise on the long term management of his mental health issues.

31. The Claimant was seen by an OH physician on 10 April 2015. A report to Mr Allman dated 15 April 2015 (Hearing Bundle page 249) stated that the Claimant had told him that his role entailed operating machines and can be physically demanding. He was currently working from 6-45am to 3-45pm. The report went on to state that Mr Allman had indicated in his referral to OH that the Claimant was only able to perform the basic duties of his role and that there were concerns about his longstanding mental health issues and behaviour. The report went on to state that the Claimant's GP had diagnosed moderate to severe depression and started him on Sertraline. The report then included this sentence:

> "Unfortunately, Mr Haworth stopped taking the medication about two weeks ago when he was referred to occupational health."

It went on to state:

"My clinical impression is that Mr Paul Haworth is mentally unstable at the present moment."

32. The report concluded (page 250) with a number of bullet-point answers to the questions raised by Mr Allman. It recommended that the Claimant be referred back to his psychiatrist via his own GP "to consider treatment adjustment." It advised that the Equality Act 2010 was likely to apply.

We reproduce the following further advice:

- Mr Haworth should remain in work with support and understanding because work can be of therapeutic benefit. However, I have concerns about his ability to manage his current role which can be classified as "safety critical" as he is required to work with dangerous machinery, climbing ladders in isolation.
- In my opinion, it would be prudent to redeploy him in view of his current mental instability, into a suitable non-safety critical role if this is operationally feasible, with supervision until his symptoms improve. Health Management will be able to assist you, if you are able to provide us with the list of non-safety critical job options available within the establishment.
- I would also recommend psychological support in the form of CBT via work or the NHS. Mr Haworth should be able to render reliable service with improved work performance, providing he is found a suitable alternative role and he responds satisfactorily to prescribed medication and psychological support.

33. On 24 April 2015 the OH physician, Dr Joseph Blankson, met the Claimant for a further appointment. His report to Mr Allman, dated 28 April 2015, includes the following:

    - I understand that based on my recommendations he (the Claimant) has been provided with a suitable alternative role which is essentially a cleaning role which is not safety-critical and I support that.

    He went on to report that the Claimant was "confused and agitated;" that he was again unfit for work and not well enough to return as yet; and that his GP had changed his medication and referred him for counselling support. Dr Blankson suggested a further referral when his symptoms improve in response to treatment "in order to consider a graduated return to work programme in his new role." We take it from this that Dr Blankson was under the impression that the Claimant had been redeployed in the cleaning/non-safety critical role either long-term or permanently. This was not, in fact, the case. A letter dated 28 April 2015 from Mr Allman to the Claimant describes the cleaning role as temporary but that suitable redeployment opportunities would be discussed further "once I have information from the physician about the suitability of any vacant roles on site."

34. In this letter, Mr Allman referred to the statement in Dr Blankson's letter of 15 April 2015 that the Claimant had unfortunately stopped taking his medication about two weeks earlier. He had then been to his GP and sent the Respondent a fit note dated 20 April 2015 stating that he would be unfit for work for 4 weeks. Mr Allman took the decision to cease company sick pay under the Company's SIIB scheme with effect from 28 April 2015 on the ground that he had "failed to follow all reasonable steps to reduce your absence."

35. In his evidence to the Tribunal, Mr Allman stated that before issuing this letter he phoned the Claimant at home "to give him advance warning of my decision." He states (WS paragraph 27) that he spoke to the Claimant and his wife. His witness statement simply says that this was "to confirm my decision". It does not state that he asked either the Claimant or his wife for an explanation of why he had stopped taking his medication.

36. In oral evidence, however, Mr Allman stated that he told Mrs Haworth during the phone call that if she or her husband could provide information that the decision to stop medication had been "on doctor's orders" he would review his decision to withhold sick pay. Mrs Haworth gave detailed oral evidence confirming that she and her husband did "go to the GP to ask him to write to the company to say how Paul had come off medication. The GP said he couldn't. The company would have to ask. I thought the union were onto it but no grievance was brought. The GP said it was for the company to prove it. April 2015 he stopped taking medication. I told him (Mr Allman) the GP's name and telephone number but he didn't care. Neil kept repeating himself. He didn't care. I was on at him for 30 minutes".

37. She also stated in oral evidence that she had asked Dr Blankson why he had used the word, "Unfortunately." She said that he replied that it was unfortunate that he had seen the Claimant at a time when he had stopped medication and had not yet started his new medication but that he did not follow this up in a further report.

38. The relevant company policy is at page 136 of the Bundle. It includes, at page 138, the following sentence:

> "The company may refuse or terminate the payment of benefit where, in their opinion, supported by the Company Doctor, the sickness, injury or length of absence is attributable to negligence or misconduct."

39. Mr Allman stated that he relied upon the word "negligence." He had construed the use of the word "unfortunately" in Dr Blankson's letter of 15 April to mean that the Claimant had taken it upon himself to cease his medication, resulting in a further i.e. longer period of sick leave. He had not gone back to Dr Blankson to investigate further or to ask him to confirm that he supported his opinion in accordance with the Sickness Absence Policy. The decision not to pay company sick pay was not reviewed or reconsidered because, so far as Mr Allman was concerned, the Claimant did not obtain an explanation from his GP of the circumstances of his stopping his medication.

40. On 19 May 2015 Marsha Shaw emailed Mr Allman to say that the Claimant had phoned her at the suggestion of his union shop steward (and workplace mentor) David Goodwin asking her to check whether he had been referred back to OH. She commented that he sounded angry and hung up on her. Mr Allman replied the following day to confirm that he had referred the Claimant back to the OH physician.

41. Mr Goodwin also emailed Mr Allman asking him to ask Dr Blankson whether it had been "ok to come off his 6 month medication and he was right to do so as the 6 months had expired." This never happened. The Claimant continued to be off sick and to be paid SSP only.
42. On 10 June 2015 Dr Blankson saw the Claimant and Mrs Haworth. He reported that the Claimant "continues to improve, albeit slowly, on appropriate medication prescribed by his GP." He proposed a further report form the GP.

43. On 4 August 2015 a different OH physician, who had not actually seen the Claimant, informed Mr Allman that a letter had now been received from the Claimant's GP stating that he had "improved somewhat with his current medication and is in contact with the Wellbeing Service…." but that he "remains vulnerable."

44. His sickness absence continued and the Claimant attended a further formal capability meeting on 18 August 2015. His current period of absence had began on 20 April. The Claimant told Mr Allman that he thought he was ready for a return to work and wanted "to see the Company Doctor and return to work." He said that he had wanted to try to come back a month earlier but his doctor wouldn't let him. He wanted to come back to work. Mr Goodwin commented that: "It was the GP holding him up."

45. Mr Goodwin also raised the issue of sick pay, pointing out that it had not been paid for 4 months. Mr Allman stated that he had explained in April the reason for the decision and that if he could show that he "came off the medication on advice, I would reconsider." Mr Goodwin acknowledged that the GP had not put it in writing that it was right to come off the medication. The Claimant replied that his GP had said he was there for his well being, not "to be drilled" (sic).

46. There followed a further appointment with Dr Blankson attended by the Claimant and his wife on 28 August 2015. The purpose of this assessment was stated to be "to discuss a phased return to work plan in a temporary suitable alternative role prior to resuming his former safety-critical role." (Dr Blankson's letter dated 1 September 2015, Hearing Bundle page 291). We take it from this statement that Dr Blankson found the Claimant's condition to be much improved as he had previously suggested permanent/long term redeployment into a non-safety critical role. Indeed, Dr Blankson writes that the Claimant "has made considerable improvement with appropriate treatment prescribed by his GP. His mood has lifted and his sleep is much better… His fit note expires on the 14 September and could return to work on the same day."

47. There follows a phased return to work plan. According to Mrs Haworth's oral evidence this plan "was put together by Dr Blankson, me, my husband and Neil Allman. We dealt with it by phone conference". We find, therefore, that this return to work plan was agreed by the Claimant and his line manager with the active input of Dr Blankson, the OH physician. His GP certified him fit for work on 14 September with the back to work plan through to 4 December 2015.

48. The terms of this plan are, therefore, a key document. It proposed "a phased return to work plan in a non-safety critical role for a period of eight weeks:
1st week – 12 hours (10am-2pm) working 4 hours on alternate days
2nd week – 20 hours
3rd week – 30 hours
4th week – 30 hours
5th week – resume full contracted hours until week 8.
He could then return to his safety critical role from the 9th week with supervision for three months. Mr Haworth should shadow a colleague working in the specific safety critical role for two weeks to come up to speed with the work plan."

49. These were the specific measures proposed and agreed. The letter also recommended that a risk assessment of all the tasks in the safety critical role should be carried out. It is not claimed that this did not occur. It also recommended that it would be helpful to deploy stress risk assessment to help identify any work stresses and resolve them as soon as possible. It is similarly not claimed that the Respondent failed to do this.

50. Finally, the report recommended that the Claimant be reassured that the company was not "trying to get rid of him." The Claimant told the Tribunal that he was told there was no criticism of his work.

51. On 2 September 2015 Mr Allman wrote stating that he would meet with the Claimant on his first day back at work, with his team leader and trade union representative.

52. A handwritten note which we assume was produced by Mr Allman shows the reduced hours for weeks 1-4; then 40 hours per week in weeks 5,6 and 7; with a note stating that "rostered hours" and safety critical duties would begin on 2 November i.e. at the beginning of week 8. There is a dispute as to whether this is in accordance with Dr Blankson's letter. This states:
"5th week – resume full contracted hours until week 8."

We can see that Mr Allman, taking this literally, would pencil in the beginning of week 8 i.e. 2 November. If one turns to the second page of Dr Blankson's letter, however, it begins: "He could then return to his safety critical role from the 9th week."

53. On a strict construction of the letter, full contracted hours would resume in week 8 but safety critical duties would not begin until week 9. Mr Allman's note shows both beginning in week 8, which is not correct. The safety critical role was not due to begin until 9 November. In fact, in his subsequent letter to the Claimant dated 8 September 2015, he refers to the resumption of full contractual hours in the 5th week until week 8 and that from week 9 onwards the Claimant would return to his role in the Mill and resume his training. We find, therefore, that in practice the Claimant was not required to resume full duties (i.e. including safety critical duties) until week 9.

54. We referred earlier to the Claimant's Statement of Terms and Conditions which contains a complex formula for calculating his contractual hours. Fortunately the parties agree that these equated to 43 hours per week on average based upon a rostered system although these could be increased by giving two weeks notice using the reserve hours. It is also clear from Mr Allman's note that he agrees with the Claimant that full contractual hours until week 8 were, in practice, to be treated as 40 hours per week.

55. The Claimant began his phased return to work on 14 September on reduced hours and initially all went well.

56. In parallel, Mr Allman again invited the Claimant to a Stage One meeting under the Capability Procedure based on his absence record. The meeting took place on 23 September. Mr Goodwin also attended. The Claimant was given a verbal warning.

57. On 24 September, Mr Allman sent an email to the Claimant with a copy to Mr Goodwin recording that by the week commencing 12 October he would be working 40 hours per week. It also recorded that the Claimant had said that he was confident of carrying out the roles in the agreed timeframe. A six month training programme was also proposed so that the Claimant would be fully trained by the end of April 2016.

58. All was proceeding according to plan but on 20 October 2015 a colleague of the Claimant, Stuart Riddings, complained that he had stormed into the Tea Room, "shouting and swearing at me." He also complained that when asked to leave he stood with arms folded "wanting a confrontation."

59. The Claimant was then invited to an investigatory interview to be held on 18 November 2015. This did not, however, take place as the Claimant submitted a further GP's certificate for 2 weeks from 17 November. The GP's note stated that he was obliged to remove the Claimant from the workplace because he had told him that the return to work plan had not been followed, "resulting in a direct and deleterious adverse effect on his mental health." This was inevitably based upon what the Claimant told him. We find that it is much more likely that the Claimant had reacted adversely to being invited to the investigatory interview the following day. Other witnesses in the disciplinary investigation were interviewed in the meantime. No further action was taken following Stuart

Riddings' complaint, which the Claimant denied. At the time of his dismissal, a further invitation to attend an investigatory meeting had been issued but it had not taken place and no further action had been taken.

60. The Claimant states that his complaint that the return to work plan had not been followed was based in part on a letter dated 16 November from Mr Allman. This stated that the limit of 40 hours per week had finished on Friday 6 November 2015 and that from 9 November he would be expected to work his rostered hours in his old role in the Mill. The Claimant disputes this but we find that Mr Allman's calculation is correct.

61. In his witness statement (paragraph 36) the Claimant also states that the plan also said that he should be shadowed for 2 weeks form the beginning of week 9 and supervised for a period of 3 months. Week 9 began on 9 November.

62. In evidence to the tribunal the Claimant accepted that he was shadowed for two weeks by an "agency worker called Jimmy."

63. With regard to the supervision, however, Mr Allman gave clear and unambiguous oral evidence to the hearing. He stated that he understood that no more than standard supervision was required under the plan: "the team leader/supervisor works in the Mill all the time and that standard supervision would be there as for all the people in the team."

64. We find that the proposed supervision for the Claimant was intended to be at an enhanced level for the period of 3 months. It cannot be correct that only standard supervision was being referred to by Dr Blankson as it provided that it would cease at the end of three months. The failure to provide more than standard supervision was, therefore, a breach of the return to work plan.

65. The Claimant's evidence is that on two occasions he was not even provided with standard supervision in that he was left alone and isolated for the whole working day. The dates to which he refers are 2 and 23 November. In his witness statement paragraph 33 the Claimant states that he was "left alone all day on a 9 hour shift". However, he goes on to say that he "had to ask a temp to check on me every hour because I was very anxious about being left alone". In oral evidence, he confirmed that the temp referred to was Jimmy, the person he was told would be shadowing him. We find, therefore, that, in practice, he was not left alone on 2 November for 9 hours. He had hourly access to the temp who had been allocated the role of "shadow". Furthermore, we do not find that this can have occurred on 23 November as the Claimant was off sick.

66. A further capability meeting was held on 8 December 2015. The Claimant was still off sick but according to his witness statement (paragraph 40) he agreed that he would try to get signed back to work by his GP and that "we would look for me to attend that week and work 8 hours." The Claimant was represented at that meeting by Ivan Mercer (GMB Organiser) and Keith Warman (GMB Rep). He, therefore, had access to substantial and experienced union representation. It was confirmed by Mr Allman that the Claimant would return on 9 December and work an 8 hour day on that day and the Thursday and Friday, returning to rostered hours on 14 December. It was also agreed that Mr Allman would meet with the Claimant and his union rep during that week.

67. Although the Claimant did return on 9 December, a further capability meeting took place on 17 December and he received a Stage Two written warning for accumulated absence over several separate periods.

68. On 22 December 2015 the Claimant brought a grievance. He continued to attend work, however, and was due to return to full rostered hours following his return to work on 9 December on 4 January 2016 (Hearing Bundle page 362). His grievance hearing was adjourned at his request and rearranged for 8 February 2016.

69. In the meantime, on 1 February 2016, Sue Allott, Regional HR Business Partners wrote to the Claimant following a meeting earlier that day with him and the Senior Steward for the GMB, Andy Lee. The Claimant had refused to continue with the meeting and it continued in his absence. Ms Allott expressed concern that the Claimant was refusing to be trained in "blends." He had also mentioned that a new medical problem had arisen, concerning his teeth, some of which needed to be removed. Ms Allott stated that she would refer these matters to OH. Training over a six month period had been discussed and was clearly in the Claimant's best interest to assist him as he returned to full duties.

70. Mrs Haworth wrote in support of her husband's grievance on 5 February 2016. She gave a poignant account of the difficulties experienced by her husband and the impact upon the family as a whole. She did not raise the matters which are relied upon in this claim other than to question why company sick pay continued to be withheld after it had been withdrawn because the Claimant had stopped his medication. She pointed out that he had only stopped for two weeks and had been back on medication ever since.

71. The Claimant produced a separate document entitled "How I was treated during my illness." Although not easy to follow it essentially sets out the matters we have referred to above. There was then a grievance hearing chaired by Sue Allott. Helen Wootton from HR attended as a note taker. The Claimant was accompanied by Ivan Mercer (GMB Organiser). Ms Allott did not uphold the grievance and wrote to the Claimant on 15 February to inform him of her decision. The Claimant appealed on 20 February 2016.

72. We come now to the incident which preceded the Claimant's dismissal. On 23 February 2016 the Claimant was handed a slip of paper asking him to see the OH Nurse on 25 February at 12.30pm. He states (WS para 55) that he thought this was for a review of his medication and a general up-date. He had not seen Occupational Health since returning to work the previous September. The nurse with whom the appointment had been arranged was not Marsha Shaw, whom he had seen on several occasions, but Helen Crawford, whom he had not met before.

73. He states that when he attended the meeting he was shocked that the nurse informed him that it was "for a capability referral." This may have been an unfortunate choice of wording. In a sense all such appointments are capability related; but the Claimant linked this wording to the Respondent's capability procedure pursuant to which he had now received a first written warning.

74. The appointment did not proceed and a few minutes after the Claimant arrived the OH Nurse, Helen Crawford, phoned Neil Allman. The Claimant states (WS

para 59) that while she was on the phone, he said that he felt that he "had been called to the meeting under false pretences and I raised my voice a little, as that was aimed at Neil who was on the other end of the phone. At no time did I become aggressive or rude towards the Nurse." This was not, however, the perception of others who stated that they had overheard the Claimant shouting.

75. Ms Crawford was interviewed about the incident on 2 March 2016 by Dave Stebbing (who had been asked to carry out an investigation). There is no record of her having made a complaint about the Claimant's behaviour. The interview record refers to her having sent an email but no copy was provided to us in the Hearing Bundle and it does not appear to have been disclosed. Ms Crawford asked Mr Stebbing if he had received it and he confirmed that he had read it but had "some follow-up questions." So far as we can tell the Claimant was never sent this email at any stage.

76. Ms Crawford was then asked to describe what happened in her own words. She said that when the Claimant first arrived she greeted him and asked him if he wanted to take his coat off as it was hot. She also asked him how he was, to which he replied that he was fine but she states that she knew from his body language that this was not the case. He was slouched and threw his coat on the floor. She asked him whether he understood why he was there. When he said he did not, she said it was a referral from his manager. At this point she states in the interview that "he got shouty and said he didn't know why he was here." He began to write something in a book and complained that he was on holiday that day but had come in because he had been told to do so. He then said he wanted a union representative. At this point she states that "he went mad, very shouty." She tried to talk to the Claimant and said that they "needed to talk sensibly." She asked if she could get Neil Allman in and he said no. Ms Crawford states that she said: "I don't like the way you are addressing me." He said he did not want to argue. She said in the interview that she felt vulnerable. After a few minutes he left but Ms Crawford states in the interview that "the shouting alerted the girl next door." She also stated that she called Neil Allman while the Claimant was standing there, shouting. Ms Crawford told Mr Stebbing that she felt sorry for the Claimant when he became agitated. She felt vulnerable because he was shouting and acting unpredictably but she placed a chair between them as she had been taught to do in such situations, so did not feel threatened. When asked whether the Claimant calmed down she said no, "he carried on shouting and slammed the door. He was angry as I was talking to Neil Allman." She told the Claimant that it was her understanding that the company was looking to put him back in his normal job; that although he was back at work there were still restrictions and they needed to get him back with training. He was not prepared to hear what she way saying and said he would not consent to the meeting without first speaking to his union and his GP. At the end of the interview, Ms Crawford stated that she was concerned "especially if he would be working with machines."

77. Mr Stebbing also interviewed Mr Allman and Marjolijn Peter (whom Ms Crawford had referred to as "the girl next door") who both stated that they had heard the Claimant shouting. He also interviewed Mr Glen Stotter, a Quality Specialist, who had seen and spoken to the Claimant both before and after the alleged incident. He described him as "angry, jumpy" before the meeting and "agitated, annoyed and twitchy" after it.

78. On 2 March 2016 Helen Wootton (HR Operations Specialist) wrote to the Claimant inviting him to an investigatory interview on 7 March. It stated that the purpose of the meeting was "to investigate an incident which took place in the Occupational Health Building on Thursday 25 February 2016. The purpose of this investigation is to establish all the facts and determine whether or not any further steps need to be taken."

79. The Claimant produced a statement dated 4 March 2016 which he handed in at the investigatory meeting on 7 March. In that statement, he states that his Team Leader, Chris Moore, had handed him a slip of paper on 23 February giving the name, date and time of the Occupation Health Nurse appointment. He also saw Neil Allman that day who mentioned seeing the Nurse later that week. He states, however, that "at no point was there any mention of a referral for capabilities to carry out my role or about medication that I'm currently taking."

80. He stated that the meeting began "with general pleasantries" and that he took out a piece of paper with a few questions he wanted to ask. He also had his current medication with him to discuss with the nurse. He said he was not aware of any referral by Neil Allman and had thought it was a review. He said he had been wanting to see the OH Nurse since his return to work in September 2015. He was, however, unhappy that it was referred by his line manager.

81. He states that he then said that he no longer wanted to take part in such a meeting until he had more clarity from the Union. At this point she called Mr Allman. He states that by this time he was already leaving the room and that as he did so he raised his voice stating that he "had been brought here under false pretences". He met Glen Stotter outside, at which point he was "very shaken." He asserted, as he has on all subsequent occasions including his disciplinary hearing, his appeal hearing and the tribunal hearing, that "at no point was I angry" nor did he show any sign of aggression. He went on to state: "I certainly was not aggressive or rude or anything else towards the nurse." He has always denied shouting or raising his voice except to be heard by Neil Allman over the phone.

82. The investigatory interview took place at 9.20am on Monday 7 March. The Claimant was accompanied by his GMB Representative, Keith Warman. The note of this meeting is at page 479 of the Hearing Bundle. It begins with Mr Stebbing stating: "it is alleged, you are accused of using inappropriate, aggressive behaviour and potentially threatening "at the meeting on 25 February. The note states that in response the Claimant laughed. He then handed Mr Stebbing his prepared statement and there was a short adjournment whilst he read it. At the resumption, the Claimant again asserted that he had only raised his voice at the end of the meeting when the nurse phoned Neil Allman. He expected a review but not of his fitness for work. He had shown no anger; never shouted aggressively; and only raised his voice to be heard by Neil Allman as he walked out.

83. Mr Stebbing adjourned at 10.00am, resuming at 10.10am. He then announced that he had decided to refer the matter for a disciplinary hearing which would be held in the same room at 12 noon that day.

84. It actually began at 12.05 just under 2 hours later. It was chaired by Elliott Creak. The record states that Sue Allott from HR was there as a note taker. The Claimant attended with Keith Warman. The Claimant was not given any further information nor copies of the interview notes with Ms Crawford, Mr Allman, Ms Peter or Mr Stotter. We would describe the meeting as "to the point." It is clear to us that Mr Creak had made up his mind before the meeting began. His introductory remarks were as follows:

> "This is a very serious matter that has been thoroughly investigated. I have the notes myself and have clarity from these and I am very concerned. At this stage I do not have any questions for clarity."

85. Keith Warman responded by asking for copies of the statements as the Claimant was adamant that he was not aggressive. Mr Creak refused.

86. He then said:

> "It is clear to me from the investigations that Paul raised his voice and shouted at Helen." He then asked the Claimant whether he was aware "that shouting and raising your voice are threatening and abusive behaviours that could be bullying and harassment."

87. The Claimant was then asked if he wished to say anything further or to raise any mitigation. His reply was again to ask what he was accused of but to deny shouting or raising his voice other than as he was leaving so he could be heard by Neil Allman.

88. Mr Creak adjourned at 12.15 and reconvened at 12.20. He told the Claimant that he was frustrated that he did not understand the reasons for the meeting. He said that Helen Crawford "describes you raising your voice in a manner that made her feel vulnerable." He also stated that this had been overheard by someone two doors away, before the call to Neil Allman. The Claimant said he refuted "all threatening charges against me." He said he respected the nurse. "I respect her and her role in life, she is an older lady and respect her job. I have no issues with her." Mr Warman then again complained that the Claimant had not known what he was said to have done. Mr Creak replied:
"It is about shouting."
The Claimant replied:
"I did not shout. I was in shock." The meeting concluded at 12.40 with the Claimant's dismissal for gross misconduct.

89. The Claimant continued to deny that he had shouted at the nurse. He did not seek to mitigate by suggesting that such behaviour might have arisen out of his disability or be a symptom of it. It is fair to say that notwithstanding his claim to this tribunal and the pleadings, the Claimant and his wife in their evidence to the hearing were both adamant that he did not and could not have acted as alleged. They stated that his medication kept him calm and sedated and that he was incapable of such behaviour on the date in question. They were each provided with more than one opportunity at the tribunal hearing to reconsider this evidence. They were both consistent in asserting that a tendency to become angry; or to shout; or to lose control in the manner alleged was not a symptom of his disability. Such behaviour did not occur either at home or at work.

90. The Claimant dissociated himself from arguments to the contrary in the ET1 and in the List of Issues, stating that his solicitors had no instructions from him to so argue. He did not raise his voice with the nurse; he did not get angry; and he could not have made her feel vulnerable. The interview notes were all lies in order to dismiss him.

91. At the hearing, Mr Creak answered a number of questions about the decision to dismiss. He was asked whether he was familiar with the Respondent's disciplinary policy and procedure as no copy had been provided to the tribunal. He stated that he was, but that he had not referred to it on this occasion. He was unable to tell the tribunal what the policy said about gross misconduct or what relevant examples, if any, it contained. He also stated that he was "not intimately aware of the ACAS Code" and had never referred to it; although he has received relevant training since the Claimant was dismissed. He believed the company procedure was "more than" compliant with the ACAS Code.

92. When asked for his understanding of what was meant by gross misconduct he said that it was "unacceptable behaviour, action or actions, as they relate to other people or to the business or its operations."

93. He also stated in unqualified terms that "something which breaches the code of business principles will be gross misconduct." He referred to the extract on page 118 of the Bundle which states:
"Employees must not:
- Engage in any direct behaviour that is offensive, intimidating, malicious or insulting…"

94. Mr Creak then agreed that he had not referred to page 118 when making this decision. He also agreed that shouting and raising the voice is not always bullying and harassment. Mr Creak also accepted on reflection that not all behaviour which is unacceptable or in breach of the company's code is necessarily gross misconduct.

95. He was asked why, in his dismissal letter which followed the hearing, he had described the Claimant's behaviour as "potentially threatening" and not simply "threatening." He stated that he "could not offer any insight" into why he said this. He had, however, indicated that he had taken HR advice.

96. Mr Creak stated that he was aware that the Claimant had "mental health issues" but in the absence of his raising it in mitigation he did not consider referring it to either OH or making inquiries of the GP to find out whether these "issues" might have contributed to his unacceptable behaviour.

97. The Claimant appealed against the dismissal. His appeal was heard by Andrew Watts. Prior to this hearing the Claimant was sent all the interview records which had been available to Mr Creak. He also had reasonable time to prepare for the hearing. The appeal meeting took place on 21 March 2016. Mr Watts was accompanied by Sue Allott, the Regional HR Business Partner. The Claimant was accompanied by Mr Warman. The Claimant's case on appeal was the same as at the disciplinary hearing and the investigatory interview which had immediately preceded it. Indeed, it was the same at the tribunal hearing. The Claimant disputed that he shouted or raised his voice for the 5 or 6 minutes that he was with Ms Crawford except at the very end when she was speaking to Neil Allman and the Claimant raised his voice to complain to Mr

Allman that he had been invited to the meeting "under false pretences." He did not offer any mitigation or seek to claim that such behaviour, if it had occurred, was linked in any way to his medical condition of anxiety and depression.

98. Mr Watts told the tribunal that he had no difficulty in concluding that the Claimant had "gone mad" to quote Ms Crawford and that he had made Ms Crawford, an experienced occupational health nurse, feel vulnerable to the extent that she felt the need to place a chair between them. He was concerned at the Claimant's failure to acknowledge his own actions. He considered him to be volatile and an unacceptable risk, "particularly in the context of a factory environment with machinery, noise and inevitable tensions."

99. Mr Watts stated that he was aware of "some of the background of Paul's capability and mental health issues" but did not consider that further input from occupational health would assist his decision. The spontaneity and aggressive nature of the behaviour made it unacceptable, "irrespective of what may or may not have contributed to the cause."

100. He took the Claimant's length of service into consideration but, in the absence of any mitigation being raised and the absence of any self-awareness of his behaviour or its effects on others, Mr Watts decided that dismissal was the appropriate sanction.

Relevant Law

Unfair Dismissal

101. By section 94(1) of the Employment Rights Act 1996 ("the Act") an employee has the right not to be unfairly dismissed. By section 98(1) of the Act, in determining whether a dismissal is fair or unfair, it is first of all for the employer to show, on the balance of probabilities, that the reason for dismissal (or the principal reason if there was more than one) was one of those falling within section 98(2) of the Act or some other substantial reason. The potentially fair reasons falling within section 98(2) include conduct which is the reason asserted by the Respondent in this case.

102. By section 98(4) of the Act, where the Respondent has shown that the reason for dismissal was one which is potentially fair, the Tribunal must go on to consider whether the dismissal was fair or unfair having regard to that reason. This will depend on whether, in all 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. The Tribunal must make its determination in accordance with equity and the substantial merits of the case.

103. In making its determination the Tribunal must also bear in mind that there is in most situations a range of reasonable responses open to a reasonable employer. This was clearly set out in guidance helpfully provided by Mr Justice Browne-Wilkinson in the EAT's decision in *Iceland Frozen Foods Ltd v Jones 1983 ICR 17*, in which Tribunals were warned against substituting their own decision as to what is reasonable for that of the employer. This approach applies equally to the investigation process adopted by the employer as well as to the substantive decision ultimately made. There will generally be cases

where one employer might reasonably take one view and another employer might equally reasonably take a different view. One may be relatively lenient; another relatively strict. The Tribunal's role is to determine whether, in the particular circumstances of the case, the employer's process and decisions fell within that wide band of reasonable responses which a reasonable employer might have adopted.

104. The Court of Appeal endorsed this approach in the case of *Foley v Post Office 2000 ICR 1283*.

105. In conduct dismissals the two long-standing and oft-quoted authorities are *British Home Stores Limited v Burchell* [1980] ICR 303 and *Sainsbury's Supermarkets Limited v Hitt* [2003] ICR 111. These can be summarised as follows:

    (i) did the Respondent carry out an investigation into the allegation of misconduct which falls within the band of reasonable responses referred to above?

    (ii) did the Respondent have a genuine belief in the Claimant's guilt at the time of making the decision to dismiss?

    (iii) did the Respondent have reasonable grounds for that belief?

    As indicated above, there is a fourth question i.e. whether the Respondent's decision was within the range of reasonable responses.

106. This guidance must also be read in conjunction with the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures (2015).

107. By section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 as amended, the ACAS Code is admissible in Tribunal proceedings and the Tribunal is required to have regard to its provisions. Compliance with the Code is a relevant factor for the Tribunal to take into account when determining the fairness of a dismissal for the purposes of section 98(4) of the Act. Furthermore, if a dismissal is found to be unfair, section 270(A)(2) provides that if the employer has unreasonably failed to comply with the ACAS Code, the Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase the compensatory award by up to 25%. There is a parallel obligation upon employees to comply with the Code and a parallel power to reduce the compensatory award by up to 25% for failure to do so.

108. The Code sets out certain basis principles of fairness to be followed as a general rule, but paragraph 3 recognises that the circumstances of the particular case (and the size and resources of the employer) may need to be taken into account.

109. Paragraph 9 of the Code states as follows:

> "If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to

> answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification".

110. Paragraph 11 states that the disciplinary meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.

111. In a section headed: "Decide on appropriate action," the Code sets out the different decisions which might be open to a reasonable employer. It states that where misconduct is confirmed, it is usual to give the employee a written warning; but that if the misconduct is sufficiently serious, it may be appropriate to move directly to a first written warning. The Code states that this might occur where the employee's actions have had, or are liable to have a serious or harmful impact on the organisation.

112. Paragraph 23 of the Code states that some acts, termed gross misconduct, are so serious in themselves, or have such serious consequences, that they may call for dismissal without notice for a first offence.

113. Paragraph 24 reads as follows:

> "Disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct. These may vary according to the nature of the organisation and what it does, but might include things such as theft or fraud, physical violence, gross negligence or serious insubordination."

114. We also bear in mind that the dismissal and internal appeal should be viewed as a single process and that defects in the dismissal process can be remedied by the appeal. This is not limited to cases where the appeal takes the form of a complete rehearing.

Equality Act 2010

115. The Claimant has presented claims under sections 15, 19 and 20/21 of the Equality Act 2010.

116. Section 15 provides that 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.

117. Section 19 defines indirect discrimination. It reads as follows:

    1. A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

    2. For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be proportionate means of achieving a legitimate aim.

3. The relevant protected characteristics include disability.

118. Sections 20 and 21 deal with the duty to make reasonable adjustments.

119. Section 20(3) imposes a duty to make reasonable adjustments where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to their employment in comparison with persons who are not disabled. The duty is to take such steps as it is reasonable to have to take to avoid that disadvantage.

120. Section 21 provides that an employer discriminates against a disabled employee if it fails to comply with its section 20 duty in relation to that person.

121. Section 23 provides that on comparison of cases for the purpose of section 19 (indirect discrimination) there must be no material difference between the circumstances relating to each case.

122. Section 136(2) of the Equality Act lays down specific rules in relation to the burden of proof in discrimination cases. It applies where the tribunal in any proceedings finds that there are facts from which it could decide, in the absence of any other explanation, that a person has contravened a provision of the Act. It goes on to provide that the tribunal must find that the contravention occurred unless the respondent has shown that it did not, in fact, contravene the provision.

123. Contrary to previous commentaries, section 136 does not place an initial burden on claimants to establish a prima facie case of discrimination. Rather, it requires the tribunal to consider all the evidence, from all sources, at the end of the hearing, and to then determine whether or not there are facts from which it can infer discrimination. If there are such facts, it must consider whether there is any explanation from the Respondent and whether it has shown that there was, in fact, no contravention of the discrimination legislation. (See ***Efobi v Royal Mail Group Ltd*** UK EAT/0203/16/DA).

Determination of Issues

Unfair Dismissal

124. The first issue we must determine is the reason for dismissal. The Respondent states that it was the Claimant's conduct on 25 February 2015. The Claimant

argues that this was a pretext and that he was dismissed because of his disability.

125. The Respondent was following its capability procedure and had warned the Claimant that this could ultimately result in his dismissal. However, we note that there had been a number of capability meetings and not all of these had resulted in the Claimant receiving a warning or steps being taken to progress through the different stages of the procedure. There had also been an earlier complaint by a colleague of the Claimant that he had been verbally aggressive/abusive towards him but this had not been progressed to disciplinary stage.

126. We find that if the Respondent had been looking for a reason (or a pretext) for dismissing the Claimant it is more likely than not that it would have done so earlier. The capability procedure could have been pursued more aggressively; as could the earlier disciplinary complaint.

127. We find that the reason for dismissal was conduct.

128. We turn, therefore, to the question of whether that dismissal was fair or unfair in all the circumstances (including the size and administrative resources of the Respondent, which were substantial, including an in-house HR team and occupational health service). The question we must ask ourselves is whether the investigation, the process and the decision to dismiss itself fall within the band of reasonable responses open to a reasonable employer.

129. We begin with the investigation. The person charged with investigating the incident interviewed all the relevant individuals. There is no-one else he could have interviewed.

130. He concluded that the complaint should be progressed to a disciplinary hearing. At this point, there are serious defects in the procedure. The Claimant was required to attend a disciplinary meeting less than two hours after he had had his investigatory interview. He was not provided with copies of the interviews (effectively, the witness statements) despite his union representative requesting them.

131. We note that the Claimant was given a summary of the interview notes and it is clear to us from the statement he produced for the investigatory interview that he knew the basic charge against him. However, if he had seen the interviews he would have understood precisely how the OH nurse perceived the encounter as well as the full accounts of the other witnesses who claimed to have overheard it. At this early stage, it may be that after discussion with his trade union representative, and having seen the weight of evidence against him, he would have prepared his response differently, and adopted a different approach at the hearing, rather than simple denial without any attempt to mitigate. We note Mr Ohringer's closing submission to us in which he stated "If he had admitted he'd lost his rag and shown some insight, contrition, then I accept that dismissal would not have been within the range of reasonable responses". We agree with that and we find that this makes it all the more important to consider the impact of such a rushed procedure.

132. Having adopted the approach of complete denial in his investigatory interview two hours earlier, he was given no real time or opportunity to reconsider his position. It is true from that point on, he has not wavered either at the appeal hearing or the tribunal. It is, therefore, the Respondent's case that it would have made no difference whatsoever if the Claimant and his representative had seen the statements and done so in good time before the disciplinary meeting. We do not feel able to accept that. This guidance is in the ACAS Code for good reason : to enable an employee and his representative to consider the evidence in full at this critical stage before any disciplinary decision has been taken; to discuss it together; and to prepare a response. Whilst the essentials were known to the Claimant (as is clear from his statement for the investigatory interview) he did not know, for example, that the nurse had not felt threatened and had said that she felt sorry for him. He had not had a chance to read the statements which all described him as shouting very loudly. He did not have the opportunity to review this evidence with Mr Warman and seek his considered advice.

133. We find, therefore, that there were serious defects in the procedure at the stage when the decision to dismiss took place. We acknowledge that by the time of the appeal hearing the Claimant had received the statements and he did have time to prepare. We note that we must review the procedure as a seamless whole, including the appeal. The appeal took the form of a review, not a rehearing, but that does not mean that it was incapable of putting right the previous procedural defects. In the circumstances of this particular case, we find that the serious disadvantages to the Claimant which resulted from the rushed and inadequate procedure cast a shadow over the appeal, which could not undo the harm which had been done. The Claimant had by then nailed his colours to a particular mast and there they stayed. We consider that the Respondent, with its HR resources, should have complied with the ACAS Code at the dismissal stage, albeit that it did seek to remedy the defects at appeal stage. In the event of our making a compensatory award, we find that it should be increased by 15 percent to reflect the failings identified.

134. Returning to the threefold test in ***BHS Stores Ltd v Burchell*** we find that the investigation itself was within the band of reasonable responses and that the Respondent, in the form of Mr Creak, the decision maker, had a genuine belief in the Claimant's guilt.

135. Was that belief supported by the investigation? There were three witnesses attesting to the fact that the Claimant had shouted very loudly. Another described him as appearing to be angry before he went in. There is, in particular, the measured interview given by Ms Crawford in which she said that the Claimant "went mad"; that she felt vulnerable because he was shouting and acting unpredictably; and that she had taken the precaution of placing a chair between them. She also described him as becoming agitated and that she felt sorry for him. She did not, however, feel threatened.

136. Mr Creak's decision (dismissal letter dated 7 March 2016) was that the Claimant was guilty of "aggressive and potentially threatening behaviour when shouting at the HML Occupational Health Adviser." He considered this to be gross misconduct warranting summary dismissal.

137. We have no difficulty in finding that it was within the band of reasonable responses for Mr Creak to conclude that the Claimant had shouted at Ms Crawford and that he had not simply raised his voice when she phoned Neil Allman just before he left.

138. The next issue is whether the decision to dismiss was within the band of reasonable responses. We found Mr Creak to be muddled in his thinking and unclear as to what behaviour amounted to gross misconduct. Indeed, he was less than clear as to what, in fact, he considered the Claimant to have done. At the disciplinary hearing he put it to the Claimant that "shouting and raising your voice are threatening and abusive behaviours that could be bullying and harassment." In his decision, however, he described the Claimant's behaviour as being "potentially" threatening; and he did not conclude that, in the circumstances of this case, the Claimant was in fact guilty of bullying or harassment. He was unable to explain the significance of the addition of the word "potentially."

139. In her interview Ms Crawford also stated that whilst the Claimant had been "shouty," he had also stated that he had no wish to argue with her. She did, however, feel vulnerable as the Claimant had gone "mad" within a short space of time. Her experience and training taught her to place a chair between herself and an individual in that state of mind, and she did so. She did not feel threatened.

140. Ms Crawford does not appear to have made a complaint about the Claimant's behaviour. Her email with regard to the incident has not been disclosed.

141. Mr Creak's decision (as brief as the disciplinary meeting which preceded it) does not explain why, in this particular case, he considered the Claimant's shouting at Ms Crawford was gross misconduct. Indeed, it was clear to us at the hearing that Mr Creak had little or no understanding of the meaning of that term. His definition encompassed all unacceptable behaviour whatever its level of seriousness and he had no awareness of the ACAS Code or the Respondent's own disciplinary procedure. We asked him about the disciplinary procedure at the hearing and he told us he had not referred to it. It was not in the Bundle. We were told, however, that the Respondent's procedure was "more than compliant" with the ACAS Code. We take it, therefore, that the Respondent's procedure includes a non-exhaustive list of examples of behaviour which amount to gross misconduct; and that it reflects the ACAS Code in recognising that an employee's actions may have "a serious or harmful impact" without amounting to gross misconduct. Mr Creak failed to appreciate any of this; and having concluded that the Claimant had shouted at Ms Crawford moved immediately to a conclusion of gross misconduct.

142. We turn next to the question of the Claimant's health. Mr Creak had asked the Claimant whether he wished to raise any mitigation. He did not. On this basis, Mr Creak decided that it was not relevant, when considering penalty, to seek further medical evidence or a further OH Report. In view of the Claimant's total denial of his behaviour (and incidentally his wife's evidence to us at the hearing to the effect that his illness does not cause him to shout or get angry) we find that it was within the band of reasonable responses not to seek further medical evidence. The Claimant was fully supported (indeed, sometimes at senior level)

by his trade union. If they did not seek to raise such mitigation it was not unreasonable for the Respondent to decide not to commission it themselves.

143. Mr Creak, however, made the quantum leap of moving from a finding that the Claimant had shouted at Ms Crawford, to a finding that such behaviour amounted to gross misconduct. She herself did not feel threatened by his behaviour although she took the precautionary step of placing a chair between them. The finding, therefore, was that his behaviour was "potentially threatening" which we take to be something short of actually threatening. Mr Creak did not appreciate that not all unacceptable conduct is gross misconduct. We referred earlier to Mr Ohringer's closing submission with which we agree. We would go further. Not only do we find that if the Claimant had shown a degree of self-awareness or contrition, dismissal would have been outwith the range of reasonable responses. We agree with the implication of Mr Ohringer's submission: that the level and nature of the conduct in this case was not such that it would necessarily be within the range of reasonable responses to dismiss and that it was not within the range of reasonable responses to categorise the misconduct alleged as gross misconduct requiring summary dismissal in a long-standing employee who had been given almost no time to prepare for the disciplinary hearing or to seek to put forward mitigation. Mr Creak's opening remarks at the disciplinary hearing suggest that he had already made up his mind. We take the view that the disciplinary hearing was so defective that the review by Mr Watts (who did not acknowledge these defects) could not repair the damage done even if the defects were not repeated.

144. Both Mr Creak and Mr Watts referred to the fact that the Claimant was employed in a safety critical post, and that such behaviour posed a risk. However, this was an issue already being addressed as part of the capability review with reasonable adjustments being made including shadowing and a recommendation of supervision. Occupational Health reports and the Claimant's own GP had made appropriate recommendations to deal with this issue. It was inconsistent and outside the band of reasonable responses to elevate the Claimant's behaviour to gross misconduct on that basis. This is particularly so given the previous complaints of the Claimant shouting or getting angry which the Respondent brought to our attention at the hearing and none of which had led to disciplinary action.

145. Neither Mr Creak nor Mr Watts referred to the Respondent's disciplinary policy and their rationale for finding that the Claimant's behaviour amounted to gross misconduct is muddled. In the absence of any disciplinary policy (whether compliant with the ACAS Code or otherwise) the Claimant could not have been expected to know that raising his voice and shouting in anger would be liable to lead to summary dismissal, particularly as the Respondent has brought to our attention earlier similar complaints which had not led to disciplinary action or warnings.

146. For all these reasons we find that the Claimant was unfairly dismissed. By Section 123(6) of the Employment Rights Act 1996, where a tribunal finds that a dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

147. Such reduction is only appropriate where the Claimant's conduct was culpable or blameworthy and contributed to the decision to dismiss. In this case, we find that the Claimant did shout at the Occupation Health Adviser, Ms Crawford, and made her feel vulnerable. He then denied having done so. We do find that such conduct was blameworthy and that it contributed to the decision to dismiss. We find that a contribution reduction of 50 percent is appropriate.

148. We also find that this conduct of the complainant is such that it is just and equitable to reduce the basic award, also by 50 percent, pursuant to Section 122(2).

149. We were addressed by Mr Ohringer on the question of whether it is appropriate to make a reduction in the compensatory award pursuant to *Polkey v AE Dayton Services Ltd* [1988] ICR 142 to reflect the likelihood that the Claimant would still have been dismissed in any event then or subsequently. We note that the Claimant had been absent on sickness grounds for much of the previous 18 months and had reached stage 2 of the Capability Procedure. He was back at work at the time of this incident but the history shows a pattern of returning to work on an agreed plan but then further periods of absence. We find that there is a percentage likelihood that ultimately the Claimant would have been dismissed under the Capability Procedure and we consider it just and equitable on that basis to reduce the compensatory award by 30 per cent.

150. We hope that with this guidance the parties will find it possible to reach agreement but, if not, a remedy hearing has been arranged for 27 November 2017.

Equality Act Claims

151. We turn now to the Claimant's disability discrimination claims. The Respondent accepts that the Claimant was disabled at all material times.

152. We take each of the claims as set out in paragraph 13.4 to 13.7 of the Case Management Discussion Summary dated 11 August 2016 (pages 53-55 of Bundle); which cross refers to the Claimant's 3rd draft list of issues dated 10 August 2016; and, to the extent which we can reconcile its contents with those earlier documents, the letter from the Claimant's then solicitors dated 7 November 2016. We have, indeed, struggled to reconcile all three, as set out below, in relation to PCPs.

Section 15

153. The Claimant claims pursuant to section 15 that he was treated unfavourably by the Respondent in two respects. First, that it commenced a disciplinary process following a complaint about his alleged conduct on 25 February 2016; and that it dismissed him on 7 March 2016 as a result of that complaint.

154. We agree that both of these actions constituted unfavourable treatment.

155. The first issue to determine is whether either was because of something arising in consequence of the Claimant's disability. The Claimant and his wife have both given clear and unqualified evidence to this tribunal that his disability (anxiety and moderate to severe depression) categorically does not cause him

to shout or get angry or to "get mad" with other people. We invited him to consider on a hypothetical basis the possibility that he might have done so on 25 February and, if so, whether this might be linked either to his illness or his medication. He was still adamant that his medication tended to have a sedative effect upon him and that he was incapable of acting as alleged; therefore, there was no link in practice with his disability. On the second day of the hearing we asked the Claimant's wife to address the same issue. She was equally clear that the Claimant's illness did not have the effect of making him lose his temper or raise his voice either in anger or otherwise. No medical report has been produced on the point. There are references in OH communications to him being anxious prior to capability referrals or meetings (para 25) or even angry (para 40) but we do not consider that this is sufficient to find a link between the Claimant's behaviour on 25 February and his disability or to draw an inference of such a link. We find no basis for finding that a person with the Claimant's mental impairment is more likely to become angry or shout loudly in the circumstances described.

156. Notwithstanding the terms in which the claim was originally pleaded, we must give due weight to the evidence of the Claimant and, equally, that of his wife. She supports her husband's evidence that such behaviour as was observed by others on 25 February is not attributable to or linked in any way to his illness. We find that we must accept their evidence, particularly in the absence of any medical evidence on behalf of the Claimant to the contrary.

157. It follows that we find that in neither case was the Respondent's treatment because of something arising from his disability.

Indirect Discrimination – Section 19

158. As stated above, we have not found it straightforward to identify the provision, criterion or practices(s) ("PCPs") relied upon under section 19 (or, indeed, section 20 in respect of which the same PCPs are relied upon).

159. At the time of the Case Management Discussion, the Claimant was said to rely upon 10 PCPs. A deposit order was made requiring the Claimant to pay £150 (said to be £15 in respect of each PCP) if he wished to continue with all his claims under section 19 and section 20. We are informed that a deposit of only £60 was paid, and this is confirmed in the solicitors' letter dated 7 November 2016. In that letter they list what they state are "the 4 PCPs in respect of which the deposit order was paid".

160. One of our difficulties is that the wording of these 4 PCPs as in the letter of 7 November does not coincide with the wording of any of the PCPs referred to in the Case Management Discussion or the 3rd Draft List of Issues. Understandably the Claimant was unable to assist in this regard when seeking to present his case in person. He told us that he did not understand what his solicitors had done; and that he did not necessarily agree with it.

161. We are, nevertheless, charged with determining these claims and we will do our best. In any analysis of a claim under section 19 the tribunal must begin with the PCP (or PCPs) which the Claimant submits applies (or apply) to persons with whom he does not share the relevant protected characteristic (in this case, his disability) but which put, or would put, persons with his disability at a

disadvantage when compared with persons who do not share his disability; and, furthermore, that these PCPs put or would put him personally at that disadvantage.

162. The Case Management Discussion summary lists the following PCPs as being relied upon by the Claimant under section 19:

    13.6.1 Require the line operatives to fulfil all the obligations of their role.

    13.6.2 Require line operatives to fulfil all functions of their role without regular contact from their line manager.

    13.6.3 Require line operatives to work 43 hours per week.

    13.6.4 Require line operatives to work without supervision.

    13.6.5 Withhold company sick pay without (adequate or any) investigation.

    13.6.6 Apply standard behaviour and/or the company disciplinary process to the Claimant which resulted in his dismissal on 7 March 2016.

163. We note that this comprises 6 suggested PCPs not 10. If we take all six to be relied upon also in relation to section 20, that makes 12. Turning to the Claimant's 3rd List of Issues, we note that in paragraph 6 (headed s.19 EA 2010) 17 suggested PCPs were listed; but it is clear that this was to support an application to amend the claim; and that this application was refused. We are, therefore, at a loss to identify the 10 PCPs which are referred to in the Case Management Discussion summary; and even more in difficulties seeking to establish which are the four in respect of which a deposit was paid. Neither the Claimant nor Mr Ohringer was able to assist us in this inquiry; and we mean no criticism of either in making that observation.

164. In fairness to the Claimant we propose to have regard to all 6 PCPs set out in the Case Management Discussion summary, as suggested by Mr Ohringer; but we will seek to consider each in the light of the letter of 7 November which was intended to "provide further clarity".

165. Did the Respondent apply a PCP requiring all line operatives to fulfil all the obligations of their role? The undisputed answer is yes. Did this place persons who had the Claimant's disability at a disadvantage? We note the Occupational Health Reports which confirm that he was unfit for work and which recommended a phased return to work plan and reduced safety-critical duties for a limited period. We find that persons with the symptoms described in those reports would be unable to fulfil all the obligations of the role during their period of unfitness and that such a requirement would put persons who shared the Claimant's disability at a disadvantage compared to their non-disabled colleagues. We turn, therefore, to whether this particular PCP was applied to the Claimant and whether it put him personally at a disadvantage. We find that it was not; or, at least, not during the periods relied upon. The Respondent was conscientious and patient, making several referrals to Occupational Health. It did not rigidly apply its capability/absence procedure; indeed, it made concessions and delayed giving warnings. With the agreement of the Claimant and his GP, it relaxed the requirement to work full duties for the periods when occupational health and the GP advised that it would place him at a disadvantage. There were some communication problems when a team leader

or a manager briefly attempted to place the Claimant on full duties earlier than agreed in the return-to-work plan; but on each occasion when the Claimant pointed this out it was corrected and any departure was short-lived.

166. The solicitor's letter of 7 November 2016 seeks to reword the first of the four PCPs on which they say the Claimant has paid a deposit as follows:

> "the requirement that the employee fulfil all functions of their role despite the contents of their back to work plan".

This is an attempt to amend the PCP, by the addition of the last nine words, after the deposit had been paid. We do not, therefore, consider that the Claimant can rely on that additional wording; but had he been able to do so we would not have found that the Respondent applied or would apply such a PCP, either to all their operatives; or to the Claimant in particular.

167. The second PCP relied upon according to the Case Management Discussion is

> "require line operatives to fulfil all functions of their role without regular contact from their line manager".

We note that there is no reference to regular contact with a line manager in any of the four PCPs in respect of which the letter of 7 November states that a deposit was paid. This suggests to us that this PCP is one of those which the Claimant no longer relies upon. We have, however, in fairness to the Claimant considered this PCP. We find that the evidence suggests that the Respondent applied this PCP to all operatives; but we find no evidence that the absence of regular contact with the line manager put, or would put, persons with the Claimant's disability at a disadvantage compared to those without his disability. The occupational health advice was that during a return to work plan period a degree of shadowing and additional supervision was required for a three month period. This could, however, be provided by Team Leaders, of whom there were two. We have no access to broader advice with regard to persons with anxiety or depression. We conclude, however, that there is no basis on which to find that persons with the Claimant's disability were placed at a disadvantage by not having regular contact with their line manager provided a reasonable level of access to management was provided. We do not find that the Claimant was or would have been put at a disadvantage by the application of such a PCP provided he was not isolated and had access to someone with management responsibility (such as a Team Leader).

168. The third PCP listed in the Case Management Discussion was:

> "Require line operatives to work 43 hours per week".

We find that there was such a requirement applied to all line operatives, as stated by the Claimant and explained by Mr Watts. The letter of 7 November, however, seeks, once again, to add wording at the end. It reads:

> "the requirement that line operatives work 43 hours per week despite having just completed a phased return to work".

The additional words are the last nine. We do not find that there was a PCP in those terms as we have had no evidence to that effect; and, in any event, it is too late for the Claimant's then representatives to seek to alter the wording of a

PCP in respect of which a deposit has been paid and without leave to amend (which they did not seek at this stage). The wording is, however, relevant in so far as it is intended to clarify the thinking behind the claim.

169. Did the PCP that line operatives work a 43 hour week place persons with the Claimant's disability at a disadvantage? We find that it did but only from time to time. Once again, we have limited evidence available but we note that the Occupational Health Physician; the Claimant's GP; the Claimant's Line Manager; and the Claimant and his wife; had all agreed that it was necessary on medical grounds to reduce his hours for a limited period before returning to work. We take this as supporting the Claimant's case that persons with his condition (and he personally) would sometimes find it difficult to work the full hours i.e. until he recovered sufficiently for reduced hours to be no longer needed.

170. Did the PCP actually put the Claimant to this disadvantage? We find that it did not. The return to work plan which was agreed by all parties was drafted by the Occupational Health Physician with input from the Claimant's GP. This set out in detail that he was fit to work reduced hours building up to a resumption of contractual hours and full duties. We do not accept the Claimant's evidence that he was required to work 43 hours outside the terms of the return to work plan. We accept that there was an occasion when a team leader incorrectly asked the Claimant to return to working 43 hours before he was due to do so; and that the line manager miscalculated by one week when the Claimant was due to return to full hours. In each case, however, the Claimant challenged the manager and the requirement to work 43 hours did not in practice apply until the time agreed in the return to work plan. With regard to the wording provided for clarification in the letter of 7 November, it appears that the complaint is about a requirement to work 43 hours per week "despite having just completed a phased return to work". If this is the Claimant's clarified case, we struggle to understand it. The phased return to work was precisely that: a plan agreed by all parties with medical advice which set out the terms of a return to work plan at the end of which the Claimant would be fit to resume his full hours. It must follow in our view that a PCP in the terms set out in the letter of 7 November would not put him at a disadvantage as the evidence before us states that once the phased return to work was complete he would be capable of working full contractual/rostered hours.

171. The fourth PCP set out in the Case Management Discussion is:

> "Require line operatives to work without supervision".

We do not accept on the evidence we have heard that line operatives were required to work without supervision. We accept the evidence of the Respondent's witnesses that there were two team leaders and a third person as back up. The line manager, Mr Allman, was not regularly present but this was what the Respondent's witnesses described as "the standard supervision". If the Claimant had sought to rely upon a PCP that required all line operatives to work with this standard level of relatively light supervision only we may have found that this was a PCP applied to all operatives; and that it put persons sharing the Claimant's disability at a disadvantage when engaged in safety-critical duties. That is not, however, the PCP relied upon. This refers to a total absence of supervision: which did not take place.

172. We note that in the letter dated 7 November 2016 the Claimant's solicitors sought once again to rely upon a PCP in different wording. No application to amend the PCPs was made in that letter so we are determining the claims on the basis of the six PCPs as worded in the Case Management Discussion, where the Claimant was represented by Counsel. We refer to the letter of 7 November 2016 in the hope that it provides clarification of the Claimant's case as claimed; but not to amend the wording of the PCPs.

173. The fifth PCP listed in the Case Management Discussion was:

> "Withhold company sick pay without (adequate or any) investigation".

The evidence we have seen does not show that there was such a PCP. Indeed, the reverse is the case. The Respondent's Sickness Absence and Emergency Leave for Dependants Policy (Hearing Bundle page 136, at page 138) contains the following:

> "The company may refuse or terminate the payment of benefit where, in their opinion, supported by the Company Doctor, the sickness, injury or length of absence is attributable to negligence or misconduct or where they are not satisfied that the absence is genuinely attributable to sickness or injury of the employee".

174. Mr Allman in his oral evidence stated that he terminated the Claimant's sick pay (which was never re-instated) under this policy when he was informed by the company doctor that the Claimant had "unfortunately" ceased to take his medication. He took the view that this had been negligent on the Claimant's part and had caused him to have longer sickness absence than he would otherwise have done. He did not, however, refer back to the company doctor as required under the policy to ask whether he supported this conclusion because he considered the use of the word "unfortunately" in the company doctor's report to be sufficient to assume his support. We find that the relevant PCP which applied to all staff was that the Respondent would not terminate sick pay without first checking that this was supported by the company doctor on the ground of negligence or misconduct on the part of the employee. There was, however, no PCP in the terms relied upon. There may have been an alternative claim which the Claimant could have made arising out of the withdrawal of sick pay; particularly bearing in mind that the decision was never reviewed despite the Claimant resuming medication under his GP's supervision. However, no such claim can be made pursuant to section 19 based upon the PCP as worded. This tribunal can only determine the claims brought before it.

175. The sixth and last PCP relied upon pursuant to section 19 is:

> "Apply standard behaviour and/or the Company disciplinary process to the Claimant, which resulted in his dismissal on 7 March 2016".

Once again, we express our difficulty with the wording of this PCP. If we remove the wording after the word "process" it may be possible to decipher a PCP. However, as worded it is less than clear. We cannot easily find that there is a PCP that the company applies standard behaviour; or even that it applies a disciplinary procedure. We have been told that there is a disciplinary procedure but neither Mr Creak nor Mr Watts applied it and we have not seen a copy. The evidence is that these decisions were made "ad hoc" without applying the company's disciplinary procedure. Mr Creak did tell us that at a recent training

session he had been told that the company's disciplinary procedure was compliant with the ACAS Code and, if anything, provided enhanced rights to staff. On that basis, we find that the defects in procedure we identified earlier, in connection with the claim of unfair dismissal, were also a breach of the company's own procedure. It follows that even if there were a PCP in the terms relied upon by the Claimant, he would not be able to show that he was put to a disadvantage by its terms; rather he was put to a disadvantage by the failure to apply the company's disciplinary procedure; not by its application of it.

176. This PCP is, however, expressed in the alternative and begins with a reference to "standard behaviour". We take this to mean that the company required all employees, including those with the Claimant's disability, to behave in an acceptable manner; in particular, complying with its policy on "Respect, Dignity and Fair Treatment". We are prepared to stretch a point and accept that there was a PCP to that effect, applied to all employees, and that this is what is meant by the application of "standard behaviour". Does such a policy put persons with the Claimant's disability at a disadvantage? We have found no evidence to that effect. Did it put the Claimant at a disadvantage? He states consistently and emphatically that it did not. It is no part of the Claimant's case that his disability made it more difficult to comply with the policy on "Respect, Dignity and Fair Treatment" than employees not sharing his disability.

Reasonable adjustments

177. Paragraph 13.7.1 of the Case Management Discussion introduces this section by asking:

> "Did the Respondent apply the PCP as set out in the section 19 claim?"

There will, therefore, be an element of repetition or cross-referral in what follows but we will take each PCP in turn and in the same order.

178. With regard to the PCP requiring all line operatives to fulfil all the obligations of their role we refer back to paragraph 165. This was a PCP and it put the Claimant, with his disability, at a substantial disadvantage in comparison with his fellow line operatives who did not have his disability. The Respondent was under a duty to make reasonable adjustments and some were formulated with occupational health and GP input and agreed with the Claimant by way of more than one phased return to work plan. We find that the terms of the return to work plans were reasonable adjustments.

179. Under these plans the Claimant was not required to fulfil his full duties save in accordance with their terms. In substance the terms of those plans were met by the Respondent despite two occasions when brief attempts were made to put the Claimant on full duties or hours earlier than provided in the plan. Considering the evidence overall, the Respondent acted reasonably in making several occupational health referrals and accepting the advice they received.

180. The reasonable adjustments which the Claimant claims should have been made but were not are listed in the Case Management Discussion at paragraphs 13.7.4 to 13.7.12.

181. Not every suggested amendment relates to every PCP relied upon. In relation to the first PCP – the requirement to fulfil all functions of the role – we find that in substance at all material times the Respondent adjusted this requirement for

the period of the agreed return to work plan. We acknowledge that there was some confusion arising out of the wording of the plan in relation to week 8 and week 9 to which we referred above but we find that the Respondent made such adjustments to the Claimant's duties as it was reasonable to make and that these were agreed collaboratively by the Claimant, his wife, the occupational health physician, the GP and the Claimant's line manager.

182. With regard to the second PCP relied upon we refer to paragraph 167. We find on the basis of the letter of 7 November that this PCP is no longer relied upon; but even if it were there is no evidence that such a PCP put the Claimant, as a disabled person, at a substantial disadvantage compared with his line operative colleagues who did not share his disability.

183. With regard to the third PCP, requiring line operatives to work a 43 hour week, we refer to our previous findings in paragraphs 168-170. The requirement to work a 43 hour week did, occasionally and for a limited period, put the Claimant at a substantial disadvantage; hence the advice that he return to work on a phased basis with a graduated increase in hours and a corresponding increase in duties. The return-to-work plans were agreed between Occupational Health, the Claimant's GP and the Claimant and his wife and we accept that these amounted to reasonable adjustments intended to bring him back to full hours when he was fit to do so. The requirement to work a 43 hour week "despite having just completed a phased return to work" as "clarified" by the letter of 7 November 2016 did not, in our view, put the Claimant at a substantial disadvantage. The unanimous advice and agreement was that having completed the phased return he would be able to resume full contracted hours. Requiring him to do so at that stage was not a failure to make a reasonable adjustment. Neither the Claimant nor OH nor his GP suggested that a permanent or longer term adjustment was required e.g. to remove him from safety critical duties altogether.

184. We turn to the fourth PCP – requiring the line operatives to work without supervision. As indicated in paragraph 171 we are unable to find that this PCP was applied by the Respondent. Line operatives, including the Claimant, were supervised – albeit that the standard level of supervision for a trained operative was relatively light. This PCP, as pleaded, cannot, therefore, succeed.

185. We further find that the Respondent made reasonable adjustments in relation to shadowing for a period of two weeks as recommended and agreed by the Claimant in the return-to-work plan. We have set out our findings in respect of 2 and 23 November 2015 earlier. We find that there was a reasonable level of contact with the Claimant during his return to work even taking into consideration that on occasion he had to take the initiative and request that it be provided hourly.

186. The fifth PCP relied upon is withholding sick pay without (adequate or any) investigation. We have set out above why we do not accept that this was a PCP applied to all line operatives for the purposes of section 19. The wording in section 20 is slightly different and requires only that a PCP of the employer puts the Claimant with his disability at a substantial disadvantage in relation to his employment in comparison with his line operative colleagues who do not share his disability. We adhere to our view set out earlier that the Respondent did not apply a PCP in the terms pleaded. However, we have gone on to consider whether, if this were a PCP applied, for example, on a "one-off" basis,

it put the Claimant at a substantial disadvantage in comparison with other non-disabled line operatives who were off sick following, say, an industrial accident for which they were considered culpable. If the Respondent terminated their sick pay without investigation would this put them at less of a disadvantage than the Claimant or someone in his position? We acknowledge that the Claimant, suffering from anxiety and depression, would be liable to have his condition exacerbated by finding himself without full sick pay and receiving only SSP. A comparator as described above would be liable to struggle financially just as much as the Claimant but would be likely to cope better with the mental pressure which would follow such a decision and its financial consequences. It would, in our view, be a reasonable adjustment to carry out a reasonable investigation (including checking with the company doctor) before concluding that an employee with the Claimant's disability should no longer receive sick pay because of their negligence. Exacerbation of their anxiety and depression could otherwise lead to a longer period of unfitness for work. We put this on record because we strongly hold the view that the Respondent had no justification for exercising its discretion to withhold sick pay under its policy for the whole of the Claimant's subsequent sickness absence.

187. The difficulty we have in this case, however, is that the PCP relied upon was not, on the evidence we have heard, one which was applied by the Respondent and the claim, as pleaded, is not made out. We should add that if we had found otherwise we would have gone on to find that this particular claim was out of time. The Claimant complains here of a failure to pay sick pay/failure to investigate. By section 123(3)(b) of the Equality Act 2010, a failure to do something is to be treated as done when the person in question decided on it. In this case, Mr Allman decided not to pay sick pay on 2 October 2014 and this decision was maintained for the remainder of the employment. It was never reviewed or renewed. The time limit for presenting a claim, therefore, expired approximately a year before the presentation of this claim. We allow for the fact that the Claimant has been diagnosed with anxiety and depression and that this will have had some adverse effect upon his ability to bring a claim. He has, however, had periods of fitness for work during that time and has for much of it been able to seek advice from his trade union and ultimately from legal representatives arranged through them. He also raised a grievance, albeit some time later. We would not, therefore, consider it just and equitable to extend time.

188. The suggested reasonable adjustment of allowing an appeal against the decision to withhold sick pay relies upon the same PCP and fails for the same reason.

189. The sixth PCP relied upon is, once again, the applying of "standard behaviour and/or the company disciplinary process to the Claimant, which resulted in his dismissal on 7 March 2016". We repeat the same reservations about the wording of this PCP as we expressed in relation to the claim under section 19.

190. The suggested reasonable adjustments in relation to this PCP are in paragraph 13.7.11 and 12 on page 55 of the Bundle: to have regard to the impact of the Claimant's disability on his behaviour; and not to dismiss him. The Claimant's difficulty is that he asserts that his disability had no impact on his behaviour. This is what he had consistently said to the Respondent and to the Tribunal. We have been shown no medical or OH evidence which states that his disability causes him to become angry or to shout. As stated earlier the Claimant never

sought to mitigate on this basis and maintained this position at the hearing. We have no basis for finding that the Respondent should have relaxed its expectations of the Claimant under its policy on Respect Dignity and Fair Treatment on the ground that he, as a person with anxiety and depression, was put at a substantial disadvantage by being required to adhere to those standards of behaviour.

191. There are four reasonable adjustments listed in paragraphs 13.7.7 to 10 inclusive to which we have not referred because we have been unable to identify a PCP to which they relate. The first is: "not arranging OH referrals whilst the Claimant was on annual leave".

192. The second is: "Communicating with the Claimant through agreed methods".

193. The third is: "explaining decisions to him at all/in good time". Once again, none of the PCPs seems to us to relate to this suggested adjustment.

194. The final suggested adjustment was to follow the GP's advice. We find here also that there is no PCP pleaded to which this relates; but, in any event, we find that the Respondent did follow the GP's advice as filtered through their OH physician.

195. It follows that the Claimant's disability claims do not succeed. This is in part because of the manner in which the claim has been pleaded. It is, also, however, as Mr Ohringer suggested in closing, because the Claimant's perception of how he has been treated differs substantially from the perception of the Respondent and our own findings of fact.

196. We make no criticisms of the Claimant in that regard; he has clearly been unwell and whilst we do not share his perceptions they are sincerely held. We have made further Orders to assist the Tribunal and the parties in bringing this matter to a conclusion. If the Claimant requires assistance he is advised to seek it.

ORDERS

197. We would encourage the parties to use their best endeavours to reach an agreed settlement of the unfair dismissal claim but if that proves impossible we direct the Claimant to serve upon the Respondent, with a copy to the Tribunal, to be received not later than 31 October 2017, an updated Schedule of Loss and a witness statement setting out his attempts to find alternative employment and his health record since dismissal. This should include any Statements of Fitness to Work and benefits received.

198. The Respondent is required to serve a counter schedule upon the Claimant (with a copy to the Tribunal) not later than 15 November 2017.

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Employment Judge Morron, Norwich

Date: 11 October 2017

JUDGMENT AND ORDERS SENT TO THE PARTIES ON

… 11 October 2017……..

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FAILURE TO COMPLY

NOTES: (1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.

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