EMPLOYMENT TRIBUNALS

Claimant: Mr E Osifo

Respondent: British Gas Trading Limited

Heard at: Manchester **On:** 17 to 20 July 2017
(20 July 2017 : in part In Chambers)

Before: Employment Judge Holmes
Mr J Ostrowski
Mr T A Henry

Representation
Claimant: Ms A Niaz – Dickinson, Counsel
Respondent: Miss Berry, Counsel

RESERVED JUDGMENT

It is the unanimous judgment of the tribunal that:

1. The claimant was unfairly dismissed.

2. The claimant's claims of disability discrimination are well founded, and succeed.

3. The claimant is entitled to a remedy. The parties are to seek to agree remedy, and in default are to notify the tribunal by **24 November 2017** as to whether a remedy hearing is required, and , if so, shall specify that issues are to be determined by the tribunal, and provide an estimated length of hearing, and dates to avoid for such a hearing.

REASONS

1. The claimant was employed as a customer services advisor worker by the respondent from April 2009 2001 until his dismissal on 5 August 2016. He complains that his dismissal was unfair, and that it was an act of disability discrimination . The claimant also brings other, allied, claims of disability discrimination.

2. The claimant was represented by Ms Niaz – Dickinson of Counsel , and the respondent by Miss Berry, also of Counsel. Disability was conceded, and the

respondent called its evidence first. The respondent called Mark Franssens, and Conor Peden. The claimant gave evidence, but called no additional witnesses. There was an agreed Bundle, running to two volumes. The parties' representatives made oral submissions on the final day of the hearing, and the tribunal reserved its decision. It had been hoped to promulgate it sooner, but pressure of judicial business has delayed completion of the final draft.

3. Having heard the evidence, read the documents in the Bundle, and considered the submissions of the parties, the tribunal finds the following relevant facts:

3.1 The respondent is a large national energy company. The claimant was employed by the respondent at its call centre at Talbot Road, Stretford, Manchester. His contract of employment is at pages 250 to 262 of the Bundle, and his employment commenced on 6 April 2009, as a customer service advisor, at a salary (then) of £16,140 per annum.

3.2 The claimant has , and has had for some time a hearing condition , tinnitus and hpyperacusis, which affects his day to day activities, and his ability to carry out some of the tasks required of him in the course of his employment.

3.3 The claimant's role involved him taking calls from customers, and seeking to resolve issues that they raised, or directing their call to other advisors who could further assist them or answer their enquiries. The respondent utilised a computer application to support customer service advisors ad the claimant, in the course of his work, would have to access this system whilst dealing with enquiries from customers. From 2010 this system was "Merlin", but from 2011 it was replaced by a system called "Agent Workbench" referred to as "AWB" for short.

3.4 The claimant experienced what he considered to be an unusually high number of faults when operating the AWB system, which impacted upon his ability to deal effectively with customers when taking calls, which resulted in him either taking longer than was required by the respondent's protocols, or the enquiry not being resolved at all. When operating this system, each employee, including the claimant had an individual log – in, and profile, which identified them on the AWB system. This was unique to each employee. In addition to operational functions relating to customer interactions, this profile was also linked to HR functions, and in particular , pension information. Further, when operating the AWB system, it was possible to leave upon it a form of note, known as a "wrap note", upon which information could be left for the attention of any subsequent user.

3.5 The claimant continued to suffer from these system failures throughout 2013 and 2014. He reported them to his managers, and in his 1 -2 1 meetings. In 2014 Gary Prendiville became the claimant's line manager , but matters did not improve.

3.6 In April 2015 the claimant was given the opportunity to go to the respondent's office in Staines, and work on a software testing project. He took it, and for two weeks worked in Staines. He underwent tests for becoming a software tester. This was unrelated to the system difficulties he was experiencing. He went back for the second part of the testing project in July

2015, and was due to attend the third part in September 2015.

3.7 In the meantime the claimant returned to work in Talbot Road. He was still experiencing difficulties with the ABW system , this continued to impact upon his performance and the attainment of targets set by the respondent.

3.8 On 11 August 2015 AJ Adams (presumably from the IT Helpdesk) sat with the claimant to ensure that he was using the system correctly , and logging the faults correctly. The upshot of this was he wanted the AWB system to be uninstalled from the claimant's computer. There was e-mail communication about this (pages 369 to 371 of the Bundle) , and the advice ultimately was that this was not, in fact, technically possible.

3.9 In August 2015 the claimant was told that there would be changes to method of assessing sales related bonus. The claimant was concerned about this, as the faults he was experiencing would be likely to disadvantage him in any revised bonus scheme.

3.10 On 24 August 2015 the claimant was in work, and experienced more faults with the AWB system. He felt that he could not cope, and informed Gary Prendiville that he wanted to go home early. (The claimant refers to this in para. 36 of his witness statement, where he says that there was a discussion as to whether this absence would be considered as sick leave, or holiday, and ultimately the claimant chose to take the absence as sick leave. The e-mail exchanges surrounding these events are at pages 467 to 468B of the Bundle, but these relate to his subsequent absence from 15 February 2016).

3.11 The claimant first consulted his GP in connection with stress in 2013. He was suffering from headaches, and his sleep was affected. Although this abated during 2014, by July 2015 he was again presenting with symptoms of hypertension. On 25 August 2015 the GP issued a fit note , the claimant leaving work on 24 August 2015 on sick leave. The condition with which he was diagnosed (see page 244 of the Bundle) was "stress at work and hypertension".

3.12 The claimant remained absent from work from 24 August 2015 until 18 January 2016. His absence was covered by medical certification. On 8 September 2015 a referral was made to Occupational Health, and the ensuing report, the result of a telephone consultation with the claimant, from Marjorie Zambezi of 14 September 2015 is at page 386 of the Bundle. She observed that he had been off work due to stress *"which appears to be caused by system issues at work."* She advised that more could be achieved by management rather than clinical intervention, and she was aware that the claimant was due to come into work on 16 September 2015 to sit down with AJ Adams and further investigate the system issues. She reported that the claimant returning to work before the system issues were resolved was likely to cause his mental health to deteriorate further. She advised the completion of a Work Impact Sheet with the claimant in order to assist in identifying and addressing the issues causing the perceived work related stress. She advised that she did not consider that the claimant's condition would fall within the criteria of the disability element of the Equality Act 2010, but added that this was ultimately a legal, and not a medical, decision.

3.13 During the claimant's absence, steps were taken to investigate if the

problems experienced by the claimant with the AWB system could be eradicated, or reduced. Gary Prediville was told, incorrectly, on or about 23 September 2015, that the claimant's profile (i.e his personal profile on the AWB system) had been rebuilt, and that this may have the effect of eradicating or reducing the system problems he had been experiencing. Gary Prendiville told the claimant that his profile had been rebuilt in a telephone call on 23 September 2015. Gary Prendiville's note of this conversation is at page 380 of the Bundle. The claimant was concerned that he may return to work to find that the system problems had not been fixed, and said he would be likely to go off sick again. The claimant did say that he may resign if the situation was not resolved, as he was fed up with the job and the length of time that it had taken to resolve the problems.

3.14 On 29 September 2015 the claimant came into work and met with Richard Berry. There are no notes of this meeting.

3.15 On 6 October 2015 there was another lengthy telephone conversation between the claimant and Gary Prendiville (notes at pages 377 and 378 of the Bundle). In that conversation the claimant was told that he needed to come in and test the system, as only then would it be possible to know if the rebuild (which he believed had been carried out) had been successful. The claimant was to see his GP again shortly, and was going away to family in Leeds. Gary Prendiville stated that the respondent was not able to move any further until the claimant came in to test the system.

3.16 Following a telephone call with Richard Berry on 22 October 2015 (page 376 of the Bundle) in which the claimant explained his continuing symptoms of irregular sleep patterns and vivid dreams, and that he was continuing to take medication. Richrd Berry , in the light of this information, arranged a further Occupational Health referral.

3.17 A further Occupational Health assessment was carried out (by telephone, it would appear) on 23 October 2015, and the ensuing report, dated 23 October 2015, from Shirley Jones is at pages 391 to 393 of the Bundle . In it Ms Jones records how the claimant had been absent from work due to stress, which he had stated to relate to technological faults which had affected his ability to work properly. She reported that she had been informed that the technology had been reviewed . She too, had been misinformed. After summarising the claimant's current health position, she went on to express her opinion of the claimant's capability for work. She stated that she believed that he would be fit for work at the expiry of his current sick note, i.e. by 9 November 2015. She advised a phased return to work, and that it would be important for the claimant to be provided with maximum technological support. She went on to express the view that if the claimant could not return to work by 9 November 2015, she was confident that he would do so by 23 November 2015.

3.16 In a telephone call between the claimant and Richard Berry on 3 November 2015 (pages 375 to 376 of the Bundle) the OH report was discussed. The claimant wanted to discuss the recommendation with his GP, and felt that he may not have accurately represented the picture in his interview with OH. The claimant was also, around this time, starting to undergo counselling, his first session being 6 November 2015. Richard Berry expressed his view that, as two OH reports had indicated that he was fit to return to work, he would be supporting this recommendation and would expect him back in work on 9 November 2015.

The claimant was to see his GP again, and then let Richard Berry know what the position was .

3.17 The claimant did not return to work on 9 November 2015, his GP signed him off sick for a further period of a month from 9 November 2015. The claimant's planned first session of counselling had not taken place, and was re-scheduled for 12 November 2015.

3.18 A further OH referral was made , by Conor Peden, HR advisor on 9 November 2015 (see page 393 of the Bundle). As the claimant did not return to work on 9 November 2015 , and had been given a further fit note from his GP for a month, Richard Berry referred the matter to Conor Peden, and it was he who by e-mail of 9 November 2015 asked Shirley Jones whether she would still deem the claimant fit to return to work on a phased basis.

3.19 A further telephone interview between the claimant and Shirley Jones took place on 10 November 2015 , and the ensuing report (wrongly dated 31 May 2017 as originally copied into the Bundle) dated 10 November 2015 is at pages 396 and 397 of the Bundle. In this report Shirley Jones reports on the claimant's current health , and his continued difficulties with his sleep pattern, his ongoing counselling (there had been some difficulty in arranging this) and increased medication. She made no reference to the claimant's GP's fit note that had recently been issued. In the section headed "capability for work" she advised that she was "now hopeful of a return to work for [the claimant] by 30 November 2015". She referred the guidance in her previous report of 23 October 2015. In relation to the future she advised that if the claimant did not return to work by 30 November 2015 she would like to offer the claimant a referral to an Occupational Health Physician.

3.20 Further communication continued between the claimant and Gary Prendiville or Richard Berry at the end of November and beginning of December 2015 (see pages 375 to 374 of the Bundle) . The claimant was keen to try to return to work, and almost did so, but in the event, he felt he could not, and his GP supported this by the continued issuing of fit notes saying that he remained unfit for work. He did not return to work on 30 November 2015. During this period there was further e-mail communication between the claimant, Gary Prendiville, Richard Berry and Shirley Jones. At one point the possibility of a return to work on 7 December 2015 was discussed, but the claimant could not manage this. The claimant spoke with Gary Prendiville on 7 December 2015 (notes on page 374 of the Bundle) explaining how he felt , and also discussing the advice he had been given by his GP for an 8 week phased return to work. The details of this had been discussed previously , and in an e-mail of 3 December 2015 (page 399 of the Bundle) to Shirley Jones, copied to Conor Peden and others, Gary Prendiville set out the details of the claimant's GP's proposal , as explained to him by the claimant.

3.21 The next step was for the claimant to be asked if he would agree to a referral to an OH Physician, which was raised with him by Shirley Jones on 11 December 2015. He agreed, and she reported this to the other parties involved by e-mail of 11 December 2015 (page 411 of the Bundle).

3.22 Gary Prendiville and the claimant spoke on 14 December 2015. The claimant updated him, and explained what medication he was taking. The OH

referral to the physician was discussed. The claimant wanted to await that referral before committing to a return to work. Gary Prediville put forward a four week phased return to work, suggested by Richard Berry. The claimant did not agree.

3.23 The next (effective, because the claimant had not responded to a number of calls, possibly because he did not realise who the calls were from) communication between the claimant and Garry Prendiville was on 7 January 2016 (notes are at page 372 of the Bundle) . They discussed his lack of response to previous calls, and his current medical position. There was discussion about the options, and what would happen if the OH report did not resolve the issues. The claimant said he would seek legal advice, he may resign, come back to work, or stay off work. His resignation was the likely option if he came back to work and everything was the same. Gary Prendiville repeated that the claimant's system had been rebuilt and the respondent's recommendations were that he come in to try and test his system to "see if the rebuild had the desired effect". He invited the claimant to send him an e-mail setting out his concerns, which the claimant tried, but later found he could not do so, as it caused him upset.

3.24 The claimant, however, did manage to send to Gary Prendiville an e-mail on 11 January 2016 (page 429 of the Bundle) in which he stated as his "wish list" the following:

"1. I wish British Gas would be willing to test the system and assure me that it is now usable.

2. I wish to receive a system that works as well as everybody else's (a reliable IT system would be preferable).

3. I need reassurances that British gas will take remedial actins in a timely manner when issues are raised.

4. I do not wish to keep having to defend myself for errors resulting from British Gas' own system failures.

5. I wish not to frequently be required to convince different managers that my system fault is the reason why I am in wrap, logged out etc.

6. I do not wish to keep having to suffer the consequences for British Gas' own system failures."

3.25 On 11 January 2016 the claimant was referred to an OH Physician , Dr O'Brien, who carried out a further telephone assessment. The resultant report, dated 11 January 2016 is at pages 430 to 432 of the Bundle. No mention is made in it of any documentation seen by Dr O'Brien, and no medical records, fit notes or other material appears to have been made available to him, nor requested by him.

3.26 His diagnosis was of a moderate anxiety and moderate depression. He considered it unlikely that the claimant was disabled within the meaning of the Equality Act 2010, as his conditions were unlikely to persist for 12 months. He noted that a return to work was unlikely unless the claimant was given the guarantees about the IT system he had been seeking. Dr O'Brien was unable to

give an indication of when the claimant may return to work, as this was dependent upon the IT issues being resolved.

3.27 Dr O'Brien advised that when the claimant did return to work, this should be on a phased basis, with the claimant working half his normal hours for the first tow weeks, then building up a further hour each day per day until back to full duties. The claimant has interpreted this (para. 48 of his witness statement) as being a proposal for a 6 week phased return to work.

3.28 Under the heading: Future Capacity for Regular and Efficient Service, he said:

"If his concerns can be addressed, his future service should be regular and effective. This does seem unlikely."

3.29 At point 4 of his answers to specific questions (to which the tribunal has not been referred, and do not appear to be contained in the Bundle) he says:

"His condition is unlikely to improve over time, but only with the changes stated above."

The tribunal assumes that this is an error, and Dr O'Brien meant that the claimant's condition was <u>likely</u> to improve, if the changes referred to were made.

3.30 In answer to question 5, in relation to reasonable adjustments, he said:

"I do not think that there are any specific adjustments that would help him return to work . He has expressed his concerns to management and it is for the Company to decide if these can "reasonably" be addressed."

3.31 The report concludes with a reiteration of the view that the claimant's future attendance was likely to be affected if he continued to have difficulties with the IT application.

3.32 The claimant returned to work on 18 January 2016 for a four week phased return, as this was, the claimant contends, and this has not been rebutted, all that the respondent would agree to. It is presumed (but the absence of any fit notes from the Bundle makes it hard to be sure) that the claimant's GP signed him off, in so far as any fit note was concerned, as he presumably could not have returned to work unless there was either no fit note, or one which permitted a phased return.

3.33 Whatever the position the claimant returned to work on 18 January 2016 on a phased return. A return to work discussion was held with Gary Prendiville that day, noted at page 434 of the Bundle. This document records:

"Ehis has a phased return to work 4 weeks, he has had his whole profile rebuilt".

This latter statement was, in fact, incorrect, the claimant's profile had not been rebuilt. The return to work was initially effected by the claimant attending the respondent's return to work Academy. Here he did not deal with telephone calls from the public, or using the AWB system, the intention being to slowly reintroduce him to his pre-absence role as a customer service advisor.

3.34 A Work Impact Sheet was completed by Gary Prendiville on 21 January 2016 (pages 437 to 439 of the Bundle) . This records the position under various headings, and the claimant expressed that he was feeling able to cope with his return to work at that stage, as there was no pressure, and he was being supported. He did not, however, return to taking calls on his own at that time. (There were issues at this time about the desk where the claimant was required to sit, which caused him back pain, but these issues are not germane.)

3.35 A record of the claimant's progress in the Academy on 25 January 2016 is at page 442 of the Bundle, in which it was recorded that he needed to begin taking calls himself.

3.36 An Attendance Review meeting was held on 26 January 2016 , with the claimant, his union representation and Gary Prendiville present . The notes of this meeting are at pages 445 to 449 of the Bundle. The claimant by now was not convinced that his profile had been rebuilt. When he had logged into the system upon his return to work he noticed that his file history since 2015 was available, which he did not consider would be the case if there had been a total rebuild of his profile, as he had been told. He raised this issue in this meeting, and there was discussion as to whether the claimant had been told that his profile would be rebuilt before he went off sick in the preceding August. There was also discussion about how the claimant's holiday entitlement would be dealt with.

3.37 There were numerous issues between the claimant and Gary Prendiville during this period. The claimant rehearsed these extensively in his subsequent grievance. In short, the claimant did return to taking calls on his own towards the end of this return to work period, and again experienced faults on the system of the same nature, and to the same degree as he had before he went off sick in August 2015.

3.38 The claimant reported these faults to Gary Prendiville. He in turn sought advice upon them. There is an e-mail chain between 9 and 11 February 2016 between Gary Prendiville, Richard Berry and some unknown (because it is redacted for some reason) person who appears to be a Business Analyst in which the faults that the claimant was experiencing are detailed. The Analyst responded with some suggestions in an e-mail of 10 February 2016 (page 462 of the Bundle), and there was discussion about matching the claimant's profile with that of another CSA, Martin Westlake.

3.38 In an e-mail to Gary Prendiville and the Analyst on 10 February 2016 (page 461 of the Bundle) , Richard Berry said this:

".. My concerns is not about the fault but the frequency. I appreciate others will encounter these issues but in Ehis' case, our worry was about him suffering a disproportionate amount. Given we understood a full rebuild had taken place and hasn't, then an identical profile had been created and hasn't, I need to make sure we're doing everything in our control to meet the commitments we've made to Ehis. Although there may be good reasons for not rebuilding as expected, Ehis may begin to feel a lack of confidence in our commitments due to the mixed message he's receiving."

3.39 Around this time, the claimant was told by Gary Prendiville and/or Richard

Berry, that the respondent needed him to complete a day of call taking, so that an assessment could be made as to the level of faults he was experiencing, and the possible reasons.

3.40 On 15 February 2016 the claimant was at work taking calls, when he experienced further system failures on 9 out of 15 calls. His tinnitus grew worse, and he called the NHS 111 service for advice. He found that he was unable to cope, felt unwell and went home. He informed Gary Prendiville of this verbally, and then sent an e-mail at 13.12 (page 467 of the Bundle) confirming that he was going home , as discussed. Luke Kinsella was copied into this e-mail, and he in turn sent one to Conor Peden (same page of the Bundle) at 13.24 informing him that the claimant had gone home sick as he was "unable to cope with AWB".

3.41 There ensued some discussion as to whether the claimant could have this absence treated as holiday,

3.42 On 16 February 2016 Richard Berry wrote an e-mail to Gary Prendiville (page 459 of the Bundle) and others (redacted) in which he said this:

"Afternoon all

I'm hoping you can help support the next steps as Ehis is unfortunately off again now, citing issues with his systems.

From the e-mails above , there is a clear picture of the efforts that have been made to solve the problems. However I understand that [?AJ – redacted] has doubts over whether a full profile rebuild took place and I would like your help in understanding why this might be ? From the notes above, there was explicit reference to the next steps and I only have confirmation that this appears to have taken place.

After reference to matching profiles, and the 9/15 calls taken where faults were experienced , he continued:

"… The big ask is to see if [?AJ – redacted] can sit with Ehis for a day on his return and log all faults with him, providing a completely independent assessment to the next stage of the escalation process. I'm really concerned that after all the work we have done, we cannot independently state Ehis is having the same experience as his peers or is being disproportionately impacted. "

Later in this e-mail he says:

".. We're working with Ehis to support his wellbeing, as his phased return to work has not gone as smoothly as we might have hoped from a system perspective, in spite of the interventions we have put in place. We will be speaking to Ehis tomorrow and we would like to go back with a commitment to this activity so that we can continue to make progress towards a resolution."

3.43 In fact, prior to the claimant's return to work a full rebuild of his profile had not taken place. This was because to do so would potentially have impacted upon personal payroll and pension information stored or accessed by the system, which would be jeopardised by a full profile rebuild. The National Help Desk, however, had not informed the claimant's managers of this, and they too were

under the impression that such a rebuild had taken place, when it had not.

3.44 On 25 February 2016 the claimant had a further telephone assessment with Shirley Jones. After this assessment on 25 February 2016 the claimant spoke later the same day to Gary Prendiville,, who discussed that the company just waiting for him to come back for a day to try the system for a day to see if he was still encountering more faults than his colleagues. The claimant said that he was never using the system again, and that he felt that he was waiting for a letter of termination from the respondent. Gary Prendiville said he would await the report from OH. The resultant document, entitled "OH Management Advice" dated 25 February 2016 is at pages 478 to 479 of the Bundle . (A document in identical terms , but dated 8 March 2016, is at pages 481 to 482 of the Bundle. As the author does not make any reference to any dates when she examined or spoke to the claimant, it is hard to tell if the latter is a further report, but this seems unlikely). In it Shirley Jones records how the claimant's stress had become worse, and the problems that he was then also having with his ears. In the recommendations section, she said:

"1. If an alternative role is available for Mr Osifo which does not involve working on the Call Centre telephonic system then I would advise a consideration of such a role for him in order to eliminate what Mr Osifo has described as the cause of his stress."

She went on to say that she could not offer any guidance on the Call Centre work as the claimant had stated that he would not be able to work on that system. She advised that she did not consider that his stress condition would be likely to fall under the criteria of the Equality Act , but did caveat this with the observation that this was ultimately a legal and not a medical judgment.

3.45 On 17 March 2016 the claimant lodged a grievance, by e-mail (pages 485 to 493 of the Bundle) addressed to Luke Kinsella and Conor Peden. In it he sets out a comprehensive narrative of the events from 2014 up to 2016, and the claimant raises issues about how Gary Prendiville had dealt with him and his health issues. He complained how Gary Prendiville constantly disputed the efficacy of his doctor's treatments, and requested details of his treatments. He said he felt targeted and that Gary Prendiville had bullied and threatened him . He had lost trust in him, and did not want him to be his manager any further. In conclusion, the claimant said in this document:

"I am requesting to be redeployed into any other role in the business that doesn't require me to use AWB. I am also willing to work at other locations if necessary."

He went on to refer to his experience in teaching and training , technical support and customer service , as a PC technician, and how he had a degree in information systems management, and had recently passed the foundation software testing exam, stating that he was willing to train for any other role.

3.46 The claimant remained off work sick. On 21 March 2016 his salary was reduced to half pay. On 22 March 2016 Gary Prendiville sent him an e-mail (page 503 of the Bundle) with a link to internal job vacancies. One of these was in Manchester, and upon opening the link, the claimant saw that this was in fact his own job, as a Customer Service Advisor – Manchester.

3.47 The claimant attended a grievance meeting on 6 April 2016, accompanied by his trade union representative Rachel Demspey. The grievance was heard by Richard Fryer, Service Delivery Manager , supported by Katherine Cooper HR Graduate. The (typed – there are handwritten notes as well) minutes are at pages 504 to 518 of the Bundle . During the afternoon session, there was this exchange between the claimant, Katherine Cooper and Richard Fryer (page 512 of the Bundle):

"KC – moving forward, how would you like business to help you, we want you to test AWB for us so we can see whether new mapped profile has reduced your faults which you are not willing to do?

EO – Only a different role moving forward would help. I don't know if any other ideas business has ?

KC – If AWB was fixed and tested , would you return to your role?

EO – This is not a valid question, it hasn't worked so far so no I am not willing to answer

RF – What is we do come up with a resolution , will it be possible for you to return to work then?

EO – Personally, I don't think I can work with AWB again."

3.48 Towards the end of the meeting, the following exchange between the claimant ("EO") and Katherine Cooper ("KC") is recorded:

"KC – Just to confirm you can't work with Gary and AWB?

EO – Yes that's right

KC – Can't promise anything but would a different role or location be an option for you?

EO – It all depends on if it suits me , I am not tied to Manchester

KC – What role would you be interested in?

EO – As long as I don't have to work with AWB

KC – Are you looking on the jobs website?

EO – Yes, I have been looking

KC – What skills and qualification do you have?

EO – Software testing , customer service and training

KC – What hours are you looking for?

EO – As long as it's in Manchester/Stockport not bothered about hrs.

KC – Are you aware that the business cannot create a role for you ?

EO – Yes I know"

3.49 Around the time that the claimant put in his grievance, a decision was made that his absence would no longer be managed by Gary Prendiville, but by Conor Peden, HR Advisor. The claimant was informed of this towards the end of the meeting on 6 April 2016.

3.50 On 18 April 2016 Richard Fryer, again supported by Katherine Cooper, interviewed Gary Prendiville as part of his investigation of the claimant's grievance (see notes at pages 549 to 556 of the Bundle). On 27 April 2016 he, and Katherine Cooper, interviewed Richard Berry, the Customer Service Manager (see notes at pages 560 to 563 of the Bundle).

3.51 On 26 April 2016, after some initial difficulty, Conor Peden managed to speak with the claimant. He summarised his conversation in an e-mail to Gary Prendiville on 26 April 2016 (pages 576 and 577 of the Bundle). An arrangement was made for regular contact between the claimant and Conor Peden.

3.52. On 28 April 2016 Richard Fryer wrote to the claimant to tell him that he would not be able to give him an outcome at that time, but needed to carry out further investigation (page 564 of the Bundle).

3.52 On 4 May 2016 Richard Fryer and Katherine Cooper interviewed Ian Sullivan of the National Help Desk (see notes at pages 566 to 571 of the Bundle).

3.53 On 6 May 2016 the claimant attended the first counselling session arranged through, and paid for, by the respondent.

3.54 During May 2016 the claimant attended counselling, and sought further counselling through the NHS. He told Conor Peden on 11 May 2016 (see e-mail of that date at pages 580 to 581 of the Bundle) that he could not say when he may be able to return to work, and did not feel he could apply for any job at that time.

3.55 Richard Fryer concluded the grievance investigation, and by letter of 18 May 2016 invited the claimant to a meeting to receive the outcome, to be held on 23 May 2016. The claimant was due, however, to fly to America to attend his brother's wedding. He had informed the respondent about this, and it had been discussed on several occasions. Consequently the outcome meeting was not held, and the claimant received the grievance outcome in the form of a letter dated 2 June 2016 , pages 626 to 637 of the Bundle.

3.56 In fact, there are several iterations of this document in the Bundle, the first being dated 20 May 2016 (pages 588 to 598 of the Bundle) , another 25 May 2016 (pages 603 to 613 of the Bundle) and a further draft , with annotations by Katherine Cooper , dated 1 June 2016 (pages 615 to 625 of the Bundle) . The version in the form that the claimant received it, however, was dated 2 June 2016, and starts at page 626 of the Bundle.

3.57 Richard Fryer did not uphold the claimant's grievances, but did apologise for the fact that AWB had been a cause of stress for the claimant. He clarified

that the claimant was still a British Gas employee, and that the company was happy to support him throughout his absence , and had a range of support available to him on site. He set out the support that had been provided and which was available to the claimant. In dealing with the second part of the grievance , which related specifically to the claimant's relationship with Gary Prendiville, he did not uphold this, but advised mediation. In his conclusion section (page 636 of the Bundle) he said this:

"

- *With regards to AWB , we have partially rebuilt your role profile and stripped your profile to that of Martin Westlake's, an agent with a low fault number, all the additions have been stripped out. Our next course of action is that we need you to come in for a day to take a day's worth of calls so we can assess whether there has been a reduction in faults. We will fully support you on this day and a member of the NHD will sit wth you.*

.

- *You stated in your grievance that you would be happy to re locate to a different role within British Gas that does not require the use of AWB. In Talbot Road all roles that match your skill set require the use of agent work bench. We are happy to support you in your search for other roles but it is important that you maximise this opportunity by checking the job board on a regular basis , and if applicable looking for roles outside the Manchester site."*

3.58 On 8 June 2016 the claimant attended an Employee Health Review meeting held by Conor Peden, accompanied by his union representative Vicki Heywood. The notes of this meeting (transcribed from a recording) are at pages 640a to 640p of the Bundle, and the review document completed by Conor Peden after the meeting is at pages 638 to 640 of the Bundle. By this time the claimant had been to America for his brother's wedding, and there was some discussion as to how he had coped with this. In this meeting the claimant said he still could not return to work whilst there a need for him to work with the AWB system. Conor Peden said that the majority of roles would involve it, but alternative roles were an option. The claimant said he now longer trusted the business, and this was an issue. The claimant did not see himself returning to work. Vicki Heywood mentioned the possibility of a role involving smart meters, in Leeds, but it was unclear if this too might involve AWB.

3.59 Conor Peden informed the claimant that the next step would be under the capability procedure (a "Stage 4") , which would await any appeal that he made against his grievance outcome. An up to date OH referral would be made.

3.60 By e-mail of 10 June 2016 the claimant appealed the grievance outcome (page 643 of the Bundle).

3.61 By e-mail of 13 June 2016 Conor Peden sent the claimant links to smart meter and engineer roles , but advised that the majority of roles would have some AWB involvement (page 644 of the Bundle).

3.62 Around 23 June 2016 Conor Peden commissioned a further OH report. There is no document in the Bundle recording this, nor the terms of any such referral. Clare Wilson, described as an Occupational Health Delivery Manager, spoke to the claimant by telephone on 23 June 2016. She prepared a report

dated the same day , which is at page 656 of the Bundle. In it she records that the claimant told her that he would not be returning to work whilst the IT system was in place, and even if assurances were given, he would not trust the respondent. She reported that the information and recommendations from the report in January 2016 remained unchanged, and she had no further advice to offer. She said that this was essentially a management issue to resolve when the claimant returned to work. She advised (without any caveat) that it was unlikely that the claimant's medical condition would fall within the Equality Act.

3.63 The claimant's grievance appeal was to have been heard on 28 June 2016, by Chris Shaw, Customer Service Manager but he only received this invitation the day before. He therefore sought an adjournment , which was granted to 1 July 2016. The claimant was unable to attend that meeting, either, and the appeal was further adjourned to 5 July 2016. By e-mail of 4 July 2016 the claimant told the respondent that he was unwell, and was taking steroids for a nasal inflammation, which he feared might affect his moods so could not attend the appeal on 5 July 2016. Chris Shaw replied that he wanted to take medical advice on the effect of steroids that the claimant was taking. This e-mail exchange is at pages 663 to 665 of the Bundle.

3.64 Conor Peden sought this advice by speaking to Clare Wilson , precisely when is unclear, but he reported his conversation to Chris Shaw by e-mail of 5 July 2016 (page 667 of the Bundle) . The advice received was that the claimant may be uncomfortable, but he should still be able to attend or write a written statement.

3.65 Chris Shaw held the appeal meeting in the absence of the claimant on 5 July 2016. He was supported by Natalie Ziara , HR Business Manager , and a note taker. The claimant's trade union representative Vicki Heywood was present, but she only observed, being unaware of the claimant's rationale or reasoning for his appeal. Richard Fryer and Katherine Cooper were interviewed for the appeal. Chris Shaw decided not to uphold the claimant's appeal, and his letter informing the claimant of the outcome of the appeal, dated 8 July 2016 , is at pages 678 to 680 of the Bundle, and notes of the hearing are at pages 681 to 686.

3.66 A Stage 4 Attendance hearing was arranged, instigated by Conor Peden. For it Gary Prendiville prepared a document a "Stage 4 Attendance Hearing Report" dated 12 July 2016. This document is at pages 687 to 835 of the Bundle. It comprises of an initial report , of 13 pages, and 29 Appendices. It reviews the entire history of the claimant's absences since his employment began on 6 April 2009. At page 2 (688 of the Bundle) is a table of the claimant's absence history. The most recent was a period of 95 days, following a period of 83 days, from 24 August 2015. This period was interrupted only by one short period from 18 January 2016 to 15 February 2016 , less one day, 1 February 2016.

3.67 On page 12 of the report (page 698 of the Bundle) Gary Prendiville says this:

"Ehis hasn't been able to make a significant improvement that can be sustained by him or the business. This has resulted in Ehis being exited and reinstated into our absence procedure and has resulted in her (sic) *being progressed through to stage 4 of our absence process.*

Highlighted above it shows that Ehis Osifo has had 260.02 sickness days over 17 occasions, since January 2010. This averages per year at 40.003 day's sickness based on 6.5 absence from the business which is significantly higher than the sites target and above the level for which the business can sustain."

3.68 The report then goes on to set out the support that had been provided to the claimant, and concluded that given the level of attendance and support implemented and given, it was felt now appropriate to the case to be reviewed at a Stage 4 attendance hearing.

3.69 The report was provided to the claimant by , and he was invited to a Stage 4 meeting on 31 July 2016. The meeting was to be held by Mark Franssens, at the time a Team Manager based at Talbot Road (now since retired), who had no previous dealings with the claimant . He was provided with the report from Gary Prendiville. That date was postponed, as the claimant was not , he said, well enough to attend. By e-mail of 25 July 2016 (page 867 of the Bundle) the claimant stated that he would attend a meeting, with a representative, but would only be able to stay for 20 minutes.

3.70 The meeting was eventually held on 26 July 2016. Mark Franssens sat with Stuart Todd, Customer Operations Team Manager, and the claimant initially attended with his union representative , Gavin Mazza. A note taker was present, and the respondent's notes of the meeting are at pages 870 to 870e. A transcript of a recording of the meeting is at pages 871 to 871s of the Bundle.

3.71 In the meeting the claimant was told of the possible outcomes, which included setting a further timescale for improvement and review, a reasonable adjustment to his current role, if applicable, adjustments under the Equality Act, the offer of an alternative position within the respondent company, or the end of his employment .

3.72 Gary Prendiville was present to present his report, which he did. At one point (page 871b of the Bundle) he said :

"Ehis as not been able to make a significant improvement that can be sustained by him or the business . This has resulted in Ehis being exited and reinstated into our absence procedure and has resulted in being progressed through to stage 4 in our absence process."

3.73 In the meeting Mark Franssens asked the claimant if he could foresee a date in the future when he might be able to return to work for the respondent, and he replied by asking "what job", to which Mark Franssens replied "just working for the company at all". The claimant s aid that this was unlikely. He went on toe elaborate that he considered this was unlikely because the respondent would not rebuild his profile, and from what he had been told whatever job he took he would always have system faults. He went on the explain in some detail effects of the AWB faults upon his work when taking calls from customers, and how he had been misled into believing that his profile had been rebuilt when it had not, and how this affected his health. He explained how his understanding was that in any job within the respondent he would have these problems because his profile could not be rebuilt.

3.74 At one point the claimant said:

"So at the end of the day, the question is not whether I'm able to work with British Gas, it is whether British Gas wants me to work with British gas. That's the question you should be asking."

3.75 Then ensued further discussion about testing of the system and how it could be done, and the claimant was asked if he was prepared to come in and work with the system to test it, and see what kind of issues there were, and he said he would not. His union representative pointed out that he had already done that.

3.76 After further discussion about the possibility of a rebuild, and the extent to which this was the issue that was preventing the claimant from returning to work, Mark Franssens asked the claimant if he had applied for other roles within the company, which had been sent to him. He replied that he had not, as he had been told that they all involved the use of the AWB system, which Mark Franssens challenged. The claimant said that was what he had been told. There was discussion about Smart Metering and Engineering roles, but the claimant had noted that the initial apprenticeship period would involve a pay cut for the first 12 months.

3.77 At one point it was suggested to the claimant that he had "painted himself into a corner", by insisting that he be guaranteed that there would be no system faults in any role. Mark Franssens wanted to bring the discussion back to the claimant's health and capability for work.

3.78 After further discussion about levels of faults, and the possibility of rebuilding a profile, Gavin Mazza pointed out that once an employee was logged out of the system for 6 months, his system profile was reset and rebuilt anyway. By that time the claimant had last logged on in February 2016, some 5 months previously.

3.79 The claimant did go on to say how he did not trust the management of the respondent. It was impossible for him to believe what the company said. He offered the company permission to log into his system. He simply wanted the same level of faults as everyone else. Shortly after this, the claimant could not continue , and left the hearing.

3.80 Following the meeting Katherine Cooper, on behalf of Mark Franssens, made further enquires into the question of whether the claimant alone had to be present and run the AWB system as himself in order to test it, or whether this could be done by anyone else. She sent an e-mail to Anders Barker raising this query on 27 July 2016 (page 879 of the Bundle), from a data protection perspective, and he replied by e-mail of the same day (page 878/9 of the Bundle) which suggested that this would be a breach of the acceptable use policy, and suggested that the employee in question be requested to work the system himself. No further enquiry was made about Gavin Mazza's suggestion that after 6 months of absence of logging into to the AWB system, the claimant would receive a new profile, or it would be rebuilt,

3.81 This information was relayed to Mark Franssens, who decided that the claimant's employment should be terminated. He did not announce his decision

at the end of the meeting, but sent an e-mail to the claimant on 28 July 2016 (page 876 of the Bundle) in which he told him that his decision would be sent to him by post to his home address. He informed the claimant that he would have 7 days in which to appeal from the date of receipt of the outcome letter.

3.82 Mark Franssens was away from 28 July 2016, and in his absence the outcome letter was sent to the claimant. There are two versions of this in the Bundle, one dated 4 August 2016 (pages 886 to 893) and one dated 5 August 2016 (pages 898 to 904). Other than the date, they are identical.

3.83 The rationale for the decision to dismiss the claimant is set out in Mark Franssens' letter. He rehearsed the relevant details of the claimant's most recent absence history , noting that he had been absent for 97 days from 18 February 2016. He recorded how in the meeting the claimant had said that he would not be able to return to work until he was able to have confidence in what he was told by the respondent's employees, and how he ad lost faith in the company and then people working in it. Whilst the OH advice had been that the claimant did not meet the definition of disability, the respondent had nonetheless made reasonable adjustments. The respondent could not rebuild his personal log - in so as to enable the claimant to return to work, as this was one of his conditions.

3.84 In relation to other positions, Mark Franssens noted that the claimant had not applied for any , because of his lack of faith in the respondent. Whilst the claimant had initially declined to do so because of the potential exposure to AWB in other roles, the respondent had simply explained that it could not be guaranteed that there would be no such exposure. In any event, the claimant had been sent links to vacancies in roles which did not involve use of the AWB system.

3.95 He made reference to details of roles that had been provided to the claimant (in Appendices 27 & 29) , and to the link that had been provided to the Centrica internal vacancies board. Again reference was made to the inability to guarantee that these roles would not involve use of the systems which had caused the claimant issues.

3.96 He went on to discuss the possibility of the claimant returning to his role, with reasonable adjustments. Reference was made to an OH report of 11 January 2016 , which recommended a phased return to work. This occurred on 18 January 2016, and the claimant did start such a return. He became ill, again, however, and was absent from 15 February 2016. Mark Franssens said that without an indication from the claimant of a possible return to work date, the respondent could not agree to a another phased return to work.

3.97 Mark Franssens then went through the claimant's current state of health, noting that the claimant was suffering stress as a result of the behaviour of the respondent, and then performance of the systems used in role, which would not diminish until he could believe that he could return without suffering faults on AWB, or at least that his fault level was no higher than his colleagues'. In the ensuing discussion of the "systems" Mark Franssens explained how the system could not be tested by someone else logging on as the claimant, as this would involve users effectively impersonating him on the system, leaving "footprints" of any entries or adjustments to customer accounts logged against his user name, and conversations with customers held by others being recorded as being held

with the claimant. He did not consider that it was reasonable to make these requests a condition of the claimant returning to work. The claimant had to accept that no system was 100% perfect, and that some level of faults was inevitable.

3.98 Turning to the claimant's statement that his well being had been affected by what he perceived as lies told to him that his system log – in had been rebuilt, when it had not, Mark Franssens accepted that this had been what his Line Manager and Customer Service Manager had been told as well, and that this had only been discovered when the issue had been escalated. He explained the reasons why this had not been done. He went on go through the support that had been provided to the claimant, which ended with the most recent updates to the system, and an IAM alignment of his log - in, with another person in the business, who had experienced less faults. This, however, could not be tested without the claimant's attendance at work to monitor the results.

3.99 In conclusion, Mark Franssens said this (page 892 of the Bundle):

"In the light of the above , I have decided that we should end your employment on the grounds of capability."

He went on to mention that he had looked into the possibility of ill – health retirement, but this was not referred to by OH (which is correct, but there is no evidence that the OH provider was never asked to consider this) , or in the report from AXA PPP in January 2016, where again no specific request was made, and, Mark Franssens stated, presumably stating his own opinion, the claimant did not satisfy the test for incapacity contained in the rules of the relevant scheme.

3.100 The claimant was dismissed with 7 weeks notice, and advised of his right of appeal, and was told that he had to exercise that right by writing to Mark Franssens within 7 working days of receiving the letter.

3.101 By letter of 17 August 2016 (pages 921 to 923 of the Bundle) the claimant appealed the decision to dismiss him. He addressed that letter to Mark Franssens . He replied by letter of 23 August 2016 (pages 926 to 927 of the Bundle). He pointed out that the claimant's appeal was out of time, and therefore would not be dealt with as an appeal. He would, however, address some of the points raised in the claimant's appeal letter, and he went on to identify 4 such points. Point 1 related to the claimant's request for proof of the medical advice received as to whether he was fit to attend the meeting. Point 2 related to the claimant picking up Mark Franssens' statement that the purpose of the hearing was to review the issues that the claimant had experienced with AWB. Point 3 related to other faults which the claimant was experiencing, not confined to AWB. Point 4 related to the claimant questioning why a statement attributed to him as to not applying for another role in the organisation was not recorded in the notes of the meeting.

3.102 By letter of 26 August 2016 (pages 928 to 932 of the Bundle) Mark Franssens set out his responses to each of these 4 points. In relation to Point 1 he explained how the medical information had been provided by Clare Wilson, who did not consider that there was much medically wrong which would prevent the claimant attending the meeting. She had, however, left the business so she could not be asked anything further. In relation to Point 2, Mark Franssens stated that it had been stated that the purpose of the meeting was to discuss the issues

with AWB, but this was part of the Stage 4 capability hearing, and was only discussed because the claimant had said that these issues impacted his attendance ,and were stress triggers. In response to Point 3, Mark Franssens acknowledged that the claimant had indeed made reference to other faults, but that the main cause of his stares which led to him being off work was the AWB system. Finally, in response to Point 4, he said that the notes were not a verbatim account, but from what the claimant had said in an Employee Health Review meeting with Conor Peden (Appendix 29 o the report by Gary Prendiville) it was reasonable to believe that the claimant had lost faith in the respondent and could not work in any other role due to the breakdown in trust. To the extent that the claimant may have been seeking to revive matters dealt with in a previous grievance, Mark Franssens stated that no further grievance would be heard.

3.103 By e-mail of 2 September 2016 to Mark Franssens (page 936 of the Bundle) , the claimant explained that he did not have regular access to his e-mails, and was not always likely to check them the same day. The e-mail dismissing him, had gone into a "spam" folder. The posted letter was received on his behalf on 6 August 2016, but he did not see it until 9 August 2016. Consequently, 7 working days from that date of receipt was 18 August 2016. There was no response to that e-mail. Mark Franssens did send an e-mail on 7 September 2016 (page 937 of the Bundle) , in which he enclosed a copy of the letter of 23 August 2016, which had been posted to the claimant.

3.104 During this process, the claimant raised with the respondent the issue of what the date of the termination of his employment was. The respondent had utilised 26 July 2016 as the date, but this cannot be right, as the dismissal was not communicated to the claimant until several days later. He was paid in lieu of notice, but the issue arises as to the effective date of termination up until which the claimant remained employed.

3.105 Following the dismissal, though precisely when is unclear, Conor Peden was told by a colleague that the claimant had been seen driving a taxi for Uber. The claimant had not, in fact, been doing so. This was never put to him before his dismissal, or when Mark Franssens dealt with the "appeal", though the implication is that Mark Franssens may have been aware of this before either the meeting on 26 July 200016, or receipt of the claimant's appeal.

3.106 The claimant did in April 2016 set up a limited company Zero Initial Limited. He did so in case, as he feared, his employment with the respondent came to an end, and it did not trade, and has not traded.

3.107 The respondent has subsequently accepted that the claimant's condition of depression and anxiety constitutes a disability within the meaning of the Equality Act 2010.

3.108 In terms of the technical feasibility of rebuilding the claimant's profile, the practical and legal implications of someone else logging onto the AWB system as the claimant , in order to test it, and the effect of a six month period between log-ins , raised by Gavin Mazza in the Stage 4 meeting, no witnesses have been called by the respondent, and only Mark Franssens and Conor Peden have given evidence about these issues from what they have been told about them, or from documents in the Bundle.

4. Those then, are the relevant facts as found by the tribunal. The tribunal has not found it easy to discern the precise details of all the relevant facts from the witness evidence and the documents. For example, the claimant has not referred in his witness statement to having an OH assessment by telephone on 25 February 2016, but it seems likely that he did, not that the ensuing report , or rather OH Management Advice as it was then termed , from Shirley Jones makes it clear that she had actually spoken to the claimant. This is a recurrent feature. Similarly , some of the "paper trail", or more likely these days "e-mail trail" between the respondent and its OH advisors seems missing, in terms of referrals, and what questions were asked. Be that as it may, no issues of credibility arise, and the tribunal is satisfied that the witnesses before it did their best , and gave truthful accounts of events as they saw them, although there were inaccuracies in the respondent's witness statements which Mark Franssens and Conor Peden accepted, to a degree.

The Submissions.

5. The parties' counsel made submissions. which are set out in written submissions upon the tribunal final, and accordingly are not extensively recited further in this judgment. In summary, for the respondent , Ms Berry contended that the PCP of not allowing other employees to test a colleague's system profile was a reasonable one, the effects of which upon the claimant the respondent sought to minimise. There were very valid reasons why what the claimant wanted could not be permitted, as there would be data protection and allied issues. The respondent was advised that it could not legally do what the claimant wanted. In any event, given the claimant's stated position that he had lost all trust in the respondent, this adjustment would not have had the desired effect of enabling him to return to work.

6. Turning to justification in relation to the s.15 claim, she relied upon the aim pleaded in para.37 of the Grounds of Resistance. The claimant had been absent for 76 and then 95 days. The respondent had taken all reasonable steps, and an impasse had been reached. Dismissal was inevitable, and any procedural issues, whilst potentially relevant to issues of unfair dismissal, were not relevant to whether the defence of justification was made out.

7. Turning to the unfair dismissal claim, in terms of remedying the AWB issue, the respondent had demonstrated that even if it could have done so, the claimant would still not have returned to work. In relation to alternative roles, the claimant had been sent job vacancies by Gary Prendiville, which did not involve AWB , but he had not applied for any such roles. He was aware of where to look for such roles, and even if placed on a redeployment register, would still have had too take a proactive role.

8. For the claimant, Ms Niaz – Dickinson's main points were as follows. She cited ***Lyncock v Cereal Packaging Ltd [1988] IRLR 510*** as setting out the factors that a tribunal should take into account in determining the fairness of a capability dismissal..In relation to the defence of justification to the s.15 discrimination claim, she cited ***Buchanan Commissioner of Police for the Metropolis [2016] UKEAT/0112/16/RN*** , and ***Hensman v Ministry of Defence [2015]UKEAT/0299/14/BA*** . In relation to the s.20 reasonable adjustment claim she referred the tribunal to ***Cave v Goodwin and anor. [2001] EWCA Civ. 391*** and ***Home Office v. Kuranchie [2017] UKEAT/0202/16/BA*** .

9. Ms Niaz – Dickinson went on the make submissions as to the credibility of the respondent's two witnesses, pointing out where they made concessions and agreed that their witness statements were not accurate. She challenged in particular the suggestion that the claimant had said he would not return to work. She invited the tribunal to make various findings of fact. The claimant was not incapable, but was prevented from doing it by reason of the faults on his system. Alternatively, the respondent gave no proper consideration to alternatives to dismissal, particularly other roles. She criticised the procedure, and lack of investigation by Mark Franssens. She contended that the respondent did not act reasonably in all the circumstances, and failed to consider "the whole picture".

10. In relation to the s.15 claim, the respondent could not succeed in justification, even if the legitimate aim advanced by the respondent were to be accepted, as the dismissal in these circumstances was not a proportionate means of achieving that aim. Finally, in relation to the reasonable adjustments claim, the claimant was put at a disadvantage by the PCP of being required to test the AWB in person, which could have been avoided by a number of alternatives , such as trying it for one day, leaving wrap notes making it clear that the claimant had not made the entries himself.

The Law.

11. The relevant statutory provisions are set out in Annexe A hereto.

(a)Unfair Dismissal.

The starting point for analysing the duty of the tribunal in deciding whether or not an ill health capability dismissal is fair is the EAT decision in ***Spencer v Paragon Wallpapers Ltd [1976] IRLR 373, [1977] ICR 301***. In that case Phillips J emphasised the importance of scrutinising all the relevant factors.

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

And he added that the relevant circumstances include 'the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do'. ***In Lynock v Cereal Packaging Ltd [1988] IRLR 510*** cited by Ms Niaz - Dickinson, the EAT (Wood J presiding) described the appropriate response of an employer faced with a series of intermittent absences as follows:

"The approach of an employer in this situation is, in our view, one to be based on those three words which we used earlier in our judgment—sympathy, understanding and compassion. There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair; one has to look at the whole history and the whole picture. Secondly, every case must depend upon its own fact, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision, include perhaps some of the following—the nature of the illness; the likelihood of recurring or some other illness arising; the length of the various absences and the spaces of good health between them; the need of the

employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the exercise carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching. These, we emphasise, are not cases for disciplinary approaches; these are for approaches of understanding'.'

So there is a conflict between the needs of the business and those of the employee, and the tribunal must be satisfied that the employer has sought to resolve that conflict in a manner which a reasonable employer might have adopted. In the course of doing this, he will have to show that he carried out an investigation which meant that he was sufficiently informed of the medical position.

12. An employer will find it difficult to claim that he has acted reasonably if it takes no steps to try and fit the employee into some other suitable available job. The scope of this duty is discussed in the following passage from the judgment of O'Connor J in the High Court decision in ***Merseyside and North Wales Electricity Board v Taylor [1975] IRLR 60*** :

"… when one comes to consider the circumstances of the case, as to whether they make it reasonable or unreasonable to act upon his incapacity and to dismiss him, it cannot be right that, in such circumstances, an employer can be called upon by the law to create a special job for an employee however long-serving he may have been. On the other hand, each case must depend upon its own facts. The circumstances may well be such that the employer may have available light work of the kind which it is within the capacity of the employee to do, and the circumstances may make it fair to at least encourage him or to offer him the chance of doing that work, even if it be at a reduced rate of pay'.'

Taylorplan Catering (Scotland) Ltd v McInally [1980] IRLR 53 also emphasised that there is no duty actually to create a job. Ultimately the question of whether an alternative job should have been offered is primarily one of fact for the tribunal. As Slynn J said in ***Garricks (Caterers) Ltd v Nolan [1980] IRLR 259*** :

"Clearly employers cannot be expected to go to unreasonable lengths in seeking to accommodate someone who is not able to carry out his job to the full extent. What is reasonable is very largely a question of fact and degree for the industrial tribunal'.'

13. So providing the issue of alternative employment has been properly considered by the tribunal, its determination will not be upset on appeal.

(b)Discrimination arisingfrom disability.

14. The need to consider more favourable treatment for disabled people, as required when there is a duty to make reasonable adjustments, means that employers must assess on an individual basis whether allowances or adjustments should be made for them: ***Griffiths v Secretary of State for Work***

and Pensions [2016] IRLR 216. In ***Buchanan*** this finding from ***Griffiths*** was emphasised in the context of holding that it was 'impossible to assess' whether a particular step was a proportionate means of achieving a legitimate aim simply by looking at the policy itself; rather, there was a requirement to ask whether the treatment was justified by considering how the policy was applied to the individual in question. In the case law, the ingrained consideration of the duty to make reasonable adjustments seems to be evidenced by the discussion (at para [56]) that the aims of the police force would 'no doubt include' supporting a disabled employee and considering termination fairly where 'an absence can no longer reasonably be supported'; this could properly be interpreted to mean when all reasonable adjustments have been made. There is thus an interrelationship between reasonable adjustments and proportionality.

15. The very close connection between not only the duty to make reasonable adjustments and discrimination arising from disability, but also with indirect discrimination because of disability was also remarked upon in these cases of ***Griffiths*** and ***Buchanan*** (above). If a policy, criterion or provision was found to give rise to indirect discrimination, in the words of Elias LJ in ***Griffiths*** "…it is in practice hard to envisage circumstances where an employer who is held to have committed indirect disability discrimination will not also be committing discrimination arising out of disability, at least where the employer has, or ought to have, knowledge that the disabled employee is disabled."

The Issues.

16. There was an agreed List of Issues (pages 57d to 57e of the Bundle). The issue of disability had been conceded, so the remaining issues are :

1.Unfair Dismissal

1.1 What was the reason or the principal for the claimant's dismissal ?

1.2 If the respondent can show that the claimant was dismissed for a potentially fair reason, namely capability:

1.2.1 Did the respondent consider alternatives to dismissal?
1.2.2 Did the respondent adopt a fair procedure in reaching its decision to dismiss the claimant?
1.2.3 Did the respondent act reasonaboly in treating capability as a sufficient reason to dismiss?
1.2.4 Was the dismissal fair in all the circumstances of the case?

2.Disability Discrimnation.

2.2 Discrimination arising from disability (s.15 Equality Act 2010)

2.2.1 The respondent accepts that the claimant's dismissal amounted to 'unfavourable' treatment . The issues to be determined by the tribunal are therefore:

(a) whether the unfavourable treatment (the claimant's dismissal) was because of something (namely the claimant's absence) which arose in consequence of the claimant's disability; and, if so,

.

(b) whether the claimant's dismissal was a proportionate means of achieving a legitimate aim (i.e that pleaded in para.37 of the Grounds of Resistance) ?

2.3Failure to make reasonable adjustments (s.21 Equality Act 2010)

2.3.1 Did the respondent operate a PCP of not allowing their employees' system profiles to be tested by others?
2.3.2 If so, did that PCP put the claimant at a substanbtial disadvantage in comparison with persons who are not disabled?
2.3.3 If so, what was the substantial disadvantage?
2.3.4 Did the respondent takes such steps as was reasonable to avoid that disadvantage?

Discussion and Findings.

1.The unfair dismissal claim.

17. The starting point has to be the issue of what was the reason or principal reason for the claimant's dismissal? The burden of establishing that lies upon the respondent., and the tribunal is quite satisfied that the reason was indeed capability , in the form of the claimant's long ill health absence from work. That , we are satisfied is the reason that operated on the mind of Mark Franssens, no other reason.

18. The next issue is whether the dismissal was fair in all the circumstances, as set out in issues 1.2.1 to 1.2.4 in the List of Issues. There are some features of the respondent's conduct of the capability process which the tribunal , conscious that it must not substitute its own views, but must consider whether the employer's decisions, both in terms of procedure and substance, fell within the band of reasonable responses, were less than adequate. In terms of the medical information upon which the respondent was acting, it is of note that the respondent relied solely upon Occupational Health reports which were (almost all) based solely upon telephone interviews with the claimant, although it is a regrettable feature of the OH reports in this case that some of them fail to make any reference to whether, and if so, when and how, the claimant was interviewed. There is no indication that the respondent or the Occupational Health advisors sought, or received, any information from the claimant's GP, other than what he himself told them in his interviews. There were clearly occasions when the claimant was informing the respondent (or Occupational Health) of his GP's views, particularly as to whether, when and how, he could manage a phased return to work, which were not explored any further. With all due respect to both those who prepared them, and the respondent who commissioned them, the occupational health reports are very superficial , and appear to based on no medical records or other information apart from interviews with the claimant himself. Given, particularly, that the medical issue in question was a mental and not physical one, a reasonable investigation into those medical issues, in the tribunal's view, required rather more than the highly superficial enquiry and opinion of an "occupational health delivery manager", whose qualifications are not apparent. The leading case on the degree to which an employer should investigate the medical position is ***East Lindsey District Council v Daubney [1977] ICR 566*** , in which Phillips J. said:

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

19. An odd feature of this case is that the series of fit notes issued by the claimant's GP has not been included in the Bundle. It is also unclear how, for example, Shirley Jones was able in her report of 10 November 2015 to opine she was "hopeful" of a return to work by the claimant by 30 November 2015 when his GP had just issued a fit note which (apparently, for it has not been seen by the tribunal) would have taken his absence beyond that date by about a week. She makes no reference to that document in her report, and the tribunal assumes that she never saw it, nor indeed, it seems likely, any other fit notes.

20. Even when an OH assessment was made by a Physician , on 11 January 2016, this too was by telephone, and there appears to have been no attempt whatsoever to provide the OH Physician with any documentation, fit notes, medical records or any other form of documentation which might be supposed to be reasonably necessary for an accurate and informed assessment of the claimant's condition, and prognosis for a return to work.

21. The Stage 4 Attendance Hearing Report, whilst containing at Appendices 1 to 16 documents relating to previous (largely irrelevant, see further below) absences pre-dating 2014, does not contain, or even refer to the fit notes submitted. In short, neither the respondent's management, nor their OH advisors have at any time sought any information from the claimant's GP, other than through the claimant himself, and not even the fit notes that were submitted were considered.

22. A further concern for the tribunal has been the inclusion in the Stage 4 Attendance Hearing Report (the "pack" presented to Mr Franssens) of the entire history of the claimant's absence history going back to 2010. Given that in 2014 he had no days of absence at all, the tribunal cannot see the relevance of this material, and fears that it introduced a risk of prejudice which was unreasonable. The relevant absence which had triggered the attendance review in July 2016 was from 15 February 2016, and was of 95 days duration at the time of the report. The absence immediately preceding it had been for 76 days, from 24 August 2015. This was clearly relevant, the tribunal accepts, but the tribunal fails to see what relevance that previous absences in 2013, going back to 2010 could possibly have had.

23. The most recent OH report before the Stage 4 meeting (save for the advice as to the claimant's fitness to attend such a meeting) was that of 25 February 2016 from Shirley Jones. No more up to date report than that was sought, and the claimant had had some counselling since that report. By the time of the Stage 4 meeting, therefore, that report was 5 months old. Further, the claimant was never asked to provide his consent for his employer or their OH advisors to access his medical records, and there was no communication whatsoever with his GP.

24. Further, turning to other factors to which an employer is required to have regard pursuant to the guidance in ***Lynock*** cited above, there is no evidence of any consideration being given by Mark Franssens to the need of the respondent to have the work done by the claimant , or the impact of his absence upon others carrying out the work (the tribunal heard no evidence about the impact and effect of the claimant's absence). Further, whilst this is not determinative, the claimant entitled (Clause 10.1.4 of his Contract of Employment, page 257 of the Bundle) to sick pay for 6 months at full pay, then a further 6 months at half pay. At the time of his dismissal he had gone onto, but had not exhausted his entitlement to, half pay. The tribunal appreciates that on the authority of ***Coulson v Felixstowe Dock and Railway Co [1975] IRLR 11*** the provision of a generous sick pay scheme is not to taken as some form of entitlement of the employee not to be dismissed during the currency of such sick pay, and there will be cases where it is fair to dismiss notwithstanding that the employee has not exhausted the sick pay entitlement, it is nonetheless a factor to be taken into account, and an employer who has made provision for sick pay of such a duration will find it harder to argue that he was entitled to dismiss before the expiration of the sick pay entitlement when he has made express provision to accommodate absences of such a duration. Further, if nothing else, it reinforces how during such absences, the employer can, and in the tribunal's view in this instance, should, be making efforts to find alternative roles for the employer whilst he remains in employment.

25. Finally, there is a procedural issue, and that is the denial of the claimant of a right of appeal. It is appreciated that the respondent's procedure specifies a period of 7 days (page 793 of the Bundle) , which was interpreted , and expressed to the claimant, as meaning 7 working days. That day, however, is expressed to be "within (7 days) of receiving written confirmation of the decision". The claimant did not receive the e-mail version, as he did not have access , as the respondent knew he may not, and the posted version, whilst received on his behalf on 6 August 2016 was not seen, and hence "received" , by him until 8 August 2016 . Seven working days (i.e discounting Saturday and Sunday) of that date would be 16 August 2016, and he appealed on 15 August 2016. He therefore considers his appeal was in time.

26. In considering this issue, however, the tribunal does not approach the matter as it would some statutory provision on limitation, and nor should the respondent. The question is, as always, was it reasonable of the respondent to deny the claimant an appeal on this basis ? That his appeal was, arguably, out of time within the terms of its own procedures is a relevant factor, but an employer will not necessarily act reasonably just because it acts within the letter of its own procedures. The bigger picture needs considering, in terms of reasonableness. It was not, we accept, Mark Franssens who took this decision, it was on HR advice.

We have not had the benefit of hearing from the person who took that decision as to why they took that view. No prejudice can have arisen by the short delay of, at most a week, and we consider that the decision to reject the claimant's appeal was an unreasonable one, and is a further ground of unfairness.

27 . It is appreciated that Mark Franssens nonetheless, and with admirable fairness, sought at least to review his own decision and afford the claimant some form of appeal, but this did remedy the defect. The claimant's right was to an appeal to a further tier of management , and a hearing, neither of which he got.

28. For all these reasons, the tribunal, whilst accepting that the reason for the dismissal was the potentially fair reason of capability, finds that the decision to dismiss was, in all the circumstances, unfair. Finally, whilst it as agreed that this would be an issue for remedy, to the extent that considerations of any ***Polkey*** reduction to the compensatory award can arise and be considered at the liability stage, on the evidence thus far, the tribunal would not be minded to make any reduction for ***Polkey*** reasons, on this evidence. That is not, however, to preclude further argument, or indeed, potentially , evidence, at the remedy stage, but the tribunal's provisional view is that no reduction should be made.

2.The s.15 Equality Act claim.

29. We turn now to the next major claim, that under s.15 of the Equality Act 2010, that the claimant's dismissal was an act of discrimination as it was because of something arising in consequence of his disability. As the respondent accepts that the dismissal was because of the claimant's sickness absence, and that arose in consequence of his disability, it also accepts that the first limb of s.15 is engaged, leaving only the issue of justification to be considered by the tribunal.

30. The legitimate aim pleaded at para.37 of the Grounds of Resistance is stated to be:

"…the management of health and attendance across the Respondent's business, with a focus on having employees who provide effective service and meet the needs of the business."

Whilst a little nebulous in expression, the tribunal accepts (and Ms Niaz – Dickinson has not really challenged) this as a legitimate aim. The question therefore is whether the dismissal of the claimant was a proportionate means of achieving that aim.

31. In terms of this justification defence , as the caselaw (***Hardy v Hansons plc v Lax [2005] ICR 1565*** , ***Hensman v Ministry of Defence [20114] EqLR 670*** , ***Buchanan v Commissioner of Police for the Metropolis [2016] IRLR 918***) makes clear, it is for the tribunal to make its own , objective , judgment on the issue. The tribunal does not apply the "range of reasonable responses" test that it does in unfair dismissal to the issue of justification. The question is not whether the respondent reasonably believed that the treatment was justified as a proportionate means of achieving its legitimate aim, but whether, in the tribunal's own objective view, it was. Conversely, the tribunal is not limited to consideration of matters which were in the mind of the employer at the time. *Ex post facto* justification can therefore be relied upon even if not in the mind of the respondent at the time.

32. Taking all the factors into account in this case, the tribunal does not find that the respondent's treatment of the claimant was a proportionate means of achieving its legitimate aim. As observed in ***O'Brien v Bolton St Catherine's Academy [2017] IRLR 547*** the assessment of reasonableness for the purposes of determining the fairness of a capability dismissal is unlikely to differ markedly from the test of proportionality for the purposes of a justification defence under s.15. We do indeed consider that the same factors which led us to hold that the dismissal was unfair under s.98 lead us also to conclude that the defence of justification is not made out, as the dismissal was not a proportionate means of achieving the legitimate aim. Indeed, some factors are rather more prominent in the consideration of proportionality than they are in the test of reasonableness, where, of course, the tribunal is constrained by the prohibition of substitution of its own views, which it is not in the assessment of proportionality for the purposes of the s.15 claim. To that extent, we consider that the requirement upon an employer, in the case of a disabled employee to "go the extra mile" , in terms of seeking, or even possibly creating, .a position that was within the capabilities of that employee, which is a much lower duty in terms of unfair dismissal, is a highly relevant factor in deciding whether the treatment was proportionate. We consider here that the respondent did very little to find alternatives that may have kept the claimant in work. The onus was put on him, little or no medical investigation was carried out, and certainly no attempt at all was made to discover what he could, as opposed to what he could not, do.

33. Further, we consider that the respondent's sick pay scheme also has some greater relevance here. Whilst , again, the degree to which that is a relevant factor in unfair dismissal claims is open to debate, and it is clear that the right to an extended period sick pay is not to be equated with a prohibition upon a fair dismissal being carried out within that period, different considerations apply in considering justification. It seems to us hard for an employer who has arranged his affairs to provide for up to 12 months of paid sick leave for all his workforce, to then argue that it was a proportionate means of achieving his legitimate aim ensuring effective service which met the needs of the business to disregard that provision which is inherently at odds with that aim. That such a prolonged period of sick leave was contemplated , permitted and even paid for, albeit at half pay, in our view seriously undermines any argument that to dismiss anyone, let alone a person with a disability, who is all the more likely to benefit from the operation of the policy by reason of that disability, cannot be proportionate. A further point, (and one that also could be said to go to the issues of unfairness as well) is that made Gavin Mazza, the claimant's trade union representative ion the Stage 4 hearing , that after 6 months of inactivity on the AWB system, an employee got a new , or rebuilt, profile in any event. This was a matter that Mark Franssens accepted he did not investigate any further. If it was correct, the claimant had already had 5 months since his last log – in in February, by the time of his Stage 4 hearing on 26 July 2016. His sick pay had gone down to half pay in March, leaving him a further couple of months, until September, when it would be exhausted. The period of 6 months "inactivity" potentially leading to a new or rebuilt profile would thus have still been within the sick pay period, raising the question of why the respondent either did not investigate Gavin Mazza's suggestion, or try it once the 6 months had elapsed.

34. Perhaps one of the reasons that the respondent finds itself in this position is the poor quality of the OH advice that it received. That is not to be critical of the

OH service providers, as much, doubtless, depends upon the brief that they were given, and the terms of any service level agreement between them and the respondent. The tribunal, however, has been struck by how , albeit with the appropriate caveats as to the test being ultimately a legal one, the OH advice as to whether the claimant's stress condition may amount to a disability within the Equality Act 2010 was given on the basis of so little information, and no medical records or other documentation from the claimant's GP. Whilst appreciating that at the time of the various referrals the claimant's stress condition had not lasted 12 months, the tribunal can see no basis upon which the OH advice that it was unlikely to last more than 12 months could be justified. Even allowing for it only starting when the claimant went off sick in late August 2015, (and it probably started before then) by the time of the reports of February and March 2016 it had already lasted more than 6 months. Whilst it was a condition which was referable to the IT issues at work, given that it did not seem that those would be resolved within 12 months of the claimant going off sick, if at all, even by early 2016 one would have thought there was a likelihood of the condition lasting more than 12 months. Be that as it may, a bewildering feature of this case is the lack of any enquiry with the claimant's GP or other medical advisors as to the prognosis for this condition. In due course, of course, albeit late in the day , i.e on or very shortly before the date of the hearing, the respondent did concede disability. Regardless of the earlier reports, by the time of the claimant's termination proceedings in July 2016, his condition had already lasted almost 12 months, and was clearly likely to last longer.

35. A further factor that has been overlooked by the respondent, we consider is the extent to which the possible involvement with AWB in other roles would necessarily present a problem to the claimant. As the tribunal understands the evidence, the claimant's issues with this system were that he was having more faults than his colleagues, and that these particularly impacted upon his performance in a customer facing telephony role. This led to issues with his performance and the attainment of targets, and added to the pressure that he felt under. It occurs to the tribunal, but appears not to have occurred to the respondent, that whilst encountering AWB in other roles may have been hard to avoid, the degree to which it would present a similar level of problems to the claimant in these others, often non – customer facing, non – telephony roles, was never explored.

36. Indeed, it is a feature of this case that the respondent did not, we find, "go the extra mile". Katherine Cooper stated in one meeting that the respondent was not obliged to create a job for the claimant, which, in ordinary unfair dismissal for capability terms is correct, but is not necessarily so in the context of disability discrimination.(see ***Southampton City College v Randall [2006] IRLR 18*** , cited with approval on this point by Cox J. in her judgment in Chief Constable of South ***Yorkshire Police v Jelic [1010] IRLR 744*** at paras.45 and 46) . In any event, the tribunal doubts that in order to make reasonable adjustments for the claimant it would have been necessary for the respondent to create a job for him. All that was needed, we are satisfied, was rather more careful investigation of what the issue with AWB was, and whether in other roles the claimant could in fact have coped with it, once the extent and degree to which he would had had to use it had been ascertained, explained, and perhaps trialled with him. With rather more application , instead of leaving the ball entirely in the claimant's court, other roles, perhaps only short term ones, could not have been found for him, of the type that he had successfully carried out. He clearly had, and was capable of acquiring,

considerable skills. It is literally beyond belief that with appropriate diligence a role within the organisation as substantial as the respondent , could not have been found. To some extent the reasons this did not occur is a function of the paucity of the medical advice that the respondent had received , or indeed sought. The question, what can this employee do, or do with some reasonable adjustments, was never really posed.

37. This is not to criticise Mark Franssens, who was given a task to carry out , and did so, the tribunal is quite satisfied, in good faith and doing the best he could. He was not, however, provided with the necessary material of sufficient quality to identify and address the real issues preventing the claimant returning to work. He was not required to manage the claimant's absence or find a solution, he was asked to carry out a Stage 4 hearing, which he did, but with rather inadequate information, and a prior lack of proper management of the situation by the claimant's line managers and their superiors.

38. A further significant feature of this case is the fact that the claimant's last sickness absence, from 15 February 2016 was after he had attempted a return to work, but then found that the rebuild of his profile, which he had been assured had taken place, had not in fact done so.. Whilst it is undoubtedly the case that the respondent, in the persons of the claimant's line manager Gary Prendiville, and others, had also been led to believe this, and they had not consciously lied to the claimant, the fact remains that he was enticed back to work on a false premise, and then suffered a relapse of his condition when the true position emerged, and he again found himself unable to cope. Whether the respondent "caused" the original sickness absence in August 2015 or not, the tribunal considers that it certainly contributed to the claimant's next period of sickness absence from 15 February 2016. That is a factor which we consider is relevant both to the fairness of the dismissal, and the issue of whether the dismissal was a proportionate means of achieving a legitimate aim, for the purposes of the defence of justification in the context of the s.15 claim.

39. We note that in his dismissal letter, whilst Mark Franssens sets out a comprehensive account of the various factors he had taken into account, the reasons why he decided to dismiss are not really articulated, with him simply saying in his final paragraph (page 892 of the Bundle) "*In the light of the above".* His rationale is therefore rather more apparent from paragraphs 36 to 39 of his witness statement. The focus of these paragraphs is upon the AWB system, and how the claimant had stated that he would not return to work unless and until his AWB system could be guaranteed to have been fixed, and a third party had tested it. As this could not have happened, a return to work was not likely. In para. 39 he says: *"In short, it was clear to me that the Claimant was never prepared to return to work, regardless of whether a third party had been permitted to test his AWB profile…"*

40. We consider that the use of word "prepared" is significant, as this suggests that Mark Franssens may have thought that the claimant had some sort of choice in the matter. He did not, rightly or wrongly, because his inability to work with the AWB system at all by this stage, after the failed attempt at a return to work when it had not been rebuilt, but he was told that it had been, was the consequence of his disability.

41. Whilst appreciating that Mark Franssens refers to his dismissal letter as a

whole for his rationale, we do find it significant that he stresses in these paragraphs the AWB system and the claimant's position in relation to it, and his statements about whether and when he could ever return to work with it. What is absent from this section of his statement, and indeed the final paragraph of the dismissal letter, is any discussion of alternative roles for the claimant. True it is that the dismissal letter does rehearse the information that the claimant had been provided with in relation to other roles, but there is not, either in the dismissal letter or his statement, any further consideration of alternative roles, and whether there was anything more that the respondent could have done to seek to retain the claimant in the employ of the respondent.

42. Two other factors trouble the tribunal. Mark Franssens and Conor Peden both mention in their witness statements becoming aware around the time of the claimant's dismissal of information that he had been driving a taxi for Uber. This, together with the fact that the claimant was able to fly to the USA for his brother's wedding, clearly planted seeds in their minds as to the extent to which the claimant's symptoms were as serious as the claimant was making out. Conor Peden says as much in para. 40 of his witness statement , as does Mark Franssens in para.45 of his. That suspicion, coupled with what Mark Franssens saw as the claimant's unwillingness, as opposed to inability, to return to work, may explain why no real efforts were made to find out what the claimant could do, as opposed to could not, do in terms of roles that the respondent could make available to him.

43. In terms of redeployment, the tribunal has experience of large companies and organisations having policies in place whereunder a disabled employee unable to continue in their existing post is placed on a register, and all departments are notified of their position, skills and training potential with a view to the business identifying any roles for which they may, or may with training or adjustments, be suitable. No such proactive stapes were taken here. The claimant was left to it, and received two lists of vacancies, and was simply expected to look for others.

44. For all these reasons, the tribunal considers that the respondent has failed to make out its defence of justification, and the s.15 claim succeeds.

3.The reasonable adjustments claim.

44. Finally we turn to the one claim of failure to make reasonable adjustments, put solely in relation to the requirement of the respondent for the claimant to attend work and test his AWB log – in himself. This is accepted to be a "PCP", and that it put the claimant at a disadvantage by reason of his disability. It was thus indirectly discriminatory, and this claim will succeed unless this treatment can be justified, or it would not have been a reasonable adjustment to have done anything else, such as to allow someone else to carry out the log – in using his details, in effect "impersonating" the claimant on the AWB system.

45. The respondent has failed to call any witness to give evidence upon what could be considered the more technical issues in this case. The tribunal does not doubt that Mark Franssens and Conor Peden relied upon the information that they were given about the "impossibility" as it was almost said to be of having another person "impersonate" the claimant using his log in, so that he personally did not have to. Doubtless it would be a highly unusual and potentially serious

exercise to undertake, and there would be data protection issues. That does not mean, however, that , in appropriately controlled conditions, as a one off, for the specific purpose of testing the claimant's AWB log – in, such an exercise could not have been carried out. Bomb disposal is inherently dangerous, but in properly controlled circumstances, can, and is, frequently carried out. It is all about managing risk, and weighing up the attendant risks against the disadvantage suffered by the claimant if such an adjustment is not carried out. With all due respect to the respondent, these are issues upon which primary evidence from those with the relevant expertise in this field was required, rather than second hand, though doubtless good faith, rehearsal by the witnesses that were called. The respondent's contentions about these issues required testing , which could not take place without those witnesses. The tribunal accordingly finds, though it is but a minor facet of the claimant's clams, that this head of claim succeeds too.

Remedy.

46. The parties are invited to consider the judgment and seek to agree remedy, or such elements of it as are capable of agreement. In the event that a remedy hearing is required, the parties are to notify the tribunal in accordance with the directions in the judgment set out above.

Employment Judge Holmes

Dated 20 October 2017

RESERVED JUDGMENT SENT TO THE PARTIES ON

24 October 2017

FOR THE TRIBUNAL OFFICE

ANNEXE A

Employment Rights Act 1996

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—
(a) 'capability', in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) 'qualifications', in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

(5) …
(6) [Subsection (4) is] subject to—

(a) sections [98A] to 107 of this Act, and

(b) sections 152, 153, 238 and 238A of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action).

Equality Act 2010

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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