EMPLOYMENT TRIBUNALS

Claimant: Mr. K Chamberlain

Respondent: 2Gether Support Solutions Limited

Heard at: London South, by video

On: 22, 23, 24, 25 and 26 January 2024

Before: Employment Judge G Cawthray
Mr. D Newlyn
Mr. S Sheath

Representation
Claimant: Ms. Dannreuther, Counsel
Respondent: Mr. Grundy, Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is:

1. The complaint of unfair dismissal is well-founded. The Claimant was unfairly dismissed.

2. The complaint of unfavourable treatment because of something arising in consequence of disability is well-founded and succeeds.

3. The following complaints of failure to make reasonable adjustments for disability are well-founded and succeed:

    a. Delaying the dismissal of the Claimant until a further occupational health report was obtained following the Claimant stent insertion.

4. The remaining complaints of failure to make reasonable adjustments for disability are not well-founded and are dismissed.

REASONS

Introduction and Evidence

1. A case management preliminary hearing took place on 4 August 2023. The basis of the complaints were discussed at that hearing.

2. At the outset of the hearing today we clarified the documentation provided. A Witness Statement Bundle had been provided, together with a Final Hearing Bundle amounting to 361 pages and a Supplementary Bundle amounting to 60 pages.

3. The Claimant had provided the following: an 11 page witness statement, a Supplementary Witness Statement and an Impact Statement. He also called Mr. Foukes as a witness, and he had produced a two page witness statement.

4. The Respondent called three witnesses: Mr. Stubbersfield, Mr. Hayman and Mr. Comper. All three had provided written witness statements.

5. All three gave an affirmation or an oath and were cross-examined.

6. At the outset of the hearing I confirmed the issues with the representatives and the Respondent explained that disability was still disputed.

7. We discussed that the hearing would deal with liability only.

8. Both parties provided written submissions, and made oral submissions at the hearing.

Issues

Unfair dismissal

9. It is not disputed that the Claimant was dismissed. The issues for determination were:

10. What was the reason or principal reason for dismissal? The Respondent says the reason was capability (long term absence).

11. If the reason was capability, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

- The Respondent genuinely believed the Claimant was no longer capable of performing their duties;
- The Respondent adequately consulted the Claimant;

- The Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position regarding the nature of the Claimant's condition and

its prognosis;

- The Respondent considered alternatives to dismissal;
- Whether the Respondent could reasonably be expected to wait longer before dismissing the Claimant;
- Dismissal was within the range of reasonable responses.

Disability

12. Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:
    - Did he have a physical or mental impairment namely a cardiac condition?

- Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

- If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

- Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

- Were the effects of the impairment long-term? The Tribunal will
- decide:
    - did they last at least 12 months, or were they likely to last at least 12 months?
    - if not, were they likely to recur?

Discrimination arising from disability (Equality Act 2010 section 15)

13. It is not disputed that the Respondent treated the Claimant unfavourably by:
    a. Dismissing the Claimant on 31 March 2022; and
    b. Failing to uphold the Claimant's appeal on or around 21 April 2022?

14. It is not disputed that the following things arose in consequence of the Claimant's disability:

    a. The Claimant being unable to undertake lone working, working at height and / or driving?;
    b. The Claimant's sickness absence between 9 December 2021 and 31 March 2022?

15. Was the unfavourable treatment because of any of those things?

16. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

    a. The efficient delivery of Technical Support to acute hospitals.
    b. The efficient management of resources, which are substantially scarce political public funds.
    c. The fair and reasonable management of all of the staff of the Respondent.

17. The Tribunal will decide in particular:

- was the treatment an appropriate and reasonably necessary way to achieve those aims;

- could something less discriminatory have been done instead;

- how should the needs of the Claimant and the Respondent be balanced?

18. The Respondent accepts that it had knowledge of the cardiac condition from 8 December 2021.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

19. The Respondent accepts that it had knowledge of the cardiac condition from 8 December 2021.

20. A "PCP" is a provision, criterion or practice.

    a. The Respondent **accepts** that it required mechanical and electrical technicians to undertake lone working/working at height/to be able to drive in the course of their work ("PCP1").
    b. Did the Respondent require mechanical and electrical technicians to be able to carry out the full duties of the role ("PCP2")?

21. Did PCP1 and / or PCP2 put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he could not work as a mechanical and electrical technician because of the risks inherent in his condition and because of that he was dismissed?

    The Respondent accepts that it had knowledge that the Claimant was likely to be placed at that disadvantage.

22. What steps could have been taken to avoid the disadvantage? The Claimant suggests:

    a. Allowing the Claimant to continue in his role without lone working; working at heights and / or driving (either on a temporary or permanent basis);
    b. Redeploying the Claimant on a temporary or permanent basis to a soft services facilities role;
    c. Creating a soft services role for the Claimant on a temporary or permanent basis; and
    d. Delaying the dismissal of the Claimant until a further occupational health report was obtained following the Claimant stent insertion.

23. Was it reasonable for the Respondent to have to take those steps and when?

24. Did the Respondent fail to take those steps?

Facts

25. The Claimant started working at Kent and Canterbury Hospital on 20 June 2016, and his employment transferred to the Respondent in April 2018. The Claimant was employed as a Mechanical and Electrical Technician.

26. The Respondent is a company which is owned by East Kent Hospitals University NHS Foundation Trust that provides non-medical services to the Trust. This includes facilities, property, procurement and professional services.

27. The Claimant was a member of Unite, the trade union, throughout his employment.

28. The Claimant signed a contract that was dated as 29 June 2016 on 15 November 2016. The Claimant's contract of employment sets out his entitlement to sick pay. The entitlement to occupational sick pay is based on length of service.

29. The Claimant's Job Description sets out information about the Claimant's role. It includes reference to autonomous and unsupervised working, the requirement to being able to drive and hold a full driving license, working in confined spaces or at height.

30. The Claimant's oral evidence, in response to cross examination, was that he usually worked with a partner and lone working was usually only when he was called out due to being on the standby rota. The Claimant primarily worked from the Kent and Canterbury hospital but on occasion also worked at other hospitals. Mr. Stubbersfield acknowledged that technicians did work in pairs, and the focus was on getting the job done. The Claimant, as a technician, could be needed to work in any place in the hospital on a wide range of tasks, which were dictated by what jobs were called in to the helpdesk. Jobs could be at any height and in busy wards or empty plant rooms. Technicians typically walked 2 to 3 miles a day.

31. In 2020 the Claimant raised whistleblowing concerns regarding allegations of theft by members of staff. The allegations involved members of management.

32. The Respondent has a Sickness Absence Policy. The Claimant and had not read the Sickness Absence Policy during his absence. The Sickness Absence Policy is not referenced in the contract of employment.

33. We have not copied extracts of important sections within the policy here, but the contents are noted, in particular paragraph 5 Medical Suspension, paragraph 6 Medical Reports and Occupational Health, paragraph 13 Managing Long Term Sickness Absence, paragraph 14 Ill Health Capability Procedure and paragraph 15 Ill Health Capability and Pension.

34. The Claimant commenced a period of sick leave in April 2021 due to work related stress. The Claimant remained unfit to work due to work related stress until 8 December 2021, approximately 8 months. Shortly before the Claimant commenced sick leave a number of allegations were made against him. The Respondent commenced a disciplinary process and the Claimant was issued with a first written warning.

35. The Claimant submitted a grievance regarding work place bullying on 8 May 2021, but it was agreed that the grievance would be put on hold due to the Claimant's ill health. The grievance mentioned members of the Claimant's team and management. The Claimant attended a grievance investigation meeting in October 2021, and the grievance outcome was given on 23 November 2021. His grievance was not upheld.

36. The Claimant attended Occupational Health on 24 June 2021. The Occupational Health report explains that the Claimant had been experiencing a significant amount of work-related stress and made some recommendations but commented that until the issue with his work colleagues was revolved, that a return to work would be difficult for the Claimant to sustain.

37. A first ill-health capability meeting took place on 29 July 2021. The table at the top of the note recorded that the Claimant was accompanied by Mr. Chris Gibbs, trade union representative, and the meeting was chaired by Mr. Mark Foulkes, Team Leader and Ms. Sophie Rimmer, People Advisor, attended as note taker. It was discussed that the Claimant was having counselling but that a return to work would not be possible until the Claimant's grievance was resolved, noting that he was not at that time well enough to undergo a grievance hearing. Mr. Foulkes followed up the meeting in a letter dated 4 August 2021.

38. The Claimant was due to attend Occupational Health again on 20 September 2021, but he cancelled the appointment.

39. The Claimant's GP provided him a fit note advising that he was not fit to attend work between 26 October 2021 and 8 December 2021.

40. On 14 November 2021 the Claimant attended a GP consultation and complained of feeling breathless and having chest tightening. His GP referred him to the rapid access chest pain clinic. The Claimant had a further GP assessment on 16 November 2021 regarding the chest pain, which is recorded as having been experienced over the last 5 weeks. The Claimant had a GP appointment on 29 November 2021 following a chest Xray on 17 November 2021 and was referred for a CT angiogram.

41. The Claimant attended Occupational Health again on 17 November 2021. Following the appointment Dr. Whitehead sent a report to Mr. Foulkes, copied to Ms. Rimmer, on 18 November 2021.The report explains that he had recently started experiencing chest pain on exertion and that he had been urgently referred to Cardiology. The report made reference to the grievance and disciplinary processes, which were hoped to be resolved shortly, and states *"Karl tells me that he feels able to plan a return to work anyway".*

42. Occupational Health recommended a phased return, namely 50% in weeks 1 and 2 and 75% in weeks 3 and 4 together a Work Stress Risk Assessment. It also recommended at formal Health and Safety

Risk Assessment and stated: *"In general, Karl should not be in a situation where he would put himself or other people at risk if he was to become suddenly incapacitated (at least while awaiting the results of the cardiology investigations). He should also not lone-work, and should not work at heights. Karl should not drive for work at present…"*

43. The Claimant was absent on sick leave until 8 December 2021, he was due to move to nil pay on 9 December 2021.

44. The Claimant returned to work on 8 December 2021. On his return to work he was due to have a return to work meeting. On 8 December 2021 Mr. Stubbersfield contacted Mr. Comper and asked if they could do the return to work discussion with the Claimant together, and the Claimant and Mr. Stubbersfield met with Mr. Comper in his office. Mr. Comper had not read the Occupational Health recommendations from the letter dated 17 November 2021 at the point of meeting. It was only at the meeting, or shortly before, that Mr. Comper became aware that the Claimant was experiencing cardiac issues.

45. In the discussion the Claimant said that he was having problems that were under investigation and that he was getting out of breath very quickly and tight chested whenever he did any strenuous task. Mr. Comper observed that the Claimant had lost weight and looked unwell.

46. Mr. Comper was concerned about the Claimant's fitness to attend work and the safety of himself and others. He was concerned that the Claimant being onsite would pose a risk to himself and others. Mr. Comper was aware that the Claimant had expired his entitlement to sick pay and made the decision to medically suspend the Claimant pending his stage two ill health capability meeting.

47. In response to cross examination, the Claimant clearly stated that he was not well enough to return to work due to the symptoms of his cardiac condition in December 2021. However, it is noted that in paragraph 21 of his witness statement the Claimant said he was fit for light duties from 8 December 2021.

48. In relation to Medical Suspension, the Respondent's Sickness Absence Policy states:

    "In exceptional circumstances a manager may send an employee home to protect them and the business for health reasons (called medical suspension) if for example, where the individual poses: a risk of spreading infection; chronic conditions where they believe they are fit to return but medical evidence advises otherwise; they are on medication which could have side effects affecting their work (e.g. travel, use of equipment etc.) or are a risk to others. If this happens, the employee will be paid the full salary and contractual allowances (not overtime) they would have received had they been at work."

49. Neither the Claimant or his trade union representative challenged the medical suspension at the time. As noted above, the Claimant had

not seen the Sickness Absence Policy and was not aware of the concept of Medical Suspension.

50. The Claimant had a CT scan on 14 December 2021.

51. The Claimant attended a second ill-health capability meeting on 15 December 2021. The Claimant was accompanied by Mr. Russell Crawley, his trade union representative, and the meeting was chaired by Malcom Stubbersfield, Maintenance Manager, and notes were taken by Sophie Rimmer.

52. The Claimant explained that he had a scan on 14 December 2021 and was awaiting the results and that a further scan was booked for 4 January 2022. The Claimant reported that he had been having pains and angina *"Felt like having a heart attack".*

53. Mr. Stubbersfield discussed the Occupational Health recommendations with the Claimant and his trade union representative. He explained that there were health and safety risks of the Claimant being in work and that he could not support the Occupational Health recommendations. The notes indicate that the Claimant and Mr. Stubbersfield agreed that the Occupational Health recommendations limited the work available for the Claimant to do.

54. Mr. Stubbersfield was concerned about the Claimant's well-being and asked that he be provided with the scan results before seeking to find a way forward. During the meeting Mr. Stubbersfield did comment on the departments business needs noting the Claimant had been absent since March but said he would wait until the results were back.

55. Mr. Stubbersfield asked the Claimant he if had a fit note. He explained that he didn't realise he had to provide a fit note, and said he thought he was medically suspended but he hadn't had a copy of the letter. Mr. Stubbersfield explained that he would send a copy of the letter but also explained the Claimant needed to obtain a fit note. The Claimant expressed his confusion as to why a fit note was required when he had tried to return to work and had been medically suspended, and Mr. Stubbersfield sought to explain the situation.

56. Ms. Rimmer explained that there was nowhere to redeploy the Claimant to and that the adjustments advised by Occupational Health could not be accommodated so that he would have to be signed off until he was fit to do his role.

57. The meeting ended by Ms. Rimmer explaining that the next stage in the process was a for a third meeting to take place. She stated: *"You have been off work for a long time now and the next meeting will either be around discussing a phased return if you are given the all clear or Malcolm will be looking at whether he can have your absence from work any longer."* Mr. Stubbersfield is recorded as making the last comment of the meeting and asking the Claimant to update him as soon as he heard anything and that they would meet again in January.

58. The Claimant was sent the medical suspension letter dated 9 December 2021. However, he did not receive this until after the meeting on 15 December 2021. The letter summarises the basis of the medical suspension, including that he was suspended in the interests of Health and Safety and set out that during the medical suspension he would receive full pay and that the Claimant must obtain a fit note that declares he was not fit for work, at which time the suspension ends and absence would be recorded as sickness absence.

59. The Claimant was diagnosed with acute bronchitis on 13 December 2021, and his GP records on 9 and 13 December 2021 reference weight loss.

60. The Claimant told Ms. Rimmer, that he had an appointment with his GP scheduled for 23 December. The Claimant attended a telephone appointment with his GP on 23 December 2021.

61. The Claimant emailed Ms. Rimmer after his appointment and told her that his GP had said his fitness for work was a matter for Occupational Health, but agreed with Occupational Health's recommendation of light duties pending the further cardiology review. On 29 December 2021 Ms. Rimmer asked Mr. Stubbersfield to arrange a meet/talk regarding a phased return and light duties.

62. The Claimant did not get a fit note from his GP.

63. On 2 January 2022 the Claimant tested positive for Covid. His GP records record him as testing negative on 23 February 2022.

64. The symptoms experienced by the Claimant were as set out in Impact Statement between November 2021 and April 2022. The Claimant accepted in oral evidence that he was unable to do the normal day to day activities set out in his Impact Statement for the entire period but the Claimant had started feeling a little better once he recovered from bronchitis and covid. The Respondent accepts that the symptoms had substantial adverse effect on the Claimant's day to day activities.

65. The Claimant attended a telephone appointment with Occupational Health on 24 January 2022.

66. On 25 January 2022 Occupational Health wrote to Mr. Stubbersfield, copied to the Claimant and Ms. Rimmer and explained that the Claimant's GP had told the Claimant that one of the Claimant's coronary arteries was blocked and that he was awaiting an angiogram and possible stenting but that there may be a two month wait for a cardiology appointment. Occupational Health noted that the Claimant had been put on medical suspension and that restricted duties had not been accommodated. The letter sets out the Ms. Rimmer had contacted Dr. Whitehead of Occupational Health to request a case conference with Dr. Whitehead, the Claimant, Mr. Stubbersfield and Ms. Rimmer to discuss a way forward. The letter notes that Dr. Whitehead has been made aware of this request and consented to such a meeting.

67. The Claimant had said that he was not interested in in office work. Mr. Stubbersfield spoke with the Head of Soft Facilities and she told him there was no light duty work as jobs such as portering and domestic work was also physical. Mr. Stubbersfield also considered the fact that the Claimant had no experience on operating switchboards. He also spoke with Adrian Prior regarding on-call cover and was informed the Respondent could not require staff to do extra on-call cover and it required staff to volunteer and that he felt there was no interest from staff in doing extra on-call cover as there was already staff shortages and no capacity or willingness for additional cover.

68. The Claimant attended an Occupational Health Case Conference on 10 February 2022. Also in attendance was: Mr. Crawley, the Claimant's trade union representative, Dr Whitehead Mr. Stubbersfield and Ms. Rimmer.

69. On 15 February 2022 Dr. Whitehead wrote to Mr. Stubbersfield, copied to Ms. Rimmer and the Claimant summarising the discussion at the case conference. The full letter has been considered, and only some extracts are summarised and/or copied below.

70. At the conference the Claimant explained that he was experiencing shortness of breath on exertion but that chest pain had started to improve since he was taking medication. He informed those present at the case conference that he had an appointment for an angiogram on 25 February 2022, at which he hoped a treatment plan would be agreed.

71. The letter notes that the Respondent had significant safety concerns and that the Claimant remained medically suspended and that no adjustments had been made. It sets out that the Claimant told the attendees that his GP had not given him a fit note because his GP believed he was fit for work. The letter states:

"However, we discussed that his GP has the option of completing the fit note, stating that "he may be fit for work", if the adjustments can me made (although Karl accepts that you aren't able to make enough adjustments to provide him with a sufficiently safe working environment"".

72. The attendees discussed the potential options for moving forward and the letter states:

"1. Wait until after Karl's procedure on 25th February, to assess for any improvement in his health;

2. Consider informal or formal redeployment (although Karl is aware that you have looked into this, including talking to Facilities, and that there are no appropriate vacancies at present); and

3. Termination of employment on capability grounds due to ill health."

73. The letter goes on to state:

"In my opinion, Karl is not currently well enough to return to work, and, unfortunately, I cannot identify a likely timeframe for when he may be able to do so, even if his procedure is successful. He is therefore in agreement that option 3 is probably the most appropriate next step. We also discussed Ill Health Retirement, and Karl will contact his pension schemes to see whether he would be eligible."

74. The letter also acknowledges that a stage 3 sickness meeting will be arranged for the week commencing 28 February 2022, namely after the angiogram appointment on 25 February 2022 and states:

"Karl is aware that this is likely to result in termination of employment, whether he is able to receive Ill Health Retirement or not."

75. Following the case conference Ms. Rimmer sent the Claimant, by email, a contact email for the person to discuss ill-health retirement with. In emails that followed, on 21and 22 February 2022, the Claimant confirmed that he wished for the Respondent to move forward with the ill-health retirement process. The Claimant appears to have been under the belief that option 3 was to be ill-health retired, not dismissed. Ms. Rimmer did not clarify that this was not the case. Ms. Rimmer completed the application form on 23 February 2022.

76. The Claimant had a further scan, a coronary angiography on 25 February 2022. This confirmed that the Claimant had ostial stenosis of the right coronary artery, in essence the Claimant's right artery was significantly was blocked.

77. The Claimant's GP provided a fit note on 15 March 2022. The fit note stated the Claimant may be fit for work and suggested a phased return and light duties. The fit note states that to be the case from 15 March 2022 until 5 May 2022 and that the GP did not need to assess fitness for work again at the end of the period. The Claimant provide the Respondent with the fit note.

78. The Claimant and Ms. Rimmer exchanged emails about the impact of his fit note ad ill-health retirement between 10 February and 24 March 2022. Ms. Rimmer, on 22 March 2022, stated:

"As discussed previously, you have made the decision to want to retire on the grounds of ill-health. If an application for ill-health is made, this constitutes a mutual decision that you as an employee are unable to fulfil their contractual obligations due to your ill-health condition."

79. The Claimant replied to this email on 24 March 2022 setting out that his decision to agree to ill-health retirement followed the Respondent not implementing recommendations, to try and reduce stress and that he wasn't informed about the process or that the decision rested with NH pensions.

80. Shortly before the third ill-health capability meeting, at 09:40 on 29 March 2022 Ms. Rimmer replied to the Claimant and said *"I think it is best to discuss a lot of this in your next meeting with your line manager next week".* It further stated: *"At the case conference with Occupational Health held on the 10th February 2022, the outcome we were looking at was termination of employment and at this point you wanted to apply for ill heath retirement to see if you would be eligible."*

81. A third ill-health capability meeting took place on 29 March 2022. The Claimant was accompanied by Chris Gibb, trade union representative and the meeting was chaired by Mr. Stubbersfield with notes taken by Nina Garrett. Ms. Rimmer also attended to provide HR support.

82. The notes demonstrate that the meeting lasted 35 minutes, starting at 10:50am. The notes have been considered in full, and we have cited here what we consider to the key comments.

83. Mr. Stubbersfield opened the meeting and said *"In this final meeting we are looking to terminate your employment, as stated in your letter/paperwork".*

84. The Claimant explained that he had not received a letter and Ms. Rimmer replied with reference to the *"pension letter/paperwork*", which we find is reference to the ill-health retirement application.

85. The Claimant responded stating that *"It was not explained in occupational health meeting that's the pension had the final say. I assumed it was occupational health. With me having my operation on Friday, effectively a week Friday I will be fit to come back if that goes well.".*

86. Mr. Stubbersfield expressed his view that he didn't know if the Claimant would be fit to return and that it was still uncertain and the Claimant replied *"Well I am not sure I should be ok, that's what I've been told".* Ms. Rimmer then referred back to the Claimant "wanted to explore the option of ill health retirement" and she referenced having put a termination date of 31 March 2022 on the ill-health retirement paper work that she had completed. A brief discussion about reasonable adjustments and the ending of medical suspension took place.

87. At the meeting Ms. Rimmer told the Claimant that she had spoken to payroll and that the Claimant's occupational sick pay entitlement had built back up.

88. Mr. Stubbersfield adjourned the meeting at 11.05 for 10 minutes and took advice from Ms. Rimmer. Upon reconvening Mr. Stubbersfield stated: *"We have looked at all options over the past year and as occupational health cannot even identify with the operation if successful a timeframe, we are therefore going to look to terminate your employment from 31/03/2022".*

89. The Claimant is recorded as stating: *"Just a statement, I was willing to come back to work 9th December and was then suspended on*

health grounds. I am having my operation in 3 days' time. I think timing of dismissal is calculated." Mr. Stubbersfield responding with *"Not quite a dismissal. Grounds for ill health. This is what occupational health have said."*

90. Mr. Stubbersfield's unchallenged evidence was that he felt there had been a long term impact on the ability to deliver the service to the hospital, that a lot of management time and effort in making sickness cover arrangements had been done and there was pressure on the service due to sickness absence. His evidence was that some duties were covered by overtime which was an additional cost and placed pressure on management to account for and explain overtime costs.

91. On 1 April 2022 the Claimant underwent a coronary intervention and had a drug-eluting stent fitted.

92. There is an NHS information sheet in the Bundle and a British Heart Foundation print out in the Supplementary Bundle. These documents explain that a stent is a short wire mesh tube that remains in the body permanently to allow blood to flow more freely by holding the artery open. A drug eluting stent reduces the risk scar tissue forming and of the artery re-narrowing after intervention by 2 – 3 %, a non-drug eluting stent reduces the risk by 10 – 15 %.

93. The NHS information sheet describes Coronary Heart Disease as *"the term that describes what happens when your heart's blood supply is blocked or interrupted by a build-up of fatty substances in the coronary arteries."*

94. It also states*: "Coronary Heart Disease cannot be cured but treatment can help manage the symptoms and reduce the chances of problems such as heart attacks."* The sheet also lists a number of potential treatments, including angioplasty *"where balloons and stents are used to treat narrow heart arteries".*

95. The fitting of the stent was successful and much improved the Claimant's symptoms, almost immediately. The Claimant undertook a (largely self-managed) rehabilitation plan to improve his fitness.

96. The Claimant takes aspirin and statins every day, and was prescribed these on 25 November 2021.

97. Following the meeting Mr. Stubbersfield sent the Claimant a letter dated 30 March 2022 headed Outcome Final Ill Health Capability Meeting. The letter was sent by email at 12.24 pm on 6 April 2022. The letter notes that the Claimant informed Mr. Stubbersfield that he had a procedure, meaning the fitting of the stent, booked for 1 April 2022.

98. Key parts of the letter are copied below:

"However, I am having to review your length of long-term sickness absence which is now over 12 months long and the advice from the

OH doctor around not being able to identify a likely timeframe for return to work even if your procedure is successful. With these uncertainties, it is very difficult for the business to sustain your absence any longer".

"As I have explained to you throughout, I did not feel able to support the light duties that were recommended, due to the risks involved and you understood and accepted this decision. I did look at redeployment options during this process and sought advice from Occupational Health and there were no suitable alternatives identified during the process as they were seen as too physically demanding due to your heart condition."

"After our meeting with Occupational Health, you took the decision to apply for ill health retirement as your employment was to be ceased due to ill health".

"As a result of your long term sickness progressing to incapability and from the advice from Occupational Health in the latest report, it has now been agreed that the most suitable option is to termination your employment on the grounds of ill health".

99. The Claimant submitted an appeal by way of email, directly to Mr. Hayman, Head of Estates, on 7 April 2022. The email set out four grounds as the basis of the Claimant's appeal.

"1) I did not receive a review by occupational health as stated at my occupational health meeting dated 10/02/22

2) I was misled and ill informed by the company regarding the possibility of ill health retirement, in particular that I was led to believe that this was indeed an agreement between HR, Occupational Health and myself. I now know that the final decision is with NHS pensions.

3) I was willing and actually came back to work on the 9th December 2021 only to be suspended on health grounds. I was told at the time by Colin Comper that this was only until they could put things in place. A heart condition is a protected characteristic and my department could of made adjustments in the short term for me to go back to work on light duties and a phased return. This was recommended by both occupational health and my GP. (GP fit note stating this was provided)

4) I stated at my 3rd ill health capability meeting held on the 29th March that my procedure to have a stent fitted was on the 1st April and the likelihood was that I would be fit to go back to work in a maximum of 1 week after my stent procedure. This was ignored, although now on the 7th April, I am indeed fit for work."

100. The Claimant was sent a letter dated 14 April 2022 inviting him to an appeal hearing.

101. An appeal hearing took place on 21 April 2022, it started at 13:02 and ended at 13:27. The hearing was chaired by Mr. Hayman, Head of Estates, and notes were taken by Emma Garrett. The Claimant was accompanied by his trade union representative, Mr. Gibbs.

102. The notes record Mr. Hayman stating that he did not know the Claimant's place of work well and asked the Claimant what a typical day was in terms of work load. In short, the Claimant explained that every day was different and cited a range of different type of work tasks.

103. Mr. Hayman discussed the ill-health retirement process with the Claimant and he explained that was *"now a no go as I'm fit for work".* Mr. Hayman asked the Claimant if he had any "medical info to say now fit to return on full duties". The Claimant replied stating: *"No decision for medical profession. Seeing cardio physio, going cycling, will be reviewed in 2 weeks, feel ok, don't want to be lifting heavy weights and 3 months to full fitness."*

104. During the appeal hearing in response to a question, the Claimant confirmed that he was not pursuing his application for ill-health. It was clarified in the course of the hearing today that the Claimant had not submitted the application.

105. A discussion about recommendations and adjustments also took place. Mr. Gibbs queried whether the Claimant could get some evidence to substantiate fitness. The Claimant said he could get an appointment with his GP. Mr. Hayman closed the meeting at 13:27 and said he would send his decision in writing.

106. After the appeal hearing, at 14:28, the Claimant's GP, Dr. Rossin sent a message to the Claimant stating that *"Fit notes are no longer issued. You can resume work when your current sick note comes to and end".* The Claimant informed Emma Garratt about the message at 17:15 on 21 April 2022.

107. On 25 April 2022 Mr Hayman sent the Claimant an appeal outcome letter. The letter comments on each ground of appeal and has been considered in full. In relation to fitness to return to work, Mr. Hayman stated:

"Lastly you state at your 3rd ill health capability meeting held on the 29th March that your procedure to have a stent fitted was on the 1st April and the likelihood was that you would be fit to go back to work in a maximum of 1 week after your stent procedure and you are now fit to work. You were unable to provide evidence that you are now fit to work at your appeal hearing. You also stated during the hearing that you are still under the care of cardio physio and recuperation could take up to 3 months but again we have not medical evidence of very this. Given the lack of up to date medical evidence I have to rely on the information I already have and note the OH report notes "Karl is not currently well enough to return to work, and, unfortunately, I

cannot identify a likely timeframe for when he may be able to do so, even if his procedure is successful."

108. Mr. Hayman upheld the decision to dismiss the Claimant and informed the Claimant that his appeal was unsuccessful.

109. On 11 May 2022 the Claimant's cardiologist wrote to the Dr Whitehead, of Occupational Health, summarizing the Claimant's treatment and confirming that his *"single-vessel coronary artery disease had been successfully treated by coronary intervention. I would anticipate a normalisation in his activity and this is unlikely to impact on his ability to perform work".*

110. On 15 June 2022 the Claimant received a discharge letter from his cardiologist.

111. In December 2023 the Claimant experienced chest pains, higher heart rate than normal, tiredness and weight loss. These symptoms are still under investigation.

Comparators – other people

112. The Claimant references a number of colleagues that he says the Respondent made adjustments for. We have not identified the names of the persons cited as we considered it appropriate to reference them by a letter only.

113. A was a Maintenance & Electrical Technician who had emergency hernia surgery in August 2019. Occupational health recommended lighter duties for approximately two months, adapting manual handling and weights over 4kg and a buddy for working at heights and confined spaces. The Claimant says A was not allowed to work alone after his operation and was given a full time assistant.

114. Mr. Comper's evidence is that there was no restriction on lone working or driving and A undertook lighter duties. Mr. Comper, in his witness statement, says: *"The Occupational Health report did recommend that A have a workplace buddy for some duties such as working at heights but I do not know if that was able to be accommodated."*

115. B was a Building Technician, and this is a different job role to the Claimant's role. B had a back injury in work August 2022 and had non-limiting arthritis. Occupational Health recommended certain some postures be avoided and that the Respondent do risk assessment. The Claimant says B was not allowed to work at heights due to problems with his knees.

116. Mr. Comper's evidence is that there were no restrictions on L working alone, at heights, or driving and although he had to avoid certain postures, L was able to do most or all of his normal duties in a six week phased return.

117. C was an Electrician and in January 2023, post the Claimant's employment ending, had pneumonia, pulmonary embolism and pleurisy – resulting in respiratory pain, breathlessness and fatigue. Occupational Health recommended light duties, phased return to work and to be based in the workshop if possible. The Claimant says C was allowed to work on light duties when he returned to work after a shoulder injury.

118. Mr. Comper's evidence was that C "may have been given lighter duties on his return to work, but these would still have been duties which were part of the role and so would have included working at heights and working alone as well as driving." Mr. Comper says there is no reference of a shoulder injury in C's file.

119. D was an Maintenance & Electrical Technician. In July 2023 it was recommended he be permitted an eight week phased return to work. The Claimant says D was hired without having a driving license and is not allowed to work alone.

120. Mr. Comper's evidence is that there were no physical issues for D and he was able to work at heights and work alone as well as do all the usual duties needed of a Maintenance & Electrical Technician. Mr. Comper was not aware that D had been allowed to use the company taxi account, and considered this decision would have been made by a team leader, but now understands that the use of the taxi account was time limited and related to on call shifts only, not his normal daily commute, for which he uses a motorcycle.

121. The Claimant says that E was a Maintenance & Electrical Technician and that he was not allowed to do on call work due to a heart condition and anxiety.

122. Mr. Comper has no knowledge of E due to him retiring in close proximity of Mr. Comper starting, but has been told by the Respondent's Human Resources team that there is nothing on his file from Occupational Health advising that he should have any adjustments made for him or that he had any health conditions.

Relevant Law

Unfair Dismissal

Section 94 and 98

123. The relevant law is set out at sections 94 and 98 of the Employment Rights Act 1996 as set out below.

94 The right.

(1)An employee has the right not to be unfairly dismissed by his employer.

(2)Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

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.

(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).*

124. In considering ill-health capability dismissals firstly, where an employee has been absent from work due to sickness for some time, it is essential to consider whether the employer can be expected to wait any longer for the employee to return — *Spencer v Paragon Wallpapers Ltd*

1977 ICR 301, EAT. The Court of Session in *S v Dundee City Council 2014 IRLR 131, Ct Sess (Inner House)*, said the tribunal must expressly address this question, and must balance the relevant factors in all the circumstances of each individual case. Such factors include:

a. whether other staff are available to carry out the absent employee's work

b. the nature of the employee's illness

c. the likely length of his or her absence

d. the cost of continuing to employ the employee

e. the size of the employing organisation; and

f. (balanced against those considerations), the unsatisfactory situation of having an employee on very lengthy sick leave.

125. These factors are essentially the same as those affecting the reasonableness of ill-health dismissals in general.

126. Secondly, a fair procedure is essential. This requires, in particular:

- consultation with the employee
- a thorough medical investigation (to establish the nature of the illness or injury and its prognosis), and
- consideration of other options; in particular, alternative employment within the employer's business.

127. An employee's entitlement, if any, to enhanced ill-health benefit will also be relevant.

128. The framework for deciding whether a dismissal on account of ill-health absence falls within the band of reasonable responses open to an employer was set out by the EAT in *Monmouthshire County Council v Harris EAT 0332/14*. In that case, Her Honour Judge Eady observed: *'Given that this was an absence-related capability case, the employment tribunal's reasoning needed to demonstrate that it had considered whether the Respondent could have been expected to wait longer, as well as the question of the adequacy of any consultation with the Claimant and the obtaining of proper medical advice'.*

129. In the context of long-term sickness absence, consultation has a number of purposes, which include:

- establishing the true medical position
- keeping the employer abreast of the employee's progress, and

- keeping the employee up to date with the employer's position, which is particularly important if the employer is considering dismissal.

130. The 'range of reasonable responses' test of fairness applies to both the decision to dismiss and the procedure that was followed in reaching that decision. The EAT, *Pinnington v City and County of Swansea and anor EAT 0561/03*, said that the test should apply to the way employers inform themselves of the true medical position, applying the Court of Appeal's decision in *J Sainsbury plc v Hitt 2003 ICR 111, CA*.

Disability

131. For the purposes of section 6 of the Equality Act 2010 a person is said to have a disability if they meet the following definition:

> *"A person (P) has a disability if – (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities."*

132. The burden of proof lies with the Claimant to prove that he is a disabled person in accordance with that definition. Section 6 of the Equality Act 2010 states:

> ***6 Disability***
>
> *(1) A person (P) has a disability if—*
>
> *(a) P has a physical or mental impairment, and*
>
> *(b)the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*
>
> *(2)A reference to a disabled person is a reference to a person who has a disability.*
>
> *(3) In relation to the protected characteristic of disability—*
>
> *(a)a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;*
>
> *(b)a reference to persons who share a protected characteristic is a reference to persons who have the same disability.*
>
> *(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—*
>
> *(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and*
>
> *(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.*
>
> *(5)A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).*

(6)Schedule 1 (disability: supplementary provision) has effect.

133. Further assistance on the definition is provided in Schedule 1 of the Equality Act 2010. The definition poses four essential questions:

a. Does the person have a physical or mental impairment?
b. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
c. Is that effect substantial?
d. Is that effect long-term?

134. In *Aderemi v London and South Eastern Railway Ltd [2013] ICR 591*, Langstaff P stated: *"It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which the Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect on his ability, that is to carry our normal day to day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading of "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other".*

135. The term "substantial" is defined at section 212 as "more than minor or trivial". Normal day to day activities are things people do on regular basis including shopping, reading and writing, having a conversation, getting washed and dressed preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, socializing.

Paragraph 2(1) of Schedule 1 Equality Act 2010 reads:

2(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

136. Likely should be interpreted as meaning "it could well happen" rather than it is more probable than not it will happen; see *SCA Packaging Limited v Boyle (2009) ICR 1056*.

137. A claimant must meet the definition of disability as at the date of the alleged discrimination - *Cruickshank v Vaw Motorcast Ltd [2002] I.C.R. 729.* This position was again repeated by the EAT in *Alao v Oxleas NHS Foundation Trust [2022] EAT 135*, where Eady P held that when assessing the question of disability the Tribunal was "bound to have regard" to the position as at the date of the acts of discrimination in issue. A Tribunal must not take into account matters post the relevant period.

138. Paragraph 5 of Schedule 1 to the Equality Act 2010 states:

5(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2)"Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

(3)Sub-paragraph (1) does not apply—

(a) in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed;

(b) in relation to such other impairments as may be prescribed, in such circumstances as are prescribed.

139. Paragraph 12 of Schedule 1 of the EA 2010 provides that when determining whether a person is disabled, the Tribunal "must take account of such guidance as it thinks is relevant*."* The "Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability" (May 2011) (the "Guidance") was issued by the Secretary of State pursuant to s. 6(5) of the EA 2010. The Guidance must not be used as a checklist.

140. In this case, we were referred to paragraphs B13, B16 and C11 of the Guidance. But we have also considered the other paragraphs copied below.

*"B12. **The Act provides** that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, 'likely' should be interpreted as meaning 'could well happen'. The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question (**Sch1, Para 5(1)**). **The Act states** that the treatment or correction*

*measures which are to be disregarded for these purposes include, in particular, medical treatment and the use of a prosthesis or other aid (**Sch1, Para 5(2)**). In this context, medical treatments would include treatments such as counselling, the need to follow a particular diet, and therapies, in addition to treatments with drugs. (**See also paragraphs B7 and B16.**)"*

"B13. This provision applies even if the measures result in the effects being completely under control or not at all apparent. Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if it is known that removal of the medical treatment would result in either a relapse or a worsening conditioning, it will be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1".

"B14. For example, if a person with a hearing impairment wears a hearing aid the question as to whether his or her impairment has a substantial adverse effect is to be decided by reference to what the hearing level would be without the hearing aid. Similarly, in the case of someone with diabetes which is being controlled by medication or diet should be decided by reference to what the effects of the condition would be if he or she were not taking that medication or following the required diet."

"B16. Account should be taken of where the effect of the continuing medical treatment is to create a permanent improvement rather than a temporary improvement. It is necessary to consider whether, as a consequence of the treatment, the impairment would cease to have a substantial adverse effect. For example a person who develops pneumonia may be admitted to hospital for treatment including a course of antibiotics this cures the impairment and no substantial effects remain (see also paragraph C11, regarding medical or other treatment that permanently reduces or removes the effects of an impairment)".

*"B17. However, if a person receives treatment which cures a condition that would otherwise meet the definition of a disability, the person would be protected by the Act as a person who had a disability in the past. (**See paragraph A16.**)"*

"C11. If medical or other treatment is likely to permanently cure a condition and therefore remove the impairment, so that recurrence of its effects would then be unlikely even if there were no further treatment, this should be taken into consideration when looking at the likelihood of recurrence of those effects. However, if the treatment simply delays or prevents a recurrence, and a recurrence would be likely if the treatment stopped, as is the case with most medication, then the treatment is to be ignored and the fact is to be regarded as likely to recur".

141. B12 and B13 acknowledge that treatment should be ignored even when the result of the treatment means the effects are completely under control or not at all apparent. Where treatment is continuing it may be having the effect of "masking" or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if the evidence establishes that removal of the medical treatment would result in either a relapse or a

worsened condition, it would be reasonable to disregard the medical treatment.

142. It is noted that there are, however, situations where medical treatment may create a permanent improvement or "cure". In such situations it is likely to be necessary to consider whether the effects of the impairment are or were sufficiently "long term".

143. It is irrelevant that a Claimant is no longer disabled at the time of the hearing. When considering if an impairment is "long term", that consideration must be considered **as at the time of the discriminatory act**, and not at the date of the hearing. This was again repeated by the EAT in **Alao v Oxleas NHS Foundation Trust** [2022] EAT 135, where Eady P held that when assessing the question of disability the Tribunal was "**bound to have regard**" to the position as at the date of the acts of discrimination in issue.

144. Pursuant to s. 6(4) of the EA 2010, someone who is no longer disabled, but who met the requirements of the definition in the past, will still be covered, if the discrimination is due to the past disability. However, if a past disability is relied on, then it must still meet all strands of the statutory definition. It will be an error of law if a Tribunal does not have regard to all three scenarios envisaged in paragraph 2 of schedule 1.

145. We were referred to the EAT case of *Carden v Pickerings Europe Ltd 2005 IRLR 721 and Abadeh v British Telecommunications plc 2011 ICR 156.*

146. The legislation regarding complaints of discrimination arising from disability is set out at section 15 of the Equality Act 2010, set out below.

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.

147. The approach to determining Section 15 claims was summarised by the Employment Appeal Tribunal in *Pnaiser v NHS England and Another [2016] IRLR 170. This* includes:

• In determining what caused the treatment complained about or what was the reason for it, the focus is on the reason in the mind of A. This is likely to require an examination of the conscious or unconscious thought process of A;
• The "something" that causes the unfavorable treatment need not be the main or sole reason, but must at least have a significant (or more than trivial) influence on the unfavorable treatment, and so amount to an effective reason for or cause of it;
• Motives are not relevant;
• The tribunal must determine whether the reason or the cause is "something arising in consequence of B's disability";
• The expression "arising in consequence of" can describe a range of causal links. The causal link between the something that causes unfavorable treatment and the disability may include more than one link;
• Knowledge is only required of the disability. Knowledge is not required that the "something" leading to the unfavorable treatment is a consequence of the disability.

148. The respondent will successfully defend the claim if it can prove that the unfavorable treatment was a proportionate means of achieving a legitimate aim. Legitimate aims are not limited to what was in the mind of the employer at the time it carried out the unfavorable treatment. Considering the justification defence requires an objective assessment which the tribunal must make for itself following a critical evaluation of the position. It is not simply a question of asking whether the employer's actions fell within the band of reasonable responses.

149. The Equality and Human Rights Commission Code of Practice suggests the question should be approached in two stages:

• Is the aim legal and non-discriminatory and one that represents a real, objective consideration?
• If so, is the means of achieving it proportionate – that is appropriate and necessary in all the circumstances?

150. The Code goes on to say that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. "Necessary" here does not mean that the treatment is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means (see *Hampson v Department of Education and Science [1989 ICR 179 and Hardys & Hansons plc v Lax [2005] ICR 1565.)*

151. Justification therefore requires there to be an objective balance between the discriminatory effect and the reasonable needs of the employer (*Hensman v Ministry of Defence UKEAT/0067/14*). The Tribunal has to take into account the reasonable needs of the employer, but it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the treatment is reasonably necessary.

152. The Equality and Human Rights Commission Code of Practice in paragraph 5.2.1 suggests that if a respondent has failed to make a reasonable adjustment it will be very difficult for it to show that its unfavourable treatment of a claimant is justified.

153. The legislation regarding complaints of a failure to make reasonable adjustments is contained within sections 20 and 21 of the Equality Act 2010.

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2)The duty comprises the following three requirements.

(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8)A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

154. The duty to make reasonable adjustments appears in Section 20 as having three requirements. In this case we are concerned with the first requirement in Section 20(3) – "(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a

substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage."

155. Under section 21 a failure to comply with that requirement is a failure to comply with a duty to make reasonable adjustments and will amount to discrimination. Under Schedule 8 to the Equality Act an employer is not subject to the duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the claimant has a disability or that the claimant is likely to be placed at a substantial disadvantage.

156. In *Environment Agency v Rowan [2008] ICR 218* it was emphasised that an employment tribunal must first identify the "provision, criterion or practice" applied by the respondent, any non-disabled comparators (where appropriate), and the nature and extent of the substantial disadvantage suffered by the claimant. Only then is the tribunal in a position to know if any proposed adjustment would be reasonable.

157. The words "provision, criterion or practice" ["PCP"] are said to be ordinary English words which are broad and overlapping. They are not to be narrowly construed or unjustifiably limited in application. However, case law has indicated that there are some limits as to what can constitute a PCP. Not all one-off acts will necessarily qualify as a PCP. In particular, there has to be an element of repetition, whether actual or potential. In Ishola v Transport for London [2020] EWCA Civ 112 it was said: "all three words carry the commutation of a state of affairs… indicating how similar cases are generally treated or how a similar case would be treated if it occurred again." It was also said that the word "practice" connotes some form of continuum in the sense that it is the way in which things are generally or will be done.

158. The purpose of considering how a non-disabled comparator may be treated is to assess whether the disadvantage is linked to the disability.

159. Substantial disadvantage is such disadvantage as is more than minor or trivial;

160. In *County Durham and Darlington NHS Trust v Dr E Jackson and Health Education England EAT/0068/17/DA the* Employment Appeal Tribunal summarised the following additional propositions:

• It is for the disabled person to identify the "provision, criterion or practice" of the respondent on which s/he relies and to demonstrate the substantial disadvantage to which s/he was put by it;

• It is also for the disabled person to identify at least in broad terms the nature of the adjustment that would have avoided the disadvantage; s/he need not necessarily in every case identify the step(s) in detail, but the

respondent must be able to understand the broad nature of the adjustment proposed to enable it to engage with the question whether it was reasonable;

• The disabled person does not have to show the proposed step(s) would necessarily have succeeded but the step(s) must have had some prospect of avoiding the disadvantage;

• Once a potential reasonable adjustment is identified the onus is cast on the respondent to show that it would not been reasonable in the circumstances to have to take the step(s);

• The question whether it was reasonable for the respondent to have to take the step(s) depends on all relevant circumstances, which will include:

- The extent to which taking the step would prevent the effect in relation to which the duty is imposed;
- The extent to which it is practicable to take the step;
- The financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of its activities;
- The extent of its financial and other resources;
- The availability to it of financial or other assistance with respect to taking the step;
- The nature of its activities and size of its undertaking;

• If the tribunal finds that there has been a breach of the duty; it should identify clearly the "provision, criterion, or practice" the disadvantage suffered as a consequence of the "provision, criterion or practice" and the step(s) the respondent should have taken.

161. Consulting an employee or arranging for an occupational health or other assessment of his or her needs is not normally in itself a reasonable adjustment. This is because such steps alone do not normally remove any disadvantage; *Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 663; Project Management Institute v Latif [2007] IRLR 579.*

162. What adjustments are reasonable will depend on the individual facts of a particular case. The Tribunal is obliged to take into account, where relevant, the statutory Code of Practice on Employment published by the Equality and Human Rights Commission. Paragraphs 6.23 to 6.29 give guidance on what is meant by reasonable steps. Paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicality of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantial disadvantage.

163. An important consideration is the extent to which the step will prevent the disadvantage. Although the Equality Act 2010 uses the term "avoid", this is not an absolute test. (The position is different in auxiliary aid cases where the employer has to take such steps as it is reasonable to take to have to <u>provide</u> the auxiliary aid).

164. A failure to consider whether a particular adjustment would or could have removed the disadvantage amounts to an error of law: *Romec Ltd v*

Rudham [2007] All ER(D) (206) (Jul), EAT. The Court of Appeal put the matter this way in *Griffiths v Secretary of State for Work and Pensions [2017] ICR 160:*

"So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness."

165. Broadly speaking, and all other things being equal, the more effective the adjustment is likely to be the more likely it is to be a reasonable adjustment; the less effective it is likely to be, the less likely it is to be reasonable. Effectiveness must be assessed in the light of information available at the time, not subsequently: *Brightman v TIAA Ltd UKEAT/0318/19 2 July 2021* (paragraph 42).

Conclusions

Unfair dismissal

166. The issues for determination in relation to the complaint of unfair dismissal are set out above.

167. It is not disputed that the Claimant was dismissed, and the effective date of termination was 31 March 2022.

168. Dealing firstly with the principal reason for dismissal, the Respondent says the reason was capability (long term absence). In submissions, Ms. Dannruetter accepted that the principal reason for dismissal was capability. She submitted that a minor factor may have been retaliation for raising whistle blowing concerns but accepted that the principal reason was capability.

169. There was little evidence in relation to any whistleblowing process, and on the evidence available we do not find the dismissal to have been influenced by any historical whistle blowing.

170. We find that the Claimant was dismissed because of his ill-health, which had resulted in a long period of sickness absence.

171. We note that the reason for the dismissal was explained to the Claimant at the 3rd ill-health capability meeting and was also set out in the letter dated 30 March 2022, key extracts are noted below.

"We have looked at all options over the past year and as occupational health cannot even identify with the operation if successful a timeframe, we are therefore going to look to terminate your employment from 31/03/2022".

"Not quite a dismissal. Grounds for ill health. This is what occupational

health have said."

"After our meeting with Occupational Health, you took the decision to apply for ill health retirement as your employment was to be ceased due to ill health".

"As a result of your long term sickness progressing to incapability and from the advice from Occupational Health in the latest report, it has now been agreed that the most suitable option is to termination your employment on the grounds of ill health".

172. As we have determined that the reason was capability, we have gone on to consider whether the Respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant.

173. As established by case law, in relation to an ill-health capability dismissal, the Tribunal must consider the issues set out above.

Whether the Respondent genuinely believed the Claimant was no longer capable of performing their duties;

174. We have concluded that both Mr. Stubbersfield as the dismissing officer, and Mr. Hayman as the appeal officer, genuinely believed the Claimant was not capable of performing his duties.

175. Mr. Stubbersfield's belief was based on discussions with the Claimant and the advice from Occupational Health.

176. No specific submissions were made in this respect.

Whether the Respondent adequately consulted the Claimant

177. We have kept in mind that in the context of long-term sickness absence, consultation has a number of purposes, and that included establishing the true medical position, keeping the employer updated with the employee's progress, and keeping the employee up to date with the employer's position, which is particularly important where an employer is considering dismissal.

178. A proper consultation with the employee should typically include the following:

- regular discussions, both at the start of the illness and regularly throughout the duration
- informing the employee if it is approaching the stage when dismissal may be considered

- personal contact with the employee
- consideration of the medical evidence
- consideration of the employee's opinion on his or her condition
- consideration of what can be done to get the employee back to work
- consideration of offering alternative employment,
- consideration of an employee's entitlement to enhanced ill-health benefits.

179. Some of these elements overlap with other factors for consideration.

180. In this case there are two separate illnesses and the Claimant became unwell with cardiac difficulties as the work related stress was resolved and we kept that in mind.

181. On face of it there have been 3 ill-health capability meetings and a case conference with Occupational Health. However, all of the meetings were relatively short and in our view there was a significant lack of meaningful dialogue. In reality, because there were two separate and very different illnesses, the second ill health capability meeting was the first time at which the cardiac condition was discussed. In the outcome letter from the second ill health capability meeting it stated that *"termination of employment may be a possible outcome."*

182. Outside of the meetings, there is no evidence of any regular personal contact. Personal contact and one to one conversations can help to ensure that any confusion regarding written correspondence or processes is managed. In this case there appears to have been confusion on the Claimant's part about the ill-health retirement process and the impact of exploring this on his employment, with ill-health retirement first being discussed on 10 February 2022, and not discussed again until the Claimant was told he was being dismissed on 29 March 2022. Although the Claimant exchanged emails with Ms. Rimmer about ill-health retirement as summarised above, indeed Ms. Rimmer's email on 29 March 2022 indicates that ill-health retirement, and the Claimant's position on that, could be discussed at the next meeting (which she indicated would be the next week when in reality was later that day).

183. As noted above, dismissal as a potential outcome was referenced in the outcome letter following the second ill health consultation meeting.

184. Again, on the face of it, Mr. Stubbersfield and Mr. Hayman considered the medical evidence available, namely the Occupational Health summary letter from the case conference on 10 February 2022. However, because of the lack of personal contact, and detailed discussion, there was no proper and detailed consideration of the

updated medical position or the Claimant's opinion on following further the 10 February 2022 letter from Occupational Health.

185. We have commented further below in relation to consultation and consideration of up to date medical evidence and prognosis. However, the Claimant's opinion as to his likely date of return, namely in this case a week or so after the third ill health meeting, and what work he would be capable of performing was not properly discussed. As set out in the extracts from the meeting above, little consultation and exploration of this was done, and we consider Mr. Stubbersfield was dismissive of the Claimant's comments in this respect. At the point of third meeting the Claimant was trying to explain that he felt he would be fit soon after the stent was fitted, and this was not, in our view, given sufficient attention.

186. We conclude that the Respondent did not adequately consult with the Respondent.

Whether the Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position regarding the nature of the Claimant's condition and its prognosis

187. The Respondent is required, by the principles laid down in case law, to establish the true medical position before deciding to dismiss an employee. This requires a reasonable investigation. We have kept in mind that the onus to take reasonable steps to obtain up-to-date medical advice about an employee's condition and prognosis falls on the employer, not the employee.

188. Further, in circumstances where the medical advice might have changed, the employer may be acting unreasonably if it fails to get an up-to-date medical report before dismissing.

189. In this case, the Respondent had, in relation to the cardiac condition, a report from Occupational Health on 17 November 2021, a letter from on 24 January 2022 and a letter from Occupational Health following the case conference on 10 February 2022. All of these were prior to the Claimant's angiogram on 25 February 2022.

190. Although there is reference in the notes of the second ill-health capability meeting to the Claimant being asked to update Mr. Stubbersfield, at no stage following 10 February 2022 does the Respondent take active steps to clarify the medical position. We consider this failing to be even more serious in view of the fact the Claimant told the Respondent that he had an angiogram booked for 25 February 2022.

191. There was no re-referral back to Occupational Health, no questions raised with Occupational Health or the Claimant or his GP.

192. Further, the Claimant at the third meeting, when he was dismissed, sought to update the Respondent on the medical position and explain the next steps in the medical process. At that time, the meeting could have

been adjourned for further enquiry about the position and the fitting of the stent to be made. It was not, and the information given by the Claimant was, in our view, improperly dismissed.

193. There also appears, at the point of dismissal, to be no proper consideration of the very fact the GP fit note dated 15 March 2022, which runs until 5 May 2022 says that the Claimant may be fit for work with adjustments, other than to note that the production of a fit note ended the medical suspension and that adjustments were not made. Where a fit note states that the employee may be fit for work, the employer may need to seek clarification, either from the GP or from a specialist.

194. In our view, the Respondent did not take any adequate steps at the point of dismissal or in the appeal stage, to obtain up to date information about the medical position.

195. In this case a further and fresh medical report, both after 25 February 2022 appointment and after the stent fitting on 1 April 2022 would have been very helpful. The medical evidence relied upon was not up to date, at the point of 10 February 2022 the Claimant had not even had his angiogram and was not in receipt of a complete diagnosis and treatment plan.

196. In relation to prognosis, when deciding whether to dismiss an employee for lack of capability, an employer must take into account not only the employee's current level of fitness but also his or her likely future level of fitness. Importantly, if an employer ignores a favourable prognosis, a dismissal may be unfair.

197. In this case, at the time of the third ill-health capability meeting, with the procedure of the stent fitting just a few days away, the Claimant's prognosis for a full and swift recovery was good. He attempted to tell Mr. Stubbersfield this. As above, it would have been very easy for info about stent procedure and prospects to have been obtained either during the meeting or in adjournment.

198. Instead, Mr. Stubbersfield relied on OH reports and letters from a time when it was not even known that a stent would be fitted.

199. In relation to the appeal stage, we note that it would still have been possible to obtain up to date medical information, either from OH or another medical provider. The appeal could have been adjourned to allow for this, and instead focus seems to have been on how long the Claimant may have taken to recover until absolute fitness.

200. In our view, the Respondent did not carry out a reasonable investigation as it did not find out about the up-to-date medical position its prognosis.

<u>The Respondent considered alternatives to dismissal</u>

201. An employer has a duty to consider redeploying or transferring employees who are not able to carry out some or all of their former duties due to ill health where alternative work exists that the employee may be able to do.

202. At the point of dismissal there was no evidence that Mr. Stubbersfield had considered an alternative to dismissal.

203. Prior to 29 March 2022 there had been some consideration about possible adjustments as recommended by Occupational Health – namely undertaking other duties and roles, but this is a separate matter to considering possible alternatives. It does not appear that this took place, for example, there appears to be no reference to considering any other vacancies within the Respondent specifically at the point of dismissal.

Whether the Respondent could reasonably be expected to wait longer before dismissing the Claimant

204. An essential consideration is whether the employer can be expected to wait any longer for the employee to return, and it is necessary for us to expressly address this question and balance all the circumstances in this case.

205. We have considered the factors set out below.

206. Firstly, we considered whether other staff are available to carry out the absent employee's work.

207. Mr. Stubbersfield's unchallenged evidence was that there was a lot of pressure on the service due to sickness and some duties were covered by staff working overtime. However, there was little evidence provided of any business disruption caused by the Claimant's absence or specific detail about the cost and practical impact on the Claimant's absence at the point of dismissal.

208. Secondly, we considered the nature of the employee's illness and likelihood of improving. In considering this, we have kept in mind that the Claimant was absent from work due to two separate and entirely unrelated conditions. At time of dismissal the Claimant was experiencing illness due to his cardiac condition. As set out in the findings of fact above, the Claimant first started suffering conditions in November 2021 and contacted his GP. There were prompt referrals and investigations. At the point of dismissal the Claimant was just days away from having a stent fitted.

209. Looking at documentary evidence in the Bundle regarding the condition and recovery post stent fitting, as summarised in the findings of fact above, we considered that with the fitting of a stent the Claimant's likelihood of a quick and significant reduction in symptoms was very likely. We also note such information would have been easily available to the Respondent.

210. Thirdly, we considered the likely length of the Claimant's absence. We note the absence regarding the cardiac condition alone was in the region of four months, but of course this followed a period of approximately 8 months absence due to work related stress.

211. At the point of dismissal this was not a case where the position was still unclear. The condition had been identified and a treatment plan promptly put in place. The recovery following a stent is fast, and although the Claimant may have needed a few weeks to recuperate and may have returned initially on a phased return with some restrictions on lifting, he was not likely to be absent for, in our view, more than a few weeks at most.

212. Fourthly, we considered the cost of continuing to employ the employee. As noted above, Mr. Stubbersfield's unchallenged evidence was that some work was covered by colleagues undertaking overtime, which led to increased overtime costs. However, there was no specific detail given.

213. The Claimant's entitlement to sick pay was due to expire on 9 December 2021, however as set out above, the Claimant was medically suspended on full pay. The Claimant later submitted a fit note stating he may be fit for work with adjustments, but the adjustments could not be accommodated. In his witness statement Mr. Stubbersfield explained that the Claimant had built up more occupational sick pay by that point. It is not clear on the exact cost associated with waiting longer before deciding to dismiss, but as we consider an appropriate delay would be only a matter of weeks, the ongoing costs of sick pay and possible overtime are not considered to be extensive.

214. Fifthly, we considered the size of the employing organisation. The Respondent has not provided any information in the ET3 regarding number of employees, but it is understood that the Respondent provides non-medical services to the hospitals within the East Kent Hospitals University NHS Foundation Trust.

215. We have considered all of the above, and conclude that the Respondent could reasonably have been expected to wait longer before dismissing the Claimant.

216. In this case, waiting longer could have been a matter of a few weeks, until shortly after the Claimant's stent had been fitted and he could provide further information on his health recovery.

Was dismissal within the range of reasonable responses

217. The reasonableness test under section 98(4) of the Employment Rights Act 1996 is based on the facts or beliefs known to the employer at the time the dismissal takes effect.

218. The factors to consider are essentially the same as those

considered in relation to whether the Respondent could have reasonably been expected to wait longer before dismissing the Claimant.

219. In this case, we do not consider the Respondent conducted a fair procedure. We have been careful not to substitute our own view, and have reached our conclusions based on the evidence and not considered the benefit of hindsight. We have considered whether dismissal was within the range of reasonable responses available to a reasonable employer.

220. We considered all of our conclusions above, and on balance, determined that that dismissal was not within the range of reasonable responses. In reaching this conclusion we kept in mind that the Respondent had not followed a fair procedure, and in particular had not obtained or considered up to date medical information and prognosis and that it should have waited longer in view of the particular circumstances and the proximity of the stent fitting.

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221. The question for consideration is whether the Claimant would have been dismissed in any event, had a fair procedure been followed. We have kept in mind that in relation to medical investigation, it will rarely be the case that provision of up to date medical information would be utterly useless or futile.

222. However in this case, on the basis of the particular facts and the Claimant's fast recover post stent, we consider it likely that the Claimant would have been retained and his employment would have continued if a proper procedure had been undertaken. There will be no reduction.

Disability

223. We have kept in mind that the burden of proof in establishing disability is on the Claimant. There is no medical expert evidence in this case.

224. The parties both have a very different view on the issue of whether or not the Claimant is disabled, and before dealing with each of the requisite questions, it is helpful to repeat the key submissions in this respect here.

225. The Claimant's position is that the stent is playing a crucial on-going role to treating the Claimant's disability. They say it is holding open his artery so that blood can flow through it freely. It is submitted, that without the stent, the Claimant's arteries would close up and his angina symptoms would return and significantly adversely impact on his daily life. They submit that the stent is a continuing measure providing continuing support to the Claimant.

226. Ms. Dannruetter further submits that it is not the case that the insertion of the stent has corrected the body in some way such that it can be removed without issue, because it plays a crucial ongoing role of keeping arteries open to allow blood to flow freely.

227. Ms. Dannreutter referred to *Carden v Pickerings Europe Ltd* EATS/0081/04, a case in which a Claimant had a metal pin and plate inserted into the ankle after a fracture. She cited paragraphs 32 – 34, and the specific extracts below:

> *"…whether there were continuing measures to correct the problem would depend upon whether there was any continuing support or assistance being given by the pins and plates to the functioning of the Applicant's ankle.*
>
> *…A natural reaction of a lay observer to an accident 20 years ago, where there had been no material problems since 1984, would be that the pins and plates were simply left in the ankle because it would be too much trouble to take them out: possible pain to the patient. There must be many occasions in which pins or plates are put into people's bodies which remain there for the rest of the patient's life, serving no continuing function once the bones have successfully knit together and recovered their original function."*

228. Ms. Dannreutter submits that, pursuant to *Carden v Pickerings Europe*, the stent is a measure that is being taken to correct the Claimant's impairment and that without it, the Claimant's impairment would have a substantial adverse effect on his ability to carry out normal day-to-day activities. She submits it is not – as in *Carden* – akin to a metal pin floating about in the body no longer of any effect, but rather It continues to hold open arteries to prevent the symptoms of angina.

229. Ms. Dannreutter further submits that, in any event, the stent has not 'cured' the Claimant's disability and references a return of symptoms returned in late December 2023 and suggests that his stent may not be working effectively (or another artery is blocked). The submits the symptoms of the Claimant's condition have recurred and they may recur again.

230. The Respondent's position is, in essence, that the fitting of the stent effectively cured the Claimant.

231. Mr. Grundy submitted that medical evidence is often of critical importance to establish that a substantial adverse effect is likely to recur as well as in respect of other issues namely whether a medical procedure or medical treatment is a permanent fix or not.

232. Mr. Gundy refers to *Abadeh v British Telecommunications Plc [2001] ICR 156*, as approved by the Court of Appeal in *Woodrup v London Borough of Southwark [2003] IRLR 111* and submits that only measures that continuing to treat should be ignored.

233. He says in the present case, the Claimant was diagnosed with

single artery disease, which was rectified by the fitting of the stent on 1 April 2021. He says the treatment has ceased and the treatment has provided a permanent improvement, not a temporary improvement. He says it is was a one off procedure with continuing consequences, such that there was no adverse impact on the Claimant's day to day activities.

234. He submits, therefore, that the stenting procedure can be taken into account and the effect of the treatment meant that Claimant's cardiac condition no longer had substantial adverse effect upon his ability to perform normal day to day activities.

235. *In Abedeh* the EAT gave the following guidance at paragraphs 30 – 32 of the Judgment:-

> *"30. Where treatment has ceased the effects of that treatment should be taken into account in order to assess the disability. This is the case because paragraph 6 of Schedule 1 applies only to continuing medical treatment, i.e. to measures that "are being taken" and not to concluded treatment where the effects of such treatment may be more readily ascertained.*
>
> *31. Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, the medical treatment must be disregarded under paragraph 6 of Schedule 1. Where however the medical treatment satisfies the Tribunal that the effect of the continuing medical treatment is to create a permanent improvement rather than a temporary improvement, such permanent improvement should be taken into account, as measures are no longer needed to treat or correct it once the permanent improvement has been established.*
>
> *32. The situation can be illustrated by two examples; firstly, where physiotherapy has resulted in an improvement in movement which will facilitate ordinary walking without the use of a stick or a crutch but where further physiotherapy is still carrying on, the permanent improvement already achieved will be taken into account in accessing the disability, whereas such residual stiffness as still requires continuing treatment, the outcome of which is not known, must be taken into account in assessing the disability without regard to that continuing treatment. If however the accepted prognosis is that such stiffness, albeit still seriously disabling, will be resolved with further physiotherapy, such recovery can be taken into account. Second, where depression is being treated by medication the final effects of which are not known or where there is a substantial risk of a relapse when the medication ceases, the effects of the medication are to be ignored …."*

236. Mr. Grundy also refers to paragraphs B13, B16 and C11 int statutory guidance, which are set out above.

237. Mr. Grundy commented on the *Carden* case, noting that the case was referred back to the Tribunal to consider whether the insertion of plates/pins into a broken ankle amounted to continuing treatment and/or continuing measures. We do not know the outcome of the Tribunal's decision.

238. Mr. Grundy also made submissions in relation to recurrence and long term. He submitted that the Tribunal must disregard events taking place after the alleged discriminatory act but prior to the Tribunal hearing. He submits that the Claimant has not proved that his cardiac condition was likely to recur and that it did not last for 12 months.

239. We have set out our conclusions in relation to each part of the test below. For ease of reading, we have set out our conclusion on measures before that on long term.

Does the Claimant have a physical and mental impairment?

240. We conclude that the Claimant has been diagnosed with ostial stenosis of the right coronary and we understand this to be a blocked artery and would be considered a Coronary Heart Disease, and this is a physical impairment.

Did the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day to day activities?

241. The Respondent accepts that it did, between November 2021 and 1 April 2022.

Are any measures (e.g., medication) being taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

242. We have paid careful attention to the legislation, the case law referred to us and the Guidance when considering this question and applied this to our findings of fact.

243. In this particular case, we consider the stent to be a measure that is being taken to treat the condition. The stent is continuing to treat a condition, this conclusion is based on the information in the NHS information sheet which states the condition cannot be cured. The stent is keeping the right artery open, to enable the blood to flow, it is continuing to provide a function and treat the condition. It has a drug coating to prevent the build-up of scar tissue.

244. We do not accept this is a case where there has been a procedure that has cured the condition, we consider it to be continuing treatment that

falls within the definition of "measures are being taken to correct it" under section 3(c) of Paragraph 5 or Schedule 1 of the Equality Act 2010.

245. We conclude, that but for stent/the measure/the treatment, the Claimant's symptoms would have been as experienced between November 2021 to 1 April 2022, which are accepted as having a substantial adverse effect on the ability of the Claimant to carry out normal day to day activities. We base this conclusion on the fact that the Claimant struggled with the symptoms consistently during this period, the stent provided an almost immediate improvement to the extent that the symptoms have been extinguished. The stent resulted in the effects being, seemingly, under control with almost immediate effect. We do of course note that the Claimant needed time to recover to full fitness, but this is separate to the effects being controlled.

246. Accordingly, we must disregard the medical treatment, in this case the stent.

<u>If so, was that effect long term?</u>

247. The Claimant only experienced the effects from early November 2021 to 1 April 2022, some 5 months. The effects ceased due to the successful fitting of the stent. However, as set out above, we need to disregard the stent.

248. As the effects had not lasted 12 months, we needed to consider if they were likely to last at least 12 months and if likely to last the rest of the Claimant's life.

249. In reaching our conclusions we have not considered events taking place after the alleged discriminatory acts but prior to the Tribunal hearing, namely although noted briefly in the facts above the Claimant's recent chest pain and symptoms have not been taken into account.

250. As noted in the findings of fact above, the cardiac condition cannot be cured, but treatment can help manage. Taking the NHS information, and the fact the Claimant consistently experienced the symptoms over a 5 month period (noting he felt better in himself when he was clear of bronchitis and covid) we conclude that it was likely to last at least 12 months and indeed the rest of his life.

Discrimination arising from disability (Equality Act 2010 section 15)

251. With reference to the List of Issues, it is not disputed that the Respondent treated the Claimant unfavourably by:

- Dismissing the Claimant on 31 March 2022; and
- Failing to uphold the Claimant's appeal on or around 21 April 2022.

252. Further, it is not disputed that the following things arose in consequence of the Claimant's disability:

- The Claimant being unable to undertake lone working, working at height and / or driving?

- The Claimant's sickness absence between 9 December 2021 and 31 March 2022?

253. However, we have had to decide, whether the reason for the unfavourable treatment was effectively because of sickness absence and/or inability to lone drive/work at heights/drive for work. The burden of proof in this respect is on the Claimant.

254. We have considered the written skeletons and the oral submissions in this respect, and key points made are summarised below.

255. Ms. Dannruetter submits that the Claimant's sickness absence and inability to work alone, at heights or drive was more than a trivial factor in Mr. Stubbersfield's mind when he dismissed the Claimant and in Mr. Hayman's mind when he dismissed the appeal. She further submits that the Respondent's alleged legitimate aims were undermined by the fact it dismissed the Claimant in view of fact that the Claimant was fit around the time of dismissal and would have eased the burden on the Respondent had he returned to work, even if not on a full basis.

256. Mr. Grundy, in relation to the rejection of the Claimant's appeal, submits that the reason for the rejection, the unfavourable treatment, is that the Claimant failed to provide medical evidence.

The Tribunal must determine what caused the unfavorable treatment, in other words what was the reason for it. The focus at this stage is on the reason in the mind of the person involved, in this case Mr. Stubbersfield and then Mr. Hayman.

257. There may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

258. We have kept in mind that motives are irrelevant, and the focus is on the cause.

<u>Dismissing the Claimant on 31 March 2022</u>

259. Dealing first with the dismissal of the Claimant by Mr. Stubbersfield and whether the dismissal was because of the Claimant's sickness absence or inability to lone drive/work at heights/drive for work.

260. Mr. Stubbersfield confirmed in his oral evidence that the sickness absence from 8 December 2021 onwards was a material factor in his mind in dismissing Claimant.

261. The outcome letter from the third ill-health capability meeting states:

"However, I am having to review your length of long-term sickness absence which is now over 12 months long and the advice from the OH doctor around not being able to identify a likely timeframe for return to work even if your procedure is successful. With these uncertainties, it is very difficult for the business to sustain your absence any longer".

"As I have explained to you throughout, I did not feel able to support the light duties that were recommended, due to the risks involved and you understood and accepted this decision. I did look at redeployment options during this process and sought advice from Occupational Health and there were no suitable alternatives identified during the process as they were seen as too physically demanding due to your heart condition."

262. In our mind this clearly demonstrates that Mr. Stubbersfield's reasons for dismissing the Claimant were his sickness absence and also that Mr. Stubbersfield considered that he was unable to lone drive/work at heights/drive for work, which were in essence the light duties recommended.

263. Further, based on the comments made at the second and third ill health meetings as well as the case conference on 10 February 2022, as recorded in the notes and outcome letters detailed in the findings of fact above, the Claimant's absence and his inability to do all elements of his role were key feature and already in the mind of Mr. Stubbersfield.

<u>Failing to uphold the Claimant's appeal on or around 21 April 2022</u>

264. We then considered the failure to uphold the appeal dismissal and whether an effective reason for this was the Claimant's sickness absence and/or inability to lone drive/work at heights/drive for work.

265. We noted that at the appeal hearing Mr. Hayman asked the Claimant whether he had any up to date medical evidence. We have not repeated them here but our conclusions in relation to the unfair dismissal complaint are relevant here, and the responsibility on obtaining up to date medical evidence rests with the employer. As noted above, the Claimant did seek to explain his current health situation at the appeal hearing, but was not aware and had not been instructed to bring or provide any specific medical evidence.

266. The appeal outcome letter states:

"Lastly you state at your 3rd ill health capability meeting held on the 29th March that your procedure to have a stent fitted was on the 1st April and the likelihood was that you would be fit to go back to work in a maximum of 1 week after your stent procedure and you are now fit to work. You were unable to provide evidence that you are now fit to work at your appeal hearing. You also stated during the hearing that you are still under the care of cardio physio and recuperation could take up to 3

months but again we have not medical evidence of very this. Given the lack of up to date medical evidence I have to rely on the information I already have and note the OH report notes "Karl is not currently well enough to return to work, and, unfortunately, I cannot identify a likely timeframe for when he may be able to do so, even if his procedure is successful."

267. This references Mr. Hayman's perceived lack of medical evidence and also references the previous Occupational Health notes and that he relies on fact they said the Claimant was not well enough to return to work at that time. We consider that, based on out of date information, Mr. Hayman decided that he was not certain on when the Claimant would be able to be fit for full duties, and we consider this to be one the reasons for not upholding appeal. This does flow from the Claimant's sickness absence but we do not think the sickness absence itself formed part of the reason for not upholding the appeal.

268. However, we do consider the Claimant's inability to lone/work at heights/drive for work was a significant factor in dismissing the appeal as the evidence demonstrates that Mr. Hayman was concerned that the Claimant could still not undertake his full role. This is indicated by the fact he referenced the Claimant still being under cardio physio and that recuperation could take up to three months.

269. As we have concluded that the unfavourable treatment was because of the things arising on consequence of the Claimant's disability we have next considered whether the treatment was a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

- The efficient delivery of Technical Support to acute hospitals.

- The efficient management of resources, which are substantially scarce political public funds.

- The fair and reasonable management of all of the staff of the Respondent.

270. The Respondent must prove that the dismissal and the rejection of the appeal was a proportionate means of achieving a legitimate aim.

271. We consider that all three aims are legitimate, and are things that a reasonable employer would seek to achieve.

<u>Dismissal</u>

272. Dealing first with the dismissal. We do not consider the dismissal was an appropriate and reasonably necessary way to achieve the efficient of delivery of technical support to acute hospitals. The Claimant was an experienced technician, and had he returned to work shortly after the stent fitting, he could have assisted in delivering electrical services. Mr. Stubbersfield stated that there was a shortage of skilled tradesmen in hospitals. The Claimant's dismissal meant that there was ongoing

shortage in personnel able to deliver technical support and that other staff would have to cover any additional work, or that the Respondent may have decided that it needed to recruit.

273. In relation to the efficient management of resources, which are substantially scarce political public funds, we have considered whether the dismissal was an appropriate and reasonably necessary way to achieve this aim. We do not consider it was. As set out above, we consider the Claimant could have been back in work within a few weeks, even if it was on a phased return basis initially, and although there perhaps may have been a short further period of sick pay these factors would not have been significant in terms of costs, and securing a return to work of skilled employee over the long term would be a better management of resources.

274. As a general proposition, the fair and reasonable management of all staff is a desirable thing. However, we have had to consider if dismissal was an appropriate and reasonably necessary way to achieve that aim. In the particular circumstances of this case, we consider a return to work by the Claimant, would have lessened the burden on staff and the workload would have been shared and therefore for not consider the dismissal to be appropriate and reasonably necessary.

Rejection of Appeal

275. In the relation to the rejection of the appeal, we have reached the same conclusion regarding the aim of efficient delivery for technical support at paragraph 267 above. We also noted that although the Claimant was still improving his fitness the Claimant was saying he was fit to work, albeit with some adjustments until the expiration of his fit note on 5 May 2022. We do not consider rejecting the appeal was an appropriate and reasonably necessary way to ensure the efficient delivery of Technical Support to acute hospitals.

276. In relation to the second two aims, when considering these in view of the rejection of the appeal, we have reached the same conclusions as per the dismissal. We do not consider rejecting the Claimant's appeal was an appropriate and reasonably necessary way to efficiently manage resources or ensure the fair and reasonable management of all staff.

277. We considered whether something less discriminatory have been done instead to meet the three specified aims.

278. In relation to the dismissal, in relation to all three aims we considered that there was something less discriminatory that could have been done to meet the aims. The Respondent could have had adjourned the third ill-health meeting and discussed and supported a return to work after the Claimant's stent operation.

279. In relation to the rejection of the Claimant's appeal, again we have considered all three aims. We do think there was something less discriminatory that could have done been done to meet the aims. The appeal could have been upheld and the Claimant reintroduced back into

the workplace. Further, the appeal meeting could have been adjourned to get up to date medical evidence, and if the fact he was soon to be fit had been properly considered, a return to work flowing from the appeal being granted or adjourned, would have been a less discriminatory way to meet the aims.

280. In reaching our conclusions we were careful to balance the needs of the Claimant and the Respondent. We understand that managing sickness absence is difficult for employers, and for this Respondent, and long term absence creates pressure on colleagues and in this case some extra cost due to overtime costs. However, weighing this against the Claimant's needs, in essence, at the point of dismissal and appeal all the Claimant needed at that stage was a little more time and support returning to work, we consider this would have been the best way for the Respondent to have met it aims because it would have resulted in a skilled employee returning to work, and not the dismissal, which is a serious action.

281. The complaint of unfavourable treatment because of something arising in consequence of disability is well-founded and succeeds.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

282. Set out below is a summary of key submissions only, but all the submissions made, both given in writing and orally have been considered.

283.

284. Ms. Dannreuter, for the Claimant, submitted that the Respondent did not make the reasonable adjustments sought by the Claimant. It is submitted that he could have been buddied up and that Mr. Stubbersfield admitted in evidence that M&E technicians often worked in pairs – whatever it took to get the job done*: "Yeah they did work together. As long as the work got done. It wasn't a requirement but it did happen."*

285. She further also submits that the evidence also shows that the Respondent also could have implemented lighter duties as it had done for other employees. She said there are other tasks the Claimant could have done, such as repairing nurse calls or doing PAT testing, or repairing macerators or tidying the store cupboard. She said the Claimant might have been slower than usual but it could have been done, if only for a brief period until the stent operation was complete.

286. Ms. Dannreuter said that no real thought was given to whether *any* adjustments could be made for the Claimant. Mr. Comper admitted in evidence he did not read the Occupational Health reports before medically suspending the Claimant. She said from then on, it was a one-way track to

the Claimant's dismissal, and this is demonstrated by the comment made at the meeting.

287. Mr. Grundy, on behalf of the Respondent, submitted that given the extent of the severe limitations caused by the Claimant's cardiac condition prior to the surgical procedure on 1 April 2022, there are no reasonable adjustments which could have been taken to avoid the disadvantage caused by PCP1. In relation to PCP2, he said there was no evidence of any such requirement for employees to be able to carry out full duties and the Respondent's own policies include provision for a phased return and the Claimant had adduced evidence of other staff working and not carrying out full duties.

288. He said it was not appropriate to try to compare the Claimant's case to the other cases referred to and highlighted that in cross examination the Claimant accepted that he was unfit to return for any work in December 2021. Although Mr. Grundy acknowledged that although the Claimant doesn't suggest there was any improvement in the severe limitations in his Impact Statement, he did say during cross examination that in early Spring which he said was late February – March 2022, that there was an improvement, but it was "slight". Mr. Grundy said that cannot realistically change the situation and that on the Claimant's own case he could not have been considered for some light duties until the negative covid test on 23 February 2022.

289. Mr. Grundy said that delaying the dismissal to obtain a further occupational health report would not have avoided the disadvantage and that it would have persisted.

290. The Respondent accepts that it had knowledge of the cardiac condition from the 8 December 2021.

291. The Claimant relies on two PCPs.

292. In relation to the first PCP, the Respondent **accepts** that it required mechanical and electrical technicians to undertake lone working/working at height/to be able to drive in the course of their work.

293. As set out above, the second PCP relied on is that the Respondent required mechanical and electrical technicians to be able to carry out the full duties of the role. We had to consider if this amounts to a PCP.

294. On the evidence presented, although constructed as something that could amount to a PCP in theory, we do not consider that the Respondent required mechanical and electrical technicians to be able to carry out the full duties of the role. There was evidence submitted, in relation to adjustments that have been made to other employees roles on a temporary basis, thus indicating that there isn't a requirement for technicians to be able to carry out the full duties of the role. The Sickness

Policy also provides for a phased return to work.

295. Accordingly, the next stage was to consider if PCP1 put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he could not work as a mechanical and electrical technician because of the risks inherent in his condition and because of that he was dismissed. In this case, the Respondent accepted that it had knowledge that the Claimant was likely to be placed at that disadvantage.

296. We then looked at the particular steps that the Claimant says would have avoided the disadvantage. We have considered whether it was reasonable for the Respondent to have taken those steps and when, and whether the Respondent failed to take those steps. We kept in mind the extent to which the step would have prevented the disadvantage.

297. Firstly, the Claimant said he should have been allowed to continue in his role without lone working; working at heights and / or driving (either on a temporary or permanent basis).

298. As set out in the findings of fact above, the Claimant admitted during cross examination that he wasn't fit for work between 8 December 2021 and 1 April 2022. We note that this conflict with the fit note saying may be fit with adjustments but the Claimant sought that fit note after medical suspension, and was concerned about the situation.

299. We considered that generally, making temporary adjustments to allow an employee to return to work is a sensible step. We consider that, on a temporary basis, it would have been reasonable to give the Claimant a buddy as he could not do work at heights. We also considered that generally, on a temporary basis the Claimant could have been given different tasks that did not require working alone and could have been removed from the on call rota and could have made his own arrangements to travel to work via other means than driving.

300. We do not consider those steps would have been reasonable on a permanent basis. Making permanent changes to the Claimant's job role would have, in our view, been an unreasonable hindrance and restriction on the operation of mechanical and electrical services. Even though staff may work together to get certain jobs done, the tasks of mechanical and electrical staff are dictated by the nature of the jobs as they arise, this may require working at heights or on an urgent job alone.

301. We have considered whether a temporary adjustment to allow the Claimant to work without the need to work alone or at height and not be required to drive was a reasonable step to take between December 2021 and April 2022, before the Claimant was dismissed.

302. In addition to his heart condition the Claimant had bronchitis and covid. He started to feel a bit better after bronchitis and covid had passed. On the face of it, he had a fit note stating he was fit for work with adjustments from 15 March 2022. However, the fit note was issued in response to is medical suspension and contradicts the clear oral evidence that was given during the hearing, that he wasn't fit for work before the stent was fitted.

303. We have considered how effective the step would have been in avoiding the disadvantage. The Claimant has acknowledged that he wasn't fit at all for work, therefore, we do not consider the adjustment would have helped avoid the disadvantage, not working alone or at heights or without driving would not have enabled the Claimant to have continued in his role and would not have avoided the disadvantage. Accordingly, we concluded it was not a reasonable adjustment, and the Respondent did not need to take that step.

304. Secondly we considered whether the Respondent should have redeployed the Claimant on temporary or permanent basis to a soft services facilities role.

305. We note that an employer is not required to create a new role as a reasonable adjustment, and therefore do not think redeploying to a soft services facilities role where there is no vacancy to be a reasonable step. The Claimant has not submitted any evidence that there was a suitable vacancy, either permanent or temporary. As set out above, Mr. Stubbersfield spoke with Head of Soft Facilities and it was considered that the was no work with suitable light duties.

306. We have also considered the position at the time, between December 2021 and the Claimant's dismissal that he was not able to work at all and that he did not want to do any office work.

307. If there had been suitable a soft facilities role available for the Claimant to undertake on a temporary basis we consider that it would have been reasonable to redeploy the Claimant to such a role on a temporary basis but only if he had been well enough to do it. However, there was no such suitable work, and as set out in relation to the first step above, the Claimant was not well enough to return to work before his stent was fitted. Therefore, as the Claimant was unfit for work, until after the stent fitting, we do not consider redeploying the Claimant to a soft services facilities role would have avoided the disadvantage in the circumstances as they were at the time. On balance, taking all this into account, we do not consider it was reasonable for the Respondent to take this step at any time during the Claimant's employment.

308. Thirdly, we considered whether a reasonable step would be to create a soft services role for the Claimant on a temporary or permanent basis. We reached the same conclusions as in relation to second

suggested step, and have not repeated here. We do not consider it was reasonable for the Respondent to take this step at any time during the Claimant's employment.

309. Fourthly, we considered whether it would have been a reasonable step to delay dismissing the Claimant until there had been a further occupational health report obtained following the Claimant's stent being inserted.

310. We concluded this would have been a reasonable step, substantially for the same conclusions as set out in relation to the unfair dismissal complaint above. The Claimant was told he was being dismissed on 29 March 2022, but his stent procedure took place on 1 April 2022. Given the Claimant informed the Respondent that his recovery prognosis was good and was expected to be quick, in these circumstances, particularly the fact there was a matter of days between the dismissal and the stent being fitted we conclude that a reasonable step would to have been to refer delay the dismissal until a further occupational health report was obtained. In this case, obtaining a report, which based on the recovering information would have likely said that the Claimant would be fit for duties within a matter of weeks, may well have avoided the disadvantage, he could have returned to work and not been dismissed.

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Employment Judge G Cawthray

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Date 1 March 2024