



Neutral Citation Number: [2020] EWCA Civ 112

Case No: A2/2019/0014

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL

Mr Justice Kerr
UKEATPA/0184/18/RN

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 February 2020

Before :

LADY JUSTICE SIMLER
and
SIR JACK BEATSON

Between :

MR CHARLES ISHOLA
- and -
TRANSPORT FOR LONDON

Appellant

Respondent

Mr Tristan Jones (instructed by **Advocate**) for the **Appellant**
Mr Andrew Allen (instructed by **Eversheds Sutherland (International) LLP**) for the
Respondent

Hearing dates: 21 January 2020

Approved Judgment

Lady Justice Simler:

1. Mr Ishola (who is referred to as “the claimant” for ease of reference) was employed by the respondent for almost eight years and was, it is common ground, at all material times a disabled person suffering with depression and migraines. Following a period of sickness absence that started on 12 May 2015, he did not return to work and was dismissed on grounds of medical incapacity by letter dated 24 June 2016.
2. He brought three wide ranging claims against the respondent. The first two claims were dealt with together and resulted in a liability judgment dated 5 October 2016 (“the first ET judgment”). Most of his complaints were dismissed but the first ET judgment upheld his claims in one minor respect.
3. The third claim (with which this appeal is concerned), was confined to allegations which post-dated 3 November 2015. It comprised claims of unlawful disability and race discrimination, together with claims of harassment, victimisation, unfair dismissal and unlawful deduction from wages. Save for a limited finding that there was a breach of the duty to make reasonable adjustments (in the respondent’s lateness in advising of a reduction to his sick pay and failure to allow a friend or family member to accompany him to sickness review meetings) and a corresponding finding of unlawful indirect discrimination, by a judgment promulgated on 27 November 2017, all claims failed and were dismissed. The Employment Appeal Tribunal (the “EAT”) held that the Employment Tribunal erred in one material respect that is not relevant to this appeal and remitted that issue.
4. This appeal proceeds on the basis of a single ground on which permission to appeal was granted. It concerns the concept “provision, criterion or practice” in s.20 Equality Act 2010, commonly referred to as a PCP, which is one of the three requirements in the creation of a duty to make reasonable adjustments in respect of a disabled person. The single ground is that too narrow and technical an approach was taken to the reasonable adjustments claim in that the Tribunals below should properly have found that the respondent operated a PCP of requiring the claimant to return to work without concluding a proper and fair investigation into his grievances raised on 12 April 2016 and 30 May 2016, which he says were not properly and fairly investigated prior to his dismissal.
5. The Employment Tribunal held there was no PCP operated by the respondent because the alleged requirement was “a one-off act in the course of dealings with one individual”. The EAT upheld that conclusion. The claimant appeals contending that an ongoing requirement or expectation that a person should behave in a certain manner (here, return to work despite the outstanding grievances) is a “practice” within the meaning of s.20(3) Equality Act 2010.

The factual background

6. Given the narrow ambit of this appeal, it is unnecessary to summarise the detailed findings of fact made by the Employment Tribunal. It is sufficient to summarise the background as follows. The claimant’s employment began in November 2008. He was employed in a number of roles and latterly, as a customer service administrator. On 15 April 2015 he made a complaint about the conduct of another employee. There was an investigation conducted by Mr Day who found against him, providing him with the

outcome of an investigation into that complaint on 12 May 2015. The claimant was not satisfied with the investigation and outcome and went on sick leave on 12 May 2015. He did not return to work after that. During his period of sick absence his pay was reduced to half pay and then to nil pay in accordance with the respondent's policy. The short notice given of the reductions in sick pay was the subject of one of his successful complaints.

7. Soon after commencing sick leave, the claimant complained about Mr Day's investigation and appealed the outcome of his complaint. These were both dealt with by Ms French. Her decisions were communicated to him on 29 June 2015. The first ET judgment was critical both of Mr Day's and Ms French's approach to and handling of his complaints, but it is common ground that these are background matters only and form no part of this appeal.
8. The claimant's sickness absence was managed by the respondent through a process of referrals to occupational health doctors and management review meetings with different managers allocated different responsibility at different stages. In December 2015 for example, Ms Bhaimia was appointed as the "People Management Adviser" (or PMA) responsible for dealing with the claimant. The task of managing his absence on sick leave was given to Mr Walters.
9. Following unsuccessful efforts to arrange a second absence review meeting with the claimant, in March 2016 Mr Walters decided to refer the claimant again to occupational health, seeking clarification on whether he was still unable to return to his substantive role and whether he could take up a position in a less stressful area of the business.
10. Mr Walters wrote to the claimant by letter dated 17 March 2016 advising him of this decision and setting out the arrangements he had made for him to attend the medical assessment on 1 April 2016. The claimant's response (of the same date) made various complaints about Mr Walters' behaviour and referred to the bullying and harassment policy. Mr Walters responded asking the claimant if the letter should be treated as a formal complaint under the bullying and harassment policy. The claimant provided a detailed response dated 23 March 2016, saying he would attend the occupational health appointment subject to his state of health but, "*would not be raising a grievance as he believed it would be a waste of time and energy and the case would be covered up as usual*".
11. The occupational health appointment did not take place as planned. Mr Walters wrote to him by email dated 7 April 2016 confirming that he had asked for a further, final appointment to be arranged. This appointment did not ultimately take place, because the claimant said he was too unwell to attend. The claimant responded to Mr Walters on 12 April 2016 stating that he felt the red font used by Mr Walters in his email was disrespectful, threatening and set a bad tone. He referred to having been victimised, threatened and harassed since Mr Walters was appointed. Mr Walters responded by letter dated 18 April 2016. He apologised for the use of red font and as the Employment Tribunal found, "*replied, as far as he was able, to the various points raised by the claimant*". This is the first of the unresolved complaints relied on by the claimant on this appeal.
12. On 10 May 2016 Mr Walters wrote inviting the claimant to a further sickness absence review meeting on 1 June at a mutually agreed location. The letter explained the

purpose of the meeting was to discuss his long-term sickness and review the options available, including any reasonable adjustments to assist his return to work and redeployment. The claimant was given a final opportunity to consent to the release of an updated occupational health report. The letter indicated that if there was no prospect of the claimant's return to work in his last role and occupational health was unable to advise on redeployment, the outcome of the meeting may include dismissal.

13. The meeting was rescheduled for 8 June 2016, as communicated to the claimant in an email from Mr Walters dated 26 May 2016, because of posting errors. The claimant complained about that email: that he felt threatened, stressed and depressed and was not well enough to attend the meeting. He asked to be sent the outcome by email and post. Ms Fearon-McCaulsky responded acknowledging that he had asked for the outcome to be sent by email and post, but stating that there were other ways he could engage with the process including sending a representative or written representations.
14. By letter dated 30 May 2016, the claimant wrote to Ms Fearon-McCaulsky (the second unresolved complaint relied on by the claimant on this appeal). The letter was headed "*Bullying, disability related harassment and discrimination arising from disability complaints against Sophia Bhaimia (PMA)*". The letter focussed on complaints about Ms Bhaimia (as the Employment Tribunal found) but included complaints about Ms Fearon-McCaulsky. The respondent treated the letter as a complaint limited to Ms Bhaimia's conduct. The complaint was passed to Ms Oduwole on 9 June 2016 and Ms Bhaimia was removed from the case and another PMA (Ms Ademolu) was appointed in her place. Ms Oduwole did not conclude her investigation or provide an outcome within the 28 day period identified as usual in the respondent's grievance policy. The outcome was dated 22 July 2016. It rejected the claimant's complaints. He did not pursue an appeal.
15. Meanwhile the meeting of 8 June 2016 took place. The claimant did not attend or send a representative and nor did he make written representations.
16. Ultimately, as set out in a letter dated 24 June 2016, Mr Walters concluded that the claimant had been unable to perform his role for more than 12 months; had failed actively to engage in the process by attending sickness absence review meetings or occupational health appointments since January 2016; and had refused consent for written reports to be released. Mr Walters concluded that there was no prospect of a return to work in the foreseeable future and terminated the claimant's employment on the ground of medical incapacity.

Treatment of the alleged PCP

17. In his claim form the claimant complained that the 12 April and 30 May 2016 grievances were not addressed prior to his dismissal. As Mr Tristan Jones submits on his behalf, his case was most clearly described in the "Additional Information" document he provided subsequently pursuant to an order of the Employment Tribunal. Paragraph 1 (f) states:

"It would have been reasonable adjustment for the Directors to have initiated proper and fair investigation into the Claimant's discrimination and harassment complaints and provide an outcome on time which would help the Claimant return to a

discrimination-free working environment. The PCP contended for in this particular allegation is (1) requiring the Claimant to return to work without a proper and fair investigation into his grievances, and (2) turning a blind eye.”

18. The case advanced by the claimant did not depart from the way the issue was framed in the Additional Information; and it was addressed by the respondent on that basis. In its closing submissions, the respondent contended as follows:

“31d. A failure to investigate his grievance of 30/5/16 prior to the dismissal

There are occasions on which a reasonable employer would need to investigate a grievance prior to making a decision to dismiss (particularly if the grievance pre-dates the invitation to a meeting at which a decision to dismiss is a possibility). However a grievance issued after the 2nd invitation to a meeting at which dismissal is a possibility is unlikely to give rise to such an obligation. R replaced the PMA who was the subject of the grievance and it was reasonable for R to continue with its process. C has not pointed to anything that occurred or was unearthed during the grievance investigation that would have had any impact on the decision to dismiss.

37f. For the Directors to have initiated proper and fair investigations into the ‘Claimants discrimination and harassment complaints

A PCP is not established – nor is disadvantage or knowledge. There is no PCP of ‘not investigating complaints’ or ‘turning a blind eye’. C brought a grievance on 30/5/16 and it was investigated by SO. C was given a reasoned outcome and had an ability to appeal – which he did not take up. When C wrote to or copied in more senior management, as SFMcC stated in her evidence, they simply ensured that the matter was dealt with at the appropriate level.”

19. The Employment Tribunal dealt with this issue briefly. It made clear that it had carefully reviewed the list of issues, the additional information document and the claimant’s written submissions in order to analyse first whether the alleged PCP was made out and if so, the reasonable adjustment sought and whether it was reasonable. Adopting that approach, at paragraph 130 (f) it held:

“Alleged PCP: (i) requiring the claimant to return to work without a proper and fair investigation of grievances: this was not a PCP. It was a one-off act in the course of dealings with one individual. ...”

20. The EAT (Kerr J) dealt with the matter equally shortly. Kerr J’s conclusion at paragraph 34 is in the following terms,

“... It was, in my judgment, open to the tribunal to decide, without error of law, that the failure to resolve the April and May 2016 complaints before dismissal was not a PCP. It did not deal with any other individual apart from the claimant. Although a one-off act can sometimes be a practice, it is not necessarily one. I therefore dismiss that first remaining ground of appeal.”

21. Before turning to the arguments raised on this appeal, it is necessary to refer briefly to a number of other conclusions reached by the Employment Tribunal that bear on the issues raised by this appeal. First, the claimant alleged that his dismissal was an act of unlawful direct disability discrimination. The Employment Tribunal rejected the claim, holding that the reason for the decision to dismiss was the claimant’s absence on long-term sick absence without engaging in the sickness review or occupational health assessment processes and therefore there being no information available to justify waiting any longer.
22. So far as certain other the reasonable adjustment claims are concerned, the Employment Tribunal, as indicated, explained that it had carefully reviewed the list of issues, the Additional Information document and the claimant’s written submissions to analyse first, whether an alleged PCP was made out and if so, whether the adjustment sought was a reasonable one. Adopting that approach, in relation to the allegation that the respondent’s sick absence policy was applied and was a PCP, the Employment Tribunal accepted this was a PCP applied by the respondent. However, it then held,

“(c) RA: allow C more time to recover especially as he had raised complaints on 12 April and 30 May – Generally we find that the respondent had waited long enough for the claimant to recover or at least start to recover given their unsuccessful attempts to engage with him and arrange for him to attend OH. Allowing more time would not have made any significant difference as all the indications were that until the workplace issues were resolved to the claimant’s satisfaction he would not be able to return to work. The respondent believed they were resolved, or as resolved as they could be, and given the history it was highly unlikely that they could be resolved to the claimant’s satisfaction. Therefore it was not reasonable to be required to wait longer.”
23. In relation to unfavourable treatment in consequence of disability (s.15 Equality Act 2010), the Employment Tribunal rejected all claims. It held in relation to dismissal, that the respondent had a legitimate aim of operating a system which sought to engage with employees off sick and was aimed at securing their return to the workplace. It held that the claimant’s dismissal was proportionate given the length of time he had been off sick and his failure to engage with management and occupational health.
24. As for the unfair dismissal claim, the tribunal found that the reason for dismissal was the claimant’s capability and long-term absence from work. At paragraph 227 the Employment Tribunal dealt with whether a reasonable procedure was followed and found,

“First we find that both Mr Walters and Mr Olafare were sufficiently independent. Although the claimant, by the time of his dismissal, had raised a complaint about Mr Walters and the home visit, this was very late in the process and it was reasonable to proceed with the dismissal process whilst that was investigated. It is relevant that Mr Walters was the third manager appointed to deal with the claimant in this regard and he had raised complaints against the other two. As for Mr Olafare, although he had earlier occasional involvement in correspondence with the claimant this did not influence him in his decision making to the detriment of the claimant. A reasonable process was adopted prior to their involvement (although there were reasonably lengthy gaps earlier on between review meetings this was not to the claimant’s disadvantage). Both Mr Walters and Mr Olafare were reasonable in their dealings with the claimant save that we have already decided that the failure to allow the claimant to be accompanied at his sickness review meetings by a family friend or member amounted to a breach of the duty to make reasonable adjustments and indirect disability discrimination. We have considered very carefully whether that in itself made the dismissal procedurally unfair. The decision to dismiss however was not based solely on the claimant’s non-attendance at those meetings. It was also based on the claimant’s very lengthy absence, medical advice that he was not fit to return to work nor to be redeployed without the underlying issues being resolved to his satisfaction and his non-attendance at the further OH appointments made for him. He also did not take the opportunity afforded to him to make written submissions. Given that overall picture, the failure to allow representation did not make the dismissal unfair. In all the circumstances, dismissal fell within the band of reasonable responses a reasonable employer could adopt.”

The legal framework

25. Sections 20 and 21 of the Equality Act 2010 set out the framework for the duty to make reasonable adjustments. So far as relevant, they provide as follows:

“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.

...

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.”

26. The words “provision, criterion or practice” also form part of the definition of indirect discrimination in s.19 of the Equality Act 2010. This provides that A discriminates against B if A applies to B a “provision, criterion or practice” which is discriminatory in relation to a relevant protected characteristic of B’s. Section 19(2) sets out the circumstances in which a PCP is discriminatory in relation to a relevant protected characteristic of B’s, namely (i) where A applies or would apply it to persons with whom B does not share the characteristic, (ii) it puts or would put persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, (iii) it puts or would put B at that disadvantage, and (iv) A cannot show it to be a proportionate means of achieving a legitimate aim.
27. The words “provision, criterion or practice” are not defined in the Equality Act 2010 or the predecessor legislation. They must mean the same thing in relation to the two different ways in which unlawful disability discrimination can occur.
28. The Equality Act 2010 Statutory Code of Practice issued by the Equality and Human Rights Commission (which must be taken into account by courts or tribunals in any case in which it appears to the court or tribunal to be relevant: see s.15(4)(b) Equality Act 2006) provides as follows:

“6.10 The phrase [PCP] is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, or qualifications including one-off decisions and actions ..”

The appeal

29. Mr Jones advanced a far-reaching submission to the effect that there is a fundamental inconsistency between the appropriate liberal and purposive reading of the statutory provisions exemplified by paragraph 6.10 of the Code of Practice and the Employment

Tribunal's approach to the question whether a PCP was applied in this case on the basis for which the claimant contended.

30. He relies on British Airways Plc v Starmmer [2005] IRLR 862 (EAT, Burton J) as supporting his approach. In that case, BA Plc refused a request for part-time working on a 50% basis by an individual pilot, Ms Starmmer, despite the introduction of a wider policy to make part-time opportunities available to accommodate its employees' requirements with particular personal circumstances, including childcare. The policy envisaged limited periods of part-time working with pilots on either a 50% or 75% of their normal full-time requirement but envisaged that in some circumstances operational constraints may mean that part-time rostering was impracticable. In Ms Starmmer's case, the request for 50% part-time working was refused for business reasons. This was challenged as unlawful indirect discrimination on gender grounds.
31. The employment tribunal upheld the claim and found that the employer's decision amounted to the application of a PCP that Ms Starmmer had to work full time or 75% of full-time, and this was to the detriment of a considerably larger proportion of women than men. BA appealed contending (as they had below), among other things, that the decision was a one-off discretionary, management decision, not applying generally to others and did not amount to a PCP. The EAT held that the tribunal was entitled to find that the employer's decision was a requirement or a condition or a provision to work at 75% part-time at least in order to work part-time. This was notwithstanding that it was a discretionary management decision not applying to others. If it was a requirement or condition, the EAT held it must also be a provision even if it was not a criterion or practice. Those alternatives are not cumulative and a provision does not have to be an absolute bar but can allow for exceptions to be made. Nor was there any necessity for the provision actually to apply to others.
32. Mr Jones challenges as wrong the approach of the EAT to the nature of an alleged practice in this context in Nottingham City Transport Ltd v Harvey UKEAT/0032/12. In that case, in the context of a flawed disciplinary process, the EAT (Langstaff J) held that although these words are to be construed liberally, bearing in mind that the purpose of the statute is to eliminate discrimination against those who suffer from a disability, to be a "practice" falling within the definition of a PCP:

"18. ... there still has to be something that can qualify as a practice. "Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply. These points are to be emphasised by the wording of the 1995 Act itself in its original form, where certain steps had been identified as falling within the scope to make reasonable adjustments, all of which, so far as practice might be concerned, would relate to matters of more general application than simply to the individual person concerned."

33. In Mr Jones' submission, if an employer takes any decision or action with effects or impacts capable of remedy by making a reasonable adjustment, it qualifies as a PCP. There is no need for any element of repetition given the availability of a hypothetical comparator in respect of whom every action or decision can be assumed to be applied. Accordingly, Mr Jones goes so far as to submit that *all* one-off acts or decisions qualify as PCPs. If such acts and decisions are excluded, that would exclude from scope a large number of cases in respect of which protection under these provisions is otherwise appropriate or justified and would lead to a search for repetition that is unnecessary, wrong and misguided.
34. I do not accept Mr Jones' submission that *all* one-off acts and decisions necessarily qualify as PCPs. His submission goes too far and distorts the purpose of the PCP in the context of both statutory provisions. My reasons follow.
35. The words "provision, criterion or practice" are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. I also bear in mind the statement in the Statutory Code of Practice that the phrase PCP should be construed widely. However, it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words "act" or "decision" in addition or instead. As a matter of ordinary language, I find it difficult to see what the word "practice" adds to the words if all one-off decisions and acts necessarily qualify as PCPs, as Mr Jones submits. Mr Jones' response that practice just means "done in practice" begs the question and provides no satisfactory answer. If something is simply done once without more, it is difficult to see on what basis it can be said to be "done in practice". It is just done; and the words "in practice" add nothing.
36. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The PCP serves a similar function in the context of indirect discrimination, where particular disadvantage is suffered by some and not others because of an employer's PCP. In both cases, the act of discrimination that must be justified is not the disadvantage which a claimant suffers (or adopting Mr Jones' approach, the effect or impact) but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course (as Mr Jones submits) that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply.
37. In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.

38. In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that “practice” here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or “practice” to have been applied to anyone else in fact. Something may be a practice or done “in practice” if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one.
39. In that sense, the one-off decision treated as a PCP in Starmer is readily understandable as a decision that would have been applied in future to similarly situated employees. However, in the case of a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future, it seems to me the position is different. It is in that sense that Langstaff J referred to “practice” as having something of the element of repetition about it. In the Nottingham case in contrast to Starmer, the PCP relied on was the application of the employer’s disciplinary process as applied and (no doubt wrongly) understood by a particular individual; and in particular his failure to address issues that might have exonerated the employee or give credence to mitigating factors. There was nothing to suggest the employer made a practice of holding disciplinary hearings in that unfair way. This was a one-off application of the disciplinary process to an individual’s case and by inference, there was nothing to indicate that a hypothetical comparator would (in future) be treated in the same wrong and unfair way.
40. Mr Jones submits in the alternative, that even if he is wrong about his construction of the word “practice”, the respondent developed an expectation or assumption that the claimant should return to work notwithstanding the lack of a proper and fair investigation into his complaints. Sickness absence meetings were scheduled and ultimately he was dismissed on grounds of medical incapacity even though, at the time of dismissal, no fair or proper investigation had been carried out. He submits that expectation plainly imposed pressure on the claimant to return to work prior to the resolution of his complaints. The employer ceased paying him any sick pay and he was under repeated threat of dismissal. His case was that the stress imposed by that behaviour exacerbated his mental health problems. That state of affairs goes further than a mere one-off act and is properly to be treated as a “practice” within the meaning of s. 20(3) Equality Act 2010.
41. Again, I do not accept Mr Jones’ alternative submissions. The Employment Tribunal found that the claimant was absent from work with effect from 12 May 2015 and made a number of complaints in the period of absence that followed. The Employment Tribunal found that investigations were conducted. Save for the 30 May 2016 complaint, it did not find as a fact that any earlier complaint remained unresolved (although none was resolved to the claimant’s satisfaction). Indeed, even the findings of fact in relation to the complaint of 12 April 2016 indicate that this was sufficiently dealt with by Mr Walters who apologised and responded so far as he was able to the points raised, within a matter of days, by 18 April 2016. The claimant did not pursue this complaint any further and the Employment Tribunal made no finding of fact that it remained unresolved in any sense.

42. There is no dispute that the grievance of 30 May 2016 was not investigated until after the claimant's dismissal. However, the Employment Tribunal found that the complaint was principally directed at the PMA dealing with the claimant's case (albeit the grievance was not limited to her) and that the respondent removed her as PMA promptly and replaced her with a different adviser. Furthermore, this was the last of many complaints or grievances raised by the claimant against different individuals in response to communications from the respondent. It was raised late in the process, after the letter inviting the claimant to the sickness absence review meeting (that would take place on 8 June) which expressly stated that dismissal was an option that might be considered.
43. It seems to me that on these facts, the Employment Tribunal was entitled to conclude that the failure to investigate the 30 May 2016 grievance until after the dismissal was not a practice of requiring the claimant to return to work without a proper and fair investigation into his grievances. There was no evidence or finding of an expectation or assumption that the claimant should return to work notwithstanding the lack of a proper and fair investigation of his complaints. Nor was there any evidence or finding of such a state of affairs or of this being the way in which things were generally done in practice or to indicate that it was the way in which things would be done in future. Rather the evidence showed that in practice grievances were promptly responded to and investigated. The particular timing and circumstances of the 30 May 2016 grievance explained why it was not investigated before the claimant's dismissal and made it a one-off decision in the course of dealings with this particular claimant, as the Employment Tribunal was entitled to find.
44. Furthermore, even if there was an error in the Tribunal's approach to this question, and a PCP was made out, it is immaterial in light of the Tribunal's other findings and conclusions, and can make no difference to the outcome for the shortly stated reasons that follow.
45. The only argument advanced by the claimant below in relation to substantial disadvantage and reasonable adjustment, as Mr Jones accepts, was that the substantial disadvantage flowing from the requirement to return to work without a full and fair investigation of his grievances, was the particular pressure placed on him as a disabled person with depression, of working in those circumstances; and his case focused on a requirement to resolve his grievances as the reasonable adjustment sought. The claimant did not argue or assert that the sickness absence process should have been adjusted in any way to avoid the pressure he complained of. In the circumstances, and notwithstanding that the claimant was a litigant in person, I do not accept Mr Jones' submission that it is open to the claimant to pursue this point now. The claimant produced lucid particulars by way of Additional Information and clearly articulated written submissions. The Employment Tribunal was entitled to proceed on the basis of his pleaded case as argued, and did so without error.
46. The consequence is that the Employment Tribunal's finding at paragraph 130(c) is an obstacle to his argument that allowing more time to resolve any outstanding grievances was a reasonable adjustment that would have removed the pressure he complained of. At paragraph 130(c) the Employment Tribunal found that given the history it was highly unlikely that the claimant's workplace issues or grievances could be resolved to his satisfaction and all the indications were that until they were resolved to his satisfaction he would not be able to return to work. The 30 May grievance was not in fact upheld, and so was not resolved to his satisfaction. Allowing more time in those

circumstances would not have made any difference. The Employment Tribunal concluded that it was not therefore reasonable to require the respondent to wait any longer before dismissing him. Moreover, the Tribunal found that the dismissal process itself was fair and that a reasonable procedure was followed.

47. For all these reasons, and despite the attractive submissions advanced by Mr Jones to whom the court is particularly grateful as a Pro Bono Unit advocate, I would dismiss this appeal.

Sir Jack Beatson

48. I agree.