EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr B Clayden	**v**	**(1) Piccadilly Coin Co Ltd t/a Coincraft** **(2) Mr R Lobel**

Heard at: London Central
On: 20 - 24 March 2017

Before: Employment Judge Hodgson
Mrs MA Brooks
Dr S Jary

Representation
For the Claimant: Ms A Chute, counsel
For the Respondents: Mr N Porter, counsel

JUDGMENT

1. **The claim of failure to make reasonable adjustments is dismissed on withdrawal.**
2. **The section 15 Equality Act 2010 claim of discrimination arising from disability fails and is dismissed.**
3. **The section 19 indirect discrimination claim fails and is dismissed.**
4. **The unfair dismissal claim fails and is dismissed.**

REASONS

Introduction

1.1 By a claim presented to the London Central Employment Tribunal on 20 October 2016, the claimant brought claims of constructive unfair dismissal,

discrimination arising from disability, indirect discrimination, and failure to make reasonable adjustments.

The Issues

2.1 The issues to be determined were considered and identified at the start of the hearing. We noted that there was a draft list of issues from both parties. That list of issues did not accurately reflect the matters contained in the claim form and the response, and we did not adopt it.

Constructive dismissal

2.2 Did the claimant's resignation amount to a dismissal? The tribunal must decide if the respondent breached the claimant's contract of employment. It is alleged the respondent breached the term of mutual trust and confidence. There was no allegation of breach of express term. The claimant specifically relies on the following events:

2.2.1 Mr Lobel's letter in March 2016 implying the claimant should retire because of age and health.

2.2.2 Mr Lobel's decision on 11 July 2016 that the claimant should not be allowed to take holiday that he had booked for September 2016.

2.2.3 Mr Lobel's letter to the claimant of 14 July 2016 stating his working part-time was of "no use to [Coincraft]" and that, as of 1 August 2016, the claimant would be put on unpaid leave of absence if he refused to return to full-time work.

2.2.4 The failure of Mr Lobel to respond to the claimant's request in his emails dated 29 July 2016 and 2 August 2016 concerning his complaint of disability discrimination.

2.3 Did the claimant resign as a result of the alleged breach?

2.4 Did the claimant affirm the contract by reason of delay or otherwise?

2.5 Has the respondent established a potentially fair reason for any dismissal?

2.6 Has the respondent acted fairly in treating that reason as a sufficient reason to dismiss?

Indirect discrimination - section 19 Equality Act 2010

2.7 Did the respondent apply to the claimant a provision, criterion or practice which he applied or would have applied equally to other persons not sharing the relevant protected characteristic? The provision criterion or practice is the requirement to work full-time.

2.8 The protected characteristics relied on is disability.

2.9 If so, did or would the provision criterion or practice put persons who share the same protected characteristic as the claimant at a particular disadvantage when compared with other persons?

2.10 It is said that the particular disadvantage is the inability to work full-time. Therefore the disadvantage is he could not work at all.

2.11 Did it put the claimant at that particular disadvantage?

2.12 If so, can the respondent show it was a proportionate means of achieving a legitimate aim. Mr Porter stated the aim was first, the efficient running of the Coincraft's business and the saving of costs, and second, by relieving stress on others in the business, and third, the claimant was not fit to return to work in any capacity, so it was also to comply with the respondent's duty to the claimant to safeguard his health and the health of others.

2.13 The means identified was suspension without pay and it was said to be proportionate.

Disability

2.14 Did the claimant have a disability in that the claimant had a physical or mental impairment which has a substantial and long-term adverse effect on the claimant's ability to carry out normal day to day activities?

2.15 The impairment is said to be the claimant's ongoing heart condition

2.16 The effect on day to day activity included the following elements: the claimant is easily fatigued; the claimant cannot use public transport at peak times (as a result of the stress caused); the need to sit down frequently to recuperate; breathlessness; impaired mobility (the inability to move quickly for long periods); impairment of concentration.

Discrimination arising from disability – section 15 Equality Act 2010

2.17 Did the respondent treat the claimant unfavourably?

2.18 If, so was it because of something arising in consequence of the claimant's disability? It is said the claimant was not in a physical condition to undertake full-time work.

2.19 The claimant relies on the following acts of unfavourable treatment:

2.19.1 allegation 1: by the second respondent stating on 14 July 2016 that the claimant's working part-time was of "no use to [Coincraft];" and

2.19.2 allegation 2: by placing the claimant on unpaid leave from 1 August 2016.

2.20 Has the respondent shown that the treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the same justification defence as for indirect discrimination.

Duty to make adjustments – section 20 Equality Act 2010

2.21 In the claim form, the claimant identified an allegation of failure to make reasonable adjustments. The reasonable adjustments claim was withdrawn before the hearing, as we detail below. It was dismissed by consent. We should, however, record the extent of the allegation, so it is clear exactly what was withdrawn.

2.22 The provision criterion or practice relied on in is the requirement to work full-time. The substantial disadvantage is alleged to be the claimant was unable to undertake full-time work. The specific adjustment contended for was the claimant be allowed to work part-time. It is unclear whether the claimant ever envisaged any other adjustments.

Evidence

3.1 For the claimant we heard from the claimant, C1; and Mrs Carol Clayden, C2.

3.2 For the respondent we heard from: Ms Carol Benton; R3; Mr Richard Lobel, R4; Mr Clive Sawyer, R5; and Mrs Claire Lobel, R6.

3.3 We received a bundle, R1, and a chronology, R2.

3.4 Both parties relied on written submissions, C3 and R7.

Concessions/Applications

4.1 When we were considering the issues, Ms Chute confirmed that the claim of failure to make reasonable adjustments had been withdrawn. Following discussion with the parties and with the agreement of both, we dismissed that claim.

4.2 We asked the parties to consider whether a failure to make reasonable adjustments could be considered as part of any justification argument, and to address us on this expressly in due course.

4.3 We noted that in the issues drafted by the parties, there was reference to a victimisation claim. No victimisation claim appeared in the original claim form. We clarified that there was no specific order amending the claim form. We were taken to the order of Employment Judge Pearl from 9 December 2016. Ms Chute indicated that in some manner an amendment had been allowed by implication.

4.4 A formal application was pursued to amend the claim form to include allegations of victimisation. All of the allegations related to the way the

respondent dealt with the grievance after the resignation, and therefore were post any dismissal.

4.5 We refused the application to amend and gave full oral reasons.[1] No request was made for written reasons, but we should summarise, briefly, our decision. We considered **Selkent**[2] and in particular the balance of hardship. It is clear that the amendment was substantial involving new facts and a new cause of action. In terms of potential remedy, the victimisation claim added little if anything to the allegations already made. The claimant could continue to proceed with his allegations of constructive unfair dismissal, discrimination arising from disability, and indirect discrimination. However, despite the fact that the allegations added little to the overall claim, they did involve significant evidence. It was agreed that the case could not be contained within the timetable. This would have led to an adjournment. Adjournment was not in either party's interest and was specifically objected to by the respondent. An adjournment would have caused hardship to all sides. It would increase costs. It would cause delay. It would have caused increased stress for both sides. We refused the application having regard to the balance of hardship.

The Facts

5.1 We will refer to the company by its trading name, Coincraft. It traces its roots back to 1955. Coincraft styles itself as a family business. It specialises in buying and selling coins, banknotes, and antiquities. It focuses on collectors.

5.2 The claimant worked for the respondent company from at least 1984, we do not need to resolve the exact date. From 1985 he was a director of the company in which he was also a minority shareholder.

5.3 Mr Richard Lobel is a director and the chairman of Coincraft; he takes all major decisions. The claimant's and Mr Lobel's business relationship lasted for about 40 years. The claimant was, in effect, the second in command and was the managing director. Whilst all senior employees had a good working knowledge of Coincraft's product areas, individuals generally had specialist areas. The claimant had a particular knowledge and interest in ancient coins and antiquities.

5.4 The claimant and Mr Lobel, historically, had a good working relationship and both agree they had a good friendship.

5.5 At the material time, Coincraft operated two premises at 53 New Oxford Street and 45 Great Russell Street. Mr Lobel worked at the former, and the claimant at the latter. The claimant sets out his duties in his own witness statement and they include the following: opening and closing number 45 (including the setting of alarms at the end of the working day

[1] A subsequent request was made and reasons have been prepared.
[2] Selkent Bus Company Limited v Moore 1996 ICR 836.

and turning off alarms at the start of the working day); laying out and displaying ancient coins and antiquities; dealing with customers generally; meeting with dealers; maintaining shop displays; and being responsible for Coincraft's publications and catalogues used to sell stock, to include editorial selection and input. There were other members of staff; many were long-term employees. Some of those staff could also take responsibility for opening and closing.

5.6 There were approximately twenty staff overall . Fourteen were full time, four of whom were senior and directors. Six were part time.

5.7 Mr Lobel considered it necessary to have two individuals working at number 45, in the shop. He considered it was important for security.

5.8 The claimant had no written contract of employment. It is common ground that his normal hours of work were from approximately 09:15 to 17:15. During that time he would undertake the duties as outlined above.

5.9 In December 2015, the claimant had a heart attack at work. Mr Lobel insisted the claimant go to hospital. At the hospital the claimant had a further heart attack. Mr Lobel visited the claimant in hospital initially, but the claimant's wife requested no further visits.

5.10 The heart-attack was serious. The claimant has not disclosed his medical notes. We have seen a number of letters most of which have been prepared at the claimant's request. It is clear the claimant underwent coronary artery bypass grafting and was left with significantly impaired left ventricular systolic function. As a result, he becomes breathless and fatigued whilst carrying out physical activity. He will continue to take medication for the remainder of his life. It is the claimant's case that his concentration is affected, but the medical evidence we have does little to clarify the exact effect of the impairment prior to his resignation.

5.11 Prior to his resignation, the claimant gave to Mr Lobel only a limited explanation of his condition and its effects.

5.12 The claimant returned to work on or about 25 April 2016. He supplied a number of fit notes. The fit note of 28 January 2016 covered the period to 24 March 2016 and confirmed the claimant was unfit to work. The fit note of 8 April 2016 covered the period from 28 March 2016 to 28 June 2016 and indicates a phased return to work is appropriate, but gives no further guidance. It simply records the condition as myocardial infarction.

5.13 The claimant also has a condition affecting his left eye, which does not concern us. Since his employment ended, the claimant says he has developed symptoms of low mood and depression. He denies any depression prior to the termination.

5.14 The medical evidence we have concerning the effect of the claimant's heart condition on his ability to work is limited and in part contradictory.

5.15 At his request, following a meeting with his consultant cardiologist, Mr Davies, on or about 13 July 2016, Mr Davies prepared a letter marked "to whom it may concern". This was intended as a letter for the employer. It confirmed the claimant had undergone coronary artery bypass and that he remained breathless and fatigued during physical activity, and that he would remain on medication for life. It states specifically "If Mr Clayden were to return to work it would need to be in a slow and graded manner and it may be that he is not able to return to full-time employment at all." The claimant received this on 25 July 2016. He discussed the letter with his wife. There was some suggestion during the oral evidence of both the claimant and his wife that the failure to give this letter to the employer was an oversight. It may be that this is what both now genuinely believe. We find that, at the time, they took an active decision not to disclose the letter because it indicated first, that the claimant may not be fit for work at all and second, it did not suggest he may be able to work full-time. We find that they therefore decided not to share the letter with the respondent.

5.16 We have seen a report prepared by Mr Davies of 18 October 2016 in response to a request by the claimant solicitors of 6 October 2016. This confirms the heart failure is relatively well controlled. There may be a need for a defibrillator to be implanted and his medication would continue for the rest of his life. The report states, "He may be able to return to some form of occupation. It is unlikely that this will happen within the first year following his bypass surgery and would need to be started in a graduated manner with part-time working initially" (R1/273). This report suggests that the claimant returned to work prematurely and holds out little hope of him returning to his full duties. This is supported by a letter from Mr Robinson (a cardiac surgeon) of 12 September 2016 which states, "Although he may be able to return to full-time work at some time, he is currently unable to take on [t]his responsibility. The work he does should involve low physical and emotional stress." It also refers to any return to work as being gradual.

5.17 There is a further letter from Mr Davies of 1 February 2017, in response to the solicitor's letter of 17 January 2017. This letter speculates the claimant may be able to work in an office or retail environment, initially on a part-time basis. It only supports a return to full-time work if the part-time work is "successful." It states the claimant is likely to remain stable on current medication until 70.

5.18 It follows that the medical evidence is supportive of the following propositions: there should be no return to work in the first year following the heart-attack; any return would be on a part-time basis; the claimant may not be able to resume his full duties at any time; the claimant may not be able to return to full-time work at any time; and the claimant should avoid stress at all times.

5.19 The medical evidence suggests that there was little or no possibility of the claimant ever returning to his full duties on a full-time basis. A fact that the claimant was told at a very early stage and certainly no later than 25 July 2016. The claimant understood that he would probably never return to

performing all of his duties, or working full-time. We have no doubt that this is very difficult for the claimant to accept and we have no doubt that he was, and remains, in denial.

5.20 Whatever medical advice he receive around April 2016, and we have no evidence of the advice given,[3] the claimant did return to work on a part-time basis. The claimant benefited from a very large degree of autonomy. He decided when he would return to work. He decided what days he would undertake. He decided his own hours. Mr Lobel did not interfere.

5.21 Coincraft did not operate formal procedures. It had no formal HR department. Mr Lobel simply hoped the claimant would get better and would return to work full-time. We accept that he genuinely wanted the claimant back in the business working full-time, if that was what the claimant wanted. Mr Lobel accepted that the claimant would need to initially return part-time and trusted the claimant to manage his own phased return. He did anticipate that the claimant would build up to performing his duties.

5.22 At no time did the claimant request permanent part-time work or communicate to Mr Lobel, or anyone else in Coincraft, that there was any possibility that he would not return full-time. Albeit he filed a further fit note covering the period from 29 June 2016 to 29 August 2016 suggesting a phased return to work, the claimant never suggested that he would not be able to return to full-time work.

5.23 Mr Lobel did attempt to understand the claimant's intentions. On or shortly before 6 March 2016, Mr Lobel wrote to the claimant. This is an informal letter and we have no doubt it seeks to strike a friendly tone. It states:

> **Ian said you looked tired. It is no wonder considering all that you have been through. We are managing to muddle through at the office, but to be honest I am staring to feel the strain. I had forgotten just how much you looked after in the business and how that took things off my back.**
>
> **Please remember that we have known and worked together for 40 years. I have been very worried about you and your health. Now that you are getting a little bit better, as a friend of 40 years I have to ask you an important question. I would like it if you and Carol sat down some time and thought it over. Neither of us is getting any younger, Ian was away for two days on his Red Cross course and I had to open the shop and keep an eye on it and to be honest I didn't like it, I felt stressed and overworked with my high blood pressure that's no good.**
>
> **Barry, you have had problems with your Eyes and now with your heart. I know that Carol retired last year and I was wondering if you have had any thoughts about what you are going to do in the future. Neither of us are getting any younger and who knows how much longer either of us has. I am not trying to be a downer but just speaking the truth. With my health problems, who knows.**

[3] We do have the GP fit notes that refer to a phased return, but this evidence does not demonstrate any advice given.

> **I would like to plan on what to do for the future and as you know, I do not like the unknown. Think about your future and discuss it with Carol. If you decide that you are perhaps going to retire and move to a warm country, I will fully understand. I will make plans to run the business down and think about retirement myself. Working 6 days a week and getting out all those publications is a bitch.**
>
> **No pressure but, I think this is something for you to decide, after all neither of us can work for ever. Think about what you want to do and give me some idea, so that I can plan the future, no matter which way you decide I will go along with it, but at least then I will know and can plan for the future.**

5.24 There was a meeting on 14 April 2016. It is the claimant's case that he asked Mr Lobel three times if Mr Lobel wished the claimant to retire, but received no answer. Mr Lobel denies this. It is not a point we need to resolve. It is likely there was some mention of retirement. However, the claimant did not set out his plans. The claimant did not share with Mr Lobel the fact that he may not be able to return to work full time or perform all of his duties. The claimant did not ask for any specific adjustments. In essence, they discussed work matters; Mr Lobel left it up to the claimant as to how and when he would return.

5.25 Thereafter, on or around 25 April 2016, the claimant did return to work. He generally worked between 11:00 and 15:00. He says he increased that to 16:00 on occasions, but that was not a frequent occurrence. The claimant worked 3 days a week, generally every other day (Monday, Wednesday, and Friday). At no time did the claimant indicate he may not be able to work full-time. At no time did he say when he would return to work full-time. Mr Lobel had no reason to believe that the purpose of the phased return was anything other than a return to full-time work, within a reasonable period.

5.26 During the time the claimant was absent, and throughout the period when the claimant worked part-time, Mr Lobel continued to pay the claimant's full wages, full pension contribution, and all bonuses. It is the claimant's evidence that Mr Lobel was morally obliged to continue full pay, having regard to the amount of time he had worked for the respondent and his seniority, but both parties accept the contractual obligation was for 15 days and then statutory sick pay only. The claimant had no contractual right to full pay for any period of sickness absence, beyond 15 days. The claimant had no contractual right to reduce his hours.

5.27 On 9 July 2016, Mr Lobel telephoned the claimant. Mr Lobel was upset and agitated. Mr Lobel had health problems and had been diagnosed with a recurrence of cancer and he needed an operation. At the time he was 71. He had multiple health issues including a pulmonary embolism, recurring cancer affecting his ear and skin, and problems affecting his mobility. In brief his health was poor. The claimant's absence had put immense strain on Mr Lobel. He had to undertake some of the claimant's duties himself and had to cover for him. Mr Lobel found himself working more days and longer hours, and found this difficult and stressful.

5.28 On 9 July 2016, he enquired what days the claimant would be working the following week. Mr Lobel wanted to arrange cover for the next week. The claimant mentioned his consultant's appointment on 13 July 2016.

5.29 Mr Lobel had become aware the claimant had booked holiday in September. The exact circumstances are unclear. It appears the claimant had completed a holiday form and given it to Mr Judd who then passed it to Ms Benton. She passed it to Mr Lobel, but we do not know when.

5.30 Mr Lobel had definitely learned about the September holiday by 11 July 2016, as he instructed Mrs Benton to tell the claimant he could not take the holiday in September. By that time, the claimant had already booked his flights.

5.31 It is common ground that the claimant was obliged to clear any holidays with Mr Lobel. When he returned to work in April, the claimant took a two week holiday in May; he agreed that with Mr Lobel. The claimant wanted to take holiday covering the end of September 2016. There is no doubt that this was an extremely inconvenient time for the respondent company. There are a number of auctions and trade fairs. The claimant was aware that taking a holiday at this time caused disruption. It had been the position up to seven years previously that no employee could take holiday during September and early October. The claimant had been allowed to take holiday at the beginning of September because it was the end of September which caused problems.

5.32 The claimant's evidence on this point has been inconsistent. His oral evidence to us was that he had Mr Lobel's specific oral agreement to take the holiday in September 2016. Mr Lobel denies this. We find that the claimant is mistaken. There was no agreement in May 2016. At that time the claimant had not decided the specific dates. He therefore could not agree the specific dates with Mr Lobel. Moreover, the claimant blanked out the entirety of the month of September on a colleague's, Mr Jull's, wallchart chart. It seems the claimant suggests that Mr Lobel knew about this because occasionally he would visit number 45 and would have seen it.

5.33 Mr Jull had no authority to grant the holiday. His wallchart was not used for the purpose of authorising holiday.

5.34 We find that the claimant decided to take holiday at the busiest time of the year. He was aware that he must clear that holiday with Mr Lobel. The claimant ignored that process, and instead has sought to suggest in his oral evidence that some agreement occurred in May. No such agreement occurred.

5.35 The claimant attended a cardiac appointment on 13 July 2016. He asked the consultant, Mr Davies, to write a letter for his employer setting out his current ability to work.

5.36 On 14 July 2016, Mr Lobel wrote to the claimant again. Mr Lobel at that time was about to turn 72. He referred to his own health issues and explained the difficulties they caused him. His letter stated:

> **I know that you have been very sick and I have tried to cover for you for as long as I can, but things have reached a breaking point. For the past 6-7 months I have paid you your full wages, pension contribution and bonus. Far more than you are legally entitled to. I have even paid someone to take your place in the shop. More importantly, I have had to do your job and to be honest I am tired.**
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> **I will be 72 next month and instead of taking it easy, I have had to do the work of two people, mine and yours. I am back to working 6 days a week 2 out of every 3 weeks. This has to stop, I cannot do two jobs any longer.**
>
> **Your doctor said to ease back into work, well it has been over 6 months. I must remind you your job is full-time, we do not have any part-time employees. You even managed to take a two-week holiday and were well enough to make a long flight, both ways. Yet in this calendar year, Claire and I have managed to get only 6 days off work for holiday. You said that you are taking another holiday in September, from what? This has to stop!**
>
> **I am sorry but the company can no longer grant you paid sick leave, you have used up much more than you were allowed. You said you couldn't stand the pressure so you come in at 11:00 and go home 3:00 or 4:00, that is of no use to the company. The hours might suit you, they are no good for the company. You have been continued to be paid your salary and bonus, in consideration of all the years you have been employed here. But times are tough and we have to take strong measures, one being that we can no longer pay you for part-time work.**
>
> **From 1 August you are on unpaid leave of absence. When you feel that you can come back to work full-time, we will be more than happy to discuss it with you. That means working normal hours 9:15-5:15 five days a week. I'm sorry to have to do this, but too many people depend on this company for a living and I need to protect them and the company. I hope you will realise that we have been more than fair to you, but enough is enough. Don't forget you are only entitled to 15 day sick leave and should have gone on statutory sick leave after that. We will also be stopping your pension payment. I am sorry that you have been very sick, but we have done more than we should have. I too am not well and have to take pills and see a number of doctors, but I am still here 6 days a week."**

5.37 This letter resulted in the claimant lodging a grievance on 29 July 2016. In the grievance, the claimant did set out some detail of his current condition as follows:

> **I commenced a gradual part-time return to work in early May 2016… but still under the care of specialist cardiac consultants. I am taking medication to ameliorate the effects of my heart failure and suffer a variety of problems with day-to-day activities because of my condition, including that I am easily fatigued, that I cannot use public transport at peak times (due to the stress that this causes), that I have to often sit down to recuperate, that I become breathless easily, that my mobility is impaired (I cannot move quickly for long periods of time), and that my concentration is impaired…**
>
> **I have been working part-time at the business, as stipulated above, since early May 2016. On 9 July 2016 I was working at the business when you called me on the internal phone system. You were agitated and wanted to**

know what days I would be working the following week. I informed you that I would be working on Monday, Thursday, and Friday (as I had an important hospital appointment on the Wednesday). You then asked me whether I would continue to work part-time, stating that you needed to know as, if so, you would have to arrange cover for the days I was not working. I received the impression that you were annoyed with me.

In early July 2016 I booked time off for a two-week holiday in September 2016 and notified my holiday booking on the planning chart, ensuring that it did not clash with any other employee's holiday and with the full knowledge of Ian Jull. On 11 July 2016 I was approached by Mrs Carol Benton, your PA. Mrs Benton informed me that you had instructed her that I was not to go on holiday in September 2016. I told Mrs Benton that this was not acceptable as my holiday had already been booked and I was not given a reason as to why I couldn't book my holiday.

On 14 July 2016 I attended work as usual. Upon my attendance at work I was given an undated letter (from you) by Mrs Benton. This letter informed me that my working part-time was "no use to the business" and that as of 1 August 2016 I would be put on unpaid leave of absence if I refused to return to work full-time. I was shocked and disappointed by this letter. You had made no effort to find out how the business could accommodate me long-term as a result of my disability, despite my working for the business for over 30 years and despite my working for almost 40 years with you.

It is currently difficult for me to know whether I will be able to work full-time again - I have been advised by my cardiac consultants that my heart muscle has recovered nearly as much as it is able and that my condition is therefore not likely to improve further. As you are aware, I have been provided with 'fit notes' from my GP recommending that I undertake part-time work until the end of August 2016

<u>My complaints</u>

… I believe that you are discriminating against me because of my disability by threatening to put me on unpaid leave and stating that I am no use to the business because I work part-time. Further, I also believe that you are discriminating against me because I work part-time. You have made no effort to find a mutually agreeable means to accommodate my disability but simply decreed that I cannot work for the business if I work part-time.

Please note that I believe that, should you follow through with your threat to put me on unpaid leave as of 1 August 2016, I will have no choice but to resign from my employment.

… Please provide me with 14 days notice of any grievance hearing so I may make suitable arrangements.

Please respond to this letter within 14 days.

5.38 The claimant had developed a problem with his back on 28 July 2016, he visited his GP and obtained a note for a two-week period stating he was unfit for work. The claimant's grievance did not refer to the consultant's opinion of 19 July 2016, which gave a clear indication that the claimant was not fit for work at that time.

5.39 The claimant's grievance did not refer to his back condition or the associated fit note. In brief, the grievance misled Mr Lobel about the true position and the existence of medical evidence.

5.40 The claimant did not wait for two weeks as indicated in his grievance letter. On 2 August 2016, Mr Lobel's PA, Mrs Benton, wrote to Mrs Clayden and stated "Richard had to have another operation today was not in the office."

5.41 This followed a letter from Mrs Clayden stating:

> **Further to my previous email last Friday 29 July, would you please acknowledge receipt, and specifically advise if it is still your intention to put Barry on unpaid leave.**

5.42 On 4 August 2016, without waiting for any further response, the claimant resigned. His letter read as follows:

> **Further to my emails dated 29 July 2016 and 2 August 2016, (sent on my behalf from Carol) I note that you have failed to reply to such - I therefore assume that it is your intention to keep me on unpaid leave. Please note that it is with deep regret that I am submitting my resignation from my employment because of the following:**
>
> > **a. The content and tone of your letter to me dated 14 July 2016;**
> > **b. The fact that you have placed me on unpaid leave, which I regard to be a fundamental breach of my contract of employment (given that I am willing and able to work, even though I am currently able to work only part-time as a result of my heart condition);**
> > **c. Your discriminatory attitude towards me because of my heart condition (which I consider to be a disability) - in particular, I believe that placing me on unpaid leave constitutes disability discrimination;**
> > **d. Your failure to respond to my emails dated 29 July 2016 and 2 August 2016.**

5.43 Thereafter, the respondent dealt with the grievance. The circumstances of this do not concern us.

The Law

6.1 Section 95(1)(c) of the Employment Rights Act 1996 states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances in which he or she is entitled to terminate it, with or without notice, by reason of the employer's conduct.

6.2 The leading authority is **Western Excavating ECC Ltd -v- Sharp [1978] ICR 221**. The employer's conduct which gives rise to constructive dismissal must involve a repudiatory breach of contract Lord Denning stated:

> **If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from**

> **any further performance. If he does then that terminates the contract by reason of the employer's conduct. He is constructively dismissed.**

6.3 In summary there must be established first that there was a fundamental breach on the part of the employer; second, the employer's breach caused the employee to resign; and third, the employee did not affirm the contract.

6.4 We note the case of **Bournemouth University v Buckland 2010 IRLR 445 CA**. In constructive dismissal cases, the question of whether the employer has committed a fundamental breach of the contract of employment is not to be judged by a range of reasonable responses test. The test is objective: a breach occurs when the proscribed conduct takes place.

6.5 In **Malik v Bank of Credit and Commerce International SA 1997 IRLR 462**. The House of Lords confirmed that there is an implied duty of mutual trust and confidence as follows:

> **The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.**

6.6 We would note that it is generally accepted that it is not necessary that the employer's actions should be calculated and likely to destroy the relationship of confidence and trust, either requirement is sufficient.

6.7 Direct discrimination is defined by section 13 Equality Act 2010.

> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**
>
> **(2) …**
>
> **(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B….**

6.8 Section 15 Equality Act 2010, discrimination arising from disability, provides:

> **(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.**

6.9 Section 19 Equality Act 2010, indirect discrimination, provides:

> (1) A person (A) discriminates against another (B) if A applies a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in re-lation to a relevant protected characteristic of B's if –
> (a) A applies, or would apply, it to persons with whom B does not share the character-istic,
> it puts, or would put, persons with whom B shares the characteristic at a particular disad-vantage when compared with persons with whom B does not share it,
> (c) it puts, or would put, B at that disadvantage, and
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Justification

6.10 The classic test was set out in **Bilka-Kaufhas GmbH v Weber Von Hartz (Case 170/84) [1984] IRLR 317** in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (para 36). This involves the application of the proportionality principle. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see Rainey v Greater Glasgow Health Board (HL) [1987] ICR 129 per Lord Keith of Kinkel at pp 142-143.

6.11 The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: **Hardys & Hansons plc v Lax [2005] IRLR 726** per Pill LJ at paras 19-34, Thomas LJ at 54-55 and Gage LJ at 60.

6.12 It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: **Hardys & Hansons plc v Lax [2005] IRLR 726, CA**.

6.13 The following paragraphs from the judgment of Pill LJ in the **Hardys** case (which concerned sex discrimination) are of assistance (paras 32-34):

> **32. Section 1(2)(b)(ii) requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (Barry) and I accept that the word 'necessary' used in Bilka is to be qualified by the word 'reasonably'. That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its**

discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. 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 proposal is reasonably necessary. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.

33. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in Allonby and in Cadman, a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal. In considering whether the employment tribunal has adequately performed its duty, appellate courts must keep in mind, as did this court in Allonby and in Cadman, the respect due to the conclusions of the fact finding tribunal and the importance of not overturning a sound decision because there are imperfections in presentation. Equally, the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification.

34. The power and duty of the employment tribunal to pass judgment on the employer's attempt at justification must be accompanied by a power and duty in the appellate courts to scrutinise carefully the manner in which its decision has been reached. The risk of superficiality is revealed in the cases cited and, in this field, a broader understanding of the needs of business will be required than in most other situations in which tribunals are called upon to make decisions.

6.14 We note the provisions of the reverse burden of proof, as set out in section 136 Equality Act 2010. In this case, we do not need to engage with the reverse burden, as the reasons advanced by the respondent are clear. When needed we can assume the burden shifts for the purposes of considering the respondent's explanation.

<u>Section 136 - Burden of proof</u>

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to--

(a) an employment tribunal;
(b) …

6.15 We have been referred to numerous cases by both sides. We do not need to set out all of those cases. Many relied on not to illustrate legal principles, but as illustrative of their application. We will refer to any key cases which have been of assistance.

Conclusions

Constructive unfair dismissal

7.1 We first consider the allegation of constructive unfair dismissal.

7.2 During submissions, there was some suggestion that this is put as a last straw case; however, it was clarified that it is not. There are four specific allegations relied on which are said to be cumulatively or individually breaches of the term of mutual trust and confidence. The test to be applied is common ground: the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. We should consider each of the four points relied on.

7.3 First, we accept that Mr Lobel's letter in March 2016 referred to the claimant's retirement. His letter was entirely appropriate. It is natural and reasonable that Mr Lobel should enquire whether the claimant may contemplate retirement, given his age and following his heart attack. The letter made it plain that the decision was the claimant's. Mr Lobel's action was not a breach of the implied term of mutual trust and confidence.

7.4 Second, Mr Lobel was entitled to refuse the claimant holiday. The claimant ignored the accepted procedure that he should agree his holiday with Mr Lobel. Instead, the claimant had unilaterally decided to take his holiday at the most inconvenient time for the respondent. The claimant has sought to persuade us that he had, in fact, agreed the matter with Mr Lobel. We have rejected that evidence. Mr Lobel's action was not a breach of the implied term of mutual trust and confidence.

7.5 Third, the claimant objects to the letter of 14 July 2016. He objects to the tone of the letter in general, but relies specifically on two points. The first is the reference to his part-time work being of no use. The second is the reference to the claimant being put on leave of absence, if he refused to return to full-time work.

7.6 It would be fair to say that this letter is strongly worded and perhaps insensitive. It perhaps reflects the degree of anger on the part of Mr Lobel. There is no doubt that there was justification for Mr Lobel's anger: the claimant appeared to have no regard for Mr Lobel's health issues; the claimant had unilaterally decided to take holiday in September, at the busiest time of year; the claimant had not agreed the holiday with Mr Lobel; the claimant had not kept Mr Lobel informed as to his medical progress; the claimant had given no indication as to when he would return to full-time work. It is clear that Mr Lobel felt the strain of all of this, and this is reflected by his language. Nevertheless, Mr Lobel was entitled to assert that the failure of the claimant to fulfil all of his duties, by undertaking only part-time work, was stressful to existing employees and financially difficult because it was necessary to employ someone to cover his work. In that context, it was reasonable to say that the current arrangement was not of use to the respondent.

7.7 Mr Lobel was also entitled to take the view that he would not accept part performance of the contract. The contract had not been varied. There was no right to part-time work. The claimant had not requested part-time work, or the consequential reduction of salary. It was clear that the claimant believed that he was entitled to work part-time and still receive full pay. The claimant was not being clear as to when he would return to full-time work. Mr Lobel was entitled to bring to an end the reasonable adjustment of the phased return to work, as it was clear that this had not led to the claimant returning full-time.

7.8 By insisting on part-time work, when knowing there was no reasonable prospect of returning to full-time work, and insisting on full pay, it was the claimant who was not complying with the terms of his contract. Mr Lobel asked the claimant to comply with the terms of his contract by working full-time. Contractually, Mr Lobel was entitled to insist on full performance, and that was not a breach of contract.

7.9 Fourth, the failure of Mr Lobel to respond directly to the claimant's emails of 29 July and 2 August prior to the claimant’s resignation on 4 August is entirely reasonable. The claimant had given a timeframe of 14 days. Mr Lobel had recently had an operation for cancer. His treatment was ongoing. His thoughts were elsewhere. It is unreasonable of the claimant to expect an immediate response to a specific point which formed part of his grievance, when the claimant had asked for a reply within 14 days. Mr Lobel's failure to respond prior to 4 August 2016 was in no sense whatsoever unreasonable, nor was it a breach of contract.

7.10 We therefore find that the respondent was not in breach of contract. It was not in breach of any express term. The various matters raised do not amount to a breach of the implied term of mutual trust and confidence. It was the claimant who was behaving in a manner which was likely to destroy or seriously damage the relationship of trust and confidence by failing to be clear, or explicit, as to his medical condition, when he could have done so. The claimant actively chose to withhold medical evidence which would be material. The claimant chose not to say that he needed

part-time work on a permanent basis and the respondent was entitled to assume that the claimant would be able to return to work within a reasonable time, as that was consistent with the way the claimant behaved.

7.11 We do note, it may have been open to the claimant to argue that the removal of the reasonable adjustments, i.e. the phased return to work, was a breach of the term of mutual trust and confidence. However, the claim has not been put in that way, no such point has been put to any of the witnesses. Further, on the evidence we have, it is clear that the adjustment of the phased return to work was withdrawn because it appeared that it had failed to result in the return envisaged.

7.12 It follows that the claim of constructive unfair dismissal fails. The matters said to constitute the breach of the implied term of mutual trust and confidence were not breaches either individually or collectively. There was no constructive dismissal, because there was no breach of contract capable of acceptance.

7.13 We do not need to consider the alternative argument that the contract was frustrated.

Indirect discrimination

7.14 We next consider indirect discrimination. The provision relied on is a requirement to work full-time. The respondent has not sought to argue that full-time work is not a provision criterion or practice that the respondent would apply to persons who do not share the claimant's characteristic of disability. The respondent has not sought to argue that the provision criterion or practice did not put persons with the claimant's disability at a disadvantage or that it did not put the claimant at that disadvantage. The respondent has not sought to argue the inability to perform the duties, is not a disadvantage; it is clear it leads to potential disadvantages, including the refusal to pay for part performance of work.

7.15 The respondent's defence is based on justification. It is necessary to consider whether the provision was a proportionate means of achieving a legitimate aim. The aim in this case has been clearly identified: it is the efficient running of the business and the need to avoid other members of staff suffering stress.

7.16 The claimant's case on the justification question remains unclear. The legal principles are agreed; both parties refer in particular to **Bilka**.

7.17 First we consider the aim. The aim concerns the efficient running of the business and the reduction of stress. There is no doubt this aim is legitimate. An employer is entitled to run its business efficiently. Efficient running is necessary in order to provide service and ultimately to make profit. Efficient running also benefits the health of those who work within the business. It is a legitimate aim to ensure that individuals are not unduly stressed.

7.18 The means adopted in this particular case is by having a full-time employee undertaking the claimant's role. In this case, the employee is a managing director. The duties of that individual are significant. They include assisting with opening and closing the premises. The premises are opened at the start of day and closed at the end. One way of dealing with that is to have a full-time employee who is there at the beginning and the end of the day. Mr Lobel thought it necessary to have two employees covering the shop at all times. One way of achieving that is to have two full-time employees. Two employees make opening and closing more efficient. Security measures are necessary. Grilles have to be fitted and removed. Coins must be removed from and taken back to safes. The coins are set up in display cabinets. An individual working alone takes approximately 40 minutes to open and 40 minutes to close. Two individuals working together improves efficiency. One way of achieving this is to have full-time employees. There can be no doubt that the means adopted does facilitate the efficiency envisaged. By being efficient, the stress on a particular individuals is reduced.

7.19 Is the means adopted proportionate? It is for the tribunal to understand the reasonable needs of the employer. It is for the tribunal then to consider the potential discriminatory effect of the provision criterion or practice and to undertake a balancing exercise whereby the needs of the employer are balanced against the potential discriminatory effect. The potential discrimination in this case revolves around a disabled employee being unable to fulfil all of his or her full-time duties. The disabled employee may be unable to fulfil the duties because physical restrictions make full-time work too tiring. In turn this means that an employee may only be able to work part-time. If the requirement is to work full-time, it may mean the individual cannot work at all for legitimate medical reasons.

7.20 The respondent is a relatively small employer. It has a limited number of employees. The claimant's salary and benefits were substantial. The claimant's duties were concerned with operating a shop. In order to do that, he needed a good working knowledge of coins and antiquities. It is necessary to have that expertise available during the day, as it can never be predicted who will enter the shop either to buy or sell. Relevant opportunities can only be identified by employees with relevant expertise.

7.21 It was reasonable to have two people in the shop at all times. There are security issues. If there is only one individual, the shop is more vulnerable.

7.22 There were other individuals in the building, but they were not working in the shop. There were at least three people who dealt with processing catalogue orders. There were two others who worked in a different part of the building and were not directly involved in the shop. Others dealt with IT and attended more occasionally.

7.23 It was necessary to open and close the shop. Part-time work in the middle of the day would mean, inevitably, that arrangements must be made for

the evening and morning opening and closing. The hours adopted by the claimant meant that he could not assist with either opening or closing. That was unsatisfactory. Moreover, there were large parts of the day in the early morning and late afternoon when there would be only one person covering the shop. That was unsatisfactory to the respondent, and understandably so.

7.24 There are a multitude of ways in which a business can organise itself, choices have to be made having regard to the resources available, and the needs of the business. The fact that there may, theoretically, be numerous ways of organising a business does not mean that the specific approach chosen is not proportionate.

7.25 The need for two individuals to be in the shop and to assist with opening and closing is clear and obvious. One way of achieving that is to provide that both of those individuals work full-time. Inevitably, arrangements must be made to cover absence, but the fact that some cover can be provided does not prevent the arrangements made from being proportionate.

7.26 It may be that when considering proportionality, it is necessary to consider what other arrangements could have been made. It may be possible to job share with different individuals working full days. It may be possible for someone to work in the morning or in the afternoons.

7.27 The degree of expertise needed limits the pool of people who could do the claimant's senior role.

7.28 Full time work would be the choice of many, as it was the choice of the claimant.

7.29 The claimant simply wished to work in the middle of the day on alternate days. This created immense difficulty. It meant that it was necessary to employ somebody to cover the morning and afternoon openings and closings. This was an added expense that ultimately was unsustainable.

7.30 We accept that it was not possible to provide cover for a few hours in the morning and a few hours in the afternoon simply to cover the gaps left by the claimant.

7.31 In this case, it is clear and obvious that the respondent company needed to provide proper and effective cover for the shop. That included having two people available at closing and opening who dealt specifically with the shop. That promoted efficiency, security, and reduction of stress for the individuals involved. Asking those employees to work full-time, and to cover the morning and evening opening and closings, reflected a clear legitimate need.

7.32 Any requirement for full-time work may disadvantage a disabled person who is unable to work full time. It may be that the disabled person is exposed to dismissal. That is the discriminatory effect, and it is that discrimination which must be balanced against the needs of the business.

7.33 In this case the requirement to work full time is proportionate. The fact that there may be some possibility of adjustment or rearrangement to accommodate part-time work, does not prevent the initial requirement for full-time work from being a proportionate means of achieving a legitimate aim.

7.34 It follows the claim of indirect discrimination fails.

Disability

7.35 It has been agreed that the claimant was disabled from the point he had his heart attack in December 2015. This required bypass surgery. It was inevitable he would be on medication for the remainder of his life. There was no possibility of him making a full recovery. The effects would last the rest of his life and therefore he was disabled. This is all agreed. The only dispute is whether the respondent could reasonably have been expected to know. The respondent relies on the defence that it could not reasonably have been expected to know the claimant had a disability.

7.36 It might be said that the circumstances are so plain and obvious no medical evidence was required. If medical evidence was required, a simple referral to occupational health or a request for a report from the claimant's GP would have put the matter beyond doubt. The argument the respondent could not have been expected to know the claimant was disabled is totally without merit

Discrimination arising from disability

7.37 We next consider the allegations of discrimination arising from disability.

7.38 There are two allegations:

> allegation 1: by the second respondent stating on 14 July 2016 that the claimant's working part-time was of "no use to [Coincraft];" and
>
> allegation 2: by placing the claimant on unpaid leave from 1 August 2016.

7.39 The two allegations are essentially the same; they are both concerned with the respondent company stating that it needed the claimant to work full-time. The first allegation concerns Mr Lobel stating that part-time work as of no use. That is simply an explanation for why full-time work was necessary. It is a reference to the fact that the respondent company was forced to cover the claimant's post, when he was not there, by employing a person to do the claimant's job. It is an explanation for why Mr Lobel wanted the claimant to work his contractual hours.

7.40 The claimant seeks to suggest that placing him on unpaid leave was a suspension. That is not an accurate analysis. The claimant was asked to return to full-time work, and was informed the consequence would be that he would have to take sick leave, as he was unable to fulfil his duties.

That is not a suspension. That is simply an assertion of a contractual right. Mr Lobel was entitled to refuse to accept part performance of the contract.

7.41 The first question is whether the treatment is unfavourable at all. We should be slow to conclude that asking an individual to comply with his or her contractual obligations is unfavourable treatment.

7.42 It is illustrative to draw an analogy with victimisation. For victimisation claims it is necessary to consider whether a reasonable employee, with knowledge of all relevant circumstances, would consider any treatment to be detrimental: there is an objective question. We find there is an objective element when considering whether any treatment is unfavourable.

7.43 The claimant objected to the requirement that he undertake his full contractual duties, but requiring him to work his contractual hours is not unfavourable treatment. There are many occasions when an individual may not be able to fulfil his or her contractual obligations. Illness and injury are two obvious examples, but that does not mean that the requirement of the underlying contract becomes unreasonable treatment.

7.44 In the case of a disabled person, a duty to consider reasonable adjustments may be engaged, but that duty does not make the requirements of the original contract unfavourable treatment. Mr Lobel was entitled to assert the contractual right at a time when it was clear that the claimant had not resumed his duties.

7.45 Both allegations fail as both are underpinned by the assertion of a contractual right to require performance. The respondent asserting its contractual rights, an briefly explaining why, in this case, was not unfavourable treatment.

7.46 We observe there is no reasonable adjustments claim before us. Failure to make reasonable adjustments and discrimination arising from disability are not synonymous. However, the fact that a reasonable adjustments claim is not pursued tells us nothing of whether the duty to consider reasonable adjustments was engaged. We will consider the relationship between a reasonable adjustments claim and discrimination arising from disability claim below.

7.47 It may be part of the claimant's argument that the language chosen to explain by Mr Lobel was harsh, albeit the claim is not expressly pursued on that basis. Perhaps Mr Lobel could have been more diplomatic. It was, however, appropriate to offer an explanation for the decision to ask the claimant to return to full time work or not attend at all. The suggestion that part time work was of not use is a clear explanation.

7.48 In some loose sense it may be possible to say there is some link between the claimant's inability to work full-time and the wording of the explanation. It may be possible to argue that the manner of the explanation was

unfavourable treatment and that the manner was because of something arising in consequence of the disability; this would then require justification. The nature of that justification would be difficult to ascertain. The aim of the explanation would be obvious. Giving an explanation would not be unfavourable and giving an explanation would obviously be justified. However, if what is at issue is the words used, in broad terms the manner of the explanation, it may be necessary to ask whether the treatment, in this case the manner of communication, was a proportionate means of achieving a legitimate aim.

7.49 It is difficult to see how an offensive tone or offensive phrasing could be a means of achieving a legitimate aim. Moreover, it would lead to the potential that employers would have to justify every unfortunate phrase on the basis of proportionality.

7.50 We find that the necessary causational link is not made out. The fact of explanation may be because of something arising in consequence of disability, but not the phrasing of the explanation.

7.51 There is, of course, an obvious course of action for alleged offensive phrasing. It would be possible to say the manner of communication was an act of harassment. It could be argued as unwanted treatment related to a protected characteristic. It is recognised, in the context of harassment cases, that it is not every unfortunate phrase which will carry legal liability.

7.52 To the extent that the claimant seeks to say that the manner in which the explanation was given was an act of discrimination arising from disability, we reject that claim for the reasons we have given.

7.53 We have dismissed the two allegations of discrimination arising from disability because we find there was no unfavourable treatment. Lest we be wrong about that we should consider the causation and justification arguments.

7.54 Was the treatment because of something arising in consequence of disability. There must be a causal link between the matter said to arise in consequence of the disability and the treatment. Here the matter said to arise in consequence is that the claimant was unable to undertake full-time work.

7.55 The claimant chose, unilaterally, to work part time. It is important to note that his insistence on working part time did not amend his contract.

7.56 The fact that the claimant was motivated by his own disability may have been his reason for choosing to breach his contract, but we are not concerned with his motivation. Had he accepted he was not fit to work full time, and stayed away from work. The sickness absence would then be in consequence of the disability, but the requirement to work full time was not because of any inability to work full time. It was not because of something arising in consequence of his disability; it was in because of the contractual obligation.

7.57 We are concerned with the respondent's reason. The claimant was asked to return to full-time work because that was the requirement of the contract. We are concerned with what was in the mind of the person who made the request, not what motivated the claimant. The causational link is not made out.

7.58 If we were also wrong about the causational issue it would be necessary to consider justification.

7.59 The treatment concerns the assertion of a contractual right: to insist on full performance of the contract by working full time; and the need to give an explanation for the request to return to full time work.

7.60 There are two clear aims: first, to pursue the contract; and second, to explain the need for full time work. Both are clearly legitimate. The treatment is a means of achieving the respective aims. Having clear contractual obligations, and explaining the need for them is justified as it is proportionate when considering any potential discrimination.

7.61 We note that the justification question in this section 15 Equality Act 2010 claim does not engage the same questions as the justification defence in the indirect discrimination claim. For section 15, it is the treatment that must be a proportionate means of achieving a legitimate aim. In section 19 the test is slightly different: it is the provision criterion or practice which must be justified. In this case the treatment, although arising out of the contractual requirement for full time work, is not the same as the provision criterion or practice.

7.62 We do not need to consider if the alternative justification argument, which concerns the subsequent realisation that there was a need to prevent the claimant working at all as he was, having regard to the unknown medical opinion, unfit.

Reasonable adjustments

7.63 There may be some argument that it is necessary to consider whether there is a failure of reasonable adjustments when looking at justification for either section 15 or section 19. This is a matter we do not have to finally resolve, but for completeness we will consider it.

7.64 Under previous legislation, there was a concept of disability-related discrimination. Within the context of that legislation, it was necessary to consider whether there had been a failure to make reasonable adjustments, and the effect of that failure, when considering he justification argument. That provision has not been replicated in the 2010 Act.

7.65 In this case the question of reasonable adjustments cannot be wholly ignored. The claimant's argument, when properly analysed, is that the requirement to work full-time is not justified because a reasonable adjustment could have been made. There has been a failure to argue this explicitly, but that is the effect of the argument as put.

7.66 There is a fundamental difficulty. The claim of failure to make reasonable adjustments was abandoned and dismissed. It has not been pursued in evidence.

7.67 The claimant's complaint is that he was not allowed to continue on his phased return to work. The purpose of a phased return to work is to allow an employee to gradually resume his or her original duties. In this case, there was no reasonable prospect of that phased return resulting in the claimant resuming his original duties. It is therefore difficult to see why a refusal to continue a doomed phased return would itself constitute a failure of reasonable adjustments. The adjustment, the phased return to work, had no prospect of returning the claimant to full-time work because there was no reasonable prospect of his returning to full-time work at any time.

7.68 There is a second potential adjustment and that revolves around a fundamental change to the claimant's duties. Had the claimant engaged with the respondent and indicated the need to reduce his duties on a permanent basis, any refusal may or may not have been reasonable. The claimant never engaged. We have no evidence on the point. We have no submissions on the point. We have no way of analysing it.

7.69 Do we need to decide whether there was a failure of reasonable adjustments in order to decide whether there was justification under section 15? We take the view that if parliament had wanted us to undertake that exercise, it would have made it explicit. It was made explicit in the previous legislation, but it was not replicated in section 15.

7.70 We should not allow the separate claims under section 15, section 19, and sections 20/21 to become elided.

7.71 It is always the case that a requirement for full-time work may disadvantage those who can only work part time. That does not prevent the requirement for full-time work being a proportionate means of achieving a legitimate aim.

7.72 It frequently occurs, as it did in this case, that an individual is no longer able to work full-time. That in itself does not undermine the proportionality argument.

7.73 The law recognises that there are times when it may be appropriate to derogate from the original contractual position. There can be requests for flexible working. The duty to consider reasonable adjustments may engage.

7.74 That duty to consider reasonable adjustments may, in appropriate circumstances, require a reduction in hours or duties, or even a reorganisation; that can, effectively, modify a contractual right. Reasonable adjustments, generally, will not require the employment of additional individuals to perform the employee's functions.

7.75 In this case, the duty to make reasonable adjustments does not fundamentally affect the proportionality of the contractual position. It is simply a separate claim.

7.76 For the reasons we have given, all of the claims fail.

Employment Judge Hodgson
16 June 2017