THE EMPLOYMENT TRIBUNAL

HEARD AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE H WILLIAMS QC**
MRS C UPSHALL

BETWEEN:

GRAHAM SUTTON **Claimant**

AND

BRITISH TELECOMMUNICATIONS PLC **Respondent**

ON: **6, 7, 8 & 9 November 2017**

REPRESENTATION:
Claimant: **Mr B Uduje (Counsel)**

Respondent: **Mr M Cole (Counsel)**

JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The Claimant was unfairly dismissed.
2. The claims for discrimination arising from disability and breach of a duty to make reasonable adjustments are upheld.
3. The claim for direct disability discrimination is dismissed upon the Claimant's withdrawal of the same.
4. If the Respondent had acted fairly the Claimant would not have been dismissed for a further six month period. Thereafter there would have been a 50% prospect of his employment being terminated fairly.
5. The Respondent is to pay to the Claimant the sum of £15,900 in relation to compensation for injury to feelings, plus interest.
6. The Respondent is to pay to the Claimant the sum of £28,830.23 in relation to loss of past and future earnings, plus interest on the past loss.

7. The Respondent is to pay to the Claimant the sum of £14,670 in relation to his basic award and loss of statutory rights.
8. (As proposed by the Respondent), the sums referred to at items 5, 6 and 7 are to be paid by 30 November 2017.

REASONS

(*Provided at the request of the Respondent at the conclusion of the hearing on 9 November 2017; summary reasons for the liability and remedy decisions having been given orally.*)

Introduction and liability issues

1. The Claimant, Mr Sutton, was employed by the Respondent as a customer service engineer. He had continuity of employment from 10 August 1981 – 10 February 2017. In late 2015 he was diagnosed with bowel cancer and in consequence underwent a right hemicolectomy and subsequent chemotherapy, the later occasioning peripheral neuropathy. As a result he was absent from work on grounds of ill health from 18 December 2015 until the termination of his employment. He was informed in November 2016 that he was to be dismissed with 12 weeks notice.

2. The Claimant brought claims for unfair dismissal and for disability discrimination, the latter entailing allegations of direct discrimination, discrimination arising from disability and breach of a duty to make reasonable adjustments. The Respondent accepted that by virtue of his bowel cancer the Claimant was a disabled person, but denied all claims and contended that Mr Sutton's dismissal was fair on capability grounds and a legitimate and proportionate step in the circumstances.

3. At the outset of the hearing on 6 November 2017 it was explained to the parties that it had only been possible for the Tribunal Service to arrange for one Panel Member (Mrs Upshall) to sit on the case. The parties were informed that in the circumstances they could: (i) consent to proceed with only one Member if they felt that appropriate (pursuant to section 4(1)(b) of the Employment Tribunals Act 1996); or (ii) wait to see if any of the other cases listed to start on the same day at the same venue went short, so that another Member became available. The parties were made aware that Mrs Upshall was the TUC nominated member and were given an opportunity to take instructions and consider the position. Both parties then consented to the hearing proceeding with the one Panel Member.

4. The issues in dispute between the parties had been formulated at an earlier Preliminary Hearing in July 2017 and were further discussed at the outset of the hearing before us. The auxiliary aids aspect of the reasonable adjustments claim had been withdrawn earlier. Mr Cole indicated that it was now accepted: (i) that the Claimant was a disabled person at the material time, not only by reason of his bowel cancer, but also the peripheral neuropathy; alternatively (ii) that the effects of the peripheral neuropathy could be properly viewed as part of

the consequence of his cancer. Mr Cole confirmed that the Respondent accepted that Mr Sutton's dismissal constituted unfavourable treatment arising from his disability.

5. Mr Cole also confirmed it was accepted that the Respondent applied the following PCP's to the Claimant:
   5.1 A requirement to maintain his attendance at work; and
   5.2 A requirement for him to perform the duties of a customer service engineer.

6. Mr Cole accepted that the claims relating to the dismissal itself were brought in time, but indicated that this was not so in relation to the other claims.

7. It was agreed that apart from the "*Polkey*" issue, remedy would be considered after the Tribunal's decision on liability had been given, if the Claimant succeeded on one or more of his claims.

8. It was therefore agreed during the discussion held on the morning of 6 November 2017 that the issues requiring our resolution at that stage were as follows:

   Unfair dismissal:

   8.1 Was the Claimant dismissed for a potentially fair reason namely "capability" or "some other substantial reason" within the meaning of section 98(1) & (2) Employment Rights Act 1996 ("ERA 1996"), as the Respondent asserted?

   8.2 If so, did the Respondent act reasonably in all the circumstances in treating the reason as sufficient to justify the Claimant's dismissal?

   8.3 If the Claimant was dismissed unfairly, what was the percentage likelihood that he would have been fairly dismissed if a fair procedure had been followed and when would this have occurred?

   Disability discrimination:

   Direct discrimination:

   8.4 Was the Claimant treated less favourably than a non-disabled person because of his disability in all or any of the respects identified at section 5 of the Claimant's Schedule of Additional Information?

   Discrimination arising from disability:

   8.5 Was the dismissal in pursuance of a legitimate aim (namely maintaining an effective workforce) and if so, was it a proportionate means of achieving that aim?

Breach of a duty to make reasonable adjustments:

8.6 Did either or both of the PCP's identified at paragraph 5 above, place the Claimant at a substantial disadvantage as compared to non-disabled employees?

8.7 Did the Respondent know or ought the Respondent to have known of the substantial disadvantage in question (vulnerability to dismissal)?

8.8 If so, did the Respondent comply with a duty to make reasonable adjustments? The Claimant relied upon the following adjustments in particular:

8.8.1 Allowing him a longer period of time to return to his substantive role;

8.8.2 Allowing him to work as part of a two person manhole team with a revised allocation of duties between them; and/or

8.8.3 Taking further steps to identify alternative employment for him within the Respondent's organisation?

Time limits:

8.9 In so far as the Claimant establishes that an act of discrimination occurred prior to his dismissal, was it part of conduct extending over a period within the meaning of section 123 Equality Act ("EA 2010")?

8.10 If and in so far as such complaints were not presented to the Tribunal within the prescribed time limit, is it just and equitable to extend the time for presenting those complaints?

9. By the conclusion of the evidence, the following matters from the above list of issues had been resolved as follows:

9.1 The Claimant accepted that his dismissal was for capability. The parties agreed that in these circumstances there was no need to consider separately whether it was also for "some other substantial reason";

9.2 The Claimant indicated that the direct disability discrimination claim was withdrawn;

9.3 In relation to the breach of a duty to make reasonable adjustments claim, the Respondent accepted that the alleged substantial disadvantage to the Claimant did arise from the PCPs that he relied upon and that the Respondent's knowledge was no longer in issue; and

9.4 The Claimant accepted that his dismissal was in pursuance of a legitimate aim (but not that it was a proportionate step).

Evidence

10. We heard evidence from the Claimant and then from the Respondent's witnesses, namely: (1) Alan Crabb, a Network Operations Field Manager and the Claimant's line manager; (2) John Rickett, the Senior Operations Manager for the South East and the Claimant's second line manager; and (3) Mark Collins, the General Manager for the South East. Mr Rickett made the decision to dismiss the Claimant and Mr Collins upheld the decision on appeal.

11. Apart from brief supplementation, the witnesses' respective witness statements constituted their evidence in chief.

12. We were also provided with documentation in an agreed bundle of documents. Cross references given below in square brackets in relation to documentation are references to the pagination of this bundle. On the first day of the hearing, after the issues had been clarified, the Tribunal read the statements and relevant documents.

Facts Found

13. The Claimant was born on 2 February 1953. From 10 August 1981 he was initially employed by the Post Office. His employment was subsequently TUPE transferred to the Respondent. He had a good attendance record and a good work record generally.

The Claimant's work as a customer service engineer

14. The Claimant worked as part of a two person manhole team. One member of the team would enter the manhole to carry out the necessary cable repair work. This entailed identifying the faulty cable, removing it from its housing, splitting it, fixing the fault, rejoining the cable and then replacing it. The other member of the team, who was known as the safety man, passed down equipment to the engineer in the manhole, in a few instances assembling the equipment first, for example screwing rods together or changing the gas bottle on the gas torch. This second employee also maintained and monitored the gas detection equipment. In the event of an emergency, for example from unsafe gas levels, if necessary the safety man would assist the other employee from the manhole, albeit the usual means of entrance and exit was via a ladder fixed to the wall of the manhole.

15. The same two member teams regularly worked together and they would usually swop the roles between them from one job to another. There were three teams, including the Claimant's team, in the Brighton – Portsmouth area and the jobs they were allocated were roughly assigned by reference to three sub-divided geographical areas.

16. Often the two members of the team would arrive at the location in separate vehicle, so as to maintain flexibility should one of them be required to attend a solo duty thereafter. Both members of the team would help with erecting signage and barriers and checking that the location was safe on arrival.

The Claimant's ill health

17. In November 2015 the Claimant was diagnosed with bowel cancer. He had been in good health up to this point. His sickness absence began on 18 December 2015. On 24 December 2015 he underwent a right hemicolectomy. On 13 January 2016 Mr Sutton's consultant advised him that the surgery had gone well, but that a course of chemotherapy was recommended because one of his lymph nodes was malignant, indicting the cancer had spread. It was originally intended that he would undergo eight cycles of chemotherapy, which began on 18 February 2016. However, in due course it was decided that he should stop after the seventh cycle on 28 July 2016, because he had developed peripheral neuropathy as a result of the chemotherapy.

18. Peripheral neuropathy entails damage to the nerves in the extremities of the body. When Mr Sutton first developed this condition, the symptoms were quite severe and he had no feelings in his fingers or toes. Over time his symptoms improved to a degree, though they were still significant when he made his disability impact statement on 4 August 2017 [50 – 52]. Therein he described his feet being constantly cold, sensitive and tender, which in turn made walking uncomfortable. Further he said that his hands permanently tingled and were very sensitive especially to hot temperatures and sharp objects. Tasks involving fine motor skills were still very difficult.

The Respondent's policies and procedures

19. The policy which Mr Rickett and Mr Collins said they applied to Mr Sutton's circumstances was the Respondent's "*Attendance policy and procedure*" [75 – 82] (hereafter, "The Attendance Procedure"). The first page of the document set out a bullet point list of "guiding principles". These included:
    - *Be consistent and fair throughout the process*
    - *Actively promote rehabilitation into work and make any necessary temporary adjustments*
    - *Recognise changing capabilities by making all reasonable adjustments to facilitate a return to effective working*
    - *Consider suitable alternative work within the company for people whose required reasonable adjustments cannot be accommodated in their current role*
    - *Consult with the individual and take into account anything they have to say before we make a decision.*

20. Much of the policy was concerned with addressing repeated short-term absenteeism. Thereafter there was a section headed "Termination of employment". This section said that termination would need to be considered where (amongst other circumstances) "*an extended absence becomes unsustainable*" and that "*Following consultation with the case advisor, the first line manager may recommend to the second line manager that consideration be given to termination of employment*". The policy went on to state that following such a recommendation, the second line manager must review the individual's case; provide the individual with written notice that termination is

under consideration; and hold a meeting with the employee to give them the opportunity to input any information they feel is relevant. It was provided that: "*If the decision is made to dismiss, the second line manager must prepare a robust business rationale which takes into account all of the circumstances of the case*". Provision was also made for a right of appeal.

21. The policy then listed in a series of bullet points the respective responsibilities of the first line manager, the second line manager, the third line manager and the representative from BT Case Management. The second line manager's responsibilities predominantly related to deciding whether the employment should be terminated. The responsibilities in this connection include "*carefully consider every aspect of the case and review all opportunities for reasonable adjustment or redeployment".*

22. The Respondent also had a short guidance sheet headed "*Disability*" [97 – 98] and a longer guidance document entitled "*BT's Workplace Adjustments policy – your role as a People Manager*" [83 – 96]. The foreword encouraged managers to read the document and stressed the legal obligation to balance business considerations against an understanding of what is possible "*to create a tailored approach for each of our employees with a health condition or disability*". The document then discussed what could amount to reasonable workplace adjustments and set out the process to follow in considering potential adjustments. Examples of potentially reasonable adjustments included in the document were a phased returns to work, reallocation of work to others in the team and a reduction in physical duties [90 – 91]. In a "FAQs" section, the text said that "*BT's policy is to support adjustments wherever we can…..If you are certain that adjustments can't be supported, you need to get written agreement from your own Line Manager to turn them down – and that needs to be clearly documented in any case files for future reference*".

Events January – July 2016

23. The Claimant was signed off work for three months initially to 13 March 2016 [110].

24. On 6 January 2016 Mr Crabb, the Claimant's line manager, went to see him and then filled in a prescribed "Home Visits Summary" form [111 – 115]. This was shortly after Mr Sutton's operation and so not surprisingly, there was no discussion about adjustments that could assist him with getting back to work at that stage.

25. Although Mr Crabb undertook six home visits in total during Mr Sutton's absence, this was the only time that he filled in the prescribed documentation. When asked about this at the hearing, he accepted he should have completed a similar document on at least some of the other occasions. He volunteered that it was "negligent" of him not to have done so (albeit he was not intending to use the word in its legal sense).

26. Whilst we do not positively find that the absence of such forms impacted upon the subsequent decision to dismiss Mr Sutton, we observe that the completion

of the home visit documents would be a valuable information resource for the second line manager when deciding whether to dismiss or not. The second line manager will only have had limited, if any, contact with the employee in question during the intervening period of their absence and prior to holding the meeting to discuss a potential termination of their employment with them.

27. On 20 January 2016 Mr Crabb sent an email to Mr Rickett (his line manager) and also to Julie Miller, a Human Resources Performance Care Consultant, (the HR representative who was advising him on this case) [120]. His email began "*On to the next sick issue*". We accept that this was a reference to sickness absence difficulties he was experiencing with other employees and not a reference to any earlier difficulties concerning the Claimant. He then summarised the information he had received from a further visit with the Claimant that day, including the plan in relation to chemotherapy, which was likely to be spread over a six month period. He said: "*To me we are looking at a long term period of sick and I assume this would now move to second line review??*". Ms Miller replied on the same day that they should await more information on prognosis after Mr Sutton had had an update with his specialist and that she would then discuss a second line manager review [120].

28. Although the Claimant has highlighted that the Attendance Policy text suggests that referrals to the second line manager will only arise in the context of a recommendation for termination of employment, we accept that Mr Crabb was not making such a recommendation at this stage.

29. On 4 February 2016 Mr Crabb emailed Ms Miller saying that it now looked like Mr Sutton would be signed off for six months and that he needed advice on whether to support the long time off [123]. This emails appears to have triggered a series of telephone calls made by Ms Miller or one of her HR colleagues [126A]. A note of a call on 29 February 2016 records that the author is going to arrange a second line review meeting with Mr Rickett. Further notes indicate that a voicemail message on that topic was left with Mr Rickett on 11 March 2016.

30. In turn this generated a letter dated 17 March 2016 to Mr Sutton [127 – 128]. The letter was expressed to be from Mr Rickett, but was in fact a template letter generated by his personal assistant ("PA"), including his electronic signature. Mr Rickett and Mr Sutton had never met at this stage and this was the first contact that Mr Rickett had with him in relation to his absence.

31. The first paragraph of the letter stated that Mr Rickett was becoming concerned about Mr Sutton's "*fitness and your potential ability to provide regular and effective service*". It went on to propose a meeting to discuss the situation and explore any support that could be provided, stating that the aim of the meeting was "*to **facilitate a return to work and/or allow us to develop a clear plan which can lead to a sustained improvement in your attendance pattern*". The letter continued that arrangements had been made for a meeting on 31 March 2016 in Portsmouth and that Mr Sutton should "*be aware **if your current absence is likely to last for much longer / if your attendance pattern cannot be improved, I will need to re-consider the arrangements for*

covering your job and your own future within BT because of the potentially significant impact on the service". The standard text appeared to envisage that the alternative options could be deleted, but the alternatives were left in on this occasion.

32. The letter was not personalised in any way and contained no expression of sympathy. The alternatives that were left in the text conveyed the unfortunate impression that Mr Rickett thought Mr Sutton was or may have been in a position to better manage or reduce his absence at that stage (and/or that he had not troubled to think about the contents of the letter). We accept that the Claimant found the contents of the letter insensitive and upsetting, particularly as he had only recently begun his stages of chemotherapy. In addition to causing Mr Sutton unnecessary stress, the letter had the unfortunate effect of making the Claimant wary towards his employers and probably less forthcoming than he would otherwise have been in his subsequent dealings with Mr Rickett. This was an understandable reaction on his part in the circumstances.

33. A certificate confirming that the Claimant was unfit to work for another three months from 13 March 2016 was provided [129].

34. The Claimant was sent a further letter dated 21 March 2016, essentially in the same terms as the letter we have described above, asking him to come to a meeting on 7 April. Like the earlier letter, it was said that, exceptionally, Mr Rickett was prepared to hold the discussion by telephone. Mr Sutton did not attend.

35. A third letter in similar terms dated 11 April 2016 was sent to the Claimant, this time referring to arrangements made for an audio meeting on 19 April 2016 [132].

36. This telephone call did take place as arranged and Mr Rickett filled in a "Second line manager review" prescribed form document during and after the discussion [134 – 142]. In the document he noted that a return to work was more than three months away. Under the "Extenuating circumstances preventing a sustained return to work" section, he referred to the chemotherapy Mr Sutton was undergoing and that he was struggling with the effects; that he had confirmed this treatment would take another three months to complete; and that he did want to come back to work, but was unable to do so currently and was unsure what he would be able to do physically. Mr Rickett noted that he had agreed Mr Sutton should focus on getting through the treatment and getting back to work [134]. Under a section headed "Return to work plan", the first question asked whether OHS (the Respondent's Occupational Health Service) had advised that the individual has a disability which impacts on current attendance. Mr Rickett wrote "not applicable". He went on to say that adjustments could not be identified as this time [136]. He noted Mr Sutton had maintained good communication with his manager [137].

37. We accept Mr Sutton's evidence that Mr Rickett came across as abrupt during this telephone call and that it was a short meeting with relatively little

discussion about how the Claimant was feeling. Mr Rickett agreed that he told the Claimant during the call that the situation may have to move to a future resolution meeting if his ill health did not improve.

38. As the Claimant was concerned about the apparent lack of engagement with him on the telephone, he forwarded a letter from his oncologist to his employers [148]. This letter referred to the chemotherapy being due to finish on 28 July 2016 and it usually taking an individual a month or two to fully recover from that afterwards. The letter indicated that given the side-effects of the current treatment too, the writer did not feel that Mr Sutton was ready to return to work. The writer offered to provide further information if it would assist.

39. Although dictated at an earlier date, the letter was apparently received by the Respondent on 23 May 2016. Emails passing between Mr Crabb and Ms Mclean (another HR Case Consultant) indicated that in light of this document Ms Mclean considered that there was no value in submitting an OHS referral until approximately August 2016, after the completion of the chemotherapy [151].

40. On 12 June 2016 Mr Sutton's pay was reduced to half the usual amount, in accordance with the Respondent's policy. A certificate was issued confirming he was unfit for work for a further three months from 25 May 2016 [149].

Events August – mid October 2016

41. In August 2016 the OHS was asked to consider the Claimant's case [156 – 159].

42. On 20 September 2016, Jackie Batt (another HR Case Consultant), emailed Mr Rickett informing him that as Mr Sutton's attendance was a cause for concern he needed to arrange a meeting with him to discuss the various options. She attached a draft invitation to the meeting letter, the Resolution Guidance document, the Resolution Rationale document and Meeting Notes Guidance. The email also made reference to the Attendance Procedure, with an electronic link to it provided. No reference was made to the Respondent's policy on reasonable adjustments, nor to the fact that the Claimant was disabled within the meaning of the Equality Act 2010 (because cancer is a deemed disability).

43. Mr Rickett had not been involved with the Claimant's case since the 19 April 2016 meeting by telephone, save that he thought he may have seen the report from the Claimant's oncologist when it arrived.

44. Mr Rickett told the Tribunal, and we accept, that he did not appreciate that Mr Sutton had a disability for the purposes of disability discrimination legislation until after these proceedings were commenced and that at all material times he treated the case as one of extended absence under the Attendance Procedure. Perhaps surprisingly, given the size of the Respondent's organisation and the responsibilities of a second line manager in relation to termination of employment, Mr Rickett said that he not received any training in

relation to disability or the legal obligations that arose in respect of disabled employees.

45. The "Rationale for Resolution" document emailed to Mr Rickett, contained five options for the decision maker: continue to accommodate absence / identify adjustments to support a return to work / terminate employment on grounds of impaired capability due to ill health / implement medical retirement / and in exceptional circumstances re-refer for further advice, for example to the OHS or to the Employee Assistance Programme [165].

46. Following receipt of the email from Ms Batt, Mr Rickett's PA sent another standard form letter to Mr Sutton [172 – 173]. The letter observed that there appeared to be no clear indication of a return to work and that accordingly, Mr Rickett would like to meet Mr Sutton on 10 October at a location in Portsmouth to discuss the situation with him. The letter went on to say that if there were no indications of a return to work then one of the considerations from the meeting would be termination of employment on grounds of impaired capability due to ill health.

47. On 22 September 2016 Mr Crabb emailed Ms Batt and Mr Rickett indicating he had met Mr Sutton that day and picked up a sick note until the end of September [174 & 171]. Mr Crabb said that Mr Sutton was suffering from permanent pins and needles in his feet and hands, but that this may improve. He also noted that he got tired very quickly. He concluded by saying: "*Graham is still looking to return to work – I have issues with what he will be fit to do??".*

48. On 1 October 2016 a further certificate was submitted indicating that Mr Sutton was unfit for work to 31 October 2016 [176].

49. A short report was obtained from the OHS dated 3 October 2016. This briefly summarised the position thus far and indicated a telephone assessment had been held with the Claimant that day. The adviser said she had discussed the case with one of the physicians and it was felt due to the symptoms described it would be more appropriate for the Claimant to be assessed in a face to face setting with an OH Physician [177].

50. As a result of this decision, a face to face assessment with the Claimant was arranged for 17 October 2016. On 6 October 2016 Ms Batt advised Mr Rickett by email that although the OHS assessment would take place after the intended date of the resolution meeting (10 October 2016), the meeting could still go ahead, as it was to understand from Mr Sutton when he felt able to return to work and what his GP had advised he was able to return to. She said that once the OHS assessment had taken place, their guidance could be taken into account before he reached his decision [183]. Whether or not the resolution meeting was to go ahead in the absence of the OHS assessment, we consider that fairness required provision to be made to discuss the contents of that report with Mr Sutton once it was available and before a decision was made to dismiss him. The need for this was reinforced by the contents of the report, once it was available, given that it raised the prospect

of the Claimant returning to work in an adjusted or alternative role (see paragraphs 60 - 61 below).

51. A further letter was sent to the Claimant, asking him to attend a resolution meeting with Mr Rickett on 25 October 2016 in Worthing, as by then Mr Sutton had indicated that it would be difficult for him to travel to Portsmouth [184 – 185]. By this date the OHS examination had taken place, but the report was not yet available. Accordingly, we will describe the resolution meeting first.

The resolution meeting on 25 October 2016

52. The Claimant attended the meeting accompanied by Tony Scott of the Communications Workers Union. Mr Rickett attempted to record the meeting on his mobile phone but in the event there was a problem with the microphone and so the recording was not intelligible. Mr Rickett had only taken bullet point notes during the meeting, but after realising the problem with the recording, he prepared a fuller note using the bullet points and his memory. His note was emailed on 10 November 2016 [197] and Mr Rickett accepted to the Tribunal that he did not prepare it in the days immediately following the meeting. There is a section at the top of the second page of the notes, which Mr Rickett accepted appeared to be cut and pasted from the "Rationale for Resolution" document, setting out the five options available to him, rather than it being a reflection of what was discussed at that point of the meeting. Further, it is evident from the relatively short length of the note, that it is not a verbatim text. Accordingly, this is not a situation where the meeting note [191 – 192] can be regarded as a fairly definitive account of what occurred at the meeting; and the fact that something does not appear in these notes, does not of itself indicate that it was not said.

53. The timings in the notes indicate that the meeting lasted 19 minutes. A significant part of the meeting was taken up with introductions, an explanation of its purpose and a re-cap of the history to date. The position with pay was confirmed and it was noted that Mr Sutton was already in receipt of his pension so that medical retirement was not an option. Reference was made to the outstanding OHS report.

54. The notes record that Mr Sutton said he could not come back to full duties at that time, that he struggled to hold things and he had limited dexterity with pins and needles in his hands and feet. As regards alternatives, it was noted that Mr Rickett asked Mr Sutton what duties he could do and he said he had always been a field engineer working on outside roles and he did not have computer skills.

55. There were two potentially significant disputes of fact between the parties which we had to resolve. Firstly, Mr Rickett said that Mr Sutton told him at the meeting that he was not fit to return to work in any capacity, as opposed to simply saying that he was not currently fit for <u>full</u> duties. The Claimant denied saying this. Secondly, Mr Sutton said he indicated at the meeting he could still work as part of a two person manhole team if the duties were re-distributed amongst the two team members; whereas Mr Rickett denied that

this had been raised.

56. We accept the Claimant did flag the possibility of a return to a two person manhole team with a re-allocation of duties so that he could avoid entering the manhole and undertaking tasks that required fine motor skills, which he was not able to do. Consistent with the proposition that he did raise this, one of the Claimant's grounds of appeal was that he had done so at the resolution meeting but it had not been addressed (see paragraph 74 below). Although Mr Sutton did not seek a formal amendment of the meeting notes in this or other respects, there was a delay in his receiving them (see paragraphs 63 and 71 below), which explains why he dealt with the point by way of a ground of appeal instead. In addition, we note that the Claimant enjoyed his work on the manhole team and we consider it likely that he would have tried to find a way to continue in that role if possible. We accept, as the Claimant alleged, that when he raised it, Mr Rickett did not engage in any detailed discussion of this topic with him.

57. We also accept that the Claimant did not tell Mr Rickett that he was not currently able to return in any capacity. This does not appear in the meeting notes. We consider that Mr Rickett would have regarded this information as highly significant had it been said in this context where he had to determine whether the employment should be terminated. If this had been said by Mr Sutton, we would have expected it to have loomed large in Mr Rickett's thinking and for it to have formed one of his bullet points and featured in his fuller note. Furthermore the discussion that was noted about Mr Sutton's other skills and experience is at least partly inconsistent with the proposition that he said he was not fit to return to work in any capacity.

58. We return to consider this meeting more fully when we set out our conclusions in relation to the unfair dismissal claim. For now, we note our surprise that the meeting was so brief and lacked any detailed consideration of the feasibility of a return to work in an alternative capacity and any detailed consideration of how much further time the Claimant would need before he was able to return.

The OHS report and the decision to dismiss

59. A further certificate dated 31 October 2016 was submitted indicating that the Claimant would not be able to return to work up to 30 November 2016 [194].

60. The Respondent received the OHS report on 3 November 2016 [188 – 190]. The report stated that Mr Sutton had been assessed by one of the OH physicians, Dr Abaecheta (referred to as "my colleague" in the text that followed, written by Dr Maimbolwa).

61. After summarising the past history, the report described the current situation as follows: "*He generally feels well. He does not feel fatigued. His walking is affected as he is not steady on his feet. He feels as though he is walking on broken glass. He said that his feet, when seated, feel like blocks of ice…Manual dexterity was also impaired and he could not pick up a coin with ease from a flat surface. My colleague advised that Mr Sutton is unfit to drive….My colleague considers that Mr Sutton is unfit to return to the role due*

to the requirements to climb ladders work in confined spaces and work fiddly wires. He is however considered fit to perform alternative duties that do not require driving and do not require significant manual dexterity. He may also struggle with sedentary roles due to the reduced dexterity and numbness in his hands such as with writing or typing…..My colleague is of the view that he may perform some light administrative work such as filing or at reception or working on the telephone".

62. The report then addressed five specific questions. As regards likely date of return to work, the indication given was that Dr Abaecheta was not able to advise on a likely return to work date due to the ongoing symptoms, but that it was "*hoped that his peripheral neuropathy will improve over a period of 3 – 6 months"*; and "*He is currently unfit for his substantive post but a return to work could take place sooner if an alternative suitable role is found for him in the interim*". As regards adjustments, it was noted that Mr Sutton may benefit from the adjustments indicated above (which must have been a reference to the adjustments to his role). In answer to other questions, it was stated that Mr Sutton was currently unable to perform his substantive role and that it would take several months for the peripheral neuropathy to improve sufficiently if at all.

63. In accordance with a request he had made during the telephone assessment with the OHS, the report was first sent to the Claimant. However, he was no longer receiving / accessing emails at his BT email address on a regular basis and so he did not see it at this stage. Mr Rickett did not attempt to discuss the report with Mr Sutton after he received it. We consider that he should have done, as we explain in more detail when we come on to address liability issues.

64. By letter dated 10 November 2016 Mr Rickett wrote to the Claimant indicating that he had decided to terminate his employment on grounds of impaired capability due to ill health "*in accordance with the Attendance Procedure*". He was to be given 12 weeks notice, so that his last day of employment was to be 6 February 2017 [198 – 199]. A rationale for the decision was enclosed [200 – 201]. In fact the letter was sent to the Claimant's previous home address and so a further version of the letter was sent to his correct address dated 16 November 2016 and giving a notice period that expired on 10 February 2017 [202 – 203].

65. Mr Rickett's rationale referred to the view set out in the OHS report that Mr Sutton was unfit to return to his substantive role (for reasons that were summarised) and that it was difficult to predict whether his symptoms would improve sufficiently for him to return to this role in the future. Reference was made to him being unable to commit to a return to work date at the resolution meeting. Mr Rickett then noted the OHS advice that Mr Sutton may be able to perform some light administrative work, but said: "*Unfortunately I do not have a role that fits in with these criteria. However Graham informed me during the meeting that he remained unfit to consider a return to work*". Mr Rickett accepted in his evidence to the Tribunal that he did not look beyond the roles under his own management before arriving at this conclusion. It will also be

recalled that we have rejected the proposition that Mr Sutton said at the resolution meeting that he was unfit to return to any role (see paragraph 65 above).

66. As regards the implications for the business, the rationale noted that "*We have been unable to resource between 3 – 5 customers new service or repair there [sic] existing service. This was potentially 600 customers that Graham could have given service if he was in work*". It was also said that Mr Sutton's current role had to be backfilled from another team, which in turn put an extra strain on the team and increased overtime, which was an extra cost to his business unit. Reference was also made to the costs of Mr Sutton's annual salary. As regards the reference to 3 – 5 customers, Mr Rickett explained to the Tribunal that this was an average figure drawn from the number of customers a BT engineer would generally be expected to assist in a day. Further, that throughout the Claimant's absence, his role in the manhole team had been covered by an engineer who usually worked solo on customer service jobs, such as repairs and installations. He also clarified the impact was not that customers received no service, but that they received a delayed service. Some of the work was covered by overtime of other employees and this was paid at 1.5 or 1.7 of normal pay. No specific figure for the overall costs involved was provided.

67. When Mr Collins gave his evidence to the Tribunal he said that the cost of Mr Sutton's absence was not something that was a significant factor for him (as compared to the returning to work issue).

68. Had Mr Sutton remained in the Respondent's employment, in accordance with the usual procedure, he would have dropped to receiving no pay from 6 December 2016.

The Claimant's appeal

69. The Claimant indicated his intention to appeal the decision to dismiss him and Mark Collins was assigned to consider the appeal. A meeting in London was proposed for 5 December 2016 [214], but the Claimant left a message indicating that he could not attend this [215].

70. A certificate indicating that the Claimant was unfit for work up to 1 January 2017 was submitted at the beginning of December [216]. Subsequently, a certificate covering the period to 12 March 2017 was submitted, again indicating that the Claimant was not fit for work [223].

71. By an email dated 11 December 2016 (sent from his wife's personal email address), the Claimant requested a number of documents including the Attendance Policy, the OHS report and the notes from the resolution meeting. Although the latter two documents at least had been sent to his BT email address, we have already noted that he had not received / seen the documents by that means. These documents were provided by Mr Collins in response the next day [217 – 219], so that the Claimant was able to consider them at this stage.

72. The Claimant subsequently indicated that he did not wish to attend an appeal meeting in person. He asked that the matter be considered on the basis of his written representations. This was a reasonable and understandable request in light of what had gone before and we note that part of Mr Sutton's reason for doing this, as he explained to the Tribunal, was because he felt he could better explain his points this way.

73. The Claimant set out his grounds of appeal in an email sent on 31 January 2017 [225 – 227]. He began by saying how disappointed he was to have been dismissed and that he had hoped to undertake his final working years with the Respondent. He said that his prognosis had been very unclear for a number of months after he first received the cancer diagnosis, but that in the last few weeks he had started to feel that his recovery was returning some normality to his life. He said that whilst he still had side effects he was seeing a specialist and they were looking at a treatment plan and how best to move forwards. He pointed out that he had disability protected by the Equality Act and that he did not feel he had been treated fairly.

74. The Claimant then indentified five grounds of appeal. Firstly, that home visits made by Mr Crabb had been insufficiently supportive and inadequately documented. Secondly, that no reasonable adjustment had been made to adjust the trigger points in terms of the length of his absence. He said he felt he had been treated like someone on regular long-term sickness absence and not as someone with a disability. Thirdly, Mr Sutton said: "*At the meeting on the 25th it was spoken about other duties and I offered that I could still work as a two man team*". He went on to say he had indicated that he could not confirm his return until he saw his specialist in January and that once he had spoken to them, he would look at his options. He pointed out that the resolution meeting notes did not refer to these matters. Fourthly, he complained that the OHS report was rushed and inaccurate. He clarified in his evidence to the Tribunal, that the inaccuracy lay in saying he could not drive, when he was able to do (as was subsequently confirmed to him by his GP). Fifthly, he offered a critique of the points made by Mr Rickett as to the impact on the business and he noted that no supporting evidence was provided.

75. Mr Sutton concluded by saying that he felt he had been discriminated against because of his disability; that reasonable adjustments had not been made; and that he had not been given the opportunity to consult with his specialist before the decision was made to dismiss him.

76. By email sent on 6 February 2017 Mr Collins asked Mr Sutton if he had now seen his specialist and if there was anything he wanted to add [225]. Mr Sutton sent two emails in response. The first, sent on 8 February 2017, summarised his recent medical history, referred to the stress caused by the March 2016 letter from Mr Rickett and stated that the Respondent had failed to make any workplace adjustments for him [228 – 229]. The second, sent on 9 February 2017, said that following his January appointment his treatment remained ongoing and his next appointment was 28 February 2017 [230].

77. By letter dated 14 February 2017 Mr Collins indicated that he upheld the decision to dismiss the Claimant. He emphasised that Mr Sutton had been "*absent from work for over a year without any certainty regarding your ability to return to full service*". He continued that whilst he was completely sympathetic to the reasons for the absence, he had concluded that Mr Rickett's decision was fair and appropriate and consistent with BT's Attendance policy [231].

78. The letter enclosed a more detailed rationale, responding to each of the five grounds of appeal in turn [232 – 234]. As regards the first ground, Mr Collins acknowledged the home visits may not have fully complied with ACAS' best practice, but he considered they were in line with the Respondent's policy and supportive. As regards the second ground, Mr Collins commented that where health issues were preventing an individual from giving regular and effective service, this was recorded as sickness absence and the attendance policy was adhered to. As regards the third ground, Mr Collins addressed a subsidiary point mentioned by Mr Sutton around the notes of the resolution meeting not being signed, however he failed to address the central complaint namely Mr Rickett's alleged failure to consider or make reasonable adjustments to his usual work duties. In his evidence to the Tribunal, Mr Collins accepted that he should have addressed this point. In relation to the fourth ground, Mr Collins said he did not believe that any unhappiness Mr Sutton had with the quality of service from the OHS had impacted upon the decision to terminate his employment. As regards the fifth ground concerning impact on the business, he said that the Respondent prided itself on delivery of customer service and that no business could support an indefinite absence. (As set out at paragraph 67 above, Mr Collins explained to the Tribunal that the cost to the business of the Claimant's absence was very much a secondary consideration for him.)

79. Mr Collins told the Tribunal that he did appreciate Mr Sutton was a disabled person when he considered the appeal. However, it is apparent that he did not engage in any detail with the points raised concerning reasonable adjustments and he based his decision on the application of the Attendance Procedure. In both the covering letter and the rationale, he referred to the Claimant being unable to give a clear time frame in which he could return to full duties. He did not make reference to or give specific consideration to the possibility of Mr Sutton returning to an adjusted role or a different role.

Relevant Law

Unfair dismissal

80. Where an employee is dismissed and claims unfair dismissal, it is incumbent upon a Respondent to establish a potentially fair reason for the dismissal from the exhaustive statutory list set out in section 98(1) and (2) of the ERA 1996. 'Capability' is one of the reasons there listed.

81. If the Respondent establishes a potentially fair reason for the dismissal, the Tribunal must assess whether the decision to dismiss was fair or unfair which

in light of the reason identified "*depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably treating it as a sufficient reason for dismissing the employee*": section 98(4) ERA. This entails the Tribunal applying the well known band of reasonable responses test; that is to say the Tribunal must not substitute its own view for that of the employer, but must consider whether the employer's decision fell outside the range of reasonable responses open to it in the circumstances. However, appellate case law has emphasised that this is not to be equated with a perversity test: see for example ***O'Brien v Bolton St Catherine's Academy*** [2017] ICR 737, Underhill LJ at paragraph 11.

82. In a long-term sickness case, the basic question for the Tribunal to determine will be whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer? The relevant circumstances will include the nature of the illness, the likely length of the continuing absence and the need of the employers to have the work done that the employee was engaged to do. For these propositions see ***Spencer v Paragon Wallpapers Ltd*** [1977] ICR 301 EAT at 306G – 307D. Furthermore, in relation to capability dismissals for long-term ill health it is expected that a reasonable employer will consult with an employee before deciding whether to dismiss; will conduct such medical investigations as are appropriate to inform it of the nature of the ill health and the prognosis; and consider other options, in particular whether suitable alternative employment is available within the organisation, see for example: ***East Lindsey DC v Daubney*** [1977] IRLR 181 EAT.

83. If a dismissal is unfair, the Tribunal should go on to consider whether the evidence shows that there was a significant chance that if a fair procedure had been followed there would still have been a dismissal, see for example the guidance given in ***Andrews v Software 2000 Ltd*** [2007] ICR 825, which recognises that this may involve a significant degree of speculation. (This guidance needs to be read taking account of the fact that section 98A ERA 1996 has been abolished.)

Disability discrimination

84. By virtue of Schedule 1, paragraph 6(1) EA 2010 cancer is a deemed disability.

Discrimination arising from disability

85. Discrimination arising from disability is defined by section 15(1) EA 2010, it provides:

> "*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".*

86. Mr Cox accepted the correctness of the contents of paragraph 13 of Mr Uduje's written summary of his closing submissions, namely that to be proportionate "*a measure has to be both an appropriate means of achieving a legitimate aim and (reasonably) necessary in order to do so*" (per Baroness Hale in ***Chief Constable of West Yorkshire Police v Homer*** [2012] ICR 794 at paragraph 22 (a case concerned with indirect discrimination).

87. In ***Bolton v St Catherine's Academy*** (above) in the context of a long-term sickness absence, Underhill LJ discussed the relationship between a Tribunal's consideration of whether the decision to dismiss was fair and reasonable and its consideration of whether the same decision was proportionate within the meaning of section 15 EA 2010, see paragraphs 52 – 54 (including footnote 2). He expressed confidence that the Tribunal in that case had not meant to suggest an unlawful discriminatory dismissal was necessarily an unfair dismissal, but nonetheless he doubted that the application of the two tests should lead to different results in practice in this kind of context. He explained this by observing that on the one hand a proportionality test "*can and should accommodate a substantial degree of respect for the decision maker as to his reasonable needs (provided he has acted rationally and responsibly*)" and on the other hand, the exercise required under section 98(4) "*does not reduce the task of the tribunal…to one of "quasi-Wednesbury" review*". In this passage he also noted that both tests involved an objective evaluation.

<u>Breach of a duty to make reasonable adjustments</u>

88. Section 21 EA 2010 indicates that a failure to comply with a duty to make reasonable adjustments constitutes discrimination against a disabled person. Sections 20 EA 2010 provides that a duty arises (amongst other situations) as follows:

> *"(3) ……where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter [employment by A] in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

89. Appellate case law has emphasised that it is important for the Tribunal to identify and keep in mind the nature and extent of the substantial disadvantage suffered by the Claimant, in order to be in a position to evaluate the impact of the proposed adjustments in terms of alleviating that disadvantage: see for example ***Griffiths v Secretary of State for Work and Pensions*** [2015] EWCA Civ 1265, Elias LJ at paragraph 44. (Paragraphs 47 and 58 in the same judgment underscore that Mr Cox was correct to concede that in this instance the PCPs that were applied gave rise to the alleged substantial disadvantage.)

90. Once it is conceded / concluded that the duty to make reasonable adjustments arose, the question for the Tribunal is an objective one, namely whether or not, having regard to all relevant material, the Respondent complied with a duty to make reasonable adjustments; it is an assessment

focused upon outcomes rather than process. Whether or not the Respondent ascertained such material via consultation with the Claimant at the time is not in point; it may be that a Respondent complies with the duty fortuitously rather than conscientiously or, conversely, obtains all relevant information, but still fails to take the required reasonable steps: see the discussion in ***Royal Bank of Scotland v Ashton*** [2011] ICR 632 EAT at paragraphs 19 – 24. It is not necessary for it to be shown that the adjustment in question would definitely have alleviate the substantial disadvantage in question, it is sufficient if there is a real prospect of it doing so: ***Royal Bank of Scotland v Ashton*** (above) at paragraph 23. However, the degree of uncertainty involved is a relevant factor to take into account when considering reasonableness: ***Griffiths v Secretary of State for Work and Pensions*** (above) at paragraph 29.

91. Paragraph 6.28 of the EHRC's statutory *Code of Practice on Employment* gives an indication of the factors that a Tribunal may take into account in considering whether an adjustment is reasonable, these include: the extent to which the step would prevent the effect for which the duty was imposed; the extent to which it is practicable to take that step; the financial and other costs involved and the extent of the Respondent's resources; and the size of the Respondent and the nature of the undertaking.

92. The relationship between a breach of the duty to make reasonable adjustments and discrimination arising from disability in a dismissal case was discussed by Elias LJ in ***Griffiths v Secretary of State for Work and Pensions*** (above) at paragraph 26. If a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, it would be expected that the dismissal will not be proportionate and therefore justified.

Time limits

93. Section 123(3)(b) EA 2010 provides that for the purposes of the rules on time limits contained in the statute, "*failure to do something is to be treated as occurring when the person in question decided on it*". Subsection (4) provides that in the absence of evidence to the contrary, a person is to be taken to decide on a failure to do something, when: (a) he does an act inconsistent with doing it; or (b) if he does no inconsistent act, on the expiry of the period in which he might reasonably have been expected to do it. A failure to make reasonable adjustments may be a one-off omission, in respect of which time runs in accordance with those provisions or may amount to conduct extending over a period within the meaning of section 123(3)(a) (where time runs from the end of the period in question): see ***Kingston upon Hull City Council v Matuszowicz*** (2009) ICR 1170 CA; and ***Olenloa v North West London Hospitals NHS Trust*** EAT 0599/11. It will depend upon the circumstances of the case, the nature of the adjustment in question and (potentially) on the way the respective cases are pleaded.

94. The Tribunal has a discretion to extend the time for presenting a claim where it considers it just and equitable to do so: section 123(1)(b) EA 2010.

Conclusions

95. As we have noted when setting out the relevant legal principles, there is a significant degree of overlap in terms of the matters that we have to consider and the evidence that bears on the three causes of action. However, we will begin by addressing the question of whether the dismissal was unfair, recognising that unlike in relation to the disability discrimination claims where the tests are purely objective, our consideration includes the extent of the employer's inquiries and the reasoning processes of the decision-makers.

Unfair dismissal: did the Respondent act reasonably in dismissing the Claimant

96. In summary, Mr Cole's contention, as set out in his written closing submissions and developed orally, was that the Respondent acted reasonably given: the length of time that Mr Sutton had already been absent from work; the lack of clarity as to his return date and over whether his peripheral neuropathy symptoms would in fact improve; that currently he could only fulfil a role if temporary arrangements were made with operational implications; and he did not have experience of working in other roles. We have borne these points in mind and in evaluating the Respondent's position we have reminded ourselves that it is not for us to substitute our view for that of the Respondent's decision-makers. That said, the degree of respect that should be accorded to an employer's decision not to postpone a decision on dismissal to await further developments, is inevitably lessened where, as here, we find that the employer did not first appropriately inform itself of the position nor reasonably consider alternatives.

Consultation and information gathering

97. We have first examined whether Mr Rickett adequately informed himself of the relevant information by consultation with the Claimant and/or obtaining appropriate medical evidence before making the decision to dismiss. We concluded that he did not.

98. We conclude that the process was characterised by a lack of meaningful engagement with the Claimant. The telephone conversation on 19 April was brief (see paragraphs 36 - 38 above). The correspondence that had preceded it was alienating and discouraging for the Claimant (paragraphs 31 - 32 above). The resolution meeting on 25 October 2016 lasted only 19 minutes in total, a surprisingly short period of time given the topics that we would expect a reasonable employer to have discussed at that juncture with Mr Sutton in terms of potential adjustments. As we have found at paragraph 56 above, the Claimant raised the possibility of a returning to work on the manhole team with a revised allocation of duties, but this was not discussed nor considered by Mr Rickett. There was then no attempt to hold a further discussion with the Claimant after the OHS report was received by the employer, despite it indicating that he was fit for certain alternative duties that did not require driving or significant manual dexterity (paragraphs 50, 61 - 62 above). The cumulative effect of these failings and omissions, arising in a context where

the Claimant had a good work record and had repeatedly stated that he wanted to get back to work when fit to do so, were such as to the take the Respondent's actions outside of those which would be expected of a reasonable employer.

99. Mr Collins consideration of the appeal did not rectify any of these matters, since he also did not engage with the possibility of the Claimant returning to work in an alternative capacity or with adjustments to his role, instead concentrating, like Mr Rickett before him, on Mr Sutton's inability to return to his full duties (see paragraphs 78 – 79 above).

100. In so far as Mr Cole placed emphasis upon the continuing receipt of certificates of unfitness for work; it would not have been reasonable for Mr Rickett or Mr Collins to regard this as a conclusive indication that the Claimant was unfit for work in any capacity, in light of the contrary opinion expressed in the OHS report after a much more detailed consideration of this topic and in light of the failure to discuss the same with the Claimant or to initiate additional enquiries, for example of his doctors. (In fact their focus upon the Claimant not being fit for full duties, tends to suggest that neither Mr Rickett nor Mr Collins attributed this significance to the certificates in terms of whether he was fit for some duties, in any event).

Consideration of alternative or adjusted roles

101. Despite the OHS report concluding that the Claimant was able to return to an alternative role that did not involve driving or manual dexterity, Mr Rickett accepted that no consideration at all was given to placing him in such a role, beyond his assessment that he personally did not have such a role to fill (paragraph 65 above). Mr Collins did not consider this either.

102. We conclude that when faced with an employee with a good work record, who was genuinely keen to return to work if an appropriate role could be found and who the OHS considered fit to return to alternative duties, a reasonable employer would have taken steps to try and identify potential options within the organisation and to discuss them with the Claimant, all the more so given the size of the Respondent and the range of diverse jobs potentially available within the organisation. As set out at paragraphs 19, 21 & 22 above, the Respondent's own policies envisaged such steps being taken. The failure to do so in this instance was misplaced and unreasonable.

103. As the inquiries that should have been made were not made and the Respondent provided no evidence to the Tribunal as to what roles might have been found at the time, for example in relation to filing or reception duties, we do not know the specifics of what may have been available. However, given the size and nature of the Respondent's business, it is likely that a role could have been identified to discuss with the Claimant. We accept the Claimant's evidence to the Tribunal that he would have been open minded about considering such roles and willing to undergo a trial period (with appropriate training if necessary).

104. We also conclude that a reasonable employer would have considered the

feasibility of re-allocating the two person manhole team duties to enable the Claimant to return to a re-adjusted version of his previous role. We have found that this was raised by Mr Sutton at the resolution meeting (paragraph 56 above). It was not given meaningful consideration by either Mr Rickett or Mr Collins and this was unreasonable.

105. As regards the feasibility of his proposal, Mr Sutton told the Tribunal that it would have been uncomfortable to stand by the manhole (in the safety man role), but that it was something he could have done by the time of his dismissal. The discomfort he experiences from standing and walking has somewhat improved since then. If this aspect was a significant problem in the early days, we consider that a portable, folding chair could have been provided without difficulty. We consider from the evidence that we heard that Mr Sutton would have been able to undertake the majority of the tasks involved in the role and in so far as he was unable to undertake those that involved fine motor skills, for example screwing rods together before passing them to his colleague in the manhole, this could easily have been done by that colleague before his descent from ground level. It was suggested that the other employee in the team would resent Mr Sutton's restricted role and the greater burden that fell on him. However, this was a matter of pure speculation, with the Respondent advancing no evidence to that effect. Furthermore, given the reason for Mr Sutton's absence, his long-standing working relationships with others in the manhole teams and the fact that his team mate could have been rotated, we do not accept that this presented a significant problem. We have already noted that the Claimant disputed the assessment he was unable to drive (paragraph 74 above). He told us that he did do so. In any event it was not a necessity for team members to arrive in separate vehicles and we accept, as Mr Sutton told us, that it was rare for him to be asked to attend solo jobs.

106. We have also taken into account the safety aspects. Although we were told that the safety man might need to help pull his colleague out of the manhole in the event of an emergency, we were also told that this was an eventuality that rarely occurred and that it would only arise if: (a) there was an emergency necessitating a quick exit and (b) the ladder which afforded the usual means of exit (paragraph 14 above) was in poor repair or otherwise not fit for purpose. Whilst health and safety factors are obviously of considerable importance, the situations in which both these contingencies would arise at the same time would indeed be rare. Furthermore, we accept as the Claimant told us in his evidence, that he could have helped a colleague out in an emergency if he had needed to; the medical evidence did not indicate to the contrary and the issue would be one of discomfort to him as opposed to the fact that he was physically incapable of making that brief exertion.

<u>Waiting longer before deciding whether to dismiss</u>

107. We conclude that a reasonable employer would have waited a further six months at least before deciding on a dismissal. There was nothing in Mr Rickett's rationale document to suggest that he specifically considered waiting for a period of months.

108. In arriving at this conclusion, we have borne in mind the certificates stating Mr Sutton was unfit for work (which we have addressed at paragraph 100 above). We have also borne in mind the uncertainty contained within the OHS report in terms of whether his peripheral neuropathy would improve significantly over the next three – six months or not. However, given that this timescale was proposed in the report as a period within which the extent of any improvement could be more apparent [189 – 190] and given the current uncertainty one way or the other as to whether this would occur, we conclude that when taken with the other factors which we go on to summarise, a reasonable employer would have waited for that period.

109. In so far as Mr Cole attached significance to the contents of the Claimant's disability impact statement in respect of this issue: (a) it was written to describe the substantial adverse effects he experienced as a disabled person and not to address what kinds of work he could do; and (b) it was a document written nine months after the dismissal decision about Mr Sutton's then condition and as such contained information that was not known to either him or the Respondent at the time we are concerned with.

110. In concluding that a reasonable employer would have waited for at least six months, we were influenced in particular by: (i) the Claimant's very long length of service and good track record with his employers; (ii) the fact he was genuinely keen to return to work to an appropriate role and had cooperated with the process; (iii) there was a significant prospect of his condition improving over the next six months, as we have just discussed; (iv) he was currently fit to do alternative duties or adjusted duties (see paragraphs 102 - 106 above) and it is likely in an organisation of the scale and nature of the Respondent that he could have been accommodated for that time (and beyond) in one or other of these ways, had this been attempted; (v) he was about to drop down to zero salary, so there would be no cost to the business in that regard if he remained absent / alternatively he would be providing services to the business in an alternative role; and (vi), as discussed in the next paragraph, the impact on the business, whilst it existed, was relatively small.

111. We have already summarised Mr Rickett's description of the effect upon the business (paragraph 66 above). The impact on customers, in terms of delay, appeared to be a moderate one, albeit we were given no specifics by the Respondent. The Claimant's usual role was being performed by another employee, but with some additional costs in terms of overtime. The sum involved has not been quantified by the Respondent and Mr Collins told us that he did not regard this as a significant factor (paragraph 67 above).

112. Although further time had passed when Mr Collins determined the appeal in February 2017, we consider that nothing substantial had occurred in the interim to alter this analysis. Furthermore, like Mr Rickett, Mr Collins gave no specific consideration to deferring the decision in this way.

113. Accordingly, for all these cumulative reasons we consider that the decision to dismiss the Claimant was unreasonable in the sense of being outside the

available band of reasonable responses to the situation. We consider the "*Polkey*" question below after we have arrived at our liability conclusions in relation to the discrimination claims.

Disability discrimination

Breach of a duty to make reasonable adjustments

114. We have considered this claim before the section 15 EA 2010 claim, given that a finding of a failure to make reasonable adjustments is very likely, in turn, to determine whether the dismissal was a proportionate step or not (see paragraph 92 above).

115. We remind ourselves that for present purposes we must assess matters in terms of outcomes and that whether Mr Rickett and Mr Collins in fact considered such matters and/or obtained the relevant information is not in point. The three adjustments we were invited to consider are set out at paragraph 8.8 above and we have examined them in turn.

116. We do consider that it would have been a reasonable adjustment to have allowed the Claimant a further six months to return to his substantive role. In arriving at this conclusion we rely on the features we have already highlighted at paragraph 110 above. As at November 2016 there was at least a real prospect of Mr Sutton's symptoms improving sufficiently by that time, as set out in the OHS report. The implications for the Respondent's business were not sufficiently significant to render this other than a reasonable step (see paragraphs 110 - 111 above).

117. We also consider that it would have been a reasonable adjustment to permit the Claimant to work as part of a two person manhole team with a revised allocation of duties between them. We have explained our reasons in this regard at paragraphs 105 – 106 above.

118. We also consider that it would have been a reasonable adjustment to have taken further steps to identify an alternative role for the Claimant, at the very least, on a temporary basis initially to trial this arrangement. Mr Cole submitted that this was really a complaint about process and as such was analogous to a failure to consult, which could not in and of itself found a breach of the duty (see paragraph 90 above). However, the substance of the complaint is that the Respondent did not find an alternative role for the Claimant and, as such, we accept that this is capable of amounting to a failure to make a reasonable adjustment. We have indicated that we accept Mr Sutton's evidence to the Tribunal that he was willing to try a new role, at least on a trial basis and with any necessary training. As we have already noted, given the size and nature of the Respondent's organisation, there was at least a real prospect that taking such a course would have kept him in employment.

Discrimination arising from disability

119. We consider that the decision to dismiss the Claimant was disproportionate, given our finding that there were significant reasonable adjustments that should have been made by the Respondent rather than dismissing him when

they did. Had any or all of these adjustments been made then he would have remained in the Respondent's employment for at least a further six months and with a significant prospect of remaining an employee thereafter. In these circumstances we also conclude that deciding to dismiss the Claimant was not a reasonably necessary step to take. We rely on the material we have already discussed in detail in respect of the failure to make reasonable adjustments claim.

Time limits

120. Although the time limit objection had been primarily directed at the direct discrimination claim (when it was a live issue), Mr Cole submitted in closing that the time for presenting a claim in relation to the breach of the duty to make reasonable adjustments had expired before the claim was lodged with the Tribunal. He contended that time ran from 9 November 2016, the date of the dismissal decision pursuant to section 123(3)(b) EA 2010, as this was an act inconsistent with the making of the adjustments relied upon. The claim was presented on 11 May 2017; and the Early Conciliation Certificate recorded that ACAS received notification of the claim on 21 March 2017 and the certificate was issued on 20 April 2017. Accordingly, any act prior to 22 December 2016 fell outside of the prescribed time limit.

121. We conclude that this part of the claim was presented in time. As we have set out at paragraph 93 above, we do not understand the appellate case law to preclude the possibility that a breach of a duty to make reasonable adjustments may be part of an act extending over a period, so that time runs from the end of that period. Here we consider that the decision to dismiss can be regarded as part of the conduct extending over a period with the date when his dismissal took effect (10 February 2017) and / or the decision to reject his appeal (on 14 February 2017). Mr Cole accepted that both of these later acts were in time. The adjustments that were sought could have been made at any point during this period and were at least in substantial part specifically raised with Mr Collins in the context of the appeal. Furthermore, in any event the failure to make reasonable adjustments claim can equally be formulated as dating from the rejection of the appeal.

122. If we are wrong on that time limits point, we would have no hesitation in finding that it was just and equitable to extend time given the very close inter-relationship on the facts and evidence between the failure to make reasonable adjustments claim on the one hand and the section 15 EA 2010 and the unfair dismissal claim, on the other, both of which were accepted to be brought within the prescribed limitation period and all of which concerned the question of whether there was a sufficient basis for the Claimant's dismissal.

The "Polkey" issue

123. In light of our findings on the liability issues, we then considered what the prospects were of the Claimant being fairly and lawfully dismissed in any event, had he not been unfairly dismissed and not subject to disability discrimination in relation to that dismissal.

124. It follows from the conclusions that we have expressed above, that it would

not have been fair to dismiss the Claimant for the first six months after his dismissal.

125. As regards the period that followed, both Counsel acknowledged and accepted that the assessment inevitably involved a significant degree of speculation on our part, in which the Tribunal simply had to make the best assessment that it could upon the relatively limited evidence.

126. In addition to the material that we have already discussed, we had regard for this purpose to the contents of the Claimant's disability impact statement (with the caveat we noted at paragraph 109 above, as to the focus of this document), as well as his evidence to the Tribunal of his recent condition, which had involved some improvement in his symptoms. Nonetheless, the difficulties with fine motor skills persist so that looking at the current position, we do not consider it realistic that the Claimant would have returned to his full duties in a manhole team.

127. However, that conclusion does not by any means rule out a longer lasting adjusted duties role within the manhole teams and even less so alternative employment within the Respondent's relatively large organisation. We have already referred to the lack of specific information provided to the Tribunal in terms of other jobs that were or may have been available within the Respondent. However, given the relatively common nature of roles involving reception duties, filing duties and positions of that nature becoming available in an organisation such as British Telecom and given the Claimant's flexibility and willingness, we do consider that there was a substantial prospect of the Claimant securing an appropriate role within a suitable travelling distance for him.

128. Bearing these conclusions in mind, we consider that there was a 50% prospect of the Claimant being fairly dismissed after the six month period we have identified.

Remedy

129. After giving a summary of our decision on liability at the end of third day of the hearing, the parties had the opportunity to reflect overnight on the implications in terms of remedy.

Agreed matters and disputed issues

130. At the start of the remedy hearing the following morning, the parties informed us that a number of matters were agreed, namely:

130.1 The calculation of the basic award for unfair dismissal, being 1.5 x 20 years x £479 (the capped weekly pay) = £14,370;

130.2 That the award for loss of statutory rights was £300;

130.3 That the relevant net weekly loss of earnings figure was £374.61. This

was the uncapped figure, it being accepted that we should award loss of earnings under the successful disability discrimination claims, rather than the unfair dismissal claim;

130.4 It followed from our "Polkey" findings set out above, that the Claimant's past loss of earnings up to the hearing date, were:

(i) 26 weeks x £374.61 = £9,739.86; plus

(ii) 13 weeks (from 10 August 2017) x £187.30 (50% of net salary) = £2,434.90

This gave a total of £12,174.76

130.5 If interest was awarded pursuant to the Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996, the applicable rate was 8% p.a. and the number of days involved in the calculation was 272 days for the injury to feelings award and 136 days for the financial losses.

131. Although Mr Cole did not positively concede that we should award interest, he advanced no positive case to suggest that we should not and he did not submit that serious injustice would result if we were to do so. Accordingly, we see no reason not to follow the standard approach here. Thus, the award of interest on the past loss of earnings is:

2.96% (136 days @ 8% p.a.) of £12,174.76 = £360.37.

132. Mr Uduje accepted that a declaration would add nothing in the circumstances and that a claim for recommendations to be made under the EA 2010 was not pursued.

133. Accordingly, we were only concerned with the assessment of compensation and the issues that remained for our resolution in that regard were:

133.1 What level of award should be made in relation to injury to feelings?

133.2 Should we make an award of aggravated damages and if so, in what sum?

133.3 What figure should be awarded in respect of future loss of earnings?

Injury to feelings award

134. Mr Uduje submitted that the circumstances fell within the middle of the well-known bands first identified in ***Vento v Chief Constable of West Yorkshire Police (No. 2)*** (2003) ICR 318. He proposed a figure of £19,800. Mr Cole submitted that the appropriate award was at the top of the lower band / bottom of the middle band, in the region of £8,400. These figures had regard to the recent Guidance from the Presidents of the Employment Tribunals of England & Wales and Scotland as to the current "*Vento*" figures; namely a

lower band of up to £8,400; a middle band of £8,400 - £25,000; and an upper band of £25,000 - £42,000.

135. In this case we bore in mind the following features in particular:

135.1 As a result of the discrimination Mr Sutton was dismissed from a job he enjoyed and had held for 35 years. He had planned to continue in that position until the end of his working life;

135.2 The circumstances leading up to and resulting in the dismissal showed an insensitivity and a lack of willingness to actively engage with the Claimant in avoiding the termination of his employment. This included the failure to try to locate or consider adjusted or alternative roles for him;

135.3 Both these aspects were genuinely very hurtful for the Claimant.

136. In all the circumstances we consider that this is a case that comes within the mid range of the middle band. We conclude that a sum of £15,000 is appropriate.

137. We then added interest to that figure: 6% (272 days @ 8% p.a.) x £15,000 = £900.

Aggravated damages

138. We bore in mind the guidance given by the EAT in ***Commissioner of the Metropolitan Police v Shaw*** (2012) ICR 464 as to the nature of aggravated damages and the circumstances in which they may be awarded.

139. We did not regard this as a case where there are aggravating features present over and above the matters we have already identified as part of the injury to feelings award.

Future loss of earnings

140. The Respondent accepted through Mr Cole that prior to developing cancer, Mr Sutton had planned to continue working with his employers until his intended retirement when he reached 67 years of age.

141. No point was taken on mitigation of loss. However, Mr Cole submitted that rather than award loss of earning up to that date, the Tribunal should make appropriate allowance for two contingencies:

141.1 Earnings he could now command from alternative employment between the present day and attaining 67; and

141.2 The prospect that after having had to deal with cancer he might have decided to slow down in his activities and retire earlier even if he could have been retained by the Respondent.

142. We consider in light of our *Polkey* findings and the concession we have

recorded in paragraph 140, it is appropriate to award future loss of earnings up to the Claimant's 67th birthday, but to discount the figure that we would otherwise award to make appropriate allowance for these features. For the reasons set out below, we consider that only a modest discount of 25% should be made.

143. Firstly, whilst we have no doubt that the Claimant is still employable in a number of fields and we note that he said in evidence he would be willing to work and he would prefer to remain active, it is not an easy process finding a new job at the age of 64, particularly in circumstances where the Claimant has had no experience of the job market for many years. If he does attain any employment, it is very likely to be at a lower salary than he would have received from the Respondent and may well be part-time or casual work.

144. Secondly, whilst we accept that there is some chance that the Claimant would have revised his plans for the reason given by the Respondent, we do not consider it particularly likely given his wish to remain active and his enjoyment of working for the Respondent.

145. Accordingly, the loss of future earnings award is:

£187.30 (50% of weekly net salary) x 116 weeks = £21,726.80
75% of this sum = £16,295.10.

Summary of the award made

146. Accordingly the total award we make to the Claimant is **£59,400.23,** comprised as follows:

Disability discrimination

Injury to feelings:		£15,000
Plus interest		£ 900
	Total:	**£15,900**
Loss of past earnings:		£12,174.76
Plus interest		£ 360.37
Loss of future earnings		£16,295.10
	Total:	**£28,830.23**

Unfair dismissal

Basic award		£14,370
Loss of statutory rights		£ 300
	Total:	**£14,670**

147. Mr Cole suggested that our judgment direct the sums be paid within 21 days, which we have done.

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Employment Judge Williams
Date: 21 November 2017