EMPLOYMENT TRIBUNALS

Claimant: **Mr M Iqbal**

Respondent: **Department for Work and Pensions**

Heard at: **Leicester**

On: **27 – 31 March 2017**
3 – 5 April 2017

Before: **Employment Judge Ahmed**

Members: **Mr J Akhtar**
Mr C Bhogaita

Representation
Claimant: **In Person**
Respondent: **Mr J Meichen of Counsel**

JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The complaints of direct disability discrimination, indirect discrimination, victimisation, discrimination arising from disability, failure to make reasonable adjustments and harassment are all dismissed.

2. The complaint of unfair dismissal is dismissed.

REASONS

1. By a Claim Form presented to the Tribunal on 18 March 2016 Mr Mohsin Iqbal (born 18 August 1976) brings complaints of disability discrimination and unfair dismissal against his former employer, the Department for Work and Pensions ('DWP'). Mr Iqbal was employed as a Benefit Delivery Officer/Caseworker from 9 June 2009 to 26 October 2015, the 'effective date of termination'. The Claimant was dismissed by reason of capability, in particular for unsatisfactory attendance.

2. Following a Preliminary Hearing on 18 May 2016 the Claimant was directed to produce a Scott Schedule setting out the allegations. The Schedule identified 19 different allegations of disability discrimination which were originally set in brief form in the particulars of claim. The allegations were against a number of individuals all of whom with the exception of one former Team Leader attended to give oral evidence at this hearing. The Claimant has throughout represented himself. The Respondent has been represented by the Government Legal Department and by Mr Meichen of Counsel. We are grateful to both parties for their assistance throughout the proceedings.

3. In terms of oral evidence we heard from the following:-

3.1 Mr Mohsin Iqbal, the Claimant;

3.2 Mr Adam Patel (a Team Leader);

3.3 Mr Adam Mortimer (Manager);

3.4 Ms Heather Luckman (Child Maintenance Senior Leader);

3.5 Mr Ismeal Jasat (Manager);

3.6 Mr Kisshore Chauhan (Team Leader);

3.7 Mr Mike Payne (Group Leader);

3.8 Ms Angela Marsh-Davies (Dismissing Officer);

3.9 Ms Beaverly Beetison (Appeal Officer);

3.10 Ms Shaileen Sidi (Claimant's Team Leader);

4. In coming to our decision we have taken into account all of the evidence of the witnesses as set out in their witness statements and their oral evidence as well as the documents in the agreed bundle. This decision represents the unanimous views of all of three members of the Tribunal.

5. We should say a word at the outset about the bundle and the documents generally. Although the bundle was agreed prior to the hearing the Claimant wished to refer to various documents as the evidence progressed which he had either not disclosed earlier nor suggested that they should be in the bundle. Such applications were, with one exception all refused on the grounds that the documents were either irrelevant or that there was no reason why, if they had any bearing on the case they were not disclosed earlier. We accept Mr Meichen's assurance that all of the documents that the Claimant had disclosed in the disclosure process were in fact included in the bundle without any editorial excision by the Respondent. Any documents not in the bundle were either those that Mr Iqbal had chosen not to disclose or viewed by the Claimant himself as irrelevant. Accordingly, although each request was considered individually these applications were generally refused. It was noticeable however that after each such decision to exclude additional documents was made Mr Iqbal's stock response under cross examination was that his answer would be found in the documents which had been disallowed. One particular document which was allowed by consent was a purported e-mail which the Claimant allegedly sent to Mr Jasat in relation to an allegation of harassment on which we will say more

below.

6. Shortly after exchange of witness statements, Mr Iqbal sought to rely upon a number of e-mails as part of his witness statements. Mr Iqbal had not served a witness statement which was in any respect different to his ET1 'particulars'. It was not clear what evidence the Claimant was planning to rely on. As a consequence an urgent telephone Preliminary Hearing was arranged shortly before this hearing to ascertain what evidence the Claimant intended to rely on and which witnesses he would be calling. It was agreed that as to the 24 or so e-mails which the Claimant had submitted as witness statements (some which predated the issue of proceedings) would form part of the bundle of documents and the Claimant would be at liberty to call those witnesses if he wished to do so to give oral evidence. In the event the Claimant only called Mr Adam Patel to give oral evidence though it has to be said that Mr Patel's evidence was not directly relevant to the issues.

THE FACTS

7. With the exception of the allegation as to harassment, the facts are not substantially in dispute. Mr Iqbal joined the Respondent initially to work on the Jobseekers Allowance Telephony Team. He was a full time employee working 37 hours a week. His working pattern subsequently changed to 18.5 hours per week from 12 May 2015. His first Team Leader was Mr Simon Fort-Powell. When the Claimant joined DWP he explained that he suffered from a chronic skin condition called Hidredonitis Supporativa which requires regular medical treatment.

8. The Respondent has detailed attendance management policies and procedures. A first written warning is issued when attendance is irregular and the employee has reached the relevant trigger point unless any of the specified special circumstances apply. A warning is usually followed by a 6 month review period during which the employee's attendance must be deemed acceptable, that is to say it must not exceed the relevant trigger point. If attendance in the review period is acceptable, no further action is taken except that it is monitored for a further 12 months during what is known as the sustained improvement period. If at any time during the review or sustained improvement period the employee's attendance falls below the required level a manager must consider whether to issue a final written warning and subsequently dismissal.

9. The Claimant has, and continues to suffer from, a number of disabilities. His skin condition was disclosed before he joined DWP. He has subsequently disclosed that he has diabetes, suffers from thalassaemia sickle-cell anaemia, anxiety and depression, back pain, sciatica, hearing problems, bowel incontinence, foot problems, vision problems and vertigo. Although the Respondent concedes that the Claimant is a disabled person within the meaning of the Equality Act 2010, it is not clear which relevant conditions are conceded as the disabilities. We have assumed that it is all of them.

10. In September 2009, whilst at work Mr Iqbal experienced a sharp pain in his ears with some accompanying discharge of blood. Upon later medical examination he was told that he had suffered a burst ear drum. As he was on the telephony team at the time it clearly had an impact on his ability to carry out the role. Mr Fort-Powell his then line manager was on leave at the time and Ms Shaileen Sidi, who managed a different team was acting Team Leader. Ms

Sidi immediately arranged for the Claimant to be removed from telephony duties and placed him on processing work which did not involve the Claimant having to answer the phones. The Claimant was subsequently off work for surgery to his right ear. He went off work on sick leave on 24 May 2010.

11. On 11 June 2010, Ms Luckman a Senior Leader in the Child Maintenance Team who would be ultimately responsible for dealing with the absence issues, was informed that the Claimant was likely to be off for 2 months. By 27 August 2010 Mr Iqbal was still off work. As a result his case was referred to Ms Luckman to decide whether employment should be terminated by reason of long term absence. On 13 September 2010 Ms Luckman decided that instead of dismissal, which was a real possibility, she would instead issue the Claimant with an oral warning. On his return Mr Iqbal appealed against the warning by lodging a grievance. Mr Iqbal has in fact appealed every unfavourable decision by lodging a grievance.

12. Following a meeting on 19 January 2011 Ms Luckman explained the situation and her rationale. The decision to issue an oral warning was confirmed. On 24 January 2011 Mr Iqbal sent an e-mail to Ms Luckman as follows:

"Hi Heather as per our meeting on 19 January 2011 regarding the appeal for the oral warning I just want to thank you for explaining the warning to me in depth as prior to this I was a little bit confused. Hence I just want to let you know that after our meeting I have decided not to take the matter further in any way as I now have a better understanding. Once again thank you for your support and understanding also."

13. In the subsequent grievance interview meeting (the notes of which were signed as an accurate record by all relevant parties) Mr Iqbal was asked whether he had everything he needed in terms of specialist equipment to make him comfortable to which he replied: "everything to the extent that you can. You have done quite a bit".

14. Following a period of absence in early 2011, Mr Iqbal was issued with a written warning for attendance on 13 April 2011. He appealed. The appeal was not rejected initially but on further appeal the warning was withdrawn for procedural reasons.

15. There were more absences from work in August/September 2011 resulting in a written improvement warning on 14 October 2011. In April 2012 the Claimant was issued with an improvement warning for absence and given a further review period. His appeal against that warning was dismissed. In August 2012 the Claimant was called to an attendance review meeting following a number of sporadic absences. No formal action was taken but he was given a further review period. He had various absences throughout 2013 and 2014 culminating in a first written warning on 24 July 2014 and a final written warning for absence in February 2015. The Claimant's appeal against the final warning in August 2015 was allowed on procedural grounds.

16. As a result of his various disabilities Mr Iqbal was allocated an increased trigger point of 26 days in a rolling 12 month period. That is to say he had an additional 18 days on top of the standard 8 days to make allowance for his disabilities. By August 2015, the Claimant had exceeded his trigger points for absence and he was referred to a decision maker as to his continued employment. That meeting took place on 15 October 2015 before Ms Marsh-Davies. In a detailed letter of 26 October 2015 Ms Marsh-Davies

confirmed that the Claimant would be dismissed with 7 weeks' notice. The reason for dismissal was unsatisfactory attendance. The Claimant's subsequent appeal against dismissal was dealt with by Ms Beetison. Following an appeal meeting on 26 November 2016 Ms Beetison dismissed the appeal on 4 January 2016.

17. As a consequence of the Claimant's disabilities, various adjustments had been put in place. These were a specialist chair, an adjustable electronic desk, time off to attend medical appointments, a change of working pattern, no telephony work, regular paid breaks, anti-glare screen monitors, desk fan, a desk next to the window, relaxed dress standards, a desk close to the toilets, an elevated trigger point for absence, a 'buddy' to assist him with undertaking his duties because he could not do telephone work.

18. The Claimant has to attend hospital regularly in respect of his skin condition. He also required a district nurse to change his wound dressings on a daily or very regular basis. Mr Iqbal was given flexi credit to attend district nurse and hospital appointments which until July 2012 were self credited but from May 2013 a decision was made that the Claimant would be given 5 hours' credit per week to attend dressing and hospital appointments which were subsequently replaced with unpaid time off and the option to reduce hours if the Claimant was unable to work full time. An internal grievance/appeal against the decision on dealing with flexi credits was dismissed.

THE ALLEGATIONS

19. The Claimant's Scott Schedule does not set out the allegations in any chronological order. We propose to adopt the numbering followed by Mr Meichen using broadly the same wording as that set out in the Scott Schedule prepared by the Claimant himself.

Allegation 1

It is alleged that in June 2009 the Claimant was not referred to occupational health nor given a hearing test prior to being put on telephony work and that he was placed on such work before and after an injury at work to his ears. This is alleged to be direct and indirect discrimination, victimisation and discrimination arising from disability.

Allegation 2

That following an injury at work in or around 5 October 2010 the Claimant was subsequently absent and following the absence he received a warning. This complaint is against Ms Luckman and is of direct and indirect disability discrimination, discrimination arising from disability and victimisation.

Allegation 3

That after the Claimant returned from an operation, he was accused of falsifying medical records and a sick note and advised that this carried a sanction of possible dismissal. This is an allegation against Mr Chauhan and it is of direct and indirect discrimination and victimisation.

Allegation 4

That in April 2014 the Claimant suffered an injury to his right hand after falling into a double glazed door at home. The accident was caused by vertigo. The Claimant alleges that he spoke to Ms Elizabeth Chaplin, his Team Leader at the time, who advised that this would be classed as an accident and the absence would be disregarded. On his return however Ms Sidi had taken over team leadership and she classed it as an attendance management issue. This is an allegation of direct and indirect disability discrimination, discrimination arising from disability and victimisation.

Allegation 5

That from June 2014 to May 2015 the Claimant was given an adjustment of up to 5 hours a week credit to attend various hospital appointments and clinics but then the adjustment was unilaterally withdrawn. The Claimant's subsequent grievance against the decision was unsuccessful. This is an allegation of a failure to make reasonable adjustments, direct and indirect discrimination and discrimination arising from disability.

Allegation 6

That between August 2014 and September 2014 the Claimant's team leadership was transferred to Mr Richard Hayden but within a couple of weeks Ms Sidi then asked for the Claimant's attendance management file back so that she would revert to being his Team Leader. When the Claimant raised this with Mr Hayden it is alleged that Mr Hayden said he did not understand why Ms Sidi had made the decision. This is an allegation of direct and indirect discrimination and victimisation.

Allegation 7

That in September 2014 the Claimant was assaulted outside of work which caused an absence from work. The Claimant was nevertheless put through an attendance process in breach of internal policies and procedures. The Claimant's appeal against the decision not to discount any such absence was unfair and discriminatory. This is a complaint of direct and indirect discrimination and victimisation.

Allegation 8

That in September 2014 to October 2015, the Claimant was not provided a reasonable adjustment by being located close to the disabled toilets contrary to the advice of his doctor and occupational health. It is accepted that up until September 2014 the Claimant was seated close to the toilets but when Ms Sidi took over as Team Leader he was moved some 60 - 70 steps away from the toilets. It is alleged he was told that another 60 - 70 steps would not make any real difference. The Claimant alleges that he had 3 or 4 embarrassing incidents at work as a result of being so far away from the toilets. It is claimed that he e-mailed his line managers/employer on a number of occasions about it, even raising the matter through his trade union but nothing happened. This is not specified as a particular type of complaint. We assume that it is a complaint of a failure to make reasonable adjustments.

Allegation 9

That in September 2014 to the point of his dismissal, the Claimant had made a request for a change of Team Leader following a breakdown of working relationship with Ms Sidi but this was not actioned. After he raised a grievance he was called into a room by Mr Adam Mortimer and told that he (the Claimant) was "creating a problem for himself and management" by raising the matter. This is a complaint of direct and indirect discrimination and victimisation against Ms Sidi and Mr Mortimer.

Allegation 10

That from September 2014 to July 2015 the Respondent failed to make three adjustments: a failure to carry out a risk assessment, a request for part-year working and a request for re-deployment. The Claimant goes on to add that any assessments that were undertaken were simply paper exercises, by which he means that it was a case of just going through the motions. He claims that he was prevented from applying for alternative jobs because of an outstanding disciplinary warning. He was advised by Ms Sidi to apply for other jobs via the Civil Service website but when he attempted to do so he was disadvantaged because the website would ask whether the applicant was undergoing any kind of disciplinary action. When he answered that in the affirmative, the system would not allow his application to go any further. Mr Iqbal also adds that Ms Sidi told him and his trade union representative that any transfer would not be treated as a priority. These are complaints of direct and indirect discrimination, failure to make reasonable adjustments, discrimination arising from disability and victimisation. The complaint is against Ms Sidi alone

Allegation 11

Between September 2014 and up to the date of his dismissal the Claimant was told that he had to attend full and half day courses on the fourth floor without any of his adjustments being available. This meant the Claimant had to stand using normal monitors for the period of training, causing severe pain and discomfort. This is a complaint of direct discrimination against Ms Sidi.

Allegation 12

That in January 2015 the Claimant was forced to use the company mobile phone to call customers even though occupational health had said since 2010 that the Claimant could not use the phone due to his loss of hearing and because the Claimant wore hearing aids. This is a complaint of failure to make reasonable adjustments, direct and indirect discrimination against Ms Sidi only.

Allegation 13

That in February 2015 the Claimant was issued with a final written warning for hitting his trigger level. The appeal was upheld but it took 4 months to do so.

Allegation 14

That in April/May 2015 the Claimant was to have an operation on his waist, scrotum and arm and asked management prior to the operation for special or unpaid leave. He was told that this could not be accommodated. The Claimant adds that another member of staff went in for a vasectomy and was given 6

months with full pay and further ongoing support. This is a complaint of discrimination arising from disability, direct and indirect discrimination against Ms Sidi, Mr Mortimer and Ms Luckman.

Allegation 15

That in May 2015 the Claimant's case was put forward to a decision maker for dismissal even though some reasonable adjustments were still outstanding. This is a complaint of direct and indirect discrimination, failure to make reasonable adjustments, discrimination arising from disability and victimisation. The complaints are against Ms Sidi and Mr Mortimer.

Allegation 16

That in June 2015 Ms Sidi gave the Claimant a "must improve" marking at the end of the relevant appraisal year and an appeal to her was not upheld. When he subsequently appealed higher up his marking was changed to "achieved". This is a complaint of discrimination arising from disability, direct and indirect discrimination. The complaint is against Ms Sidi.

Allegation 17

It is alleged that on 5 October 2015 Mr Jasat discriminated against the Claimant because of his disability, accusing him of lying and deception. This is a complaint of harassment.

Allegation 18

That in October 2015 the Claimant was dismissed and that dismissal was not only unfair but also an act of disability discrimination.

Allegation 19

That the Claimant's appeal against dismissal was not properly upheld by Ms Beetison. This is a complaint of discrimination arising from disability and victimisation.

THE LAW

The relevant statutory provisions

The Equality Act 2010

Section 13 (1)

"(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."

Section 15 Discrimination arising from disability

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

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

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

Section 19

"(1) A person (A) discriminates against another (B) if A applies to B 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 relation 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 characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(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."

Section 23(1)

"(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."

Section 27(1) and (2)

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because:-

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act."

(2) Each of the following is a protected act:-

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

Section 26

"(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

Section 39(2)

"(2) An employer (A) must not discriminate against an employee of A's

(B)—

(c) by dismissing B;

(d) by subjecting B to any other detriment."

Section 123 (2), & (3),

"(1) Subject to section 140A proceedings on a complaint within section 120 may not be brought after the end of:-

(a) The period of 3 months starting with the date of the act to which the complaint relates, or

(b) Such other period as the Employment Tribunal thinks just and equitable.

(3) For the purposes of this section:-

(a) conduct extending over a period is to be treated as done at the end of the period;"

Section 136

"(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."

Employment Rights Act 1996

Section 98(1) (a) - (b)

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

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

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

Section 98(2)(a)

"(2) A reason falls within this subsection if it:-

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

Section 98(4)(a)

"(4) In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):-

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

20. As it will be seen from the foregoing, the Equality Act 2010 ("EA 2010") sets out the relevant provisions in relation to discrimination. The Employment Rights Act 1996 ("ERA 1996") sets out the relevant provisions in relation to unfair dismissal. Section 13 EA 2010 defines what is meant by 'direct' discrimination. Section 23 EA 2010 deals with the circumstances in which the treatment of the Claimant must be compared to another individual, whether actual or hypothetical (the 'comparator'). The comparator exercise essential in determining whether treatment has been *less favourable* treatment within the meaning of section 13 EA 2010. Section 15 of the Act deals with discrimination 'arising from disability'. Any potentially unfavourable treatment under section 15 EA 2010 can be 'justified' – that is to say if it is 'a proportionate means of achieving a legitimate aim'. Dismissal is of course usually unfavourable treatment but it may be justified in the circumstances. Section 19 EA 2010 defines the rather difficult concept of indirect discrimination and its various components. It will be seen from the relevant provision that it is essential for a Claimant to firstly identify what the 'provision, criterion or practice' ("PCP") is. Section 136 EA 2010 deals with the so-called reversal of the burden of proof. Section 27 of the Act deals with victimisation in the legal sense and what is meant by a protected act which is a necessary pre-requisite to any victimisation claim. Section 39 EA 2010 sets out the general prohibition against discrimination. Section 123 deals with the question of time limits in bringing a claim setting out what constitutes an 'act extending over a period' (often referred to by its former title of a 'continuing act') and the circumstances when an extension of time to the normal time limit is possible, namely when it is 'just and equitable' to do so. Section 136 EA deals with the issue of the burden of proof in discrimination cases. There is no dispute as to the application of the burden of proof provisions in this case. It has been well established since **Madarassy v Nomura International Plc** (2007) ICR 867 that in deciding whether there is direct discrimination, it is for the Claimant to establish a prima facie case (the first stage) and for the Respondent then to discharge the burden of proof in proving the absence of discrimination (the second stage).

21. In relation to the determining the issue of the reasonableness of a dismissal of an employee, and the proper application of section 98(4) ERA 1996, the guidance we have applied was originally contained in **Iceland Frozen Foods Ltd v Jones** [1982] IRLR 439) and later re-affirmed in **HSBC Bank v Madden,** [2000] ICR 1283. That guidance is as follows:-

"(1) The starting point should always be the words [section 98(4) ERA 1996] themselves.

(2) In applying the above section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether the Tribunal would have done the same thing.

(3) The Tribunal must not substitute its decision as to what was the right cause to adopt.

(4) In many cases there is a band of reasonable responses to the employee's conduct with which one employer might reasonably take one view and another employer quite reasonably take another.

(5) The function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the

dismissal falls within the band, the dismissal is fair; if the dismissal falls outside the band it is unfair."

22. The Court of Appeal in **London Ambulance Service NHS Trust v Small** [2009] IRLR 563 reminded Tribunals of the importance of not substituting their views for that of the employer. We have been conscious of the importance of not doing so.

23. In addition the Court of Appeal in **O'Brien v Bolton St Catherine's Academy** [2017] EWCA Civ 145 has recently held that the test of justification (that is to say, what constitutes a proportionate means of achieving a legitimate aim) for the purposes of a claim under section 15 EA 2010 is essentially the same as the test of reasonableness under Section 98 ERA 1996 (see paragraphs 53 and 54 of the judgment).

CONCLUSIONS

The out of time issue

24. Mr Meichen submits that all of the allegations with the exception of dismissal and the appeal (allegations 18 and 19) have been presented outside the time limit set by Section 123 EA 2010. Mr Iqbal has suggested that all of the acts are an act extending over a period. In the alternative we are invited to extend time on 'just and equitable' principles.

25. We are satisfied that all of the allegations save for those relating to dismissal and appeal are not a single act extending over a period. They relate in the main to different people, the allegations are different and refer to different incidents on different subject matter. There is nothing that links the allegations together nor is there any common thread. There are long gaps between the alleged acts. They are not therefore an act extending over a period within the meaning of section 123(3)(a) EA 2010.

26. We have gone on to consider whether it is just and equitable to extend time. In **Robertson v Bexley Community Centre trading as Leisure-Link** [2003] IRLR 434, the Court of Appeal made it clear that time limits are to be exercised strictly and in exercising their discretion to consider a claim out of time on just and equitable grounds, there is no presumption that tribunals should extend time. A Claimant should convince the Tribunal that it is just and equitable to extend time.

27. The exercise of discretion to extend time is thus the exception rather than the rule. In this case the Claimant has not put forward any grounds or reasons as to why time should be extended. On the contrary, there are good reasons not to extend time. The Claimant has had advice and support from his trade union representatives throughout. He appears to have taken advice from Thompsons Solicitors in connection with a personal injury action in September 2010 and also having instructed Slater and Gordon Solicitors about bringing either a personal injury or an employment claim. In an e-mail which the Claimant has disclosed from himself to a trade union representative of 17 September 2010 it is clear that the Claimant has had advice about both the personal injury claim and a Tribunal claim because it refers to both a Court and an ET, which we presume is a reference to the Employment Tribunals. The Claimant appears to have made a conscious decision not to issue proceedings until after he was dismissed. The allegations are very historical. The first allegation is nearly 8 years old (2009).

There are two allegations from 2010. There are no allegations between 2011 and 2013. There appear to be 8 allegations relating to matters in 2014 and the remainder are in 2015. The length of time by which the claims are out of time is considerable. It is not just and equitable to extend time. All of the complaints with the exception of the dismissal and appeal matters are therefore dismissed as being out of time. In the event however that we are wrong on the time point we have nevertheless gone on to consider the allegations on their merits.

CONCLUSIONS

Allegation 1

28. The Claimant states in his Scott Schedule/witness statement that although he made his employer aware prior to going into telephony he was nevertheless placed on the telephones. This is contrary to the documentary evidence. In the notes of a meeting of 13 September 2010 Mr Iqbal states:

"I started with the department last June. I was basically fine when I started other than having a slight cold. During the induction I was advised that I would be going to telephony. At this stage I asked if it was possible for me to work elsewhere as I had a cold and was using eardrops. On the Friday I was told that I still had to go to telephony. The problem with my ear started as I was on the phones taking a call…"

29. It is clear therefore that the Claimant did not have a hearing problem prior to joining the DWP. When he complained he was immediately taken off phone duties.

Allegation 2

30. The Claimant's absence in May 2010 lasted some 3½ months (and not 3 months as the Claimant seems to suggest) and it was normal practice to review the position after a month or two. Ms Luckman decided quite reasonably that 2 months would be an acceptable period of absence following an ear operation but 3 months warranted an oral warning. The length of absence was such that dismissal was quite conceivable. Despite the lengthy absence however Mr Iqbal was only issued with an oral warning, the lowest form of sanction available. After he had appealed, the position was explained to him and he accepted it. He was profuse in his gratitude as is clear from his e-mail. There is nothing to suggest that the treatment was because of the Claimant's disability but rather because of his lengthy absence.

Allegation 3

31. The Claimant alleges that he received a letter inviting him to a disciplinary hearing. He has not produced the disciplinary letter nor any documentary evidence surrounding it. There is no meeting note despite the fact that the Respondents are assiduous in keeping notes of all meetings. It would be in their own interests to suggest that the Claimant was subjected to disciplinary proceedings. We prefer Mr Chauhan's account that he noticed something unusual about the Claimant's sick note, that he then took it to his Team Leader who asked him to obtain an explanation from Mr Iqbal but not to make any accusations. Given the Claimant's propensity to raise grievances we have no doubt that if he had been accused of falsifying anything this would have been the subject of a formal complaint. The allegation is factually untrue.

Allegation 4

32. The Claimant alleges that he was told by his then Team Leader Ms Chaplin that the absence caused by the injury at home would be disregarded. The accident occurred in May 2014 and not April as the Claimant suggests. That is significant because the Claimant's line management by Ms Chaplin ended in April and from 1st May his line manager was actually Ms Sidi, not Ms Chaplin. It is highly unlikely that Ms Chaplin would have given any assurance of the type described by the Claimant if she was no longer his line manager.

33. The Claimant has failed to produce any evidence in support of the allegation. Whilst Ms Chaplin may not necessarily have felt it sufficiently important to confirm it in writing there was nothing to prevent the Claimant from sending an e-mail to confirm that this was what had been said. Despite the fact that the Claimant attended a very large number of meetings all of which are properly documented, he makes no reference to this discussion in any of them. He does so only in the appeal in relation to the absence many months later. We find that there was no such discussion with Ms Chaplin and accordingly the absences were properly taken into account.

Allegation 5

34. The Claimant had a number of medical appointments each week. In addition to his daily appointments with a district nurse he also took Wednesday and Friday afternoons off. He had historically been awarded flexi credits for the hours he took off for medical appointments. These amounted to approximately 11½ hours per week paid leave. In May 2013, Ms Chaplin decided that the Claimant should be awarded a maximum of 5 hours per week flexi credit with a possibility of a review. The Claimant then had paid leave between December 2012 and March 2013 whilst he was awaiting delivery of a specialist desk for one of his disabilities. In April 2014 the Claimant confirmed that there were no outstanding adjustments and Ms Chaplin made the decision that the awarding of flexi credits to attend medical appointments could no longer be sustained. Mr Iqbal was sent a formal decision on 23 April 2014 to say that the decision to remove flexi credit would come into force on 22 May. Despite this the Claimant continued to add flexi credit to his time sheets until he was challenged about it at a meeting with Ms Sidi on 20 October 2014. Mr Iqbal said in evidence that he was not aware of the decision because he did not get the e-mail but the e-mail was only confirming a meeting with Mr Iqbal on 22 April 2014 when the decision was made and he was told orally. In any event no action appears to have been taken in respect of that but the allegation is noteworthy because firstly the Claimant gives no real information as to the basis of his claim in his ET1/witness statement and he appears to have accepted at the time that he would have to manage his time accordingly as he could not afford to go part time. The Claimant was still being supported by a flexible working pattern at this stage, that is to say he could make up his hours at any stage during the hours the office was open and he could also request paid leave for irregular medical appointments. Insofar as this can amount to any form of discrimination, it is arguable only as discrimination arising from disability or a failure to make reasonable adjustments. In respect of the former it was a proportionate means in achieving a legitimate aim in not to allow the Claimant time off for all medical appointments given their extent and frequency and the appropriate reasonable adjustment was flexible working, not paid time off.

Allegation 6

35. There is no factual basis for this allegation. Ms Sidi remained the Claimant's Team Leader until he was dismissed and there is no evidence whatsoever that the Claimant's line management was ever transferred to Mr Hayden.

Allegation 7

36. The Claimant argues that the absences should have been excluded under the special circumstances section of the Claimant's attendance management policy. The policy is however very clear that absence because of personal injury due to an assault or accident caused by a third party in certain circumstances constitutes special circumstances. They do not however include absence due to personal injury as a result of an incident outside of work. It is then a question of applying discretion. The Respondent was entitled not to exercise its discretion in favour of the Claimant. The absence was not because of a disability and it was properly excluded. We note that the subsequent appeal was upheld but that was entirely on procedural errors and not the substance or the rationale of the original decision.

Allegation 8

37. Although it is accepted that the Claimant's desk was moved to the fourth floor for training purposes there is no evidence of a decision in September 2014 to move the Claimant's desk further away from the disabled toilets. Ms Sidi explained that the office is in the shape of a doughnut and that the desk would be no more than 50 steps away from a disabled toilet in any given location. Indeed in December 2014, the Claimant was moved to the location suggested and he appeared to be content with it throughout the whole of 2015. Mr Meichen suggests that the Claimant somewhat disingenuously raised this as an issue in July 2015 when he knew that dismissal was imminent. We note that at a review which took place on 22 May 2015, at a time when the Claimant was not under any final warning, he said words to the effect that all existing reasonable adjustments were fine and nothing else was required. Nothing had changed between 22 May and 21 July except that he had now passed his trigger point for absences and was facing imminent dismissal.

Allegation 9

38. This is primarily a complaint of victimisation against Mr Mortimer. It is difficult to see how it can be a complaint against Ms Sidi. Interestingly, in the course of evidence and cross examination the allegation was not even put to Mr Mortimer even though he appears to have been called as a witness specifically to deal with the allegation. Bearing in mind the Claimant was a litigant in person, we asked Mr Mortimer to comment on the allegation which was unsurprisingly denied.

39. We find the allegation implausible. There is nothing to suggest that Mr Mortimer, who was not even the Claimant's line manager at the time of the alleged incident, would be so concerned as to try and make it difficult for the Claimant to pursue a grievance. The allegation is not factually true.

Allegation 10

40. In respect of risk assessments it is accepted that the Claimant chose to discontinue these from 2014 onwards. In 2015 Ms Sidi offered the Claimant the option of doing a stress risk assessment with another manager which he did not reply to until August when he agreed and it was actioned. In respect of part year working the Claimant was invited to submit an application which he never did. As to re-deployment, the Claimant's evidence that he could not apply for jobs because of his outstanding warning was contradicted by the Respondents witnesses who having tested the process themselves found that it did not prevent the making of an application itself. We infer that the Claimant chose not to apply for redeployment rather than the website prevented him from doing so.

Allegation 11

41. The Claimant has failed to provide any dates or details or any evidence as to the allegation.

Allegation 12

42. The Claimant accepted in oral evidence that he was never forced to use the company mobile phone only that Ms Sidi had said to him that if he could use his own personal mobile phone when he was at work there was no reason why he could not use the office mobile phone but he was never pressed or required to use the office mobile phone. The Claimant accepted that he had never been 'forced' to use the office mobile phone nor did he ever do so.

Allegation 13

43. We accept that it would not have been reasonable for the hospital absences to be entirely disregarded.

Allegation 14

44. There is no evidence of any request for special or unpaid leave either from the Claimant or his trade union representative. The Claimant chose to apply for temporary part time hours and that application was approved by Ms Sidi promptly. The circumstances of the comparator are not clear nor on the basis of what the claimant himself puts forward, materially alike.

Allegation 15

45. The Claimant was given ample opportunity to demonstrate reasonable levels of attendance. Despite the fact that he knew he was on a final warning he continued to be absent in June and July 2015, mostly for non-disability reasons. The Claimant was by this point working on reduced hours of half a day. The Claimant was aware that working for more than half a day's shift would constitute working the entire shift if it then had to be cut short for some reason. We note that on 3 June the Claimant left work at 11:09 (his starting time was 9.00 am) because he was feeling pain and uncomfortable looking at the screen which was causing him to feel dizzy and uneasy. The next day he sent an e-mail at 10:49 am to say that he was feeling uneasy and nauseous due to vertigo and that he was leaving work that day. On 10 June he left early to attend a funeral. On 16 June the Claimant had 2 hospital appointments. On 8 July the Claimant sent an e-mail at 11:06 to say that standing a lot had triggered his sciatica and he was

going home to relax. In addition the Claimant was absent on sick leave on 20 and 29 July.

46. At the time of referral by Ms Sidi to a decision maker, the Claimant had 99 days sickness absence in the preceding 2 years of which 85 days were due to vertigo and skin-related conditions, 11 days due to an eye injury, 2 days for a car accident and one day due to pain on the left arm. The Claimant had paid time off for the period June 2009 to May 2014 equating to 10 - 15 hours a week of flexi credit. That arrangement was terminated in the circumstances which we have described. The following adjustments were in place at that time: an adjustable chair, an electronic desk, time off to attend medical appointments, a change of working pattern to part-time, a reduced benchmark, an adjustment in terms of processing work so that the Claimant only took basic details such as change of address, phone number and security details and no telephony work.

47. In referring the Claimant to a decision maker Ms Sidi noted the majority of the Claimant's absences were in relation to the skin disorder which was a permanent condition. It was estimated that there would be three or four operations a year plus time to recover. The occupational health report of 2011 had noted that surgical procedures were not curative and only served to temporarily alleviate the symptoms associated with an acute flare up. It was also noted that the Claimant had as a result of his conditions been deployed to work on simple work such as change of address, phone numbers and security. In her view the business could not support the high level of absence of the Claimant. In the last 12 months the Claimant had had 48 days of sickness absence and in the review period he had 17 days. If the disabled employee trigger point was adjusted and increased to 48 days to take into account all of the absences that would put considerable added pressure on the rest of the team. Ms Sidi noted that the most recent occupational health report of July 2015 had said that the condition had not improved and that medical issues were a long-term problem. In respect of the desk being closer to the toilet facilities she ascertained that the Claimant's work desk was only 35 steps from the men's toilets and 50 steps from the disabled toilets. In the circumstances we are satisfied that the referral to a decision maker was a proportionate and reasonable decision.

Allegation 16

48. Ms Sidi had issued a "must improve" marking with which the Claimant was dissatisfied and which he appealed. The appeal was allowed but on procedural grounds because the Claimant had not been informed that he was operating at a "must improve" level prior to 1 June 2015, not because of the merits of the decision itself. There is nothing to suggest that the marking was manifestly wrong or motivated for reasons connected with disability.

Allegation 17

49. This is an allegation of harassment and perhaps the only allegation which involves a measure of disputed facts. The circumstances were as these. Also employed by the DWP at the same office but in a different section and not having any line management responsibility for the Claimant is Mr Ismael Jasat, a Group Manager. The Claimant and Mr Jasat are distant relations. Both of them are Muslims. Mr Jasat sometimes drives past the Claimant's father-in-law's house (where the Claimant resides) to and from work on a regular basis. He has also seen Mr Iqbal at the same Mosque from time to time although their contact with

each other is limited. We accept they are not close friends. They have however bumped into each other outside of work and engaged in polite conversation. On one occasion they met at a local supermarket where Mr Iqbal proceeded to explain how he had been physically attacked outside of work and was therefore off work. Mr Jasat, undoubtedly a devout Muslim and from the impression we gained of him, a man who strongly believes in doing what he believes to be the right thing, became increasingly annoyed at what he regarded as the Claimant's disingenuous or exaggerated displays of incapacity. He noticed on one occasion as he was driving past the house that Mr Iqbal was about to cross the road with 3 bags of shopping in each hand. This was at a time when Mr Iqbal came to work wearing a sling around his arm and using an arm crutch for support. On another occasion also saw Mr Iqbal pushing a shopping trolley without wearing a sling or a walking aid when he was using one at work. On the occasion in question Mr Jasat says the shopping session lasted approximately an hour.

50. On the day with which we are concerned with Mr Jasat was driving to work. Unknown to Mr Iqbal, Mr Jasat was in the queue of traffic behind him. They were both stationary on a bridge over the railway station. In front of Mr Jasat was Mr Iqbal driving his vehicle which Mr Jasat recognised immediately from the distinctive registration plate. Whilst waiting in the queue of traffic Mr Jasat saw the Claimant using his left hand to adjust the rear view mirror. However when they both arrived at work Mr Iqbal had his left arm in a sling and was using an arm crutch. Mr Jasat asked to speak to Mr Iqbal privately. He told him that he was not talking to the Claimant as a manager but from a religious perspective. He said that he had seen the Claimant without his arm in a sling outside of work yet the scenario at work was very different. Mr Jasat said that he had been told, although he had not witnessed personally, that the Claimant was seen doing workouts in a health club where he was observed running, lifting weights and doing general physical training. Mr Jasat went on to remind the Claimant of Islamic teachings about fearing God and being mindful of one's actions. Mr Jasat says he did not accuse Mr Iqbal of lying or deception but merely reminded him of his obligations as a Muslim.

51. Mr Iqbal's account of the incident is slightly different. He says that whilst it is agreed that this was a private discussion, what Mr Jasat said to him was: "How do you live with yourself and the way you deceive people the way you do?" Mr Iqbal accepts that there was a discussion about the Claimant being seen in the gym but then, without apparently any such request, he showed Mr Jasat those parts of his body where he had undergone surgical operations. The Claimant said that he was very concerned about people making false statements and if Mr Jasat had any questions he should speak to him direct. The encounter might have ended there but Mr Iqbal went home and mentioned the incident to his wife and he felt it necessary to set out his feelings in an email. He then sent an e-mail that evening to Mr Jasat. Mr Iqbal set out at length his indignation at the accusations.

52. Whilst it is not disputed that the Claimant sent an e-mail to Mr Jasat it is disputed that the document which the Claimant now seeks to rely on was the e-mail in question. Having looked at it carefully and having heard the evidence, we prefer the account of Mr Jasat that the document presented to us now is not the e-mail he actually received. For one thing the document does not look like an email but a normal Word document. It is not the email which Mr Jasat recognises which he recalls was only one lengthy paragraph whereas this has several paragraphs.

53. We conclude that this was a private conversation, albeit on work premises but in a private location between two distant relations who share a common faith. The discussion was about honesty, not disabilities. We accept that Mr Jasat was not accusing the Claimant of deception or lying but simply reminding him of his religious obligations, not least because both of them attended the same Mosque and Mr Jasat no doubt felt he was in a position to have such a discussion with the Claimant having prefaced his remarks with the caveat that it was a private discussion and obtained the Claimant's consent to do so.

54. Within the legal definition of harassment there is an objective element to the test contained in Section 26(4) EA 2010, namely that it must be reasonable for the alleged conduct to be intimidating, hostile, degrading, humiliating or offensive to have that effect. We do not find that it was reasonable for the conduct to have the alleged effect. This was a private discussion between two distant relatives sharing a common faith and some prior degree of social contact. In any event the complaint is not in relation to the protected characteristic of disability because Mr Iqbal did not mind being asked questions about his conditions. In fact he volunteered to show areas of his body to demonstrate the genuineness of his condition. If anything the Claimant's allegation of harassment is in relation to the protected characteristic of religion or belief but that is not an allegation in these proceedings. Accordingly the complaint of harassment is dismissed.

Allegation 18

55. This allegation can conceivably only be one of discrimination arising from disability. It is accepted that dismissal amounted to unfavourable treatment but that it was justified, or more accurately a proportionate means of achieving a legitimate aim.

56. There is no dispute as to the accuracy of the absence records. The only error as to the dates of absence was actually in the Claimant's calculations which was identified by Ms Marsh-Davies in her decision letter. There is no dispute that the Claimant's condition was unlikely to improve. At one stage the Claimant had likened it to a volcano which could erupt at any time. The legitimate aim of the Respondent was to have in place a workforce that was both capable and reliable. We are satisfied that it was proportionate to dismiss having regard to that legitimate aim as the process of warnings had failed to improve the Claimant's attendance

Allegation 19

57. Although the Claimant complains of the appeal from dismissal as an act of discrimination, he has not specified what allegation arises out of it nor are we able to detect any.

58. Having considered the allegations of discrimination both individually and in the round we are satisfied that the Claimant has failed to establish a prima facie case. In relation to the complaint of direct discrimination he has failed to establish a prima facie case of less favourable treatment or to establish facts from which it could be inferred that the treatment was because of his disability. In relation to indirect discrimination he has not identified any PCP or any group disadvantage. In relation to the duty to make reasonable adjustments he has not identified any PCP or shown how any PCP which puts a disabled person at a substantial

disadvantage has been such that the Respondent ought to have taken steps to avoid any disadvantage. The Claimant had had the benefit of a very large number of adjustments none of which have improved his attendance record. For the reasons given all of the complaints of disability discrimination, including harassment and victimisation, are all dismissed.

Unfair dismissal

59. At the end of the day the question the question the tribunal has to ask itself is when enough is enough? In the **O'Brien** case which we have referred to, the Court of Appeal referred to a statement in **Spencer v Paragon Wallpapers** [1977] ICR 301 where Phillips J said:

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

60. Although this is not a case about long term absence (as was **Spencer)** but of unsatisfactory attendance, the same broad principle applies. By any standards, the Claimant had a very poor attendance record. His absences were frequent and not always for disability-related reasons. This is not a case where there were no reasonable adjustments put in place to help the Claimant. Indeed none of them helped to improve the Claimant's attendance to any significant degree and the Claimant's attendance remained consistently inconsistent throughout. The Respondent had given the Claimant considerable time to improve attendance yet there was no sign of sustained progress at any stage. Indeed if the second written warning had not been rescinded on procedural grounds the Claimant was likely to have been dismissed much earlier.

61. We find the substance of the reason to dismiss to be fair. The Respondent was entitled to conclude that the absences were such that dismissal was appropriate and warranted. The decision to dismiss fell within the band of reasonable responses open to a reasonable employer.

62. We can see no procedural defect in the dismissal process. The Respondent has not only followed its own policies and procedures but has also adopted a fair procedure throughout.

63. The Claimant alleges that there were outstanding reasonable adjustments at the time of dismissal and these should have been explored prior to any decision to dismiss. One of these was having his desk being moved closer to the toilets. However, being seated closer to the toilets was not likely to improve his attendance. During the time the Claimant was seated close to the toilets his attendance record still remained poor. Similarly, changing his work pattern would not have improved matters. His absences when he worked half days were particularly acute. The long list of reasonable adjustments made had little or no effect on improving attendance. Despite the fact that this is a government employer with good resources there are nevertheless pressures with restraints on staff recruitment. Ms Sidi alluded to these in her referral to the decision maker. There is a shortage of administrative officers due to retirements, resignations and promotion exercises. The Claimant's sporadic and frequent absences placed undue and unfair pressures on other members of the team. The Claimant's suggestion of outstanding reasonable adjustments was merely in an attempt to stave off dismissal for a little longer. A few months earlier when asked about outstanding adjustments the Claimant had not identified any further

adjustments.

64. The Claimant sought a change of Team Leader but that would not have helped him unless a different Team Leader was prepared to ignore internal policies and procedures. It is difficult to see how a change of Team Leader would improve the Claimant's attendance. Ms Sidi had not done anything inappropriate. Where her decisions were procedurally wrong they were corrected on appeal but in the main she followed internal procedures appropriately and correctly in our view.

65. The complaint of unfair dismissal is therefore also dismissed.

Employment Judge Ahmed

Date: 24 May 2017

JUDGMENT SENT TO THE PARTIES ON
9 June 2017

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S.Cresswell

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FOR THE TRIBUNAL OFFICE