RESERVED JUDGMENT

EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
DR A RICHARDS	**V**	**HYWEL DDA UNIVERSITY LOCAL HEALTH BOARD**

HELD REMOTELY ON: 12, 13, 14, 15 & 16 SEPTEMBER 2022 & 18, 19 & 20 JANUARY 2023

BEFORE: EMPLOYMENT JUDGE S POVEY
MRS L OWEN
MR A FRYER

REPRESENTATION:
FOR THE CLAIMANT: IN PERSON
FOR THE RESPONDENT: MR POLLITT (COUNSEL)

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The claim of direct discrimination was brought out of time and it is not just and equitable to extend time. In the alternative, the claim of direct discrimination is not made out and is dismissed.

2. The claim of discrimination arising from a disability was brought out of time and it is not just and equitable to extend time. In the alternative, the claim of discrimination arising from a disability is not made out and is dismissed.

3. The claim of a failure to make reasonable adjustments was brought out of time and it is not just and equitable to extend time. In the alternative, the claim of a failure to make reasonable adjustments is not made out and is dismissed.

4. The claim for unfair dismissal is not made out and is dismissed.

5. The claim of indirect discrimination is not made out and is dismissed.

6. The claim of harassment related to disability is not made out and is dismissed.

7. The claim of victimisation is not made out and is dismissed.

8. The claim of detriment for making protected disclosures is not made out and is dismissed.

9. So far as relevant to these proceedings, the Claimant was not disabled by reason of post-traumatic stress disorder until September 2021.

REASONS

1. These are claims brought by Dr Aaron Richards ('the Claimant') against his former employer Hywel Dda University Local Health Board ('the Respondent').

Background

2. By way of a brief background to the claims:

   2.1 The Claimant was employed as a Clinical Psychologist by the Respondent from September 2017. He was dismissed on grounds of capability arising from his ill-health with effect from 14 October 2021.

   2.2 Prior to his dismissal, the Claimant commenced ACAS Early Conciliation on 6 April 2021 and the ACAS Early Conciliation Certificate was issued on 18 May 2021. He presented his claims to the Tribunal on 17 June 2021, alleging, at the time, various forms of discrimination (arising from claimed disabilities) and victimisation. In its response, the Respondent resisted the claims in their entirety, although it accepted that the Claimant was disabled at the relevant times (as defined by section 6 of the Equality Act 2010), by reason of depression.

   2.3 The Claimant subsequently sought and was granted permission to amended his claim to include unfair dismissal and detriment arising from protected disclosures. These claims were similarly resisted by the Respondent. However, the Respondent also accepted that the Claimant was disabled by reason of post-traumatic stress disorder ('PTSD') but only from September 2021.

The Hearing

3. The hearing was conducted remotely. We heard oral evidence from the Claimant, who represented himself and from Dr Remy Markus. For the Respondent, we heard oral evidence from the following employees:

    3.1. Dr Beca Stilwell (Clinical Psychologist)
    3.2. Dr Kate Rhodes (Clinical Psychologist)
    3.3. Dr Kerry Donovan (Professional Lead Psychologist)
    3.4. Mr Neil Mason (Head of Service for Older Adult Mental Health)
    3.5. Mr Huw Davies (Senior Workforce Advisor)
    3.6. Ms Melanie Evans (Head of Service for Learning Disabilities)
    3.7. Ms Grace Naluwagga (Senior Workforce Advisor)
    3.8. Ms Liz Carroll (Director of Mental Health and Learning Disabilities)
    3.9. Mr Andrew Carruthers (Executive Director of Operations)
    3.10. Ms Sarah Rees (Assistant Director of Nursing for Mental Health)
    3.11. Ms Sarah Bevan (Information Governance Officer)

4. All the above witnesses provided and adopted written statements as their evidence in chief.

5. In addition, we heard oral evidence from Mrs Andrea Evans, who had been employed by the Respondent as a Consultant Clinical Psychologist and was, for some of the relevant time, the Claimant's line manager. Her attendance was the subject of a witness order made at the request of the Respondent. As a result, she did not provide a written statement and her evidence in chief was provided orally, in response to questions from Mr Pollitt.

6. The Tribunal was also provided with a paginated bundle of documents to which we were referred throughout the hearing ('the Bundle'). We were also helpfully provided with an agreed chronology, cast list and list of issues. Finally, we received oral submissions from the Claimant and written and oral submissions from Mr Pollitt for the Respondent.

7. The Claimant represented himself and conducted the entirety of these proceedings without legal assistance. Throughout the hearing, the Tribunal took time to explain the processes and procedures, checked the Claimant's understanding and encouraged him to ask questions of us. We also took regularly breaks and acted upon any requests for additional time or information from the Claimant. The Tribunal was of the view that the Claimant was able to fully engage in the proceedings and presented his case in a clear, cogent and professional manner.

8. In reaching our decision, the Tribunal had regard to all the evidence we saw and heard, as well as the submissions we received.

The Relevant Law

Unfair Dismissal

9. By virtue of section 94 of the Employment Rights Act 1996 ('ERA 1996') an employee has the right not to be unfairly dismissed by his employer. In respect of what constitutes an unfair dismissal the relevant law is to be found within section 98 of the ERA 1996.

10. Section 98(1) requires that in deciding whether a dismissal was unfair it is for the employer to show the reason for that dismissal. That reason must fall within a list of potentially fair reasons to be found within Section 98(2) of which subsection (2)(a) states:

> A reason falls within this subsection if it –
>
> (a) relates to the capability…of the employee for performing work of the kind which he was employed by the employer to do…
>
> …

11. Section 98(3) of the ERA 1996 further defines 'capability' as being assessed by reference to an employee's "*skill, aptitude, health or any other mental or physical quality."*

12. Section 98(4) of ERA 1996 requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for one of the reasons in section 98(2).

Discrimination

13. Section 39(2) of the Equality Act 2010 ('EqA 2010') states:

> An employer (A) must not discriminate against an employee of A's (B)—
>
> (a) as to B's terms of employment;
>
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
>
> (c) by dismissing B;
>
> (d) by subjecting B to any other detriment.

14. Section 6 of the EqA 2010 defines disability for the purposes of the Act. Disability is one of the protected characteristics under the EqA 2010.

15. Section 13(1) of the EqA 2010 defines direct discrimination as follows:

> 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.

16. Section 15 of the EqA 2010 defines discrimination arising from a disability as follows:

> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

17. Section 19 of the EqA 2010 defines indirect discrimination as follows:

> (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.

18. Section 20 sets out the duties to make reasonable adjustments in respect of disabled persons. So far as relevant, section 20 states:

> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following … requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> …

19. Schedule 8 to the EqA 2010 provides more details as to the duty to make reasonable adjustments. In addition, section 212 EqA 2010 defines "substantial" as "*more than minor or trivial."*

20. If a person fails to comply with the duty to make reasonable adjustments, that person discriminates against the disabled person (per section 21 EqA 2010).

21. Section 40(1) of the Equality Act 2010 ('EqA 2010') states:

> (1) An employer (A) must not, in relation to employment by A, harass a person (B)—
>
> (a) who is an employee of A's;
> …

22. Harassment is defined by section 26 of the EqA 2010 and, so far is relevant, states as follows:

> (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.

23. The "relevant protected characteristics" include disability (per section 26(5) EqA 2010).

24. *Cause of action for victimisation?*

25. Victimisation is defined by section 27 of the EqA 2010 and, so far as relevant, states as follows:

> (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.

…

26. Section 123 of the EqA 2010 requires that proceedings under the EqA 2010 may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks just and equitable. By reason of section 123(3), conduct done over a period of time is treated as being done at the end of the period, for the purpose of calculating the three-month time limit for bringing proceedings.

Protected Disclosures

27. Section 43B(1) of the ERA 1996 defines a protected disclosure as follows:

> … a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

28. Section 47B of the ERA 1996 affords protection to workers who have made protected disclosures. Section 47B(1) states as follows:

> A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

29. Section 103A of the ERA 1996 renders any dismissal automatically unfair if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

30. Section 48(3) of the ERA 1996 requires that any compliant of a contravention of sections 47B or 103A must be presented to the Tribunal before the end of a period of three months beginning with the date of the detriment and/or effective date of dismissal or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months (per sections 48(3) & 111(2) of the ERA 1996).

The Issues

31. The issues to be determined by the Tribunal were agreed over the course of a number of case management hearings and confirmed by the parties at the outset of the final hearing, as follows (so far as they related to liability):

1. Time limits

1.1. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 7 January 2021 may not have been brought in time.

1.2. Were the discrimination and victimisation complaints made within the time limit in Section 123 of the Act 2010? The Tribunal will decide:

1.2.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2. If not, was there conduct extending over a period?

1.2.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1. Why were the complaints not made to the Tribunal in time?

1.2.4.2. In any event, is it just and equitable in all the circumstances to extend time?

1.3. Was the detriment complaint made within the time limit in section 48 of the Employment Act 1996? The Tribunal will decide:

1.3.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?

1.3.2. If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.3.3. If not, was reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.3.4. If was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Unfair dismissal

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

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

2.2.1. The Respondent genuinely believed the Claimant was no longer capable of performing their duties;

2.2.2. The Respondent adequately consulted the Claimant;

2.2.3. The Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

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

2.2.5. Dismissal was within the range of reasonable responses.

2.3. Was the reason, or principal reason for dismissal that the Claimant made protected disclosures? If so, the Claimant will be regarded as unfairly dismissed.

3. Disability

3.1. Did the Claimant have a disability (PTSD) as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

3.1.1. Did he have a physical or mental impairment: PTSD?

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

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

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

4. Direct disability discrimination (Equality Act 2010 section 13)

4.1. Did the Respondent do the following things:

4.1.1. Fail to upgrade the claimant to the 8a pay band.

4.1.2. Exclude the Claimant from text messages about his line manager's sick leave in October 2019

4.1.3. Fail to make an agreed phone call on 09/06/2020.

4.2. Was that less favourable treatment?

4.2.1 The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

4.2.3 If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who he says was treated better than he was.

4.3. If so, was it because of disability etc?

4.4. Did the Respondent's treatment amount to a detriment?

5. Discrimination arising from disability (Equality Act 2010 section 15)

5.1. Did the Respondent treat the Claimant unfavourably by:

5.1.1. Failing to upgrade the claimant to the 8A pay band?

5.2. Did the following things arise in consequence of the Claimant's disability:

5.2.1. the Claimant's sickness absence?

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

5.4. Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

5.5. If it is found that the Claimant was subject to unfavourable treatment, was the treatment a means of achieving a legitimate aim?

5.6. If so, was it a proportionate means of achieving that aim?

5.7. The legitimate aim relied upon by the Respondent was "to ensure patient safety and quality of service, by ensuring that the person undertaking the tasks was suitably trained, experienced and capable of working at that level."

6. Indirect discrimination (Equality Act 2010 section 19)

6.1. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP:

6.1.1. Not proactively drawing attention of employee to the Industrial Injury Policy

6.2. Did the Respondent apply the PCP to the Claimant?

6.3. Did the Respondent apply the PCP to persons with whom the Claimant does not share the characteristic, or would it have done so?

6.4. Did the PCP put persons with whom the Claimant shares the characteristic, those with a disability, at a particular disadvantage when compared with persons with whom the Claimant does not share the characteristic?

6.5. Did the PCP put the Claimant at that disadvantage?

6.6. Was the PCP a proportionate means of achieving a legitimate aim?

6.7. The Tribunal will decide in particular:

6.7.1. Was the PCP an appropriate and reasonably necessary way to achieve those aims?

6.7.2. Could something less discriminatory have been done instead?

6.7.3. How should the needs of the Claimant and the Respondent be balanced?

7. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

7.1. Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

7.2. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

7.2.1. A practice of accepting trainees into the department?

7.2.2. Requiring employees to attend work regularly?

7.2.3. Requiring employees to work within professional standards?

7.3. Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability?

7.4. Did the Respondent know, or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

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

7.5.1. Making use of short periods of sick leave;

7.5.2. Offering a reflective supervisory space;

7.5.3. The Claimant taking on only one trainee;

7.5.4. Making the Claimant aware if he was losing insight into his mental health.

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

7.7. Did the Respondent fail to take those steps?

8. Harassment related to disability (Equality Act 2010 section 26)

8.1. Did the Respondent do the following things:

8.1.1. Fail to upgrade the Claimant to 8a pay band?

8.1.2. Fail to deal with a dress code issue relating to a trainee?

8.1.3. Exclude the Claimant from text messages about his line manager's sick leave in October 2019?

8.1.4. Fail to make an agreed phone call on 09/06/2020?

8.1.5. Make a rude and abusive phone call on 18/06/2020?

8.1.6. Make an abusive phone call on 23/06/2020?

8.1.7. Hold a hostile meeting with the claimant on 17/07/2020?

8.1.8. Fail to consider offering adjustments for a grievance hearing?

8.1.9. Make a telephone call on 14/05/2021?

8.1.10. Fail to respond properly to a subject access request?

8.1.11. Hold an unfair grievance appeal procedure?

8.1.12. Dismiss the claimant?

8.2. If so, was that unwanted conduct?

8.3. Did it relate to disability?

8.4. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

8.5. If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

9. Victimisation (Equality Act 2010 section 27)

9.1. Did the Claimant do a protected act as follows:

9.1.1. Call Neil Mason on 01/09/2020 outlining concerns?

9.1.2. Submit a formal grievance on 10/01/2021?

9.1.3. Submit a Grievance Appeal on 14/06/2021?

9.2. Did the Respondent do the following things:

9.2.1. Fail to follow up the report to Neil Mason?

9.2.2. Follow and unfair grievance procedure?

9.2.3. Fail to respond properly to a Subject Access Request?

9.2.4. Follow an unfair grievance appeal procedure?

9.2.5. Dismiss the claimant?

9.3. By doing so, did it subject the Claimant to detriment?

9.4. If so, was it because the Claimant did a protected act?

9.5. Was it because the Respondent believed the Claimant had done, or might do, a protected act?

10. Protected disclosures.

10.1. Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

10.1.1. What did the Claimant say or write? When? To whom? The Claimant says he made disclosures on these occasions:

10.1.1.1. Call Neil Mason on 01/09/2020 outlining concerns?

10.1.1.2. Submit a formal grievance on 10/01/2021?

10.1.1.3. Submit a Grievance Appeal on 14/06/2021?

10.1.2. Did he disclose information?

10.1.3. Did he believe the disclosure of information was made in the public interest?

10.1.4. Was that belief reasonable?

10.1.5. Did he believe it tended to show that:

10.1.5.1. a person had failed, was failing or was likely to fail to comply with any legal obligation;

10.1.5.2. the health or safety of any individual had been, was being or was likely to be endangered;

10.1.5.3. information tending to show any of these things had been, was being or was likely to be deliberately concealed.

10.1.6. Was that belief reasonable?

10.2. If the Claimant made a qualifying disclosure, it was a protected disclosure because it was made to the Claimant's employer.

11. Detriment (Employment Rights Act 1996 sections 47B & 103A)

11.1. Did the Respondent do the following things :

11.1.1. Fail to follow up the report to Neil Mason?

11.1.2. Follow an unfair grievance procedure?

11.1.3. Fail to respond properly to a Subject Access Request?

11.1.4. Follow an unfair grievance appeal procedure?

11.1.5. Dismiss the Claimant?

11.2. By doing so, did subject the Claimant to detriment?

11.3. If so, was it done on the ground that he made a protected disclosure /other prohibited reason?

Preliminary Issues

Disability

32. The Respondent accepted that for all the relevant periods, the Claimant was disabled (a defined by section 6 of the EqA 2010) by reason of depression.

33. However, the Respondent did not accept that the Claimant was disabled by reason of PTSD during the relevant periods until to September 2021. In particular, the Respondent took issue with whether any PTSD symptoms had a substantial and long-term adverse effect on the Claimant's ability to carry out day-to-day activities.

34. The Claimant claimed to have first been diagnosed with PTSD in 1995 and to have suffered from intermittent symptoms thereafter. He claimed to have made the Respondent aware of his history of PTSD symptoms at a supervision meeting with Andrea Evans on 31 July 2018 (at [130] of the Bundle).

35. The Claimant alleged (for the purposes of these claims) that he had been suffering from PTSD and its associated symptoms since June 2020 (per Paragraphs 87 & 88 of his witness statement). In his oral evidence, the Claimant clarified that it was his case that since June 2020 he had been disabled by reason of PTSD and continued to be so disabled for the rest of his employment with the Respondent.

36. So far as relevant to the claims being pursued, the Claimant was diagnosed with PTSD on 27 September 2021 (per the report of Dr Roger Denny at [1072] – [1075]).

37. As detailed below, from June 2020 onwards, the Claimant engaged in a detailed and lengthy grievance process, arranged his ill-health retirement, pursued an industrial injury claim and started the current Tribunal proceedings. Even if the recurrent nature of the PTSD symptoms brought the Claimant within the long-term (i.e. likely to last 12 months) rubric of the definition of disability, there was, in the Tribunal's judgment, insufficient evidence that those symptoms had a substantial adverse impact on the Claimant's ability to carry out normal day to day activities.

38. For those reason, the Claimant was not disabled at the relevant times by reason of PTSD. Given our findings on the substantive claims, the extent of the Claimant's disabilities became academic, since the Tribunal found, for the reasons detailed below, that none of the actions complained constituted discrimination by reason of disability (whether depression and/or PTSD).

Time Limits

39. The Claimant started ACAS Early Conciliation on 6 April 2021. ACAS issued the Claimant's Early Conciliation Certificate on 18 May 2021 (at [9] of the Bundle). The Claimant presented his ET 1 Claim Form to the Tribunal on 17 June 201 (at [10]).

40. It follows that any claims pre-dating 7 January 2021 were brought out of time (as they arose after a period of three months, ending with the start of the Early Conciliation process), unless:

40.1. The acts complained of formed part of a course of conduct extended over a period, where the end of that period was within the three-month time limit; or

40.2. The Tribunal exercised its powers to extend time, such that those claims out of time were deemed to have been brought in time.

41. Unless a claim was brought in time or time was extended, the Tribunal had no power to consider it.

42. Given the Tribunal's findings on the substantive clams, save in one instance, it was not possible for there to be any course of conduct as we did not find any of the alleged acts of discrimination or claims of detriment arising from protected disclosures made out,.

43. The Tribunal was prepared to accept that the alleged failure to proactively bring the Claimant's attention to the Industrial Injury Policy was a continuing act. It followed that the indirect discrimination claim was brought in time.

44. The Tribunal considered whether to exercise its discretion to extend time (whether on just and equitable grounds in respect of the out of time discrimination claims or on reasonable practicability grounds in respect of the out of time protected disclosure claims). The Claimant relied upon his status as a non-lawyer, his mental health and his decision to focus on pursuing his grievance with the Respondent ahead of commencing ACAS Early Conciliation.

45. The Claimant was, at the relevant, times a disabled person. His depression had a substantial and long-term adverse effect on his ability to carry out day-to-day activities. By his own admission, the Claimant had concerns that he was discriminated against in April 2019 and June 2020 (at Paragraphs 14, 70 & 71 of his witness statement). He took advice from his trade union in or around October 2020. In January 2021, he had submitted his grievance, which ran to over 40 pages and included allegations of discrimination and breaches of the EqA 2010 (at [218] – [261]).

46. The Claimant explained that, by reason of his mental health, he was simply incapable of directing his limited energy and focus on more than one thing at a time. He chose to prioritise the grievance process at the expense of pursuing his Tribunal claims. It was far from clear why he made that choice, even more so given that the Claimant had taken advice from his union by October 2020.

47. In addition, there was also an absence of any medical evidence to support the assertion that, by reason of his mental health, the Claimant was incapable of completing and submitting, at the very least, the ACAS Early Conciliation paperwork sooner than April 2021.

48. In reality, even if the Claimant had chosen to prioritise his Tribunal claims over the grievance process, the claims currently out of time would still be out of time. The Claimant's decision to focus his energies on the grievance process did not explain why he didn't begin the Tribunal process within three months of the matters complained of arising. As noted above, the Claimant's own evidence was that he believed he may be being discriminated against as early as April 2019.

49. Extending time is the exception, not the rule. The Tribunal must also balance the impact on the Respondent of having to answer allegations which by their very nature are historic. That causes a degree of prejudice, especially where, as in this case, staff have moved on, memories fade and extensive documentation has to be retrieved.

50. Drawing all those factors together, we concluded that it was not just and equitable to extend time in respect of those discrimination claims which were brought out of time. For the same reasons, the Claimant failed to show that it was not reasonably practicable for him to bring his out of time protected disclosure claim in time.

51. The following claims were therefore brought out of time and the Tribunal had no jurisdiction to determine them:

    51.1. The direct discrimination claim.

    51.2. The discrimination arising from disability claim.

    51.3. The following allegations within the harassment claims:

        51.3.1. Failure to upgrade the Claimant to 8a pay band.

        51.3.2. Failure to deal with a dress code issue relating to a trainee.

        51.3.3. Excluding the Claimant from text messages about his line manager's sick leave in October 2019

        51.3.4. Failure to make an agreed phone call on 09/06/2020.

        51.3.5. Making a rude and abusive phone call on 18/06/2020

        51.3.6. Making an abusive phone call on 23/06/2020

        51.3.7. Holding a hostile meeting with the claimant on 17/07/2020

    51.4. The reasonable adjustments claim.

    51.5. One allegation within both the victimisation and the protected disclosures claims:

51.5.1. Calling Neil Mason on 01/09/2020 outlining concerns.

52. Despite finding all those claims to be out of time and outside of our jurisdiction to determine, the Tribunal nevertheless considered and determined all of them. We did that for the following reasons:

52.1. The allegations against the Respondent generally, and members of staff specifically, were serious. We heard from numerus witnesses, over many days and were provided with extensive documentary evidence. All of the issues were argued before us. Those against whom these various allegations were made were entitled to know that the allegations had not been proven.

52.2. Similarly, we did not want the Claimant to be left with the impression that he had only lost some of his claims on a 'technicality.' Like the Respondent, he had invested time and energy in preparing and presenting his claims. It was important for the Claimant to fully understand that, even if his claims had been brought in time (or time had been extended), they were still without merit.

Findings of Fact

53. As detailed above, we heard from a lot of witnesses throughout the course of the hearing. Every witness did their best to assist the Tribunal and answered the questions they were asked candidly and honestly. We did not find any witness to be evasive or dishonest. However, we were required to resolve a number of relevant factual disagreements. Where we have resolved those in a manner which is at odds with some or all of the evidence of a witness, the Tribunal did so because we found other recollections to be more reliable and often supported and corroborated by other evidence, including from within the extensive bundle of documentary evidence before us.

54. We had some additional comments about the evidence of the Claimant and Mrs Evans. Again, we found both to be helpful, candid and honest. However, we found force in Mr Pollitt's observation that there was material difference between the Claimant's reaction to and perception of some of the events complained about and the motivations which lay behind them. The Tribunal did not doubt the impact some of these events had upon the Claimant. He described how certain events distressed him or triggered reactions within his mental state. The Claimant's subjective reaction, whilst undoubtedly genuinely felt, was at times wholly distinct from the intention behind or the objective effect of the actions complained of. In short, whilst the actions complained of upset the Claimant, the Tribunal's focus had to be on the mind (and the intentions) of the person or persons undertaking the act.

55. Mrs Evans was the source of most of the complaints made by the Claimant. As noted above, she attended the hearing not out of choice

but because she was ordered to do so. Like the Claimant and the other witnesses (who all attended voluntarily), Mrs Evans was co-operative, candid and honest in her evidence. In particular, the Tribunal found her to be an impressive witness as regards what motivated or informed the acts or omissions relied upon by the Claimant to support his allegations of discrimination.

56. There was another aspect of Mrs Evans' evidence which deserves mention. She kept contemporaneous notes of telephone calls and meetings, including with the Claimant. Those notes were provided in the Bundle and Mrs Evans confirmed in her oral evidence that they were made during or immediately after the various meetings they related to.

57. These notes were written at the time and so were far less likely to suffer from the challenges of memory and recall. They were written solely to record what had been said, without any consideration or foresight that they may one day appear as evidence in legal proceedings. Those factors enhanced the likely accuracy of the notes.

Background

58. The Claimant began his employment with the Respondent on 25 September 2017. His line manager was Mrs Evans. The Claimant's post was initially at Band 7 but with the opportunity for development into Band 8a. So far as relevant, it was not until March 2019 that the Claimant began to have issues with the Respondent generally and Mrs Evans in particular.

59. The Respondent operates an appraisal system, known as a Performance Appraisal Development Review ('PADR'). The Claimant underwent his PADR in March 2019 (at [431] – [439] of the Bundle). He claimed that in the course of the PADR, Mrs Evans informed him that he had attained the Band 8a requirements and would, as a result, be upgraded. Mrs Evans in her evidence and the Respondent in these proceedings denied that the Claimant was informed that he had met the criteria for Band 8a in March 2019 as claimed or at all.

60. The Claimant also claimed that Mrs Evans failed to properly deal with a dress code issue which had arisen in respect of one of the trainee psychologists who was working with him in or around July 2019. In addition, he accused Mrs Evans of excluding him from text message communications in October 2019.

61. In order to manage his mental health, the Claimant took short periods of sick leave in July 2018 and August 2019. These were taken with the agreement of Mrs Evans. The Claimant went off again by reason of his mental health on 18 November 2019. He never returned to work and was dismissed on grounds of capability with effect from 14 October 2021.

62. The rest of the allegations and claims arose after the Claimant went on sick leave on 18 November 2019. Some related to alleged conduct by Mrs Evans, others related to a grievance pursued by the Claimant, a Subject Access Request, the Respondent's Industrial Injury Policy and the Respondent's dismissal of the Claimant.

63. As detailed above, the Claimant alleges that these actions and omissions by and on behalf of the Respondent constituted various forms of discrimination, unfair dismissal and detriment for making protected disclosures. We considered the factual allegations in turn, before going on to consider the substantive claims.

The Band 8a Issue

64. It was not in dispute that in the aftermath of the PADR of March 2019, the Claimant was not upgraded. As a result, he raised a formal grievance on 10 January 2021 (at [218] – [261] of the Bundle).

65. Some of the events surrounding that grievance process were relied upon by the Claimant in support of his claims. We return to those in more detail later. However, for the purposes of the Band 8a issue, the key factual dispute between the parties was whether or not Mrs Evans informed the Claimant in March 2019 that he had met the re-banding requirements.

66. The Respondent relied upon Mrs Evans' own recollection (that she had not informed the Claimant that he had met Band 8a), as well as the PADR form completed by the Claimant ahead of the March 2019 meeting (in which he highlighted areas of self-improvement in order to meet the Band 8a requirements) and the evidence of Dr Becca Stilwell (that in July 2019 she shared with Mrs Evans her own view that the Claimant had not met the Band 8a requirements).

67. In contrast, the Claimant relied upon his own recollection of the March 2019 PADR meeting, along with the grievance outcome (explored below) and the recollection of Dr Kerry Donovan (that Mrs Evans had informed her in or around March 2019 that the Claimant had satisfied the Band 8a requirements).

68. As noted above, the Claimant raised a grievance in January 2021. Following an external investigation, a grievance hearing took place on 14 May 2021, conducted by Liz Carroll. By a letter dated 1 June 2021, Ms Carroll set out her findings and conclusions (at [603] – [612] of the Bundle). So far as relevant to the Band 8a issue, Ms Carroll found in favour of the Claimant and concluded that he had been informed that he met the Band 8a requirements in March 2019. Ms Carroll went on to state as follows (at [611]):

> I feel that I owe you an apology and will complete a change of grade form as a Band 7 to band 8a with effect from the 5th March 2019.

69. The Claimant appealed against many of the findings of the grievance outcome. The grievance appeal was conducted by Andrew Carruthers. Following a hearing on 23 July 2021, Mr Carruthers issued a grievance appeal decision letter dated 6 August 2021 (at [717] – [724] of the Bundle). In respect of the Band 8a issue, the letter confirmed that Ms Carroll had "*upheld this element of your grievance (i.e. that Mrs Evans withheld your promotion to a band 8a role) and the back dating of the award supports this"* (at [720]) and went on to make the following finding (at [723]):

> However, in recognition of the protracted time it took to award your 8a banding I will ensure that your half sick pay is re-instated and back dated to when you went into no pay.

70. In summary, the Respondent, after carrying out an investigation and conducting a grievance hearing and grievance appeal hearing, concluded that the Claimant had been told that he met the Band 8a requirements in March 2019, backdated his upgrading to March 2019 and also awarded him enhanced sick pay in recognition for the delay in upgrading him to Band 8a. All of that was done between January and August 2021.

71. The Respondent invited the Tribunal to, in effect, resile from the findings of Ms Carroll and Mr Carruthers. It was not in dispute that Mrs Evans took no part in the grievance hearings but she was interviewed as part of the grievance investigation. That investigation was conducted between March and April 2021 by Ruth Clancey-Roberts, Associate Director of Ibex Gale Limited. The evidence was considered by two different senior managers of the Respondent's. All of this took place closer in time to the events surrounding the Band 8a issue.

72. For those reason, the Tribunal could see no reason to re-open or depart from clear, robust findings made and acted upon by the Respondent. In our judgment, Mrs Evans' recollection in her evidence to us was mistaken. The Claimant was told by Mrs Evans in March 2019 that he had achieved the requirements to be upgraded to Band 8a.

73. However, contrary to the Claimant's assertions, there was simply no evidence that Mrs Evans or any other employee of the Respondent failed to upgrade him earlier because he was disabled. It was, undoubtedly, a failure of management on Mrs Evans part. But there was nothing to suggest, whether in the documentary or oral evidence, that that failure was in any way motivated or influenced by the Claimant's disability.

74. In reality, there was not a failure to upgrade the Claimant but a delay in enacting the decision to upgrade him. As found above, that was because of managerial shortcomings on the part of Mrs Evans, compounded by some degree of confusion as to whether or not the Claimant did in fact

meet the necessary criteria (given the opinions shared with Mrs Evans by Dr Stillwell), the decision of Mrs Evans in July 2019 to pause the regrading process as a result and her subsequent long-term sickness absence which began in October 2019.

75. Whilst the Respondent quite properly acknowledged that the management and support received by the Claimant fell someway short of the standards expected, there was simply no evidence that the Claimant's disability played any role, conscious or otherwise, in the errors and delays around the management and implementation of his upgrading to Band 8a. That conclusion was only reinforced upon hearing Mrs Evans' oral evidence, which was robustly examined and stood up to scrutiny.

76. It also follows that the delay in upgrading the Claimant did not have the purpose of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. If it had that effect on the Claimant, the conduct complained of was not, when considered objectively, capable of having such an effect. That does not change the Claimant's own perception. But it does impact upon whether the Respondent's failure to process and implement the Claimant's upgrade in a timely manner constituted harassment for the purposes of the claims being pursued.

The Trainee Issues

77. As part of their training, trainee psychologists spend time in real clinical situations, under the supervision of qualified staff. It was not in dispute that the Respondent would take trainees for a period of time or that individual psychologists were under no obligation to supervise any of the trainees. It was a wholly voluntary commitment.

78. The Claimant relied upon two alleged acts of discrimination in relation to the Respondent's practice of taking on trainees. The first related to the allocation of trainees to qualified staff. It was not in issue that the Respondent had a practice of accepting trainees into its psychology department. However, the Claimant alleged that the Respondent should have ensured that he was only ever responsible for one trainee at a time. That was a reasonable adjustment which he suggested the Respondent should have implemented.

79. In our judgment, irrespective of whether or not accepting trainees into the department placed the Claimant at a disadvantage because of his disability, the evidence was clear – the Claimant was, in fact, only ever responsible for one trainee at a time. The Claimant's case appeared to rest on the fact that another trainee, who was being supervised by Mrs Evans, spent some time with the Claimant at a memory clinic he was conducting. As explained by Mrs Evans, this was an area of particular interest to the trainee and it made sense to observe the Claimant's clinic. The Claimant was not being asked to take over the full-time supervision

of the trainee, simply to facilitate the observation and participation in a relevant subject-specific clinic.

80. In addition, the Respondent agreed to the Claimant's request that he only take on a trainee during the summer months, as this was more congenial to the welfare and management of his mental health.

81. We reiterate that agreeing to supervise a trainee was voluntary. There was no requirement or expectation on the Claimant to do so. It was his choice.

82. The other trainee-related claim was more specific. In or around July 2019, the trainee attending the Claimant's memory clinic came to work in what was deemed inappropriate dress (namely, shorts and black tights). The shorts had ridden up during the day, causing distress to the Claimant. He raised his concerns with Mrs Evans, who agreed to address the issue. She did so by sending a text message to the trainee, after she had gone home for the day, explaining that the Respondent's dress code required skirts no shorter than knee length and no shorts. Mrs Evans also took the view that, as the trainee lived some distance from the clinic, there was little point in raising it with her whilst in work, as nothing constructive could be done. Instead, Mrs Evans chose to deal with the issue discretely via text message, also mindful of the potential embarrassment that could be caused to the trainee (at [375] – [376] of the Bundle).

83. The trainee was, as expected, mortified, both that her clothes were inappropriate and that she had caused distress to the Claimant. The trainee did not dress inappropriately again. Mrs Evans informed the Claimant that she had dealt with the issue.

84. The Claimant alleged that Mrs Evans had failed to deal with the dress code issue (per Paragraph 9.1.2 of the List of Issues). In reality, as born out by the evidence, his complaint was that Mrs Evans should have dealt with the matter sooner, including sending the trainee home to change.

85. Whatever the disagreement might have been about how Mrs Evans managed the dress code issue, one thing was abundantly clear from the evidence. Mrs Evans management of the matter was in no way motivated by or related to the fact that the Claimant was disabled. There was simply no evidence to support such a contention. Rather, this appeared to the Tribunal to be an example of the Claimant's reaction being confused and conflated with the motivation and intent behind the action complained of.

86. Similarly, there was no evidence that the manner in which Mrs Evans chose to manage the dress code issue had the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. If it did have that affect subjectively on the Claimant, the way Mrs Evans' dealt with the issue was not, when

considered objectively, capable of having such an impact or effect. Mrs Evans dealt with the issue as she saw fit. The Claimant believed she should have dealt with it in another way. That difference of opinion was not capable, on any reasonable measure or standard, of constituting harassment as defined and applied for the purpose of these claims.

The October 2019 Exclusion

87. On 9 October 2019, Mrs Evans suffered a fall at home and broke her ankle. She attended hospital for treatment. As required under the Respondent's absence policy, Mrs Evans informed her line manager that she would be absent from work the following day. She also texted one of the trainee psychologists with whom she was due to have a meeting the following day, to explain that the meeting would have to be cancelled and the reason why.

88. It was not in dispute that Mrs Evans did not text or communicate her impending absence or the reasons for it to the Claimant. It was not suggested that she was required to do so under the Respondent's absence management policy. Rather, Mrs Evans reasonably expected such information to be appropriately cascaded by her own line manager, as appropriate.

89. The reason for why Mrs Evans did not contact the Claimant on 9 October 2019 was clear. She was under no obligation to do so. She was required to contact her own line manager and took the decision, whilst apparently waiting to be seen at hospital, to alert the trainee with whom she had a scheduled meeting.

90. It was difficult to see how Mrs Evans' failure to do something which she was not required to do could remotely constitute less favourable treatment of the Claimant. Importantly, there was no evidence that Mrs Evans' failure to contact the Claimant had anything to do with him being disabled.

91. It was also not reasonably possible for Mrs Evans' failure to contact the Claimant to violate his dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him. Again, to the extent that the Claimant contended that that was how he was made to feel, there was a disconnect between his subjective feelings and perceptions when compared with the objective reality of the situation.

The Events of June & July 2020

92. The Claimant went on planned sick leave on 18 November 2019. As it transpired, he was never well enough to return to work. As noted above, Mrs Evans had broken her ankle on 9 October 2019. She was unable to return to work until Spring 2020. Upon her return, Mrs Evans contacted the Claimant (by telephone on 4 April 2020). There followed further calls on 30 April and 26 May 2020. At the conclusion of the 26 May call, it was

agreed that the Claimant and Mrs Evans would speak again in two weeks (at [931] of the Bundle), on 9 June 2020.

93. That telephone call did not take place. On 18 June 2020, Mrs Evans sent a text message to the Claimant, apologising for the delay in contacting him and explaining that she had "*taken some leave at short-notice"* (at [932] of the Bundle). Later the same day, Mrs Evans telephoned the Claimant, wherein he expressed his distress at her failure to call or contact him on 9 June as arranged. Again, Mrs Evans apologised and explained that "*personal circumstances"* had required her to take "*time off at short notice."* The Claimant went on to explain how Mrs Evans' failure to contact him as planned had impacted his mental health, affected his relationship with her and led him to feel let down by her (also at [932]).

94. The "*personal circumstances"* referred to Mrs Evans were particularly sad. She took time off work to nurse a dying relative. Although that was not revealed to the Claimant at the time (as it was understandably extremely personal to Mrs Evans), he has for some time been aware of the reason for why Mrs Evans did not contact him as arranged on 9 June 2020. Despite that, the Claimant maintained throughout this litigation that Mrs Evans' failure to contact him on 9 June 2020 was because he was disabled.

95. In the Tribunal's judgment, this episode was perhaps the starkest example of the Claimant mistakenly conflating how he felt with why events had (or in this case, had not) happened. Mrs Evans was tending to a sick and dying relative. That was why she took time off and that was why she did not contact the Claimant on 9 June 2020. It had absolutely nothing to do with the Claimant or, importantly, the Claimant's disability. It was not intended to harass the Claimant (as defined) and, notwithstanding the Claimant's reactions to the lack of contact on 9 June 2020, could not reasonably have had the effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

96. The evidence that demonstrated that was so obvious, it almost did not need to be stated. However, the Claimant's continued insistence that Mrs Evans' failure to call him was both an act of direct discrimination and harassment arising from his disability required the Tribunal to set out in the clearest terms possible what, objectively, appeared to be self-evident.

97. The subsequent telephone call between the Claimant and Mrs Evans on 18 June 2020 was described by the Claimant, for the purposes of his claims, as "*rude and abusive*" on the part of Mrs Evans and motivated again, he claimed, by his disability. The Tribunal read Mrs Evans' contemporaneous notes of that telephone call (at [932] – [933] of the Bundle). We also heard from Mrs Evans. In our judgment, there was nothing in the way Mrs Evans conducted that call or spoke to the

Claimant which could in any reasonable or objective sense be described as rude or abusive. She did not make derogatory or condescending remarks about him but rather sought to maintain a professional and objective tone, as would be expected between an employee and their line manager. The Claimant was upset and distressed. Mrs Evans sought to manage the situation.

98. Not only was the factual allegation not made out (that Mrs Evans had been rude and abusive to the Claimant in the course of the telephone call on 18 June 2020) but whatever complaints the Claimant had about the call, there was once again no evidence at all that any aspect of Mrs Evans' conduct during the call or towards the Claimant was related to the fact that he was disabled. It also did not meet the high threshold of conduct constituting harassment. There was no intent or purpose on the part of Mrs Evans to harass the Claimant and, once again, any subjective perception or emotions felt by the Claimant in response were not borne out objectively. In other words, the telephone call of 18 June 2020, which we found to be neither rude nor abusive, was not capable of meeting the definition of harassment.

99. The Claimant and Mrs Evans had a further telephone conversation on 23 June 2020. The Claimant characterised this as an "*abusive"* telephone call, again for the purposes of his harassment claim. Mrs Evans once more made a contemporaneous note of that call (at [934] – [935] of the Bundle). Whatever the Claimant's subjective recollection or opinion may have been, Mrs Evans was not abusive. Again, the Claimant had a view of how he believed Mrs Evans should have acted. Specifically, he claimed that she should have acknowledged that the previous call on 18 June 2020 had caused her issues and she should have apologised to the Claimant for her behaviour during that call. As found above, the Tribunal did not agree that Mrs Evans had acted unprofessionally on 18 June 2020, still less that she had been rude or abusive. To that end, she was entitled to believe that she did not have anything to apologise for and it was a matter for her, not the Claimant, to decide whether or not the 18 June 2020 call had caused her any difficulties.

100. Once again, the Claimant's perception of what happened was removed from the motivation and intention behind Mrs Evans' actions. More importantly, and yet again, there was no evidence whatsoever that anything said or done by Mrs Evans in the course of the 23 June 2020 telephone call was motivated by, related to or directly informed by the fact that the Claimant was disabled. There was simply nothing to suggest that Mrs Evans would have conducted herself any differently if the Claimant had not been disabled. Mrs Evans conducted the call as she believed was appropriate. The Claimant believed that she should have conducted it differently. There was, at its highest, a difference of opinion about how Mrs Evans should have managed that call. What there was not was any abuse, still less any abuse motivated by the Claimant's mental health.

101. For completeness, there was also no evidence that the telephone conversation on 23 June 2020 met the definition of conduct which constitutes harassment. As we have found, the call was not abusive. Whatever the Claimant's perception might have been, the call did not and could not have violated his dignity or create an intimidating, hostile, degrading, humiliating or offensive environment.

102. At the beginning of July 2020, Mrs Evans contacted the Respondent's Workforce Team for advice and support in manging the Appellant's sickness absence. By this time, the Appellant had been off work for eight months. Support was forthcoming from Huw Davies, who accompanied Mrs Evans at a sickness review meeting with the Claimant on 17 July 2020.

103. For the purposes of this litigation, the Claimant characterised the meeting on 17 July 2020 as "*hostile"* and an act of harassment. In his witness statement, he claimed that during the meeting Mrs Evans "*suddenly became very 'testy' with me"* (Paragraph 89 of his statement). Mr Davies' recollection of the meeting was that there was "*tension between [the Claimant] and Mrs Evans"* arising from the Claimant's unhappiness at not being informed of Mrs Evans' absences in June 2002 (Paragraph 10 of his statement). As noted above, Mrs Evans was absent from work as she was caring for a dying relative.

104. On 21 July 2020, Mrs Evans wrote to the Claimant, setting out what had been agreed at the 17 July 2020 meeting (at [956] – [957] of the Bundle). It contained proposals regarding the management of the Claimant's ill-health absence which, on any view, were supportive, proportionate and reasonable.

105. In the Tribunal's judgment, it was perhaps understandable that there existed some tension between the Claimant and Mrs Evans. The Claimant was, after all, seeking to criticise Mrs Evans for an alleged failure of management which arose because she had been engaged in the obviously difficult and highly emotional role of nursing a dying relative and thereafter managing the grief which followed. The Claimant's reactions were informed by his perceptions, which were materially affected by his own mental health issues.

106. Whatever those perceptions may have been, the Tribunal was unable to find evidence that could objectively characterise the meeting of 17 July 2020 as "*hostile".* Rather, the meeting appeared to have been useful and constructive, delivering as it did a number of actions which could only be described as supportive and considerate of the Claimant's circumstances at the time. For those reasons, there was no unwanted conducted during or immediately after the meeting on 17 July 2020. More importantly, there was again no evidence that anything said or done by Mrs Evans or Mr Davies during and in the immediate aftermath of the meeting on 17 July 2020 was in any way motivated in a negative or discriminatory way by the Claimant's disability.

107. In addition, the meeting generally, and Mrs Evans' conduct within it specifically, clearly did not have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Once again, to the extent that the Claimant claimed that the meeting had that effect on him, such an effect was not, in our judgment, objectively justified.

Sickness Line Management & Grievance Proceedings

108. On 1 September 2020, the Claimant contacted Neil Mason (as Service Manager for Older Adult Mental Health). and raised concerns about Mrs Evans' management, including the delay in progressing his Band 8a upgrading. At that stage, the Claimant did not wish to commence a formal grievance. However, Mr Mason agreed to undertake an initial fact-find exercise focusing on the re-banding issue, which he initially sent to Melanie Evans (as Head of Service for Older Adult Mental Health) on 2 October 2020. There was a delay in Melanie Evans' response, as she was on sick leave from 29 September until 2 November 2020. Upon her return, Melanie Evans discussed the matter further with Mr Mason. After a further delay, on 27 November 2020, Mr Mason asked Melanie Evans to review his fact find. His email to Melanie Evans also included the following information (at [1009] of the Bundle):

> [The Claimant] is going to apply for retirement on ill health grounds and also likely to submit a grievance. I am working with Huw Davies and [the Claimant] re-Long Term Sickness Management and Ill Health Retirement. We therefore ideally need to look at this issue if indeed we can before those other two items commence?

109. In the meantime and at the Claimant's request, Mr Mason had taken over managing the Claimant's long-term sickness absence in place of Mrs Evans with effect from 28 October 2020. In short, the Claimant had requested that Mrs Evans ceased to be the manager who contacted him.

110. On 18 December 2020, Mr Mason reported to Melanie Evans that the likelihood of the Claimant submitting a formal grievance had crystallised (at [1108] of the Bundle):

> … we have held two long term sickness meetings and the Fact Find was brought up by [the Claimant]. [The Claimant] is now clear he is going to submit a grievance which will in all likelihood supersede this Fact Find.

111. The Claimant contended that there was a failure to follow up the concerns which he reported to Mr Mason of 1 September 2020 and that that failure was an act of victimisation. In other words, the Claimant alleged that any delay in dealing with or responding to his concerns of 1 September 2020 was both detrimental to him and motivated by the fact that he had raised the concerns in the first place.

112. The evidence did not support the Claimant's contention. There was no failure by the Respondent to follow up the Claimant's concerns, as raised with Mr Mason on 1 September 2020. The evidence was replete with email communications between Mr Mason and Melanie Evans and Mr Mason and the Claimant. There was an agreement between Mr Mason and the Claimant that fact-find would be undertaken. That fact-find was undertaken. Any further action on it was overtaken by events, not least the Claimant's decision to pursue a formal grievance.

113. At its highest, there was a short delay in progressing matters caused by the wholly unrelated sickness absence of Melanie Evans. There was, in any event, no evidence whatsoever that the manner in which the Claimant's concerns as raised with Mr Mason were managed or considered was in any way adversely affected by the Claimant raising those concerns. In reality, the opposite was true. The concerns as raised were taken seriously, a plan of action was formulated in agreement with the Claimant and it was executed by Mr Mason, in discussion with Melanie Evans.

114. In summary, there was no detriment to the Claimant. In the alternative, if there was any detriment (at its highest, because of a short delay), it was not in any way because the Claimant had reported his concerns about Mrs Evans, her management and the Band 8a issue to Mr Mason.

115. On 10 January 2021, the Claimant sent a formal grievance to Steve Moore, the Respondent's Chief Executive (at [214] – [261] of the Bundle). Details of the grievance ran to 43 pages (at [219] – [261]).

116. At a long-term sickness review meeting between the Claimant, Mr Mason and Mr Davies, on 5 February 2021, it was agreed that any further discussion or progression of the Claimant's application for ill-health retirement should await the outcome of the grievance process (at [1012] – [1013] of the Bundle).

117. Liz Carroll (Director for Mental Health & Learning Disabilities) was appointed by the Respondent to conduct the hearing into the Claimant's grievance. The Tribunal did not understand it to be in dispute that Ms Carroll had not met or worked with the Claimant prior to her involvement in the grievance process.

118. In addition, Grace Naluwagga (Senior Workforce Advisor) was also retained to support the grievance process. Like Ms Carroll, she had had no previous dealings with the Claimant. Ms Naluwagga's role included organising the grievance hearing. She liaised with the Claimant, who indicated that he preferred a start time no earlier than 11am. He was also offered the option of joining the hearing remotely via MS Teams but indicted that he wished to attend in person. A hearing date of 14 May 2021 was agreed with the Claimant and a formal invitation was sent to him by a letter dated 29 April 2021 (at [525] of the Bundle).

119. In his evidence to the Tribunal, the Claimant alleged that he had asked for a venue closer to his home, proposing Prince Phillip Hospital in Llanelli. However, that was not Ms Naluwagga's recollection of the discussions about the arrangements for the grievance hearing. Her evidence was that the Claimant did not raise any issue with the proposed venues (both of which were in Carmarthen), only the proposed start time. In contrast, Ms Naluwagga did recall the Claimant raising an issue about the venue location in his grievance appeal (at Paragraph 22 of her witness statement).

120. The Tribunal preferred Ms Naluwagga's recollections. There was nothing in the email exchanges between the Claimant and Ms Naluwagga ahead of the grievance hearing where the Claimant raised any concerns about the venue location (at [523] – [524] of the Bundle). He did, as recalled by Ms Naluwagga, raise concerns regarding the venue location in his grievance appeal submissions (specifically at [631] of the Bundle). However, there was no contemporaneous evidence of the Claimant raising these concerns prior to the grievance hearing itself, only afterwards.

121. It follows that there was not, in our judgment, a request by the Claimant to move the hearing of the grievance to a venue closer to his home. It was clearly open to him to raise that issue and make that request (as he did in the course of his grievance appeal submissions). However, for the reasons explained above, the Tribunal found, on balance, that he did not do so. In addition, the Respondent, through Ms Naluwagga, did make reasonable adjustments for the grievance hearing, by moving the start time to 11am and offering the Claimant the options of attending in person or remotely via MS Teams.

122. It follows that there was no failure by the Respondent to consider offering reasonable adjustments for the grievance hearing.

123. Ms Carroll commissioned an external investigating officer, Ruth Clacey-Roberts of Ibex Gale Limited. The investigation was, by any measure, comprehensive and resulted, on 29 April 2021, in a 66-page report, with 255 pages of appendices ([264] – [522] & [531] of the Bundle).

124. The grievance hearing on 14 May 2021 took place at Ty Gwili in Carmarthen. The scheduled start time was 11am. It was not in dispute that at or around 11.05am, the Claimant had not arrived at the venue and Ms Naluwagga telephoned him. In his witness statement, the Claimant alleged that Ms Naluwagga "*demanded to know"* where he was (Paragraph 113 and his grievance appeal submission, at [632] of the Bundle). The Claimant also alleged that this telephone call was an act of harassment.

125. Contrary to the Claimant's speculation that Ms Naluwagga had "*probably been told to do this by [Ms Carroll]"* (Paragraph 113 of his witness statement), Ms Naluwagga's evidence was she had in fact offered to

make the call to the Claimant, wherein she checked where he was, told him not to worry, to take his time and she would see him shortly (Paragraph 16 of her witness statement). Under cross-examination, Ms Naluwagga confirmed that she wanted to check that the Claimant was ok and on his way. She also referred to her belief that she had developed a good rapport with the Claimant during the time she had been supporting the grievance process.

126. The Tribunal again preferred Ms Naluwagga's evidence of the motive behind the telephone call, the tone of the call and what was said. She was far better placed than the Claimant to know the intent behind her decision to make the call. That intent was borne out of concern for the Claimant's welfare (Ms Naluwagga made clear on numerous occasions in her evidence that she had been aware of the Claimant's vulnerabilities) and the hope that he would be attending the hearing of his grievance. Ms Naluwagga's role throughout was to support the grievance process. The evidence showed that she had been fulfilling that role diligently and professionally prior to the events of 14 May 2021. Ms Naluwagga's account of what she said to the Claimant (notably, not to worry or rush) was wholly consistent with the intent which lay behind the decision to make the call.

127. Ms Naluwagga did not, on any objective analysis, demand anything of the Claimant during the telephone call of 14 May 2021. She was concerned for his welfare and sought to reassure him. To characterise her actions in any other way was unfair, unwarranted and inaccurate. If the Claimant believed the call constituted unwanted conduct, it was unreasonable to expect Ms Naluwagga to know that in advance, since the purpose and effect of the call was wholly concerned with the Claimant's welfare. It could not, on any reasonable or objective assessment, have violated the Claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for him.

128. As already alluded to above, the Respondent upheld the Claimant's grievance in part (most notably, in respect of the Band 8a issue). The outcome of the grievance was communicated to the Claimant by a letter from Ms Carroll dated 1 June 2021 (at [603] – [612] of the Bundle). That letter informed the Claimant of his right to appeal against Ms Carroll's decision. The Claimant exercised that right on 14 June 2021, with the submission of a 24-page letter of appeal (at [613] – [636]).

129. On the same day, the Claimant also sent an email to the Respondent's Data Protection Officer (at [1090] – [1091] of the Bundle), making a request for "*all information held about me"* by the Respondent ('the subject access request'). The request was made "*in relation to the…grievance"* the Claimant was pursuing, as well as in respect of the proceedings in the Tribunal (which the Claimant began on 17 June 2021).

130. The Claimant contended that the Respondent failed to respond properly to the subject access request and that such failure was an act of harassment. The Tribunal had the benefit of hearing evidence from Sarah Bevan, the Respondent's Information Governance Manager. She dealt with the Claimant's subject access request. Her witness statement set out in some detail the procedures which she was required to follow and how these were delayed by a number of unconnected factors (including the Claimant's use of a personal email address, the impact of the Covid pandemic, the process of retrieving email information, dealing with other requests being made, the limited resources available and the sheer quantity of information requested by the Claimant). Ms Bevan kept the Claimant informed throughout of progress in actioning his requesting and sent him information in batches as it became available.

131. The Claimant's request was fully complied with by 10 November 2021, five months after it had been made. Contrary to the Claimant's speculation, there was no evidence of any undue interference in the processes undertaken by Ms Bevan and her team.. The Claimant may have found the delay frustrating but it was difficult to see how the understandable (and reasonably explained) delay in fully complying with the subject access request could constitute unwanted conduct.

132. In any event, the was no evidence whatsoever that the delay was related to the Claimant's disability. The delay was caused by a number of factors, all clearly and cogently explained by Ms Bevan. None of them had anything remotely to do with the Claimant's disability.

133. The delay did not have the purpose and could not, on any reasonable or objective assessment, have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

134. The appeal was conducted by Andrew Carruthers (Executive Director of Operations), who had had no previous dealings with the Claimant. A hearing of the appeal took place on 23 July 2021. The Claimant attended and was supported by Mr Mason. The outcome of the grievance appeal hearing was communicated to the Claimant by Mr Carruthers in a letter dated 6 August 2021 (at [717] – [724] of the Bundle).

135. Mr Carruthers partially upheld some of the Claimant's points of appeal and dismissed others. The Respondent agreed to support the Claimant's application for ill-health retirement and, in recognition of the delay in upgrading the Claimant to Band 8a, agreed to re-instate and backdate the Claimant's half-pay sick pay to when he went into no pay.

136. The Claimant alleged that the Respondent followed an unfair grievance procedure, both in respect of the original grievance process and the appeal process. Again, in the Tribunal's judgment, this allegation was wholly without merit. The Respondent's grievance and grievance appeal processes were undoubtedly fair. They were both conducted by officers

who had no prior, material involvement with the Claimant. An investigation was commissioned by a person who was wholly independent of the Respondent. The Claimant was kept fully informed of the processes, afforded the opportunity to make written and oral submissions, which he made full use of and was provided with comprehensive explanations and reasons for the outcomes of both processes.

137. Reasonable adjustments were considered and implemented to enable the Claimant to take a full part in both processes. The success of both processes can be measured by the Claimant's deep involvement in them. He clearly had sufficient support and information to fully engage in the grievance process and the appeal process.

138. The Claimant did not agree with the outcomes of either process. That did not render them unfair. When viewed objectively, both processes were rigorously fair and the employees involved in them acted appropriately to maintain that fairness and facilitate the Claimant's engagement and involvement.

139. It follows that the manner in which the grievance process as a whole was conducted by the Respondent was fair and, as such, did not constitute unwanted conduct, still less have the purpose or objective effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

Industrial Injury Policy

140. The Respondent operates an injury allowance payments scheme ('the Industrial Injury Policy'), a copy of which was in evidence (at [1315] – [1347] of the Bundle). The Claimant submitted a claim under the Industrial Injury Policy on 9 June 2021 (at [1024] – [1038] & [1041]). It was agreed that the determination of that claim should await the outcome of the on-going grievance process (per the letter of 1 July 2021 at [1050] – [1052]). A panel to decide the claim was convened on 1 September 2021.

141. The outcome of the Claimant's claim under the Industrial Injury Policy was communicated to him by Sarah Rees, in a letter dated 16 September 2021 (at [1067] – [1068]). The claim was successful, with the panel backdating the award of an industrial injury payment to 9 June 2021 (the date on which the claim had been submitted). That letter also recorded, in summary, the Claimant's basis for bring the claim:

> The injury was perceived by you to have been caused by the actions of a Health Board employee unfortunately resulting in an exacerbation of your pre-existing clinical depression to the point that you are currently being supported by occupational health to apply for ill health retirement as it is deemed unlikely that you will return to working within the NHS in any capacity for the foreseeable future.

142. The reasoning behind the award was detailed in Ms Rees's witness statement (specifically at Paragraphs 19 – 23). The following were relevant:

    142.1. The panel were unable to question Mrs Evans, the "*Health Board employee"* referred to in the above summary of the Claimant's claim, because she had left the Respondent's employment on 31 March 2021.

    142.2. The decision to allow the claim was based solely upon the Claimant's allegations against Mrs Evans' behaviour and the alleged impacts upon his mental health.

    142.3. The panel were unable to state definitively that Mrs Evans' actions had exacerbated the Claimant's ill health but found, based solely on the Claimant's account, that his wellbeing had been compromised.

    142.4. Notwithstanding the limited information available, the panel concluded that Mrs Evans should have been aware of the impact on the Claimant of failing to make the agreed telephone call on 9 June 2020

143. Unlike Mrs Rees and the panel, we had the benefit of hearing from Mrs Evans. Our findings as to the reason why she did not contact the Claimant on 9 June 2020 are detailed above.

144. The sums awarded by the panel were paid in full to the Claimant (per Paragraph 110 of his witness statement).

145. For the purposes of his Tribunal claims, the Claimant relied upon an aspect of the procedure which led to his Industrial Injury Policy claim succeeding. In support of a claim of indirect discrimination, the Claimant relied upon the following PCP:

    Not proactively drawing attention of employee to the Industrial Injury Policy

146. The Claimant did not complain that he had not been made aware (or was unaware) of the Industrial Injury Policy. Rather, as per the claimed PCP, his complaint was that the Respondent had not "*proactively"* drawn it to his attention.

147. The Tribunal found force in Mr Pollitt's submission that the claimed PCP was not capable of being a PCP. It was, in effect, a one-off complaint. At its highest, it was an allegation of an error or shortcoming on the part of the Respondent. It did not, without more, constitute a provision, criterion or practice. In reality, it was difficult to see how it could be applied to others within the Respondent's employment, given the subjective nature of the complaint. For the Claimant, the Respondent was not proactive.

However, there was no evidence of a pattern or practice of inactivity when it came to drawing employees attention to the Industrial Injury Policy. If the Respondent should have acted sooner, the Claimant does not suggest when it should have brought the policy to his attention.

148. The purpose of a PCP in indirect discrimination claims is to identify "*where particular disadvantage is suffered by some and not others because of an employer's PCP…the act of discrimination that must be justified is not the disadvantage which a claimant suffers…but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply…"* (per Ishola v Transport for London [2020] EWCA Civ 112 at [36]).

149. In the Tribunal's view, the alleged failure by the Respondent of proactively drawing the Claimant's attention to the Industrial Injury Policy was an example of a one-off decision which was not capable of being classified as a PCP. For those reasons, we did not find that the alleged PCP was in fact a PCP.

150. In the alternative, even if it were a PCP that was applied to the Claimant, it was difficult to see how not drawing a policy to employees' attention proactively would place disabled employees at a particular disadvantaged compared to non-disabled employees. A non-disabled employee would be just as ignorant of the Industrial Injury Policy during the time that it was not brought to their attention as a disabled employee.

151. In addition, the Claimant referred extensively to a number of the Respondent's policies in his grievance of January 2021 (at [220] – [221] of the Bundle). In his oral evidence, the Claimant confirmed that he had downloaded the Respondent's policies onto a memory stick. Even if, as claimed, the Claimant was unable to access the Respondent's intranet whilst he was on sick leave (and by extension, the Respondent's policies), it was reasonable to conclude, on balance, that he already had the Industrial Injury Policy, along with the Respondent's other policies, on his memory stick. As he did not return to work after November 2019, the Claimant must have downloaded the policies onto his memory stick at some point prior to November 2019.

152. Whatever the complaints about the Respondent's failure to proactively draw his attention to the Industrial Injury Policy, the Claimant was in personal possession of an electronic copy of the policy from at least November 2019. It follows that the Claimant had access to, and was fully aware of, the Industrial Injury Policy irrespective of the Respondent's failure or otherwise to make him aware of it in a timely manner.

153. As a result, even if the PCP was as claimed (and even if it was a PCP) and even if it would have put a person with a disability at a particular disadvantage (which, as explained above, it did not), it did not put the Claimant at any disadvantage whatsoever because he already had access to the Industrial Injury Policy, having downloaded it along with other polices at some point prior to November 2019.

Dismissal

154. As noted above, the Claimant raised the prospect of applying for retirement on grounds of ill-health with Mr Mason in November 2020, the same having been raised with Mr Davies by the Claimant's union representative (per the letter of 12 November 2020 from Mr Mason to the Claimant, at [1002] – [1003] of the Bundle).

155. The Claimant had a telephone consultation with occupational health on 16 November 2020. By a letter dated 20 November 2020, Dr Shuja Din (Consultant in Occupational Medicine) wrote to Mrs Evans in the following, relevant terms (at [1004] of the Bundle):

> [The Claimant's] function remains significantly impaired. On the basis of the information provided to me and my assessment on 16th November 2020, I advise [the Claimant] is not fit to return to work as a Clinical Psychologist for the foreseeable future. I am unable to advise any adjustments to alter my advice. I am unable to advise an alternative role. In my opinion, [the Claimant] will not be able to provide regular and effective service for the foreseeable future in either his role or an alternative role.

156. The Claimant and the Respondent agreed to await the outcome of the on-going grievance proceedings before discussing terminating his employment on the grounds of ill-health (see, for example, the letter of 4 May 2021 from Mr Mason to the Claimant, specifically at [1018] of the Bundle). As noted above, the grievance appeal outcome was notified to the Claimant by a letter dated 6 August 2021.

157. The Claimant was seen again by Dr Din on 31 August 2021 and in his letter to Mr Mason of 1 September 2021, Dr Din reiterated his opinion that the Claimant was unable, by reason of ill-health, "*to provide regular and effective service for the foreseeable future in either his role or an alternative role"* (at [1065] – [1066] of the Bundle).

158. The Claimant had a sickness review meeting with Mr Mason on 15 September 2021 (via MS Teams). Mr Davies also attended. In a letter dated 22 September 2021, Mr Mason confirmed to the Claimant the following (at [1069] – [1071] of the Bundle and so far as relevant):

> …The intention and agreement prior to this meeting was that, if the corresponding Occupational Health Advice was of the same as back in November 2020, that we were going to serve you notice of contractual termination based upon ill-health grounds on the grounds of capability.

> …
>
> We therefore went on to discuss serving you notice based on health grounds and the timeframe associated with that based on this meeting the point of notice for 12 weeks as per your contract of employment, which would take you up to the 8"' December 2021. You stated that you have realised that this notice period, given its proximity to Christmas and the festive season, would mean that not just this Christmas but every other for the rest of your life would resonate with the premature and ignoble end to your career and the associated psychological trauma. You asked for us to consider or the Health Board to consider this impact on you and to see if there was any "leniency" to delay until after the festive season, to mid or late January 2022, especially as there has been significant delays in some or all of the HR processes you have been subject to.

159. Mr Mason held a further meeting with the Claimant on 22 September 2021 (again via MS Teams). Mr Davies was again in attendance. The outcome was confirmed in Mr Mason's letter to the Claimant of 11 October 2021 (at [1076] – [1077]). It included the following:

> …This meeting followed on from our previous review on 15.09.21 so that in the interim period, your request was considered in connection with the timing of your termination meeting, ideally being outside the festive period. Huw Davies had made further enquiries around this and myself consulting with my line manager to best support you. It appears, that with your agreement, we can move to payment in lieu of notice of your termination of 12 weeks' pay plus annual leave in advance of the festive season. This was mutually agreed and you felt that an arbitrary notice period was irrelevant as you were not in work anyway and unable to work due to ill health.
>
> …
>
> …We agreed to arrange a final termination meeting to complete the process of termination on ill health and capability grounds on 14'° October 2021 at 13:00hrs…

160. Following the meeting on 14 October 2021, Mr Mason wrote to the Claimant on 15 October 2021, confirming that his employment had been terminated, his last day of employment was 14 October 2021 and he was to be paid in lieu of 12 weeks' notice (at [1080] – [1082] of the Bundle). The Claimant, for reasons reproduced in Mr Mason's letter, did not appeal against his dismissal.

161. The Respondent's reason for dismissing the Claimant was capability, arising from his ill-health. It was not, as contended in the List of Issues, for making protected disclosures. To be fair, even the Claimant conceded in his oral evidence that he had been dismissed by reason of his ill-health and that he had requested the termination of his employment as he did not feel well enough to return to work. That concession was amply supported by the documentary evidence and the testimony of Mr Mason.

162. The Claimant was on sick leave from 18 November 2019 until his employment was terminated with effect from 14 October 2021. On any view, the Claimant was dismissed as a result of long-term ill-health absence (as opposed to persistent short-term absences).

163. The decision to dismiss the Claimant was not unwanted conduct. The Claimant actively pursued ill-health retirement with the Respondent. Whilst the termination of his employment was related to his disability (as a result of his long-term, sickness absence), it could not, on any reasonable or objective assessment, have violated the Claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for him.

Application of the Findings of Fact to the Law

Unfair Dismissal

164. The Respondent dismissed the Claimant by reason of capability. Capability is a potentially fair reason for dismissal pursuant to section 98 of the ERA Act 1996. What was in issue was whether the decision to dismiss the Claimant was substantively & procedurally fair.

165. As this was a capability dismissal arising from long-term sickness absence, the following issues required determination:

    165.1. Whether the Respondent could have been expected to wait any longer before terminating the Claimant's employment.

    165.2. The adequacy of any consultation with the Claimant.

    165.3. Whether the Respondent obtained of proper medical advice.

166. The Claimant was asking to be medically retired from as early as November 2020, by which time he had been absent from work for 12 months. The Respondent fully consulted with the Claimant (primarily by way of Mr Mason, supported by Mr Davies) to ensure that every possible alternative was considered, short of termination. Expert occupational health opinions were sought, which supported the Claimant's request for ill-health retirement.

167. By the time Respondent dismissed him on the grounds of his health, the Claimant had been off work for almost two years. The medical evidence was clear – there was little, if any, likelihood of an improvement in the Claimant's fitness for work. The Respondent delayed the Claimant's dismissal to await the outcome of the grievance process and the industrial injury claim. It was not reasonable (nor was it contended by the Claimant) that the Respondent should have waited any longer before terminating his employment.

168. In our judgment, having reached a conclusion that the Claimant's health would not sufficiently improve, which was based upon detailed medical evidence and in full consultation with the Claimant, dismissal was undoubtedly a fair and proportionate sanction. It was squarely within the range of reasonable responses available to the Respondent.

169. The Claimant argued that his dismissal was unfair because, in his view, the ill-health which led to his long-term absence was caused by the Respondent (specifically, Mrs Evans). Whilst the culpability of an employer can be a relevant factor in determining whether a dismissal is unfair, the key consideration is whether the Respondent could or should have done something more to save the Claimant's employment. The truth is that the Claimant himself was asking for his employment to end because of his health, a request which was supported by Dr Din and, after proper consideration, acceded to by the Respondent.

170. For the avoidance of doubt, the Claimant was not dismissed for making protected disclosure.

171. For all those reasons, the Claimant's dismissal was substantively fair.

172. The Respondent operated a managing attendance at work policy (at [1246] – [1287] of the Bundle). It was not suggested that there were any material breaches of the policy in the manner in which the Respondent managed the Claimant's absence from November 2019 until his dismissal in October 2021.

173. The Respondent acceded to a request by the Claimant to terminate his employment. That was clearly reflected and explained in the various letters from Mr Mason to the Claimant (particularly in September and October 2021). The Claimant was afforded a right of appeal against the decision to terminate his employment, which for various reasons he did not exercise. Indeed, as he had been requesting that course of action, it would have been somewhat odd if the Claimant had then sought to challenge the termination of his employment.

174. As such, we found that the procedure followed by the Respondent in dismissing the Claimant was fair.

175. As we found the decision to dismiss to be both substantively and procedurally fair, the claim of unfair dismissal was not made out and is dismissed.

<u>Direct Discrimination</u>

176. As found above, the Respondent delayed upgrading the Claimant to Band 8a (as opposed to failing to upgrade him). Mrs Evans also did not text the Claimant about her sick leave in October 2019 and failed to telephone him on 9 June 2020.

177. The Claimant alleged that these three events constituted direct discrimination. The delay in upgrading the Claimant was less favourable treatment. The other two events were not less favourable treatment. The Claimant was not treated worse than anyone else would have been treated. Mrs Evans was under no obligation to inform the Claimant of her absence in October 2019. Her failure to contact him on 9 June 2020 arose from an immensely personal issue and there was nothing to suggest that Mrs Evans would not have acted in exactly the same manner whomever she was line managing at the time.

178. More importantly, and as found, there was simply no evidence that any of these acts or omissions were in any way informed or motivated, consciously or otherwise, by the fact that the Claimant was disabled.

179. For those reasons, the claims of direct discrimination were not made out and are dismissed.

Discrimination Arising From Disability

180. It was not in dispute that the Claimant's sickness absence arose in consequence of his disability. The Tribunal found that the Respondent delayed upgrading the Claimant to Band 8a and that the delay constituted unfavourable treatment.

181. The Claimant alleged that, in effect, the delay in upgrading him was because of his sickness absences and constituted discrimination arising from his disability.

182. The Claimant's allegation was misplaced. The delay in actioning the Claimant's upgrade to Band 8a was caused by managerial shortcomings on the part of Mrs Evans, which was, to a degree, compounded by Dr Stillwell's comments as to the Claimant's aptitude. What the delay had nothing to do with was the Claimant's sickness absence record or, more broadly, the Claimant's disability.

183. For those reason, the claim of discrimination arising from disability was not made out and is dismissed.

Indirect Discrimination

184. The Claimant alleged that the Respondent applied the PCP of not proactively drawing attention of employees to the Industrial Injury Policy to him, which put him at a disadvantage because of his disability. For those reasons, he contended that the Respondent had indirectly discriminated against him.

185. As set out above, the claimed PCP was not, in reality, a PCP. It was, at its highest, only capable of being one-off decision which impacted upon the Claimant. In addition, even if it were a PCP, there was nothing to suggest that it would have placed the Claimant at a disadvantage

compared to someone without his disability. Finally, and as a matter of fact, the Claimant had access to the policy in any event from at least November 2019.

186. It follows that not only was there no PCP engaged by this claim, but there was also no disadvantaged caused to the Claimant, whether by reason of his disability or otherwise.

187. For those reasons, the claim of indirect discrimination was not made out and is dismissed.

Reasonable Adjustments

188. It was not in dispute that the Respondent had the following provision, criterion or practices ('the PCPs'):

    188.1. A practice of accepting trainees into the department

    188.2. Requiring employees to attend work regularly.

    188.3. Requiring employees to work within professional standards.

189. The Claimant maintained that each of the PCPs put him at a substantial disadvantage because of his disability. The Tribunal was unable to accept that the first PCP put the Claimant at a substantial disadvantage. As found above, there was no compulsion or requirement on the Claimant to take any part in the supervision or conduct of any of the trainees accepted by the Respondent. The PCP itself caused no disadvantage to the Claimant. His decision to volunteer as a supervisor for one of the trainees was, in reality, the cause of his complaint but that was not the PCP and it was a wholly voluntary decision on the part of the Claimant. To the extent that supervising a trainee caused any disadvantage to the Claimant, it was not by reason of the PCP or for that matter any proactive measure by the Respondent.

190. In addition, the policy of taking on trainees did not place the Claimant at any disadvantage compared to someone without the Claimant's disability, for the very reason that there was no requirement on any employee, disabled or otherwise, to take on supervision or conduct responsibilities.

191. In contrast, the Tribunal accepted that the second PCP could put the Claimant at a substantial disadvantage because of his disability, by reason of his disability-related sickness absences. We were also prepared to accept that the third PCP could potentially place the Claimant at a substantial disadvantage because of the impact of his disability on his mood and state of mind, in addition to the need to manage his mental health, including by way of planned sickness absences.

192. We did not understand it to be in dispute that the Respondent knew or could reasonably have been expected to know that those PCPs were likely to place the Claimant at a disadvantage.

193. As noted in the List of Issues, the Claimant suggested the following steps which the Respondent could have taken to avoid any such disadvantage arising:

    193.1. Making use of short periods of sick leave

    193.2. Offering a reflective supervisory space

    193.3. The Claimant taking on only one trainee;

    193.4. Making the Claimant aware if he was losing insight into his mental health.

194. In our judgment, the Respondent did allow the Claimant to make use of short periods of sick leave, a fact which the Claimant himself acknowledged in the course of his oral evidence. So far as relevant, the Claimant took planned sick leave in July 2018 and August 2019, with the agreement of Mrs Evans.

195. As found above, the Claimant did volunteer to take on the supervision of trainees. The Respondent, via Mrs Evans, agreed with the Claimant that he would only supervise one trainee, albeit that a total of three trainees were taken on. It was also agreed that the Claimant would only volunteer during the summer months, when his mental health was generally better.

196. For those reasons, the Respondent took the step proposed by the Claimant of him only taking on one trainee. The fact that another trainee observed one of his clinics did not, in our judgment, constitute the Claimant "*taking on"* that trainee. We also reiterate that there was no compulsion, expectation or requirement for the Claimant to take on the supervision of any trainees.

197. In his oral evidence, the Claimant explained that "*a reflective supervisory space"* meant affording opportunities for the Claimant or his line manager, if they had concerns about his health, to consider whether it was appropriate for him to remain in work or take planned sick leave. As noted above, the Claimant did take planned sick leave, in consultation with Mrs Evans.

198. In addition, it was not in dispute that the frequency of supervision sessions for the Claimant were increased. The Respondent's Clinical Supervision Policy included the following (at [1698] of the Bundle):

> Supervision is a safe and reflective space in which to learn and develop confidence, within the supervisory boundary, focussing on the welfare of the supervisee undertaking the intensity of the work.

199. For those reasons, the Tribunal concluded that the Respondent did offer the Claimant reflective supervisory space and did so at a frequency which was wholly reasonable.

200. In his oral evidence, the Claimant agreed that he was the best person to say if he was feeling unwell, that he was capable of recognising any deterioration in his mental health and was capable of saying when he needed to take time of work as a result. The Claimant referred obliquely to a previous experience with another employer where he had lost insight into his own mental health and no one had raised it or alerted him to that fact.

201. Whilst the Claimant was understandably concerned about how a loss of insight would impact upon both him and those he was treating, there was extensive and lengthy evidence of the Claimant's almost forensic insight into his mental health, his mood and his cognition. The Claimant was undoubtedly the person best placed to manage and understand his own mental health. To that end, the Respondent, by offering additional supervision and agreeing to periods of planned sick leave, did all that was reasonable to assists and support the Claimant as regards his insight into his mental health. It was not reasonable to expect the Respondent to do more.

202. In addition, the proposed reasonable adjustment would not have assisted in maintaining the Claimant within the workplace (which is the operative purpose of any proposed reasonable adjustment). In reality, it would have had the opposite effect, ensuring that the Claimant would take sick leave when appropriate and therefore not remain in work. As such, the proposal fell outside the definition of a reasonable adjustment.

<u>Harassment</u>

203. As detailed in the List of Issues, the Claimant identified 12 separate alleged actions by the Respondent which were claimed to constitute unwanted conduct, related to the Claimant's disability and were undertaken by the Respondent with the purpose or effect of violating the Claimant's dignity, creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

204. We have set out our findings and conclusions regarding the various alleged actions in the course of our findings of fact above. Some did not occur in the manner claimed by the Claimant. However, and for the avoidance of doubt, we make clear that whatever the alleged actions were, the evidence failed to support a finding that any of them were related to or motivated by the Claimant's disability. Those actions which did occur, whether they constituted unwanted conduct or not, were in no way whatsoever linked to or informed by the Claimant's health.

205. In addition, and equally clearly, the evidence failed to come anywhere close to supporting a finding that actions taken by the Respondent were undertaken with the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. In our judgment, the various approaches taken by the Respondent, including the support offered to the Claimant and the adjustments made to ensure that he was treated fairly, were appropriate, professional and sensitive.

206. For all those reasons, the claims of disability-related harassment were not made out and are dismissed.

Victimisation

207. As recorded above, the Claimant outlined his concerns regarding Mrs Evans with Mr Mason on 1 September 2020, submitted a formal grievance on 10 January 2021 and submitted a grievance appeal on 14 June 2021. It was not in dispute that each of these constituted a protected act (as defined by section 27(2) of the EqA 2010).

208. The Claimant alleged five actions taken by the Respondent which subjected him to detriment and was because he had done the aforesaid protected acts. They were as follows:

    208.1. Failed to follow up the report to Neil Mason

    208.2. Followed an unfair grievance procedure.

    208.3. Failed to respond properly to a Subject Access Request

    208.4. Followed an unfair grievance appeal procedure.

    208.5. Dismissed the Claimant

209. Those five actions also appeared in the Claimant's list of 12 alleged acts in his claim of harassment.

210. As we have found, there was not a failure to follow up the Claimant's report to Mr Mason. Rather, there was a delay in Mr Mason reaching his conclusions in October 2020 and a delay in those conclusions being acted upon. Those delays were caused by a combination of Mr Mason being off work due to illness and delays in investigating the allegations against Mrs Evans because of her absence from work, again due to ill-health. Even if those delays were detrimental to the Claimant, there was no evidence at all that such delays were in any way motivated by the fact that the Claimant had raised his concerns with Mr Mason in the first place.

211. For the reasons set in detail above, neither the grievance nor the grievance appeal procedures were unfair. As such, those aspects of the

acts complained of did not occur, still less did they cause any detriment to the Claimant or were motivated by the fact that the Claimant had raised concerns regarding Mrs Evans and embarked on the Respondent's grievance procedure.

212. Similarly, as found, the Respondent did respond properly to the subject access request. At its highest, there was a delay caused by myriad factors, all of which had nothing whatsoever to do with the Claimant's protected acts.

213. The Claimant was dismissed by the Respondent. But it was not detrimental to the Claimant. He requested it and agreed with it. In the alternative, the Claimant's dismissal was because of he was incapable of undertaking his role as a result of his ill-health. It was in no way whatsoever linked to, motivated by or a result of the Claimant's protected acts.

214. For all those reasons, the claims of victimisation were not made out and are dismissed.

Protected Disclosures

215. The Claimant relied on the same actions detailed above as also constituting protected disclosures (as defined by section 43B of the ERA 1996), namely raising his concerns with Mr Mason in September 2020, submitting his grievance in January 2021 and submitting his grievance appeal in June 2021. The alleged detriments were identical to the those relied upon in his victimisation claims.

216. The Respondent argued that they were not, in fact, protected disclosures because they were not made in the public interest. The Tribunal agreed with that submission. The disclosures relied upon by the Claimant were all private matters regarding allegations which were personal to his employment with the Respondent. They were not made in the public interest. It was far from clear whether the Claimant himself believed that he was making the disclosures in the public interest but if he did, such belief was not reasonable.

217. Even if the disclosures were made in the public interest (such that they became protected, as defined by the ERA 1996), there was either no detriment caused to the Claimant or any detriment was in no way done on the grounds that the Claimant had made protected disclosures. The same rationale and reasoning for the shortcomings in the Claimant's victimisation claims applied equally to his protected disclosures claims.

218. As such, the claims by the Claimant that he had suffered detriment as a result of making protected disclosures were not made and are dismissed.

EMPLOYMENT JUDGE S POVEY

Dated: 20 February 2023

Order posted to the parties on 21 February 2023

For Secretary of the Tribunals Mr N Roche