EMPLOYMENT TRIBUNALS

Claimant: Mr S Garry-Madden

Respondent: Network Rail Infrastructure Limited

Heard at: Manchester **On:** 31 July to 4 August 2023
(in Chambers) 7 August 2023

Before: Employment Judge McDonald
Mrs C Bowman
Mrs C A Titherington

REPRESENTATION:

Claimant: In person assisted by Mr A Napier
Respondent: Miss I Ferber, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claims that the respondent failed to make reasonable adjustments as required by sections 20 and 21 of the Equality Act 2010 fail and are dismissed.

2. The claimant's claim that the respondent discriminated against him because of something arising from his disability in breach of section 15 of the Equality Act 2010 fails and is dismissed.

3. The claimant's claim that the respondent made unauthorised deductions from his wages in breach of the Employment Rights Act 1996 fails and is dismissed.

REASONS

Introduction

1. This was the final hearing of the claimant's claim of disability discrimination and unauthorised deduction from wages. By way of a very brief summary, the

claimant's claim arises from his absence from work with the respondent from 22 September 2016. Again, in broad terms, the respondent says that the claimant has not been certified as fit to return to work since that date, which is why he is still on sick leave. The claimant's case is that at various points he was well enough to return to work and the failure to allow him to do so amounts to disability discrimination. The claimant also claims that he should not have had his sick pay reduced to zero after 12 months' absence.

2. At the final hearing the claimant represented himself with the assistance of Mr Napier. Miss Ferber of counsel represented the respondent.

Preliminary Matters

3. There had been a significant amount of discussion about the documents which should be included in the bundle for the final Tribunal hearing (the "Bundle"). There had been preliminary hearings dealing with this matter. At the time the final hearing started the parties had agreed a "core Bundle" consisting of four lever arch files and 1501 pages. We also had three Appendix bundles. Those included documents which the respondent disputed were relevant to the issues in the case. Those were available throughout the hearing, and we were able to refer to documents in those appendices if and when required.

4. At the start of the first day of the hearing we dealt with the following preliminary matters:

(1) The claimant applied to add two documents to the Bundle. The first was a copy of the collective bargaining agreement entered into by the respondent and its recognised trade unions on 1 January 2020. The respondent did not object to that document being added to the Bundle.

(2) The claimant also applied to add the response which the claimant and Mr Napier had produced to the respondent's adjournment application for the preliminary hearing dealt with by Employment Judge Dunlop on 23 November 2021. The respondent confirmed that it did not object to that document being added either.

5. The claimant had also produced a "dual index" as discussed with Employment Judge Leach at the preliminary hearing he conducted. That cross referenced the documents appearing in the core Bundle with documents in Appendix 3.

6. Miss Ferber had also produced a chronology (which was updated to strike out those claims which we had ruled out of time at the hearing in November 2020). She had also produced a helpful opening note.

7. After reading the documents on the afternoon of the first day the Tribunal asked the respondent to produce further documents. They were the letter from the respondent to the RMT union dated 12 June 2018 and the response from that union on 12 July 2018 which were referred to in Stephen Barbour's statement.

Reasonable Adjustments

8. The relevant disability for this claim is post infection syndrome and/or chronic fatigue syndrome. The respondent concedes that the claimant is a disabled person by reason of that impairment.

9. We asked the claimant at the start of his evidence whether there were any reasonable adjustments we needed to make to take into account the potential effects of his disability. Specifically, should we have longer breaks or even consider sitting for shorter days. Having heard the Judge explain the normal length of a Tribunal hearing day and the breaks the Tribunal would take, the claimant confirmed that he did not anticipate needing any additional breaks. The Judge emphasised the need for the claimant to raise with the panel if he felt that his concentration was in any way flagging or if he felt otherwise that he needed either a break or for a day to be shorter than the usual Tribunal day. In the event, the claimant gave his evidence without the need for any additional breaks or shorter days.

10. The claimant also has dyslexia. We agreed that we would ensure that he had added time if needed to read any documents he was referred to during the proceedings. We also noted his observation at a previous preliminary hearing about potentially requiring additional time to prepare any submissions in this case.

11. We finished the evidence at the end of Day 4 of the hearing. Both parties indicated they would want to produce written submissions for us to consider. We originally proposed that those written submissions be sent in on the morning of Day 5 (Friday 4 August). Mr Napier confirmed he was content with that. The claimant was concerned that he and Mr Napier might need more time to put their submissions together. After further discussions we agreed that Miss Ferber would send her written submissions to the claimant and Mr Napier by 10.00am on Friday morning. Both parties would then send their written submissions to the Tribunal by 12.30pm on Friday. The Tribunal would reconvene at 2.00pm to hear oral submissions. The Employment Judge explained to Mr Napier and the claimant that the Tribunal would not expect them, as non-legally qualified persons, to deal in detail with the relevant law which was in any event fairly settled. Instead, the submissions were an opportunity for them to explain why the claimant's case should win. The Employment Judge confirmed that during oral submissions the Tribunal would ask questions to ensure that they had all the relevant submissions they needed to decide the case.

12. The Tribunal did not receive the claimant's submissions at 12.30pm as expected. Mr Napier had tried to email the submissions at 9.00am (i.e. before waiting to see Miss Ferber's submissions) but they had not been received by the Tribunal. It was not clear why. When the claimant and Mr Napier attended the Tribunal for the 2.00pm hearing it also emerged that the laptop on which the written submissions were held had been left at their hotel. There was therefore a further delay to allow that laptop to be collected. The claimant's written submissions were eventually provided to the Tribunal around 3.00pm and the hearing started at 3.20pm. We then heard submissions from Miss Ferber and from Mr Napier.

13. During Mr Napier's submissions made with the assistance of the claimant, reference was made for the first time to evidence that the claimant had helped Mr Lincoln with his MSc while the claimant was off sick. That was not a matter referred

to in the claimant's witness statement and (as the Judge pointed out) it had not been put to Mr Lincoln in evidence. The claimant suggested that he and Mr Napier had not been aware that they could challenge anything that was not included in Mr Lincoln's witness statement during cross examination. The Judge asked the claimant to clarify the significance of the evidence about the MSc. The claimant submitted that it supported his case that Mr Lincoln was in fact well aware that the claimant's ability to concentrate was not as bad as being suggested by some of the medical evidence. Mr Lincoln was not in attendance at the hearing on Day 5 nor is he currently employed by the respondent. Even allowing for the claimant's status as a litigant in person, the Tribunal did not consider it was in accordance with the overriding objective to allow Mr Lincoln to be recalled, particularly when the claimant had not taken the opportunity of referring to this matter in his witness statement.

14. We deliberated on Day 6 and reached a unanimous decision as to the claimant's claims. The Judge apologises to the parties that absences from the Tribunal and other judicial work has led to a delay in finalising this judgment.

The Issues

15. The issues in the case are set out in the List of Issues in the Annex to this document.

16. In our reading the Tribunal noted that the grievance appeal hearing conducted after the events which are the subject of this claim had decided the claimant should be entitled to back pay from 17 October 2019. The claimant explained that he had received back pay for that period although there were outstanding disputes about how were amounts received, including taxation of the amounts received.

17. The Tribunal asked whether the respondent had conceded any part of the claimant's claim in light of the grievance appeal outcome. Miss Ferber confirmed that there was no concession in relation to the reasonable adjustments claim. Miss Ferber confirmed that from the date that the respondent received a copy of the Occupational Health report dated 17 October 2019 (page 1024) it was conceded that there was unfavourable treatment of the claimant. The respondent's case was that there was no unfavourable treatment before that point. The claimant accepted that the respondent would not have had the 17 October 2019 report by 22 October 2019, which is when this claim was issued, and therefore the latest time point with which we are concerned. That meant there was no concession in relation to any of the claims with which we were dealing.

Evidence

18. We have already referred to the Bundle in the case. References in this Judgment to page numbers are to page numbers in that Bundle.

19. For the claimant, we had witness statements from the claimant, from Mr Napier and for Mr David Pinkney. Mr Pinkney had been a colleague of the claimant but had now retired. The claimant confirmed that Mr Pinkney would not be attending to give evidence. The Tribunal explained in those circumstances they could give his written statement less weight than if he had attended in person to be cross examined.

20. For the respondent, we heard from Mr Mark Lincoln. He was the claimant's line manager ("Mr Lincoln"). We heard from Lisa Crawford, a Human Resources Business Partner with the respondent ("Miss Crawford").

21. At the previous hearing we had granted permission for the respondent to add a witness statement from Mr Stephen Barbour. His evidence was in relation to the applicability to the claimant of the "Red Book" terms and conditions. That was relevant to the claimant's claim about his sick pay entitlement. Mr Barbour had since retired and the respondent applied for permission to introduce a witness statement from Christoper Lee ("Mr Leww), Head of Industrial Relations. He would give the evidence which Mr Barbour was going to give, adopting the contents of Mr Barbour's statement as his own. The claimant did not raise any objection to that.

22. We heard the claimant's evidence on Day 2 and the morning of Day 3. We heard Mr Napier's evidence on the afternoon of Day 3. We heard evidence from Mr Lincoln on the morning of Day 4 and from Miss Crawford and Mr Lee on the afternoon of Day 4. Each witness was cross examined by Miss Ferber (in the case of the claimant's witnesses) or Mr Napier (in the case of the respondent's witnesses), answered questions from the Tribunal and were in some cases re-examined by Miss Ferber or Mr Napier.

Findings of Fact

23. We set out below our findings of fact based on the evidence we read and heard. There was a significant amount of contemporary documentary evidence. There were in some places a conflict of evidence between the claimant and Mr Lincoln. Where that was the case, we generally preferred Mr Lincoln's evidence. We found his evidence to be more reliable than the claimant's and more consistent with the documentary evidence.

Background Facts

24. The claimant has been employed by the respondent since 10 November 2008. From early 2010 the claimant transferred to a section of the respondent's Projects Division where he was involved with major projects. His role was primarily office based and involved dealing mainly with railway systems engineering, technical system safety and safety assurance. The claimant had at one point in his employment suffered an injury in a road traffic accident. The respondent had made reasonable adjustments to his working hours to enable him to phase his return to work after that injury.

25. At the time of the events giving rise to this claim the claimant was working on the Thameslink programme ("the TLP"). That project had an indicative end date of December 2016. That meant that from the latter part of 2016 the claimant's current role was coming to an end so there was a need to identity a new role for him within the respondent.

26. The claimant was based at an office in Manchester, but his main project team Head Office was located in London. Mr Lincoln (who was the claimant's line manager at all relevant times) was based in London. The claimant regularly worked from home.

27. On 20 June 2016 while walking between Manchester Piccadilly Station and offices the claimant was bitten by a tick. He subsequently became unwell. The claimant's first fit note dated 22 September 2016 confirmed that he was not fit for work with the reason given as "unspecified illness – I suspect Lyme's disease but test had been negative (not conclusive though)" (p.369)". The claimant did not return to work during the period this case is about.

Events from September 2016 to 8 December 2016 – Initial period of illness absence including Dr Bonington's report and the meeting with Mr Pinkney

28. Throughout the claimant's absence he sent Mr Lincoln fit notes. Throughout the period covered by this case, they all confirmed he was not fit for work. He sent a covering memorandum with each fit note detailing his current treatment and setting out (usually in some detail) his analysis of his current situation position. He generally sent documents to Mr Lincoln by post which sometimes caused delays in their being received. He and Mr Lincoln spoke regularly on the phone. There continued to be uncertainty about the exact nature of the claimant's illness. That in turn meant there continued to be uncertainty about the appropriate treatment and prognosis.

29. On 25 November 2016 the claimant saw Dr Bonington, an Infectious Disease consultant at North Manchester General Hospital. In his written report to the claimant's GP (pp.378-379), Dr Bonington recorded that the claimant was reporting fatigue, tiredness and difficulty concentrating since the tick bite. He felt tired after walking 300-400 yards but could walk a mile. Dr Bonington reported that on examination the claimant looked well and that he was "fit and well apart from broken bones". Dr Bonington did not think that the claimant had Lyme disease. He noted that the Lyme test taken by the claimant was negative. He acknowledged that the Lyme test can be negative in the first few weeks after infection and repeated the test. He advised that if that test was negative the claimant definitely didn't have Lyme disease.

30. At the Tribunal the claimant suggested that Dr Bonington's reference to his being "fit and well" meant he was at that point well enough to return to work. We find that is to take that remark out of context of the rest of the report and the surrounding circumstances. The claimant continued to file fit notes confirming he was not fit for work after seeing Dr Bonington. Immediately after Dr Bonington's report a further fit note extended the claimant's absence from 30 November 2016 to 15 January 2017.

31. By December 2016 the claimant had been absent from work for 10 weeks. Mr Lincoln and Mr Pinkney agreed that Mr Pinkney would go up to Manchester to see the claimant. They were being supported by Maggie O'Sullivan ("Ms O'Sullivan") an HR Business Partner.

32. Ms O'Sullivan advised Mr Pinkney that the meeting would in essence be a step 2 meeting under the respondent's Long Term Absence Policy. It would also be an opportunity to help the claimant complete an "Aspiration Document". The purpose of that document was to try and match the claimant to a new role after the ending of the TLP. As she explained in her email of 21 November 2016 (p.376), Ms O'Sullivan was keen for the claimant to complete that document because she had heard that there might be roles becoming available in Northern Programmes. Without the data from the Aspiration Document, she could not match the claimant to any of those

roles. She was conscious however, that the respondent must not be seen to be pressuring the claimant to complete the form while he was off sick.

33. Mr Pinkney met the claimant on 8 December 2016. The claimant accepted that Mr Pinkney's note of the visit (pp.386-387) was a genuine note of what he observed at the time. That note recorded the claimant as being constantly fatigued and having low energy, finding it difficult to concentrate and being forgetful. Mr Pinkney reported that during the meeting the claimant "lost the thread of the conversation more than several times". The claimant had been referred to a consultant by his GP, but the consultant was not certain that the claimant had Lyme's disease. Under the heading "Lack of Progress" Mr Pinkney recorded that "[the claimant] has reached an impasse. He feels that his health is slowly declining; he is not getting better." The claimant reported he had done a lot of research on the internet and was working with his GP to arrange to see a different consultant. The claimant was concerned, even scared, that he may have a condition or disease more serious than Lyme Disease (e.g. Chronic Fatigue Syndrome). They discussed completion of the Aspiration Document. The claimant had not been able to get the link to the document to work. Mr Pinkney agreed to address that issue. He explained to the claimant that the purpose of the document was to enable the respondent to help the claimant find another role within the respondent. The claimant said that his preference was "to be cured first so that he can start his new job without the brain fog ([the claimant's] words)." The claimant asked for M O'Sullivan's contact details so he could contact her directly.

34. At the meeting Mr Pinkney told the claimant that Mr Lincoln would have to refer him to Occupational Health because he had been absent for more than 4 weeks. Mr Pinkney noted that "that did not concern [the claimant]". Mr Pinkney and the claimant also had a lengthy discussion about other support and it was agreed that Mr Lincoln would also refer the claimant to the respondent's support scheme, Validium.

<u>Events from 9 December 2016 to April 2017 – the first OH referral and the advice of Professor Elsheikha</u>

35. On 12 December 2016 Mr Lincoln made an Occupational Health ("OH") referral to OH Assist in relation to the claimant (pp.388-389). Under "relevant conditions" the form lists Anxiety, Depression, Symptoms of Post-viral like syndrome, possibly Lyme's disease". The claimant submitted that Mr Lincoln was in no position to diagnose him as having "Anxiety and Depression". We accept Mr Lincoln's evidence that he was not seeking to make a medical diagnosis. Instead, he was including what he thought was relevant information for HO to take into account. We find the references to "anxiety and depression" reflected his understanding of the claimant's state of mind based on Mr Lincoln's conversations with him and Mr Pinkney's note[s] of meetings with the claimant. We do not accept that Mr Lincoln included the reference to "anxiety and depression" to mislead OH by suggesting that the claimant was more unwell than he was with the aim of reducing the chances that OH would say he was fit for work.

36. The referral form recorded the claimant's "current duties" as "Computer work/Display Screen Equipment/Prolonged Sitting". Under "additional questions" it said that the claimant was severely dyslexic with suitable adjustments in place for his

current role. It clarified that his reading and comprehension were unaffected but "written reports are verbose" and that so far as Mr Lincoln was aware the claimant lived alone. The form confirmed that the claimant had consented to the referral.

37. As Mr Pinkney discussed with the claimant on 8 December 2016, Mr Lincoln also made a management referral to the Validium Employee Assistance Programme. That referral form on 15 December 2016 included a text box which allowed more scope for Mr Lincoln to provide information (pp.393-394). Mr Lincoln included in that text box the text of Mr Pinkney's note of the 8 December 2016 meeting. He added that the claimant had dyslexia and that to his mind that was not constant, with the severity being exacerbated by stress and circumstance. He said that the severity of the claimant's dyslexia had increased over the past few months. He gave his opinion that the claimant needed medical advice and assistance to help him obtain a good diagnosis for his condition and then further support in treatment of his condition.

38. Under "Employment with [the Respondent]" Mr Lincoln discussed the cessation of the TLP and the issue of re-deployment. He suggested that the claimant may need counselling to "asset him to be motivated to start the re-deployment programme". He also said that the claimant was technically extremely competent in his field of system safety and security but had problems communicating his expertise to others. He explained that the claimant would often explain his point of view (written and orally) in great detail in a long or complicated manner which a non-technical person would find difficult to follow. We did find that was a feature of the claimant's written communications which were long, precise, detailed but at times risked losing the wood for the trees. Mr Lincoln noted that that characteristic could make the claimant difficult to work with and unpopular with those colleagues who were impatient. He suggested that if the claimant was to progress in the respondent help managing that characteristic would be beneficial.

39. We find that the contents of the form reflected Mr Lincoln's honest assessment of the claimant's situation. We find that those contents (including the references to the claimant being unpopular with impatient colleagues) were included by Mr Lincoln as a way of giving the EAP service as clear a picture as he could with a view to enabling it to identify the best way to support the claimant. We accept the claimant might well not have agreed with Mr Lincoln's assessment but do not doubt it was genuine.

40. A fit note dated 21 February 2017 confirmed the claimant was not fit for work until 26 March 2017. The reason given was "Unspecified illness – under care of infectious disease unit)". A further fit note dated 31 March 2017 confirmed the claimant was not fit for work for a further 4 weeks until 23 April 2017. It repeated the reason given in the previous fit note.

41. The claimant sent the fit note of 31 March 2017 to Mr Lincoln with a covering memo dated 1 April 2017 (p.408). In the memo he recorded further discussing with his GP the need to obtain advice from a medical consultant with specific expertise in Lyme Disease. That followed a long conversation the claimant had had with Professor Elsheikha (a bacterial infection specialist and research consultant at Nottingham University). Professor Elsheikha had raised concerns that the blood tests carried out by Dr Bonington were unsuitable for a proper evaluation of bacterial

infections of the Lyme Disease type and that the standard medication regime may be ineffective.

42. The claimant also raised these concerns with Mr Lincoln when they spoke on the phone on 3 and 4 April 2017 (pp.410-411). Mr Lincoln noted the difficulties the claimant was experiencing in getting to see another consultant through the NHS. The claimant reported that without a proper diagnosis any treatment was merely palliative. We find that Mr Lincoln was at something of a loss to know what to do to help given the uncertainty about the claimant's condition. We find his understanding to be that the claimant was fatigued with low energy and that the claimant found it difficult to concentrate and could be forgetful. He noted that the claimant was, on his GP's advice, undertaking brisk 3-5 mile walks a day (unless too fatigued) to try and lift his spirits and boost his resistance naturally. The claimant confirmed that the condition waxed and waned and there was a concern that activity triggering a relapse could result in the claimant being unable to get out of bed for more than an hour or two. The constant was the claimant being signed off as unfit for work by his GP with no indication that he would be fit to return if adjustments were made. After further discussion with the claimant, it was agreed he would be referred to OH again. We find that Mr Lincoln's intention was that OH might be able to assist the claimant's GP's attempts to arrange for the claimant to see another consultant by promoting the need for a definite diagnosis.

5 April 2017 until September 2017 – HR Direct and further OH advice

43. On 5 April 2017 Mr Lincoln and HR Adviser Zohaib Ali opened a Case (no.109600) in relation to the claimant on the respondent's HR Direct system. That system provided a way of uploading information, emails and documents (e.g. OH Reports and meeting notes) relating to the claimant in one place. It also recorded interactions between Mr Lincoln and the relevant HR Adviser dealing with the claimant's case.

44. The printout of the Case Report in the Bundle was run on 19 November 2019 (pp.1096 to 1336). At the Tribunal hearing it was suggested for the claimant that the Case Report had been set up as a "Severance" file, i.e. that the intention from 5 April 2017 was to bring the claimant's employment to an end. That was based on the fact that the "Stage" box on the first page of the printed report (p.1096) says "Severance: Final Meeting". We find, however, that the "Stage" box was an updated box on the first screen of the electronic record. It showed the status of the case at the point the record was printed off. We do not accept that that box said "severance" when the Case was set up On HR Direct. We do not accept that Mr Lincoln had ending the claimant's employment through ill health severance in mind as at 5 April 2017 when he set up the Case on HR Direct.

45. On the 5 April 2017, Mr Lincoln made a second OH referral. The first OH referral did not result in a report because of difficulties the claimant experienced in making an appointment with them. In the second OH Referral (pp.412-413) Mr Lincoln gave the "Relevant Conditions" as "chronic fatigue and tiredness. Possibly Lymes disease but there is no diagnosis". In the additional questions he wanted covered in the OH Report, Mr Lincoln asked whether it was possible for OH to write to the claimant's GP in support of further/better tests. He also asked whether it was possible to explore the claimant's frame of mind, i.e. whether the claimant's illness

was giving rise to depression or anxiety exacerbating his symptoms, and whether the claimant had concerns affecting his wellbeing as a result of the proposed redeployment, i.e. the transition from TLP as that project ended.

46. The claimant submitted that the OH referral process was "contaminated" by OH Assist being "misinformed" by Mr Lincoln about his condition and situation. An OH Assist case record dated 6 April 2017 (p.440) recorded the claimant's role as "Scrutiny Systems Safety Engineer – safety critical" and the issue as "?CFS/?Lyme Disease". Mr Lincoln confirmed he would have spoken to OH Assist before the claimant's OH appointment but had not seen the note before.

47. The claimant suggested that the reference to Chronic Fatigue Syndrome was inaccurate. We find that the question marks around it in the note reflect the fact that it was a possible diagnosis at that point. That simply reflected the reality of the situation at that time.

48. There was a dispute between the parties about whether or not the claimant's role was "safety critical". The claimant submitted that by telling OH Assist that his role was "safety critical" Mr Lincoln made it less likely that OH would find him fit to return to work. That was because an OH adviser would be more cautious about making that recommendation where an employee was in a safety critical role. The claimant's understanding was that his role was not "safety critical". It involved sitting at a desk using computer equipment. He was not in the same position as a trackside worker whose role involved them being in dangerous situations while carrying out their role. We accept that. We also, however, accept Mr Lincoln's cross examination evidence that although he did not recall using the phrase "safety critical" the claimant's role was "safety critical" in a colloquial, non-technical sense. The claimant's role was systems assessment. The claimant making mistakes through lack of concentration or fatigue would have posed a risk to the respondent's business and, ultimately, to passenger safety. Regardless of whether or not the role was safety critical in the narrow technical sense in which the claimant understood that term, we accept that it was a valid consideration for Mr Lincoln to raise with OH Assist the potential consequences of any lapses of concentration by the claimant. We do not find any deliberate intention on his part by doing so to make it more difficult for the claimant to return to work.

49. On 25 April 2017 the claimant had a telephone OH appointment with Johanna Bulley, an OH Advisor. She confirmed that the claimant remained unfit for work because his symptoms remained significant (p.420). A further telephone appointment with Ms Bulley took place on 17 May 2017. The resulting OH report letter said that the claimant may be able to return to work in some capacity but that would be dictated by the impact of his symptoms on any given day. It also said that it was difficult to offer a return-to-work plan which could be sustained and consistent in nature (p.429). Ms Bulley arranged for the claimant to have a face-to-face appointment with an OH physician because of the complexity of his case. The intention was to provide a full OH report after that appointment (p.429).

50. The claimant was assessed by Dr Hazem Lloyd ("Dr Lloyd") on 13 June 2017. The resulting report confirmed that the claimant was unfit for his substantive work role (pp.442-443). That would remain the position for the next 3 months until the claimant was seen by a consultant in Tropical Medicine in Liverpool. In the absence

of a diagnosis Dr Lloyd could not advise on the outlook for the claimant. The response to the specific additional questions raised by Mr Lincoln were stated to be "none". His opinion at that point was that the claimant did not meet the definition of a disabled person because his condition was not long term and was not having a substantial affect on day to day activities.

51. The claimant continued to file fit notes confirming he was unfit for work. He sent each of them to Mr Lincoln with a covering memo. He and Mr Lincoln also spoke on a roughly weekly basis. During this period the respondent was also manging the process of transition from the TLP. Mr Lincoln and the claimant had a 1 to 1 meeting about that on 11 April 2017. The claimant's "indicative Transition Date" from the TLP was confirmed as 22 December 2017. The respondent had agreed with the trade unions that there would be no compulsory redundancies at the claimant's grade. However, because no suitable alternative role had been identified for the claimant, he and Mr Lincoln had an "Individual Consultation Meeting – at risk" on 20 June 2017. At the meeting Mr Lincoln confirmed that the claimant was not on notice of redundancy because of the no-compulsory redundancies agreement. They primarily discussed suitable alternative role, including the fact that the respondent's HR team did not appear to have taken on board the claimant's preference to work in the North West. They touched briefly on the claimant's health, with Mr Lincoln noting that the claimant wasn't feeling great but was due to see the consultant in Liverpool (pp.444-447).

52. When Mr Lincoln sent the claimant the notes of that meeting on 29 June 2017, the claimant responded with an email setting out the position as he saw it (p.450). He said that he was certain that he had the potential to substantially (albeit perhaps not 100% completely) recover from his infective condition and to return to working productively. He acknowledged that OH Assist were advising that he should not work and acknowledged that he was required to comply with that guidance even if he did not entirely agree with it. He suggested that the medical professionals and/or the respondent's HR team might be taking too cautious or risk averse a view when it came to his ability to return to work. His own view was that he might be capable of working in a part-time capacity. He accepted he might not be suited at that point to "critical" levels of system work but might be able to assist with non-critical equipment or systems analysis. He suggested that he had discussed this possibility with Ms Bulley but there had apparently been no response from the respondent's HR to that suggestion. Mr Lincoln suggested that approach would be useful when treatment was forthcoming and the claimant was getting better. He suggested they catch up after the claimant's next appointment with his GP. The subsequent fit note dated 7 July 2017 signed the claimant off until 13 August 2017. It confirmed the claimant was unfit for work rather than suggesting he would be fit for work with adjustments (p.448).

53. The claimant was due to see the consultant in Liverpool on 2 August 2017. Mr Lincoln intended to make a further OH referral once the outcome of that appointment was known. The appointment went ahead but the claimant did not see the consultant he had expected to. Instead, he saw a specialist who carried out some initial examination, took blood samples but then recommended attendance at a specialist clinic elsewhere in 6-8 weeks. There was a preliminary diagnosis of induced Chronic Fatigue Syndrome ("CFS") but that needed to be confirmed by further tests.

Events from September 2017 to September 2018 – further OH reports and the Bridgewater Clinic's involvement

54. By September 2017 the claimant had been absent from work due to illness for a year. His sick pay reduced to nil. He was still seeking a diagnosis for his condition. The claimant continued having blood tests and was due to attend a chronic fatigue clinic on 28 October 2017. He agreed with Mr Lincoln that he should be re-referred to OH Assist. The respondent was having problems with the service being provided by OH Assist which was leading to delays and admin failures on OH's part. The issues were sufficiently serious and widespread to cause the respondent's Chief Medical Officer to work with OH Assist senior management on an "Emergency Plan" to rectify the situation. He explained that plan in an email to the respondent's senior management on 28 September 2017.

55. Mr Lincoln made the referral in mid-September 2017 but had to chase them up. The claimant was by this point raising the possibility of a managed return to work in his conversations with Mr Lincoln. Mr Lincoln's view was that that could only really be considered once there was feedback from the tests results and from OH Assist. We accept that Mr Lincoln's position was that unless he could be sure that the claimant returning to work would not make the claimant worse and/or cause a relapse it was not appropriate for him to do so.

56. The OH appointment took place by phone on 23 October 2017. To the claimant's disappointment the appointment was not with Mr Bulley or with Dr Lloyd but with another OH Adviser, Tina Bain. Understandably, the claimant felt that the lack of continuity was not helpful given the nature of his condition. He had also been impressed by Ms Bulley's understanding of the issues in his case. The note of the call taken by OH Assist (p.469) recorded some improvement in symptoms over the previous 6 months. It noted that the claimant would like to try a graduated return to work but also noted that he remained very fatigued and had good days and bad days which were unpredictable. The note states "Manager seeking advice on RTW, unable to support long-term adjustments, Is IHR (Ill Health Retirement) appropriate." It was suggested by the claimant that that entry recorded Mr Lincoln telling OH Assist that the respondent was unable to make long-term adjustments. We find that entry records what the claimant told Ms Bain. The note is a record of her discussions with the claimant, as the first paragraphs of her subsequent interim report (p.464) make clear. We do not accept that it was Mr Lincoln who said that the respondent was unable to make long term adjustments.

57. The interim OH report dated 23 October 2017 did not refer to reasonable adjustments but did record that there were days when the claimant's symptoms were more manageable and that the claimant was keen to explore a possible return to work. It noted that the claimant had been referred to the National Infectious Disease Team and Diagnostic Clinic and had appointments on the 31 October 2017 and 8 November 2017. The report concluded that due to the unpredictable nature of his ongoing condition, the claimant was unlikely to be able to resume a safety critical role in the foreseeable future.

58. Ms Bain's interim report said she would refer the claimant to an OH Physician to advise on long term prognosis. However, his next OH appointment on 30 November 2017 was with another OH Adviser, Nandy Blay. Her report (p.477) took

matters no further. She said she would set up an appointment with an OH Physician but Mr Lincoln had to chase this up in mid-December. That resulted in a face to face appointment for the claimant with Dr Lloyd on 9 January 2018.

59. By the end of 2017 the claimant was increasingly frustrated at the failings of OH Assist and what he saw as the failings of the respondent's HR team to contact him to progress matters. Mr Lincoln was in regular contact with HR via the HR Direct system. He was advised by HR to await the outcome of the appointment with Dr Lloyd before deciding on next steps. Mr Lincoln had by this point raised the possibility of ill-health retirement with the claimant (p.1133). He had asked in the OH referral what options the respondent could consider if it was unable to accommodate long term restrictions or redeploy the claimant.

60. Dr Lloyd's OH Report dated 9 January 2018 (pages 488-490) advised that the claimant was unlikely to return to work and was "unfit for his substantive work role for the foreseeable future". It noted that there was no definite diagnosis but that the claimant was still suffering from excessive sleep, being easily fatigued and lack of concentration. The report advised that the claimant was likely to meet the definition of a disabled person in the Equality Act 2010. In answer to the specific questions posed by Mr Lincoln in the referral, Dr Lloyd said the claimant was suffering possibly Lyme disease and/or CFS; that he was unlikely to return to work for the foreseeable future; but that ill health retirement criteria were not met because the claimant was "able to have gainful employment which suits his conditions".

61. The reference to the claimant being able to have gainful employment appeared to Mr Lincoln to contradict the rest of the report. When Mr Lincoln discussed the report with the claimant by phone, the claimant reported that Dr Lloyd had advised him that physical work was not an option and that his cognitive ability was likely to be impaired in the sense of being unreliable in terms of decision making so that safety and other engineering analysis work was not advised. (p.1139). Mr Lincoln agreed with HR colleagues that they needed greater clarity from OH Assist about potential next steps.

62. The claimant's fit notes were still saying he was unfit for work. The claimant's last fit note dated 28 December 2017 signed the claimant off until the 4 February 2018 because of "an unspecified illness" noting that he had been referred to Royal Liverpool Hospital for further advice (p.484). We find that Mr Lincoln did not receive that fit note or the claimant's covering memo until 12 February 2018 (p.1144).

63. The covering memo dated 28 December 2017 (memorandum 13) was 7 pages long and provided a great deal of detail about the claimant's interactions with his GP, Dr Suntha with OH Assist. In summary, the claimant told Mr Lincoln that he was keen to return to some kind of productive work. He acknowledged that there were a number of potentially very serious concerns relating to his practical capability including in particular his cognitive ability and ability to concentrate. In addition he noted his GP had raised concerns that the sorts of standard reasonable adjustment to working patterns which employers made would be too inflexible and highly structured to be suitable for people suffering from conditions such as the claimant's. Instead, it was probable that "significantly amended and extensive work practice alterations" would be required in his case. He raised concerns that his GP was not in a position to properly evaluate the situation and that OH Assist might need

information from the respondent about the claimant's role in order to be able to do so. The claimant also noted that Nandy Blay had referred to the respondent starting to consider the possibility of what he referred to as "medical retirement". He said that if that was indeed the situation there ought to be an open and transparent process and dialogue with him about that possibility.

64. The claimant was clearly and understandably concerned that his position was very uncertain because of the TLP transition process. He acknowledged that much would clearly depend on the views of OH Assist Medical Practitioners but that the continuing uncertainty over such a long period of time about his position needed to be resolved. He was not specifically criticising Mr Lincoln but was expecting that some element of the respondent's HR team should provide clarity to him about what was going to happen next. The claimant in evidence said that his GP had at around that point suggested that there was a legal obligation on the respondent to contact the GP to discuss reasonable adjustments because of the number of fit notes which had been supplied. We do not find any evidence that the claimant's GP had said that or that the claimant himself said that.

65. When the memorandum dated 28 December 2017 was received by Mr Lincoln until 12 February 2018 he took advice from HR and then responded to the claimant on 9 March 2018. He summarised the points made by the claimant, including noting that the claimant would like to know what other employment opportunities were available to him at the respondent. Those alternative roles would need to be able to accommodate the highly flexible adjustments the GP suggested would be needed and would need to be subject to the advice of OH Assist and the claimant's consultant. Mr Lincoln suggested a meeting between himself, the claimant and HR to address the points and have an in-depth discussion. He proposed meeting on 26, 27 or 28 March 2018.

66. In the meantime, on the 21 February 2018 the claimant had been seen for the first time by Dr Gaber, Consultant in Rehabilitation Medicine at NHS Bridgewater Community Healthcare ("the Bridgewater Clinic"). Dr Gaber's report dated 28 February 2018 to the claimant's GP (p.508) said that regardless of the initial cause what they were dealing with was CFS/ME with classic manifestations of fatigue, unrefreshing sleep and cognitive impairment. Dr Gaber's advice was that it was unlikely they would get a conclusive opinion about the exact pathology but as the clinical picture was one of CFS/ME they should instead focus on a rehabilitation approach to the problem. He arranged for the claimant to undergo 1 to 1 sessions with one of his experienced therapy colleagues.

67. After discussing again with HR, Mr Lincoln made a further OH referral on 27 March 2023 (pp.503-504). In that referral he repeated the reference to the claimant's role having safety critical implications. That was, he said in the form, because it related to the communications and signalling networks and their safe and secure design, implementation and operation. He asked whether the claimant's medical condition meant he was unable to return to his current safety critical role requiring high mental function nor a role requiring physical fitness even if the respondent made reasonable adjustments.

68. Mr Lincoln and the claimant both spoke to OH Assist on 6 April 2018. Mr Lincoln expressed the view that the severity of the claimant's condition meant that it

was difficult to see what reasonable adjustments the respondent could make. As agreed during that discussion Mr Lincoln added a question to the referral asking the medical professional seeing the claimant to confirm whether there were grounds for ill-health severance (p.1159).

69. The OH Adviser, Martha Mutikani, recorded in her interim report dated 6 April 2018 (p.506) that as there were no curative measures possible, it may be appropriate to consider an application to the pensions provider for ill health retirement. She arranged a face to face appointment for the claimant with Dr MacCarthy, a Consultant Occupational Physician. That appointment took place on 18 April 2018.

70. The claimant had sent OH Assist Dr Gaber's report and Dr MacCarthy took that into account in preparing his report dated 18 April 2018 (pp.511-512). He advised that due to the combination of mental and physical fatigue the claimant was unfit for his usual work and that there did not appear to be any adjustments management could make that would allow him to resume any work. He also advised that the claimant was likely to meet the definition of a disabled person in the Equality Act 2010. In terms of prognosis, he indicated that there might be improvement in the claimant's condition but that indications were that any recovery may be protracted over a lengthy period. Dr MacCarthy noted that there had been an allusion to ill-health retirement but that there was no question on that in the OH referral (Mr Lincoln had unsuccessfully tried to add it). The claimant said that ill-health retirement had not been raised with him and on that basis Dr MacCarthy took the view he had not given informed consent so he could not address that issue. We find that Mr Lincoln had raised the issue of ill-health retirement with the claimant including during a face to face meeting on 9 April 2018 (p.1160) and that the claimant had himself referred to it in his memorandum of 28 December 2017.

71. Mr Lincoln made a further OH Referral on 30 April 2018, specifically asking whether the respondent could progress severance on ill health grounds for the claimant (pp.521-522). He also asked for clarity about a referral relating to Pensions made by OH Assist. The claimant had a telephone assessment with Dr Ingo Torbohm on 15 May 2018. The resulting OH Report (pages 526-528) confirmed that the claimant "would be considered unfit to undertake his normal duties or any other duties which could require concentration and which are safety critical. In addition he would not be able to commit himself to regular work due to the severe fatigue" and therefore the claimant "remains unfit to return to work in his normal duties or other duties that his employer might be able to accommodate at least for the foreseeable future. He therefore in my opinion meets the criteria for ill health severance". Dr Torbohm's report also clarified that the pensions process was a separate one which aimed to establish whether a person was deemed permanently unfit for gainful work. The claimant had been referred to that process, the outcome of which was potentially ill-health retirement.

72. We find based on Miss Crawford's evidence that ill-health severance was an internal respondent process by which an employee's employment would be terminated for ill-health with payment of a lump sum. Ill-health retirement was a process external to the respondent in that the decision was made by the Railway Pension Scheme. It could lead to retirement on an ill-health pension.

73. On 24 May 2018 Mr Lincoln emailed the claimant. He said that OH Assist had now confirmed that ill health severance was the only recommendation they could make to protect the claimant's health and welfare. He advised that the final option they had was to seek to progress Ill Health Retirement via the Pension scheme (page 529). He sent the claimant the application form for ill-health retirement (PM30) asking him to complete Part A. of that form. Mr Lincoln had already completed Part B of the form. There was a degree of urgency because HR had advised Mr Lincoln that an application would need to be based on an OH Report no more than 3 months old. Mr Lincoln did not explain that time limit in his email to the claimant. He was however in regular contact with the claimant by phone during this period. In mid-June the claimant reported being at a low point in the cycle of symptoms. He had also been advised by his GP that it would be preferable if the medical assessment part of the form (Part C) was completed by the Bridgewater Clinic as they had the necessary expertise to ensure the correct medical information was included. The claimant's GP arranged that appointment but the earliest available date was 18 July 2018 (p.1181).

74. In parallel with the Ill Health Retirement application, Mr Lincoln was following HR advice to follow the Ill Health Severance process. That was, we find, necessary in case the Ill Health Retirement application to the pension scheme was unsuccessful. By a letter dated 21 June 2018 Mr Lincoln invited the claimant to an ill health severance meeting on 29 June (pages 559-560). The letter explained that the meeting would provide an opportunity to discuss any suitable alternative employment options though it noted that the advice from OH was that the claimant was unlikely to return to his substantive role in the foreseeable future. He emailed the claimant to report back on the HR advice received, having tried unsuccessfully to phone him. We find that Mr Lincoln accepted and had discussed with the claimant that the meeting would be a final opportunity to discuss any reasonable adjustments but that Mr Lincoln's view given the medical opinions was that it was unlikely there were any such adjustments (p.1190). That was because the advice the respondent had consistently been receiving from OH Assist was that the claimant was unfit for work.

75. The clamant suggested that email exchanges between Mr Lincoln and Neil Longbottom of the respondent's HR on 4 July 2018 (pp.574-575) showed that the meeting (which eventually took place on 17 September 2018) was a sham. Specifically, the claimant referred to that part of the email where Mr Lincoln explained why he had not yet provided the claimant with the Ill Health Severance quotation. Mr Lincoln said that he was worried that it would undermine the purpose of the first meeting, in that it would "clearly establish in writing that the respondent had set its position and had a pre-ordained result in mind with no intention of discussing possible reasonable adjustments". Mr Lincoln denied the claimant's suggestion that this was duplicitous behaviour on his part, i.e. that he was going through the motions of holding the meeting knowing full well that respondent had already decided to terminate the claimant's employment. We accept Mr Lincoln's evidence on this point. We find that although he did think, given the weight of medical evidence, that it was unlikely there were steps which could be taken to enable a return to work, he did not have a closed mind on that issue. He did think that the most likely outcome was Ill Health Severance or Ill Health Retirement so it made sense to progress those processes, He was open about that in his emails to the claimant in his emails to him in July and August in the lead up to the September meeting.

76. Having taken advice from the TSSA trade union, the claimant requested a delay to enable him to find representation for that meeting. It is clear that he was struggling at that point due to his illness. He was also hoping to receive feedback from his GP and the Bridgewater Clinic (page 565). There was a further period of delay with the claimant being unwilling to rely on local trade union representation and raising questions about the HR process (referring back to his memo dated 28 December 2017). Mr Lincoln chased up the claimant by email and text but there was no progress made in July or August 2017. We find that the delays at this point were due to the claimant not progressing matters. Mr Lincoln tried to progress matters by suggesting that Mr Napier act as the claimant's representative at the severance meeting. On 21 August 2018 Mr Lincoln wrote to the claimant inviting him to a rearranged ill health severance meeting on 17 September 2018 (pages 594-595).

77. On 23 August 2018 Mr Lincoln received further fit notes which confirmed the claimant was unfit for work. The claimant sent it under cover of a 5 page memorandum which was dated 6 May 2018 (pp.598-602). In brief, it acknowledged that given the medical evidence, his desire to return to any kind of "useful function" looked remote. He suggested that there should be a review of his case and criticised the opaque approach taken by the respondents' HR function to it. He also reported that having taken trade union advice he was of the view that his condition was a work-related condition. He pointed to other public sector organisations in which employees subject to such conditions were entitled to a year's full sick pay followed by a year's half pay (in contrast to his situation on nil sick pay after 12 months).

<u>Events from September 2018 to 6 June 2019 – Bridgewater Clinic report and welfare meetings</u>

78. On 3 September 2018 the claimant sent Mr Lincoln a 3-4 page email (pp.605-609). In it he set out his concerns that HR were seeking to push matters through and stressed the need for his case to be dealt with thoroughly and properly not just as a tick box exercise. He expressed concern that he was not being provided with clarity about which of the respondent's policies and processes were being applied to him. He rejected any suggestion that he was seeking to delay matters. He set out the serious financial ramifications for him of the lack of sick pay which extended to his having to consider selling some of his investments. He did not confirm whether he would be attending the rearranged ill health severance meeting.

79. Mr Lincoln spoke to the claimant on the phone and emailed a response on 6 September 2018. He attempted to provide guidance on the Ill-Health Severance process and explained why that process was being progressed alongside the claimant's Ill Health Retirement application. The claimant was still chasing the Bridgewater Clinic for the completed Part C of Form PM30. Mr Lincoln confirmed he had been advised throughout of the need to make reasonable adjustments but that the position was that the medical advice was that the claimant was unfit for work and the respondent did not want to risk aggravating the claimant's disability and future health and welfare through triggering some form of relapse if he returned to work. He confirmed that part of the purpose of the meeting on 17 September was to confirm whether that understanding was correct. He urged the claimant to contact Mr Napier and confirm whether he would be attending the meeting or suggest alternative dates or times.

80. On 10 September 2018 the Bridgewater Clinic sent a report to Mr Lincoln (pages 611-612). It was a joint report from Dr Gaber and Wilma Hudson, the Specialist Occupational Therapist in the Management of CFS/ME. It confirmed that the claimant was presenting with a clinical picture of CFS/ME and its classic symptoms. It advised that in the balance of probability "the claimant will not be able to return to his current role nor does there seem to be any realistic reasonable adjustments or alternative options for him within the respondent (e.g. computer work also requires significant need for high levels of concentration)". That opinion was based on "ongoing evidence of presenting symptoms which include significant problems with his sleep pattern, his inability to concentrate plus unreliable energy levels needed to consistently complete his current daily living activities which obviously at this time do not include completing a work role". The report also noted that "any type of stressors – physical, emotional or social – is bad for CFS/ME (consumes energy)". The stated aim of the report was to set out Dr Gaber and Ms Hudson's joint opinion in the hope that a decision could be made about the claimant as soon as possible to enable him to focus on his CFS/ME management plan. We accept Mr Lincoln's evidence that he saw that report as categorical and as confirmation the claimant would not be able to return to work.

81. On 17 September 2018 the first formal welfare meeting with the claimant took place in Manchester. Miss Crawford and Mr Lincoln both attended, with Mr Napier attending with the claimant. Over subsequent weeks the claimant provided detailed comments on the notes of that meeting and Mr Napier added a series of questions to those notes to which Mr Lincoln responded (pp.623-645).

82. Both at the meeting and in his subsequent questions Mr Napier queried whether there had been sufficient steps taken to identify reasonable adjustments (including alternative roles) which could enable the claimant to return to work. Mr Lincoln's position was that the medical advice throughout the claimant's illness had been clear that the claimant was not fit for work and that a return to work risked setting the claimant back by triggering a relapse. That position had been reiterated in the Bridgewater Clinic report of 10 September 2018. Mr Napier suggested that the respondent should have been more proactive in challenging the medical reports' conclusions that there were no reasonable adjustments which could have been made. He suggested that there were other employees of the respondent with CFS/ME for whom reasonable adjustments had been made. The claimant was highly critical of the respondent's HR function and expressed the view that there was a lack of clarity in the process and parameters applied by the respondent in assessing the claimant's position. Mr Lincoln was not certain about the answers to these points and the extent of the respondent's obligations and as an action point from the meeting he agreed to seek legal advice on the claimant's position and the respondent's obligations. He also agreed to consult the Diversity and Inclusion team and seek a further report from OH Assist to address Mr Napier's concerns that not enough had been done to identify reasonable adjustments which could enable the claimant to return to work.

83. There was also discussion at the meeting of 2 aspects of pay. The first was Mr Napier and the claimant submitting that the claimant's sick pay should have been extended because his absence was for work-related reasons (the tick-bite having been sustained at work). Mr Lincoln agreed to take advice on this issue and on whether the respondent should have reported the incident to the HSE under The

Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR). The second pay-related issue discussed was in relation to the statutory holiday pay which the claimant had accrued during his period of sickness absence. Ms Crawford looked into this issue after the meeting. As a result, the claimant was paid holiday pay accrued from May 2017 to November 2018 on 16 November 2018 (p.675).

84. Mr Napier suggested in his questions annexed to the notes of the meeting (but not at the meeting itself) that the respondent had decided to terminate the claimant's employment because that was "the easiest option open to them" (p.646). Mr Lincoln responded to deny that and say that the option of severance was the best option available to all parties given the authoritative medical advice.

85. Mr Lincoln asked OH Assist to provide advice on the reasonable adjustments which could be made where an employee had CFS/ME. They responded that they did not give advice on a generic basis, so Mr Lincoln prepared a further OH Referral. In consultation with Ms Crawford and the respondent's HR team he prepared a series of questions for OH Assist. It included questions about what reasonable adjustments could be made and whether it was foreseeable that the claimant could be declared fit for work in the next 3-6 months. It also included a question to clarify whether one reason the medical reports to date had said that the claimant was unfit for work was because of the risk that the condition of a patient with CFS/ME could worsen irrevocably if they were to become stressed or overly fatigued for whatever reason. It was agreed that OH Assist would carry out an initial telephone consultation with the claimant followed by an extended medical review by an OH Physician (p.658).

86. Mr Lincoln shared the questions with Mr Napier in early October 2018. At that point Mr Lincoln was still waiting for the claimant and Mr Napier's comments on the notes of the welfare meeting (they were provided on 13 October 2018). Mr Napier agreed on 2 October 2018 that the questions were on the surface fair ones but queried why no details were being provided about specific roles to enable OH Assist to make an informed decision on what alternative roles and reasonable adjustments might be available. He also queried whether the 3-6 month time scale for recovery was a reasonable one. Mr Lincoln also shared the questions with the claimant on 15 October 2018 when he sent him the consent form for the OH referral.

87. The claimant returned the consent form signed on 19 October 2018 and an OH appointment was arranged with Dr Lloyd on 20 November 2018. The claimant was unhappy that the OH review was not going to be carried out by an "independent specialist medical consultant" (p.676).

88. On 20 November 2018 Dr Lloyd provided a further Occupational Health report (his third). It said the claimant "would be considered unfit to undertake his normal duties or any other duties, which would require concentration and which are safety critical." In addition, it said he would "not be able to commit himself to regular work due to the severe fatigue". The report stated that Dr Lloyd was "unable to advise on any measures that would be likely to facilitate a return to work for the foreseeable future".

89. In answer to the specific questions posed by Mr Lincoln, the report reiterated that the claimant was unfit for his substantive role as a systems safety engineer for the foreseeable future. In response to a request to identify reasonable adjustments

the report said "NA". In response to a further question on the claimant's return to work the report said the claimant "is likely to be fit for an alternative role, office duties with adjustments". In answer to the question about the risk of stress or overfatigue worsening the claimant's condition, the report said that "it was likely that the psychological element of the claimant's condition can become worse if he is under stressful situations like target driven duties" (pages 684-686).

90. Neither the claimant nor Mr Lincoln were very impressed by Dr Lloyd's report which had been produced after a 25 minute appointment with the claimant. Mr Lincoln noted that the report was inconsistent with the categoric report from the Bridgewater Clinic in seeming to suggest that there were reasonable adjustments which could be made in the form of alternative roles. However, he decided that the report meant that the respondent should consider alternative roles and produced a paper on the issue (pp.693-696). At the start of December 2018, a few days after receiving Dr Lloyd's report, he sent a draft to the claimant and Mr Napier. The claimant was disappointed that Mr Lincoln distributed the paper a few days later without discussing it further with him and Mr Lincoln. In summary, the paper tried to identify appropriate job roles and adjustments based on Dr Lloyd's report and the other medical reports received.

91. Mr Lincoln summarised the relevant criteria as being a role involving limited travel to work; flexible start and finish times with no more than 3 hours work per day; an absence of time pressures in terms of attendance times, tasks and targets; not involving extensive periods of computer work nor long periods of concentration or be too physically tiring. In addition the role should take into account the claimant's prior engineering skills and experience; and have an element of sociability and interaction to facilitate the claimant's well being. The paper made clear that those criteria were preliminary and should be adjusted or added to following discussion with the claimant. It also suggested that ideally a bespoke role should be found. The paper then included a table to be completed with possibly relevant roles. It was to be shared with a number of teams in the respondent including the TLP transition team as well as the claimant and TSSA reps.(pp.693-396).

92. In the meantime, Mr Napier was pressing for the claimant to be reinstated on the payroll, referring to the "stood off" arrangements which applied to other staff and suggesting that the delay in dealing with the claimant's case amounted to discrimination arising from disability in breach of s.15 of the Equality Act 2010. He also advised Mr Lincoln that the claimant was considering raising a formal grievance about the issue.

93. On 14 December 2018 Mr Lincoln emailed the claimant and Mr Napier to report that HR and legal colleagues had advised him that the claimant was not entitled to return to payroll with the "stood off" arrangements not applying to him (see paras 125-130). He also confirmed that the holiday pay paid to the claimant would be recalculated to include a bonus element following a query from the claimant about the amount received. (That supplementary amount was paid in January 2019). Mr Lincoln also attached to that email details of 2 possibly alternative Network Support Engineer Roles). He emailed the job spec for the first to the claimant. Both roles were Manchester roles at Band 4 (the claimant was Band 5). On 21 December Mr Lincoln emailed the claimant with a clearer copy of the job spec, confirming he had

also contacted the relevant Senior Network Support Engineer to find out whether the role could be done part time.

94. There was a second formal welfare meeting on 16 January 2019 with the same attendees. We find that at the meeting Mr Napier strongly pressed for the claimant's pay to be reinstated, suggesting (as we understand it) that it was discrimination arising from disability and a failure to make reasonable adjustments for the usual sick pay policy to be applied to the claimant. Mr Napier referred to the EHRC Code of Practice on Employment to back up his argument that the respondent should have known the claimant was a disabled person from the 12 months' anniversary of his absence. Mr Lincoln's position was that the respondent could not know the claimant was a disabled person until medical advice supported that. The key point in time he identified was the claimant's diagnosis with CFS by the Bridgewater Clinic in February 2018. During the meeting the claimant was highly critical of OH Assist. Mr Napier was highly critical of the respondent (though not of Mr Lincoln) for its handling of the claimant's case. He maintained that the respondent should now reinstate the claimant's pay. In response to his querying why no reasonable adjustments had been made to get the claimant back to work, Mr Lincoln said that the medical advice throughout (until Dr Lloyd's most recent report) was that there were no appropriate reasonable adjustments. In the absence of such advice the risk for the respondent was that any adjustments attempted could be to the detriment of the claimant's health.

95. The next formal meeting took place on 20 March 2019 with the same attendees. The invitation letter dated 13 March 2019 set out the agenda. The key agenda items were consideration of possible alternative job roles (in light of Dr Lloyd's most recent report) and discussion of the possible Ill Health Severance Package. The letter made clear that no decision had been taken on severance and that the respondent would continue to look for alternative employment for the claimant (pp 741-742).

96. By the time that meeting took place the claimant had reported the tick bite to the HSE and the Office of Rail and Road ("the ORR") under RIDDOR. Mr Napier had continued to press Mr Lincoln for the claimant to be reinstated on full pay on the basis that the respondent had failed in its duties under the Equality Act 2010. Mr Lincoln reiterated his position that until Dr Lloyd's report, the medical evidence was that the claimant had been unfit for work. He referred to the Railway Safety Standards Board (RSSB) Flow Chart T662 (p.753). He understood the process under that flowchart to be that where a "significant impairment" was present and the medical professionals involved had the competence to carry out a practical function test there was no requirement for a separate risk assessment to be carried out. Mr Napier and the claimant criticised the respondent for a lack of policies and processes to deal with reasonable adjustment and ill-health severance. They compared the respondent unfavourably with its Australian equivalent in that regard.

97. At the claimant's request, the meeting on 20 March 2019 began with a review of the previous meeting's minutes. This led to the first part of the meeting going over the same ground as the previous meeting. The claimant also said that he had raised by his own count 28 questions of which only 6 had been answered by the respondent. These were questions he had raised in the memos he had sent with his fit notes. Mr Napier again pressed for Mr Lincoln to restore the claimant's pay and

instigate ill-health severance. Mr Lincoln made it clear that he did not have authority to do so. The claimant said that Mr Lincoln had been wrong to take T662 into account because it was for the use of medical practitioners and related to front line staff such as train drivers.

98. Mr Napier and the claimant questioned Dr Lloyd's qualifications to provide an OH opinion and insisted that he not be involved in any medical report provided to the Railways Pension Scheme in the context of any Ill Health Retirement process. The claimant said he had given Dr Lloyd a list of questions to which he had still not had any answers (p.752). These related in particular to the information Dr Lloyd has been given to enable him to assess whether any reasonable adjustments might be made for the claimant.

99. Mr Crawford then provided a list of vacancies which the respondent thought might be suitable for the claimant. She accepted that most of the roles were office based admin roles, some of which were on the same band as claimant's role. The claimant responded that he was not an admin person. Ms Crawford accepted that but explained that they were aiming to find roles involving lighter duties consistent with what Dr Lloyd's report suggested the claimant might be able to do. Those roles tended to be admin roles.

100. Ms Crawford provided the claimant with the quotation or ill-health severance which was around £14,000. The claimant referenced civil service schemes which paid 3-4 times annual salary. Mr Napier made the point that the severance payment would not cover the shortfall in the claimant's pay resulting in his having been on nil pay. The meeting ended with Mr Napier making it clear that the claimant would be pursuing matters formally by way of the respondent's grievance policy.

101. The next meeting to discuss Ill health Severance was set for 30 May 2019. Mr Lincoln took advice from HR on whether he should continue with the Ill Health Severance process if the claimant was intending to file a grievance. HR confirmed the 2 processes were separate and could continue in parallel. Mr Lincoln informed the claimant of that by text message on 25 April 2019. By that point, Mr Lincoln was finding it difficult to get hold of the claimant by phone.

102. Mr Lincoln told the claimant by email on 15 May 2019 about the meeting on 30 May 2019. On 15 May 2019 the claimant emailed Mr Lincoln to "EMPAHTICALLY OBJECT TO" this "plan" on the part of the respondent to run the 2 processes concurrently. He said it was further discriminatory behaviour on the respondent's part. Mr Lincoln responded by email on 20 May 2019. The claimant had still not filed his grievance despite indicating he would do so at the previous welfare meeting. Mr Lincoln confirmed in his email that there would be an opportunity to discuss matters at the meeting on 30 May 2019 and confirmed that, as agreed, he and Ms Crawford would provide a breakdown of how the Ill health Severance package had been calculated; how the accrued holiday pay had been calculated; and how pension arrears had been calculated.

103. On 22 May 2019, Mr Lincoln sent the claimant the formal invitation letter to the 30 May 2019 meeting. The letter noted that this was the next step in the Il health Severance process and that one possible outcome of the meeting could be termination of the claimant's employment. The letter noted that the claimant had asked for the meeting to be delayed because of his intention to submit a grievance. It

pointed out that there had been sufficient time for the claimant to have done so since 20 March 2019 even taking into account that his dyslexia. The claimant received the letter on 25 May and on 28 May emailed Mr Lincoln to ask for a postponement. He explained he was due to attend the Bridgewater Clinic on 6 June. He suggested it would make sense to wait until he had had the appointment and a preliminary report from the clinic was available. He accepted a full written report from the Bridgewater Clinic would be likely to take a further 6 weeks. Mr Lincoln tried unsuccessfully to contact Ms Crawford and decided it was too late in the day to postpone the meeting. He also did not want to delay matters further given it had been 3 months since the last meeting.

104. At the meeting on 30 May 2019 Mr Napier and the claimant repeated their criticisms of the respondent's approach, focussing in particular on what they saw as the inadequate support provided to Mr Lincoln by the Infrastructure Projects' ("IP") HR Team. In particular, they criticised what they saw as a failure to provide OH Assist with relevant medical information and information about job roles, resulting in OH Assist concluding that the claimant was not fit for work and that there were no reasonable adjustments which could be made. The claimant also criticised what he said were failures by the TLP Transition Team to find him an alternative role in 2017 and for failing to continue to engage with him while he was off sick. The claimant also asked Mr Lincoln to "withdraw" reliance on T662 because, he said, it was not applicable and had been wrongly used by Mr Lincoln in the decision-making process. Mr Lincoln said there was no reason to "withdraw" it because he had merely used the flow chart as a guide and not to assess the claimant's fitness for work.

105. Ms Crawford provided information about how the Ill health Severance Package had been calculated. The claimant and Mr Napier asked for more details of how it had been calculated, having identified what they said were 3 different matrices which could have been applied in the calculation. Ms Crawford confirmed she would look into that. She also confirmed that the pension provider had told her that it would only discuss pension matters with the account holder, i.e. the claimant.

106. Mr Napier confirmed that he would be lodging a formal grievance on the claimant's behalf against Penny McIntyre, Director (IP) HR. he said that the grievance would not be sent to anyone in IP as they believed everyone in IP was compromised by their involvement in oversight of the case.

107. We find that the meeting did not have a very clear outcome. There was no decision taken to implement ill-health severance but a commitment on the part of the respondent to explore whether a "functional assessment" could be carried out to better assess whether the claimant might be redeployable. The claimant and Mr Napier were insistent that OH Assist were not qualified to carry out such a functional assessment.

<u>Events from 6 June 2019 until 22 October 2019 – the grievance and functional assessment referral</u>

108. On 25 June 2019 the claimant raised his grievance alleging breaches of section 15 of the Equality Act 2010 and failures to make reasonable adjustments. The grievance was sent to Alison Rumsey, Group HR Director late on Friday 28 June 2019. The claimant accepted (in his subsequent grievance dated 16 September 2019) that that meant it would not have been read or actioned until 1 July

2019. The grievance itself was 22 pages long. With attachments it was over 150 pages. It is not clear when it was received by the respondent but by the time it was, Alison Rumsey was no longer in post. The grievance was not copied to Mr Lincoln or Ms Crawford but they were aware by around 12 July 2019 that it had been received.

109. The respondent's grievance policy required that the grievance be acknowledged within 3 working days and a hearing held as soon as possible. The policy required that the date for that hearing be agreed within 7 working days of submission of the grievance. On 18 July 2019 Mr Napier emailed the respondent to point out that the policy requirements had been breached. Although he accepted Ms Crawford had confirmed the grievance had been received, there had been no formal acknowledgment from "on high" and no date for a hearing.

110. Mr Napier chased again on 23 July 2019. On that date, Pauline Holroyd, the respondent's Interim Group HR Director, acknowledged the claimant's grievance. She apologised for the lengthy delay in acknowledging the grievance and confirmed the matter had been assigned to an investigating manager. She said she would respond "as soon as we have reviewed the issues you have raised". The claimant responded by email on 30 July to express his dissatisfaction with the lack of care and consideration being shown to his case and specifically with the failure to confirm a grievance hearing date. He acknowledged that he could not definitively link the failure to a direct breach of the Equality Act 2010 but noted there was a breach of the ACAS Code of Practice on grievances. He asked Ms Holroyd to "hasten" any actions without further delay.

111. Ms Holroyd responded later that same day to confirm that she had appointed Mary Doody-Jenkins, Head of HR, to manage the grievance and that Ms Doody-Jenkins would be in touch in the next few days. On 31 July 2019, Mr Napier raised a concern about Ms Doody-Jenkins dealing with the matter because she reported to Ms McIntyre, the IP HR Director against whom the grievance had been raised. The respondent agreed that an alternative hearing manager would be appointed. Catejan Chukwulozie was appointed instead on 2 August 2019.

112. There were further delays, with Mr Napier chasing Ms Carwford for updates during August 2019 and up to 11 September 2019. On 11 September 2019 Mr Chukwulozie wrote to the claimant formally acknowledging his grievance. He then emailed the claimant on 16 September 2019 suggesting grievance hearing dates.

113. On 16 September 2019 the claimant raised a second grievance. This was against Ms Holroyd about the delay in dealing with his first grievance. It was addressed to the respondent's Chief Executive Officer, Andrew Haines. On 20 September 2019 Mr Haines sent a written apology to the claimant. He agreed that it was unacceptable not to get a response within the respondent's own policy timeframe. He explained that Ms Holroyd had an enormous learning curve and workload at the time and noted that she had apologised to the claimant for the delay. Mr Haines indicated that he viewed that apology from Ms Holroyd as an informal resolution of the grievance and that he did not believe the delay warranted a grievance hearing.

114. On 4 October 2019 Mr Chukwulozie wrote to the claimant inviting him to a grievance hearing. The grievance investigation commenced on 15 October 2019 with an interview with Lisa Crawford. There was grievance hearing interview with the

claimant on 16 October 2019. There was subsequent interviews with David Pinkney on 18 October 2019 and Mr Lincoln on 24 October 2019. There were subsequent delays in completing the grievance but those are not part of this Tribunal case which concerns matters up to 22 October 2019.

115. Alongside the grievance process, Ms Crawford was seeking to progress the "functional assessment" discussed at the 30 May 2019 meeting. By July 2019 Mr Napier was reporting to Mr Lincoln informally that the claimant had attended another appointment with the Bridgewater Clinic who now regarded his condition as "stable". We were not taken to any written report to that effect from the Clinic. Ms Crawford was taking a more leading role in the matter by this point and she and Mr Lincoln had agreed that she would approach OH Assist to ask whether they could carry out a functional capability assessment to assess the claimant's ability to carry out day to day activities without exacerbating his CFS/ME. The intention was that that would enable the respondent to identify job roles the claimant could do with reasonable adjustments, subject to suitable risk assessments to ensure that would not make his condition worse.

116. By 4 July 2018 Ms Crawford had approached OH Assist who had agreed that the best course of action was to prepare an up to date report on the claimant's health and capability. Although OH Assist said they did not have anyone who specifically "specialised" in complex cases such as the claimant's, it was possible to request a "bespoke referral" which would allow for an extended appointment to assess the claimant's case. Ms Crawford requested that a doctor other than Dr Lloyd deal with the referral and OH Assist confirmed that could be specified in the referral (p.876). Around this time, OH Assist changed its name to "Optima Health". For the avoidance of doubt, references to "Optima" in this judgment are to the same organisation as "OH Assist".

117. Ms Crawford made the referral to OH Assist and on 12 August OH Assist confirmed a recommendation that the claimant be forwarded for what it referred to as an "OT assessment" (pp.888-889). OH Assist contacted the claimant on 6 September 2019 to arrange an appointment for him to see an "Occupational Therapist at his place of work". Mr Napier emailed Ms Crawford for clarification that same day. His understanding was that Mr Lincoln had confirmed that a functional assessment required a suitably qualified professional and could not be carried out by an Occupational Therapist ("OT"). Ms Crawford confirmed that she and Mr Lincoln understood that the assessment would be carried out by a suitably qualified professional.

118. On 22 September the claimant sent Ms Crawford a lengthy email asking a series of questions about the proposed functional assessment. He made it clear that based on his research Optima did not have the capability to carry out the relevant tests and evaluations. In summary, he said that the assessment should be carried out by an independent 3rd party specialist occupational assessment contractor. He had identified such a service in his area and asked whether that could be used. He also wanted clarity about which of the respondent's functions would be providing information to the 3rd party medical assessor. He asked that Ms Crawford respond to him and to Jan Hamilton, TSSA employment rights adviser (p.930).

119. The claimant said that his questions ought to be addressed before any medical assessment took place. He chased Ms Crawford for a response on 7 October. She confirmed that Optima used its own in-house OTs but also had access to 3rd party contractors. She asked the claimant to confirm whether he would prefer that she request that Optima use a 3rd party contractor.

120. Before the claimant replied, he attended an appointment with Optima on 10 October 2019. The claimant and the respondent were initially under the impression that that assessment had been carried out by an independent medical practitioner. In the event, it became clear later in October 2019 that Karen Philpotts, who carried it out, was an OT employed by Optima.

121. The claimant received the draft report in late October 2019. He asked for an extension for comments on it because he was not happy with the contents and the fact it had not been carried out by an independent 3rd party. That meant the respondent did not see the report until 2020, outside the scope of this case.

122. In brief, the draft report provided to the claimant advised that the continued fatigue the claimant was experiencing remained a barrier to his returning to full time work. During the assessment the claimant experienced no significant cognitive issues but Ms Philpott's advice was that fatigue could lead to "brain fog". She advised that the claimant could at that point work approximately 3 hours spread over a working day. She suggested a phased return. He would not be able to complete work requiring a short turn around and would need primarily to work from home. The report acknowledged that ultimately it was a management decision whether the ad-hoc pattern of work the claimant would need to manage his fatigue could be accommodated (p.1027).

123. The claimant emailed Ms Crawford on 17 October 2019 to suggest that an independent assessment could be carried out by an organisation called Salus Occupational Health and Safety based in Blackpool. His email made no reference to his having attended the Optima assessment on 10 October 2019.

124. Subsequently in February 2020 (and so outside the scope of this case) an independent report was provided by Salus on Occupational Health and by Vita Health Group Limited on functional capability. The respondent received the Vita report in February 2020 but did not see the Salus report until May 2020 because the claimant had comments on the report and did not consent to its release until the comments had been addressed. A further welfare meeting took place in February 2020. At the time of the Tribunal hearing the claimant remains employed by the respondent, his pay having been reinstated.

<u>Findings about Contractual Terms including the applicability of "Red Book" terms to the claimant</u>

125. The claimant's unauthorised deductions of wages claim relies in part on certain collective terms being applicable to him. The respondent's predecessor, British Rail, operated a number of "coloured books" which set out the terms and conditions for different types of employee. The applicable "coloured book" for supervisory, professional and technical staff like the claimant was the Red Book. The Red Book was last updated in 1991.

126. We find, based on the exchange of letters between the respondent and the RMT union on 12 June 2018 and 19 July 2018, that the Red Book provided as follows:

(a) Employees with permanent medical conditions which prevented them from performing their current role should be accommodated into their current role with reasonable adjustments where feasible;

(b) Those who could not be accommodated should have their permanent restrictions detailed by their GP and by the respondent's OH provider. Where there was a difference of opinion between the GP and OH with regards to the employee's restrictions the view of OH should be preferred;

(c) Following receipt of the OH report a welfare meeting would be arrange in which suitable alternative roles would be identified.

(d) If there was a dispute about whether any suitable alternatives exist that would be escalated to a meeting with senior managers and could be referred to OH for assessment as to whether roles were suitable;

(e) When every possible endeavour had been made to identify suitable alternative roles but no such roles were identified, the employee would leave the company with their contractual notice and ill health severance;

(f) Where a suitable alternative role was identified that was vacant the employee should be placed into that role provided the role was indeed a suitable alternative role;

(g) Where the suitable alternative role was not currently vacant the employee would be Stood Off for up to two years with basic pay and allowances if they had at least ten years' service;

(h) If the employee was not accommodated during the Stood Off period notice would be served to coincide with the end of the Stood Off period i.e. at month 21 if three months' notice was due. Ill health severance would then be paid at the end of the notice period;

(i) In all cases where an employee was redeployed into a suitable alternative role or Stood Off their substantive role would be backfilled by the respondent on the assumption that their medical restrictions were permanent;

(j) If any employee covered by those arrangements declined the offer of suitable alternative role or expressed a desire to leave, they would leave the company with ill health severance.

127. Mr Napier's submission was that the collective bargaining agreement entered into between the respondent and its recognised trade unions on 1 January 2020 meant that the Red Book terms applied to the claimant. He relied in particular on paragraph 3 ("Scope") which said that all employees of the respondent whose terms and conditions are regulated by joint agreements with the trade unions, including role

clarity Bands 5-8, shall be within the scope of the collective bargaining machinery. The respondent accepted that the claimant was within role clarity Bands 5-8 and that the collective bargaining machinery applied to him.

128. Mr Lee's evidence was that that collective bargaining agreement dealt with the machinery for collective bargaining. The fact that the claimant was covered by it did not mean that he was also automatically entitled to any collective bargaining terms agreed, such as the Red Book. Whether specific terms of employment applied to the claimant (including whether any Red Book terms were incorporated) would have to be looked at by reference to the claimant's own contract. WE accept that was the case.

129. We accept Mr Lee's evidence that from 2002 "role clarity contracts" were introduced for new employees. Existing employees continued on "Red Book" terms unless they elected to move to a role clarity contract.

130. The claimant started employment with the respondent in 2008. We find that he would have been employed on a role clarity contract. The claimant disputed that the contract of employment included at pages 201-214 of the Bundle was his. The copy in the bundle had his name at the top but was not signed by him. Ms Crawford suggested that was because acceptance of the contract would have been by email. On balance we find that that contract was the claimant's. If we are wrong, and it was not, we find that the claimant would have been employed on the same role clarity terms as those at pp.201-214 when he started his employment. We find that the role clarity contracts did not incorporate the Red Book terms so that the "stood off arrangements" did not apply to the claimant.

Relevant Law

131. The claimant's claims of disability discrimination were brought under the Equality Act 2010 ("the EqA")

Discrimination arising from disability ("s.15 claim")

132. Section 15 of the EqA states that:

> **(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**.

133. The required knowledge, whether actual or constructive, is of the facts constituting the employee's disability, i.e. (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties. Provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the

employee is a 'disabled person' as defined in the 2010 Act (**Gallop v Newport City Council [2014] I.R.L.R. 211**).

134. There is a need to identify two separate causative steps in order for a s.15 claim to be made out (**Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, EAT**):

- the disability had the consequence of 'something';
- the claimant was treated unfavourably because of that 'something'.

In **Basildon** the EAT said it does not matter in which order the tribunal approaches these two steps.

135. In **Pnaiser v NHS England and anor 2016 IRLR 170, EAT**, the EAT summarised the proper approach to establishing causation under S.15:

- First, the tribunal has to identify whether the claimant was treated unfavourably and by whom.
- It then has to determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant.
- The tribunal must then determine whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

136. "Unfavourable treatment" is not defined in the EqA. Paragraph 5.7 of the EHRC Code explains that it means "the disabled person must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably."

137. For a s.15 claim to succeed the 'something arising in consequence of the disability' must be part of the employer's reason for the unfavourable treatment. The key question is whether the something arising in consequence of the disability operated on the mind of the alleged discriminator, consciously or unconsciously, to a significant extent (**T-Systems Ltd v Lewis EAT 0042/15**).

138. A claimant needs only to establish some kind of connection between the claimant's disability and the unfavourable treatment. In **Hall v Chief Constable of West Yorkshire Police 2015 IRLR 893, EAT** the EAT confirmed that a s.15 claim can succeed where the disability has a significant influence on, or was an effective cause of, the unfavourable treatment.

139. A s.15 claim will only succeed if the employer (or other person against whom the allegation is made) is unable to show that the unfavourable treatment to which the claimant has been subjected is objectively justified as a proportionate means of achieving a legitimate aim.

140. The Equality and Human Rights Commission's Code of Practice on Employment ("the Code") sets out guidance on objective justification. In summary, the aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration. Although business needs and economic efficiency may be legitimate aims, the Code states that an employer simply trying to reduce costs cannot expect to satisfy the test (see para 4.29). As to proportionality, the Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see para 4.31).

141. A failure to make a reasonable adjustment will make it very difficult for the employer to argue that unfavourable treatment was nonetheless justified. The converse is not necessarily true. Just because an employer has implemented reasonable adjustments does not guarantee that unfavourable treatment of the claimant will be justified, e.g. if the particular adjustment is unrelated to the unfavourable treatment complained of or only goes part way towards dealing with the matter.

142. The burden of proof provisions apply to s.15 claims. Based on **Pnaiser**, in the context of a S.15 claim, in order to prove a prima facie case of discrimination and shift the burden to the employer to disprove his or her case, the claimant will need to show:

- that he or she has been subjected to unfavourable treatment
- that he or she is disabled and that the employer had actual or constructive knowledge of this
- a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment
- some evidence from which it could be inferred that the 'something' was the reason for the treatment.

143. If the prima facie case is established and the burden then shifts, the employer can defeat the claim by proving either:

- that the reason or reasons for the unfavourable treatment was/were not in fact the 'something' that is relied upon as arising in consequence of the claimant's disability, or
- that the treatment, although meted out because of something arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim.

<u>Failure to make reasonable adjustments</u>

144. Section 39(5) of the EqA provides that a duty to make reasonable adjustments applies to an employer.

145. That duty appears in Section 20 as having three requirements, and the requirement of relevance in this case is the first requirement in Section 20(3)

146. Section 20(3) provides as follows:-

> **"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".**

147. The importance of a Tribunal going through each of the constituent parts of that provision was emphasised by the EAT in **The Royal Bank of Scotland –v- Ashton [2011] ICR 632** (approved by the Court of Appeal in **Newham Sixth Form College v Sanders [2014]**). A Tribunal must identify:

(a) the provision, criterion or practice applied by or on behalf of an employer, or

(b) the physical feature of premises occupied by the employer,

(c) the identity of non-disabled comparators (where appropriate) and

(d) the nature and extent of the substantial disadvantage suffered by the Claimant.

The EAT added that although it will not always be necessary to identify all four of the above, (a) and (d) must certainly be identified in every case.

148. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is one in respect of which the EHRC Code provides considerable assistance. A list of factors which might be taken into account appears at paragraph 6.28 and includes the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources and the type and size of the employer. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards

149. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, Section 212(1) of the EqA defines "substantial" as being "more than minor or trivial".

150. The duty does not apply if the respondent did not (nor could reasonably be expected to know) both that the disabled person has a disability and that they are likely to be placed at a substantial disadvantage by the provision, criterion or practice (Schedule 9 Para 20 of the EqA).

151. As we discuss in the "discussion and conclusions" section below, Ms Ferber referred us to the case of **Newcastle-upon-Tyne Hospitals NHS Foundation Trust**

v Bagley EAT 0417/11. In that case, the employer refused to continue to pay the disabled employee at 85% of her pay while she undertook a phased return working less than 85% of her usual working hours. The Tribunal found that was a failure to make reasonable adjustments. The EAT disagreed. It identified the PCP in question as the Trust's policy 'of paying people for the work they do'. It found that this PCP did not place the clamant in that case at a disadvantage in comparison with someone who was not disabled. It simply placed her in the same situation as anyone else returning to work on a part-time basis for whatever reason. The EAT also held that paying the claimant 85 per cent pay for 60 per cent work would not have been a reasonable adjustment because of the implications this might have for the employer generally in respect of employees working part time (whether because of disability or because of other personal circumstances).

Unlawful deduction from wages

152. In relation to a claim for deduction from wages, s.13(1) of the Employment Rights Act 1996 ("ERA") says:

"(1) An employer shall not make a deduction from the wages of a worker employed by him unless-

(a) the deduction is required or authorised to be made by virtue of a statutory provision of a relevant provision of the worker's contract, or

(b) **the worker has previously signified in writing his agreement or consent to the making of the deduction."**

153. S.27(1) of ERA says:

"(1) In this Part 'wages', in relation to a worker, means any sums payable to the worker in connection with his employment, including-

(a) Any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise"

154. S.13(3) of ERA says:

"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

155. in **New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA** the majority of the Court of Appeal held that a worker would have to show an actual legal, although not necessarily contractual, entitlement to the payment in question in order for it to fall within the definition of "wages".

156. When it comes to the relevant test in deciding the terms of a contract, Lord Clarke explained the relevant principles in this way in **RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH [2010] UKSC 14; [2010] 1 WLR 753**, para 45:

"The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads

objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. "

157. When it comes to implied terms, The courts will not imply a term simply because it is a reasonable one. Nor will they imply a term because the agreement would be unreasonable or unfair without it. A term can only be implied if the court can presume that it would have been the intention of the parties to include it in the agreement at the time the contract was made.

Discussion and Conclusions

158. Applying the relevant law to our findings of fact we unanimously concluded as set out below. The crossed-out items in the list of questions are those claims previously withdrawn or dismissed. We have retained them to make the numbering of the list of issues easier to understand:

Duty to make adjustments (sections 20 and 21 Equality Act 2010)

1. Did the respondent have a provision, criterion or practice of applying the respondent's policies to the claimant. In particular those policies/requirements which:

   ~~(a) restricted him from being considered for a role at a higher band;~~ [Withdrawn]

   ~~(b) stopped him from being able to liaise directly with the Skills Retention Team;~~ [Withdrawn]

   (c) required the claimant to work or return to work full-time;

   (d) required the claimant to return to work in his role (and in any event not in an alternative role with employment characteristics which would enable him to return);

   (e) required him to return to a role in the same division or department; and/or

   (f) did not pay the claimant when absent on ill health grounds once his entitlement to sick pay had expired.

159. In relation to 1(c), (d) and (e), we find that the respondent did not apply these PCPs to the claimant. Until the report from Dr Lloyd in November 2018 all the medical evidence received by the respondent indicated that the claimant was not fit to return to work. The respondent therefore never got as far as applying any of these PCPs to the conditions on which the claimant would return to work. The discussions were whether the claimant could return to work at all (the respondent's conclusion on the medical evidence being that he could not) rather than the terms on which he would return.

160. When Dr Lloyd advised that the claimant was likely to be fit for an alternative role, i.e. office duties with adjustments, the respondent took steps to seek to identify such roles and they were discussed with the claimant at the meeting on 20 March

2019. The respondent did not require that the claimant work full time in those roles nor that he remain in the same division or the same role. Indeed, the claimant's reason for dismissing those alternatives were that they were admin roles, i.e. different from his substantive role. In those circumstances we accept the respondent's submission that the PCPs at 1(c), (d) and (e) were never applied to the claimant.

161. In relation to PCP (f), i.e. not paying the claimant once his entitlement to sick pay had expired, the respondent accepted that that PCP had been applied.

2. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled at the relevant time?

162. In relation to PCPs 1(c)-(e) we have found that those PCPs were not applied. The claim fails at that point.

163. In relation to (f) i.e. the PCP of paying the claimant when absent once his entitlement to sick pay had expired, we find that there was a disadvantage. The respondent submitted that there was not a disadvantage because anyone not working would be subject to the same disadvantage (paragraph 20 of Miss Ferber's submissions). Those submissions relied on the case of **Newcastle-upon-Tyne Hospitals NHS Foundation Trust v Bagley EAT 0417/11**. Miss Ferber's submission was that that case was authority that a PCP which amounts to "not paying people when they are not working" would not place a disabled person at a substantial disadvantage in comparison with non-disabled people. We take the view that the PCP in **Bagley** is different from the one we are considering. In this case the PCP was one of not paying an employee once their entitlement under the respondent's standard sick pay procedure had expired. In this case that meant that the employee had exhausted their entitlement to six months' full sick pay and six months' half sick pay. We find that a PCP of not paying employees who had exhausted that entitlement (i.e. those who were absent for more than 12 months) would put disabled people at a substantial disadvantage compared to non-disabled people. That is because disabled people (who by definition are subject to an impairment having a long-term, i.e. more than 12 months, effect on their day-to-day activities) would be more likely to exhaust their entitlement to sick pay. That is what happened to the claimant.

3. If so, did the respondent know that the PCP in question put the claimant at a substantial disadvantage, in comparison with persons who are not disabled, in relation to employment by the respondent?

164. This question only arises in relation to PCP 1(f) i.e. not paying the claimant. We find that the respondent did know that this would put the claimant at a substantial disadvantage. Mr Lincoln in his evidence said that he was very aware that the claimant would have exhausted his sick pay entitlement by September 2017. There was clear evidence of the clamant explaining the financial impact on him to Mr Lincoln.

4. If not, could the respondent reasonably have been expected to know that the PCP in question put the claimant at a substantial disadvantage

in comparison with persons who were not disabled, in relation to employment by the respondent?

165. This question does not arise because we have found that the respondent would have had actual knowledge that the PCP of not paying employees beyond the standard sick pay entitlement would cause a substantial disadvantage to the claimant as a disabled person.

5. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The steps the claimant alleges should have been taken are as follows:

~~(i) Not restricting the claimant from being considered for a role at a higher band;~~ [Withdrawn]

~~(ii) Being able to liaise directly with the Skills Retention Team in order to fill a role with the claimant's skills;~~ [Withdrawn]

(iii) Being allowed to return to part-time work;

(iv) Being allowed to return on reduced hours;

(v) Being allowed to return to a different job/role (of a type or with characteristics which are to be identified by the claimant in the further particulars he provides);

(vi) Allowing the claimant to undertake a role in a different division or department;

(vii) Returning the claimant to basic pay from a date on or after 4 July 2017 and/or 1 November 2018?

166. In relation to the PCP of not paying sick pay beyond the standard sick pay entitlement, the suggested reasonable adjustment is (vii), i.e. to return the claimant to basic pay from a date on or after 4 July 2017 and/or 1 November 2018. We find that this would not have been a reasonable adjustment. We accept the submissions made by Miss Ferber on behalf of the respondent that the respondent would by returning the claimant to basic pay have been making an open-ended commitment in this case. The prognosis for the period during which we are considering (i.e. up to 22 October 2019) was that the claimant would not be in position to return to work. His condition was not one which was gradually improving. Instead it was waxing and waning and continuing to do so. The medical evidence was that the prognosis was for it to continue to wax and wane rather than make a linear recovery reaching a point at which the claimant would be in a position to return to work. In those circumstances the respondent would be opening up itself to an open-ended financial commitment by returning the claimant to basic pay. That is a particular relevant consideration given that the respondent is a body funded by the public purse.

167. In those circumstances we do not accept that it would have been a reasonable adjustment to return the claimant to full basic pay. On neither of the dates cited was there evidence that the claimant's prognosis was that he would be able to return to work shortly (or at all) without risk of relapse.

168. In reaching our decision we do take into account the comments made in the case of **O'Hanlon v Commissioners for HM Revenue & Customs [2007] EWCA Civ 283** that the purpose of sick pay should not be to incentivise people to stay off work. We do not in saying that in any way criticise the claimant or suggest that he wanted to stay off work (the evidence shows that the opposite is true) but to accept that as one potential inadvertent consequence of returning the claimant to basic pay while not at work.

169. We note that the case of **Bagley** was said to be one to treat with caution by the EAT in the later case of **G4S Cash Solutions (UK) Limited v Powell [2016] IRLR 820**. We remind ourselves that what we are doing is deciding whether it would have been reasonable for the respondent to make adjustments to the PCP we have found to be applied in this case not to a generalised or notional PCP of "not paying people when not working".

6. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

170. In summary, therefore, all the claimant's claims of failures to make reasonable adjustments fail and are dismissed.

Discrimination arising from disability (section 15 Equality Act 2010)

7. Did the following things arise in consequence of the claimant's disability:

(i) The claimant's absence from work on ill health grounds; and/or

(ii) The claimant's inability to return to his previous role undertaking the full duties of that role?

171. The respondent accepts that the claimant's absence from work on ill health grounds and the claimant's inability to return to his previous role undertaking the full duties of that role arose from or in consequence of the claimant's disability.

8. Did the respondent treat the claimant unfavourably as follows:

(i) Not following the grievance process in a reasonable time; and/or

~~(ii) Not allowing the claimant access to IT systems and portals;~~ [Dismissed out of time]

~~(iii) Not allowing the claimant to be considered for a role at a higher band;~~ [Withdrawn]

~~(iv) By him not being able to liaise directly with the Skills Retention Team in order to fill a role with the claimant's skills;~~ [Withdrawn]

(v) Not allowing him to return to part-time work;

(vi) Not allowing him to return on reduced hours;

(vii) Not allowing him to return to a different job/role (of a type or with characteristics which are to be identified by the claimant in the further particulars he provides);

(viii) Not allowing him to undertake a role in a different division or department; and/or

(ix) Not paying him basic pay from a date on or after 4 July 2017 and/or 1 November 2018?

172. In relation to 8(i) we do find that the respondent subjected the claimant to unfavourable treatment by failing to deal promptly with his grievance when it was first lodged. The evidence shows that there is a gap of about a month before Pauline Holroyd acknowledged the claimant's grievance on 23 July 2019. We remind ourselves that the period covered by this claim is up to 22 October 2019. We find that after Ms Holroyd had taken hold of the case, a grievance officer was appointed within a week. That was Mary Doody-Jenkins. The claimant and Mr Napier were informed of that promptly but they then objected which led to the appointment of Mr Chukwulozie. There was a further delay after Mr Chukwulozie was appointed until the grievance investigation process started in September 2019. Some of that was due to his absence on leave. After that up to 22 October 2019 the grievance was progressed in a reasonable timeframe.

173. We find therefore that there was unfavourable treatment by not following the grievance process in a reasonable time for the initial month of the grievance period and then during August and the first week or so of September 2019.

174. The alleged unfavourable treatment at (v)-(viii) relate to the respondent not allowing the claimant to return to work. We find that the respondent did discuss with the claimant returning to work in different jobs in different divisions on a part time basis or reduced hours at the meeting on 20 March 2019 following receipt of Dr Lloyd's November 2018 report. The claimant was offered such roles but turned them down. We find there was no unfavourable treatment for the period post Dr Lloyd's November 2018 report.

175. Prior to then we do find that the respondent did not allow the claimant to return to work at all whether on part-time or on reduced hours, in different roles or in a different division. We have considered whether this amounts to unfavourable treatment. We remind ourselves that unfavourable treatment in this context does not require less favourable treatment than a non-disabled person in the same circumstances. On the one hand, we can see that it can be said to be unfavourable treatment not to allow an employee to return to work when they wish to do so. However, the respondent submitted that it could not be unfavourable treatment to allow someone to return to work when the medical evidence was telling the employer that they were not fit to do so.

176. In deciding whether this amounted to unfavourable treatment we have taken into account the definition of "detriment", which is that a reasonable employee would see the treatment as a disadvantage. The respondent's case is it could not be unfavourable treatment to refuse to allow an employee to work when the medical evidence was telling the employer that they were not fit to do so. On balance we

have decided that we accept the respondent's submissions on this point. We find that the respondent did not treat the claimant unfavourably as alleged at 8(v)-((viii).

177. When it comes to 8(ix) the respondent accepted that not paying the claimant basic pay when his sick pay had expired amounted to unfavourable treatment.

> 9. Did the respondent treat the claimant unfavourably in any of those ways outlined at issue 8, because of any of the things identified in issue 7?

178. This question only arises in relation to 8(i), i.e. delays in dealing with the grievance, and (ix) i.e. not paying the claimant after his sick pay had expired which are the only unfavourable treatment we have decided occurred.

179. In relation to the grievance (unfavourable treatment 8(i)), we find that this unfavourable treatment was not because of any of the things identified as arising from the claimant's disability. Although as it happens the claimant's grievance was about his absence, we find that the reasons for the delay were in no way connected with his absence or his inability to return to his previous role. Instead they were due to the person to whom the grievance was addressed initially having left the respondent and the subsequent failure of anybody else to pick up and progress the grievance. Later delays were due to delays in Mr Chukwulozie progressing matters. There was no evidence on which we could find that that delay was anything other than a system breakdown or lack of competence on the part of the respondent rather than anything arising from the claimant's absence or his inability to return to his previous role. In essence, what we find is that if the grievance had been about something else altogether and the claimant had been in work that delay would have arisen in any event.

180. When it comes to not paying the claimant basic pay for the relevant periods, we find that was because of something arising from the claimant's disability, namely his absence from work on ill-health grounds.

> 10. If so, has the respondent shown that the treatment was a proportionate means of achieving a legitimate aim? The respondent is to confirm all and any legitimate aims relied upon in their amended grounds of response.

181. We have found that the unfavourable treatment relating to the grievance process was not because of any of the things arising from the claimant's disability. The issue of objective justification does not therefore arise in relation to that claim.

182. When it comes to not paying the claimant basic pay, we find that failure to be objectively justified. We have set out our reasons why this was not a reasonable adjustment above, and those same reasons apply here. We find that it was a legitimate aim of the respondent i.e. to operate in accordance with its contract terms by not paying employees for time when they are not working. We find that not paying employees beyond their contractual sick pay was a proportionate means of doing this. We have regard to the fact that this was a public purse organisation and that the commitment to continue to pay the claimant would have been an open-ended one given there was no prognosis indicating when he would be in a position to return to work.

183. In summary, therefore, we find that the claims of discrimination arising from disability fail.

184. In relation to the claims relating to a failure to progress the grievance, we find that this was because the unfavourable treatment was not because of something arising from the claimant's disability.

185. When it comes to the unfavourable treatment relating to a return to work, we find that this did not amount to unfavourable treatment.

186. In relation to the failure to pay the claimant beyond his sick pay entitlement, we find that that was objectively justified.

Unauthorised deductions from wages

11. Did the respondent make unauthorised deductions from the claimant's wages and, if so, how much was deducted? The claimant contends that he is entitled to: further periods of pay during sickness absence after completing ten years' service; and/or pay for days on which he attended a meeting and/or a health assessment. Further particulars of what is claimed are to be provided by the claimant.

187. For the claimant's claim to succeed he would need to show that he was legally entitled to be paid for sickness absence beyond the six months' full pay and six months' half pay which he had received.

188. On a number of occasions Mr Napier was asked to clarify the legal basis for this entitlement. They appeared to be threefold.

189. The first was said to be that the "Red Book" "stood off" arrangements applied to the claimant. As we have dealt with in our findings of fact, these are arrangements which provide that where an employee of the respondent subject to the Red Book terms is unfit for their substantive role but otherwise fit for work and a suitable alternative role has been identified which is not at that point vacant, they continue to be paid their basic pay for a period of up to two years. If the suitable alternative role becomes vacant then they are moved into that role. If it does not then their employment is terminated by way of ill health severance at the end of that 2 year period. If no suitable alternative role can be identified then the employee is subject to ill health severance at that point. Entitlement is for those employees with ten years' service at the point where they are identified as suitable for other roles and a suitable alternative role is identified.

190. Mr Napier's argument was that the collective bargaining agreement entered into between the respondent and its recognised trade unions on 1 January 2020 meant that the Red Book terms applied to the claimant. We have found it did not. The claimant's contract did not incorporate the Red Book. The "stood off" arrangement therefore did not apply to the claimant.

191. If we are wrong about that and the Red Book terms did form part of the claimant's terms of employment, we find that they would not have applied such that he was entitled to the "stood off" arrangements. His employment at the point when he went off sick in 2016 had not been for ten years. The earliest at which the "stood

off" arrangements could have applied would therefore be 2018. At that point, however, the claimant had not been certified as being fit for restricted duties. In addition, no suitable alternative role had been identified. The claimant himself had turned down some that had been offered.

192. In those circumstances, even had the Red Book terms been incorporated into the claimant's contract, we accept the respondent's case that the "stood off" arrangements would not have applied to the claimant.

193. Mr Napier also suggested that the concept of "waiting time" in collective agreement documentation gave rise to a legal entitlement to be paid while off sick. We do not see that there is a basis for saying that that amounts to a contractual term or other legal entitlement written into the claimant's contract in substitution for the express entitlement to sick pay already set out in that contract.

194. Finally, Mr Napier suggested that natural justice required that the claimant be paid. We accept that it was not the claimant's fault that he was off work or that the medical opinion was that he was unable to return to his substantive post. We accept that it must have been frustrating for the claimant to be in the limbo position of being unfit for work and yet not so unfit as to benefit from ill health retirement or ill health severance. We do not, however, accept that there is any argument that a term equivalent to the "stood off" arrangements (or any other term entitling the claimant to continue to receive sick pay) should be incorporated into his contract. The implication of such a term is only required by law where it is necessary. In this case there are explicit terms setting out the limits of sick pay entitlement, and it would not be necessary to imply such a term.

195. In those circumstances we find that none of the three bases put forward by Mr Napier on behalf of the claimant as giving rise to a legal entitlement to additional sick pay give rise to a legal entitlement to be paid wages beyond the sick pay entitlement in the claimant's contract. That means that the respondent has not made any deductions from the claimant's wages by failing to pay him any additional sick pay. This claim therefore fails.

Remedy

12. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

196. This does not arise as all the claims fail and are dismissed.

Employment Judge McDonald

Date: 13 December 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

15 December 2023

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Annex
List of Issues

Duty to make adjustments (sections 20 and 21 Equality Act 2010)

1. Did the respondent have a provision, criterion or practice of applying the respondent's policies to the claimant. In particular those policies/requirements which:

   ~~(a) restricted him from being considered for a role at a higher band;~~ [Withdrawn]

   ~~(b) stopped him from being able to liaise directly with the Skills Retention Team;~~ [Withdrawn]

   (c) required the claimant to work or return to work full-time;

   (d) required the claimant to return to work in his role (and in any event not in an alternative role with employment characteristics which would enable him to return);

   (e) required him to return to a role in the same division or department; and/or

   (f) did not pay the claimant when absent on ill health grounds once his entitlement to sick pay had expired.

2. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled at the relevant time?

3. If so, did the respondent know that the PCP in question put the claimant at a substantial disadvantage, in comparison with persons who are not disabled, in relation to employment by the respondent?

4. If not, could the respondent reasonably have been expected to know that the PCP in question put the claimant at a substantial disadvantage in comparison with persons who were not disabled, in relation to employment by the respondent?

5. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The steps the claimant alleges should have been taken are as follows:

   ~~(i) Not restricting the claimant from being considered for a role at a higher band;~~ [Withdrawn]

   ~~(ii) Being able to liaise directly with the Skills Retention Team in order to fill a role with the claimant's skills;~~ [Withdrawn]

   (iii) Being allowed to return to part-time work;

   (iv) Being allowed to return on reduced hours;

(v) Being allowed to return to a different job/role (of a type or with characteristics which are to be identified by the claimant in the further particulars he provides);

(vi) Allowing the claimant to undertake a role in a different division or department;

(vii) Returning the claimant to basic pay from a date on or after 4 July 2017 and/or 1 November 2018?

6. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Discrimination arising from disability (section 15 Equality Act 2010)

7. Did the following things arise in consequence of the claimant's disability:

(i) The claimant's absence from work on ill health grounds; and/or

(ii) The claimant's inability to return to his previous role undertaking the full duties of that role?

8. Did the respondent treat the claimant unfavourably as follows:

(i) Not following the grievance process in a reasonable time; and/or

~~(ii) Not allowing the claimant access to IT systems and portals;~~ [Dismissed out of time]

~~(iii) Not allowing the claimant to be considered for a role at a higher band;~~ [Withdrawn]

~~(iv) By him not being able to liaise directly with the Skills Retention Team in order to fill a role with the claimant's skills;~~ [Withdrawn]

(v) Not allowing him to return to part-time work;

(vi) Not allowing him to return on reduced hours;

(vii) Not allowing him to return to a different job/role (of a type or with characteristics which are to be identified by the claimant in the further particulars he provides);

(viii) Not allowing him to undertake a role in a different division or department; and/or

(ix) Not paying him basic pay from a date on or after 4 July 2017 and/or 1 November 2018?

9. Did the respondent treat the claimant unfavourably in any of those ways outlined at issue 8, because of any of the things identified in issue 7?

10. If so, has the respondent shown that the treatment was a proportionate means of achieving a legitimate aim? The respondent is to confirm all and any legitimate aims relied upon in their amended grounds of response.

Unauthorised deductions from wages

11. Did the respondent make unauthorised deductions from the claimant's wages and, if so, how much was deducted? The claimant contends that he is entitled to: further periods of pay during sickness absence after completing ten years' service; and/or pay for days on which he attended a meeting and/or a health assessment. Further particulars of what is claimed are to be provided by the claimant.

Remedy

12. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.