THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr B McElvogue	**AND**	Network Rail Infrastructure Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: North Shields ON: 14, 15 & 16 March 2017
Deliberations: 23 March 2017

EMPLOYMENT JUDGE HUNTER MEMBERS: Ms R Bell
Mrs L Georgeson

Appearances
For the Claimant: Mr P Morgan of Counsel
For the Respondent: Ms A Mayhew of Counsel

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that the claims of unlawful deductions from wages, unfair dismissal and disability discrimination are not well founded and are dismissed.

REASONS

1 Issues

The issues were originally identified at a preliminary hearing held on 15 December 2016. They were later amended at a hearing on 20 January 2017. They were further refined at the hearing. The surviving issues were:

Unlawful deduction from wages

1.1 Did the claimant's GP deem him fit for work as he alleges?

1.2 Did the relevant provision of the Red Book National Agreement entitle the claimant to be paid his basic rate of pay following the 'fit note' from his GP dated 24 March 2016 stating that he "may be fit for work"?

1.3 If so, did the respondent make a deduction from wages which were properly payable?

1.4 If a deduction was made, was it unlawful or was it authorised in accordance with section 13 (1) of the Employment Rights Act 1996

Discrimination arising from a disability

1.5 The claimant alleges that he was treated unfavourably by:

(a) the respondent's decision not to pay the claimant his basic rate of pay following receipt of the 'fit note' dated 24 March 2016 until the receipt of the Occupational Health report of 13 may 2016.
(b) the respondent's decision to terminate the claimant's employment on grounds of capability.

1.6 In respect of (a) and/or (b) above:

(a) Did the treatment referred to at (a) and/or (b) above amount to unfavourable treatment as alleged?

(b) If so, was the treatment because of something arising in consequence of the claimant's disability?

(c) If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments

1.7 Did the respondent apply a provision, criterion or practice (PCP) to the claimant? The PCP stated by the claimant is:

(a) A PCP that the claimant would be fit to carry out the duties of a suitable post

1.8 Is the alleged PCP a valid PCP?

1.9 If so, did the alleged PCP place the claimant at a substantial disadvantage in comparison with those who are not disabled?

1.10 Did the respondent take reasonable steps to remove that disadvantage?

1.11 Did the respondent know or ought reasonably to know of the claimant's disability, and that the claimant is or was likely to be placed at a substantial disadvantage?

Unfair dismissal

1.12 What was the reason for the claimant's dismissal?

1.13 Was that reason a potentially fair reason as set out in section 98(2) Employment Rights Act 1996?

1.14 In the circumstances, did the respondent act reasonably in treating that reason as a sufficient reason for dismissing the claimant?

1.15 Did the respondent follow a fair procedure when dismissing the claimant?

1.16 If not, should any compensation awarded to the claimant be reduced to take into account the prospects of him being dismissed in any event had the respondent followed a fair procedure and, if so, by what percentage (Polkey deduction)?

2 The Facts

2.1 The claimant began his employment on 15 March 2004 as a signalman. He worked in the Wylam signal box on the railway line between Newcastle upon Tyne and Carlisle.

2.2 In late 2012 the claimant was involved in a road traffic accident. While riding his bicycle, he was hit by a Heavy Goods Vehicle. He went back to work soon after the accident and for 2 years he continued as a signalman. No concerns were raised by the respondent, although it was becoming clear that he was struggling with the role. He had a period of sickness in 2013 and October 2014. On both occasions the absences were diagnosed as stress related. He began to suffer extreme fatigue, poor memory and bad co-ordination. He suffered from panic attacks. On 26 December 2014, he took sick leave, because he felt that he could not do his job safely. Eventually a diagnosis was made that he had suffered a brain injury as a result of the road traffic accident. The claimant never returned to work.

2.3 There were a series of referrals to the respondent's occupational health service. On 11 March 2016, the Occupational Health Physician reported that the claimant's impaired cognitive functions were such that he would be unfit for anything but the most basic tasks and that a significant improvement of his functional capabilities would not be expected. In the Occupational Health Physician's opinion,

the claimant was permanently unfit to undertake his previous duties and other gainful employment. He recommended that that the claimant be referred to determine his possible eligibility for ill-health retirement.

2.4 There was an ill-health severance meeting on 23 March 2016 at which the claimant was accompanied by Mr Rogerson, his RMT representative. The respondent said that it would look for redeployment opportunities and if there was anything suitable the claimant would be risk assessed for the roles. The claimant said that he would like to keep a role with the respondent. There was a discussion about what the claimant could and could not do, the amount of work he could do before he would feel tired and the places he could and could not go to for work. The claimant was told that the respondent would review the information and look to see what alternatives might be suitable. This would take about two weeks.

2.5. The claimant contacted his GP the following day (24 March 2016). The GP's note records,

> "Would like to return back to work . . .
> Works on railways but will be going back amended duties- work aware and are able to adapt."

2.6 A Statement For Fitness to work was issued by the claimant's GP following this contact. It read,

> "I advise you that you may be fit for work taking account of the following advice:
> If available, and with your employer's agreement, you may benefit from: a phased return to work, amended duties, altered hours. Under regular psychology review."

2.7 The guidance issued by the Department for Works and Pensions makes it clear that a doctor no longer issues a certificate when she or he considers a person is fit for work. If a fit note says that an employee may be fit for work, the employer should discuss with the employee whether there are any changes that could help them return to work. If changes cannot be agreed, the employer should treat the "may be fit" note as if it says the employee is not fit for work.

2.8 On 13 May 2016 the Occupational Health Physician reported as follows:

> "His medical condition has not changed since the last assessment. He continues to suffer from impaired cognitive functions. He himself feels it would be beneficial to his well-being, if he could return to some gainful work. On the other hand it is very important that such a return to work is considered very carefully to avoid setting him up to fail. He continues to be significantly affected in his ability to undertake normal day-to-day activities. Therefore, he is likely to be found disabled as defined in the Equality Act.
> Current capacity for employment
> Mr McElvogue would remain unfit for his normal duties as a Signaller or any other safety critical work, because he experiences significant fatigue as the day progresses. Suitable duties, if these were available, would have to consist of small tasks without the need to multitask or to switch between tasks. He would have to be given clear instructions by a manager who understands his limitations. Initially he would only be able to work approximately three hours a

> day. Possibly this could be gradually increased depending on how he progresses, but that is difficult to predict. When attempting such a return to work it is very important that he gets good support from a manager (sic) understands his condition. If he is given a task he might struggle with this (sic) might result in him panicking. He might initially also be slower in completing any tasks.
>
> Outlook
> With time there might be a slight improvement in his condition and therefore capabilities, but he will never be able to return to safety critical work."
> . . .
>
> In the summary to his report, the Occupational Health Physician said,
>
> "If he attempts tasks that are likely to make him fail, this could have a significantly negative impact on his well-being. Therefore any attempts to a return to work would have to be done on a trial basis, supervised by a manager, who is very supportive and understands his condition. I am not aware as to whether the above recommendations could be reasonably accommodated."

2.9 The roles on the respondent's establishment are agreed with the trade unions and there is no scope to create new posts without such agreement. They are referred to as templated roles. The respondent sought to identify those roles which were vacant and templated roles which might, with adjustments, be suitable for the claimant in the future. Having eliminated roles that were geographically inconvenient for the claimant, three roles were submitted to the Occupational Health Physician for his comments. On 1 June 2016 the Occupational Health Physician reiterated the matters set out in his report of 13 May 2016. He commented that none of the three suggested roles seemed suitable unless they could be adjusted such that they would fit his recommendations.

2.10 Mr Westhorpe, the local Operations manager, with the help of Mrs S Lawson, then an HR officer, took the view that none of the roles could be adjusted sufficiently to meet the claimant's needs. He felt that the complexity of the respondent's business was such that a role restricted in the way the Occupational Health Physician had suggested could not be accommodated. No risk assessments were undertaken.

2.11 There was a further ill health severance meeting on 8 July 2016 when the decision was taken to terminate the claimant's contract of employment on the grounds of ill-health.

2.12 Mr J Mansfield, Operations Manager for Sheffield, held an appeal on 14 October 2016. The claimant's union representative pressed for a trial in a vacant role. Mr Mansfield, acting on the warning from the Occupational Health Physician, considered it would be too risky and contrary to the respondent's duty of care to the claimant to allow him to attempt any role even on a trial basis. He dismissed the appeal.

2.13 The parties agree that nationally agreed terms and conditions contained in a document known as the Red Book are incorporated into the claimant's contract of employment.

2.14 The unlawful deductions from wages claim is based on the claimant's interpretation of a provision in the Red Book agreed on 26 March 1975 with a supplementary paragraph agreed on 15 January 1976. The relevant paragraphs are:

> "Self-Certified as Fit to Resume Duty by GP but not by the Board's Medical Officer
> A member of staff who is declared fit by his own doctor but does not meet the medical standards required by the Railway Medical Officer shall be paid the basic rate of pay appropriate to his grade until such time as he resumes work, either in his own post or on other suitable work.
> The arrangement is supplementary to existing arrangements and relate [sic] only to the occasional situation (generally of short term duration) where the view by the Railway Medical Officer that a man is unfit to resume any form of work conflicts with the opinion of a general practitioner to the extent that the general practitioner is unable to agree to take the individual back on to the sickness panel for a limited period of time."

2.15 The agreement came into force at a time before the Railway industry was fragmented and at a time when the Railway Industry employed an in-house Medical officer. Such a post no longer exists and the parties agree that the respondent's Occupational Health Physician adopts that role now.

2.16 The claimant's challenge to the reasonableness of the decision to dismiss him and the respondent's alleged failure to justify section 15 discrimination is based partly on an alleged entitlement of the claimant to be kept on the books for two years rather than being dismissed. This entitlement is alleged to arise from the following provisions of the red Book:

> "Staff Certified as Fit for Light Work
> Staff who are certified by the Railway Medical Officer as fit for restricted duties but for whom a suitable position in the Railway service cannot be found to be dealt with as follows:
> (a) The man's name to be kept on the books for a period of up to two years, during which time he should keep in touch with the appropriate Local Officer of the Railways in regard to the prospects of his return to Railway employment
> …
> (d) If, at any time during the period of two years, a man refuses to accept any reasonable offer of Railway employment, the arrangements to be terminated so far as he is concerned forthwith.
>
> 1. Staff Certified as Fit for Restricted Duties with Little or no Prospect of Resuming Their Normal Duties but for whom Suitable Work Cannot be Found
> Such staff to continue to be dealt with in accordance with the arrangements set out above under which provision is made for a man's name to be retained on the books for a period of at least two years.
> If, at any time during the period of two years a man refuses to accept an offer of reasonable employment, expresses his desire to be dealt with under the

resettlement arrangements, or at the end of the two-year period it has still not been possible to accommodate him he will be dealt with under the ill-health severance arrangements unless there are definite prospects of a return to work within a reasonable period.

2. Staff who are Certified by the Railway Board's Medical Officer as Permanently Unfit for Further Railway Work
Such staff to be dealt with under the ill-health severance arrangements

3. Staff off Sick who do not Resume within Two Years of the Date of Going Sick
…

Staff Stood Off Whilst Awaiting Selected Work
Every possible endeavour will be made to accommodate staff certified as fit for restricted duties by the Railway Medical Officer in suitable alternative work. However, those staff who have ten or more years service, and for whom no suitable alternative work can be found, will be regarded as remaining in the employ of the British Railways Board (ie they will not be regarded as being absent from duty "sick" or "stood-off") and will continue to be paid at the basic rate of pay of their substantive grade for a maximum period of two years…

2.17 The claimant's union representative, Mr Rogerson had enquired on 31 March 2016 as to the pay the claimant would receive following the "may be fit for work" certificate issued by the GP on 24 March 2016. This was followed up by a long email from Micky Thompson RMT Regional Organiser arguing that under the Red book the claimant was entitled to receive basic pay because he had been declared fit by his own doctor but did not meet the standards required by the Railway Medical Officer.
The second sick note

2.18 The GP's notes show that another "May be fit for work" certificate was issued on 28 April 2016 for a duration of one month. The respondent was unaware of this.

3 <u>The Law</u>

<u>Deduction from wages</u>

3.1 Section 13 of the Employment Rights Act 1996 (ERA), which gives a worker the right not to suffer unauthorised deductions, provides:

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

(a) the deduction is required or authorised to be made by virtue of a statutory provision or 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.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

> (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

Unfair dismissal

3.2 Section 98 ERA provides that it is for the employer to establish the reason for the dismissal and to show that it was a potentially fair reason.

3.3 If the reason for dismissal relates to the capability of the employee to perform work of the kind that the employee was employed by the employer to do, then it is potentially fair (section 98 (2) (a) ERA).

3.4 Where the employer satisfies the Tribunal that there was a potentially fair reason for dismissal, then section 98(4) ERA provides:

> "The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)
>
> > (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a reason for dismissing the employee, and
> > (b) shall be determined in accordance with equity and the substantial merits of the case."

3.5 In deciding the reasonableness of the decision to dismiss the starting point is always the words of section 98(4) themselves. The Tribunal has to consider the reasonableness of the employer's conduct, but must not substitute its decision for that of the employer. The function of the Tribunal, as an industrial jury, is to determine whether in the particular circumstances of the case, the decision to dismiss fell within a band of reasonable responses, which a reasonable employer might have adopted Iceland Frozen Foods Ltd v Jones [1982] IRLR 439.

3.6 Where dismissal is for a reason relating to ill health, guidance has been given in BS v Dundee City Council [2014] IRLR 131 as follows:

> First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasise, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed

medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered.

Discrimination arising from disability

3.7 Section 15 Equality Act 2010 (EqA) provides:

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

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

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

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

3.8 In Pnaiser v NHS England [2016] IRLR 170, the following guidance as to the correct approach to a claim under section 15 EqA was given:

'(a) 'A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The “something” that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises.

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The

tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

3.9 The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the reasonable needs of the undertaking. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no room to introduce into the test of objective justification the 'range of reasonable responses' which is available to an employer in cases of unfair dismissal. Hardys & Hansons plc v Lax [2005] IRLR 726

Duty to make reasonable adjustments

3.10 Section 39 (5) EqA imposes a duty to make reasonable adjustments on an employer.

3.11 Section 20 EqA provides:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

3.12 Section 21 EqA states:

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

3.13 Part 3 of Schedule 8 EqA provides:

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

3.14 Employers are expected to act positively and constructively. In the key case of Archibald v Fife Council, [2004] IRLR 651, HL the House of Lords said:

> "The DDA does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination."

3.15 Environment Agency v Rowan 2008 IRLR 20 gave guidance for handling reasonable adjustment claims. As well as identifying the offending PCP the tribunal must establish the nature and extent of the substantial disadvantage suffered by the disabled employee in comparison with non-disabled people. Further, it must be clear what 'step' the employer has allegedly failed to take to remedy that disadvantage and whether it was reasonable to take that step.

4 Analysis

Unlawful deductions from wages

4.1 The unlawful deductions from wages claim is based on the alleged difference of view by the GP from the Occupational Health Physician during the period 24 March 2016 when the "May be fit to Work" note was issued and the Occupational Health Physician's report of the 15 May 2016. This depends on the interpretation of the Red Book provision set out in paragraph 2.14.

4.2 We have asked ourselves whether a situation arose when the claimant was certified fit to resume duty by the GP but not by the Occupational Health Physician.

4.3 First we look at the context. The GP's note establishes that the certificate was issued because the GP believed that the claimant wanted to go back to work and that the respondent was able to take him back on amended duties. That was a misunderstanding on the part of the GP.

4.4 The certificate is not an unequivocal certificate as to the claimant's fitness. It is conditional on the respondent making adjustments. It can safely be assumed that the GP would be aware of the Government guidance that if those adjustments could not be made, the certificate would be treated as if it had said that the claimant was not fit for work.

4.5 Moreover, the supplementary agreement of 15 January 1976 suggests that the agreement relates only to those circumstances where the employee's general practitioner has discharged him and will no longer issue him with sickness notes because of his illness. That is the only sense we can make of the phrase "to the extent that the general practitioner is unable to agree to take the individual back on to the sickness panel for a limited period of time." We know this was not the case because a further note was issued in April 2016.

4.6 We cannot infer in these circumstances that the claimant's GP took a different view from the Occupational Health Physician as to the claimant's fitness to resume duties, nor can we sensibly interpret the GP's certificate as a declaration that the claimant was fit to resume duty.

4.7 In these circumstances the claimant was not entitled to be paid his basic pay. He had exhausted his right to receive sick pay. His claim for unlawful deductions from wages, therefore, fails.

4.8 Before considering the discrimination and unfair dismissal claims, we consider whether the claimant was entitled to be regarded as "stood off" under the Red Book provisions. These are set out in paragraph 2.16 of these Reasons. If he was so entitled, he would have been entitled to remain in employment for two years and would also have been entitled to receive basic pay, since he had ten or more years service.

4.9 The respondent's case is that an employee is only regarded as stood off if there is a role available that the employee could do either with or without adjustments, but not available at the time that the Occupational Health Physician certifies that the employee is fit for restricted duties. The claimant says that the Red Book provisions apply whether or not there is a role available.

4.10 We consider that the respondent is interpreting the provision correctly. It is inconceivable that in 1964, when this provision was introduced, the Railway Medical Doctor, who was employed by British Rail and would have been fully aware of all of the different roles then available, would have certified an employee as fit for restricted duties unless there was a role available, albeit not vacant. We note that in 1964 there was a far greater range of roles and that some of these may have comprised light duties. Moreover, the Red book makes reference to "a suitable position" and "any reasonable offer of Railway employment."

4.11 We note that the respondent's interpretation of the provision has been applied consistently without previous challenge from the trade unions.

4.12 In this case, we do not consider the report of the Occupational Health Physician dated 13 May 2016 to be a certificate that the claimant was fit for restricted duties. The Occupational Health Physician had already recommended that the procedure for ill health severance was appropriate. He commented that the claimant's health had not improved since the report on which that recommendation had been based. The only thing that had changed is that the claimant now wanted to continue to work, if he could, and wanted to try an alternative role. The Occupational Health Physician made it clear that the claimant was unfit for anything but the most basic tasks, that he could not work full time, that he needed constant supervision and that if a trial failed it could make the claimant's illness worse.

4.13 In this case, the "stood off" provisions did not apply because there was no certificate of fitness for restricted duties and because the respondent did not have a role that even with adjustments the claimant could do. Our conclusion is that the claimant was not entitled to be kept on the books for two years following the Occupational Health Report of 13 May 2016.

Unfair dismissal

4.14 The reason for the dismissal was the claimant's long term absence from work arising from his ill-health. This is a reason which relates to the claimant's capacity to do his work and is a potentially fair reason.

4.15 We are satisfied that the respondent has met the test of reasonableness as set out in BS v Dundee City Council. They had satisfied themselves of the claimant's medical condition and had waited for long enough before they concluded that he was permanently unfit to work.

4.16 The claimant's argument that dismissal was unreasonable because he was entitled to be stood off for two years fails for the reasons set out above.

4.17 The claimant says that the respondent could have done more to find him alternative work. Perhaps that might have been a reasonable course, but we must not substitute our view for that of the respondent. Mr Mansfield gave conscientious consideration to the representations made on behalf of the claimant about this and came to the conclusion that it would be too risky to give the claimant a trial in the light of the comments made by the occupational Health Physician. If no reasonable employer could have taken that view, then we might have found for the claimant, but we cannot say that. We are satisfied that the respondent was acting within a band of reasonable responses in treating the medical incapacity as sufficient for dismissal.

Section 15 EqA

4.18 The section 15 claim, so far as it is based on the failure to pay the claimant basic pay following the GP's certificate of 24 March 2016, fails because we have found that there was no entitlement and the non-payment cannot, therefore, be treated as unfavourable treatment.

4.19 The dismissal was unfavourable treatment. He was dismissed because of his absence and that arose in consequence of his disability. The respondent has conceded that the claimant was a disabled person at the relevant time and that it had the requisite knowledge.

4.20 The case turns on whether the dismissal was a proportionate means of achieving the pleaded legitimate aim, which was (a) ensuring the operation of the railway network in a safe and secure manner (b) ensuring the safety of members of the public (c) ensuring the safety of other employees of the Respondent (d) ensuring the safety and well-being of the Claimant in the light of Occupational Health advice received and (e) acting in the public interest in gaining value for public funds by ensuring stood off arrangements are not implemented inappropriately at a cost to the taxpayer. The claimant accepts that (e) stands or falls with the issue of entitlement to his being stood off. We have decided against him on this point. The claimant argues that dismissal was not reasonably necessary because the respondent could and should have done more to redeploy him. As decided in respect of the unfair dismissal claim, we believe that the respondent did consider this and for good reasons decided that redeployment was not an option. Not only could they not find a

role that could be adjusted for him having regard to the advice from the Occupational Health Physician, they believed that the risk to the claimant's health was too great. We balance the need to eliminate discrimination from the work place against the respondent's need to provide a safe means of transport for the pubic and a safe working environment for its staff, including the claimant. In doing this we find that the decision to dismiss the claimant on the grounds of his ill-health was a proportionate means of achieving its legitimate aims.

4.21 The claimant brought a stand alone reasonable adjustments claim, but made very brief submissions in respect of it. The essence of the claim is that the respondent required the claimant to perform his duties as a signalman and that a reasonable adjustment would have been for him to be redeployed to a role in the Stores on adjusted duties.

4.22 We are satisfied that it would not have been reasonable for the respondent to have had to make such adjustments because (a) none of the roles on the respondent's establishment would have been economically viable if they were restricted to the duties the Occupational Health Physician had said the claimant was capable of and (b) employing the claimant in any such role would have given rise to an unacceptable risk to the claimant' health, that of his colleagues and to the public.

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JOHN HUNTER EMPLOYMENT JUDGE

RESERVED JUDGMENT SIGNED BY THE EMPLOYMENT JUDGE ON

31 March 2017

JUDGMENT SENT TO THE PARTIES ON

3 April 2017

AND ENTERED IN THE REGISTER

G Palmer

FOR THE TRIBUNAL