Case Numbers: 3303285/2015
3322736/2016

# EMPLOYMENT TRIBUNALS

**Claimant** Mr. W. Lema

**Respondent** DHL Supply Chain Ltd

v

**Heard at**: Watford

**On**: 16 – 20, 23 – 25 January 2017
26 January 2017 (in chambers)

**Before:** Employment Judge Heal
Mrs. S. Low
Mr. S. Bury

**Appearances**
**For the Claimant:** in person
**For the Respondent:** Mr. D. Dyal, counsel

# RESERVED JUDGMENT

1. The complaint of unpaid accrued holiday pay is well founded.

2. The remaining complaints of unfair dismissal, unfair dismissal because of public interest disclosure, breach of contract, unauthorised deductions from wages and disability discrimination, including direct discrimination, indirect discrimination, discrimination because of something arising in consequence of disability, failure to make reasonable adjustments, victimisation and harassment are all dismissed.

3. In the event that the issue of unpaid holiday pay is not resolved between the parties, that will be dealt with at a remedies hearing at 10.00am on **1 June 2017**. The second day of the provisional remedies hearing booked for 2 June will be vacated.

# REASONS

1. By a claim form presented on 4 November 2015 the claimant made complaints of disability discrimination, including victimisation and unlawful deductions from wages.

2. By a second claim form presented on 20 March 2016 the claimant made complaints of unfair dismissal, disability discrimination, including victimisation, breach of contract and dismissal because of public interest disclosure.

3. We have had the benefit of an agreed 3 volume bundle running to 994 pages, albeit many of those numbered pages have been followed by additional pages identified by multiple alphabets.

4. Additional pages been added during the hearing by consent: these are page numbers 416 a to q and 300F.

5. We were also provided with a sample of Mr Dockree's handwriting, produced while he was giving evidence.

6. The respondent has supplied us with a cast list and chronology and the claimant has supplied us with a Scott schedule setting out his complaints of discrimination. We are grateful to both parties for their work in producing these useful tools.

7. We have heard oral evidence from the following witnesses in this order:

Mr Wilson Lema, the claimant;
Mr Jason Lawford, admin team leader;
Mr Jason Law, operations support manager;
Mr. Nathan Tress, warehouse operations manager;
Ms Trish Hopkinson, senior HR business partner;
Mr Geoff Morgan, general manager;
Mr Darren Tabiner, account manager and
Mr Chris Dockree, vice president-first-tier operations.

8. Each of those witnesses gave evidence in chief by means of a prepared typed witness statement. We read that statement before the witness was called and then the witness was cross examined and re-examined in the usual way.

9. We also accepted in evidence without the witness being called, a hand-written witness statement from Ms Anjali Sharma, associate solicitor in the employment and pensions department of DAC Beachcroft. Mr Dyal for the respondent made an application before he closed his case for us to receive that witness statement in evidence without Ms Sharma being called. He did so because a dispute arose about who had written some manuscript additions on

pages 416 a-q. The comment that concerned the claimant was that written next to the words,

"*The company have allowed me 5 days to appeal the grievance outcome. I contend this timeframe is discriminatory."*

The words added are,

"*Why discriminatory? Applied equally to everyone*."

10. The claimant considered this comment to be discriminatory. He believed that Mr Dockree had written it because he saw Mr Dockree writing something during his hearing. He did not see exactly what Mr Dockree was writing. He objected to the application to admit Ms Sharma's statement. He said that he had no evidence to suggest that Ms Sharma was incorrect.

11. Mr Dyal wished to adduce Ms Sharma's evidence because Mr Dockree denied making the written comments. Ms Sharma said that she had made the manuscript additions. She is a solicitor based in Leeds.

12. The witness statement is signed and is itself a sample of her handwriting. In all these circumstances, we considered it disproportionate for the respondent to call her (from Leeds to Watford) to give evidence in person. We decided to admit the evidence subject to the weight that was appropriate to give it, albeit we bear in mind that Ms Sharma is a solicitor.

13. During Mr Law's evidence, Mr Law referred to a document which was a note of a conversation he had with the claimant on 23 November 2015. This document was not in the bundle. Mr Law said that he had disclosed it to the respondent's solicitors. Mr Dyal sought that evidence and on the fifth day of the hearing disclosed it to the claimant in accordance with his duty of continuing disclosure. Mr Dyal did not seek to admit the document in evidence but only wished to disclose it appropriately to the claimant. The claimant asked us to add it to the bundle in evidence and we did so without objection from Mr Dyal. Mr Law was then re-called on the sixth day of the hearing so that he could explain that document and for Mr Lema to have an opportunity to question him about it.

***Issues***

14. The issues that arise under the various heads of claim are as follows:

*Unfair dismissal*

15. Does the tribunal have jurisdiction to determine the claimant's complaint of unfair dismissal? The respondent says that the claim was made prematurely because it is a complaint of constructive dismissal and it first received communication from the claimant that he had resigned when the employment

tribunal sent the respondent the claim form presented on 20 March 2016. The respondent says therefore that the contract terminated by means of that communication *after* the claim had been presented. The respondent says that the claim is therefore premature so we can have no jurisdiction.

16. If the tribunal does have jurisdiction:

16.1 Was the respondent in fundamental breach of contract (that is the implied term of trust and confidence) in that:

16.1.1 On 8 August 2015 when the claimant suffered discrimination from Jonathan Berks, he told the company that he was at risk of harm because of his depression, he was harassed again by Jonathan Berks and told the respondent that he was at risk of harm but the respondent did not do anything to assess him;

16.1.2 In August 2015 the company refused to make an assessment of the claimant's disability;

16.1.3 On or after the incident on 25 November 2015 the claimant's manager refused to make an assessment of his disability;

16.1.4 Geoff Morgan and Trish Hopkinson failed to ask for assessment of the claimant's disability;

16.1.5 On 13 and 14 March the respondent refused to make an assessment of the claimant's disability; and

16.1.6 The claimant did not receive any support from the respondent;

16.2 Did the claimant resign in response to any breach which he may prove?
16.3 If so, did he waive any breach which he may prove?
16.4 If the claimant has been dismissed, what was the reason for the dismissal?
16.5 Was that reason a potentially fair reason for the purposes of section 98 of the Employment Rights Act 1996?
16.6 Was the dismissal otherwise fair or unfair purposes of section 98 (4) of the Employment Rights Act 1996?

*Public Interest Disclosure*

17. At a preliminary hearing dated 4 February 2016 Employment Judge Smail refused the claimant permission to amend the claim to add a complaint of detriment based on public interest disclosure.

18. This claim therefore is limited to the claimant's dismissal and arises only if the tribunal has jurisdiction to hear the complaint of unfair dismissal.

19. The respondent admits that the claimant's letter to Enfield Borough Council dated 28 October 2015 contained a protected disclosure.

20. If the claimant was dismissed, was the reason, or if more than one, the principal reason for the dismissal that he had made a protected disclosure? Given that this is a complaint of constructive dismissal, did the respondent carry out the acts said to amount to a repudiatory breach of contract because the claimant had made a protected disclosure?

*Holiday pay*

*21.* Mr Dyal told us in his submissions that the respondent accepted that there was a sum of money owing to the claimant in unpaid accrued holiday pay. This remained subject to calculation.

*Unauthorised deductions from wages*

22. The parties agree that the claimant was not paid from 23 December 2015 to 20 March 2015. Was he entitled to be paid during that period? The respondent says that he was not, because he did not attend work, was not off sick but was not willing to work.

23. There was also an issue of unpaid sick pay from the period 12 October to 23 November 2015 however the claimant has been paid that sum, albeit late. There is no claim to be determined therefore under this head.

*Disability discrimination*

24. The respondent accepts that the claimant was a person with a disability both because of his back condition and also because he suffered from anxiety and depression.

25. The respondent accepts that it had knowledge or constructive knowledge of the back condition as a disability at all relevant times.

26. The respondent accepts that it had knowledge or constructive knowledge of the anxiety and depression as a disability from 23 November 2015 but not before.

27. Did the respondent have knowledge or constructive knowledge of the claimant's mental impairment as a disability (for the purposes of sections 15, 20 and 21) before 23 November 2015?

28. The allegations of disability discrimination are set out by the claimant in a Scott schedule which we have used to inform ourselves of the issues throughout the hearing and our deliberations.

29. At the outset of this hearing we reminded the parties of the importance of identifying the issues in this case. We told the parties that knowing what the issues were would help us decide what evidence was relevant and what was

irrelevant. We told them that our judgment would deal with the matters in issue and only with those matters. We therefore spent time in the early part of this hearing making sure that we understood (with the help of the parties) what the issues were. We have set out that understanding above.

***Concise statement of the law***

*Prematurity*

30. Section 111(1) of the Employment Rights Act 1996 provides that a complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer. Section 111(2) then provides that an employment tribunal shall not consider a complaint under section 111 unless the complaint is presented to the tribunal before the end of the period of 3 months *beginning with* the effective date of termination. [Emphasis added.] Section 111(2)(b) provides for what is often called an 'extension of time' in a case where it was not reasonably practicable for the complaint to be presented before the end of that period.

31. If a dismissal is with notice, an employment tribunal shall consider a complaint under section 111 if it is presented after the notice is given but before the effective date of termination (section 111(3)).

32. If a dismissal is not with notice however and the complaint to the tribunal is presented before the period of 3 months *beginning with* the effective date of termination has started, then there is no power or provision to extend time to allow a claim to be made before the beginning of the period. In such a case the tribunal shall not hear the complaint and there is no discretion provided in the 1996 Act that can allow us to do so.

33. If one party is in repudiatory breach of contract, the innocent party has a choice. That party may either affirm the contract, continue to carry out his obligations under the contract and, if he seeks a remedy, sue for damages for the breach; or he may accept the repudiation and treat the contract as at an end. This is the legal structure that underpins a claim in the employment sphere of constructive dismissal.

34. Acceptance of a repudiation of the contract is not effective to terminate the contract until it is communicated to the party in breach. The contract ends in these circumstances when the 'guilty' party receives communication that the employee has accepted the repudiation and is treating the contract as at an end. Commonly, this will take the form of a resignation letter.

*Constructive dismissal*

35. So far as is relevant section 95 of the 1996 Act provides:

***95 Circumstances in which an employee is dismissed***

*(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—*

> *(a) the contract under which he is employed is terminated by the employer (whether with or without notice),*
>
> *(b) [he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]*
>
> *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*

36. To succeed in establishing a claim under section 95(1)(c) the claimant must show that the employer is guilty of a fundamental or repudiatory breach of the contract of employment. Behaviour that is merely unreasonable is not enough. The test is not one of whether the employer was acting outside the range of reasonable responses but the question is whether, considered objectively, there was a breach of a fundamental term of the employment by the employer.

*37.* Although unreasonableness on the part of the employer is not enough, an employee may rely upon the "implied term of trust and confidence". Properly stated, the term implied is, "*the employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

38. The duty not to undermine trust and confidence is capable of applying to a series of acts which individually might not themselves be breaches of contract.

39. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship. The question is, does the cumulative series of acts, taken together, amount to a breach of the implied term?

40. The employee must leave in response to the breach of contract, which may mean the tribunal deciding whether it was *an* effective (but not necessarily the sole or *the* effective) cause of the resignation. There is *no* legal requirement that the departing employee must tell the employer of the reason for leaving however.

41. A repudiatory breach is not capable of being remedied so as to preclude acceptance. The wronged party has an unfettered choice of whether to treat

the breach as terminal, regardless of his reason or motive for so doing. All the defaulting party can do is to invite affirmation by making amends.

42. The fact that a dismissal is constructive (within sub-section (2)(*c*)) does not of itself mean that it will be held to have been unfair (though in practice that will often be the case); we must still go on to consider fairness in the usual way.

*Public Interest Disclosure*

43. Where an employee has at least two years' service and so qualifies to claim unfair dismissal, the burden of proof in a complaint of dismissal by reason of public interest disclosure works as follows:

44. Has the claimant produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosure?

45. Has the respondent proved its reason for the dismissal?

46. If not, does the tribunal accept the reason put forward by the claimant or does it decide that there was a different reason for the dismissal?

*Entitlement to pay*

47. In a contract of employment, work and wages go together. The employer pays for the work and the worker works for his wages. If the worker declines to work, then the employer need not pay. In an action by a worker for his pay he must show that he was willing to work. Special rules or terms may govern absence for sickness.

*Disability discrimination.*

48. We have reminded ourselves of the principles set out in the annex to the Court of Appeal's judgment in *Igen v Wong* [2005] EWCA Civ 142.

49. It is the claimant who must establish his case for direct discrimination to an initial level. Once he does so, the burden transfers to the respondent to prove, on the balance of probabilities, no discrimination whatsoever. We remind ourselves that it is unusual to find evidence of direct discrimination. Few employers would be prepared to admit such discrimination, even to themselves. We make findings of primary fact on the balance of probability on the basis of the evidence we have heard. From those findings, the focus of our analysis must be the question whether we can properly and fairly infer discrimination.

50. In deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical and to ensure that he or she has relevant

circumstances which are the same or not materially different as those of the claimant.

51. Facts adduced by way of explanations do not come into whether the first stage is met. The claimant, however, must prove that the facts on which he places reliance did happen, not just that they might have happened.

52. It was pointed out by Lord Nicholls in *Shamoon v Chief Constable of the RUC* [2003] IRLR 285 that sometimes it will not be possible to decide whether there is less favourable treatment without deciding 'the reason why'. This is particularly, but not only, likely to be so where a hypothetical comparator is being used. It will only be possible to decide that a hypothetical comparator would have been treated differently once it is known what the reason for the treatment of the complainant was. If the complainant was treated as he was because of the relevant protected characteristic, then it is likely that a hypothetical comparator without that protected characteristic would have been treated differently. That conclusion can only be reached however once the basis for the treatment of the claimant has been established.

53. Sections 20 and 21 of the Equality Act set out the duty to make reasonable adjustments. In order to make a finding that there has been a failure to make reasonable adjustments, first we must find that there has been a 'provision, criterion or practice' applied by or on behalf of the employer.

54. A provision, criterion or practice might include such matters as the rules governing the holding of disciplinary or grievance hearings. It is unlikely however that the application of, say, a flawed disciplinary procedure on a one-off basis will amount to a practice. Practice connotes something which occurs more than on a one-off occasion and which has an element of repetition about it. The PCP might on the facts of a case only have taken place once: but we would expect this to be in circumstances where it would be repeated generally if the circumstances arose.

55. We must be satisfied that that provision, criterion or practice has placed the disabled person not only at a disadvantage in relation to a relevant matter when viewed generally, but has placed him at that disadvantage when compared with persons who are not disabled. That comparative disadvantage must also be substantial.

56. If those requirements are satisfied, then we ask whether the employer has failed to take such steps as are reasonable, in all the circumstances of the case, to avoid that disadvantage. Section 18B(1) of the Disability Discrimination Act 1995 used to set out some useful factors to be taken into account in assessing whether a proposed adjustment was reasonable. Those factors have largely been carried over into chapter 6 of the Code of Practice on Employment (2011). The focus is on ways that will retain people in employment. The duty will not usually extend to matters which would not help in retaining the employment relationship.

57. Paragraph 8 of the Code lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take. These are:

57.1 whether taking any particular steps would be effective in preventing the substantial disadvantage;
57.2 the practicability of the step;
57.3 the financial and other costs of making the adjustment and the extent of any disruption caused;
57.4 the extent of the employer's financial or other resources;
57.5 the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
57.5 the type and size of the employer.

58. Ultimately, the test of the reasonableness of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

***Facts.***

*Burden of proof*

59. We have made the following findings of fact on the balance of probability. What that means is this: we do not possess a fool proof method of discovering absolute truth. Therefore, we listen to and read the evidence placed before us by the parties. On that evidence and that evidence only, we decide what is more likely to have happened than not.

*Credibility*

60. This has been a case with some substantial disputes of fact. Where there are differences between the claimant's evidence and the respondent's, we have preferred the respondent's evidence. We have not found the claimant a reliable witness. He does not pay reliable attention to detail, most noticeably as regards dates. The evidence showed that he was not transparent with his employer, in particular with the evidence of his medical appointments and we found ourselves that he had to be reminded to answer the question he was asked. We did not consider that he was open with us and we found him evasive.

61. By contrast, we found that the respondent's evidence was consistent with the contemporaneous documents. We found that the respondent's witnesses were ready to admit fault: for example, Mr. Lawford was ready to admit that he failed to refer the claimant to occupational health in November 2015. They gave evidence with openness, reflection and care. We consider that we can rely upon their evidence.

*Background*

62. The respondent is a company engaged in logistics which provides warehouse and distribution services to various large organisations, including major retailers such as Iceland. The grocery and convenience sector within the respondent's retail division alone employs approximately 5,000 people across 9 different customer accounts.

63. At the respondent's Enfield site, the respondent provides warehouse and distribution services on behalf of the food retailer Iceland. Frozen, chilled and ambient food items are delivered to the Enfield site from manufacturers and then distributed to Iceland stores.

64. The claimant began his employment with the respondent on 8 August 2010. He was employed at first as a warehouse team member. The claimant developed a back problem however and as an adjustment to accommodate that problem he was moved to day shifts and to administration.

65. The work of the administration team was also divided into 3 sections: frozen, chilled and ambient. The purpose of the administration team was to communicate to the warehouse what orders had been received for products so that they knew in the warehouse which products to 'pick' and send out. Unless the administration team does its work efficiently and effectively, those in the warehouse cannot properly do their work. Put simply, if the warehouse does not receive the orders, it cannot start its work.

66. The claimant never worked in the chilled section. He worked initially in the ambient section but subsequently found it too stressful, to the extent that it reduced him to tears. He was transferred therefore to the frozen section.

67. The frozen section of administration was always active during the day shifts, but it was not always active during night shifts. There were therefore occasions when there was no call for administrative staff in the frozen section on night shifts.

68. The site worked on 3 rolling shifts. These were: 6 am to 2 pm, 2 pm to 10 pm and 10 pm to 6 am. The last of these was the night shift which attracted an additional payment of £5,000 per annum.

69. On the night shift there is reduced support from other staff and management. The nightshift needs staff who are fully experienced in all aspects of the role because there are fewer opportunities to rectify mistakes.

70. Mr Law was Mr Lawford's line manager. Mr Law occasionally worked night shifts. Mr Lawford did not work night shifts but did do the handover to the

nightshift and when he was on early shift he would come in early to find out if there were any issues. Mr Lawford was the claimant's direct line manager.

*Chronology*

71. An incident took place between the claimant and one Stockey Kumalo on 27 May 2015. The claimant raised a grievance about this on 3 June 2015. There was a grievance hearing on 23 June and interviews with 3 witnesses took place on 21 and 24 July 2015. A statement was also taken from Mr Kumalo on 6 August 2015. A further witness was interviewed on 10 August 2015. Mr Tress delivered the outcome to the claimant by letter dated 11 August. Mr Tress reached the conclusion that there was insufficient and inconsistent evidence to support the claimant's allegation and therefore the grievance was not upheld. The delay in dealing with the grievance arose mainly from the claimant's absence on holiday and then Mr Kumalo's absence on leave for 4 weeks.

72. The claimant made a complaint to the employment tribunal about the incident with Mr Kumalo, alleging race discrimination. The claim was struck out because it was presented out of time.

73. On 8 August 2015, a Mr Berks mistakenly believed that the claimant had failed to keep some lanes clear in the warehouse. He challenged the claimant and Mr Berk's behaviour was unacceptable. There is no suggestion before us that the claimant was to blame for this incident. The claimant accepted in cross examination that there was no evidence that what Mr Berks did was to do with his disability.

74. By email dated 16 August 2015 the claimant both appealed against the grievance outcome in relation to Mr Kumalo and complained about the behaviour of Mr Berks.

75. There is a dispute of evidence about a discussion in the canteen between the claimant and Mr Law on 19 August. On the balance of probability, we prefer Mr Law's account. We find that the claimant approached Mr Law in the canteen and told him that he needed to move on to the nightshift on a permanent basis from 4 September because he had a medical appointment on that date and would be needing ongoing treatment. Mr Law told the claimant to speak to Mr Lawford, the claimant's line manager but said that because this was a request for a permanent change the claimant would need to submit a flexible working request. He told the claimant to make his request urgently for there to be any chance of it being heard and decided before 4 September. He told the claimant that it was unlikely that it could be dealt with before that date and therefore the claimant should speak to Mr Lawford and request time off from the day shifts to attend any appointments. He told the claimant that he would be allowed time off if he gave notice of the appointments. He explained to the claimant that the change would involve a change to salary and that might delay things. He suggested to the claimant

that he submit all relevant documents with his application so as to speed things up. He specifically told the claimant to send a copy of any hospital letter containing details of the appointment and any letters dealing with physiotherapy appointments thereafter.

76. By e-mail sent on 22 August 2015 the claimant told Mr Law,

"*I can no longer ignore the 'palpable risk of harm' Mr. Jonathan Benks unwanted conduct has had upon my 'mental and physical health', both of which are 'materially injurious'…. I am having sleepless nights and night sweats whilst wondering what the next day might bring. This has caused anxiety, nervousness and distress. Due to a lack of sleep, I often go about my duties in a state of autonomy or 'zombified state'; this is hardly conducive to a safe working environment*."

77. By a separate email dated 22 August 2015 from the claimant to Mr Law the claimant requested to change his shift from day to night from 4 September. He said that the reason was that he had to start a medical treatment for his physical problem. We note that this email does not give the time of the appointment for the treatment and provides no documentary evidence to confirm to Mr Law the fact of the medical appointment.

78. On 27 August, the claimant submitted a flexible working request in writing. By that request he asked to work from Sunday to Friday from 10 pm to 6 am from 4 September 2015. He made the point that there was a duty to make an adjustment under section 20 of the Equality Act 2010 for a person with a disability.

79. The claimant did not submit any supporting documentation with this application as advised by Mr Law. At this point we note that at no time during the history that unfolded did the claimant give the respondent contemporaneously any document confirming any medical appointment or psychiatric appointment. He subsequently provided such documents to the tribunal. The letter making the appointment is dated 18 August 2015 and it gives the claimant an appointment at 12 o'clock on Friday, 4 September 2015 at Whipps Cross Hospital. This is for a 'trauma and orthopaedics operation/procedure'.

80. By dated 1 September Mr Lawford invited the claimant to a meeting to discuss his flexible working application. The meeting was set for Friday 4 September at 9 am. Amongst other things, the letter asked the claimant to confirm by 3 September at 10am if he was unable to attend and needed to rearrange.

81. By further letter dated 2 September 2015 Mr Paul Ward, general manager, invited the claimant to a grievance hearing set for 10 am on 4 September 2015. Mr Ward asked the claimant to telephone him no later than 2 September to confirm his attendance at the meeting. He asked the claimant that if he had any queries regarding the issue, to contact him on the telephone number provided.

82. The claimant did not take any steps to reorganise the time of those 2 meetings to deal with the risk of a clash with his hospital appointment. He did not tell Mr Lawford or Mr Ward the time of the appointment at 12 noon at Whipps Cross.

83. Mr Lawford attended the meeting at 9 am. He cancelled the meeting because the claimant did not arrive. When the claimant did ultimately arrive, he did so at 9:45 am. Cover had been arranged so that the claimant could attend and the claimant explained that the reason he was late was that he was busy preparing everything for the person who was to cover for him. The meeting did not go ahead because the claimant had another meeting to attend.

84. The claimant attended the grievance meeting on 4 September which started at 10.12am. It appears that that meeting discussed both the grievance appeal about Mr Kumalo as well as the initial grievance against Mr Berks. Mr Berks was expected to leave the respondent's employment in the following 2 weeks. That meeting lasted about 2 hours.

85. The claimant missed his medical appointment at 12 o'clock on 4 September.

86. Mr Berks produced a typed, detailed witness statement for the grievance investigation about the incident on 8 August on 16 September 2015.

87. Mr Lawford met the claimant for a flexible working hours meeting on 17 September 2015. The claimant said that he was asking for night shifts because he had worked night shifts for the company previously and had been moved to day shift on an agreement that he could return to nightshift after certain training had been completed. Mr Lawford asked the claimant whether he had his hospital schedule and asked him to bring it in. The claimant said that it would be difficult to do so because he only got a few days' notice (of an appointment).

88. By letter dated 17 September Mr Lawford invited the claimant to attend a second flexible working application meeting on 22 September. The meeting was to discuss the claimant's request and examine how it could be accommodated. The claimant was specifically asked to bring any relevant and supporting paperwork with him.

89. By letter dated 18 September 2015 Kevin Gilchrist, assistant distribution manager, wrote to the claimant with the outcome of his grievance against Mr Berks. His letter records that he initially proposed to hold a mediation meeting between the claimant and Mr Berks, however the claimant had not felt this acceptable. Therefore, Mr Gilchrist felt that the claimant should receive a written apology from Mr Berks and he enclosed that apology with his letter.

90. Paul Ward chaired the grievance appeal meeting into both grievances 21 September 2015. The thrust of the claimant's appeals in both cases was that

the company had not properly complied in detail with its own policies and procedures.

91. By letter dated 22 September 2015 Mr Ward gave the claimant the outcome to his grievance appeal hearing. He upheld the claimant's grievance that the process regarding Mr Berks had not been dealt with in a sufficiently timely manner. He found it difficult to determine precisely what been said between the claimant and Mr Kumalo but he upheld the claimant's grievance to the extent that he found that the way he had been spoken to was inappropriate. He therefore put in place corrective action in relation to Mr Kumalo and recommended retraining for managers in handling investigations. In evidence before us the claimant agreed that this was broadly supportive, but said that he did not find it satisfactory.

92. Mr Lawford met with the claimant to hold the second flexible working meeting on 22 September 2015. The claimant produced to Mr Lawford the appointment letter for 4 September. Mr Lawford asked him to make another appointment and to let him know the date so that he could make sure the claimant could attend. The claimant referred to a letter saying that he was to be moved to the nightshift. Mr Lawford then postponed the meeting so that he could think.

93. The meeting reconvened the following day and Mr Lawford gave the claimant the outcome of his application, which was that he declined it. He gave as his reason that the agency staff working the night shifts had been on the respondent's staff for 13 weeks or more and therefore qualified for the same rights as the respondent's own staff. He had made enquiries about a vacancy on nights but had been told that this was an ad hoc vacancy i.e. to work on nights as and when required, rather than a permanent vacancy. He suggested to the claimant that he ask those on the nightshift if anyone would like to swap to day shift. The decision was confirmed to the claimant in an outcome letter dated 25 September in which Mr Lawford set out his grounds as being that there were no vacancies on the nightshift but that the claimant could ask someone on nightshift to swap shifts or alternatively the claimant's rest days could be moved to accommodate his appointments.

94. By email dated 24 September 2015 claimant appealed against Mr Gilchrist's decision relating to Mr Berks and raised a number of points in relation to policy and procedure.

95. The claimant appealed his flexible working decision by email dated 28 September 2015.

96. On the week commencing Monday, 5 October 2015 the claimant expected that his rest day was to be Wednesday, 7 October 2015. On that day it appears that he had a physiotherapy appointment. There has been some confusion over which day was expected to be his rest day, however his clocking in card, which he used on the Monday and Tuesday shows his rest

day as the Tuesday. 'RD' appears crossed out on the Wednesday. The respondent expected the claimant to take his rest day on the Tuesday. The claimant attended work on the Tuesday at 13.56 and was told that that was his rest day. On balance we consider that he had a discussion with Mr Lawford and did tell Mr Lawford that he had physiotherapy treatment booked for the Wednesday. He did not however provide Mr Lawford then or later with evidence of the appointment.

97. The claimant attended his appointment and arrived at work late on the Wednesday. Mr Lawford was concerned that the claimant had not followed proper procedures when he knew he was going to be at work late and therefore had a discussion with him on 8 October 2015. He gave the claimant the option of booking the day off as holiday and gave him a holiday form to enable him to do so. The claimant did not submit the form and did not claim the day as paid holiday. We find that the problem with the rest day was caused by administrative confusion. Mr Lawford did not know before that confusion arose that the claimant had a physiotherapy appointment booked for the Wednesday. He only found out about that appointment while he was realising that the confusion had arisen. He offered the claimant the option of taking the day as paid holiday because the claimant had not provided him with written evidence of the appointment.

98. Mr Law met with the claimant on Thursday, 8 October 2015 to discuss his flexible working application appeal. The claimant showed him a letter dated 20 October 2014 from Mr Richard Dannatt. That was the outcome of the medical capability investigation review which had resulted in the claimant moving from nightshift to dayshift. The claimant had raised concerns to Mr Dannatt about not being on nightshift but Mr Dannatt had felt that it was not suitable to return him to nightshift because there was more support available during the day and the claimant was currently going through further training which was not accessible during the nightshift. Mr Dannatt confirmed that a review of a move to nights could be carried out in the future. Amongst other things we note that Mr Dannatt was to recommend to the claimant's line manager adjusted duties for example walking around approximately 45 minutes every hour.

99. It was in the context of that letter being produced by the claimant that Mr Law said to the claimant that his performance was not up to the standard needed to be able to move on to nights. The comment itself was irrelevant to Mr Law's own analysis of the appeal. It was simply a response to a point made by the claimant. In the context of Mr Law's comment about the claimant's performance, we note that on 24 April 2015 a 'one-to-one' between the claimant and Mr Lawford had recorded that the claimant only partially met most of the performance requirements. Mr Lawford had noted that the claimant was still only capable in one area. Therefore, although Mr Law's comment was irrelevant to his decision, nonetheless it was accurate and was made because the claimant's performance was still not satisfactory.

100. By letter dated 8 October 2015 claimant presented a formal grievance to the respondent. The content of the grievance is substantially legalistic and quotes case law and statute to the respondent. The factual complaint however arose because the claimant was dissatisfied with the events of 4 September 2015, because he said that he had not been allowed to attend his medical treatment and because two meetings had been arranged with him for the same day. The claimant also wished to know why his managers would not allow him to change his shift to undergo medical treatment.

101. On 8 October 2015 the claimant told Mr Lawford verbally that he had a further medical appointment on 9 October. He did not show Mr Lawford evidence of the appointment. In those circumstances, with only one day's notice and with no evidence, Mr Lawford told the claimant that he could either take the day as annual leave or take it as unpaid leave. Had the claimant given adequate notice and supplied Mr Lawford with written evidence Mr Lawford would have been able to take a different approach.

102. On 12 October 2015 the claimant began a period of sick absence because of work-related stress, back pain and knee pain. The claimant's general practitioner signed him off work from 19 October to 26 October because of anxiety.

103. By letter dated 20 October 2015 Mr David Evans, operations manager, invited the claimant to attend a grievance hearing on 26 October. This hearing was to deal with the claimant's grievance dated 8 October.

104. A further grievance appeal on 21 October was postponed by Mr Morgan because the claimant had raised concerns about Mr Morgan himself and so there was a conflict of interest.

105. The claimant's orthopaedic consultant discharged him on 24 October 2015.

106. By an email dated 25 October 2015 the claimant presented a further formal grievance to the respondent about Mr Law and Mr Lawford. This grievance too contains substantial references to the law and it repeats the facts complained of in the 8 October grievance. It adds a complaint about Mr Lawford's flexible work application outcome, a complaint about Mr Lawford's comment about agency staff having the same rights as the respondent's staff and a complaint that on 8 October Mr Law alleged that the claimant was not up to the job.

107. In the morning of 26th of October 2015 a telephone conversation took place between the claimant and Mr David Evans about their expected meeting later that day. The claimant asked to have the meeting conducted by telephone conference. He has told us that this was because he was ill and in bed. He therefore regarded his request as a request for a reasonable adjustment because of his disability. Mr Evans considered his request and

according to the claimant, later that day told the claimant that he preferred to have the meeting face-to-face because he wished to see the claimant's body language.

108. By letter dated 26 October 2015 Mr Law sent the claimant the outcome to the appeal from his flexible working application. In that detailed letter he explained that it was not possible to grant the claimant's request because there were no positions available on the nightshift to accommodate the claimant's current role and restrictions. However, because the claimant's medical treatment was for physiotherapy one day per week a move to nightshift was not necessary because the appointments could be accommodated by time off on the claimant's current shift. This could be achieved provided the respondent received advance notice of the appointments.

109. In relation to the letter from Richard Dannatt, Mr Law recorded that he had pointed out that the claimant was not performing to an acceptable standard in his current role and had been moved to a less demanding position to be monitored closely.

110. Mr Law reiterated the need for the claimant to produce documentary evidence of medical appointments and to support applications.

111. By letter dated 26 October 2015 Mr Evans wrote to the claimant confirming their discussions and his decision about how to conduct the grievance hearing. He explained that due to the complexities and serious nature of the claimant's grievance of 8 October he did not feel a telephone conference call was appropriate. He thought that a face-to-face meeting was prudent particularly because a thorough investigation would be needed and he did not think he would be able to establish the background detail of the grievance over the telephone. He says that he understood that the claimant had been instructed by his GP to rest following an operation on the Saturday and he said that he would like to rearrange the grievance hearing at the earliest possible opportunity when the claimant was fit to meet him in person. He therefore asked the claimant to let him know when he would be in a position to attend a meeting at the Enfield site or, if the claimant was medically unable to attend the site, to tell Mr Evans of that so that a suitable alternative location could be arranged. He asked the claimant to inform him no later than 29 October.

112. The claimant wrote a letter to Enfield Council Borough Local Environmental Health Department dated 28 October 2015. Summarised, this letter is a complaint that the respondent has not made adequate arrangements to protect the claimant's health and safety because the claimant says that he has been bullied and harassed at work - naming in particular Jonathan Berks - and the respondent has not undertaken a risk assessment or consultation with the claimant with regard to the risks. It

appears that the claimant sent a copy of this letter to Jerry Belcher the respondent's health and safety manager.

113. The respondent accepts that that amounts to a protected disclosure.

114. The claimant's general practitioner advised that he was not fit for work due to anxiety and an epidural injection on 24 October from 27 October 2015 to 11 November 2015.

115. During this period from 12 October until his return to work on 23 November, the claimant was covered by certificates from his general practitioner. However, instead of sending these to the Enfield site - which was the usual practice so that they can be processed by payroll locally - the claimant sent them to People Services at head office in Milton Keynes. The practical result of this was that he was not paid during his sick absence because payroll did not receive the certificates.

116. By letter dated 29 October 2015 the claimant sent a further grievance to Geoff Morgan. This grievance was in similar form to previous grievances in that it contained substantial references to case and statute law. However, it also said that the claimant was not fit to attend a face-to-face meeting at the material time. He asked for the grievance procedure to take place via the modified procedure.

117. On 4 November 2015 the claimant presented his first claim to the employment tribunal in these proceedings.

118. By letter dated 9 November 2015 Trish Hopkinson, senior HR business partner, wrote to the claimant with reference to his grievance appeal and his 3 recent grievances. She proposed that an independent manager not associated in any way with the Enfield site or the Iceland account should meet with the claimant to hear the grievances. To do this she proposed one meeting to be attended personally by all parties. This meeting could take place either at the Enfield site or at a mutually agreed alternative location. She said that she would be the claimant's main point of contact in relation to the grievances and would liaise with the independent manager appointed to hear them.

119. By email dated 10 November 2015 the claimant presented a further grievance. In this grievance the claimant complained that although he had sent his medical certificates to 'People Services' at head office, he had not been paid sick pay since 12 October. The claimant suggested in particular that he had not been paid either because he had made a protected disclosure or because he had carried out a protected act.

120. By letter dated 12 November Ms Hopkinson acknowledged that grievance and noted that she had not yet heard from the claimant about his preferred venue and any necessary adjustments for the hearing of all

grievances together. She proposed that the latest grievance form part of those being heard by the independent manager.

121. By email dated 13 November the claimant said that he would prefer the grievance to be dealt with in writing because of his back pain. He said if the respondent refused that then he would cooperate and attend face-to-face.

122. The claimant's general practitioner advised on 16 November that he was unfit for work due to anxiety issues from 11 November to 22 November 2015.

123. Ms Hopkinson wrote to the claimant on 20 November saying that because the respondent was dealing with complex and multiple concerns it would prefer to hold a meeting with the claimant. Ms Hopkinson thought that trying to deal with the complaints in writing would prevent the respondent from getting to the root of matters. She reiterated that the respondent was prepared to meet with the claimant at Enfield or an alternative site or the claimant's home address. She asked the claimant to respond directly to Mr Tabiner who was going to hear the grievances.

124. The claimant returned to work on 23 November and attended a return to work interview with Jason Lawford. The claimant said that he had been absent with depression, was being treated with antidepressants and was seeing a psychologist. When asked whether he was fully recovered from his illness, he said that he was still seeking support and counselling. He said that he needed support and that he had not been paid while he was off sick. Mr Lawford noted that the reason the claimant had been unpaid was because the Enfield site had not received sick notes, they having been sent to People Services at head office. In answer to a question on the return to work form, 'is there a requirement to visit an approved company medical practitioner', Mr Lawford has ticked 'yes'. Mr Lawford in cross examination agreed that there was a requirement to see an approved medical practitioner which he did not follow up. He accepted that this was a failing on his part.

125. Sue Allen of payroll raised the issue of the claimant's non-payment on 23 November 2015 and a same day payment was requested and authorised on 24 November 2015. The claimant received his unpaid sick pay on that day.

126. On 23 November 2015, after the return to work interview, the claimant also had a one to one conversation with Jason Law. The claimant said that his needs were being met and he was in good health to return. He said that he was fine with the work but would need support from the management team. He said that management had not always been fair to him, but with some support from them he would be comfortable in the role. Mr Law told the claimant that he could come to see him if there was anything he wanted to talk about.

127. On 25 November 2015 those planning the allocation of work (who do not know the respective skills, abilities and needs of the employees themselves and simply need to allocate a person to a task) allocated the claimant to work in 'ambient issue'. Normally, management would notice if an employee was allocated to an inappropriate area. On this occasion Mr Francis Kobina was in charge and he mistakenly failed to notice that the claimant should not have been allocated to ambient. We find that this was simply a mistake. Therefore, when the claimant arrived at work he found that he was expected to work in ambient which was too stressful for him.

128. The claimant refused to work in ambient because it was too fast for him. The shift operations manager Adam Buchan met with him at 6.55 that morning and discussed with him his refusal to work. The claimant said that the ambient area was too fast for him and he did not get the support he required from management. He said that the company was aware of a physical impediment that prevented him from working. The discussion continued to 7:25 am, Mr Buchan considered the matter and then shortly after 7:30 am decided that the claimant would work in the frozen section after all.

129. The claimant had two appointments scheduled for 27 November and 4 December 2015 for treatment for his mental health impairment. We find on the balance of probability that Jason Law spoke to the claimant on 25 November and asked him if he had made arrangements for time to attend those appointments. Specifically, we find that Mr Law told the claimant that he could attend the appointments if he gave notice, booked time off and provided the respondent with evidence of the appointments. The claimant did not do so and in particular did not provide his employer with evidence of his appointments. Accordingly, Mr Law told him that in the event that he did not provide evidence he could take the time off only if he used annual leave. He did not tell the claimant that he could only attend the appointments if he booked holiday.

130. Mr Tabiner chaired a grievance hearing on 10 December 2015. He told the claimant at the outset that he intended to deal with all the outstanding grievances and appeals together. The claimant took no issue with this. In fact, at that hearing Mr Tabiner was only able to deal with what Mr Tabiner labelled 'grievance A': the appeal dated 24 September against Mr Gilchrist's decision.

131. However, the claimant wrote to Mr Tabiner on 12 December saying that he was disappointed that Mr Tabiner intended to hear all the grievances together before giving the conclusion of the grievance appeal. He asked for an answer to the grievance appeal within 14 days.

132. On 16 December 2015 Mr Lawford asked the claimant to make a written statement about why he was unable to cope with his duties. The claimant wrote that statement and gave the reason as his depression. He said he told Jason Lawford when he returned to work that he would need support

to help him cope with his duties. He said he had called Mr Law several times to request support but had been ignored.

133. Mr Lawford did send members of staff to support the claimant on two occasions during this period. However he did not have the resources available to provide a member of staff to sit with the claimant and do his job with him all the time. It was not possible, given the staffing levels he had, to provide the claimant with the support that he wanted.

134. As Mr Lawford knew, the freezer area where the claimant worked was an easier place to work than ambient. Ambient was 25 to 30% busier than freezer. The claimant had never worked in the chilled area. The claimant was already working in the area best suited to him.

135. Darren Tabiner heard a further consolidated grievance hearing on 22 December 2015. Mr Tabiner started the meeting by explaining to the claimant that it was not practical to hear the claimant's many grievances each separately. He wished to document all the grievances and to try to investigate them all together. However, the claimant insisted that Mr Tabiner should give him an outcome to the appeal of the grievance dated 24 September within 14 days. The claimant would not contemplate any alternative. Ultimately, Mr Tabiner said that he would not continue with the meeting if the claimant wanted an answer to that grievance within 14 days. The grievance hearing therefore ended.

136. On the morning of 23 December 2015 the claimant attended the Enfield site and sat in the canteen. He did not start work. A meeting took place between the claimant, Nathan Tress, Brian Todd (a Unison representative) and Katie Marcus from HR who took notes. The claimant was not at this stage a member of Unison but the respondent invited Mr Todd to be present so that the claimant had a witness and representative. The claimant said that he had suffered harassment and no investigation had been done. He complained that Mr Tabiner wanted to hear all his grievances together although the policy said that they should be completed in 14 days. He agreed that he was withdrawing his labour and said that he was doing so because the grievance had not been investigated properly. The claimant said that all the grievances were separate. He did not accept that Mr Taverner was following the correct procedure.

137. Mr Tress told the claimant that he believed that the company was reasonable in its approach and the claimant was making it difficult to continue. He told the claimant that if he was not going back to his duties he would be sent home unpaid. He asked the claimant if he had any questions and the claimant asked if he was suspended. Mr Tress said that he was not suspended. He confirmed that the respondent would not pay the claimant because he was refusing to do his job. They would write and confirm this to him. He told the claimant that if he wanted to come to work he should let the respondent know and he was welcome to do that.

138. The claimant said that the reason he was leaving his workplace was because the respondent was failing to provide him with a workplace free from harassment, discrimination and victimisation. He said that the grievances were being done in a capricious and calculated manner. He was not refusing to be paid his salary.

139. By letter dated 23 December 2015 Mr Tabiner reiterated that the respondent was attempting to address his complex and multiple concerns reasonably under one grievance hearing so that the they could be resolved as quickly as possible and in their entirety following a full investigation. Therefore, he urged the claimant to reconsider attending a grievance hearing to allow that to be done. He asked the claimant to respond to him before 8 January 2016 if he wished to continue using the respondent's preferred method. Mr Tabiner said that if the respondent had not heard from the claimant by that date then he might consider responding to the grievances in writing.

140. By letter dated 28 December 2015 Ms Hopkinson wrote to the claimant. She confirmed that the company had every intention of hearing his grievances and that it took the matter of harassment, victimisation and discrimination seriously. It was incumbent on the claimant however to help the respondent to understand his concerns and to allow them to be investigated. She urged the claimant to return to work and to reconsider his actions. She said that the company would do everything it could to protect him from harassment or other unlawful acts and she told the claimant to contact Nathan Tress or Geoff Morgan immediately if anything occurred on his return to work. She urged him to consider attending a grievance hearing to have his complaints heard personally. If not, she would try to have his complaints investigated on the information so far provided. She told him that he would not be paid while he was absent from work.

141. By letter dated 6 January 2016 the claimant told Ms Hopkinson that he had removed himself from his area of work because of the respondent's negligence and breach of its duty of care to protect his health and safety. It had omitted to act to take reasonable and practical steps. This he said was prejudicial to his health or materially injurious to his health. He refused to come back to work until the respondent provided him with a safe place and safe system of work free from harassment, discrimination and victimisation and until a fair and prompt investigation of his grievance was carried out. He reserved his rights to accept a repudiatory breach of his contract employment and claim constructive dismissal should the respondent fail to observe its statutory duty and health and safety obligations.

142. He asked for any further investigation about his grievances to take place via the modified procedure.

143. He asked for answers to his questions and grievances within 14 working days in writing after receipt of his letter.

144. Ms Hopkinson wrote to the claimant again on 8 January acknowledging his letter. She reiterated some of the remarks from her previous letter and said that she did not think it appropriate to respond to all the points in the claimant's letter because she thought these would be better dealt with in the meeting she had proposed. She again invited the claimant to attend a meeting with Mr Tabiner. In default of a meeting she said that she would ask Mr Tabiner to investigate the complaints based on the information provided so far so that he could revert in writing.

145. The claimant telephoned Ms Hopkinson on 13 January 2016. He asked to be separated from Mr Law and Mr Lawford and to transfer to the nightshift. Ms Hopkinson could not confirm whether that request could be accommodated but, in a subsequent e-mail dated 14 January, requested details from the claimant of the shift to which he wished to transfer, particulars of hours of work and type of work 'and so forth'. The claimant asked Ms Hopkinson in the telephone call why he was not being paid and she explained that he was not prepared to attend work with the safeguards that had been offered and therefore he would not be paid.

146. By letter dated 14 January 2016 the claimant presented a further grievance against Ms Hopkinson and Mr Tress. He said that they had subjected him to economic detriment.

147. By email dated 18 January 2016 the claimant asked Mr Tabiner for an outcome to the grievance on 10 December as soon as possible.

148. By email dated 20 January Ms Hopkinson replied to a voicemail from the claimant asking about a transfer to the nightshift. She reminded him of her previous email in which she asked him to specify which shifts he wished to transfer to in terms of number of hours/work type and so forth. She also asked him to confirm that the individuals who he claimed had committed acts of discrimination, harassment and bullying were Mr Law and Mr Lawford. She asked for a response on or before 22 January. She confirmed that Mr Tabiner was now progressing the investigation into the grievance.

149. By letter dated 25 January the claimant wrote to Ms Hopkinson. He was disappointed that he had not been paid the previous week. He repeated his request to be separated from Jason Lawford and Jason Law and to transfer to the nightshift. He did not provide the particulars in relation to the transfer to the nightshift that Ms Hopkinson had asked for. Ms Hopkinson repeated her request for those particulars by email dated 28 January.

150. At some point in January 2016 Ms Hopkinson spoke to Mr Morgan and told him that the claimant had requested to be allowed to return to work on the night shift. Mr Morgan considered the request but from his point of view if the

reason for the request was to move away from Jason Lawford and Jason Law then even on the nightshift there was no guarantee that the claimant would avoid those managers. There was a chance of encountering them at handover between shifts or on occasions when one worked nightshift. Mr Morgan also thought that the weaknesses in the claimant's performance meant that working on the nightshift would be inappropriate because there would be less support available. He also considered that the positions on the nightshift were all full, with no vacancies. In oral evidence he added that sometimes the freezer would close at nights, so the claimant would not have any work to do. He took the view in any event that it would be premature to consider the request before the investigation had shown whether there was any evidence of harassment.

151. Mr Tabiner carried out a thorough investigation into the claimant's grievances. Between 29 January and 2 February he interviewed Mr Law, Mr Gilchrist, Mr Belcher, Mr Lawford, Ms Niemkuc, Mr Gathercole, Mr Dala, and Mr Ward. He also sent written questions to Geoff Morgan who he subsequently interviewed on 9 February. Mr Tabiner also made an email enquiry of Sue Allen of payroll. He sent a letter dated 2 February to Enfield Borough Council asking whether they had any concerns or queries in relation to the claimant's letter to them. He asked for copies of any correspondence from Enfield Borough Council to the claimant.

152. Meanwhile, on 1 February 2016 the claimant told Ms Hopkinson that there was only one nightshift from 22:00 to 06.00 from Sunday to Friday. He said that there were 2 other managers on nightshift and he would report to those managers. He thought he would receive better support on the nightshift and would be able to undertake his medical treatment. This he said would enable him to avoid Mr Law and Mr Lawford.

153. By email dated 5 February Ms Hopkinson confirmed to the claimant that now she had received the particulars of the shift he wanted she would forward those details to the site for consideration.

154. By email dated 15 February Ms Hopkinson wrote to the claimant that his complaints were still being investigated. A decision about a change to his work pattern might be dependent upon the outcome of that investigation. Therefore, a decision about a change to his work pattern had not yet been made. She reminded him that he was welcome to return back to the site on his normal day shift role and the respondent would ensure that he had a safe environment in which to work and access to the senior management team should he experience any difficulties.

155. By letter dated 25 February 2016 Mr Tabiner sent the claimant the outcome of his various grievances. He partially upheld the grievance relating to Jonathan Berks in that he considered that the respondent could have resolved the matter in a more timely manner. He considered that the respondent had made reasonable adjustments and had attempted to support

the claimant in attending his medical appointments. He did not uphold the complaint that the claimant had been harassed and discriminated against by Mr Law and Mr Lawford. He treated the letter to Enfield Borough Council as a grievance but was unable to reach an outcome because those he interviewed were unclear about what the matter related to. He did not uphold the grievance relating to withholding company sick pay because the delay was caused by the claimant sending fit notes to People Services and not to the site. The site acted as soon as reasonably possible to rectify the problem when it came to light. He did not uphold the grievance about Mr Evans failing to make reasonable adjustments when holding a grievance hearing. He thought that it was reasonable for Mr Evans to take steps to ensure that a full and thorough investigation could take place when the claimant was fit enough to undertake a meeting.

156. Mr Tabiner's letter told the claimant of his right to appeal and told him to send a letter stating the grounds of his appeal to Mr Chris Dockree within 5 working days of the date when he received the outcome letter.

157. By letter dated 27 February apparently addressed to Ms Hopkinson and Mr Morgan but actually only sent to Ms Hopkinson, the claimant asked when he would have adequate adjustments made to return to work. He asked to be sent to an occupational health specialist and said that he was suffering from economic detriment and that staying without work and without money was not helping his mental health.

158. By what appears to be the covering email to that letter dated 3 March and sent to Ms Hopkinson the claimant also asked to be sent to occupational health services by the respondent and to work separately from Mr Law and Mr Lawford. He asked for an appointment within 2 days.

159. By letter dated 3 March 2016 the claimant submitted his appeal against the grievance outcome. In the covering e-mail sent to Mr Dockree, the claimant repeated his request to be sent to Occupational Health, *'to have better information what adjustment you can do.*' The substantive text of this appeal runs to 16 pages. Assuming that it took a couple of days for the claimant to receive the grievance outcome, his grievance appeal was submitted in time. The respondent did not send him to occupational health.

160. The copy of the claimant's grievance appeal letter at pages 416 a - q in our bundle has some manuscript additions on it. We find as a fact on the balance of probability that those additions were made by Ms Sharma and not by Mr Dockree. The comments are consistent with the sort of comments that a lawyer might note on first reading a document of this sort. Although we have not heard from Ms Sharma in person, we note that she is a solicitor and we are confident that she would not mislead us.

161. Mr Dockree conducted the grievance hearing on 14 March 2016. The meeting started at 10.41 am and continued, allowing for breaks, until 15.40

towards the end of the meeting. The claimant told Mr Dockree that he wanted to know his status, that is, whether he had been dismissed and how.

162. The claimant presented his second claim form in these proceedings to the tribunal on 20 March 2016. He had not at any point before this told the respondent orally or in writing that he was resigning. Amongst other claims, this form complained of unfair dismissal.

163. By letter dated 24 March 2016 Mr Dockree sent the claimant the outcome to his grievance appeal. That outcome set out carefully the 7 matters which Mr Dockree, with the claimant's assistance, had identified as being the points at issue in the grievance appeal. Mr Dockree's outcome letter recorded the process of agreeing these issues and then worked through those 7 issues one by one providing his answer to them. Mr Dockree also noted that his letter contained numerous references to legislation and case law. He said that the claimant had failed to link the relevance of that information to the specific facts contained in his appeal letter. He did not consider that these legal references were relevant to the appeal and he did not consider them further.

164. By letter dated 5 April 2016, Jo Nicholson a senior HR resolution manager wrote to the claimant. She said that she had that day been provided with a copy of his claim to the employment tribunal in relation to a claim of constructive dismissal. She asked the claimant to confirm that he had resigned from his employment as of 23 December 2015 as he suggested in his claim form.

165. Pausing there, neither party now suggests that the claimant did resign on 23 December.

166. We have to find on which date the contract of employment terminated. Therefore we have to find on balance when the respondent received communication of the claimant's resignation. The first communication of his resignation was contained in the claim form presented on 20 March. On the balance of probability, we find that the respondent received that form on 5 April, the day Ms Nicholson wrote her letter. We think that because it is a document of such importance we think it likely that as soon as its significance was realised the respondent would have begun to respond to it.

***Analysis.***

*Unfair dismissal*

167. We consider that we have no jurisdiction to hear the complaint of unfair dismissal, whether expressed as constructive unfair dismissal under sections 95 and 98 or as (constructive) dismissal by reason of public interest disclosure by reason of section 95 and section 103A of the 1996 Act.

168. We think this because we consider that the claim was presented prematurely. Assuming, for the sake of argument, that the respondent was in repudiatory breach of contract, the first communication the respondent received that the claimant had accepted that repudiatory breach was when it received the claim form sent to it by the employment tribunal. It received that claim form, we have found, on 5 April 2016. The effective date of termination then was 5 April 2016. The claim was presented to the tribunal on 20 March 2016. Therefore, the claim was presented before the contract had been terminated.

169. The claim form was presented therefore before the beginning of the 3 month period which began with the effective date of termination. Section 111(3) expressly provides that where a dismissal is with notice a tribunal shall consider a complaint if it is presented after the notice is given but before the effective date of termination. No exception is provided apart from that to enable us to hear a complaint of unfair dismissal presented before the effective date of termination. Therefore, we have no jurisdiction and there is no discretion available to us that would permit us to find otherwise.

170. For those reasons the two complaints of unfair dismissal under section 98 and/or section 103 A are dismissed.

171. In case we are wrong about that however and we do have jurisdiction, we examine the complaint of constructive dismissal. We set out the claimant's allegations in italics for ease of reference.

*Was the respondent in fundamental breach of contract (that is the implied term of trust and confidence) in that:*

*On 8 August 2015 when the claimant suffered discrimination from Jonathan Berks, he told the company that he was at risk of harm because of his depression, he was harassed again by Jonathan Berks and told the respondent that he was at risk of harm but the respondent did not do anything to assess him;*

172. Jonathan Berks certainly behaved inappropriately to the claimant. There was no evidence however that he was motivated by the claimant's disability, as the claimant accepted in cross examination. Mr Berks apologised and then left the company. The claimant's email of 22 August 2015 does draw attention to the claimant's rather fragile mental state and says that Mr Berks' behaviour put the claimant at risk of harm. We consider this email, read as a whole, conveys to the respondent a concern about Mr Berk's behaviour and a desire for action to be taken to address that behaviour, not a request for or indication of the need for a medical or psychiatric assessment. The claimant did not take time off work sick at this stage.

*In August 2015, the company refused to make an assessment of the claimant's disability;*

173. The claimant did not request an assessment of his disability in August 2015. His complaint about Mr Berks also did not make such a request. Although the claimant said that Mr Berks caused a risk of harm to his physical and mental health and referred to his anxiety, nervousness and stress, he was continuing to work. We do not think that there was either a refusal, or any culpable failure to refer the claimant for a medical assessment at this stage.

*On or after the incident on 25 November 2015 the claimant's manager refused to make an assessment of his disability;*

174. 25 November 2015 was the day when the claimant, having returned to work after a period of sick absence, was sent initially to work in the ambient office. He had been sending his sick notes to People Services, not to the Enfield site but he told Mr Lawford on 23 November that he had depression. When asked whether he was fully recovered from his illness he said that he was still seeking support and counselling. Mr Lawford on cross examination agreed that that was a requirement to see a medical practitioner which he did not follow up. He accepted that that was a failing on his part. Strictly, we would characterise this as a failure rather than a refusal.

175. We consider that this failure should be placed in context. At times the claimant blamed his difficulties on a physical impediment, as he did with Mr Buchan. At other times, he said he was fine, but needed management support, as he did with Mr Law. At other times, he referred to his depression. He presented a complicated set of problems for management. He did not himself make sure that management had all the medical information they needed. His own challenging behaviour might have made management aware that an assessment from occupational health could help them understand the complex problem they and the claimant were dealing with but it also made it difficult for them to see the problems clearly.

*Geoff Morgan and Trish Hopkinson failed to ask for assessment of the claimant's disability;*

176. Factually, this is correct. Ms Hopkinson, who did receive a request for referral to occupational health, from her oral evidence was concentrating on the claimant's desire to be separated from his managers Mr Law and Mr Lawford because that seemed to be what was pre-occupying him. She agreed that the claimant's request to be sent to Occupational Health was reasonable, however she reasonably saw the request in the context of his fear of harm from his managers. She did not refer the claimant to occupational health because she perceived no risk of harm to him from the managers.

177. Mr Morgan did not consider the request because the request was not asked directly of him: it did not reach him. The e-mail containing the request was sent to Ms Hopkinson but not to him.

*On 13 and 14 March the respondent refused to make an assessment of the claimant's disability; and*

178. It is difficult to see the significance of 13 March. The allegation is more likely to refer to 3 and 14 March, which are the dates the claimant sent in his appeal coupled with a request for an occupational health assessment and that of the appeal hearing itself.

179. The claimant wanted to be sent to occupational health so that occupational health could advise the respondent on reasonable adjustments. The claimant explored earlier failures to send him to occupational health with Mr Dockree in cross examination, but did not deal with the March request.

*The claimant did not receive any support from the respondent;*

180. The claimant received a great deal of support from the respondent. The respondent changed the claimant's role to a sedentary role to accommodate his disability (his back condition). The claimant had performance difficulties but the respondent accommodated these, in particular allowing the claimant to work only in the freezer department which he could cope with. The claimant made mistakes but was not disciplined for them. Mr Lawford sent someone to support the claimant when he could, doing so on two specific occasions. His managers did their best to hear his request for a change to the nightshift as soon as possible because they understood that it was urgent. When the claimant refused to work, he was not disciplined but was repeatedly encouraged to return and promised support. When the claimant refused to work in the ambient area, he was listened to and his manager did not insist that he should work in that area.

181. The claimant has not proved that the respondent was in fundamental breach of contract. The respondent has agreed that there was a failure to refer him to occupational health in November 2015, that it might have been better to do so and that this was an oversight. This referral might have been a useful exercise because there was real reason to believe that the claimant was vulnerable due to mental ill-health. A referral might have given the respondent insight into his behaviour and how to handle it. Some employers might indeed have made a referral at this stage.

182. However, the respondent was dealing with an extremely difficult situation and with a claimant who was not being consistent. Just because it is possible to say with hindsight that a referral to occupational health might have been beneficial does not mean that it was a fundamental breach of contract to fail to do so. On the facts that the respondent was dealing with we do not think it was such breach.

183. We do not consider that, separately or taken together with the whole, the subsequent failures to refer the claimant to occupational health amount to a fundamental breach of contract. Ms Hopkinson had reasonable and proper

cause, in the context of the requests the claimant was making of her, to take the view that a referral to occupational health would not shed light on any risk of harm from his managers. She thought that there was no risk of harm from his managers and, absent a finding from the investigation, was not prepared to assume that there was.

184. The claimant's request of Mr Dockree was not made because the claimant feared for his own mental health but because he thought that occupational health could advise about reasonable adjustments. Mr Dockery found that he was able to deal with the claimant's actual grounds of appeal and that the claimant was able to conduct a lengthy appeal hearing without the need for such a referral. He refused to be drawn into answering the claimant's many legalistic requests and adhered properly to his remit. We do not think he can be criticised for that approach.

*Did the claimant resign in response to any breach which he may prove?*

185. This question does not now arise. However, we note that the claim form presented on 20 March 2016 refers to the failure to send the claimant to occupational health on 23 November 2015, but not to any other failure to refer him. It sets out the claimant's reasons for claiming constructive dismissal in different terms to those he outlined to us at the outset of this hearing. So we do not accept that he resigned for the reasons he now gives and in particular not because of the latter allegations of failure to send him to occupational health in 2016.

186. For those reasons, we do not deal with the other issues that arise under the complaint of unfair dismissal. The claimant was not dismissed.

*Unpaid accrued holiday pay.*

187. The complaint of unpaid accrued holiday pay is well-founded as conceded by the respondent. The sum to be paid is yet to be quantified.

*Unauthorised deductions from wages*

188. The claimant was not signed off work sick during the period 23 December 2015 to 20 March 2016. The respondent gave him a clear, free choice between working and being paid on the one hand, and not working and not being paid on the other. It did not suspend him and did not accuse him of misconduct. The respondent wanted the claimant to stay and work on 23 December. It repeatedly invited the claimant back to work. The claimant chose not to work on 23 December or thereafter. He was able to work: not only was he not signed off sick but he was asking to transfer to the nightshift. As Mr Morgan put it, if he was fit enough to work nights, he was fit enough to work days. The claimant was able to work, was not unable through sickness to work but was not willing to work. Therefore, he was not entitled to be paid for the period between 23 December 2015 and 20 March 2016.

189. The claimant has in fact been paid, albeit late, for the period between 12 October and 23 November 2015.

190. For those reasons the complaints of unauthorised deductions from wages are dismissed.

*Disability discrimination*

Issue 1

191. The claimant alleges that on 8 August 2015 Jonathan Berks shouted at him, invaded his space and pointed at him with his finger. He says he also spread bad comments to other employees about the claimant that he was unable to understand a simple instruction and this caused an oppressive and intimidating environment. The claimant says that this is an act of harassment related to his disability.

192. The claimant accepted in cross examination however that there was no evidence that this act was related to his disability. We think he was right to accept that because we see no evidence before us that Jonathan Berks' behaviour to him was related to his disability.

193. Therefore, the claim based on this allegation is dismissed

Issue 2.

194. The claimant alleges that on 4 September 2015 Jason Lawford and Jason Law deliberately scheduled meetings for when they knew the claimant had medical appointments.

195. The claimant frames this allegation as one of discrimination arising from a disability, a failure to make reasonable adjustments, direct discrimination and harassment.

196. In fact, there was only one medical appointment at issue: that on 4 September. Although Mr Lawford and Mr Law knew that the claimant had an appointment on 4 September, the claimant had produced no documentary evidence of this despite a request that he should do so. Mr Law and Mr Lawford did not know the time of the claimant's appointment. Mr Law and Mr Ward both made provision in their letters inviting the claimant to meetings for the claimant to make contact so that he could raise any issues, such as a clash of commitments.

197. In fact, it was Mr Lawford who was involved in scheduling the meetings, not Mr Law. He scheduled his meeting about flexible working for 4

September because he understood from the claimant that that was an urgent request and 4 September was the first day he had available for a meeting. He was therefore offering that day because he was trying to help the claimant resolve the problem as soon as possible.

198. Our findings show us that no one deliberately scheduled meetings for when the claimant had medical appointments: the respondent could not do that because it did not know the time of the medical appointment. It made provision in its invitation letters to allow for times of appointments to be changed if they were not appropriate. So on this basis on the facts the claimant's allegation is not well-founded.

199. Looking at the facts under the different headings raised by the claimant, and taking direct discrimination first, we see that the 'reason why' the flexible working meeting was scheduled when it was, was because that was the first day available. We have no evidence that either Mr Law nor Mr Lawford scheduled the meeting involving Mr Ward. Mr Ward is not accused of discrimination.

200. The scheduling of the flexible working meeting was not related to the claimant's disability. The meeting itself was related to the claimant's disability (his back condition) but it is the conduct of scheduling the meeting that we must look at. The scheduling was related to Mr Lawford's busy diary, his desire to help the claimant by holding the meeting as soon as possible and the claimant's failure to show him documentary evidence of and/or tell him of the time of the appointment. Therefore, there was no unwanted conduct related to the relevant protected characteristic.

201. Although the meeting arose from the claimant's disability, we have already identified the reason for setting the date and time of the meeting as something that did not arise in consequence the disability: those of the matters set out in the paragraph above. Therefore, the complaint under section 15 fails.

202. Now we turn to reasonable adjustments. The claimant says the 'PCP' was 'the claimant appointment beforehand'. This does not make a great deal of sense. The PCP can only be that of requiring the claimant to attend a meeting although the respondent knew his appointment beforehand.

203. We do not think this can arise as a PCP: it was not applied in fact. The respondent was open to flexibility and had provided for the claimant to make contact if the time and date given was inconvenient. The claimant could simply have rearranged the date. For that reason too he was put at no disadvantage because of the 'PCP'. The reason he failed to attend his appointment was because he did nothing to rearrange either meeting, had not told the respondent about the time of his meeting and had not given the respondent documentary evidence of the appointment.

204. Therefore, the disability discrimination complaints under issue 2 fail.

Issue 3

205. The claimant says that on 23 September 2015 Jason Lawford said that all agency staff had the same rights as 'DHL Members'.

206. He frames this as a complaint of direct discrimination and/or failure to make a reasonable adjustment.

207. He gives as a comparator Adriana Marin. The claimant's evidence says nothing about Ms Marin however. Other comparators were also named during the course of the evidence; however those like Ms Marin were people already working on a nightshift, not employees applying to work on a nightshift from the day shift. Therefore, there is a material difference between their situation and that of the claimant, because the claimant was applying to move to the nightshift: he did not have a pre-existing right to be there. A proper comparator would be somebody else working on the day shift and making a flexible working request to move to the nightshift. There is no evidence of such an actual comparator.

208. In any event the reason why Mr Lawford made the remark he did was because this was his understanding of the law.

209. The claimant's choice of comparators however suggests that the treatment of which he is really complaining is the refusal to move him to the nightshift, not the justification given for it. The reason the claimant was not moved to the nightshift is that Mr Lawford believed that the claimant's appointments could be accommodated without a change of shift. If the claimant gave notice and provided evidence of his appointments, then he could swap rest days with colleagues or do shift swaps or make a request for annual leave.

210. As Mr Lawford knew there were no vacancies on the nightshift in the administration team. There were no vacancies on the nightshift at that time and none could be made without displacing employees or long serving agency workers.

211. The letter from Richard Dannatt did not give the claimant any guarantee of returning to the nightshift.

212. We have accepted Mr Lawford's reasons and there is therefore a 'reason why' which is not discriminatory.

213. The claimant identifies the PCP as the respondent's refusal 'to change the shift pattern to allow the claimant to undergo treatment and said that agency staff had the same rights as a disabled employee'. The PCP was not allowing the claimant to change his shift to undergo treatment.

214. However, this was an individual decision made on the facts of the claimant's particular case. It was not a 'practice' of not allowing employees generally to change their shifts to undergo treatment. This was a one-off occasion made as a decision on the facts as they appeared to be related to the claimant, including what was known about his appointments, and given the circumstances in relation to the nightshift in September 2016.

215. So, no PCP was applied to the claimant.

216. For these reasons the complaint of discrimination in issue 3 is not well-founded.

Issue 4

217. The claimant says that Jason Lawford changed his day off on 5, 6 and 7 October 2015 and forced him to work when Mr Lawford knew beforehand that the claimant had a medical appointment in the hospital on his rest day.

218. The claimant frames this as direct discrimination, indirect discrimination, failure to make adequate adjustments, and discrimination arising from disability.

219. We have found as a fact that Mr Lawford did not know that the claimant had a medical appointment on his rest day. The reason the rest day changed was simply one of administrative confusion. Mr Lawford only found out about the claimant's medical appointment as he was discovering the confusion about the rest day. He did not deliberately change the day off to prevent the claimant from undergoing treatment.

220. Mr Lawford did not force the claimant to work: the claimant actually went to his appointment and arrived at work after it.

221. Therefore, the claimant has not established the primary facts upon which this allegation is based and it is not well-founded.

Issue 5

222. The claimant says that on 9 October 2015 Mr Lawford did not allow the claimant to attend a medical appointment unless he took holiday or more holiday.

223. The claimant frames this as harassment, discrimination arising from disability, failure to make reasonable adjustments, and indirect discrimination.

224. We have accepted as a fact that Mr Lawford knew about the appointment on 9 October only when the claimant told him about it on 8 October. The claimant provided Mr Lawford with no documentary evidence of

his appointment. That left Mr Lawford with insufficient time to rearrange the shifts or rest days. It is in and because of those circumstances that Mr Lawford told the claimant that he could attend his appointment and that he could either take it as unpaid leave or as annual leave.

225. Therefore, the allegation as framed by the claimant is not strictly accurate. Mr Lawford did give the claimant the option of taking unpaid leave and did not compel him to take holiday so as to attend the medical appointment.

226. In any event the reason why he gave the claimant choice of unpaid leave or annual leave in order to take his appointment was because of the late notice and lack of evidence.

227. Therefore, although the appointment was related to the claimant's disability, the 'unwanted conduct' was telling the claimant that he could take time off to attend the appointment if he took annual leave (or unpaid leave). That conduct was not related to the claimant's disability but was related to the short notice and lack of evidence. Therefore, the complaint of harassment fails.

228. Similarly, the treatment complained of arose in consequence of the short notice and lack of evidence, not in consequence of the disability. The section 15 complaint fails.

229. The claimant relies upon two PCPs: 'the claimant's day shift pattern' and a requirement by the respondent that the claimant take holiday leave to attend medical appointments.

230. The first is capable of amounting to a PCP which was applied the claimant: that is, that those employees who were allocated to the day shift remained allocated to the day shift unless they were successful in applying for a transfer to the nightshift.

231. The second 'PCP' was in fact a one off decision applied to the claimant only on the facts of his particular situation. It was not a practice applied generally but was Mr Lawford's solution to the problem of the claimant only giving one day's notice and providing no documentary evidence of a medical appointment.

232. However, neither alleged PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. It would have been a disadvantage and a substantial one not to be able to attend his medical appointments and/or to have to take annual leave to attend them.

233. On the facts however the claimant was not put at that disadvantage either by the PCPs alleged or at all. First, the claimant was not compelled to

take annual leave to attend his medical appointment because he could have taken unpaid leave to do so. In any event he was in the position of having to take annual leave or unpaid leave because he had given only one day's notice and provided no evidence. Any disadvantage caused therefore was caused by his own actions not by the application of any PCP.

234. No duty to make reasonable adjustments arises therefore.

235. Turning to indirect discrimination, the first PCP was applied to the claimant and the respondent did or would apply it to persons with whom the claimant did not share a characteristic of disability. However, it did not put the claimant at the disadvantage he alleges because as we have already found, the claimant was put at that disadvantage by his own actions.

Issue 5A

236. The claimant says that on 8 October 2015 in the appeal from the flexible working application decision, Jason Law said that he was not up to the job, and questioned his ability and capability.

237. The claimant frames this as direct discrimination and/or victimisation.

238. Mr Law did say to the claimant that his performance was not up to the standard to be able to be moved onto nights. We accept that this came up because the claimant had referred to the letter from Mr Dannatt and it was in the context of responding to that letter and the claimant's resulting expectation to be returned to nights that Mr Law made the comment about the claimant's performance. He made the remark, therefore because the claimant referred to the letter. In fact, it was irrelevant to his decision about the appeal about flexible working. The 'reason why' Mr Law made this remark was because the claimant referred to the letter. He was also able to say it because he believed that it was true.

239. Mr Law therefore did not make this remark because of the claimant's disability or because he carried out a protected act.

240. Insofar as the treatment was not changing the claimant's shift pattern, Mr Law made the decision that he did because he did not consider that any permanent change to the shift was needed in order to accommodate the claimant's medical appointments. In this, he agreed with Mr Lawford. He was also aware that there were no vacant positions on the nightshift for the claimant to move into.

241. This being the case, the reason why Mr Law made his decision on the appeal was not because the claimant's disability or because he had carried out a protected act.

Issue 6

242. The claimant says that Mr Evans requested him to attend a meeting in person when he was off, 'by operation epidural, depression and anxiety.'

243. The claimant frames this as harassment, discrimination arising from disability and failure to make reasonable adjustments.

244. On the facts, the claimant was off sick due to his disability (his back impairment) when he was invited for a meeting. Although Mr Evans made the request itself that the claimant meet him face-to-face while the claimant was off sick, the claimant was not requested to attend a meeting that was going to happen while he was off sick. Mr Evans made it clear that the claimant should come to a face-to-face meeting when he was able to do so. He deferred the meeting to a time and place of the claimant's own choosing.

245. The claimant did not want this: he wanted the meeting to be conducted by telephone. To that extent, this was unwanted conduct. It was related to the claimant's disability only in the sense that the meeting was deferred because the claimant was off sick due to his disability. However, the reason Mr Evans wanted the meeting face-to-face was not related to the disability. He wanted to meet in person because he thought that a face-to-face meeting was prudent. This was particularly because a thorough investigation would be needed and he did not think he would be able to establish the background detail of the grievance over the telephone.

246. So we consider that Mr Evans conduct in desiring to meet in person and so deferring the meeting was not related to the disability but was related instead to the nature of the investigation to be carried out.

247. In any event the conduct did not have the purpose of creating the prohibited environment; it had the purpose of doing justice to the issues raised by the claimant. Nor did it have the effect of creating the prohibited environment when we take into account the factors set out in section 26(4). Albeit the claimant's perception might have been that the effect was to create an intimidating, hostile, degrading, humiliating or offensive environment for him, taking into account the other circumstances of the case we do not think that it was reasonable for the conduct to have that effect. The other circumstances are that the claimant had raised a complicated set of issues, it would have been difficult to do full justice to them over the telephone, and Mr Evans offered the claimant a sensible alternative, that is that the meeting should be deferred until the claimant was able to manage it and it could be held at a time and place appropriate for him.

248. It is not clear from the Scott schedule what the claimant says was the PCP. There was no requirement that put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. Had Mr Evans required the claimant to attend a meeting in person when he was not physically able to do so then there might have been

such a PCP applied. However, Mr Evans was content to wait until the claimant was physically able to attend. Therefore, the claimant was not put at any comparative disadvantage. Like persons who are not disabled, he would have been able to attend the meeting.

249. If we were wrong about that, it appears to us that Mr Evans has in fact made the most appropriate reasonable adjustment. That is, he has deferred the meeting and introduced flexibility of time and place to suit the claimant. The claimant's alternative proposed adjustment, that is to conduct the meeting by telephone would not have been reasonable given that it would have made it more difficult to investigate the detail of the claimant's complaints.

Issue 7

250. The claimant says that he was sent to work in the ambient area despite the requests to have support in relation to the load of work, 'and depression and anxiety suffering.'

251. The claimant frames this as harassment and failure to make a reasonable adjustment as well as direct discrimination.

252. Taking harassment first, this was unwanted conduct because the claimant did not want to work in the ambient area. However, it was not related to his disability because those who allocated him to work in that area had no knowledge of his personal characteristics, abilities or disabilities. They allocated him to work there at random because they had to allocate a person to a task when carrying out their planning. Francis Kobina did not pick the issue up simply because he made a mistake. This was not related to the claimant's disability.

253. The Scott schedule gives no PCP for this issue. In fact, sending the claimant to work in the ambient area was a one-off and random event. It could not be a provision, criterion or practice.

254. In any event it did not place the claimant at a disadvantage because, when he drew attention to the problem there was a meeting and he was not sent to the ambient area.

255. The complaint of direct discrimination also fails, because those who allocated the claimant to work in the ambient area did so mechanistically and without consideration of the skills and abilities or indeed disabilities of those they were allocating to tasks. This was the 'reason why'.

Issue 8

256. The claimant says that he was not allowed to attend [a] medical appointment unless holiday was booked or [to] take more holidays because of appointments. The dates given are 27 November and 4 December 2015.

257. The claimant frames this as harassment, discrimination arising from disability failure to make a reasonable adjustment and indirect discrimination.

258. On the facts, the respondent did not refuse to allow the claimant to attend medical appointments without booking holidays or to take further holidays. It is because the claimant failed to provide evidence of his appointments that he was told to take annual leave. Had he provided the evidence required, he would have been able to attend without taking annual leave.

259. Therefore, the treatment telling the claimant to take annual leave was not related to his disability but to his failure to provide evidence. In any event, the purpose was not to create the prohibited environment or to violate the claimant's dignity. Given all the circumstances of the case it was not reasonable for the claimant to perceive that the conduct had the prohibited effect. This is because he had been told, not for the first time, to produce evidence of his appointment and he had not done so.

260. Turning to section 15, the treatment complained of did not arise in consequence of the claimant's disability but from his failure to produce evidence.

261. The PCPs relied upon are (1) 'the claimant day shift Pattern' and (2) 'a requirement by the respondent that the claimant took holidays leave to attend medical appointment and not be paid while attending medical appointment.'

(1) must mean that if the claimant had been allowed to transfer to night shifts he would have been able to attend the appointments. It is the case that the claimant was required to work on the day shift so that that is a PCP applied to him. It did not however put him at a substantial or particular disadvantage by comparison with those who did not have his disability because had he produced evidence of his appointments he would have been allowed to attend them without having to take leave. Any disadvantage came from his failure to provide evidence, not from the PCP.

(2) This alleged 'PCP' fails on the facts, because there was no such requirement.

262. Therefore, the complaints of indirect discrimination and failure to make reasonable adjustments fail.

Issue 9

263. The claimant says that the respondent failed to pay him in line with his contract of employment between 12 October and 23 November 2015. He frames this as victimisation and breach of contract.

264. In fact, the claimant was paid, albeit belatedly, for this period of time. It was not therefore a breach of contract outstanding upon termination of employment.

265. The reason the claimant was not paid was because he sent his medical certificates to head office instead to the Enfield site. This is the 'reason why' so that the treatment was not because he had a disability.

266. Therefore, these complaints fail.

Issue 10

267. The claimant says that he was sent home unpaid because he requested [an] assurance to work in an environment free from discrimination, harassment, victimisation and prompt investigation of his grievance.

268. He frames this as victimisation.

269. On our findings of primary fact, the claimant was sent home unpaid because he refused to work, although he was able to work. This was the 'reason why'. It was not because he had carried out any protected act or because he had made any disclosure. He was not paid because he did not work. He was sent home because he did not work.

Issue 11

270. The claimant says that on 25 January 2015, Trish Hopkinson refused to make a reasonable adjustment to allow him to attend his medical appointment. She refused to separate him from his managers Jason Law and Jason Lawford and she said that the claimant would be unpaid.

271. The claimant frames this as discrimination arising from disability, failure to make reasonable adjustments and harassment.

272. The alleged year must be wrong. These events took place in January 2016. There is a correspondence between the claimant and Trish Hopkinson about these matters in which Ms Hopkinson wrote to the claimant on 20 and 28 January, 5 and 15 February 2016.

273. As Mr Dyal points out, the claimant's pleaded case in his Scott schedule on this and the related issues is extremely difficult to understand.

274. The claimant did not ask Ms Hopkinson to be allowed to attend his medical appointment, unless this means that he wanted to change to night shifts because he saw this as a way of attending his medical appointments.

275. Ms Hopkinson took steps to find out what shift pattern the claimant had in mind, but on 15 February 2016 she told the claimant that an amendment to his working pattern might be dependent on the outcome of the investigation.

276. This was not a refusal per se but was a recognition of the fact that the claimant's request to move to night shifts was based on his assertion that he had been harassed by Mr Law and Mr Lawford. That matter was under investigation. Ms Hopkinson said what she did because she recognised rationally that the investigation had to be concluded before a decision was made.

277. The same thinking applies to her approach to separating the claimant from Mr Law and Lawford.

278. Ms Hopkinson had confirmed to the claimant by letter dated the 28th December that he would not be paid while he was absent from work. This was in the context that he was refusing to return to work, was withdrawing his labour and in which she urged him to return to work and to reconsider his actions. She confirmed in her email dated 14 January that as the claimant was not prepared to attend work, with the safeguards that he had been offered, he would not be paid.

279. Therefore, Ms Hopkinson did not refuse to separate the claimant from his managers (and in so doing enable him to attend his medical appointments) and did not confirm that he would be unpaid because of anything that arose in consequence of his disability. The first decision was because there was an ongoing investigation and the second was because the claimant was refusing to work.

280. The PCP put forward by the claimant is difficult to decipher:

'*Did the PCP put or would put persons who have the same disability as per the claimant at a substantial disadvantage when compare with persons who do not have the same disability as the claimant relies inability to work by refused by the respondent to make adequate adjustment and separate the claimant from the harasser manager to be able undertake his treatment*.'

281. It probably means failing to separate the claimant from the managers who were harassing him, so that he could undertake his treatment.

282. In fact, Ms Hopkinson made individual decisions tailored to the precise circumstances of the claimant's case. That being the case, it is difficult to see what PCP was being applied.

283. If it was a general rule that decisions about moving an employee to a different shift would not be made until the conclusion of an investigation, that might amount to a PCP. There was no evidence of such a rule or practice.

284. The claimant however would not be placed by this at a substantial disadvantage in comparison to persons who did not have his disability. Anyone making allegations of harassment in these circumstances, with or without a disability, would have to wait for the outcome of the investigation. If the claimant says he was disadvantaged because, not being on night shift he could not attend medical appointments, then this has already been dealt with by our earlier findings. Being on the day shift did not prevent the claimant from attending medical appointments, so long as he provided evidence and notice of them.

285. If it was a general rule that employees who did not work would not be paid, then the claimant would not be placed at a substantial disadvantage in comparison to persons who did not have his disability. In any event he has not explained or put to the respondent why this should be the case.

286. Looking at this issue as one of harassment, the treatment complained of was not related to his disability, but to the decision by the respondent to finish the investigation before making a decision.

Issue 12.

287. The claimant says that Geoff Morgan [failed or refused] to allow the claimant to return to work with amended duties and separate from his managers Jason Law and Jason Lawford. The claimant also says that Geoff Morgan said to him that he was not going to deal with him because he refused his labour.

288. The relevant dates are said to be 25 January and 28 January 2015 but the claimant might mean 2016 which is when these issues arose. His witness statement says that on 28 October 2015 Mr Morgan said that he was not going to deal with the claimant because he had refused his labour, yet in cross examination he put the date as 28 January.

289. This allegation is framed as one of harassment, failure to make a reasonable adjustment and discrimination arising from disability.

290. We have made findings about why Mr Morgan decided that the claimant should not be transferred to nights. We have accepted his explanation that the claimant would still have occasional contact with Mr Law and Mr Lawford, that the claimant lacked the skills to work with the lower level of support on nights, that the freezer would close sometimes and that there were no vacancies.

291. Mr Morgan had no recollection of the conversation in which he refused to deal with the claimant because he had refused his labour, but accepted that it may have happened. We accept therefore that it did happen, whatever the date, but his reason for refusing to deal with the claimant is contained in the allegation: the claimant had refused his labour.

292. We find that these matters do not amount to harassment. They are not related to the claimant's disability: they are related to the practical problems of transferring the claimant to the nightshift and the decision was made on those grounds. The second allegation is related to the claimant's refusal to work. So the complaint of harassment fails.

293. The PCPs relied upon are that the claimant was sent home unpaid, that the respondent refused to make a reasonable adjustment, and that the respondent refused to separate the claimant from 'the harasser'.

294. The decision to send the claimant home unpaid was an individual decision made in his particular circumstances. It was not therefore a PCP. In any event, it did not put him at a substantial or any disadvantage compared with persons who did not have a disability. What stopped the claimant from working was his refusal to work, not the disability. The claimant could have earned his pay at any time had he decided to work and his disability did not disadvantage him in doing so.

295. It is difficult to see how refusing to make a reasonable adjustment can be a PCP: this appears to be 'putting the cart before the horse'. Before there can be a failure to make a reasonable adjustment, first there must be a PCP identified.

296. Mr Morgan too made an individual decision rejecting the claimant's request to move to nights on the particular circumstances of his case. There was therefore no PCP. In any event, this placed the claimant at no substantial or any disadvantage in comparison with persons who are not disabled. The claimant could have attended his medical appointments while working on days if he gave notice and provided evidence of them.

297. Turning to discrimination arising from disability, the treatment complained of does not arise from the disability. Mr Morgan said what he did because the claimant refused to work. Mr Morgan took the decision that he did for the reasons he gave which do not arise out of the claimant's disability.

298. Therefore issue 12 fails.

Issue 13.

299. The claimant says that on 15 February 2015, Trish Hopkinson made a decision that whether it would be beneficial to amend the claimant's work pattern may depend on the outcome of the investigation.

300. The claimant frames this issue as one of harassment, discrimination arising from disability and failure to make a reasonable adjustment.

301. In fact, this is a different way of framing issue 11 which we have dealt with above. On 15 February 2016 Ms Hopkinson told the claimant that an amendment to his working pattern might be dependent on the outcome of the investigation. It is susceptible to the same reasoning in relation to harassment and section 15 and fails for the same reasons.

302. The PCP is expressed differently: '*the claimant Relies in PCP the claimant Day time shift pattern take holidays to attend medical appointment not be able to work by constantly refusal to make A. adjustment by the respondent*'

303. This seems to mean that the claimant relies as a PCP on the requirement that he undertake his daytime shift pattern, that he take holidays to attend medical appointments and the respondent constantly refused to make adjustments.

304. As we have already found, the daytime shift pattern did not put him at a disadvantage in comparison with persons who did not have a disability because he was permitted to attend medical appointments if he provided evidence and gave proper notice. He only had to take holidays if he did not do this. As we have already said, to rely on refusal to make reasonable adjustments as a PCP misunderstands the structure of the legislation. First there must be a PCP and a disadvantage in comparison with persons who do not have a disability before there can be a failure to make a reasonable adjustment.

305. For those reasons issue 13 fails.

Issue 14

306. The claimant says that Darren Tabiner on 25 February 2015 failed to make an adequate adjustment to the grievance procedure despite [the fact that] the claimant was suffering from a high level of depression and anxiety [in that] the respondent only gave 5 days to lodge the grievance appeal.

307. This is framed as discrimination arising from disability, and a failure to make a reasonable adjustment.

308. Taking the section 15 claim first, giving the claimant 5 days to lodge his appeal does not arise from his disability but from the respondent's procedures. Therefore, this claim cannot succeed.

309. The claimant relies upon a PCP of [only] allowing the claimant to lodge the appeal within 5 days. However, the claimant was able to present his appeal in time and it was accepted and dealt with. He did not ask for an extension of time. The appeal he submitted was lengthy and detailed. If he became short of time, that disadvantage arose from his detailed approach and this would have been the same disadvantage experienced by those who did

not have a disability who took that approach. He would have been entitled to restrict himself to giving grounds of appeal which he could have managed comfortably within the 5 day time limit, but he did not do this. He was given a full appeal hearing. He was put at no disadvantage by comparison with persons without a disability.

310. Therefore this issue fails.

Issue 15

311. The claimant says that Chris Dockree and Darren Tabiner refused to answer questions regarding disability discrimination and gave only evasive and equivocal [answers] to all questions and grievances from the claimant.

312. The claimant does not identify a cause of action.

313. Mr Tabiner considered, investigated and dealt with the claimant's grievance fully. Mr Lema did not explore with him in cross examination what he suggested should have been answered by Mr Tabiner but was not.

314. Mr Dockree dealt expressly with the issues raised by the claimant in his appeal which were relevant to the grievance heard by Mr Tabiner. He did not deal with the legally related questions which he considered outside his remit. We consider that was a proper approach.

315. For these reasons as well as because of the lack of a cause of action, this complaint fails.

316. Therefore, aside from the complaint of unpaid accrued holiday pay, these complaints all fail.

_____
Employment Judge Heal

Date: ……24 March 2017..

Sent to the parties on: ..6 April 2017.....

.....
For the Tribunal Office