EMPLOYMENT TRIBUNALS

Claimant: Mr M Serra Garau

Respondent: Commissioner for HM Revenue & Customs

HELD AT: Liverpool **ON:** 3,4,5,6 & 7 April, 26 & 27April 2017 (in chambers)

BEFORE: Employment Judge Shotter

Mr AG Barker
Mrs JC Fletcher

REPRESENTATION:

Claimant: Mr K McNerney, Counsel
Respondents: Mr D Northall, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Tribunal does not have jurisdiction to consider the claimant's complaint of unfair dismissal, the claimant having presented his claim outside the statutory three-month time limit, it was reasonably practicable for the claim to be presented before the end of the time limit and the claimant's claim for unlawful dismissal is struck out.

2. The Tribunal does have the jurisdiction to consider the claimant's complaint of unlawful disability discrimination which was presented after the end of the relevant time limit and it is just and equitable to extend the time limit to 25 May 2016.

3. The claimant was not unlawfully discriminated against in accordance with S.20-22 and Schedule 8 of the EqA, and his claim unlawful disability discrimination is not well-founded and dismissed.

4. The claimant was not unlawfully discriminated against in accordance with S.19 of the EqA, and his claim of unlawful indirect discrimination is not well-founded and dismissed.

5. The claimant was not unlawfully discriminated against in accordance with S.15 of the EqA, and his claim unlawful discrimination arising from his disability is not well-founded and dismissed.

6. The claimant was not unlawfully discriminated against in accordance with S.27 of the EqA, and his claim for victimisation is not well-founded and dismissed.

REASONS

<u>Preamble</u>

<u>The claims</u>

1. The claim form was received on 25 May 2016 following the issuing of two Early Conciliation Certificates, the first dated 4 November 2015, the second dated 25 April 2016. The claimant, who had been continuously employed from 24 March 1997 to the effective date of termination on 30 December 2015 following 13 weeks notice of dismissal, claimed unfair dismissal and disability discrimination under sections 15, 19, 20-22 and 27 of the Equality Act 2010.

2. It is not disputed the claimant had a mental impairment and was disabled with chronic depression, stress and anxiety. He is also dyslexic but this is not a disability relied upon for the purpose of these proceedings.

3. With reference to the claim that the respondent had failed in its duty to make reasonable adjustments the claimant alleged due to his disability he could not return to working in Manchester, and he "continually" requested that he be allowed to work away from Manchester and this was refused. The claimant maintained his removal from Manchester would have avoided dismissal.

4. In the grounds of complaint, the practice, criteria and provisions ("the PCP") relied upon by the claimant are:

    I. The respondent's policy on Special Transfers that put disabled people at a particular disadvantage as that class of individuals are more likely to change their working location to accommodate their disability. The claimant was put at a disadvantage as he was prevented from transferring (when he needed to because of his disability) because he did not meet the Special Transfer Criteria.

II. The practice of requiring the claimant to carry out his role at the Ralli Keys office in Manchester.

III. The practice of refusing to consider permitting employees from working at different locations or remotely.

5. The claimant alleged the PCPs put him at a substantial disadvantage because "they prevented him from working away from Manchester when his disability stopped him from travelling to Manchester for work or otherwise…"

6. With reference to the section 19 indirect discrimination complaint the claimant relied on the following PCPs:

I. The respondent's Policy on Special Transfers as above.

II. Dismissing employees on long term sick absence that put disabled people at a particular disadvantage because they have more frequent absences or long periods of absence caused by their disability.

7. With reference to the Section 15 complaint discrimination arising from disability the claimant alleged the unfavourable treatment was being dismissed and awarded 0% compensation for dismissal.

8. Finally, with reference to the Section 27 complaint the claimant relied on his 6 March 2015 grievance as the protected act and the detrimental action dismissal, the decision to award him no compensation for dismissal and the decision to dismiss his appeal. The latter detriment was not relied upon in the agreed issues.

9. The respondent denied the claimant's claims maintaining he was dismissed on the grounds of continuing sickness absence. The respondent did not initially accept the claimant was disabled for the purpose of section 6 of the EqA but this has since been conceded. It denied the Special Transfer Policy put disabled employees at a particular disadvantage maintaining the claimant had failed to identify the correct grouping of employees that would be adversely affected, denying disabled people are much more likely to need to change their work location to accommodate their disability. With reference to the 0% compensation the respondent maintained the decision under the discretionary scheme was due to the claimant's lack of cooperation and "his behaviours throughout the sickness absence process." It was denied the claimant's dismissal and appeal was connected to the grievance he raised.

10. A preliminary issue was identified concerning time limits, the claimant's disability status no longer being an issue. It was agreed the time limit issue would be heard at the beginning of the liability hearing, the EAT having decided the first early conciliation certificate issued by ACAS did not extend time as it covered a period before time had started running on termination of employment, and the second early conciliation certificate was ineffective as by then the claimant had already complied with the requirement for early conciliation by way of the first certificate.

11. The Tribunal heard the respondent's application to strike out to claimant's claims on the basis they were out of time and the Tribunal had no jurisdiction to consider them, as a preliminary hearing following which oral judgment was given. A request for written reasons has since been made, and in accordance with that request written reasons of the decision made at the Preliminary Hearing have been incorporated below as previously indicated to the parties.

Evidence for the preliminary hearing on jurisdiction

12. The Tribunal considered the claimant's witness statement dated 20 September 2016 and took into account his oral evidence, together with the written statement of Mr B Toner dated 31 March 2017 who was not called to give evidence. The Tribunal accepted the contents of Mr Toner's statement, to which weight was given. With reference to the claimant's evidence, it did not find it to be entirely credible, for example, his insistence that he had looked up provisions concerning Employment Tribunal claims on the internet, but had not looked at the Employment Tribunal government website until March 2017. It can be seen by reference to the finding of facts made in relation to liability the claimant had access to legal advice early on in the process, alleging the respondent had unlawfully discriminated against him and constructive dismissal was a possibility.

13. The Tribunal took into account the agreed bundle of papers dealing with time limits (at the bequest of the parties as the original bundle had not been retained) incorporating a number of documents including medical records, and oral closing submissions together with case law to which it was referred by Mr Northall, the following findings of fact have been made:

Facts relating to the Preliminary Hearing issue on time limits and jurisdiction

14. On 1 October 2015, the claimant was given notice of termination that confirmed he was entitled to 13 weeks' notice the last day of service being 30 December 2015. The claimant was clearly informed by the respondent of the 3-month time limit in which to bring an Employment Tribunal claim.

15. Prior to the termination of the claimant's employment he had been absent from work with anxiety and depression. The claimant's disability status is not disputed by the respondent. During the relevant period the claimant was on the maximum dose of Sertaline. He had been on anti-depressant medication for some time. The medical records reflect the claimant had been diagnosed with depressive disorder.

16. On the 6 October 2015, the claimant lodged a 3-page detailed appeal referencing the Equality Act ("the EQA") and the respondent's duty to make "work place adjustments." The document was produced with the assistance of the claimant's wife, and during this period the claimant was supported by PCS and Mr Palmer, his union representative. The claimant also submitted a substantial and detailed appeal against the decision to award him 0% compensation to the Civil Service Appeal Board and the Tribunal concluded

his disability did not prevent him from dealing with a complex range of matters including completing an ET1.

17. During his notice period the claimant remained off work ill, and on the 12 October 2015, he contacted ACAS for the first time with the intention of negotiation a resolution. A number of emails were exchanged between ACAS and the respondent as a result. On 29 October 2015 ACAS wrote to the respondent referring to a claim of unfair dismissal and disability discrimination, the resolution sought being re-engagement to Liverpool, the claimant having been employed in Manchester sought a reasonable adjustment of re-deployment to Liverpool. The claimant 's evidence that he did not have litigation in mind at the time ACAS was approached was found by the Tribunal not to be at all credible bearing in mind the contemporaneous evidence. It may be the case contact with ACAS was made on the suggestion of the PCS as submitted by the claimant; nevertheless, the claimant would have known ACAS Early Conciliation ("ACAS EC") was necessary in order to being a claim in this jurisdiction and it is not credible he would have been oblivious of time limits in which to bring claims of unfair dismissal and disability discrimination.

18. By the 30 October 2015, less then 2-hours after the first communication via ACAS, in an email the respondent confirmed it did not wish to pursue ACAS EC in the case and this response made it more incredible that the claimant sought to ACAS EC a second time in the knowledge the respondent was not interested.

19. The Early Conciliation Certificate ("ECC") was issued on 4 November 2015 and the claimant would have known on or around this date the next step would have been to lodge the ET1 if his intention was to take the matter further. During the conciliation period, it appears ACAS were under the impression the claimant was represented; there are two references to the claimant's representative advising ACAS of HMRC procedures in respect of a priority move (29 October 2015 email) and in an email dated 4 November 2015. Today, the claimant was unable to recall whether he was represented or not, and by whom, referring to his memory as a "foggy day in London town." The Tribunal concluded relying on the contemporaneous documentation that he was represented and his response that his memory was "foggy" was less than believable. It would be surprising if ACAS, who are very experienced in such matters, were to have been confused as to whether they were dealing with the claimant in person or his legal representative.

20. The claimant attended a number of internal appeal hearings and was in a position to make representations and put forward his case, albeit with the support of the PCS union. The claimant's health did not prevent him from taking an active and cognisant part in the appeal procedure, and the Tribunal is satisfied the claimant had insight and fully understood he had been dismissed and was appealing, an Employment Tribunal claim was a possibility and there existed time limits in which to bring such a claim. There were no medical records before the Tribunal for this period, and the claimant's evidence concerning the effect of his incapacity was not credible without

supporting medical evidence, bearing in mind the active role he took in the disciplinary process and ACAS EC.

21. The appeal outcome was set out in a letter dated 6 January 2016; the claimant was reminded of the 3-month time limit from the date his employment ended. The claimant upon receipt of that letter would have been in no doubt that the limitation period expired on 29 March 2016.

22. On 30 December 2015, the claimant's employment came to an end on expiry of his notice period.

23. The medical records from 15 December 2015 reveal Seraline medical had been prescribed at the maximum dose, and it is recorded the claimant was looking for a new job. There is no evidence before the Tribunal the claimant, who was in a position to deal with his appeals and put forward a detailed statement of case, was not able to lodge an ET1 during this period, due to his depression and/or medication, and the Tribunal concludes there was no physical or mental impediment to his dealing with the case within the statutory time limit.

24. In a letter dated 21 January 2016 the claimant was requested to complete an appeal form and prepare a statement of case to the Civil Service Appeal Board, which he did as a paper exercise. The Tribunal is satisfied the claimant could have produced a claim form, he did not instead he approached ACAS a second time (just under 3 months after the first ACAS EC) on 28 March 2016, one day before the primary 3-month limitation period would have expired in the knowledge of that expiry date. The claimant chose to go down this route because he did not have sufficient funds to instruct a solicitor, and the Tribunal accepts he was confused as to Early Conciliation. He gave oral evidence to the effect the CAB or a similar organisation was unsuitable to act as his advisors on the basis that the claimant believed a "full legal service" was necessary. However, the Tribunal did not accept the claimant was unaware that he could have acted on his own account as a litigant in person, his dyslexia being no impediment when dealing with the appeals. It is apparent on the claimant's witness statement; he does not say dyslexia was the reason for the claim to have been submitted out of time. The Tribunal accepted the reasons for the delay were manifold; the claimant preferred to settle out of court, was reluctant to litigate, confused over EC and instead chose to proceed down the EC route for the second time.

25. During the month of May 2016, the claimant approached Nationwide Employment Lawyers under his wife's household insurance, by which time the primary limitation period had expired. By 12 May 2016 Nationwide were appointed, and the claimant provided ACAS with Nationwide's name as his representative. The Tribunal accepted the claimant's evidence that Nationwide were not acting form him as at 25 April 2016 but he anticipated that they would be. The 25 April 2016 email from ACAS refers to the matter having been before EC before.

26. In an email 25 April 2016, the respondent confirmed their stance had not changed and they did not wish to enter into EC.

27. The ACAS ECC is dated 25 April 2016. The claimant took no steps to lodge an ET1 pending the legal insurance position being resolved, which it was by 12 May 2016 and work was then carried out by the solicitors who, "as there was no higher authority and lack of guidance" on whether there could be two ECC on the same matter, "sought to argue that the clock should stop during the second period of early ACAS conciliation." It would have been self-evident the claimant was well out of time, and the Tribunal have formed a view that the reliance by the solicitors on the second ECC was an attempt to circumvent the strict time limits. The claimant's intention was to not proceed without the benefit of legal representation and given the expiry of the time limit the second ACAS EEC may have well been an attempt at damage limitation arising out a misunderstanding concerning Early Conciliation.

28. On the 25 May 2016, the claimant presented his claim for unfair dismissal and disability discrimination.

Law and conclusion unfair dismissal

29. Time limits in unfair dismissal cases are strict and employees who have the right to claim unfair dismissal will generally lose that right if they fail to present the claim to the Tribunal before the end of three months beginning with the effective date of termination – Section 111(2)(a) of the Employment Rights Act 1992 as amended ("ERA"). Tribunals have a discretion to extend the time limit if the claimant can show that it was not reasonably practicable to put the claim in on time and that the claim has been submitted within a reasonable time of it becoming practicable to present the complaint – Section 111(2)(b).

30. Even if the claimant was negligently advised (which the Tribunal does not accept on the face of the evidence before it), it is the Tribunal's view the claimant ought to have acted expeditiously in the circumstances and there was nothing preventing him from doing so. The Tribunal concluded the claimant decided not to proceed with his Employment Tribunal claim until he had obtained legal representation, and as a litigant in person he was confused over EC.

31. The Tribunal was referred to the principles set out in Deadman –v- British Building and Engineering Appliances Limited (1974) ICR 53. The Court of Appeal held if the solicitor is at fault for a claim being out of time, a Tribunal will usually consider that it was reasonably practicable for the claim to have been presented in time. There was no evidence before the Tribunal the claimant's legal advisors were at fault, the time limit having already expired before Nationwide were instructed.

32. On behalf of the respondent the Tribunal was referred to the Court of Appeal decision in Wall's Meat Co Ltd v Khan [1975] ICR53. On the facts of this case the ignorance or mistaken belief by the claimant and/or his advisors, was held to be unreasonable. Turning to Mr Garau, there is wealth of information on the

website concerning time limits, litigants in person and the remission fee system. The Tribunal concluded the claimant took a risk when he did not present his claim on time pending obtaining legal representation and conciliate a second time. Further, there was no satisfactory evidence before the Tribunal the claimant was ignorant of time limits or held a mistaken belief save for the confusion surrounding conciliation. It is no notable ACAS were aware the matter had been to EC before and yet a second ACAS ECC was issued. The Tribunal is satisfied the claimant could have issued proceedings within the time limit after the first ECC was issued.

33. The Tribunal was referred to Schultz v Esso Petroleum Company Limited [1999] IRLR 489. The Court of Appeal found that during the last six weeks of the three-month time limit the claimant had been too depressed to instruct solicitors and, overruling the Tribunal and the EAT, held that it was not reasonably practicable for claimant to have presented his claim in time. The Court emphasised that the test is one of practicability - what could be done - not whether it was reasonable not to do what could be done. In the Court's view, the Tribunal had failed to have regard to all the surrounding circumstances, which included the fact that claimant had been trying to avoid litigation by pursuing an appeal against his dismissal. Although it was necessary to consider what could have been done during the whole of the limitation period, attention should be focused on the closing stages rather than the earlier ones. Mr Schultz' disabling illness took place at the end of the period in question and it was not reasonably practicable for him to have made the claim in time.

34. The claimant referred to his inability to submit the application any earlier due to health reasons. The first point to note is that the claimant did not submit any medical evidence in support of this contention. The Tribunal did not consider the claimant's evidence on this point to be credible, given the fact that he had taken part and active role in the appeal processes arising from his dismissal and grievance, and in ACAS ECC process. The Tribunal does not accept that the claimant was unable to submit his claim within the time limits as a result of ill health.

35. In conclusion, the claimant's claim for unfair dismissal was brought outside the three-month time limit and it had been reasonably practicable for the claimant to have brought it within the primary time limit extended by the first ACAS Early Conciliation Certificate and for this reason the Tribunal has no jurisdiction to consider the complaint of unfair dismissal which is dismissed.

Law and conclusion: Disability discrimination

36. Turning to the disability discrimination claim the test is different to that for unfair dismissal. The Tribunal has been referred to the Habinteg Housing Association v Holleron EAT 0274/14 in which Mr Justice Langstaff, then President of the EAT, pointed out that one of the first relevant factors identified in British Coal Corporation –v- Keeble and others (1997) IRLR 336 was the reason for the delay. On the facts of the present case, Mr Garau has advanced an explanation for the delay, which meant that the Tribunal could

come to the conclusion that the extension should not be refused if it was just and equitable in all of the circumstances taking the multifactorial approach of Keeble into account. The Tribunal was also referred to the EAT judgment in Rathakrishnan v Pizza Express (Restaurants) Ltd [2016]. His Honour Judge Peter Clark doubted whether Langstaff P's decision was correct to the extent that it implied that a failure to provide a good excuse would inevitably result in an extension of time being refused. HHJ Peter Clark noted that Langstaff P had not been referred to some relevant authorities and so declined to take the same approach. Instead, starting from first principles as elucidated in Keeble he held that the exercise of the Tribunal's discretion involves a 'multi-factorial approach', and no single factor is determinative. HHJ Peter Clark could not accept that a failure to provide a good excuse for a delay in bringing a claim would inevitably result in an extension of time being refused. He therefore rejected the appellant's submission that, where an unsatisfactory explanation is given for the delay, it can never be just and equitable to extend time.

37. The Tribunal rejected the claimant's reasons for the delay for the reasons set out above to excuse the late presentation of his unfair dismissal complaint. With reference to the late presentation of a discrimination complaint, providing a reason has been given, it is then required to consider the balance of prejudice and potential merits. There is no dispute the case has potential merits. There is no dispute the respondent can defend the claim and in this regard, have not been prejudiced. The case was "sustainable" and both parties are ready for trial. The issue of prejudice and balance can be reduced to the following proposition– the respondent no longer being required to defend the claimant if a 5-day liability hearing as opposed to the claimant no longer able to bring his claims and have them heard.

38. It is accepted by the claimant that his complaint for disability discrimination was presented after the end of the period of three months beginning when the act complained of was done and he is out of time. The claimant invites the Tribunal to consider extending the time limit to the 3rd July 2012 repeating the arguments he raised in respect of the unfair dismissal above, all of which have been dealt with above and need not be repeated. For the avoidance of doubt, the Tribunal has taken into account all of the claimant's arguments.

39. The Tribunal has a wide discretion to consider whether it is just and equitable to extend time in discrimination cases, we can take a wide range of factors into account all of which have been dealt with above in respect of the claimant's unfair dismissal complaints. In Counsel's closing submissions, it was referred to the EAT decision in Keeble above, a case involving claimants bringing sex discrimination claims in respect of voluntary redundancy payments, which were a year out of time. The EAT suggested Tribunals would be assisted if they considered the factors listed in Section 33 of the Limitation Act 1980. This Tribunal has done so, taking into account the prejudice which each party would suffer as a result of the decision reached, and recognise Mr Garau would be prejudiced if he was unable to take the claim forward. The Tribunal considered the matter carefully, particularly Mr Northam's argument that the prejudice is equal and opposite and cancelled each other out, which at first blush was compelling. However, if one looks at

the true balance between the parties that statement is not accurate, and the prejudice swings more in favour of the claimant than the respondent despite the dim view taken by the Tribunal of the claimant's explanations for the delay. Reference has been made repeatedly on behalf of the claimant to his successful EAT appeal, his argument is essentially if an Employment Judge was wrong, the claimant getting it wrong more understandable in the context of a litigant in person. The claimant was aware very early on in the process of time limit, it expired and he took a chance in issuing the second ECC as an attempt at circumventing the jurisdiction problem he faced with the knowledge of ACAS that this was the second ECC.

40. In arriving at its decision to grant an extension of time in the claimant's favour, the Tribunal has taken into account the length of and reason for the delay as described by the claimant and rejected for the reasons set out above, which includes the claimant's less than credible explanations. It also took into account the extent to which the respondent co-operated with requests for information in that ACAS wrote to the respondent very early on within the limitation period and the respondent provided information within a reasonable period. After the respondent provided this information there was no further requests by the claimant.

41. The Tribunal concluded on the evidence before it the claimant did not act promptly when he knew of the facts giving rise to the cause of action. Nevertheless, when balancing all of these matters, one against the other, given the confusion surrounding the ECC, the fact the cogency of the evidence is likely to be unaffected by the delay, this is the first day of the trial for which both parties have prepared and given the balance of prejudice which swings to the claimant's favour against the principle that there should be finality and legal certainty within litigation, it is just and equitable to allow the claimant's claim of disability discrimination to proceed out of time by extending the time limit. This matter was very finely balanced and had it not been the unusual circumstances surrounding the two early conciliation certificates the outcome may have been different.

42. In conclusion, having applied the two different formulae relating to time limits in unfair dismissal claims and time limits in an unlawful discrimination complaint to the same facts, the Tribunal is satisfied that it was reasonably practicable for the claimant to have presented his complaint of unfair dismissal before the end of the relevant time limit and it was just and equitable to extend the time limit in respect of the complaints of unlawful disability discrimination to 25 May 2016. The Tribunal does not have the jurisdiction to consider the complaint of unfair dismissal and the complaint is dismissed accordingly. It does have the jurisdiction to consider the unlawful disability discrimination which it will then proceed to hear at the liability hearing to immediately follow.

The liability hearing dealing with the disability discrimination complaints.

Evidence

43. The Tribunal heard evidence from the claimant on his own behalf, and on behalf of the respondent it heard from Valerie Nelson, higher officer and the claimant's line manager, Renu Mair, senior officer and the dismissal "decision maker", Zoe Parsons, grade 7 operational lead in the Business Tax Directorate and appeal manager, Susan Smith, senior officer, Paul Kelley, grievance appeal manager, and Andrea Williams-McKenzie, HR director.

44. On issues of credibility the Tribunal preferred the evidence given by the witnesses appearing on behalf of the respondent in the main when it came to conflicts in the evidence, to that given by the claimant who was not always believable. For example, the claimant asserts in his grounds of complaint and evidence that he "continually" requested a move from Manchester per se, as opposed to Ralli Quays in Manchester and his claims were predicated on this. The Tribunal found this was not the case, preferring the evidence given on behalf of the respondent supported by contemporaneous documentation unlike the claimant's evidence, which was not.

Agreed issues

45. The parties agreed the following issues at the outset:

Failure to make reasonable adjustments

1. Did the respondent apply the following PCP's (the claimant having withdrawn the PCP relating to the Policy on "Special Transfer" save in relation to indirect discrimination below):

(a) The practice of requiring the claimant only to carry out his role at Ralli Quays in Manchester?

(b) The practice of refusing to consider permitting employees to work from different locations (or remotely)?

2. Did any of the PCPs place the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled?

3. Did the respondent know, or ought it reasonably to have known, of the claimant's disadvantage?

4. Was it reasonable for the respondent to permit the claimant to work away from Manchester remotely or in another office, such as Liverpool, in order to avoid that disadvantage?

Indirect discrimination

5. Did the respondent apply the following PCPs:

(a) The policy on special transfers, or

(b) A policy of dismissing employees on long term sick absence?

6. Did the respondent, or would the respondent, apply either PCP to persons who were not disabled?

7. Did the application of the PCP put disabled persons at a particular disadvantage when compared with persons who were not disabled, or would it put them at that disadvantage?

8. Was the claimant put at that particular disadvantage?

9. If so, can the respondent show it to be a proportionate means of achieving a legitimate aim?

Discrimination arising from disability.

10. Was the claimant treated unfavourably by:

(a) Being dismissed, or

(b) Being awarded 0% compensation following dismissal?

11. Was such treatment because of something arising in consequence of the claimant's disability? (The claimant asserts that the "something arising" was his long-term absence).

12. If so, can the respondent show that such treatment was a proportionate means of achieving a legitimate aim?

Victimisation

13. Did the claimant's grievance dated 6 March 2015 amount to a "protected act"?

14. Did the respondent treat the claimant detrimentally by deciding to award him no compensation following termination?

15. If so, was such treatment because the claimant had done a protected act?

46. The Tribunal took into account the agreed bundle consisting of 3 leaver arch files and one witness bundle, written submissions and oral closing submissions, which the Tribunal does not intend to repeat and has attempted to incorporate a number within this Judgment with Reasons, together with

case law to which it was referred, the following findings of fact have been made:

Facts relating to liability hearing dealing with the disability discrimination complaints.

47. The respondent is one of the main employers in the North West and responsible for running the National Duty Repayment Centre ("NDRC") based in the National Clearance Hub ("NCH") in Salford, the UK's central office that deals with pre and post-clearance functions of imports and exports selected for document checks. The National Import Duty Adjustment Centre ("NIDAC") is responsible for the issue of refunds for duty payments on deposits. The claimant worked as an assistant officer in NIDAC. Valarie Nelson, a higher officer, was the claimant's line manager's manager. Anneka Wilson, the line manager, managed the claimant including the period of his long-term sickness through to her recommendation for dismissal.

48. The respondent relies upon a number of policies issued to employees, including the claimant, when it comes to managing capability and keeping sickness absence to a minimum. The Tribunal does not intend to repeat the entire content of those policies and has picked out a limited number of relevant sections as follows:

Policies
Managing Attendance Procedure

49. The process set out includes a flow chart and guidance whereupon various steps are followed from step 1 to 15. Step 13 provides if a return to work within a reasonable timescale is unlikely step 14 provides ill-health retirement should be considered, and if refused step 5 provides for dismissal. Step 3 provides a stage 1 formal warning, step 4 a stage 2 formal warning. Throughout the capability process the manager is required to keep in touch with the absent employee.

Continuous Absence Policy

I. The aim of this Policy is to support people back to work as soon as they are well enough, but within a realistic time frame or consider other options that include ill-health retirement and "where a return to work within a reasonable timescale appears unlikely deciding how long the absence can continue to be supported, taking account the individual circumstances…" The procedure is used to minimise absenteeism and maintain delivery of public services. The Tribunal accepted the evidence of Renu Mair that her function as decision maker in the claimant's case was to consider under the policies and procedures the claimant's circumstances, whether there was any prospect of him returning to work in a reasonable time frame, whether management had done everything it could to support the claimant's return to work including considering adjustments and finally, and whether the business could continue to support the long-term sickness absence.

II. When an absence reaches 1 month a manager is to "consider" whether to invite the jobholder to a formal meeting and at that meeting advise them "if they are unlikely to return to work within a reasonable time period you will consider the options, which may include brining their employment with HMRC to an end…"

III. When an absence reaches 3 months a senior manager will consider whether "everything has been done to support the jobholder to return to work help to identify any further options which could be explored…"

IV. If the job holder will not return to work in a reasonable time scale dismissal is an option. There is no written definition of a "reasonable time scale" but the Tribunal accepted the evidence of Valarie Nelson that the respondent did not expect an employee to be absent for more than 12 months due to the adverse impact on the business and workload of colleagues. Where ill health retirement is not possible, the case should be referred to a decision maker to decide whether or not dismissal is appropriate.

Keeping in touch – generic guidance

V. Under this guidance managers and job holders are required to keep in touch throughout the sickness absence as a "two-way process." It is not an option for employees to choose whether or not to keep in touch with managers, and the claimant was expected to keep in contact once a week and attend meetings to discuss his absence and adjustments to get him back to work.

Redeployment and Relocation Policy

VI. This Policy deals with redeployment and relocation due to "departmental reinvestment, reductions in work, office closures and changes in organisational design." Its purpose is "to seek redeployment for people whose current job has ended and who have no alternative job opportunities within their line of business." It is not available for employees seeking a transfer as a reasonable adjustment and such employees do not fall into the pool for priority status or managed moves under this Policy. Employees seeking adjustments to qualify for entry into the redeployment pool must meet 3 conditions; their role has disappeared or numbers cut, the respondent is withdrawing from the current location or their line of business is withdrawing from their current location.

Filling Vacancies: Special Transfer Policy

VII. Special transfer arrangements are available to employees who meet one of two strict criteria, namely, he or she is "a victim of domestic violence, or at significant risk of violence outside the workplace and working hours as a result of their official duties." An employee seeking a transfer as a reasonable adjustment can apply for a special transfer providing one of these two conditions are met.

Disability – Reasonable Adjustment Policy

VIII. This is the relevant Policy for disabled employees seeking a transfer as a reasonable adjustment, and it clearly sets out the respondent's legal duty under the Equality Act 2010, giving examples of reasonable adjustments including "working from home – if the job duties allow, subject to business needs and consultation with the Data Guardian to ensure that security issues are considered."

IX. The Policy provides for "Priority Movers." The respondent's first consideration is "**always** [my emphasis] to retain the jobholder in their current role, therefore reasonable adjustments must be considered to achieve this…Only in exceptional circumstances where, all reasonable adjustments and options have been explored within the current directorate and there are no reasonable adjustments which would enable the individual to continue in their existing role within their Directorate, an application for priority mover status can be made…a move can only be facilitated where there is an actual vacancy. There is no legal obligation for HMRC to create a post for someone who cannot undertake their current role or be deployed after reasonable adjustments have been considered…It may be a reasonable adjustment to reallocate duties or transfer the jobholder to an existing vacancy."

X. The Policy provides a number of possible options for reasonable adjustments within an employee's current role including "changing working hours or pattern…moving the jobholder's work area within the location…moving the jobholder to an alternative location but allowing them to continue in the same role…"

XI. If a Priority Moves process is unsuccessful ill-health retirement or dismissal will be considered. In order to apply for a Priority Move the manager must complete the "Reasonable Adjustments Moves form" and send it to the HR director or a nominated person and "in doing this the manager is confirming that all options have been explored and the jobholder cannot be accommodated within their directorate. The manager is seeking agreement for the job holder to be classed as a departmental priority mover giving them priority status (limited to 6 months) for any suitable vacancies in HMRC."

XII. If there is insufficient evidence the reasonable adjustment support team known as RAST will request additional information.

XIII. During the process managers and jobholders "must actively explore any suitable job opportunities." The requirement to explore suitable job opportunities was a requirement for priority movers and it cannot be the clamant was disadvantaged by this condition that applied to all disabled employees under the Reasonable Adjustment Policy. There no evidence, including medical opinion, before the Tribunal to the effect that the claimant was incapable of actively exploring suitable vacancy. The claimant, over a period of time, chose to explore unsuitable vacancies against management advice, and chose not to explore suitable vacancies at his applicable grade. The Tribunal found there was nothing to prevent the claimant complying with

the respondent's procedure, and the criticism of him during the attendance management process was merited, and the decision not to award compensation causally linked to claimant's disregard for the respondent's procedural requirements.

Dismissal for Poor Attendance – Guidance for Decision Makers

XIV. The Guidance refers to the Equality Act 2010 that must be followed. When making a decision the decision maker is required to "take account of the manager's recommendations and reasons. The manager will have used their judgment and discretion when making the recommendation… [and] seek advice from CSHR Casework to ensure consistency of approach (though you must look at the individual circumstances of each case.)"

The claimant's employment

50. On 24 March 1997, the claimant commenced employment as an administrative assistant. Originally, he worked at Customs House based in Manchester, Salford as assistant officer ("AO"). Along with colleagues, he transferred as an assistant officer to the Ralli Quays office, Manchester, in November 2013. The claimant was unhappy with the transfer, which he claimed, added significant travel time and cost to his daily commute. His dissatisfaction continued despite being awarded a daily travel allowance for a 5-year period, due to the increase in travel cost as he had previously taken his wife to her workplace and had sought payment for additional mileage when taking his wife to work, which was refused. The claimant's negative attitude towards the transfer and quest to be moved continued throughout the remainder of his employment, this is turn coloured his managers' understanding of the events which transpired when he requested a transfer from Ralli Quays and how they dealt with his applications to be transferred as "Priority Mover" under the Reasonable Adjustments Policy.

51. The claimant did not formally appeal the relocation to Ralli Quays, despite indicating to the respondent later on during his absence, that he had done so. For a period of approximately 7 months he worked in a small team; he took calls from the public, produced paperwork and operated a particular IT application that dealt with his area of work known as CHIEF. The CHIEF program had been installed on the desktop computers based at Ralli Quays following the department's migration from Dover and Custom House in Manchester. The CHIEF programme could not be installed on a laptop due to security issues and it was not available in Liverpool, Bootle or Warrington. The claimant dealt with sensitive company information and the Tribunal accepted there existed security consideration which prevented remote working even had the CHIEF programme capable of being installed, which it was not.

52. In or around 2014 the respondent received an anonymous email complaining of communications between the claimant and a colleague that went no further, but upset the claimant.

The claimant's first written complaint

53. The first written compliant from the claimant was by an email sent 18 June 2014 when he expressed "concerns" about a new manager, Anneka Wilson, who had been in post a mere 2-days. Valerie Nelson explained Anneka Wilson should be given a chance to settle and had not had a hand-over, to which the claimant responded by suggesting she had no knowledge of customs, was overawed and would better suited to gaining experience in another team. This was indicative of the claimant's attitude towards his work colleagues, who he criticised, and so the Tribunal found.

54. On 23 June 2014, the claimant sent an email in which he described himself as follows; "I'm at breaking point mentally and physically" due to problems with his colleagues, the amount of work and "I'm struggling with getting into the office since the move…I was told I have no choice this causes stress, due to a 4-hour plus travel time everyday." The claimant concluded "I do not want to have a relapse of the breakdown I suffered a few years ago, I recognise the indicators and I am very close to a melt down."

55. The claimant was absent on sick leave from 23 June 2014 to his dismissal on the grounds of capability on 30 December 2015 on the expiry of 13-weeks' notice, a period of some 18 months. In a nutshell, the claimant's complaint was travel time, relationship issues at work and workload.

56. On the same day, 23 June 2014, the claimant applied for Band O position at Trinity House in Manchester, a temporary promotion. There was no suggestion the claimant's mental impairment included an inability to approach Manchester city, and the respondent was entitled to reach an understanding that this was not the claimant's complaint.

The first fit note 30 June 2014

57. The claimant was certified 2-weeks absence for "stress at work" and no adjustments were suggested. There was no information before the respondent to put it on notice the claimant could be disabled, and the Tribunal found the respondent was not under a duty to make reasonable adjustments at this date.

58. The claimant felt anxious when management attempted to telephoned him at home, if no message was left and the call number withheld. Agreement was reached with Anneka Wilson that she would ring and they would speak every Monday at 4pm. Throughout the relevant period Anneka Wilson managed the claimant's sickness absence she was supported and advised by Valarie Nelson, her experienced line manager who recognised Anneka Wilson's lack of experience in such matters.

The second fit not – 14 July 2014

59. The claimant was certified for an absence of 3 weeks for "stress at work." No adjustments were suggested and there was nothing to put the respondent on notice that the claimant was disabled.

60. On the 15 July 2014 Anneka Wilson recorded a telephone contact she had with the claimant who indicated he was suffering from depression "because he is unable to cope [with] perceived stress related issues at work…and he would prefer not to keep contact with work on a regular basis." The claimant was informed a new person with customs experience was joining his team in Reilly Quays. He was provided with sickness absence guidance. The claimant stated his doctor had asked if there was to be an occupational health referral.

61. On the 21 July Anneka Wilson recorded telephone contact with the claimant who confirmed he was waiting consultation with his counsellor. He was informed the department had a new team member and was getting on top of the workload. Following a 5-week absence Anneka Wilson wrote to the claimant on 28 July 2014 requesting a meeting on 4 August to discuss his health and return to work.

62. In a telephone conversation to Anneka Wilson on 29 July 2014 the claimant stated he had moved house further away from work and, "keeping in touch with management was more of a hindrance and not doing his condition any justice" suggesting the respondent agree a keeping in touch nominee and confirming he had "not been anywhere near Manchester in 6 weeks as this brings on panic." The claimant further discussed the problem with workload and the team. Given the background to this matter it was assumed the claimant's references to Manchester was to his office in Reilly Quays, the respondent proceeded on this basis and at no stage did the claimant state he had a phobia with entering into Manchester city centre.

4 August 2014 – third fit note for depression.

63. The claimant was certified for a further 4-weeks absence citing "depression" and no adjustments were suggested.

64. In a letter dated 7 August 2014 the claimant responded to the invite letter of 28 July 2014 confirming he was "now on medication for depression," complained about the "numerous phone calls" and his disappointment at the way Anneka Wilson was handling "the situation thus far." The claimant was very critical of Anneka Wilson, and did not hold back, suggesting she should go the "extra mile" because he was suffering from stress and depression. The claimant refused to attend any meeting giving the reasons to be a house move on the 8th August, trade union representative unavailability and his medical condition.

65. An occupational health referral took place on 12 August 2014 submitted by Anneka Wilson, a copy of which was provided to the claimant who did not dispute its contents. The referral confirmed the claimant he has "struggled to

get into the office after the office move" to Ralli Quays. He did not appeal the decision maker's decision that he move. He was offered the option to adjust his start times…he is "currently not fit receive visitors or face questions due to his illness…" The claimant was aware the respondent could be flexible with start and finishing times and this knowledge became relevant later on in the process when he refused to apply for vacancies in the call centre partly on the basis of start and finishing times.

First occupational health report- 15 August 2014

66. The claimant was provided with a copy of this report and did not dispute its contents.

67. The Occupational Health Advisor confirmed the claimant was unfit for work in any capacity and there were no adjustments that could be recommended "that would have an impact on an imminent return to work." The respondent was advised the claimant was unlikely to be disabled. The claimant complained to occupational health about telephone contact with management, occupational health advice was not that telephone contact should be stopped. The claimant would leave a voice mail message on his phone in order that the respondent could be sure they had correct number before leaving him a message. There was no suggestion the claimant was too unwell to attend any meetings. At the meeting with occupational health advisor the claimant majored on his transport difficulties including dropping off his wife at work. There was no reference to any problems with driving to Manchester per se or any phobia in this regard. By the date of this report the claimant had been absent some 7 weeks and the contemporaneous evidence reflect the claimant was not keeping in touch in accordance with policy and this was to adversely affect the later decision to award him zero compensation for a no-fault dismissal.

68. The occupational health advisor, as borne out by the case record, was informed by the claimant the cause of the claimant's medical condition was a "variety of issues…moved offices: put an 8-page document complaining about it. Lots of issues Re travel 2 hours 10 to get to work and gets mithered at work…"

69. The Tribunal found as at 15 August 2014 the respondent was not required to make reasonable adjustments and was not in breach of its duty in this regard as born out by the occupational health advice and GP fit notes. Notwithstanding the fact the respondent was not put on notice that the claimant was disabled, the Tribunal accepted Valerie Nelson's evidence adjustments had been suggested to get the claimant back into work including offering him a phased return, reduced targets, and informing staff refresher training that had taken place and an additional team members had joined his team in NIDAC. By the time of the first occupational health report the claimant had been absent 7 weeks and Valerie Nelson in discussion with Anneka Wilson, was concerned that a one month formal meeting or a face-to-face meeting in accordance with the respondent's procedure had not taken place. She was aware if the claimant remained absent a 2-months absence case conference would need to be convened.

70. In a letter dated 21 August 2014 from Anneka Wilson, following her meeting with Valeria Nelson, the claimant was informed that; "I will have to have a face-to face-meeting with you to discuss the reasons for your work related stress…As your absence is now in the second month stage I have to inform you a case conference will be held…the aim of the case conference is to decide whether the business can support your absence…therefore it is imperative I meet with you face-to-face to discuss your reasons for the work related stress…during the meeting I will complete a Fit for Work Plan to record or monitor measures that need to be put in place to facilitate your return…"

71. The claimant responded in a detailed 5-page letter dated 23 August 2014 refusing to attend the meeting without notice of 2 weeks, complaining of short notice and setting out "current problems" preventing him for working as follows; **"the primary problem has been the office move** [my emphasis]. It has taken me in excess of 2-hours to get to work and the same returning home. I made my case to the manager at the time…the reality since the move…is such that it has taken longer than my findings showed. This has impacted heavily on my working hours. I was only a couple of hours down on my flexi at the move date, but have been losing out to the point that by June 2014 I am now at the maximum flaxi deficit with no way of reducing this."

72. The claimant further explained he had been car sharing with his wife, and now that he had moved house he was 10.5 miles further away, his doctor had "recommended that I do not work in Manchester to alleviate the stress and depression I am suffering from this decision" which was a reference to the relocation to Reilly Quays…" He added "it is a failure to make reasonable adjustment by refusing a change of location, and upsets my home life work balance." The claimant also alleged he had been "discriminated against" over a grievance dispute concerning his contract and criticised the "current team", particularly 3 members of the team on NIDAC" citing their capability issues- "I have no problems with these individuals personally but they make it impossible to work." In summary, the claimant concluded; "All of these contributing factors have caused me serious and mental health issues" and sought the following resolution: "change my location to an office closer to home under compassionate transfer rules. Remove the 3 individuals from NIDAC…there is nothing I can suggest other than moving my location to one closer to home to remedy the discrimination…I feel it is spread at every level of management throughout the NCH no matter where I go in the NCH this will continue to follow me."

73. It is notable in the claimant's letter dated 23 August 2014 the claimant set out the main reasons he could not return to work and why he was looking to move closer to home and no reference was made to a phobia with driving into Manchester city.

74. The claimant's letter was forwarded to Valarie Nelson who responded in a 4-page letter dated 28 August 2014 confirming under the respondent's guidance 3 days notice for meetings was all that was required. A meeting was arranged

for 8 September 2014 with a view to giving the claimant the notice he required. Valerie Nelson considered the claimant's allegations in the light of his previous line manager's decision to award him 5 years' daily travel allowance following the move, and the fact that he had not appealed. Valerie Nelson wrote; "…unfortunately your decision to move house further away from your place of work remains that – your decision and is a domestic issue not one for HMRC."

75. Valerie Nelson refused the claimant's application to transfer under compassionate transfer rules on the basis that he did not qualify. It is clear to the Tribunal the claimant did not meet the criteria as he was not a victim of, or at a significant risk of, violence. She advised the claimant's only option was to apply for a sideway move should a job vacancy occur reminding him "…it is a requirement that all applications are discussed" with his line manager prior to submission of the application, advice ignored by the claimant who continued to make applications for vacancies he was not qualified to take up throughout his absence. It is the Tribunal's view on the balance of probabilities the respondent was not in breach of its duty to make reasonable adjustments by the refusal to transfer the claimant as requested given the fact the claimant was not well enough to return to work whatever adjustments were set in place.

76. With reference to the claimant's complaints concerning his team Valerie Nelson advised "performance of other team members is an issue for the manager of the team...you were not to worry about this. Your new line manager has introduced daily rotas on the team to share responsibilities across all the staff within NIDAC…you have requested the removal of 3 individuals from the NIDAC team and this is an issue for management…" the claimant was urged to meet with his manager face-to-face.

77. The claimant responded in a 3-page letter dated 4 September 2014 indicating his medication had been increased by the GP who had agreed to the claimant holidaying abroad. The claimant raised a number of complaints and clarified the move to the NIDAC team was in accordance to the "Court of Appeal legislation" a failure, duty of mutual trust/confidence, breach of duty of care and negligence…" The claimant concluded "I am suffering a mental illness (depression)… [it] affords me legislative rights…change of location" alleging pressure and behaviour by management "can be construed as constructive dismissal." The Tribunal infer from the contents of the 4 September 2014 letter the claimant was aware at this early stage of his employment rights and it would have been a straightforward matter for him to have gained knowledge concerning the three-month statutory time limit for bringing a discrimination complaint and unfair dismissal should he have accepted the alleged breach and resigned.

78. As a result of the claimant's letter the 8 September meeting was cancelled, which was the claimant's intention, and the claimant was referred again to occupational health. By this stage the claimant had been absent just under 3-months and under the respondent's absence procedure a meeting to discuss the position should have taken place, the medical advice being constructive

discussions needed to take place, and as a matter of logic, such discussions would require face-to-face communication.

Second occupational health report – 15 September 2014

79. The occupational health assessment on 12 September 2014 was set out in 5-page document which recorded the claimant had been off since June 2014 with depression, and he had depression "some years ago." Under "Current adjustments" it was noted the claimant "has asked to consider moving closer to home…has been trying for a lot of jobs nearer home…unfit to RTW [return to work] at present due to numerous work related matters, unable to advise on likely RTW date. Needs constructive discussion with management and HR to impartially address work related issues…would benefit from redeployment to an office nearer home to facilitate an earlier RTW and to address any unresolved work related issues. In the long-term will also need to look at redeploying him nearer home due to the stress of commute."

80. The report recorded the claimant reporting "he gets panic attacks when thinking about work or Manchester where he works[s]…stated had an agreement for work to contact him…has had contact through ACAS and legal advice." The Tribunal conclude from the contents of this report the claimant was in receipt of legal advice and advice from ACAS and he would have been made aware of the statutory time limits.

81. The occupational health advice was the claimant was not disabled, he was unlikely to return to work and "remains unfit to return to work at present due to the severity of his mental health impairment…management should consider a temporary redeployment nearer to an office closer to his home to improve his chance of an early return to work. As he has problems with his commute to his normal place of work it will be advisable that management reconsiders his normal work location as part of the constructive discussion as this is always likely to be an issue that may cause or aggravate his anxieties." An individual stress assessment was suggested. The Tribunal conclude as at this date any adjustment was limited to minimising the claimant's commute, and it is apparent from calculations conducted by the respondent, there was very little difference between the claimant's commute from home to and from Manchester, Liverpool and Bootle, the alternatives put forward by the claimant during this liability hearing. Accordingly, it found the adjustment sought by the claimant during this period was not a reasonable one as it would not have reduced the claimant's travel and would not have facilitated his return to work.

82. Under the heading "Outlook" occupational health confirmed the claimant did not appear to have an underlying mental health condition advising his "current severe mental health impairment is reactive to his perceived work related circumstances…he can be expected to make a good recovery from his anxiety and depression…dependent on his perceived work related issues to be addressed to a satisfactory resolution. Hence treatment such as anti depressant and counselling will have limited effect." A home visit was advised, the initial meeting aimed at building bridges and "not to address any stressful issues or asking about return to work." The respondent was entitled to take

the opinion of occupational health into account despite the claimant at a later date arguing it should wait until medication and counselling had been given time to take effect; according to occupational health it would have a minimal effect only.

83. The 15 September 2014 occupational health report confirmed the claimant continued to be unwell with depression, he remained unfit to return to work and a likely return to work date could not be given. It was suggested a meeting took place with the claimant, and management "consider" the option of temporary redeployment to an office closer to the claimant's home. Occupational health advised with the usual caveats the claimant was not disabled by the anxiety and depression condition, advice the respondent was entitled to accept.

84. Following the occupational health report attempts were made by Anneka Wilson to arrange a meeting with the claimant. The 16 September 2014 meeting was postponed by him due to his colleague being ill. The claimant's view of the proposed meeting was expressed in a letter dated 15 September 2014 to Anneka Wilson as follows; "In my opinion I find your reasoning for a meeting is futile. I have expressed on several occasions via email…and letters the causes for my absence. Discussing these face- to-face will not give you any further insight…I have yet to receive a satisfactory response to my proposed resolution." Anneka Wilson was unhappy with the claimant's response as occupational health had made it clear such a meeting should take place in order the progress and resolve the claimant's health situation. The claimant's negative attitude towards taking part in meetings despite the advice of occupational health, was taken into account when compensation for no fault dismissal was assessed through to appeal.

<u>29 September 2014 fit note</u>

85. The claimant submitted a fit note for 4 weeks citing depression confirming he was not fit for work. No adjustments were advised.

<u>3 months' case conference</u>

86. Under the respondent's Managing Continuous Absence procedure once a absence reached 3 months the case should be referred to a senior manager and a conference took place on 1 October 2014 with Anneka Wilson in the capacity of the claimant's line manager, Valerie Nelson as her manager, Lorraine McEwan, the NCH attendance champion and Andrew Bryant, head of business area, to discuss the claimant's absence, the problems arranging a meeting with him, and the adjustments that had been suggested by occupational health. It was agreed the claimant should be given a choice of 3 different dates for a meeting and on 9 October 2014 Anneka Wilson accordingly sent the claimant a letter giving the claimant an option of 3 dates including 22 October 2014.

<u>22 October 2014 meeting</u>

87. Anneka Wilson attended the meeting with a note taker. The claimant was accompanied by his trade union representative. His health was discussed and the changes made to the NIDAC team. He was informed since his absence all staff "now pulling their weight," there had been a decrease in the work and change in ethos. Anneka Wilson asked the claimant what she could do to help him return to work. The response was there should be no questions concerning this and it was agreed questions regarding the claimant returning to work should be left to another date, the claimant believed the meeting had gone "better than he thought it would." The claimant confirmed he had been unable to answer some of Anneka Wilson's calls to him at the agreed time. It was left that communication by the respondent would be to the claimant's mobile at 4.30pm Mondays and a further meeting would take place for the claimant to complete a Fit for Work plan and discuss reasonable adjustments.

<u>27 October 2014 fit note</u>

88. A fit note issued on 27 October 2014 signing the claimant off for a further 28 days with depression. No adjustments were suggested.

89. On 27 October 2014 Anneka Wilson spoke with the claimant and provided him with 3 dates in which they could discuss work related issues. In an email sent 29 October 2014 the claimant indicated "I do not feel I can discuss face-to-face the work situation…I feel possibly at the end of November I may have made suitable progress."

90. The claimant also submitted an accident report form completed that read as follows: "Signed off 30/06/2014. Prev week I made senior management aware the extreme travel 2.5 hours and then the incompetent co-workers…subsequently diagnosed with depression by my GP." Anneka Wilson completed section 15 setting out the changes that had been made to the claimant's department including the work reduction and in section 22 confirmed the service level agreement was "regularly met" setting out the training the claimant's team had received.

91. The claimant was not claiming he was so ill he was unable to travel into Manchester city per se and so the Tribunal finds.

92. The claimant subsequently "missed" Anneka Wilson's attempt to contact him on the agreed day and time, and emailed her indicating it would not be convenient to speak that week, and would speak to her the following Monday. The reasons he gave for lack of communication was counselling, opticians and dental. The claimant did not suggest any other times or date for the communication to take place. Anneka Wilson's view that the claimant was avoiding communications and meetings were reasonable. The medical evidence was clear; the claimant was well enough to comply with the "in touch" agreement and attend meetings; he continually failed to do so despite occupational health advice and an absence of approximately 4 months.

93. The claimant was informed of the changes to his team in a telephone conversation with Anneka Wilson on 17 November 2014.

26 November 2014 one-to-one formal meeting

94. The claimant was accompanied by his trade union representative at the meeting attended by Anneka Wilson and a notetaker. The notes were not disputed by the claimant as being an accurate record of the discussion. This meeting took place after a continuous absence since 23 Jun 2014, a period of approximately 5 months when it should have taken place after a 1-month absence delayed as a result of the claimant refusing to attend any meeting to discuss his absence and return to work.

95. The claimant indicated at this meeting he had applied for "quite a few jobs" had been unsuccessful and wanted to go into the re-deployment pool. Anneka Wilson confirmed the keeping in touch had "gone really well…they had stuck to the agreement." The claimant confirmed the main reason for his was travel "he would be undertaking a lengthy journey in to be mithered by incompetent people." A discussion took place concerning the changes made by the respondent to address his criticisms of the team. A phased return to work was offered and suggested the claimant could look at applying for a level transfer, working on his competencies. A stress reduction plan was completed. It was apparent to Anneka Wilson the claimant had difficulties being in Manchester and she took this to be Reilly Quays where he worked. The claimant confirmed he was not ready to return to work and a phased return was not possible. In the sickness absence fit for work form the claimant requested a move to Wigan, an occupational health referral, being placed into the redeployment pool, and made reference to the Equality Act and Tribunal. The move to Wigan was not a reasonable adjustment sought by the claimant as conceded during these proceedings in recognition of the fact the office was due to close.

96. The Tribunal finds, on the balance of probabilities, the respondent was entitled to interpret the claimant's references to Manchester, Manchester campus and Manchester office to be the claimant's workplace in Manchester and not a phobia of travelling into Manchester centre as now submitted by the claimant. From the evidence before it as set out above the respondent was entitled to conclude the "main reason" for the claimant's stress was the commute, an entirely different matter to a Manchester phobia now relied upon. The description "phobia" was never used by the claimant until these proceedings and there was no reference to such in any medical evidence including occupational health notes of discussions and reports.

97. On 28 November 2014, the claimant was referred to occupational health referral.

1 December 2014 Fit Note.

98. The claimant was signed off with depression. No adjustments were suggested.

99. In a letter dated1 December 2014 the claimant was asked to explain how he qualified for special transfer status given the 2 criteria are; "The victim of domestic violence, or at significant risk of violence outside the workplace and working hours as a result of their official duties." It was suggested he apply for an AO caseworker job in Liverpool, and was informed he could not go into the re-deployment pool.

Third occupational health report – 4 December 2014

100. The claimant informed occupational health on 4 December 2014 "his journey time to work due to a change of location, frequent changes to management and less experienced staff within the team, are all impacting upon his condition."

101. The resulting medical report dated 4 December 2014 reflect the claimant's view. The Tribunal accepted submissions made on behalf of the respondent that the report cannot be read in a vacuum but in conjunction with the other reports and information the claimant gave to the respondent concerning his health. All of that evidence points to the fact the claimant was complaining to occupational health and the respondent of the journey time to work, (a reoccurring theme since the move to Ralli Quays) and frequent changes of management and less experienced staff within the team impacting on his condition. The respondent was entitled to interpret the report as journey time i.e. length and time of journey since the move, being the issue, changes to management which it had addressed, and also the question of less experienced staff, which it had also addressed. The claimant had not taken up the offer for a phased return to establish whether the changes had in fact addressed his issues. Occupational health did not suggest, implicitly or explicitly, phobias were experienced by the claimant when travelling to Manchester. The Tribunal is of the view had the claimant suffered from such phobias, as he now alleges, this would have been made more explicit in the medical reports and referred to in GP records. The contents of the occupational health report were never disputed by the claimant.

102. Under the heading "Capability for Work" occupational health confirmed the claimant's absence was "primarily associated with non-medical issues and the causes of continuing absence [were] predominantly related to his current unresolved work issues." In the opinion of occupational health, the claimant would remain unfit for work until the "perceived issues" were resolved and the outcome "will depend upon negotiation and conciliation and a mutually agreed resolution. There are no further medical interventions that would be likely to achieve a return to work." Occupational health was of the view, for the first time, the claimant's mental health impairment was likely to be considered a disability with the usual caveats. It was reasonable for the respondent to take occupational health's view on the claimant's medical condition and status into account when it came to consider what adjustments were reasonable.

103. In answer to the question would the claimant be able to return to his current work location occupational health confirmed "Mr Serra has indicated that he would find it very difficult to return to his current work location. This

could potentially further aggravate his symptoms and mental health condition in the future."

104. In an email sent 11 December 2014 email to Anneka Wilson the claimant addressed Anneka Wilson's letter of 1 December 2014 confirming he did not fit the "limited profile" arguing the profile should be expanded on the grounds that he was disabled under the EqA and a return to Ralli Quays or Manchester would be "detrimental to my illness and future health." By 11 December 2011 the claimant had accepted he did not qualify under the respondent's Special Transfer Policy and so the Tribunal also found.

105. Anneka Wilson and Valerie Nelson were correct in their view the claimant did not qualify for a transfer under the special transfer guidance or into a redeployment pool as he had a permanent post. In an email sent on 19 December 2014 Valerie Nelson confirmed; "he qualifies under the Equality Act for reasonable adjustments and as such we need to consider what is reasonable – however we cannot create a job for him in another office – so one option for him is to apply for a sideways move as jobs are advertised…" The Tribunal are of the view that advice given to Anneka Wilson was incorrect in part, in that a reasonable adjustment in some circumstances could include placing an employee into a vacant position without application or competition.

106. Anneka Wilson received advice from HR concerning supporting the claimant were he to return to work on 5 January 2015 suggesting a move to another team in "your business area/location" as a temporary adjustment, or a reasonable adjustment as a priority mover depending on whether the claimant met the criteria and HR director approval was given.

107. The claimant requested a priority move as a reasonable adjustment having been sent a vacancy in Liverpool on 18 December 2014 for him to apply for, which he failed to do. As at 18 December 2014, this matter could have been resolved by slotting the claimant into the vacant position rather than invite him to a competitive application. The claimant had been applying for vacancies, in the main above his grade and inappropriate, and there was no satisfactory evidence before the Tribunal that the claimant was unable to apply for vacancies or take part in interviews as a result of his medical condition. The claimant in a telephone conversation with Anneka Wilson made it clear he would be applying for level transfer jobs and was seeking jobs above his grade, such as band O technical caseworker jobs. He was informed promotion was not an option and would not be supported. The claimant did not agree, stating he would apply "without manager's approval" despite the rule which requires such approval. The claimant indicated "if he does not get a move then he will be forced to come back to work on 5 January [2015] as he is struggling as it is and he will not be able to go onto half pay." This conversation reveals the claimant was anticipating a return to his job in Manchester in 2-weeks, refusing to apply for any roles at his grade. The Tribunal is of the view, on the balance of probabilities, it was unlikely the claimant would have accepted the AP position in Liverpool had it been offered under the respondent's Reasonable Adjustment Policy as an alternative to

returning to Manchester given his requirement of a promotion and his decision not to apply.

108. By 24 December 2014 date the respondent had taken a view the claimant could not be a priority mover under the Reasonable Adjustment Policy on the basis that Liverpool was equidistant to his new home address as was Manchester Ralli Quays, and the Tribunal found on the evidence before them there was little difference in the commute. Accordingly, the respondent made a reasonable adjustment by offering to transfer the claimant into a new different team under new management on a different floor in Ralli Quays. The respondent view was that it was not reasonable to transfer the claimant to Liverpool on the basis it was equidistant to Manchester. The Tribunal concluded, on the balance of probabilities, the responded had provided the answers to the claimant's complaints, the adjustments offered to him were reasonable and would have achieved the effect of the claimant returning to work, away from his original team and manager. Given the lack of medical evidence that the clamant had a phobia of travelling into Manchester city, and given the representations made by the claimant at various intervals throughout his communications with the respondent, the respondent was entitled to accept that the claimant's remaining contention (an offer having been made for the claimant to move teams on to a different floor) was travel, and the respondent was entitled to conclude as Liverpool was a similar distance away from the claimant's house to Manchester, it was not a reasonable adjustment to transfer him to Liverpool as this would not impact on his travel time or distance and so the Tribunal finds. The claimant refused the reasonable adjustments offered, and the respondent as at 24 December 2014 was not in breach of its duty in this regard.

109. The Tribunal was taken to the respondent's calculations, a reference by the claimant to a website and inaccurate maps providing case study details to Wigan, which was never a possibility as Wigan was in the process of being closed down during the relevant period and unsuitable for a transfer. This was not disputed.

110. The claimant went on half pay on 31 December 2014.

111. The claimant continued to request a move "closer" to home as a reasonable adjustment. A Fit note referring to depression was issued for a further 4-weeks, no reasonable adjustment was suggested and no mention of a phobia. The claimant was unable to explain with any clarity why a transfer to another team on another floor under a new manager doing a different job was unsuitable given the equidistance of Manchester and Liverpool to his home. A transfer to an "office closer to home" was the key consideration for him, and it is clear from the evidence this did not exist. There was no reference in any medical evidence to a phobia of travelling into Manchester, and no evidence of any medical diagnosis. The Tribunal took the view the claimant's self-diagnosis is insufficient. The Tribunal would have expected some clear reference in occupational health notes/ report, GP fit notes and/or GP medical notes/specialist opinion.

112. The Wigan office closed March 2015, and the claimant accepted a transfer to this office was not an adjustment he sought, and during the liability hearing made reference to his surprise Wigan was referred to in correspondence by the respondent.

113. In an email sent 5 January 2015 by Anneka Wilson the claimant was offered the opportunity to apply for a transfer to Bootle as a service consultant customer service at a call centre. The attached advertisement stated there were 1000 vacancies nationally, 100 of which were located in Bootle, and as the claimant had call centre experience it was accepted by the parties had the claimant applied for a position it would have been offered to him. The claimant did not apply because he knew the role would be offered to him and did not want to work in that position. As a consequence, the Tribunal finds had the respondent applied its reasonable adjustment Policy and complied with the legal duty under the EqA to treat the claimant as a "Priority Mover" giving him priority mover status by transferring him to the vacancy of service consultant customer service at the call centre in Bootle, on the balance of probabilities, the claimant would have rejected the offer on the basis the he had not enjoyed the role in the past having found it too stressful. It is clear to managers the claimant was looking for a job of his own choosing and a promotion, for which management did not consider him suitable. In an email sent 9 January 2015 the claimant confirmed his reasoning as to why the role was unsuitable.

114. The Tribunal was of the view the respondent had already met its obligation to make reasonable adjustments by offering to transfer the claimant in to a new job in a new team on another floor and under a different manager; there was no duty for it to continue making offers until the claimant chose to accept a job that suited him. It is notable the job centre vacancies were advertised on 2 different occasions given the number of vacancies totalling 1000 nationwide, 100 locally, and thus the claimant had two opportunities to submit his application to Anneka Wilson who had offered to support him. This is the role the Tribunal finds, on the balance of probabilities, the claimant would have been offered had he applied, and thus the respondent met its obligation to make reasonable adjustments given the fact the customer service position complied with all of the claimant's demands in respect of the team and working at Reilly Quays, and should have facilitated his return to work.

115. The claimant submitted an application for reasonable adjustments under the respondent's procedure in or around 9 January 2015. The claimant disputes this date, but nothing hangs on this. The application was sent by Anneka Wilson to HR on 9 January 2015 and a copy given to the claimant on some date thereafter. It referred to the offer of phased return to work on a different team. In the sections completed by management Anneka Wilson referred to the journey details articulates the above findings by the Tribunal concerning equidistance. The reasonable adjustment request form together with further information was sent by Valerie Nelson to George Jones, HR together with email sent 21 January 2015 in connection with the RAST

("Reasonable Adjustment Support Team). Anneka Wilson also forwarded the claimant a "suitable job" in Liverpool for application.

116. George Jones sought advice from Claire Fletcher, HR, as to whether the claimant should be moved as a reasonable adjustment given the travelling journey. In an email sent 18 February 2015 from George Jones to Anneka Wilson she was informed the claimant's case not strong enough. He had not been proactive having "turned does the chance to apply for a contact centre post…Mike has to show he is making efforts himself. This is very important when considering if someone would be granted a move as a reasonable adjustment." The key to the refusal was the view that the claimant was not helping himself by refusing to apply for vacancies deemed suitable by management, coupled with his failure to try the adjustments which were deemed reasonable based on the information before the respondent at the time.

<u>13 March 2015 Fit for Work note</u>

117. On 13 March 2015 MED3 fit for Work note citing panic/depression advised the following; "working from Manchester is likely to help…may benefit from workplace adaption." There is no reference to the claimant having a phobia at working in Manchester. The Tribunal is of the view that at that point the respondent should have sought specific advice from occupational health or clarification from the GP, as the statement is inconclusive, the claimant having in the past factored on the travel and team in accordance with the evidence above. The MED 3 cannot be read in a vacuum. The respondent as a reasonable employer should have explored the first medical reference to panic, and possibility of a link between depression and working away from Manchester. The respondent failed to do so. Mr McNerney submitted the respondent should have gone back to occupational health to see if the adjustments offered potentially worsened the claimant's mental health, they failed to do so and this was the "death knell" to any management changes being reasonable. The Tribunal recognises a proper assessment is required to eliminate the disabled person's disadvantage and this is a necessary part of the duty to make reasonable adjustments, since that duty cannot be complied with unless an employer knows what it ought to do to ameliorate that disadvantage. It is the Tribunal's view that whilst it may have been preferable to obtain a further occupation health report, the last being 4 December 2014 obtained before the claimant refused to apply for the call centre position, the medical evidence before the respondent had not really changed with the introduction of the term "panic." The claimant had been diagnosed with depression and sought work outside Manchester. There was no requirement for the respondent to establish via medical experts whether the call centre work was suitable; it had been carried out by the claimant in the past and satisfied the reasonable adjustment of a transfer to Liverpool/Bootle.

118. Had it not been for the contents of the 13 March 2015 MED 3 the Tribunal would have remained of the view the transfer to a different floor, team and manager was a reasonable adjustment. However, the position changed given the possibility that as a result of panic/depression what was

required to get the claimant back into work was a transfer out of Manchester into Bootle or Liverpool. The Tribunal cannot understand why, given the respondent's priority mover's policy and the possibility of employees being transferred into vacancies without competition, this did not happen. As indicated above, with reference to the call centre position in Bootle, the claimant was invited to apply within a competitive process, he had been absent from work since 23 June 2014, was certified by the GP suffering from panic and depression. In accordance with the respondent's Reasonable Adjustment Policy a job holder can be transferred into a suitable existing vacancy, and the call centre role was deemed suitable by Anneka Wilson, who would have supported the claimant in his application. The case is complicated by the fact that had the claimant applied for that position the Tribunal found on the balance of probabilities, it would have been offered to him. Had the claimant been offered it with or without competitive interview, it would have been refused out of hand for reasons unsupported by medical evidence. In short, the process adopted by the respondent fell short, but the outcome would have been the same, namely, the claimant would have refused the call centre position with or without further reasonable adjustments to the role. The call centre position was a reasonable adjustment and thus it cannot be said the respondent was in breach of its duty given the particular circumstances of this case on the basis that the position would have been offered to the claimant, with adjustments to the role, had he applied.

Grievance – 10 March 2015

119. The claimant lodged a grievance alleging the respondent had failed to make reasonable adjustments that clarified his position further; "as stated from professional independent bodies the only acceptable adjustment that can be is a move away from Manchester." He does not say there was an issue with Manchester city as an entity in itself. It is accepted by the Tribunal that the grievance is a protected act for the purpose of the claimant's complaint of victimisation.

120. On 24 March 2015 Susan Smith, senior officer, was appointed grievance manager.

Fit note 8 April 2015

121. A MED3 dated 8 April 2015 citied "depression tied in with work" confirming "an alternative place to work would help."

122. On 14 April 2015, the claimant expressed an interest in a business tax vacancy in Liverpool after the deadline had passed, having been informed of the vacancy by Anneka Wilson in good time on 23 March 2015, who would have supported him in his application. In relation to this vacancy the claimant would have competed against internal applicants and not the wider civil service, a smaller pool which enhanced the prospects of him being successful.

123. In a telephone conversation that took place between Anneka Wilson and the claimant on 20 April 2015 it was pointed out the claimant had missed the deadline for confirming whether or not he would be able to attend a formal meeting on 17 April 2015 to discuss his return to work. Prior to this discussion a letter dated 13 April 2015 had been emailed to claimant emphasising the matter had become urgent and "if you are unable to meet with me, then I will have no other alternative than to refer your case to an independent decision maker." A discussion also took place in similar terms by telephone on 13 April 2015. The claimant did not respond by the deadline date of 17 April to confirm whether the 2 dates suggested for the meeting were suitable, and his case was referred to a decision maker on 20 April 2015.

124. The respondent proceeded down the capability route to dismissal, and the claimant's failure to comply with the respondent's polices was a matter taken into account during the consideration and appeal process involving compensation for a no-fault dismissal.

125. On 21 April 2015 Anneka Wilson forwarded flexible working caseworker vacancies based in Liverpool to the claimant. In or around this period the claimant received confirmation of his ineligibility for ill-health retirement.

126. A grievance investigation meeting with Mohammed Ahasan took place on 14 May 2015. the minutes taken are not disputed and reflect the claimant's position as follows;

126.1 "Moving back to Ralli Quays was a non-starter and there were no reasonable adjustments possible which could make him return to that office." A number of allegations were discussed ranging from whistle-blowing detriment, bullying, harassment, and intimidation. He confirmed travel was a problem (4 hours a day or 3 hours more than travel to the "old" office) along with the "maliciousness in the office." He described the feelings of panic when travelling to Manchester maintaining it was the "whole Manchester thing." At the liability hearing the claimant correctly pointed out the occupational health referrals did not cover the panic attacks specifically. The Tribunal found a reasonable employer would have obtained further medical advice from occupational health at this stage.

126.2 The issue of the job centre role was brought up and the claimant confirmed the role was unsuitable, even adjustments were made to the hours were stating Anneka Wilson was "putting him through for jobs that he felt were unsuitable for him. The Contact Centre does not work with his home/life balance and he would be on an unsociable hour's contract. MS said he had got out of the contact centre and did not wish to go back…contact centre work was detrimental to his health…does not want to return to places he has worked at before having had the experience and would not take a job he hasn't looked into…and would look at any job offered apart from contact centre which would have an effect on his health condition." The Tribunal found this comment was indicating of the claimant's unreasonable attitude; he wanted control over the type of work he was

employed to do, and if he did not want to do it, for whatever reason, it was not a suitable adjustment.

126.3 When asked for the reason why the claimant had not applied for any of the vacancies at AO level referred to him he responded they were not suitable to him and he had "set his alerts to find a suitable job…if suitable positions he came up…he would have degree of control as to what job he took…"

126.4 The claimant was asked about his habit of declining/rearranging meetings and why he was not cooperating to which the claimant gave the explanation that he understood why managers would think this but he was "in a fragile state of mind…couldn't deal with visitors and wasn't ready to speak or convey." The claimant did not dispute there had been difficulties, and given this it was apparent to the Tribunal there existed facts that causally linked the decision to award zero for no-fault dismissal compensation with the claimant's default, as opposed to the 10 March 2015 grievance relied upon.

127. On 20 May 2015, the claimant was invited to a meeting with the decision maker following 265 days' sickness absence before the outcome of the grievance which was in the process of being investigated, with the claimant being sent notes of the meeting on 21 May 2015. It is notable Anneka Wilson had recommended dismissal whilst the grievance was still ongoing. Anneka Wilson wrote "As there appears to be no prospect of you returning to work within a reasonable time, I have decided to recommend ending your employment…on the grounds of continuing absence due to ill health." Anneka Wilson wrote to Renu Mair on 1 June 2015 with her recommendation.

128. The claimant lodged a Fit Notes citing depression dated 17 June 2015 for 28-days, no adjustments were suggested. A further Fit note was issued 31 June 2014 citing stress at work for a 2-week period.

129. In an email sent on 19 June 2015 the claimant confirmed his recovery had taken a "backward step" and medication increased advising contact was not possible in any form from 22 June to 2 July 2015. He disputed the correctness of the RAST referral maintaining jobs had been applied for and the Ralli Quays team was still not adequately resourced. Valerie Nelson forwarded the claimant's evidence to RAST seeking confirmation that RAST had sufficient information to reconsider the case on the basis the claimant had applied for "numerous" jobs over the past 24 months, all "promotional posts" from grade 7 to officer, none a sideways move. A list of the AO officer and customer service consultant vacancies the claimant had not applied for were set out, including one the VAT caseworker the claimant had applied for late and was unsuccessful.

Grievance Investigation Report dated April 2015

130. Mohammed Ahsan recommendation the claimant's grievance should not have been upheld in a detailed comprehensive report to which 28 appendices were attached and 10 witnesses interviewed or statements obtained. The report dealt with the claimant's move from Ralli Quays as follows:

129.1 "He said that Manchester triggers some of his mental health problems such as panic attacks and also that he feels that the environment there is malicious citing the incident over the anonymous email as an example…." Mohammed Ahsan queried with the claimant the lack of medical evidence stating there was nothing in the occupational health report to suggest panic attacks when travelling to Manchester and referred to the claimant's responses in the 14 May 2015 meeting.

129.2 Mohammed Ahsan found the claimant has been "selective with the types of jobs he has been prepared to apply for…He will not go for contact centre jobs." The report recorded the claimant had only provided evidence for 4 vacancies he had applied for out of the alleged 25.

129.3 Mohammed Ahsan reported that Chris Jones, senior officer at the Business Unit at NCH, had confirmed the claimant had missed the deadline for the VAT caseworker vacancy, which he eventually applied for and it would have been "his if he [had] applied on time."

129.4 Claire Fletcher, HR business partner, had confirmed during the investigation based on the information provided to her she did not see the case meriting a referral to the HR director to consider the claimant as a priority mover. The advice was provided by her in February 2015 and she still remained of the same view. Mohammed Ahsan concluded NCH management did explore this option to see if the claimant could be moved. The claimant did not meet the criteria to enter into the redeployment pool or be treated as a special transfer.

131. In an email sent 7 July 2015 Valerie Nelson forwarded Clare Fletcher's email dated 26 June 2017 concerning the claimant's application for priority mover status.

132. The claimant lodged a MED 3 fit note citing depression for an absence of 28-days with no adjustments suggested.

133. Renu Mair, a higher officer based in Wolverhampton, was the decision maker. The Tribunal was satisfied she was independent and objective.

Decision making meeting 23 July 2015

134. The meeting took place with Renu Mair, a note-taker, the claimant and his union representative to discuss the claimant's ill-health absence in excessive of 12 months. Renu Mair was aware of the 8 July 2015 fit note

signing off the claimant due to depression for a further period of 28 days, and she took into account the earlier MED3's, occupational health reports and claimant's indication in June 2015 that his condition had deteriorated and medication increased. The claimant was given the full opportinu8t to state his case, which he did going into detail concerning the move out of Manchester he sought on the basis that he was incapable of returning and should be considered for a priority move, and applications for various jobs for which he had not been interviewed.

135. The final version of the hearing meetings was agreed between the parties and Renu Mair obtained confirmation from Peter Edge, the claimant's line manager before Anneka Wilson took over, that the claimant was not ready for progression to a higher grade and the claimant had been informed. Anneka Wilson confirmed the travel distance from the claimant's home to Manchester and Liverpool was equidistant.

136. The undisputed minutes of the meeting record the following key points:

137.1 The claimant referred to "several incidents" including travelling time and confirmed he had been looking for jobs since the move to Ralli Quays was announced maintaining he had evidence to prove suitability for promotion to higher officer roles, and the Liverpool jobs were "not suitable to my skills and given my condition at the moment jobs not suitable." The claimant confirmed because people move around from building to building he could not work in any of the buildings in Manchester which he avoids "at all cost." The claimant stated he had applied for 24 jobs and evidenced a number of applications at AO and higher level grades. The claimant indicated if he were to be offered a job with flexible hours not on a lower grade he did not know if he would accept it.

137.2 The claimant reported on his health, providing copies of GP records that he needs flexibility and to be able to leave work when needed confirming "I sleep a lot at the moment and can't do too many things, my concentration is 20 minutes' tops."

137.3 When it was pointed out HMRC works flexible hours and if there was a job in Liverpool would he return to work the claimant replied "Back in October undeniably yes but due to anxiety don't know, but if job met needs I would take it but not at a lower grade…I was in a state last year condition worse now due to not being given priority move. I need control over my own environment…" the claimant confirmed he would try a phased return to work and he wanted a priority move away from Manchester to Liverpool.

137.4 The occupational health reports dated 15 August 2014, 10 September 2014 and 4 December 2014 were considered together with the latest Fit note provided to the respondent. The claimant's supporting medical evidence confirmed the diagnosis of depression and the latest GP record produced was dated 17 June 2015 which confirmed the claimant was unfit for work and "feels he has gone backwards." A MED3 Fit Note citing depression issued for 28 days was attached.

137. Renu Mair held back making a decision pending the claimant's grievance hearing following HR advice.

138. The claimant submitted a MED3 on 4 August 2015 citing depression and was signed off for a further 4 weeks. No adjustments were suggested.

The grievance hearing 3 August 2015

139. Prior to the hearing taking place the claimant was provided with the investigation report together with appendices, and an amended version of the investigation meeting held with the claimant on 14 May 2015, the earliest date the claimant and his trade union representative could make the hearing.

140. Susan Smith, a senior officer based in East Kilbride heard the grievance. She was independent, employed as a senior officer and it was entirely appropriate for her to consider the grievance. She took the view the investigation report was extensive and thorough and the tribunal agreed.

141. The hearing took place on 3 August 2015. The claimant was accompanied by his union representative. and requested further information as to why his case had not been referred to the HR director for priority mover status.

142. Susan Smith considered all of the claimant's grievances including wanting to be moved from Ralli Quays and the claimant's explanation for not applying for the contact centre job on the basis that it was not appropriate, and even if reasonable adjustments were put in place as suggested (breaks between calls or reduced call handling times) he would not accept the role as it would still be highly pressurised.

143. Following the hearing Susan Smith emailed Clare Fletcher for further information concerning her advice to Chris Jones given in February 2015 relating to priority mover status, why it was not considered as a reasonable adjustment under the EqA and a recommendation was not escalated to the HR director. In an email sent 8 August 2015 Clare Fletcher referred only to the original conversation with Chris Jones and wrote; "I provided HR advice that I did not think all reasonable adjustment options had been explored fully and I felt further work could be carried out by the jobholder to fully understand the position and what could be done to facilitate a return to work. I also advised that the jobholder could do more to suggest what adjustments they believed would be helpful, and why, that is beyond relocation a different office outside of the Manchester area…I did not receive a formal request from Chris or any other manager via a Reasonable Adjustments Moves Form."

Grievance outcome

144. Susan Smith sent a copy of her deliberations and grievance decision letter for HR approval before onward transmission to the claimant and on the 19 August 2015, the claimant was informed of the outcome of the grievance dated 6 March 2015 as follows;

143.1 With reference to the alleged failure to make reasonable adjustments she found "there is no doubt that Mike suffers from a long standing mental health condition…it is clear that management have offered a number of reasonable adjustments to help and support…changes have been made within the team…various reasonable adjustments have been offered; a move to another team, phased return to work, changes made within the team based on Mike's email of 23 June 2014…Mike working in his current role from another location but IT issue made this option unworkable. Mike however will only consider a move to an office closer to his home and is unwilling to consider any other adjustments…"

143.2 Susan Smith referred to her communications with Clare Fletcher and the advice given in February, May and August 2015 that "only in exceptional circumstances, where, all reasonable adjustments and options have been fully considered within the current directorate can an application for priority mover status be made..."

143.3 Susan Jones concluded; "I do not uphold the grievance on this point management have tried to support Mike and put adjustments into place for him and have recognised his disability in doing so. I suggest Mike and his manager continue explore any further reasonable adjustments to help him return to work within his current directorate.

143.4 Susan Jones also dealt with the claimant's current absence describing it as "a challenging absence to manager, Due in no small part to Mike's reluctance to keep in touch, I do not believe this has been deliberate on the part of the jobholder merely a symptom of his medical condition." Susan Jones sets out the communications and contact with the claimant in some detail, which the Tribunal does not intend to repeat. In short, she accepted the requirement "to keep in contact under KIT may have been more difficult due to the nature of his illness. Anneka Wilson has stated that there were long periods where she could not get in touch with Mike. These attempts to contact have not been documented. Mike has corresponded in writing and email during his absence…management have been flexible with him and I accept that the process followed have been tailored to his needs as much as possible. It was more difficult at the start of the KIT process due to Mike's inability/reluctance to KIT."

143.5 With reference to the grievance concerning the move from Ralli Quays Susan Jones considered this in detail setting out the history of the move and finding the claimant had not appealed it, the financial impact cited by the claimant in 2012 and the fact the move under the EqA was a recent request. She noted the claimant had moved house further away from work on 2 occasions and the reasons he now gave, in addition to the financial impact and daily travel time was issues with working in the Manchester area. The advice given by Claire Fletcher to Chris Jones (as set out above) was taken into account, and she concluded there was no evidence the claimant had proactively sought alternative employment work area and "I would expect to see more than 4 vacancies applied for in a 12-month

period…I have today gone onto the jobs web site myself and identified 10 vacancies in Liverpool that do not involve call centre work…A reasonable adjustments template was completed on 21/01/2015 after discussion with Mike…At this time Mike gave reasons for not working in Manchester as issues surrounding anonymous emails, the allegations of him making inappropriate comments about other staff, he cannot trust staff…."

143.6 Susan Jones concluded the advice given by Claire Fletcher was reasonable in February and May 2015, the claimant had "refused to consider any other reasonable adjustment other than a move to an office in Liverpool area and this has thwarted efforts by management to help him. He has had the opportunity to apply for roles in the contact centre within his chosen working area and has chosen not to apply". It is notable Susan Smith has also explored with the claimant the possibility of Liverpool contact centre work flexible working hours, breaks between calls and different call handling targets so as to reduce any pressure, offers which the claimant rejected. The Tribunal finds that contact centre work was available for the claimant throughout this period, and it met the requirements set out by occupational health and the claimant's GP, namely a move outside Manchester. There was no suggestion the claimant was incapable of working in the call centre as a result of his medical condition, he had worked in that role previously and did not want to return to it. Susan Smith's conclusion in respect of the contact centre role was a reasonable one, namely, the claimant cited the high-pressure environment as a reason for rejecting it. He was unwilling to consider a role in the contact centre even if reasonable adjustments had been made to reduce that pressure. Susan Jones concluded; "management have attempted to support Mike by offering adjustments, however, he will consider only a move to his own geographical area and into a role of his own choosing…. he has been prescriptive about the work he is willing to undertake.

143.7 The claimant's grievance was rejected and mediation suggested as it appeared to Susan Jones the relationship between the claimant and a number of his colleagues had broken down. The claimant appealed the decision to Paul Kelly on 28 August 2015, and refused to mediate.

Continuation of the decision-making process by Renu Mair

145. As the claimant's grievance, had been concluded Renu Mair continued with the decision-making process that led to dismissal. Renu Mair was not informed of the grievance outcome. It is notable during this period the claimant was aware dismissal could be a possibility having been so informed by Anneka Wilson and in the invitations to the hearing that complied with the ACAS Code. The claimant's evidence at the liability hearing was that had the respondent moved his work out of Manchester he would have been fit enough to work. The Tribunal did not accept this was the case on the medical evidence before it. The MED3's was clear that the claimant was not fit for work. The claimant had the option to work in the call centre from 5 January 2015 onwards, with adjustments to take any pressure off and if he believed he was fit enough to work in Liverpool, it is incomprehensible why he chose to

reject the offer and remain absent with no foreseeable date for a return to work.

146. Renu Mair concluded the claimant’s long term sickness absence could not longer be supported and he should be dismissed. Renu Mair’s reasoning was set out in a letter dated 1 October 2015. Renu Mair had the same information available to Susan Jones concerning the claimant’s sickness absence, disability and reasonable adjustments. With reference to the reasonable adjustments that had been considered by management Renu Mair concluded the following:

147.1 In accordance with the respondent’s guidance management were required to consider implementing adjustments to support a job holder in returning to work when they had been on long term sick leave. Renu Mair concluded management had complied with the respondent’s guidance.

147.2 If the adjustment required was a move to an alternative role with “priority mover status” management are required to first consider retaining the jobholder in their current role by making reasonable adjustments to that role. Renu Mair took into account the fact the claimant had been offered a number of adjustments ranging from phased return, change of team, change of office floor, option of undertaking project work and a change of hours none of which the claimant wanted to trial because he wanted a transfer outside Manchester.

147.3 Renu Mair was advised Clare Fletcher had not considered the claimant’s case strong enough to put forward to a HR director for priority mover status on the basis the claimant had elected to move house further from Manchester, he should have trialled the adjustments offered and despite being encouraged to apply for jobs in other offices, including the contact centre role referred to above, the claimant had not done so at his grade and had applied for vacancies at a higher grade. Clare Fletcher confirmed she would consider the claimant’s request if he could show he had made efforts to obtain a post nearer to his home and trialled the adjustments that had been put in place.

147.4 Renu Mair considered the claimant’s argument that the medical advice was he should be moved outside Manchester and under the EqA the adjustment should have taken place, and he disputed he had not helped himself by applying for jobs. She took the view it was apparent from HR the claimant’s request for a transfer to another office would have been considered if after trialling the adjustments offered, the claimant felt work issues had not been resolved.

147.5 Renu Mair concluded that as claimant had been reluctant to apply for vacancies at the same grade which he may have had more success in being accepted for, coupled with the failure to trial the reasonable adjustments offered, he had made insufficient effort to work with management to aid his return to work.

147.6 Renu Mair accepted the claimant could not have worked remotely due to the nature of his role, confidentiality and IT issues.

147.7 With reference to the medical evidence Renu Mair concluded the claimant's attendance was unlikely to improve within a reasonable timeframe unless the workplace issues could be resolved. Adjustments had been suggested to alleviate the workplace issues and the claimant could have "engaged with management more in an attempt to explore adjustments that could be implemented to assist his return to an office in Manchester in the same business area."

147.8 Consideration was given as to whether updated medical evidence was necessary. Renu Mair concluded it was not needed as "there was no evidence to suggest the reason for the claimant's absence had changed significantly."

147.9 Renu Mair concluded as the claimant's continuing absence impacted on the respondent's business, he was included within the overall headcount within the department whilst off sick and this impacted recruitment in a team who were under increasing pressure to take on additional work. She took the view that the respondent was entitled to manage high levels of sickness absence as this had a negative impact of the level of service provided to the public. There was no evidence the claimant was likely to return to work in the near future.

<u>The Civil Service Compensation Scheme ("CSHR").</u>

147. Having made the decision to dismiss but prior to informing the claimant Renu Mair informed the CSHR she was recommending dismissal in the claimant's case. Starting at 100% Renu Mair considered the level of compensation to be awarded, and working downwards she recommended 30% completing the form already partly completed by Anneka Wilson who was not the final arbiter, recommended dismissal and zero compensation.

148. Renu Mair recorded reasons for her decision confirming she was satisfied management had done "everything expected "to support the claimant and "management had supported employee by notifying him of AO jobs that became available (one consisted of 1000 jobs) but he did not apply for these…. Employee has made some but insufficient efforts in with the keeping in touch arrangements, some but insufficient efforts in applying for jobs in Liverpool." The Tribunal found Renu Mair's written record correctly reflected the true position, unlike Anneka Wilson, who provided mixture factual information and incorrect facts within the recommendation form.

149. Anneka Wilson recorded the claimant's reasons for being at work with depression "keeps changing" and "now the issue is with travel to work" giving the appearance that this was a new matter when it was the issue from the outset. The claimant's reasons for being off work with depression had remained constant, and not changed save for the later references to panic attacks. The requirement that he should be moved from Manchester was

suggested by the claimant's GP on 2 occasions and occupational health, but this advice was not referred to. In short, a number of key facts were not set out within Anneka Wilson's recommendations. There was no response to the question whether the claimant's condition was likely to be a contributing factor to any perceived lack of cooperation or engagement, and this does not appear to have been considered by Anneka Wilson in direct contrast to Susan Smith, who had concluded the claimant's actions were not intentional but a symptom of his condition. There was no suggestion the claimant was disabled despite the respondent possessing knowledge that he was. The Tribunal found Anneka Wilson's report misleading in part, in particularly her failure to properly address the issue with cooperation, the agreement reached concerning telephone messages and a degree of regular contact with the claimant whom she described as "not very cooperative or forthcoming as he refused to speak to management until almost 4 months after he went off sick."

150. The Tribunal would have expected Anneka Wilson, with her personal knowledge of the claimant's sickness absence and her day-to-day management of it, to have got these facts right and provided an accurate and informative account. She did not, and gave no evidence at the liability hearing despite the allegation of victimisation. The Tribunal has raised adverse inferences by the discrepancies in Anneka Wilson report, however, she was not the ultimate decision maker and merely made a non-binding recommendation. It is notable Renu Mair after the hearing with the claimant made a recommendation of 30% in the knowledge that Anneka Wilson had recommended zero.

151. The recommendations of Renu Mair and Anneka Wilson were forwarded to the HR director in accordance with procedure. Andrea Williams McKenzie, the HR director did not complete the form; this was delegated to Katherine Al Sherreri, senior HR business partner, who made the decision to award zero% on the basis the claimant had not made sufficient effort to keep in touch or return to work.

152. It is notable the Tribunal heard evidence from Andrea Williams McKenzie and not Katherine Al Sherreri as to the decision-making process in relation to the amount of compensation to be awarded, if any. In oral evidence on cross-examination Andrea Williams McKenzie confirmed neither she nor Katherine Al Sherreri had knowledge of the claimant's grievance against Anneka Wilson, the protected act relied upon in respect of the victimisation claim. There was no satisfactory evidence before the Tribunal to the effect that Katherine Al Sherreri was aware of the protected act, and whilst an adverse inference may be raised over the fact Katherine Al Sherri had not given evidence to explain her decision-making process, the facts are such that a causal link exists between the claimant's lack of cooperation with keeping in touch and failure to apply for suitable AO positions, and the amount of the award. There was no suggestion in the medical evidence the claimant should not look for work or attend meetings or maintain contact with the respondent, occupational health positively recommended meetings and contact as the means by which the claimant's health could be improved.

153. It is not disputed Katherine Al Sherreri would have been required to take into account the recommendations of Renu Mair and Anneka Wilson before arriving at her decision, which she did. Renu Mair was unaware of the grievance and allegations against Aneka Wilson, who had been part of the investigation. Katherine Al Sherreri was based in London and had no prior knowledge of the claimant or his case, and on the balance of probabilities the Tribunal finds it is unlikely she would have known about the grievance against Anneka Wilson, accepting Andrea Williams McKenzie's evidence that both were unaware of the grievance.

154. The claimant appealed the decision to award him zero compensation to the Civil Service Appeal Board ("CSAB") an independent body consisting of retired civil servants. In a letter dated 26 February 2016 to the CSAB a statement of case and numerous documents were provided by the respondent, including occupational health reports, party-to-party correspondence and minutes of meetings. Various responses and counter-responses prepared by the claimant were put before the CSAB in good time for hearing on 11 May 2016. It is clear to the Tribunal the information provided by both parties to the CSAB was voluminous.

155. Following the hearing the CSAB concluded the decision to pay zero percent was fair. In the decision reference was made to the claimant having been "selective in his efforts to secure an alternative posting. He had apparently passed up the opportunity to pursue some level transfer opportunities, although he had applied for a number of posts at higher grades…further, although travel to work was stated to be a significant contributor to his condition, he had…apparently moved home to 10 miles further away…in this connection it was not clear Mr Serra's preferred new location of Liverpool would materially improve his travel position, nor is it clear why, in the papers submitted by Mr Serra to evidence roles he had applied for, one of these appeared to be in Manchester…The Board also noted that there appeared to have been shortcomings on Mr Serra's part in adhering to the keeping in touch process and that Mr Garau argued that this was attributable to his illness and that there had also been failings on the part of the department."

Grievance appeal

156. Paul Kelly, senior officer and grievance appeal officer independent to the claimant, heard the claimant's grievance appeal on 29 October 2015 following a delay by the claimant in responding the correspondence. The claimant was accompanied by his union representative. Notes of the hearing were taken. The claimant's main concern was the respondent's failure to provide him with priority mover status believing he should be moved to Liverpool as a reasonable adjustment. The claimant believed Susan Smith was incorrect when she stated he should have been proactively seeking jobs in Liverpool, and he should not be expected to apply for vacancies but be placed in the priority movers' redeployment pool despite the requirement that priority movers must actively explore suitable job opportunities.

157. Paul Kelly took advice from Julie Bradbury, HR caseworker, on 2 November 2015 before concluding that the respondent's priority mover's guidance stated there was an expectation on job holders, including those with priority mover status to apply for jobs and proactively manage the move. In a grievance outcome letter dated 13 October 2015 Paul Kelly held the grievance procedure had been correctly followed, the investigation fair and Susan Smith's conclusions well-supported by the evidence. Susan Smith's decision was upheld.

Appeal against dismissal

158. The claimant's appeal against dismissal heard by Zoe Parsons, Renu Mair's line manager, who at the time was employed as a senior manager in the Business Tax unit based in Wolverhampton. The Tribunal accepted Zoe Parsons did not speak to Renu Mair about the claimant; was independent and impartial, and had no knowledge of the claimant until she volunteered to act as appeal manager in his case.

159. It was difficult for the parties to agree a hearing date; eventually the appeal took place on 18 December 2015. During the appeal the claimant focused on the move to Liverpool explaining he had not applied for the AO vacancies in a different business area sent to him by Anneka Wilson because it would be too stressful. The claimant did not submit any new evidence.

160. Zoe Parsons considered a substantial number of documents including those that had been before Renu Mair, and reached the view that the claimant's rights under the EqA had been considered, and medical evidence followed and reasonable adjustments had been made in line with occupational health advice to help the claimant return to work in Ralli Quays. She was satisfied Renu Mair had investigated whether the claimant's role could be undertaken in another office and as he needed access to CHIEF it could not as CHIEF was only available at Ralli Quays.

161. Zoe Parsons noted the change in the claimant's evidence for his refusal to return to work in Ralli Quays, an observation with which the Tribunal concurred. The claimant relied upon at first the difficulties he had with colleagues and the journey to Ralli Quays. The issue concerning his anxiety being exacerbated by being in Manchester was "identified quite far into his sickness absence." Zoe Parsons was satisfied the different adjustments proposed/or implemented by management were intended to address the different reasons…" She did not accept the fact the claimant's GP had not been approached resulted in unfairness on the basis that whether or not to approach the GP was a "professional medical decision for occupational health and not management..."

162. With reference to the continuous absence procedure Zoe Parsons took the view it had in general been followed, but not to perfection, with difficulties initially. She was satisfied the claimant had contributed to some of the delays by refusing to meet on at lest 3 occasions or cancelling a meeting at short

notice, and that he was initially uncooperative in the completion of the Fit for Work plan.

163. Zoe Parsons found the claimant could not qualified for priority mover status concluding "unless it could be shown that adjustments already offered would not be effective. If they were not tried the effectiveness of the adjustment could not be evaluated which is required before a priority move can be addressed" She questioned the claimant's reasoning for refusing to apply for a level move to an AO valuation office role giving the reason that he felt unable to learn new skills, and yet he had applied for a higher grade 7 roles in Manchester, 4 grades higher than the claimant's role. Zoe Parsons took the view the claimant was unable to grasp that priority movers must cooperate to find a way to end the sickness absence and proactively find suitable vacancies. His decision not to apply for vacancies in Liverpool, particularly the call centre role which he was "highly likely" to secure, were not actions of an employee keen to resolve the situation, given he was expected under the respondent's policy to explore suitable vacancies.

164. Zoe Parsons concluded as the claimant had been absent from work for over 12 months, his post could note back filled during that period and the department was one person down. The claimant was unable to say when he could return to work, he had not applied for vacancies in Liverpool and his case could not formally be considered for priority mover status because he had not explored all options.

165. Zoe Parsons wrote to the claimant on 6 January 2016 in a letter running to 4-pages confirming the decision to terminate his employment was reasonable and upholding the original decision. In the letter, there was a reference to the potential costs of adjustment, which was not relevant in the claimant's case and the Tribunal accepted Zoe Parson's explanation that she had included this information to reflect the Guidance and it was not a factor in her decision-making process.

<u>Law - Duty to make reasonable adjustments</u>

166. The duty to make reasonable adjustments is set out in S.20 of the Equality Act 2010 ("EqA"). Section 20(3) sets out the first requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. Section 21(1) provides that a failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments.

167. Schedule 8 of the EqA 2010 applies where there is a duty to make reasonable adjustments in the context of 'work' and the Statutory Code of Practice on Employment is to be read alongside the EqA. The Code states that a PCP should be construed widely so as to include, for example, informal policies, rules, practices, arrangements, criteria, conditions and so on. Para

6.33 of the EHRC Code of Practice on Employment sets out examples which include transferring the disabled worker to an existing vacancy and assigning them to a different place of work, training or home working.

168. In the well-known case of Archibald v Fife Council [2004] IRLR 651, a House of Lords decision it was held that the duty to make reasonable adjustments is triggered where an employee becomes so disabled that he/she can no longer meet the requirements of his/her job description, and the duty to take such steps as is reasonable could include transferring without competitive interview a disabled employee "upwards, sideways or downwards."

169. Paragraph 20 of Schedule 8 states the duty to make reasonable adjustments will not arise unless the employer knows or ought reasonably to know of the disabled person's disability and that disabled person is likely to be placed at a substantial disadvantage.

170. It is agreed between the parties the Tribunal must identify;

1. The PCP applied by or on behalf of the employer,

2. The identity of the non-disabled comparator (where appropriate) and

3. The nature and extent of the substantial disadvantage suffered by the claimant.

4. Identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage. The Tribunal is to focus upon the practical results of the measures to be taken" and not to focus on the reasoning. "It is the adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) for good reason"- RBS v Ashton [2011] ICR 642.

171. On behalf of the respondent the Tribunal was referred to the EAT decision of Secretary of State for Work and Pensions (Job Centre Plus) v Higgins [2013] UKEAT/0579/12 in which it was held at paragraphs 29 and 31 of the HHJ David Richardson's judgment that the Tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, (3) the nature and extent of the substantial disadvantage suffered by the employee, and (4) identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage. HHJ David Richardson clarifies at paragraph 34 that "the purpose of identifying a PCP is to see if there is something about the employer's operation which causes substantial disadvantage to a disabled person in comparison to persons who are not disabled. The PCP must therefore be the cause of the substantial disadvantage – Para. 35.

172. At Para. 49 HHJ David Richardson emphasises that S.20 (3) sets out the fundamental test to be applied by the Tribunal in determining whether an employer is under a duty to make reasonable adjustments. The duty to take the step arises if it is a step which is reasonable for the employer to have to take to avoid the disadvantage and the Equality and Human rights Commission's Code of Practice on Employment at Para. 6.28 makes reference to the factors, including "whether taking any particular steps would be effective in preventing the substantial disadvantage." As in the case of Mr Higgins, one of the key issues is how far the step or steps would have been effective in preventing any substantial disadvantage to the claimant caused by the PCP? At Para. 56 HHJ David Richardson indicated if an employer grants a reduction in hours which the employee says he is capable of working, it would not "generally also be necessary…to give some explicit guarantee of future review. If, at the end of the period, the employee continuous to be under a substantial disadvantage, the duty to make an adjustment will still be applicable and can be judged in the circumstances at that time." It was submitted on behalf of the respondent if an employer has put in place adjustments it is entitled to test the efficacy of those adjustments before deciding whether future adjustments are required. Mr Garau, had he applied for and as a consequence been offered the positon at the call centre with adjustments the respondent's duty to make further adjustments would have been applicable if it transpired the role was not suitable due to the claimant's disability. The claimant was made aware of this continuing obligation in relation to the adjustments carried out to his role in Reilly Quays which he was expected to trial to see if they were effective or not.

173. On behalf of the respondent the Tribunal was referred to the court of Appeal decision in <u>Finnigan v Chief Constable of Northumbria Police </u>[2014] 1 WLR 455 and the EAT decision in <u>Nottingham City Transport v Harvey</u> UKEAT/0032/12/JOJ held a; "practice has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability…If that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be seen by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply." The Tribunal are aware when considering the reasonableness of the adjustment it was not an inquiry into whether the claimant was treated well, or the reasonabless of the respondent's approach and decision making process. What is relevant is the practical effect of the measures concerned, and it is not "a section which obliges an employer to take reasonable steps to assist a disabled person or help the disabled person overcome the effects of their disability, except in so far as the terms of the statute – <u>RBS v Ashton</u> [2011] ICR 642. The substantial disadvantage must arise out of the PCP. "The focus is on the practical result of the measures which can be taken…it is not…for the focus to be upon the process of reasoning by which a possible adjustment was considered…it is irrelevant to consider the employer's thought processes leading to the making or failing to make a reasonable adjustment…"

174. In Mr Garau's case had the PCP's relied upon been made out, the Tribunal would have gone on to find in accordance with Archbold v Fife Council above a reasonable step would have been to transfer the claimant without competitive interview into the call centre role. The respondent did not, however, the practical effect of the measure taken, which was supporting the claimant in his application, was such that the claimant's application would have succeeded on the balance of probabilities, and he would have been placed into the AO role, filling one of the thousand vacancies, to carry out work in which he had previous experience and the disadvantage caused to the claimant by working in Manchester overcome.

175. On behalf of the respondent the Tribunal was referred to the Court of Appeal decision in Newham Sixth Form College v Sanders [2014] EWCA Civ 734 at paragraph 14; "An employer cannot…make an objective assessment of the reasonableness of the proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee of the PCP…an adjustment will only be reasonable if it is tailored…to the disadvantage in question; and the extent of the disadvantage is important since the adjustment which is either excessive or inadequate will not be reasonable." A proper assessment by the employer of what is required to eliminate the disabled person's disadvantage is a necessary part of the duty to make reasonable adjustments, since that duty cannot be complied with unless the employer makes a proper assessment of what needs to be done. There must be many cases in which the disabled person has been placed at a substantial disadvantage in the workplace but in which the employer does not know what it ought to do to ameliorate that disadvantage without making enquiries." In relation to Mr Garau, the Tribunal accepted the respondent understood the nature and extent of the adjustment sought by the claimant; albeit the claimant at this liability hearing has tried to make out that he informed the respondent early on in the sickness absence of the Manchester phobia, evidence the Tribunal did not accept as credible given the contemporaneous documentation.

Indirect discrimination

176. Section 19(1) of the EqA defines indirect discrimination as occurring when a person (A) applies to another (B) a provision, criterion or practice ('PCP') that is discriminatory in relation to a relevant protected characteristic of B's. A PCP has this effect if the following four criteria are met:

174.1 A applies, or would apply, the PCP to persons with whom B does not share the relevant protected characteristic

174.2 the PCP puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share the characteristic

174.3 the PCP puts, or would put, B at that disadvantage, and

174.4 A cannot show that the PCP is a proportionate means of achieving a legitimate aim – S.19(2).

177. All four conditions have to be met before indirect discrimination can be established. The burden of proof lies with the claimant to establish the first, second and third of these elements - '*prima facie* evidence' from which the Tribunal could conclude, in the absence of any other explanation, that respondent has committed an act of discrimination – s.136 EqA. If the tribunal is satisfied that the claimant has discharged the burden of establishing a *prima facie* case, it then falls to the employer to justify the PCP as a proportionate means of achieving a legitimate aim.

<u>Unfavourable treatment because of something arising in consequence of disability.</u>

178. Section 15(1) of the EqA provides-

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

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

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

179. Paragraph 5.6 of the Equality and Human Rights Commission: Equality Act 2010 Code of Practice provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

<u>Victimisation</u>

180. Section 26 EqA provides (1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) Bringing proceedings under this Act;
(b) Giving evidence or information in connection with proceedings under this Act;
(c) Doing any other thing for the purposes of or in connection with this Act;
(d) Making an allegation (whether or not express) that A or another person has contravened this Act.

<u>Burden of proof</u>

181. Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A

did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

182. In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that he did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondents and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds.

Conclusion – applying the law to the facts

183. With reference to the first issue, namely, did the respondent apply the following PCP's (the claimant having withdrawn the PCP relating to the Policy on "Special Transfer"); (a) the practice of requiring the claimant only to carry out his role at Ralli Quays in Manchester, and/or (b) the practice of refusing to consider permitting employees to work from different locations (or remotely), the Tribunal found that it did not given the existence of policies where relocations were permitted providing employees met the qualifying conditions.

184. Mr McNerney submitted the respondent did not deny the PCP in their defence, and this "late in the day invention" was sophistry. The claimant was required to work at Ralli Quays and this amounted to a practice which created a disadvantage to the claimant, who was severely disabled and the reasonable adjustment was to move him. It is the Tribunal's view whether or not the PCP existed is a factual matter not predicated on pleadings.

185. The Tribunal considered the claimant's contract, and noted his place of work is a term of his contract and a contractual term can fall under definition of a PCP. In this respect we agree with Mr McNerney. In accordance with the claimant's mobility clause he can be asked to move as a term in his contract, he was and ended up working at Ralli Quays. Employees can move offices at their own request in a limited number of circumstances as provided in the respondent's policies and procedures set out above, including disabled employees as a "Priority Mover." Only those employees covered by Redeployment and Relocation Policy following "departmental reinvestment, reductions in work, office closures and changes in organisational design," and/or the Special Transfer Policy available to employees is "a victim of domestic violence, or at significant risk of violence outside the workplace and working hours as a result of their official duties," and/or seeking a special transfer as a reasonable adjustment under the Reasonable Adjustment Policy, could relocate. Employees wishing to change location at will were not free to

do so, they could not choose whether they wanted to work in a particular location and in order to be moved must fall under the respondent's policies or apply for vacancies. The Tribunal has ignored transfers on secondment in this analysis as there was no evidence before it the claimant applied for a secondment.

186. On behalf of the respondent it was submitted there was no evidence of a practice requiring the claimant only to carry out his role at the Ralli Quays office, the respondent electing to explore adjustments to enable the claimant to return to his original workplace, but that is not the same thing. The Tribunal has not equated the respondent's offer of a number of adjustments within Ralli Quays as evidence of a practice requiring the claimant to remain in his contractual workplace. The Tribunal's reasoning is straightforward and took into account the requirement that a "practice" must be something capable of repetition that would apply to other employees. The very fact that policies and procedures exist to address the issue of workplace changes is an indication of there being no practice in the terms set out within the claimant's PCP; the Tribunal found employees were required to work in their original workplace unless there was a valid reason for relocation or working from home, confidentiality requirements and technology permitting.

187. On the balance of probabilities, the Tribunal found a PCP did not exist arising out of the practice of requiring employees to carry out their contractual role within their contractual workplace given the facilities for a transfer under the respondent's policies and procedures. It did not find there was a practice of requiring the claimant only to carry out his role at the Ralli Quays office in Manchester as he could have relied upon, had he met the qualifying conditions, any of the policies referred to above, in support of a transfer to an office in Liverpool or had the IT facilities/confidentiality considerations allowed, carry out his contractual duties remotely or in a different office. The first PCP cannot thus be relied upon by the claimant in support of his claim for reasonable adjustments.

188. With reference to the second PCP, namely, the practise of refusing to consider permitting employees to work from different locations, or remotely, there was no satisfactory evidence pointing to such a practice on the part of the respondent as set out within the factual matrix above. It is clear permitting the claimant to move to Liverpool and/or work remotely was considered and in respect of remote working, rejected due to IT limitations concerning CHIEF accessible only from Ralli Quays and confidentiality issues. It is notable the claimant was aware of the fact had he applied for the call centre position it is more likely than not he would have been working in Liverpool, a different location, with adjustments to the role.

189. With reference to the second issue, namely, did any of the PCPs place the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled, the Tribunal found that they did not. If the Tribunal's analysis is incorrect in relation to the first PCP relied upon, and a PCP did exist to the effect that the claimant was required only to carry out his role at Ralli Quays in Manchester, it would have gone onto find

as a result of the respondent's policies the claimant was not disadvantaged in comparison with persons who were not disabled. It is correct he did not qualify under any of the criteria required to be met under the Special Transfer Policy and a non-disabled employee failing to meet the criteria would have been similarly disadvantaged as submitted on behalf of the respondent.

190. With reference to the third issue, namely, did the respondent know, or ought it reasonably to have known; of the claimant's disadvantage the Tribunal found there were three possible relevant dates; 23 June 2014, 4 December 2014 and 13 March 2015. The Tribunal found that the earliest date the respondent was made aware of the possibility that working from Manchester is "likely" to help his panic and depression as opposed to wanting to work closer to home, was the 13 March 2015 Fit Note. Prior to this date the respondent was aware that the claimant's core concerns from the outset were journey times and relationships with work colleagues. During the absence period the concerns changed to panic (as set out in 13 March 2015 MED3) and the claimant's inability to enter into Manchester. He was dissatisfied with the transfer to Ralli Quays prior to it taking place in November 2013 and by approximately 2014 he had concerns about his work colleagues and this was followed by "concerns" with Anneka Wilson, despite the fact she had only been in post for 2-days. Travelling to Ralli Quays was described by the claimant as a 4-hour commute in a 23 June 2014 email that threatened a "relapse of a breakdown." Prior to this date the respondent did not know, and nor ought it reasonably have known the claimant was disabled, the claimant having applied for a position 4 grades above his own on 23 June 2014, the day he went off sick never to return to work. The respondent was entitled to take into account the expert views of occupational health that the claimant was not disabled until the 4 December 2014 report, when for the first time, occupational health was of the view, with the usual caveats, the claimant's medical condition qualified as a disability. The 4 December 2014 medical report made no mention of any disadvantage caused to the claimant by feelings of panic at travelling into Manchester per se, and the first indication of this was the 13 March 2015 MED3.

191. With reference to the fourth issue, namely, was it reasonable for the respondent to permit the claimant to work away from Manchester remotely or in another office, such as Liverpool, in order to avoid that disadvantage, the Tribunal would have gone on to find, had the claimant established the existence of the PCP relied upon, that it was reasonable and on the balance of probabilities, the respondent had given a clear indication on a number of occasions the call centre role was available with adjustments, and all the claimant needed to do was apply with the support of his manager. The Tribunal accepted the evidence given on behalf of the respondent as to the reasons why the claimant could not work remotely either at home or from another office. Valarie Nelson gave a detailed explanation as to why the electronic system known as CHIEF that had been installed on computer terminals within NIDAC could not be installed on to a laptop due to data security issues. When the claimant was not using CHIEF, which formed a large part of his work, he dealt with a paper based casework using official stamps that could not be allowed off the premises due to security and

confidentiality; it is undisputed the claimant dealt with numerous sensitive confidential documents. He also formed part of a team, which involved reviewing and checking each other work where errors were expected to be identifying without delay. This would be difficult if not impossible if the claimant was not working in the office.

192. The fit notes that followed the claimant's absence on 23 June 2014 did not put the respondent on notice of the claimant's disability or any disadvantage. The fit notes at the outset of his absence referred to "stress at work"" and it was not until the 4 August 2014 fit note depression was cited as the reason for absence with no adjustments suggested. The occupational health report of 15 August 2014 advised the claimant was unlikely to be disabled. It is notable, following a discussion between the claimant and the occupational health advisor on 12 August 2014 and in relation to the subsequent reports obtained, occupational health did not advise the claimant was too unwell and should not attend meetings. As indicated above, the claimant refused to attend meetings and have regular contact with managers from the outset of his absence with the result that the requirement to meet the various stages in the respondent's Continuous Absence Policy and Managing Attendance Procedure were not met. The first one-to-one meeting took place on 26 November 2014, a meeting that should have taken place within one month of the absence and not 5 months. It is notable in the occupational health report dated 4 December 2014 negotiation, conciliation and resolution was advised, and there was no indication the claimant could and should not attend meetings.

193. Had the respondent been under a duty to make reasonable adjustments the Tribunal would have gone on to find by 5 January 2015 this duty had been met. The Tribunal found the claimant was offered the opportunity to apply for a transfer to Bootle (near Liverpool) as a service consultant customer service at a call centre. He had previous call centre experience and the support of his line manager. On the balance of probabilities, the Tribunal found had the claimant applied for a position he would have been offered the role. He did not because the claimant's attitude throughout the entire process relating to his absence was the reasonable adjustment sought was into a role of his own choosing. The claimant did not apply because he knew the role would be offered to him and did not want to work in that position. The Tribunal was reminded by the respondent the duty was to investigate or consider what steps should be taken: Tarbuck v Sainsburys Supermarkets [2006] IRLR 664, and not to give an employee the adjustments he wants: Garrett v Lidl UKEAT/0541/19/ZT para.19.

194. It is the case the claimant was not offered the role in Bootle call centre under the respondent's Reasonable Adjustment's Policy as a priority mover. Had the claimant been given priority status he would not have needed to apply and be interviewed, and this was the only advantage denied to him. Given the fact the claimant had applied for numerous vacancies at a higher level, and there being no indication from the claimant or medical experts that he was unable to apply for vacancies and attend interviews, the claimant was not disadvantaged on the basis that the outcome would have been a transfer

out of Manchester had he accepted the Bootle job, and this was the reasonable adjustment sought focusing on the practical result and not the process of reasoning and how the adjustment was considered. It is the Tribunal's view on the evidence before it, on the balance of probabilities, had the claimant been granted priority mover status and transferred to the vacancy of service consultant customer service at the call centre in Bootle the offer would have been rejected on the basis the claimant had not enjoyed the role in the past and considered himself to be unsuitable on the basis of his medical condition. This assertion was unsupported by any medical evidence. It is clear to the Tribunal the claimant was looking for a job of his own choosing and possibly a promotion, for which management did not consider him suitable. In an email sent 9 January 2015 the claimant confirmed his reasoning as to why the role was unsuitable. There are numerous references by the respondent thereafter to the call centre role, with offers to make adjustments to that role in order to entice the claimant to apply, but he was resolute in his rejection of it.

195. The Tribunal was of the view the respondent had already met its obligation to make reasonable adjustments during this period up to 13 March 2015 by offering to transfer the claimant into a new job in a new team on another floor and under a different manager and the call centre role in Bootle, was no duty for it to continue making offers until the claimant chose to accept a job that suited him. It is notable the 1000 job centre vacancies were advertised on 2 different occasions and thus the claimant had two opportunities to submit his application to Anneka Wilson who had offered to support him if he chose to apply. This is the role the Tribunal finds, on the balance of probabilities, the claimant would have been offered and thus the respondent met its obligation to make reasonable adjustments in this regard given the fact the customer service position complied with the claimant's request to be moved out of Manchester, and it would have facilitated his return to work.

196. Thereafter, the claimant remained absent and it was not until the 13 March 2015 Fit notes that panic/depression was cited. The 8 April 2015 MED3 referred to "depression ties in with work" suggesting an alternative place of work. There was no reference to the claimant experiencing panic attacks when entering Manchester. During the relevant period the respondent accepted the claimant was disabled; but appeared to ignore the reference to panic on the 13 March 2015 Med 3. It was in the grievance investigation meeting held 14 May 2015 that the claimant specified in any detail feelings of panic when travelling to Manchester and his inability to do so.

197. It was submitted on behalf of the respondent the claimant had changed his evidence to include a "Manchester phobia" at the liability hearing, and this was not supported by medical evidence. On careful review of the contemporaneous documents it became apparent to the Tribunal this was not a new matter, but one that had been aired at various internals, albeit the claimant had been far from clear in what he was saying and had not at any stage described it as a "phobia" or "Manchester phobia." Up until 13 March 2015 MED3 the respondent was entitled to assume the claimant's references

to Manchester were to the office at Ralli Quays, hence the reasonable adjustments put in place, and which could have resulted in the claimant returning to work albeit into a different team under a different manager on a different floor.

198. Following the 13 March 2015 MED3 and 14 May 2015 grievance hearing the respondent failed to explore the claimant's aversion to entering Manchester, either via his GP or occupational health. Up until that date, based on the information before it, given the equidistance between the claimant's home and Manchester/Liverpool, it was not a reasonable adjustment to have transferred the claimant to Liverpool. Wigan was discounted as confirmed by Mr McNerney due too imminent closure.

199. The 13 March 2015 was the earliest date the respondent was alerted, by reference to the Med 3, of the claimant's panic and the fact that working away from Manchester may help. Prior to this the respondent was not put on notice, the claimant having expressed an interest in a temporary promotion in Manchester in June 2014 and there being no satisfactory medical evidence linking his medical condition with an aversion to Manchester. It was at this stage the respondent should have considered obtaining medical advice clarifying the position one way or another, but its failure makes no difference to the outcome of this case. The claimant's oral evidence before the Tribunal when dealing with his aversion in Manchester was unsatisfactory. The Tribunal was reminded in oral closing submissions made on behalf of the respondent, that the claimant's omission to make clear the aversion to Manchester city centre during the capability process was due to his mental health condition, was far from plausible. The Tribunal agreed, noting the claimant had prepared, albeit with assistance, and submitted lengthy, coherent and detailed letters and made a number of oral representations as to why he should be moved from Manchester "nearer home" the clear impression being miles and journey time, (and not an aversion to Manchester) which was investigated by the respondent, who could only go off the information it was provided with, and discounted.

200. The medical position did change and an up-dated-report should have been obtained; there was no evidence before the Tribunal that the respondent believed the claimant was fabricating his condition with a view to engineering the transfer he sought, into a role that was suitable for him. Mr Northall submitted it was not encumberant on the respondent to refer the claimant to occupational health a fourth time prior to making the decision to dismiss. The duty to make adjustments does not involve a duty to investigate, and this was accepted by the Tribunal in accordance with Tarbuck referred to earlier.

201. Based on the contemporaneous evidence, the Tribunal is in no doubt the claimant believed he had leverage as a result of being disabled under the EqA and this resulted in unreasonable demands being made as to the type of the role that would have been acceptable to him, with the result that when he was invited to apply for the Bootle call centre role in January and February 2015 it would have made no difference had the respondent offered the role without competitive interview. It was not disputed there were 1000 vacancies

in total nationwide, with 100 of those in Bootle, and the claimant would have been successful. Further, the claimant was not prevented by his medical condition from applying for vacancies, and it was his choice to make applications for promotion deemed by management to be neither suitable nor supported. In contrast the call centre role was suitable and supported by management. It was not for the claimant to pick and choose jobs. He may not have wanted to work in the call centre; the position was a reasonable alternative on the basis that it took him out of Manchester into Bootle on the same grade.

202. The respondent's failure to obtain up-dated medical evidence in this case have been exacerbated by the advice of HR, the changes in the medical evidence by March 2015 appeared to have been overlooked by the respondent. The claimant's application to RAST was blocked at the gate keeping stage and it may have been the case that had it been forwarded to the director of HR; an up-to-date medical report may have been obtained. Whilst the respondent can be criticised for the way it approached the medical evidence concerning the claimant's panic attacks, it made no difference to the Tribunal's finding that had the claimant has failed to establish the relevant PCP, a comparator and substantial disadvantage. The respondent took the step of inviting the claimant to apply for the call centre position, and the practical result of that measure was the claimant would have been offered the position and moved out of Manchester, which was the focus of the adjustment removing any disadvantage caused to claimant by him travelling to and working in Manchester. Had the claimant been given priority status and slotted into the call centre role as a reasonable adjustment, he would have refused. The Tribunal agreed with the submission made by Mr Northall, an adjustment does not cease to be reasonable because the claimant disagrees with its implementation.

203. In conclusion, applying the burden of proof set out in S.136 of the EqA the claimant had satisfied the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise, taking into account the respondent's explanation, untainted by disability, it finds there was no breach in the duty to make reasonable adjustments, the claimant was not unlawfully discriminated against in accordance with S.20-22 and Schedule 8 of the EqA, and his claim unlawful disability discrimination is not well-founded and dismissed.

<u>Section 19 indirect discrimination</u>

<u>The first PCP relied on</u>

204. With reference to the fifth issue at (a) namely, did the respondent apply a PCP consisting of the respondent's Policy on Special Transfers as set out above, on the balance of probabilities the Tribunal found it did amount to a PCP.

205. With reference to the issue, did the application of the PCP put disabled persons at a particular disadvantage when compared with persons who were

not disabled, or would it put them at that disadvantage, the Tribunal found it did not.

206. It was submitted by Mr McNerney special transfers were a gateway to get a move if the criteria were met and restricting that ability to move disadvantaged disabled people because they may need the advantage of an easy move. It was suggested the Tribunal possessed judicial knowledge in this respect, on the basis that disabled employees are disadvantaged because they are more "susceptible" to long term absences. The Tribunal's judicial knowledge in this regard was compared to its knowledge on the female/male split on childcare. The Tribunal has dealt with this below, disputing it held judicial knowledge to the effect disabled employees were more "susceptible" to long term absences and required the advantage of an office move in comparison with non-disabled employees.

207. In relation to the first PCP the Tribunal preferred the submissions made by Mr Northall, who accepted the policy on special transfers amounts to a PCP, stated it cannot be shown the policy on Special Transfers caused group disadvantage to disabled persons. The claimant did not qualify under the Policy because he was not a victim of violence or at significant risk of violence outside the workplace, and this had nothing to do with his disability. A non-disabled person would be similarly disadvantaged if they did not qualify. The purpose of indirect discrimination is to challenge employment practices that appear to be applied neutrally but have greater disadvantageous effect on one protected group in comparison with a group who does not share the same protected characteristics. The Tribunal found there are no evidence disabled employees are more likely to be victims of violence or occupy roles that put them at a significant risk of violence outside the workplace.

208. With reference to the issue was the claimant put at that particular disadvantage, the Tribunal found he was not. In short, the claimant has failed to satisfied the Tribunal that there are primary facts from which inferences of unlawful indirect discrimination can arise and this PCP cannot be relied upon as it cannot be shown the Policy on Special Transfers caused group disadvantage to disabled persons.

<u>The second PCP relied on</u>

209. With reference to the second PCP(b); did the respondent apply the a PCP consisting of the respondent's dismissing employees on long term sick absence that put disabled people at a particular disadvantage because they have more frequent absences or long periods of absence caused by their disability, the Tribunal found on the balance of probabilities the Managing Absence Procedure, Continuous Absence Policy and Dismissal for Poor Attendance Guidance amounted to a PCP, but there was no satisfactory evidence of group disadvantage to disabled persons with no statistical evidence as to the make up of the respondent's workforce or attendance levels as submitted by Mr Northall.

210. It was submitted by Mr Northall there was no evidence of such a "policy." Whether an employee on long-term absence would be dismissed was a question of fact and degree and decided on the circumstance of each case. The Tribunal was of the view it is clear from the Managing Attendance Procedure, Continuous Absence Policy and Dismissal for Poor Attendance, whilst the aim of the respondent was to support people back to work as soon as they are well enough, if this could not be achieved in a realistic time frame and there was no prospect of returning to work in a reasonable time scale, i.e. an absence greater than 12 months, the case should be referred to a decision maker to decide whether or not dismissal is appropriate for poor attendance.

211. The claimant has not provided any evidence identifying the appropriate pool for comparison. No statistics have been relied upon to demonstrate a disparate adverse impact. The EHRC Employment Code refers to statistics being a useful tool in establishing indirect discrimination that involves comparing the proportion of workers with and without the protected characteristic who are disadvantaged in order to ascertain whether the group with the protected characteristic experience a particular disadvantage in comparison with others – paras. 4.21-4.22. In this case the claimant relies on judicial notice of a particular disadvantage. The Tribunal accept there are cases, for example, indirect sex discrimination resulting from childcare responsibilities, where common knowledge concerning social attitudes and practices relating to the disadvantage of a particular group is accepted without proof.

212. Mr McNerney submitted the Tribunal could rely on their judicial knowledge that disabled employees were off sick and needed office transfers more than non-disabled. The Tribunal disagreed. It does not have any judicial knowledge to this effect, and felt most uncomfortable with the concept bearing in mind the clamant has dyslexia, a disability that did not result in any absences from work or an office transfer. No doubt there may be a number of employees absent from work periodically or in the long-term who are not disabled and yet are dismissed for cumulative short–term or lengthier absences. Based on this Tribunal's knowledge and expertise it did not feel able to find that significantly more disabled people were dismissed following a long-term sick absence or required an office transfer than non-disabled. If the Tribunal is wrong on this point, and if common knowledge exits to this effect, sufficient for judicial notice to be taken of that particular disadvantage, the Tribunal would have gone on to find the claimant showed the PCP not only put or would put persons with whom he shared the relevant protected disadvantage at a particular disadvantage but also that he had been put to that disadvantage by being dismissed prior to it considering objective justification.

Objective justification

213. With reference to the issue of objective justification, had we got to this point in the process, the Tribunal held the respondent can show the decision to dismiss the claimant after an absence in excess of 12 months with no foreseeable return to work, was a proportionate means of achieving a

legitimate aim. The burden of establishing the defence of justification on the balance of probabilities lies with the respondent, and it has discharged that burden.

214. It was submitted by Mr McInerney dismissal was not a proportionate means of achieving a legitimate aim and the alternative would have been to get the claimant back into work by either moving him or relocating. It was maintained Mrs Nelson's decision not to was based on a "flimsy" analysis of CHIEF. The claimant, despite his disability, was left to apply for vacancies along with other applicants and there were a number of ways in which he could have been got back to work.

215. The justification test requires that the application of the PCP is a 'proportionate means of achieving a legitimate aim - unless the aim behind the imposition of a PCP is regarded as 'legitimate', the employer's defence will not get off the ground and there will be no need for the Tribunal to examine the issue of proportionality. According to the EHRC Employment Code, for an aim to be legitimate it must be 'legal, should not be discriminatory in itself, and it must represent a real, objective consideration' - Para 4.28. Consideration of the defence of justification requires an objective balance to be struck between the discriminatory effect of the PCP and the reasonable needs of the party who applies it. This balancing exercise better known as the test of 'proportionality' is set out in S.19(2)(d) of the EqA. The EHRC Employment provides – "Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts" - Para 4.30.

216. The respondent's attendance procedure is used to minimise absenteeism and maintain delivery of public services. Absences can adversely affect teams and their workload. A lengthy absence, such as the claimant's, adversely impacted on the respondent's business, workload of colleagues and quality of service to the public. The policies and procedures are aimed at ensuring the attendance of employees at work, and given the steps taken by the respondent to get the claimant back into work, the Tribunal concluded on balance, the dismissal was a proportionate means of achieving the aim of consistent and effective attendance at work given the length of the claimant's absence and there being no indication he would be returning to work in the foreseeable future, the claimant having rejected wholesale the respondent's reasonable adjustments aimed at getting him back into work as set out in the factual matrix above. The claimant was aware of the possibility he may be dismissed as a result of continuing absence, and yet when a discussion took place at the decision makers meeting with Renu Mair concerning alternative employment and the claimant taking on the role in Bootle call centre with adjustments made to it so as to reduce any possible stress for him, his stance remained unchanged; the call centre role was unsuitable come what may. By this stage the claimant was aware he had been absent a "ridiculous amount of time" as admitted in cross-examination,

and that his condition had worsened and taken a back step. The Tribunal accepted the evidence given on behalf of the respondent that the claimant's position in the NIDAC team could not be replaced during his absence, and the team was under pressure of work.

217. It was submitted by Mr Northall the claimant had refused to explore the Ralli Quays adjustments, and the Tribunal noted this was indeed the case even during the period prior to 13 March 2015 when the claimant was not asserting he suffered from anxiety and unable to travel into Manchester. It is correct the claimant refused the offer of mediation as part of the grievance process, and there was no certified medical reason supported by medical evidence for this.

218. The Tribunal is aware there is a need for it to carry out a balancing exercise. In order for it to do so there has to be a nexus established between the function of the employer and the imposition of PCP. The Tribunal accepted the respondent had established a 'real need' based for employees to attend work on a regular basis and manage non-attendance, when balanced against the discriminatory impact complained of. It found the respondent's means proportionate and necessary to achieve the relevant objective given the reasonable needs of the business. The Tribunal found the decision taken by the respondent was justifiable.

219. In conclusion, the claimant was not unlawfully discriminated against in accordance with S.19 of the EqA, and his claim of unlawful indirect discrimination is not well-founded and dismissed.

Disability related.

220. With reference to the first issue, namely, was the claimant treated unfavourably by: (a) Being dismissed, or (b) Being awarded 0% compensation following dismissal, the Tribunal found that he was in respect of (a) but not (b). The respondent admitted the claimant was dismissed because of his long-term absence and that this arose in consequence of his disability. The issue was therefore one of justification.

221. Mr Northall referred the Tribunal to the EAT decision in Pnaiser v NHS England [2016] IRLR 170 paragraph 31, and the requirement that the Tribunal must determine "what caused the impugned treatment, or what was the reason for it…an examination of the conscious or unconscious thought process of A is likely to be required…The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more have trivial) influence on the unfavourable treatment, and so amount to an effective reasons for or cause of it…A's motive in acting as he or she did is simply irrelevant."

222. With reference to the second issue, namely, was such treatment because of something arising in consequence of the claimant's disability (The claimant asserts that the "something arising" was his long-term absence), the Tribunal found that it was in respect of (a) but not (b). The Tribunal found on

the balance of probabilities the claimant was awarded 0% compensation following dismissal the decision having been made by Katherine Al Sherreri taking into account written representations of Renu Mair who recommended 30% and Anneka Wilson who recommended zero compensation. Both criticised the claimant for his management of the absence and refusal to trial adjustments offered.

223. Renu Mair recorded how the claimant had been supported, failed to apply for suitable jobs when they became available including the 1000 call centre vacancies. She found the claimant had has made "some but insufficient efforts in with the keeping in touch arrangements, some but insufficient efforts in applying for jobs in Liverpool." Anneka Wilson criticised the claimant in similar terms, and described how he was "not very cooperative or forthcoming as he refused to speak to management until almost 4 months after he went off sick."

224. Katherine Al Sherreri award zero percent on the basis of the recommendations relying on the fact the claimant had not made sufficient effort to keep in touch or returned to work. As indicated above, no medical evidence existed advising the respondent the claimant was unable to keep in touch or attend meetings, and the occupational health advisor was clear that there should be communication in order for there to be resolution, hence the respondent's offer of a mediation later on in the process. It is not disputed Katherine Al Sherreri would have taken into account the recommendations of Renu Mair and Anneka Wilson before arriving at her decision.

225. The CSAB, an independent body consisting of retired civil servants, concluded the decision to pay zero percent was fair. In the decision reference was made to the claimant having been "selective in his efforts to secure an alternative posting. He had apparently passed up the opportunity to pursue some level transfer opportunities, although he had applied for a number of posts at higher grades…further, although travel to work was stated to be a significant contributor to his condition, he had…apparently moved home to 10 miles further away…in this connection it was not clear Mr Garau's preferred new location of Liverpool would materially improve his travel position, nor is it clear why, in the papers submitted by Mr Serra to evidence roles he had applied for, one of these appeared to be in Manchester…The Board also noted that there appeared to have been shortcomings on Mr Garau's part in adhering to the keeping in touch process and that Mr Garau argued that this was attributable to his illness and that there had also been failings on the part of the department." These are all matters unrelated to the claimant's disability on the evidence before the Tribunal and the claimant has not discharged the burden of proving that the reasons he was awarded a zero was causally linked to his disability and the Tribunal found it did not arise in consequence of that disability.

226. With reference to the third issue, namely, if so, can the respondent show that such treatment was a proportionate means of achieving a legitimate aim, the Tribunal was satisfied that it could on the balance of probabilities in relation to (a) the claimant being dismissed. The Tribunal refers to paragraph

above relating to justification. Mr Northall suggested a 2-stage approach should be used as follows: (a) Is the legitimate aim non-discriminatory and one that represents a real, objective consideration; and (b) if the aim is legitimate, is the means of achieving it proportionate – that is appropriate and necessary in all the circumstances? The Tribunal was referred to Hardys v Hansons Lax [2005] IRLR 726 in which the Court of Appeal held that it is for the Tribunal to weigh the reasonable needs to the undertaking against the discriminatory effect of the employer's measure and make its own assessment of whether the former outweighs the latter. This the Tribunal has carried out, balancing the claimant's need not to be dismissed with the respondent's need of ensuring his consistent and effective attendance at work against the factual background set out above where the claimant has rejected all of the reasonable adjustments offered to him, even before he reported feeling panic and was unable to drive into the city of Manchester. In particular, he refused to apply for a vacancy which he knew would be offered to him with adjustments and there was no medical reason for this. Against this background it is undisputed evidence the claimant was not replaced during his absence, the team was small and under pressure and the respondent could not recruit. It was accepted by the Tribunal as a result of such a lengthy absence and its consequences on the claimant's team within NIDAC, a business need existed, and this outweighed the claimant's argument that whilst he acknowledged the absence had been a "ridiculous amount of time" and his condition had deteriorated, the respondent as the "biggest employer in the North West" could have transferred him to Liverpool, Bootle or Warrington and as a consequence, the dismissal was not a proportionate means of achieving a legitimate aim. The problem with this argument is that on the evidence before the Tribunal, had the respondent insisted the claimant transfer to Bootle and work in the call centre he would have refused on the basis that a position of his own choosing was the starting point for any transfer and anything other than this would not be a reasonable adjustment.

227. In conclusion, the claimant was not unlawfully discriminated against in accordance with S.15 of the EqA, and his claim unlawful discrimination arising from his disability is not well-founded and dismissed.

Victimisation

228. With reference to the first issue, namely, did the claimant's grievance dated 6 March 2015 amount to a "protected act" the Tribunal found that it did.

229. With reference to the second issue, namely, did the respondent treat the claimant detrimentally by deciding to award him no compensation following termination, the Tribunal found that it did not for the reasons set out above.

230. If the Tribunal is wrong on this point, it would have gone on to consider the third issue, namely, if so, was such treatment because the claimant had done a protected act, concluding it was not.

231. Mr McNerney submitted Anneka Wilson influenced Katherine Al Sherreri by her adverse script and it is this that caused the decision to award zero percent. The claimant has discharged the burden of proof, which shifted to the respondent and Katherine Al Sherreri did not give evidence explaining her decision-making process. The explanation from head of HR was not "worth anything" as she did not ascertain what information Katherine Al Sherreri had before her, and adverse inferences can be drawn from this. Mr McNerney's observations are valid in part; the Tribunal agrees it would have been preferable for it to have heard from the person who actually made the decision as opposed to her manager. Any adverse inferences that could have been raised are dislodged by the facts in this case; the criticisms of the claimant by Anneka Wilson and Renu Mair were based in fact and it follows logically that the effective reason for the zero percentage award flows from this and not the protected act, which appeared not to have any influence on the decision.

232. The Tribunal accepted the claimant's victimisation complaint was predicated on Anneka Wilson's original recommendation and not the fact that Katherine Al Sherreri was the decision maker. She was line managed by the director of HR, based in London and the Tribunal accepted on balance, evidence given on behalf of the respondent that she had had no prior knowledge of the claimant or his case. As indicated above on the balance of probabilities the Tribunal found it is unlikely Katherine Al Sherreri would have known about the grievance against Anneka Wilson, and there was no evidence whatsoever that she did possess such knowledge. The Tribunal accepted Andrea Williams McKenzie's evidence that she was unaware of the grievance as was Katherine Al Sherreri. In addition, it cannot be the case that the CSAB was aware of the grievance and motivated to confirm the decision and reject the appeal on that basis. The Tribunal accepts the submission made by Mr Northall that the actual decision to award no compensation was made by two independent decision makers, Katherine Al Sherreri and the CSAB thus undermining any argument the claimant may have that either were motivated by the protected act.

233. It was submitted by Mr Northall even if the claimant was able to show Anneka Wilson was motivated by the content of the grievance, he cannot show Katherine Al Sherreri and/or the CSAB were similarly motivated given that neither appeared not to be aware of the grievance. It is not credible the CSAB would take into account the fact the claimant had raised a grievance against his line manger as a basis for awarding zero percent.

234. The Tribunal was referred to CLIFS v Reynolds [2015] IRLR 562 a Court of Appeal Judgment. The Court of Appeal in CLIFIS took the view it was fundamental to the legislative scheme that liability can only attach to an employer where an individual employee or agent for whose act it is responsible has done an act which satisfies the definition of discrimination. That meant the individual employee who did the act complained of must him or herself have been motivated by the protected characteristic - another person's motivation could not render the act in question discriminatory. The correct approach in a 'tainted information' case was to treat the conduct of the

person supplying the allegedly discriminatory information as a separate act from which loss could flow, provided it was not too remote.

235. The Court of Appeal held there was no error by the Tribunal in only considering the decision maker's motivation. If it were a case the decision to terminate the claimant's contract had been made jointly by the decision maker and others, the Tribunal would have had to consider the motivation of all those responsible, since a discriminatory motivation on the part of any of them would be sufficient to taint the decision. However, the Tribunal's findings showed only that the decision maker reached his decision as a result of (allegedly discriminatory) information provided, and opinions expressed, by other employees. That was not the same as saying that those employees were parties to the decision. The Court of Appeal conceded that there might be cases where it was difficult to distinguish the two situations. This Tribunal took the view that in Mr Garau's case it was not difficult to distinguish between Anneka Wilson's recommendation and the decision made Katherine Al Sherreri and the CSAB. It is apparent from the finding of facts above the claimant did not want to keep in touch at first, and failed to so do. He did not attend face-to-face meetings in accordance with the respondent's procedures, he ignored the advice of occupational health in his belief meetings were futile. He did not apply for vacancies outside Manchester for which he was qualified and would have succeeded in obtaining with managerial support, such as the call centre role in Bootle. These are all matters taken into account as evidenced by the contemporaneous documentation taken into account by Katherine Al Sherreri and the CSAB.

236. In conclusion, the claimant was not unlawfully discriminated against in accordance with S.27 of the EqA, and his claim for victimisation is not well-founded and dismissed.

Employment Judge Shotter
04.05.2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

13 July 2017

FOR THE SECRETARY OF THE TRIBUNALS