Claim Number: 1302702/2016

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr B Patton	**v**	**Secretary of State for Justice**

FINAL MERITS HEARING

Heard at:	**Birmingham**	On:	**30 October – 9 November 2017**
Before:	**Employment Judge Perry**	Members:	**Mr RW White** **Mr TC Liburd**

Appearances
For the Claimant: **In person**
For the Respondent: **Mr T Sadiq (counsel)**

JUDGMENT

It is the unanimous judgment that:-

1 There was no contravention of part 5 of the Equality Act 2010 and the claimant was not subjected to discrimination based on the protected characteristic of disability or age in contravention of s.13 (direct) and s.19 (indirect) Equality Act 2010. Those complaints are dismissed.

2 The claimant was dismissed by reason of capability, his complaint of unfair dismissal is not well founded and is dismissed.

3 The claimant has not shown, the burden being on him to do so, that he was entitled to further contractual (or discretionary) payment(s) as result of his dismissal being categorised by the respondent as "medical inefficiency" and his claims for breach of contract (and for the avoidance of doubt, unlawful deductions from wages) are dismissed.

REASONS

References in square brackets below are unless the context suggests otherwise to the page of the bundle or if they follow a case reference or a document reference, or a witness' initials, the paragraph number of that authority or document (e.g. [BP/36 or ET1/8.2]). References in round brackets are to the paragraph of these reasons.

THE COMPLAINTS & ISSUES

1 By a claim form presented on 5 October 2016 the claimant brought complaints of:

1.1 unfair dismissal,

1.2 unlawful deduction from wages

1.3 breach of contract,

1.4 disability discrimination, and

1.5 age discrimination.

2 The issues were identified and claim case managed at Preliminary Hearings on 14 January and 1 March 2017 before Employment Judges Dimbylow and Broughton respectively.

3 The respondent accepts that the claimant has a physical or mental impairment, namely:

3.1 Fibromyalgia (it is agreed this was diagnosed in 2013 prior to the time about which the claimant complains),

3.2 a benign tumour on the pituitary gland (again it is agreed this was diagnosed in November 2014 and this was prior to the time about which the claimant complains), and

3.3 skin cancer (again it is agreed this was diagnosed in July 2015 and this was prior to the time about which the claimant complains);

and is disabled within the meaning of s.6 Equality Act 2010 (EqA).

4 The relevant time for the disability claim (namely, when the discrimination is alleged to have occurred) is from August 2015 to the date of the issue of the proceedings on 5 October 2016.

5 When seeking to address the clarification of the issues Employment Judge Dimbylow identified in his case management order the detail Mr Patton would be expected to set out to pursue claims for reasonable adjustments pursuant to s.20 EqA (or for that matter harassment, (s.26) or something arising from his disability (s.15)). We sought clarification from the claimant as to how the claims sued he set out the basis upon which they any such complaints needed to be identified. The claimant provided a Scott schedule and at the Preliminary Hearing before Employment Judge Broughton on 1 March 2017 the issues were clarified and encapsulated by him in his order no reasonable adjustments complaint was pursued. We note in that regard Mr Patton was formerly a union official, received assistance from his union and thus knew how and where to access advice. He told us he also took advice from a solicitor following the Preliminary Hearing conducted by Employment Judge Dimbylow.

6 Accordingly, the question of knowledge (ss. 15 & 20) does not arise.

7 It was clarified following the Preliminary Hearing conducted by Employment Broughton on 1 March 2017 that the complaints included a claim for breach of contract (but not an unlawful deduction from wages claim – in any event the latter would stand or fall with our determination as whether the respondent was liable to make the payments claimed here because it was accepted that had not been paid)

8 Whilst the respondent had not supplied a revised list of issues addressing justification for both direct and indirect age as ordered by Employment Broughton, it had supplied revised response. That having been pleaded to the Tribunal directed Mr Sadiq to remedy that omission by the afternoon of day 1. He did so as follows:-

8.1 As to the business aim or need sought to be achieved namely the management of the Claimant's absence and its business.

8.2 As to the reasonable necessity for the treatment it was reasonable for the Respondent to consider how long it could sustain an arrangement whereby the it paid an employee fulltime pay for part-time hours, when there was no specific end point in the short to medium term identified by the employee or his medical advisers.

8.3 As to proportionality, it was proportionate since the Respondent could not sustain an arrangement whereby it paid an employee fulltime pay for part-

time hours, when there was no specific end point and given the claimant's stance there was no reasonable alternative to dismissal.

9 The remaining issues were as identified by EJ Broughton:-

1. UNFAIR DISMISSAL CLAIM

1.1. What was the reason for the dismissal? The respondent asserts that it was a reason related to capability and/or some other substantial reason (arising out of "medical inefficiency") which is a potentially fair reason for section 98(2) Employment Rights Act 1996. It must prove that it had a genuine belief in the facts and that this was the reason for dismissal.

1.2. Did the respondent hold that belief in the facts on reasonable grounds? The respondent asserts there was: consultation, investigation (including obtaining OH reports) and negotiation. The burden of proof is neutral here but it helps to know the claimant's challenges to the fairness of the dismissal in advance. The claimant stated that he was challenging the absence of warnings and his argument was also focused on the fact of his dismissal in circumstances where he says he remained fit for work and likely to improve in the foreseeable future. He alleges that his age and/or particular disabilities also played a part.

1.3. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer? The claimant's argument is that dismissal was outside the range and he should have been given more time for his condition to improve. Specifically, he believed that if he had been allowed one month beyond the date of the hearing of his appeal this would have made a real difference to his case; as by that time the knowledge about the effect of his skin cancer would have been greater; and would have affected the way in which the respondent dealt with him.

1.4. If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on the balance of probabilities, the facts alleged. In particular, the claimant would not agree to only being paid for the hours he actually worked because he says OH had recommended reduced hours but on full pay.

1.5. Can the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when? The respondent considers that this is relevant in the sense that if the claimant succeeds in the argument that he should have been given greater time, then at that new point the claimant would have been dismissed in any event.

3. SECTION 13: DIRECT DISCRIMINATION BECAUSE OF DISABILITY AND/OR AGE

3.1. Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely:

In relation to age

3.1.1. by dismissing the claimant to replace him with a younger officer

In relation to disability

3.1.2. on 19 August 2015 refusing to deal with the claimant's request for reduced hours on a local basis without a referral to OH

3.1.3. referring him 3 times to OH between August 2015 and February 2016 and

3.1.4. 3 appointments with OH between September 2015 and March 2016

in both cases because, the claimant says, the respondent refused to accept the OH recommendations because of his particular disabilities

3.1.5. being called to a return to work interview on 11 January 2016 and the same taking place on his first morning back. The claimant suggests other employees would not have had an rtw or, if they did, it would have taken place much later

3.1.6. at that rtw meeting questioning whether the absence was disability related and Ms Heath pointing at the claimant's chest and saying "that's not cancer"

3.1.7. on 9 February 2016 being required to record an hour lost for an urgent family phone call

3.1.8. insisting that the claimant record his start time as 7.30a.m when he was starting at 7a.m

3.1.9. on 20 April 2016 referring the claimant to OH in relation to the possible termination of his employment

3.1.10. calling the claimant to a capability hearing

3.1.11. dismissing him

3.1.12. not upholding his appeal

3.2. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on the following actual comparators and/or hypothetical comparators

in relation to 3.1.2

DN

in relation to the dismissal and appeal process and disability

PB, SD and WM

In relation to age related dismissal

LG, PB, SD and WM

3.3. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic(s)?

3.4. If so, what is the respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment? The respondent is to further particularise it's case in relation to the allegations as now understood and specifically the comparators Age only:

3.5. And/or does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent relies on facts not yet pleaded, and which will be given in the amended response which will include the following:

See above

4. SECTION 19: INDIRECT DISCRIMINATION IN RELATION TO AGE

4.1. Did the respondent apply any provision, criteria and/or practice that they were looking to remove more expensive probation officers and replace them with cheaper ones ('the provision') ?

4.2. Does the application of the provision put other people over 50 at a particular disadvantage when compared with persons who do not have this protected characteristic in that they are more likely to be at or towards the top of the pay band and have accrued more service related holiday?

4.3. Did the application of the provision(s) put the claimant at that disadvantage in that he was dismissed and replaced by a younger cheaper member of staff?

4.4. Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent relies on matters which will be set out in its amended response but which will include:

See above

5. TIME/LIMITATION ISSUES

5.1. The claim form was presented on 5 October 2016. Accordingly, and bearing in mind the effects of ACAS early conciliation (the dates on the certificate being 22 August 2016 and 12 September 2016), any act or omission in relation to the discrimination claims, which took place before 23 May 2016, is potentially out of time, so that the tribunal may not have jurisdiction.

5.2. Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

5.3. Was any complaint presented within such other period as the employment Tribunal considers just and equitable?

6. BREACH OF CONTRACT

6.1. The claimant clarified that he was claiming that he was contractually entitled to PIN 40 payments. He says that there was a contractual compensation payment, calculated on a formula for employees dismissed on grounds of medical inefficiency and that he should have received the same based on his full length of service

6.2. Was there a contractual entitlement to a termination payment?

6.3. If so, under which scheme?

6.4. What was the claimant's length of service for the purposes of such a scheme?

6.5. To how much is the claimant entitled? (subject to the tribunal's jurisdiction limit of £25000)

7. REMEDIES

7.1. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.

7.2. There may fall to be considered reinstatement, re-engagement, a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, and/or the award of interest.

10 At the outset, the panel checked if any adjustments were required by the parties. We indicated that we would be taking regular breaks and we did so least once an hour or thereabouts throughout the hearing. After each break the Employment Judge checked with the witnesses and parties if any adjustments or additional breaks were required they should let us know.

11 The Employment Judge at the outset also reminded the parties of the need to lead evidence, to challenge matters that were disputed by asking questions of the witnesses whose evidence was disputed and to summarise their cases at the end. An issue arose during the hearing concerning evidence that Mr Patten had not led evidence in his witness statement but instead had referred to in the Scott Schedule. We reminded him that Employment Judge Broughton's order (made after the Scott Schedule was lodged) was explicit in that regard.

12 The claimant also raised two matters at the outset:-

12.1 Firstly, in relation to what he considered to be harassment resulting from the threat by the respondent before the hearing to bring a potential second claim to recover what the respondent asserts were overpayments made to Mr Patton. They were not identified as requiring determination before us by Employment Judge Broughton nor was an application made to include the same. In any event it would as yet be premature as the respondent has merely indicated it seeks to recover those monies from Mr Patton and further given it does not appear to us that those matters fall within our ambit we suggested the parties discuss that issue to identify if a second set of proceedings could be prevented ensuing. The parties were unable to reach an agreement. We thus indicated we would leave those matters for the parties to resolve between themselves in due course.

12.2 Secondly regarding an application as to disclosure of evidence regarding comparators. Following a discussion, the reasons for which we do not intend to relay that application was not pursued by Mr Patton.

13 It was agreed at the outset the issues here would be limited to liability, and that *Polkey* and contribution issues would be addressed at the same time as remedy. It was agreed the substantive aspects of the breach of contract claim that we will relay in due course would be addressed at the same time as liability.

14 It was agreed that the claimant's dismissal also forming an act of discrimination that he would give his evidence first which would allow him to see the way Mr Sadiq asked him questions. We remind ourselves at this point that the burdens lie on different parties and differ for the discrimination, unfair dismissal and breach of contract claims.

15 That being so was agreed the panel asked Mr Sadiq to relay to the claimant any authorities upon which he relied. He supplied to the claimant copies of the four authorities that we refer to in relation to breach of contract claim (see (166)) and we referred the claimant to a number of other authorities that we relay below (145 & 148) and how he could obtain these on bailii.org if he wished to (and indeed he has referred us to some of the same). We made it plain he should not feel obliged to do so and that was done merely to allow him to have sight of the same in advance should he wish to but we did not wish the claimant to be overwhelmed by many authorities. On day 2 following receipt of the four breach of contract authorities from Mr Sadiq the claimant indicated it would have been helpful if Mr Sadiq had

highlighted where they were relevant. We told Mr Patton that it was not Mr Sadiq's role to do that.

16 We should add that at the start of the hearing the Employment Judge declared that he (like many other judges) was engaged in a claim against the Secretary of State/Ministry of Justice, but given that was against a separate administrative branch of the respondent that did not cause him to consider that he should recuse himself. Mr Sadiq thanked the Employment Judge for declaring the same before indicating (as did the claimant) that the respondent did not object to him hearing the claim.

17 Further at the end of the hearing the Employment Judge asked if there was anything that had been omitted that the panel could have done to have made the hearing a fair one, or that was done that rendered it not, save for the claimant indicating he did not like the insinuations made against him by Mr Sadiq both parties indicated that they considered the hearing was a fair one. The Employment Judge explained to Mr Patton that Mr Sadiq had a professional obligation to put the questions to the claimant in the way he had done and had the panel considered the way he had put them inappropriate it would have stopped them and they did not and had not.

THE EVIDENCE

18 We had before us :-

18.1 A bundle of 413 pages that was added to as the hearing progressed,

18.2 A chronology, and

18.3 A cast list & tree/structure diagrams of the relevant part of the respondent's business.

19 Both parties also lodged written closing submissions and elaborated on these orally.

20 The pre-reading we would undertake was also agreed at the start of the hearing.

21 We heard from the following witnesses:-

21.1 Mr Brian Patton (BP - the Claimant), a Probation Service Officer

21.2 Mr Terry McCarthy - a Senior Probation Officer (retired), who was a former line manager of Mr Patton.

21.3 Miss Alison Heath (AH) – a Senior Probation Office, Mr Patton's line manager at the time of the incidents that concern us.

21.4 Mr Andrew Wade (AW) – the Head of The National Probation Service's (NPS) Coventry, Solihull and Warwickshire and the dismissing officer.

21.5 Mrs Sarah Chand (SC) – Head of the Respondent's NPS Midlands Division. Who chaired the hearing of Mr Patton's appeal and upheld Mr Patton's dismissal.

21.6 Mr Jim Fraser - Her Majesty's Prison and Probation Service HR Policy Lead - HR Policy Team, HR Directorate.

22 It was confirmed before us and not disputed that Mr Wade was senior to Miss Heath and Mrs Chand senior to Mr Wade.

23 The respondent did not appear to the tribunal to have considered prior to the hearing when the witnesses would be availiable to give evidence. Miss Heath was on maternity leave and only availiable on two days, Mr Fraser and Mrs Chand had family commitments (albeit in Mrs Chand's case the degree of which could not be foreseen). We do not expand on them here because they relate to personal matters

and it is not relevant to do so other than for us to convey to Mr Patton our thanks for cross examining them out of turn. Whilst he had prepared questions in advance having seen the way Mr Sadiq asked questions of him and following the guidance that the Tribunal gave as to the way the matter should be conducted he sought time to reflect on his questions. He was of course given that extra time.

24 It is convenient at this point to record a request we also raised during the hearing to the respondent with regards to pagination. The bundle had additional pages inserted that were identified using both upper and lower-case letters instead of these being referred to as .1, .2 (or similar variants /1, (1) etc). That was unhelpful because clarity had to be sought between upper and lower case.

OUR FINDINGS

We make the following primary findings of fact on the balance of probabilities and from the information before us. It is not our role to attempt to resolve every disputed issue that has emerged during this hearing. What follow are our findings relevant to the principal issues in the claim.

Background

25 Mr Patton was born on 18 July 1953 and is now 64 years of age. He was employed as a Probation Service Officer (PSO) and is recorded as agreed in the Case Management Orders that he worked 37 hours per week for a gross salary of £2,281 per month, netting down to £1,699.

26 He was dismissed on the agreed date of 7 June 2016. There was originally a factual dispute when he commenced work; the respondent stated this was on 1 October 1998 although the claimant asserted it was 26 June 1996. The respondent now accepts the date asserted by the Claimant is correct [394 – 397].

27 In November 2012 Mr Patton made a flexible working request because of Grand-parenting commitments. His hours of work were subsequently changed to 7.30-3.30 Monday-Thursday and 7.30-3.00 on a Friday.

28 In 2013 Mr Patton was diagnosed with fibromyalgia.

29 On 1 June 2014, the probation service went through a restructure and its staff transferred either into the NPS or one of the regional Community Rehabilitation Companies. Mr Patton was among the staff transferred to NPS [411 – 413]. The respondent asserts that such transfers are exempt from TUPE because of Reg. 3(5).

30 Throughout the period that concerns us Mr Patton was a PSO who worked at the respondent's office at Sheriff Court in Coventry. After the "transfer" he was line managed by and reported to Miss Heath, a Senior Probation Officer (SPO)

31 Following the "transfer" the normal hours of work for Respondent's staff were 9:00 am to 5:30 pm Monday – Thursday and until 5:00 on Friday (although some staff worked late (evenings) on Thursdays for which they came in late etc on other days) although the respondent also operated a flexible working arrangement for its staff.

32 Mr Patton's flexible hours arrangement was maintained post "transfer" although he told us and we accept, he attended at 7.00 am each day.

33 On 1 September 2014, Mr Patton requested a referral to the Respondent's occupational health (OH) advisers, OH Assist. Miss Heath told us this arose from symptoms Mr Patton was experiencing with his Pituitary Gland [AH/9].

34 An Access to Work (AtW) Assessment was conducted in October 2014 and recommended that Mr Patton be provided with a chair, a sit / stand desk, Dragon Naturally Speaking Professional Access to Work, a Desk Mount and four half days'

Dragon Naturally Speaking Training [AH/11]. A copy of the AtW Assessment was not before us.

35 It was common ground the OH report the September 2014 referral supported recommendations an earlier Access to Work referral had made to put in place special assistive technology, a new chair and desk, as well as desk top equipment (the "assistive equipment").

36 On 20 October 2014 Mr Patton made a flexible working application, requesting to work 7.00am to 3.00pm. That application was refused on basis of business needs.

37 In November 2014 Mr Patton was diagnosed with a tumour on his pituitary gland.

38 By January 2015 the assistive equipment recommended by AtW and supported by OH had not been delivered.

39 On 30 January 2015 Mr Patton made a further request for an OH referral. Miss Heath told us [AH/12] he was concerned about the effect of his symptoms related to his tumour and Fibromyalgia, and as well as a delay in the delivery of the assistive equipment.

40 By 24 February 2015 the assistive equipment had still not arrived and Mr Patton made a further request to vary his hours for three months, proposing 7.00am to 1.00pm and working late night twice a month on Thursdays. [AH/13]

Mr Patton's first period of Reduced Hours on Full Pay (8 March - 25 May 2015)

41 On 5 March 2015 Mr Patton submitted an accident form [216d – 216j] concerning the impact of his symptoms on his work and the delays regarding the delivery of the assistive equipment. Mr Patton was concerned that the combination of his symptoms from his tumour and Fibromyalgia and medication was causing him excessive tiredness and fatigue, and affecting his ability to concentrate in the afternoon. Miss Heath told us she sought advice from the respondent's HR advisors [AH/14] and on 9 March 2015 Mr Patton met with Miss Heath to discuss his work pattern. She not only authorised his request to work 7.30am to 1.00pm with immediate effect but despite him not having sought this agreed that he should be paid his full salary despite the reduction to his hours. She told us [AH/13] and he did not dispute that was always intended to be a temporary arrangement to place pressure on the providers to action the assistive technology request. The arrangement was to end on 25 May 2015 but would be subject to regular review prior to then [217 – 218].

42 Miss Heath met with Mr Patton to review that arrangement on 7 April 2015 and 11 May 2015. By the second meeting the assistive technology had been delivered and the Claimant mid-way through some training. It was thus agreed he would return to his contracted hours of 7.30-3.30 Monday-Thursday and 7.30-3.00 on a Friday with effect from 25 May 2015 [AH/18].

Events following the diagnosis of Mr Patton's skin melanoma

43 Between Thursday 7 July and Thursday 25 August 2015 (he returned to work on Friday 26 August just before the Bank Holiday weekend), the claimant was absent from work having undergone a medical procedure to remove a skin melanoma.

44 Mr Patton complains [BP/10] that prior to that time Ms Heath appeared to be very supportive of his health problems as could be seen by his Appraisal [215-216] but his diagnosis marked a change in her behaviour. He speculated that in hindsight this could have been because he was attending work every day at a time when the Coventry office was very short of staff, whether through staff shortages, staff

sickness or staff annual leave commitments, and unfortunately her attitude towards him changed.

45 On 19 August 2015, prior to the claimant's return to work, he states he sought to discuss with Miss Heath a reduction in his working hours (without pay) because he felt at the time he was struggling to concentrate in the afternoons. They both agreed orally although neither mentioned this in their witness statements that Miss Heath visited Mr Patton at home during that period of absence. If minutes were made of that meeting they were not before us.

46 Mr Patton complains that on 19 August 2015 the Respondent refused to deal with his request for reduced hours on a local basis and instead Miss Heath referred Mr Patton to OH Assist [Issue 3.1.2] & [BP/11]. It is not in dispute that Mr Patton was referred to OH Assist, that he attended an appointment with an Occupational Health Adviser, Ms Amanda Savage on 15 September 2015 and indeed her report ("the Savage OH Report") which appears to be dated the same day (the hole punch is inconveniently positioned in our copy) [221 – 222] records the referral was received by OH Assist on 25 August (prior to his return to work).

47 Sadly, no copies of the OH referrals were within the bundle. Given the issues raised by Mr Patton we find that surprising. Of yet further surprise given the size and resources of the respondent's organisation and relevance to the issue the respondent provided no explanation for this. We find the respondent failed to identify if it had searched for those documents, if they still existed and if so why it had failed to disclose the same.

48 While giving evidence Mr Patton accepted that he had received copies of the occupational health referrals, he also accepted he had retained copies but could not give a good explanation why they were not in the bundle given that those matters were in issue. Whilst we acknowledge that he is a lay person and is not familiar with the procedures of the tribunal, he was in receipt of clear orders from the tribunal requiring relevant documents to be disclosed and cross-referenced within his witness statement. We find that he should have included those documents and/or brought copies to the hearing once their relevance was raised and given he had brought and sought to add other documents to the bundle

49 If as Mr Patton originally stated that meeting took place on 19 August, that was before he returned to work. In response to a question both Mr Patton and Miss Heath confirmed that meeting took place at his home. We find it surprising neither recorded that as such in their statements.

50 Ms Heath disputed that Mr Patton made a request for flexible working (reduced hours) in the August Home visit. She told us [AH/57] she believed the exchange Mr Patton refers to took place in February 2015.

51 Mr Patton maintained that the request was made verbally at their meeting but also stated the date of the meeting was not 19 August but 21 August and then subsequently suggested it was 24 August (in response to a suggestion it was 24 February).

52 Whilst Mr Patton also states it was made because he was struggling to concentrate in the afternoons [BP/11] Mr Patton had not returned to work by the time so whilst that difficulty in concentration could relate not just to work but generally, Mr Patton did not say that lack of concentration was a general one. That suggests in our judgment that the application was made when Mr Patton was back at work and thus not on the dates he suggests. The following matters also support that view.

53 As we say no record was made of that meeting that was before us and neither party referred to it as having been at Mr Patton's home while he was on sick leave. We find that surprising in the context of the other minutes Miss Heath kept that were before us. However, we also find Mr Patton's recollection of those dates was vague and inconsistent and that if that request been made and refused in the way Mr Patton suggests, we find that Mr Patton would more likely than not, have complained about the respondent's failure to address his flexible working request. We say that because where Mr Patton had previously made flexible working requests, and access to work recommendations and they had not been addressed, he repeated those requests and lodged an accident report. We find that had he made a request for flexible working in August he would have pursued this further.

54 It was common ground that when Mr Patton returned to work from 26 August to 21 September 2015 he worked his full-time hours on full pay and yet he led no evidence that he did complain about the failure to address the alleged flexible working request prior to 15 September (when he met with Miss Heath to discuss the OH report that resulted from the August referral). Those matters being so we find that he did not make a flexible working request in August 2015.

55 Mr Patton also accepted orally before us that a referral to OH was automatically triggered pursuant to the Respondent's attendance management policy [75] after a single period of 28 calendar days absence (irrespective of the number of or aggregate absences over a reference period). 19 August 2015 marked 42 consecutive calendar days absence and we find that a referral had already been triggered.

56 Mr Patton was asked how he pursued this complaint as direct disability discrimination given he accepted the referral had automatically been triggered. He told us it was irrelevant to him whether the referral had been triggered because the decision was within Miss Heath's remit. He went on to add that it might be different if he had passed the trigger point and this was not talked about at the time. That answer failed in our judgment to address the question, in addition it was at odds with the preceding answer Mr Patton gave (where he accepted that the trigger point had been reached) and given on his account he states there was no discussion about the trigger, that suggests that discussion took place before the trigger had been reached.

57 We find that the trigger having been reached prior to Mr Patton's request, the respondent's procedures dictated that an OH referral be made. Based upon the evidence that Miss Heath gave before us, we find that where the respondent's procedures required her to do something she was a manager who "went by the book" and followed those procedures. That does not mean to say that where she felt good practice required it, that prevented her from going beyond the respondent's procedures but we find as a minimum she followed them.

58 We find irrespective of whether the claimant was a person with a disability or not the trigger point having been reached and the respondent's procedures having required it that referral would have been made. We find the claimant was treated no differently to the way that any individual who had had a similar period of absence would have been treated, whether or not s/he suffered from a disability.

59 That trigger having been reached even if the claimant had made a request for reduced hours in August 2015 (and we find above he did not) we find that Miss Heath would not have addressed the claimant's request for reduced hours until the receipt of the occupational health report she was required to obtain had been received. We find that Mr Patton's disability would have played no part in that hypothetical refusal to address his request, because she would have treated any individual who had been

referred to occupational health because of the respondent's attendance management process and the triggers within it, in the same way and would not have addressed those matters until the occupational health report had been received.

60 Accordingly, we find that Mr Patton was not treated less favourably than he would whether or not he was a person with a disability.

61 The Savage OH Report suggested that a number of adjustments be considered, indicated that it was difficult to speculate on the prognosis for Mr Patton, indicated there was no reason why he could not return to his full role once recovered but suggested a further assessment be carried out once he had seen his neuro-surgeon. Ms Savage noted in her report that Mr Patton had told her that he had a good working relationship with Miss Heath and that she had been supportive of him. That is contrary to the way he now portrays their relationship at the time and the date he identifies that started to deteriorate (see (44)).

62 The Savage OH Report also recommended Mr Patton working hours be reduced to a maximum of six hours a day as a short-term measure until Mr Patton had seen his specialist dealing with his tumour and received a treatment plan.

Mr Patton's second period of Reduced Hours on Full Pay (21 September 2015 to 7 June 2016)

63 On 21 September 2015 Mr Patton met with Miss Heath to discuss the Savage OH Report. The meeting was minuted [223 – 224]

64 The Savage OH Report identified a number of adjustments that should be considered. We find these were discussed. In Mr Patton's view the greatest assistance to him would be a reduction in his working hours. Mr Patton described how he would become tired and found it difficult to concentrate in afternoons. Mr Patton was at that time chasing up a consultant appointment and expected it appointment to take place that October.

65 Miss Heath agreed that pending that consultant appointment that in addition to other adjustments that were in place (following the AtW recommendations) Mr Patton's hours would be reduced to 7.30am to 1.00pm for a period of three months but he would receive full pay despite him having only sought to reduce his hours and take a reduction in pay for the reduced hours.

66 We find it was made clear by Miss Heath at that meeting that if Mr Patton had not been given a date for the consultant's appointment in the next twelve weeks she would need to make a further referral to OH Assist for further medical advice and that would be regularly reviewed. That was because the respondent's policies allowed for adjustments in the form of full time pay on reduced hours on a short-term basis.

67 Miss Heath met with Mr Patton on two occasions to review work arrangements 6 November 2015 [225 – 236] and 14 December 2015 [229 – 234].

68 Mr Patton complains that even though Miss Heath accepted the recommendations in the Savage OH Report she made another referral to OH on 15 December 2015, the day after the second review. We find that Miss Heath referred him for a further OH assessment as a result of the review on 14 December 2015 and that the reason for that was not because Mr Patton was disabled but because, as Mr Patton accepted, he had not been notified of a further consultant appointment by then, the paid flexible working arrangement was always intended to be short term, it had been agreed from the outset another referral to OH would be made if the consultant appointment had not been received within 12 weeks, and he was still awaiting the consultant appointment, the 12 weeks being about to elapse. We find Miss Heath would have

treated any of her reports, whether disabled or not, in the same way in those circumstances and referred the matter again for another OH report.

The biopsy, absence and return to work (RTW) interview on 11 January 2016

69 On the afternoon of 5 January 2016 Mr Patton had to attend hospital for a biopsy; he remained off work for the remainder of the week. On his first morning back at work, 11 January 2016, he was called to a RTW interview by Miss Heath [BP/16]. The claimant asserts:-

69.1 *other employees would not have had an RTW or, if they did, it would have taken place much later [Issue 3.1.5], and*

69.2 *at that RTW meeting questioning whether the absence was disability related and Miss Heath pointing at the claimant's chest and saying "that's not cancer" [Issue 3.1.6].*

70 Firstly, as to the calling of the RTW interview, whilst not strictly required pursuant to the respondent's management of attendance procedure [80] relating to Mr Patton's return from that period of sickness absence we heard from Miss Heath and accept that it was her practice to try to hold RTW interview whenever there was an absence by one of her team on the first morning back, her commitments permitting. She told us she considered that good practice. Those procedures in our judgment set out the minimum standards required of managers. The claimant did not provide any specific examples where members of Miss Heath's team were not called to RTWs at all or where she met them some time after the team member's return to work. Nor did he did not challenge her about those points. Although we accept the claimant may not have been aware of such examples where as here he alleges that he was treated less favourably than colleagues some evidence of that less favourable treatment would need to be before us. It was not. We accept that that was genuinely her view and her practice.

71 However, even if we were wrong in that view by that time Mr Patton had been diagnosed as having three disabilities and OH Assist had advised that he was likely to be a person with a disability within the meaning of the Equality Act. He was awaiting a consultant's appointment, adjustments had been made in the context of both the assistive equipment recommended by AtW and the temporary changes to his hours and he was being paid full pay. We find in those circumstances, it was highly likely improbable that Miss Heath would not have sought, whether on her own account, or following advice from HR to have met with the claimant as soon as reasonably practicable following his return from any period of ill health, in which a biopsy had been undertaken.

72 We find that the respondent in doing so was merely complying with its obligations pursuant to its duty of care to its staff and its obligations to ensure that if any further adjustments were required in the claimant's favour that it appraised itself of what was required.

73 Whilst the claimant purports to suggest that undertaking a return to work meeting when it was or at all was less favourable treatment, he does not expressly state why that was so. However, he states that from that time Miss Heath began to monitor his attendance in a more aggressive manner.

74 As we state above we found it was Miss Heath's practice to attempt to meet with staff as soon as reasonably practicable following a period of absence to conduct a return to work meeting. Mr Patton as a disabled person with the various health requirements outlined above in our judgment reinforced her desire to hold that meeting quickly to assess any issues that had arisen during the absence and any

further adjustments that were required. However, as we say above we find that Miss Heath would have treated any individual, whether disabled or not who had returned from a period of absence where a health or other issue had arisen, in the same way.

75 We do not therefore consider the calling of the RTW, and it being on Mr Patton's first day back at work, to be less favourable treatment on the ground of disability. We find that Ms Heath would not have treated any other member of staff any differently.

76 At the end of RTW interview it was common ground that Mr Patton refused to sign a RTW interview record and only later returned this. It was also agreed that he sought the absence be treated as disability related sickness and in response he states Miss Heath pointed at his chest and said, "that's not cancer" [BP/16].

77 Miss Heath accepts she used those words but did not point at his chest and the words were used in the context of his assertion that the absence was related to his disability. She told us that she knew from a previous case in which she had been involved that to be recorded as disability related absence on a RTW form she had to seek advice from OH first, that Mr Patton had not received a diagnosis at that point that the biopsy was cancerous (and thankfully it was common ground before us that when it was received it was not cancerous), thus the biopsy could not be treated as a disability related absence and it was therefore outside of her remit for her to determine that it was such. However, she agreed to refer the question to OH to enable a decision to be made. We return to our findings in relation to that meeting in a moment (84) but first address the outcome of the OH referral made in December 2015 which was received following the RTW meeting.

78 The second OH assessment was conducted by another Occupational Health Adviser, Mr Stephen Pugh. His report was dated 11 January 2016 [241 – 242] ("the Pugh OH Report"). The Pugh OH report concluded that Mr Patton was fit for work but that the reduced hours adjustment should continue for a further six months. Mr Pugh also noted that Mr Patton had stated he was being supported by his manager and the specialist equipment supplied by the Respondent was proving beneficial.

79 Miss Heath said in both cross examination and her statement [AH/53] that following receipt of the Pugh OH Report she took HR advice and was informed that a further referral to OH was required firstly because a definitive answer how long reduction in hours and the consequent adjustment to Mr Patton's working hours needed to be supported for and managed, and secondly, if Mr Patton's absence following the biopsy should be treated as disability related. Mr Patton accepted orally that the third OH referral was made for those reasons and we find therefore a third referral was made to occupational health, this time to an occupational health physician, Dr Dar, by the respondent on 27 January.

80 We find that any employee who had been absent for that period without a definitive return date for full time duties being provided would have been re-referred to OH assist. Similarly, any employee who had sought to suggest that an absence was disability related without specific medical evidence supporting the same but in similar circumstances would have been referred to OH. We find the claimant's disability played no part in Miss Heath's decision(s) to make that further referral.

81 On 25 January 2016 Miss Heath again met with Mr Patton to review work arrangements [243 – 248] following receipt of the Pugh OH report. Miss Heath states that she explained to Mr Patton that she would have to make a further referral to OH Assist as Dr Pugh's report had not provided advice on how the reduced hours adjustment should be managed in the future other than saying it should continue for a further six months and that might not be feasible on the basis that he was receiving full pay for reduced hours [AH/33].

82 Miss Heath states that Mr Patton also raised the RTW form completed in early January [237 – 240], stating that the absence referred to in it should be classified as disability related and her statement that that was not cancer and that she was taking advice from HR. She alleges Mr Patton alleged she was sharing his personal data with colleagues without his permission naming Mr Mark Cornfield and Mr Nick Healey (both members of the Respondent's HR department), and that he told her he would be making a Freedom of Information request in due course [AH/35], [BP/16] & [249/50]. Miss Heath also states that it was at this point that she detected a notable change in Mr Patton's attitude towards her and more generally. The minute records (as does Miss Heath [AH/34]) that Mr Patton stated that he felt less supported by her and the Respondent, that he was being unfairly placed under scrutiny and was regarded as a hindrance (see (89 & 92)).

83 Following that meeting, on 27 January 2016 Miss Heath again referred Mr Patton to OH Assist, this time requesting an Occupational Health Physician's report. Despite the claimant's biopsy result having been received back and it being negative she still made the referral to OH Assist to determine if the absence for the biopsy was disability related. When OH confirmed that the absence to undergo the biopsy was disability related it was immediately recorded as such

84 Returning to the events of the RTW meeting we find that Miss Heath sought that OH Assist consider if the absence for the biopsy was disability related. We find that Mr Patton disagreed with her view that should be referred - he told us in his view it was obvious his absence should have been treated as disability related. The claimant accepted he did not provide any medical evidence to suggest that this was disability related at the RTW meeting (there is no suggestion of a sick note or any other verification of the medical position having been provided).

85 We find that the discussion that occurred arose because the claimant was unhappy that Miss Heath did not accept his view that the absence should be treated as disability related as a matter of course. In the absence of any supporting documentation we find it unsurprising that Ms Heath as an adherent of rules and procedure would have behaved any differently to any other member of staff irrespective of whether they were disabled or not and thus she would have sought guidance from OH, which is what she did.

86 Miss Heath accepts she used the words that she is accredited with saying. Before us she apologised, stating that she had not intended them to be treated in the way that the claimant took them. She further maintained they were not expressed in that way. We find that in the context of that meeting where the claimant had sought to relay the biopsy as related to his existing skin cancer diagnosis and that thus should be treated as disability related we find that whilst that comment could have phrased better Miss Heath was seeking to relay to Mr Patton that merely because a biopsy had been taken and he had asserted that it was related to his diagnosis that it was not necessarily disability related. We find that factually her statement was correct and she would have treated any individual who had sought to assert an absence was disability related in just the same way. We find Mr Patton was not treated less favourably than any other of her reports as a result.

87 As to the allegation Miss Heath pointed at Mr Patton's chest when she stated*, "that's not cancer"* this issue boils down to the question of whose version of events we prefer. We prefer her version for the following reasons.

88 Whilst in his statement made at the capability hearing Mr Patton refers to the pointing incident [296], in the supervision meeting on 25 January Mr Patton made no reference to Miss Heath pointing at him at the RTW meeting despite Mr Patton

stating at that meeting on 25 January that he felt less supported, that his ill health was under scrutiny and that the absence for the biopsy should be disability related. Further, he made an addition to the notes of that meeting [248] after Miss Heath had signed it referring amongst other matters to her comment *"it was not cancer*". We can find no reference in the meeting of 25 January to an allegation Miss Heath pointed at him. We find that given he expressed grievances about issues at the meeting on 25 January had Miss Heath pointed at him at the RTW as he now says he would have included that, at least in the addition he made to the note of the supervision meeting [248]. We find that absence of such an assertion in the record of the supervision meeting on 25 January suggests that Miss Heath did not point at his chest as Mr Patton suggests.

89 Further support for that view is that Mr Patton not only revised his version as we state above as to the dates on which a number of incidents occurred (sometimes on more than one occasion) but that we find Mr Patton's version of events changed him having reflected on them. Before us he suggested that the reason for referrals was because of his disability. Yet he made no complaint about the referrals at the time and accepted orally before us that there were good reasons for all three of the referrals. We are reinforced yet further in that view due to Mr Patton's view about the deterioration in relations that he stated started followed the diagnosis of his cancer in July 2015. That it is at odds with what he told Ms Savage, Mr Pugh and Miss Heath's account and for that matter the first contemporaneous complaint from Mr Patton is that endorsed on the revised record of the supervision meeting on 25 January. We prefer the accounts of Ms Savage, Mr Pugh (see (77) above) and Miss Heath [AH/34] to that of claimant and find that that relations deteriorated following that RTW meeting.

90 As to Mr Patton's complaints

90.1 *that the respondent referred him 3 times to OH between August 2015 and February 2016 [Issue 3.1.3] and*

90.2 *as a result he had to attend 3 appointments with OH between September 2015 and March 2016 [Issue 3.1.4]*

and those matters amounted to direct disability discrimination we find that during cross examination Mr Patton accepted the reasons advanced by the respondent for the three referrals to OH Assist, (in the first instance because the claimant had hit the trigger in the respondent's management of attendance procedure, secondly his hours of work having been reduced as a short-term measure pending the receipt of the consultant's appointment for a 12 week period and the consultant's appointment not having been scheduled in that time, and thirdly to clarify (1) how long the adjustment to working hours would need to continue for and (2) if the biopsy absence was disability related).

91 We found for the reasons we give above that by referring the claimant to OH 3 times the claimant was treated no differently to the way a non-disabled employee would have been treated in those circumstances. Having accepted the reasons for the referrals to occupational health were those advanced by the respondent it follows the reasons for claimant's attendances on occupational health advisors arose for the same reasons as gave rise to the referrals. Thus, we find that the reasons for those referrals and the appointments that flowed from the referrals were in no sense whatsoever connected to the disability but for the reasons we give above.

92 Mr Patton also complains about the deterioration in relations we refer to at (81) (see [BP/17]) and asserts:-

92.1 on 9 February 2016 being required to record an hour lost for an urgent family phone call [Issue 3.1.7] [AH/72] [BP/17]

92.2 insisting that the claimant record his start time as 7:30 am. when he was starting at 7:00 am. [Issue 3.1.8]

93 Mr Patton's position with regard to the recording of the hour lost for the telephone call is in our judgment confused. In the list of issues Mr Patton identifies the complaint as we set out above at (92.1). Yet in his witness statement he refers to the complaint relating to an instruction to record an hour lost because of him leaving early.

94 We were told that the respondent's procedures were that staff were expected to record their working hours on timesheets because the respondent operated a flexible working hours system and that if staff had to leave for family emergency or similar reasons they could make a request to their line manager for compassionate consideration of the same if they felt the circumstances justified it.

95 The respondent suggests that instead of Mr Patton receiving a telephone call on 9 February as he suggests, it actually occurred on the 12 February. The respondent's position is that Mr Patton having received a telephone call from his daughter concerning a miscarriage Miss Heath indicated that he could leave the office and that she his colleagues would cover for him. Mr Patton did not dispute that the respondent's procedures required him to record his time accurately, nor did he indicate that any point an application for compassionate consideration had been made. Nor did he provide a copy of the timesheet.

96 Despite reminders from the Tribunal on a number of occasions throughout the hearing to Mr Patton to challenge witnesses about disputed matters, Mr Patton did not ask Miss Heath about this issue. She denies the incident happened in the way he states and points to her behaving sympathetically toward him [253 & 306]. In turn, Mr Patton suggested that despite Miss Heath sitting only a few metres from him failed to show any concern for his wellbeing by asking him about these matters.

97 The difficulty with that allegation is that Mr Patton did not detail in his statement or give evidence under cross examination when it was given his absence, that he suggested Miss Heath should or could have expressed that concern,

98 Whilst Mr Patton suggests that he was being treated differently because of his disability insofar as Mr Patton was asked to comply with the respondent's timekeeping procedures we find that was in no sense whatsoever because of his disability, he accepted the respondent's procedures required him to record his hours of work and he did not lead evidence of a difference in treatment compared to other colleagues. Regarding his assertion that he was being treated less favourably specifically by Miss Heath because of his disability around that time, we consider that at the same time as issue 3.1.8, which we turn to now.

99 It was not in dispute that in the supervision meeting on 11 March [261] Mr Patton was asked to ensure that his timesheets recorded the agreed start time of 7:30 a.m. [265]. We have seen evidence that on a number of occasions Mr Patton applied to vary his working hours to start at 7:00 am. On each occasion that request was refused. In the flexible working adjustment that was agreed in September 2015 his start time also commenced at 7:30 am. What Mr Patton appears to suggest was an act of discrimination was him being instructed in the context of the respondent's flexible working hours' time recording system that apparently applied to all its staff, that he ensure that the hours that he recorded were hours that he was entitled to record and on the basis that he had had a number of requests to work from 7:00 am refused he was to ensure that any hours recorded were from 7:30 am onwards.

100 If despite the refusals of those applications to work from 7:00 am. Mr Patton chose to do so, and is of course a matter for him but he was not entitled to record that time in the context of the flexible time recording system which the respondent operated.

101 We find that the claimant was treated no differently to the way that any other employee would have been treated in relation to issues 3.1.7 and 3.1.8. Putting the Mr Patton's case at its highest the allegation is that the respondent sought to implement its procedures, and that the reason for it doing so was his disability. We find that instead the respondent was merely implementing its procedures and his disability played no part whatsoever in that.

The Occupational Health Report prepared by Dr Sumra Dar on 7 March 2016 and the events that followed

102 Mr Patton attended an Occupational Assessment on 7 March 2016 with an Occupational Health Physician, Dr Sumra Dar. Her report [259-60] ("the Dar OH Report") was dated the same day as the assessment, 7 March 2016, and indicated amongst other matters that:-

102.1 Mr Patton was continuing to suffer from some symptoms, but was fit for adjusted duties,

102.2 he would be kept under review for his pituitary tumour and would be offered further treatment if that was required,

102.3 his fibromyalgia was a chronic long-term condition and he was probably working at the upper limit of his abilities to manage the same,

and as a result, the respondent should continue to allow Mr Patton to work reduced hours for a number of months going forward. She indicated it was difficult to give an exact timescale for that, but that could easily extend to the next 4 to 6 months and that it was ultimately a business decision whether that could be supported for him. She indicated that his absence for the biopsy in January 2016 was also likely to be disability related, even though that had not turned out to be cancerous.

103 On 11 March Mr Patton attended a regular supervision meeting with Miss Heath [261-266]. The note records the previous meeting was on 25 January and the next meeting was scheduled for 20 April. We return to that in due course. Whilst the minutes of the 11 March meeting record that the Dar OH Report had been received and the absence in January was to be recorded as disability related and given neither party suggested before us that there was any substantive discussion of the Dar OH Report on 11 March we find that that there was no substantive discussion of the Dar OH report at the meeting on 11 March.

104 Further support for that view is that Miss Heath told us she discussed the Dar OH Report with HR and that she scheduled a meeting specifically to consider the report between her, Mr Patton and Mrs Hardip Sira, a HR Case Manager, on Friday 15 April 2016. Before we turn to the events of the meeting on 15 April we firstly touch upon two events that happened in the interim.

105 In March 2016 Miss Heath completed Mr Patton's Staff Performance and Development Report (Appraisal) for the period April 2015 to March 2016 [268 - 271]. She assessed his as "good".

106 Secondly, on 6 April Mr Patton and his NAPO Representative, Ralph Coldrick, met with Mr Nick Healey one of the Respondent's HR advisors. Mr Patton told us [BP/23] he explained to Mr Healey that he felt he was being treated very unfairly because the respondent no longer wanted to continue the arrangement of him being paid his full pay despite working a shortened day. He explained that he had been working

throughout his illnesses and felt like he was being pushed out of his employment because he was unfortunate enough to have become ill. He followed that up with an email of 7 April to Mr Healey [274].

107 Turning now to the Meeting on Friday 15 April 2016 no notes of that meeting were before us. In the context of the reason for that meeting, that it was considered appropriate Ms Sira should be present and given Mr Patton's concerns expressed to Mr Healey on 6 & 7 April, we again find that surprising.

108 Miss Heath told us that at that meeting [AH/42] Mr Patton had stated his Fibromyalgia was worse than ever, his medication had been increased and an MRI scan was booked for 18 April. He relayed that the new desk assisted him, but voice recognition software did not, he was better in the mornings but tired in afternoons but could not suggest further adjustments.

109 She told us that she explained to Mr Patton [AH/43] that because the temporary reduction in his hours had been in place for six months and Dr Dar's prognosis was that the adjustment should remain in place for at least a further four to six months, if Mr Patton he wanted to make an application to permanently reduce his hours. If so she told us she had relayed that the business would support his application, and if and when his health improved in the future he could increase his hours to their normal full-time level but that such a (permanent) change to reduce his hours would mean Mr Patton's pay would reduce in line with the hours he worked.

110 Mr Patton made no reference to that meeting in his witness statement and when asked on several occasions told us he had no recollection of it. We find that contrary to the suggestion of Mr Sadiq, Mr Patton did not deny that the meeting took place merely that he could not recall it. We find it did take place, Mr Patton's exchange of emails with Miss Heath of 18 and 19 April 2016 [280] also refer.

111 Miss Heath states [AH/44] Mr Patton replied that he would not be making such an application, he had proposed that in the past, it had been rejected and that he was content with the current arrangement, namely being paid full-time pay for part time hours. We find that was his position both at that meeting and subsequently. Miss Heath states Mr Patton told her that he had been discouraged by occupational health advisers from making an application to reduce his hours. He repeated that before us adding that was because of the additional stress the loss of pay would cause but could not point us to that advice nor did he tell us the name of the advisor who had given that advice

112 Miss Heath told us she was disappointed by Mr Patton's response, and advised him that the current arrangement may not be sustainable in the longer term, and his case would be referred to Mr Wade, Head of NPS for Coventry, Solihull and Warwickshire, under the Respondent's Management of Attendance Policy.

113 At approx. 10:00 am on Monday 18 April (the next working day after the meeting) Miss Heath asked Mr Patton if he had given any thought to being considered for Ill Health Retirement (IHR) following on from the meeting the previous Friday [280]. At 8:36 am on Tuesday 19 April Mr Patton replied stating he wished that Miss Heath had mentioned that at the meeting on Friday and that he knew nothing about what it entailed. She replied at 9:26 am that day [279] stating it had only come up after the meeting and that if he wished to be considered another OH referral would be required.

114 We find that the respondent's policy permitted IHR, that that could have been advantageous to the claimant and thus it was attempting to ensure he did not lose out on a benefit to which he was entitled.

115 On Tuesday 19 April Ms Sira submitted a capability hearing case analysis submission to Mr Wade [275] repeating what Dr Dar had said, that the reduced hours would ned to continue for a number of months although it was difficult to give an exact timescale but that was a business decision for the respondent.

116 On 20 April Miss Heath and Mr Patton had a regular supervision meeting. The supervision note of 11 March 2016 refers (see (103)). Again, we did not have before us a copy of the note of the meeting on 20 April.

117 At 2:12 pm, (the documentary evidence suggests this was an hour after the supervision for reasons we will return to) Miss Heath emailed Mr Patton [287] to inform him that due to not being able to see him until the Friday of that week (23 April) due to their respective commitments she would be referring him to OH to be considered if he was eligible for IHR [88]. A later email from Mr Patton of 8:22 am on 26 April [286] stated that her email of 2.14 pm on the 20 April was sent about an hour after the supervision meeting. He stated that whilst he did not have an issue attending OH it was of concern to him as to whom had given that advice. Mr Patton went on to relay that Miss Heath had told him at the supervision that a referral for IHR was futile as he was not eligible and stated that repeatedly being asked to attend meetings to discuss his health was both stressful and intimidating.

118 We find it was not clear from his email of 8:22 am on 26 April if Mr Patton wished to be considered for IHR or whether his concern related to other issues. Later that day at 4:41 pm Miss Heath responded, again by email, indicating that he had been copied in on the referral and to clarify that if he did not wish to be referred she would withdraw it [285]. Mr Patton responded at 8:03 am on 28 April stating explicitly that he was not interested in IHR and that the referral was without his consent.

119 Turning to Issue 3.1.9 on *20 April 2016 Miss Heath referred the claimant to OH in relation to the possible termination of his employment.* It was agreed before us that the referral to OH was made and when it was made Mr Patton was copied in (as he was with the other referrals).

120 Mr Patton complains [BP/22] :- *"Unfortunately, … without any discussion and without my consent Ms Heath referred me again to OH to this time look into the possibility of my employment being terminated on the grounds of Ill Health Retirement. … At this point I felt completely devastated because it made me feel completely unwanted and a burden to my colleagues. I also felt completely let down and humiliated because even though I had done everything in my power to ensure my work, and others' work was completed on time this now appeared to be being thrown back in my face. Unfortunately, this also made me feel old for the first time in my life. I have never thought of retiring, even in good health and I knew that all being well I would soon be able to work full time again without any problems. This referral was withdrawn after I raised concerns but I was then told that I would need to attend a Capability Hearing sometime in the future."*

121 We find that as soon as the claimant indicated that he specifically did not wish to be considered. The referral was withdrawn.

122 Mr Patton sought before us to suggest in closing submissions that the IHR referral was made without him being asked. We find that he had been informed that an IHR referral could be made prior to the referral being sent but had not consented. Mr Patton pointed out before us that the referral was not urgent and could have waited.

123 We find that on the 19 April Ms Sira submitted a capability hearing case analysis submission to Mr Wade. We accept what Miss Heath told us [AH/63] that the referral for IHR was a procedural matter. Whether she was entitled to be surprised, given that

Mr Patton was a NAPO representative, that he was not familiar with the Respondent's procedures regarding occupational health, including referrals concerning IHR, as she went onto state was another matter. That aside we find that the capability hearing process was running and that if Mr Patton wished to be considered for IHR that needed to be addressed and quickly.

124 Whilst Mr Patton may have found being asked to attend meetings to discuss his health stressful and intimidating we find the reason that referral was undertaken was not because of the claimant's disability but because the respondent wished to ensure that if he could have benefited from IHR, that that option should not be excluded and thus the respondent would have treated any employee who was to be referred for a capability hearing in exactly the same way by seeking to consider if ill health retirement was a possibility.

125 Whilst Mr Patton points us to the requirement in the respondent's procedures [88] that IHR be considered sympathetically that was not the basis on which the issue was identified and whilst we find that whilst he was not content with the way the IHR issue was addressed we find the respondent was attempting to do the best for the claimant in the circumstances and thus it was trying to address this as sympathetically as possible in the circumstances.

126 On Wednesday, 4 May 2016 *the respondent wrote to Mr Patton [287a] inviting him to a capability hearing on 19 May 2016 [Issue 3.1.10]* and set out therein several matters it wished to discuss with him including whether a return to full duties in the near future was possible, if he was able to give regular and effective service going forward, adjustments, ill health retirement and his possible dismissal on grounds of medical inefficiency.

127 We find that the in the circumstances the respondent was entitled to refer the claimant to a capability hearing. The reason for that was that Mr Patton had been working part time hours on full pay since September 2015, OH had been involved from the outset and had advised that there was no definitive date when he would be able to return to his full duties but this would be in the region of at least 4 – 6 months. The claimant had agreed that no further adjustments would assist. Before the referral the claimant had met with his line manager and HR and after alternatives had been put to him he had declined the option. (Mr Wade subsequently again put, the option of a reduction in hours but on reduced pay and that the claimant could seek a return to full time hours if and when his health improved). We find Mr Patton had made it abundantly clear on several occasions that he was not prepared to accept a reduction in his contractual hours with his pay pro rata'd. The respondent told us and we accept that the work Mr Patton was not doing because of his reduced hours had been shared amongst colleagues and this could not be supported in the long term. Whilst Mr Patton disputes the extent that was so, we find he was not fulfilling his contractual hours and that could not be maintained in the long term. The respondent's business needs were demonstrated by the recruitment problems it told us and which Mr Patton referred to. We accept the respondent had recruitment problems at least at the claimant's place of work at the time, that not being disputed. Accordingly, we find that the claimant was treated no differently to the way that a non-disabled employee would have been treated in those circumstances.

The Adjourned & Re-convened Capability hearing (19 May & 7 June 2016)

128 The capability hearing was chaired by Mr Andrew Wade, Head of NPS for Coventry, Solihull & Warwickshire. Mr Patton was accompanied by Ralph Coldrick, a NAPO Representative It was minuted [299 – 305]. Mr Patton read out a statement at the outset [296-298]. Mr Wade subsequently wrote to Mr Patton confirming the matters

discussed at the adjourned capability hearing. There did not appear to us to be a dispute over those points and we relay them below so will not set them out here. The meeting was adjourned in part to allow Mr Patton to consider with Mr Coldrick a reduction in hours and pay suggested by Mr Wade, but also because Mr Patton's father in law, who had lived with him and his wife, had died the day before.

129 During that meeting the claimant accepted he would not be able to return to full-time duties in the near future, indicated that he had done his best to ensure that he progressed his treatment by pressing for consultant appointments etc. and also took issue with the respondent's assertion that he was unable to give regular and effective service. He indicated that he found that insulting. We should state that was an issue over the respondent's definition of what regular and effective service was. Essentially as it confirmed before us that did not refer to the quality of the claimant's work, there was not an issue in that regard (see (105) - the March 2016 Appraisal) but related to Mr Patton not being able to fulfil his full contractual hours.

130 On 20 May 2016 Mr Wade wrote to Mr Patton confirming matters discussed at the adjourned capability hearing [305a – 305b]. He noted that during the hearing on 19 May Mr Patton had informed him that he might require an operation at some point in the future for his tumour, and in the meantime, he was prescribed medication that made him extremely drowsy, that had prompted the reduction in hours with an associated reduction in pay by Mrs Heath. He identified that Mr Patton had asserted that one of OH Assist's advisers (albeit the person was not identified by Mr Patton before Mr Wade or before us) had recommended to him that he should not accept a reduction in pay, as this would cause him stress. We find the evidence before us was to the contrary, namely, that OH Assist had expressly specified this was a business decision – see the Dar OH report.

131 Mr Wade also stated that in his view the current arrangement could not be sustained by the Respondent indefinitely, or in the light that OH Assist had proposed that the reduction of his working hours should continue for a further four to six months.

132 Mr Wade went on to say that he also considered following the adjournment a proposal made by Mr Patton at the meeting to use a laptop at home but had concluded that this was not viable because the nature of Mr Patton's work was client facing, and the strain it would place on him at home during the weekend to make up his hours.

133 Mr Wade concluded by asking Mr Patton to consider voluntarily agreeing to reduce his hours and pay, whilst stating that, a decision had not been made at that stage, he might be forced to take the decision to dismiss him on grounds of medical inefficiency. Finally, Mr Wade invited Mr Patton to the adjourned capability hearing on 7 June 2016. On 23 May 2016, Mr Patton responded [305c – 305d].

134 Mr Patton told us that over the period of his illnesses he felt perfectly capable of completing his work without any problems whatsoever. We find that is at odds with the OH advice. Whilst he states the Respondent had not followed its own procedures in dealing with Sickness Absence, we find that is not correct, the respondent's sickness absence procedures to which he referred related to unsatisfactory attendance whereas the claimant's sickness had explicitly been identified as disability related and thus outwith that procedure [3.13]

135 We remind ourselves that any acts that any complaints that occurred before 23 May 2016 are out of time unless they form conduct extending over a period and that period concluded on or after 23 May or in the alternative we consider it is just and equitable to extend time.

136 Mr Patton accompanied by Mr Coldrick attended the re-convened capability hearing on 7 June 2016. We find that at that meeting Mr Wade repeated the offer to support any request by Mr Patton for reduced hours with the option to increase that later. Mr Patton declined the offer. We find that Mr Wade took the *decision to dismiss Mr Patton and that the reason or principal reason for this was medical inefficiency [Issue 3.1.11]* [309 – 312]. We find that this is a term defined in the respondent's procedures and entitled the claimant to be considered for a discretionary payment. We return to that in a moment.

The Appeal, Appeal hearing (26 July 2016) and subsequent events

137 On 19 June 2016 Mr Patton appealed his dismissal [321a – 321b]. He provided grounds of appeal on 5 July 2016 [328 - 332]. On 26 July 2016 Mrs Chand, Deputy Director of the NPS for the Midlands, wrote to Mr Patton inviting him to an appeal hearing [326 – 327].

138 Mr Patton attended the appeal hearing on 26 July 2016 was accompanied by Erik Puce, NAPO Regional Representative. The appeal meeting was minuted [332A – 332C]. Mr Puce presented a written submission [328-332], and within that submission Mr Puce raised seven grounds. Firstly, that the reconvened capability hearing wrongly concluded there was no alternative to dismissal for medical efficiency; secondly, the failure to allow a continuance of the reasonable adjustments already in place; thirdly, the failure to give due consideration to the occupational health reports and essentially that the loss of time was minimal; fourthly, the failure to properly take into consideration the NPS absence management procedure; fifthly, disability discrimination; sixthly, an inconsistent and improper approach to sickness absence and finally, the incorrect calculation of the compensation offered to Mr Patton in relation to what the respondent states is a discretionary payment on termination for medical inefficiency. Given Mr Wade had addressed these, these were challenges to his conclusions.

139 On 12 August 2016 Mrs Chand wrote to Mr Patton *upholding his dismissal [Issue 3.1.12]* [333 – 335].

140 Mr Patton conciliated via ACAS between 22 August 2016 and 12 September 2016 and presented this claim on 5 October 2016.

THE LAW

Unfair Dismissal

141 Where, as here, it is not in dispute the claimant has qualifying service, an employee has the right not to be unfairly dismissed. And it is for the respondent to show the reason (or, if there was more than one, the principal reason) for the dismissal and that was one of the six potentially fair reasons for dismissal. The reason for the dismissal is assessed by facts known to the employer at the final stage at which it formed that belief [1].

142 Here the potentially fair reason relied upon by the respondent is "capability", or in the alternative, "some other substantial reason". The respondent accepts it dismissed the claimant by reason of "medical inefficiency"; on Occupational Health Advice, an adjustment having been made (amongst several others) restricting the claimant's working hours. As a temporary measure, the claimant was paid his full contractual pay. The respondent states it could not maintain that arrangement going forward in

[1] *Abernethy v Mott, Hay & Anderson [1974] ICR 323 CA*

the light of the medical evidence availiable. The claimant made it clear he was not prepared to agree to a reduction in his pay.

143 If a potentially fair reason is shown by the employer the question whether the dismissal is fair or unfair is assessed by the Tribunal using the words of s.98(4) Employment Rights Act 1996 (ERA) having regard to the reason shown by the employer and "*(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case."*

144 For the s.98(4) assessment the burden of proof is neutral and the Tribunal assesses the reasonableness of the employer's conduct pursuant by reference to "…*the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, …"*; that is not a perversity test [2] instead there is a "*band of reasonable responses"* within which one employer might take one view, and another might quite reasonably take another [3].

145 At the outset of the hearing, Mr Sadiq having only identified the four cases we refer to below in relation to the breach of contract issue (166), we pointed to the parties (and the claimant in particular) in the context of the unfair dismissal claim to the authorities of *Daubney v East Lindsey [1977] IRLR 181 EAT* (where Phillips J stressed the need for the employer to consult the employee and inform itself of the true medical position before dismissing him on the grounds of health), another decision of Phillips J *Spencer v Paragon Wallpapers Company [1977] ICR 301* and *Iceland Frozen Foods Ltd v Jones* and how to locate them on Bailii.

146 *Paragon Wallpapers* was referred to in one of the cases Mr Patton referred us to; *Bolton St Catherine's Academy v O'Brien [2017] EWCA Civ 145 [2017] IRLR 547 CA "Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer? Every case will be different, depending upon the circumstances."*

147 Our function is to determine whether the respondent has satisfied us that in the circumstances that they acted reasonably in treating the reason as a sufficient reason for dismissing the employee. It is not the function of the industrial tribunal to take the management's decision for it, but only to decide whether the decision taken by the management passes that test and that the relevant circumstances include *"the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do"*.

Discrimination

148 Mr Sadiq did not take us to any discrimination authorities so not wishing to overwhelm the Claimant, at the outset we merely referred the parties to *James v Eastleigh Borough Council [1990] 2 AC 751, Governing Body of JFS and Others [2010] 2 AC 728, R v Birmingham City Council, ex p Equal Opportunities Commission [1989] AC 1155 HL and the EHRC Code of Practice.*

---

[2] both *Orr v Milton Keynes [2011] ICR 704 CA*

[3] *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT*

149 The claimant as we state above referred us to *Bolton St Catherine's Academy v O'Brien* [2017] EWCA Civ 145 [2017] IRLR 547 *CA.* That was a case on s.15 EqA. We thus clarified with the claiamnt that its relevance in the context of discrimination was limited to justification arguments.

Direct Discrimination (s.13 EqA)

150 A person (the alleged perpetrator) discriminates against another (the complainant) if, because of a protected characteristic, the alleged perpetrator treats the complainant less favourably than the alleged perpetrator treats or would treat others.

151 The reference to "less favourable treatment" means a comparison is required between the complainant and a real or fictional individual created for that purpose (a comparator). There must be no material difference between the circumstances of the complainant and comparator.

152 The protected characteristics relied on here are disability and age. Where the protected characteristic relied upon is age, the alleged perpetrator does not discriminate against the complainant if the alleged perpetrator can show his/her treatment of the complainant is a proportionate means of achieving a legitimate aim.

153 The fundamental question in a direct discrimination case is: what were the reasons or grounds for the treatment? The answer to that question is dependent on the facts and context but normally gives rise to two types of case[4]; in the first, the grounds for the alleged perpetrator's action can be found in the 'criterion' itself, in the second, it is necessary to consider the alleged perpetrator's mental processes which will include his motivation, even if this benign [5].

154 An example of the first type of case is where an owner of premises puts up a sign saying 'no blacks admitted'; race is, necessarily, the reason why that person is excluded [6]. If the criterion is based on the protected characteristic or its application is the reason for the treatment complained of, there is no need to look further; by establishing that the reason for the detrimental treatment (in this example, race), the complainant shows at one and the same time that s/he is less favourably treated than the comparator [7].

155 The second case concerns complaints that are not of themselves discriminatory but where the alleged perpetrator did the act because of a conscious or unconscious discriminatory motivation.

156 Complaints of discrimination rarely deal with complaints that exist in isolation from others. So, in the same way that one cannot understand a scene in act 3 of a play without first having understood what has happened in acts 1 and 2, to understand if a protected characteristic was a ground for less favourable treatment, the total picture must be looked at. Thus, where there are allegations of discrimination over a

---

[4] Underhill P (as he then was) in *Amnesty International v Ahmed [2009] IRLR 884* at [35]

[5] *Amnesty* [34] and see third para of Lord Nicholls' judgment in *Nagarajan v London Regional Transport [1999] IRLR 572 HL.* The difference is explained by Lady Hale in *Governing Body of JFS [2009] UKSC 15 [2010] 2 AC 728 at [64] and Amnesty at [32]*

[6] *Amnesty* at [33]

[7] Elias P (as he then was) in *Islington v Ladele [2009] IRLR 154 EAT* at [30]

substantial period, looking at the individual incidents in isolation from one another should be avoided as it omits a consideration of the wider picture[8].

157 The protected characteristic need not be the sole or even principal reason for the treatment so long as it has significantly influenced the reason for the treatment; a 'significant' influence is one that is more than trivial[9].

Indirect discrimination (s.19 EqA)

158 Indirect discrimination is defined as follows:

> *"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
>
> *(c) it puts, or would put, B at that disadvantage, and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim."*

159 Direct and indirect discrimination cannot occur at the same time [10]. If the people who suffer the disadvantage correspond exactly with the category of people with the protected characteristic it is direct discrimination. If they do not exactly correspond it is indirect discrimination [11].

The burden of proof (s. 136 EqA)

160 A protected characteristic and a difference in treatment alone merely indicate a possibility of discrimination They are not sufficient material so the tribunal *"could conclude"* on the balance of probabilities, the respondent had committed an act of discrimination. There needs to be *'something more'* [12].

161 Because it is rare to find clear evidence of discrimination if there are facts from which the tribunal could decide, in the absence of any other explanation, that the alleged perpetrator discriminated against the complainant, the Tribunal must hold that occurred unless the alleged perpetrator shows that s/he did not contravene the provision. That involves a two-stage analysis of the evidence.

---

[8] *London Borough of Ealing v Rihal [2004] IRLR 642* CA applied in *Laing v Manchester City Council [2006] IRLR 748* by Elias LJ (as he became) at [59] and endorsed in *Madarassy v Nomura International [2007] IRLR 246 CA*

[9] *Nagarajan as applied in Igen v Wong [2005] IRLR 258 CA at [*37]

[10] Lady Hale in *JFS at [57]*

[11] *Interserve FM Ltd v Tuleikyte [2017] UKEAT 0267/16 at [16] referring to* Lady Hale in *Taiwo v Olaigbe [2016] UKSC 31* at [22, 23 and 27 to 30]

[12] *Madarassy at [56] approving the CA in Igen v Wong*

162 At the first stage, it is not for the complainant to prove facts to 'shift' the burden to respondent, but those facts must be before the tribunal by the end of the hearing [13]. However, the respondent can attempt to show at the first stage that the acts complained about never happened; that, if they did, they were not less favourable treatment of the claimant; that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not on the protected ground. The only factor that shall not *"… form part of the material from which inferences may be drawn at the first stage is 'the absence of an adequate explanation' from the respondent."*[14].

163 The tribunal can also move straight to the second stage of the test, the *"reason why"* question, and consider whether the respondent has proven that the treatment was not on the proscribed ground without considering the first stage of the test. If the respondent does so the claim fails and the claimant is not prejudiced by this [15]. An example where that might be appropriate is where the claimant seeks to compare his treatment with that of a hypothetical comparator; the question whether there is a hypothetical comparator is often inextricably linked to the issue of the explanation for the treatment [16].

164 The burden of proof however has no role in a case *"where the tribunal is in a position to make positive findings on the evidence one way or the other"* [17].

Timing

165 Complaints of discrimination must be brought before the end of 3 months starting with the date of the act complained of, or if the conduct extends over a period, the end of that period. The tribunal has a discretion to hear complaints outside that time but only if it considers it is just and equitable to do so.

Breach of Contract

166 Mr Sadiq provided copies of four authorities *Collino v Telecom Italia Spa* [2000] IRLR 788 and *Scattolon v Ministero dell Istruzione, dell Universita e della Ricerca* [2011] IRLR 1020, *Jackson v Computer Share* [2008] IRLR 70 CA and *Small v Boots* [2009] UKEAT 0248/08, [2009] IRLR 328.

167 We also referred the parties to one of the authorities identified therein *Horkulak v Cantor Fitzgerald* [2005] ICR 402, [2004] EWCA Civ 1287 which makes clear that even if a payment (there a bonus) is discretionary that does not mean the employer is entirely free to decide whether to pay the sum or not. On the contrary, when exercising the discretion whether to make a payment, and if so how much, it must be done bona fide and in a fair and rational manner exercise. The test is essentially one of Wednesbury unreasonableness (see also *Keen v Commerzbank [2007] ICR 623,*

---

[13] *Efobi v Royal Mail Group Ltd UKEAT/0203/16* and *The Commissioner of Police of the Metropolis v Denby UKEAT/0314/16*.

[14] Mummery LJ in *Madarassy* [69-72] CA approving the approach adopted in *Laing [2006] IRLR 748* by Elias LJ (as he became)

[15] *Brown v Croydon [2007] IRLR 259 and Madarassy at [81 & 82] both CA*

[16] Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337* at *[7-12]* cited *in Laing* at *[74]* approved in *Madarassy at [81 & 82]*

[17] Lord Hope in *Hewage v Grampian Health Board [2012] UKSC 37, [2012] ICR 1054* [32/1065H]

[2006] EWCA Civ 1536 Mummery LJ at [55] approving the judgment of Potter LJ in *Horkulak* and *Khatri v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA* [2010] IRLR 715, [2010] EWCA Civ 397 at [8] Lord Justice Jacob (giving the sole judgment of the CA).

OUR FURTHER FINDINGS & CONCLUSIONS

Unfair Dismissal

168 We find that the circumstances that underlay the decision to dismiss and to uphold the dismissal were as Mr Wade described them in his letter of 20 May, the claimant had been working part time hours on full pay since September 2015, OH had been involved from the outset and had advised that there was no definitive date when he would be able to return to his full duties but this would be in the region of at least 4 – 6 months and that the claimant had agreed that no further adjustments would assist.. Contrary to what Mr Patton argued this was not a sickness absence because it was disability related for the reasons we give at (134). Before the referral to OH for IHR the claimant had met with his line manager and HR, alternatives were put to him and he had declined the option that had again been put (and which was subsequently put again by Mr Wade) namely a reduction in hours and a consequential reduction in pay. Mr Patton did not point us to who or where OH had advised that he should not be expected to take a reduction in pay due to the stress this would cause (see (111)) and the Dar OH Report expressed that that was a management decision

169 We find Mr Patton had made it abundantly clear on several occasions that he was not prepared to accept a reduction in his contractual hours with his pay pro rata'd and having done so we find if the respondent had unilaterally sought to do this, the claimant having made his position clear, the respondent could have faced an unfair constructive dismissal complaint. Mr Wade had considered and rejected the use of a computer at home at weekends and the only other alternative suggested by the claimant was that the current arrangement be maintained. Thus, contrary to what Mr Patton suggested, the respondent was left with accepting the continuation of the existing arrangement as Mr Patton wished or dismissing. Our findings as to the background to the business needs that underpinned that decision are set out at (127). With no definitive date when Mr Patton would be able to return to his full duties we find that the respondent was entitled to come to the view that the temporary arrangement could not continue in the long term and thus, dismiss. Given the grounds rehearsed at the appeal hearing were all matters that had been dealt with by Mr Wade and essentially the appeal challenged his conclusions we find that it was within the band of reasonable responses for Mrs Chand to uphold the appeal.

170 It was not in dispute that the respondent's categorisation of the reason for dismissal by reason of medical inefficiency entitled the claimant to a discretionary payment, indeed the claimant argued for a such a payment to be made and still does. Irrespective of the way in which the respondent categorises the dismissal for its internal procedures we find the claimant was not fit to fulfil his full contractual duties and the statutory reason for his dismissal was capability.

171 We find in the light of the process that the respondent went through prior to and at the capability and appeal hearings, the respondent having obtained medical advice, considered with Mr Patton his medical position, whether further adjustments could be made and alternatives, when set against the background along with that we relay at (127) & (168), Mr Patton having been permitted to put his arguments with the benefit of union representation, the respondent, via Mr Wade and Mrs Chand, was entitled to come to the view that it came to and the decisions they came to at the capability and appeal hearings and they were decisions a reasonable employer was entitled to

come to. Accordingly, Mr Patton's unfair dismissal complaint is not well founded and is dismissed.

Discrimination

172 Before us Mr Patton sought to argue that both the dismissal and upholding of the decision to dismiss at appeal were acts of direct disability discrimination. He provided a number of comparators that he suggested implied had been on long term absence and were younger than him. He accepted he had not checked their ages or whether they were disabled (or not) prior to bringing the claim. We accept it would be difficult for him to do so.

173 As to the age discrimination complaint this is put as both direct and indirect discrimination. We reminded the parties at the outset that whilst it can be argued as both the finding must be in the alternative (see *JFS*).

174 The complaints are put as direct age discrimination on the basis that the respondent dismissed the claimant to replace him with a younger officer and indirect age discrimination as follows:-

174.1 Did the respondent apply any provision, criteria and/or practice that they were looking to remove more expensive probation officers and replace them with cheaper ones ('the provision')?

174.2 Does the application of the provision put other people over 50 at a particular disadvantage when compared with persons who do not have this protected characteristic in that they are more likely to be at or towards the top of the pay band and have accrued more service related holiday?

174.3 Did the application of the provision(s) put the claimant at that disadvantage in that he was dismissed and replaced by a younger cheaper member of staff?

175 Mr Patton told us [BP/31] the basis for that view was he could only assume that the respondent adopted the capability process as an opportunity to get rid of me and replace him with someone younger and more financially viable. Mr Patton advances no evidential basis for that assertion it is based merely upon an assumption by him that he accepted he came to several months after he had been dismissed.

176 Turning first to the direct disability discrimination complaints Mr Patton argues he was not treated as favourably as the comparators and that the temporary arrangement should have been continued. What he sought to argue before us was that he should be treated the same as the named comparators. We find that is flawed, because each comparator's circumstances and thus their treatment was different. One "WM", the respondent asserts and Mr Patton does not refute, applied for and was granted IHR, others were not, their absence periods and pay also differed. We say that merely to reinforce that a person's treatment will vary depending on their personal circumstances.

177 We indicated to the claimant that the proper comparator in our view was a person whose circumstances were materially the same as his but who did not have the impairments from which he suffered. When put in that way he accepted that he had not been treated less favourably than the comparators he put forward – he had been paid full pay despite working reduced hours for 9 months or so and accepted a non-disabled employee would not have been treated in that way. That being so, based on the argument he puts forward we find he was not subjected to less favourable treatment than the comparator; as a minimum, he was treated at least as favourably as a non-disabled person would have been.

178 We find having looked at matters individually the were no facts from which inferences of discrimination could be drawn. Having stepped back and looked at matters in the round we come to the same view; there are no facts from which inferences of discrimination can be drawn.

179 We find that likewise his age played no part in that decision, an individual whose material circumstances were the same as his but for his age would have been treated in the same way.

180 We find that in the circumstances here where a lengthy consultation process had been conducted the claimant accepted all adjustments had been made, there was no definitive date when he would be able to return to his full duties but this would be in the region of at least 4 – 6 months, business needs would not permit this to continue (the claimant accepted there had been recruitment difficulties for the respondent) and where the employee had flatly rejected the option of working reduced hours on reduced pay (with the option to increase the hours back if his health permitted it) a non-disabled person or employee of a different age or age group would have also have been dismissed and the appeal against dismissal rejected.

181 We find that the circumstances are such that we can make a positive determination as to the reason or the claimant's dismissal (per ***Hewage)*** namely there was no definitive date when Mr Patton would be able to return to his full duties, it would be several months at least before that was so, alternatives having been considered and discussed with the claimant that the claimant was dismissed because he could not fulfil his full contractual duties. Accordingly, both the direct age and disability discrimination claims fail.

182 We also find that the evidence before us does not support the assertion made by the claimant that the respondent was seeking to apply any provision, criteria and/or practice that they were looking to remove more expensive probation officers and replace them with cheaper ones. The evidence did not support this and we find that the treatment he was subjected to was not because of the application of the PCP he relies upon but instead for the reasons we give above.

183 Accordingly, there was no contravention of part 5 of the Equality Act 2010 and the claimant was not subjected to discrimination based on the protected characteristic of disability or age in contravention of s.13 (direct) and s.19 (indirect) Equality Act 2010. Those complaints are also dismissed.

Breach of Contract

184 The claimant argues there was a contractual compensation payment to which he was entitled calculated based on a formula used for employees dismissed on grounds of medical inefficiency. He argues he should have received the same based on his full length of service not as what happened limited to his post "transfer" service.

185 The respondent raises three issues:-

185.1 there was no relevant transfer under Reg. 3(5) TUPE 2006 since this was a transfer of administrative functions between public administrative authorities i.e. from the probation trust to the NPS and that is repeated in the transfer scheme [134],

185.2 there was no contractual right to medical inefficiency payment; it was a merely discretionary payment [170 para 1.4], and the respondent exercised the discretion reasonably in the circumstances, and

185.3 in any event Mr Patton was paid a discretionary payment based on his reckonable service [172 para 1.13 & 187 para 1.5], that was two years in the

civil service and he was not is not entitled to carry forward the service preceding the "transfer".

186 We accept that TUPE does not apply for the reasons the respondent advances in (185.1) this was a transfer of administrative functions between public administrative authorities and that is repeated in the transfer scheme [134]. In any event we also accept that the case law Mr Sadiq referred us to (166) makes plain that a transfer cannot give rise to more beneficial terms that pre-existed the transfer and Mr Patton accepted he was not entitled to the terms he argued he is now entitled to pre-"transfer".

187 However, that is not into the matter because the respondent here paid to the claimant two of the four discretionary payments that are claimed these were for convenience referred to as heads of payment "a", "b", "c" & "d" see [176 para. 3.3 (a)-(d)].

188 Thus, in our judgment the issue goes beyond the TUPE point and the question arises was Mr Patton entitled to a contractual or discretionary payment and further as to the reckonable service issue Mr Patton points to his to continuity of employment expressly being preserved in Para. 2.2 of the Transfer Scheme [135]. However, that is a very different matter that to a contractual or a discretionary right.

189 In our view, the questions for us are therefore :-

189.1 were the disputed sums contractual or discretionary?

189.2 has the claimant demonstrated, the burden being upon him to do so that he qualified for such a payment based on a contractual or discretionary right? and

189.3 if that right was a discretionary, was that discretion exercised in accordance with the principles we relay at (167)?

190 We find that the claimant has not demonstrated the burden being upon him to do so that there was a contractual payment to which he was entitled. All the references that we have been taken to refer to a discretion.

191 Nor has the claimant demonstrated that the payments he claims to be entitled which refer to a calculation based on his reckonable service must include the period prior to him becoming a civil servant and thus the payment for the years of service he gave pre "transfer".

192 Mr Sadiq in closing submissions argued that that the Principal Civil Service Pension Scheme expressly did not apply to the claimant and the payment was made in error. He referred the Tribunal to the definition of "reckonable service" [187, paragraph 1.5], which whilst not limited to service in the Civil Service was restricted to service which reckoned towards a pension under that scheme. Further he argued that by virtue of the Transfer Scheme [139 para. 8(1) employees who "transferred" remained active members of the Local Government Pension Scheme and not the Principal Civil Service Pension Scheme. Thus, Mr Patton was not eligible for a payment at all.

193 We decline to make a determination in that regard. The reason for that is that the documentation before us simply does not enable us to look at that issue in full and determine what the correct position was. The documentation before us appeared to be incomplete; for instance, we only had the PCSPS Section II – The 1972 Section but not the other sections and whilst we had the Civil Service Compensation Scheme again it was unclear if we had the entire scheme.

194 We find instead that the claimant has not demonstrated, the burden being on him to do so, that the provisions concerning reckonable service include service predating

the transfer, such that any payments to which he was entitled should have been calculated based on the same. The provision, he refers to in relation to maintaining contributes continuity does not address that issue and the references he makes to continuity being preserved relate to continuity which is a separate and distinct concept. Accordingly, we find the claimant has not demonstrated an entitlement under a contractual or discretionary provision and that being so he was paid, based on the arguments before us, the sums to which he was entitled, in full.

195 However, even if the claimant had demonstrated that there was a discretionary as opposed to contractual provision, to which he was entitled, we find that he has also not demonstrated that the respondent did not exercise that discretion bona fide and in a fair manner. We find the respondent considered in deciding whether to make a payment to him whether to exercise the discretion in his favour and did so. Further when doing so it determined that he should be paid the full amount that it considered that he was entitled to. The claimant may disagree with that but that is some way from him showing that that test that the exercise of that discretion was not exercised bona fide and in a fair and rational manner on Wednesbury principles. Accordingly, we conclude that the discretion, was exercised bona fide a fair and rational manner. Accordingly, the breach of contract claim is also dismissed

196 Thus, the claimant has not shown, the burden being on him to do so, that he was entitled to further contractual (or discretionary) payment(s) as result of his dismissal being categorised by the respondent as “medical inefficiency” and his claims for breach of contract (and for the avoidance of doubt, unlawful deductions from wages) are dismissed.

Footnote

197 At the conclusion of submissions at approx. 1:30 p.m. on Friday 2 November (Day 5) we reminded the parties that we would be giving oral judgment if possible in the afternoon of Monday 6 or in the alternative Tuesday 7 November. We reminded them that if they wished to seek written reasons they would be placed on the Internet. Our clerk later contacted the parties to inform them that Judgment would be delivered at noon on Tuesday 7 November (Day 7).

198 At the start of the oral judgment we reminded both the claimant and Mr Sadiq of the need to make a note. At the end of the oral judgment, which took two hours to deliver, Mr Sadiq indicated that written reasons were required.

199 As a matter of practice Tribunals endeavour to give oral judgment if appropriate. It is a matter for the parties if they wish to attend the tribunal to hear the Tribunal deliver judgment and incur the costs of doing so, in terms of costs of attending as here, the claimant and for the respondent one observer and one witness and instructing solicitors/counsel and or instead seek a reserved decision (and written reasons). The Employment Tribunal Rules of Procedure provide that the parties have the right in any event to seek written reasons, subject to doing so within certain time limits.

200 Those matters being so we asked Mr Sadiq to pass on to those instructing him a rhetorical question namely if they felt that it was a good use of tribunal resources for the Tribunal, to spend two hours in delivering oral judgment given the demands currently being placed upon tribunals when written reasons were to be sought in any event, and that time could have been spent fairing the judgment. The Employment Judge spent in total 10 hours fairing this 33 page judgment.

201 Mr Sadiq indicated the judgment was thought to have some wider merit in relation to the breach of contract claim. We reminded him we had not made a substantive

determination on that head, instead determining Mr Patton had not proved his claim so we doubted that this judgment would serve that purpose.

202 The pressure on that scarce resource can be readily illustrated thus. The Employment Judge on what was scheduled to have been the eighth day of this hearing was allocated another case that he had to list for a merits hearing. That case had a time estimate of three days and was listed in June 2018, some eight months hence. The respondent will no doubt be aware of that pressure.

203 We asked the parties if there were any issues that arose such as anonymisation, privacy or restricted reporting pursuant to r.50. No such application was made.

Employment Judge Perry
15/11/2017

Sent to parties on 17/11/2017