EMPLOYMENT TRIBUNALS

Claimant: Mr Richard Howard Southworth

Respondent: SPS (EU) Limited

HELD AT: Manchester **ON:** 12-16 June 2017
27 and 28 September 2017
and 7 November 2017
(in Chambers)

BEFORE: Employment Judge Sherratt
Ms L Atkinson
Mr S Stott

REPRESENTATION:

Claimant: Litigant in person
Respondent: Ms L Amartey, Counsel (at initial hearings starting on 12 June 2017)
Mr T Gilbart, Counsel (at submissions on 27 September 2017)

JUDGMENT

The judgment of the Tribunal is that:

1. The respondent discriminated against the claimant, a disabled person, by treating him unfavourably when it failed to pay his notice and other payments, with the exception of the statutory redundancy payment, in full.

2. This failure also amounted to an unlawful deduction from the claimant's wages.

3. All other claims are dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as an IT Manager from 4 January 2011. The respondent imports and sells consumer goods.

2. Following his dismissal on 15 March 2016 the claimant went to ACAS on 22 April 2016 and their certificate was issued on 22 May 2016. The claimant commenced his Employment Tribunal claim by an ET1 received on 17 June 2016.

3. The claims are in respect of:

(a) Unfair dismissal contrary to section 98(4) Employment Rights Act 1996;

(b) Direct discrimination contrary to section 13 Equality Act 2010;

(c) Discrimination because of something arising in consequence of disability contrary to section 15 Equality Act 2010;

(d) Failure to make reasonable adjustments contrary to sections 20 and 21 Equality Act 2010;

(e) Victimisation contrary to section 27 Equality Act 2010;

(f) Unlawful deduction from wages contrary to section 13 Employment Rights Act 1996; and

(g) A redundancy payment.

4. In its response the respondent took issue with the claimant's claims.

5. The respondent initially did not accept that the claimant was a person with a disability but subsequently conceded this question. The claimant, in September 2014, was diagnosed with a cancerous tumour of the eye and had to have his left eye removed.

The Evidence

6. The claimant gave evidence on his own behalf and did not call any other witness.

7. For the respondent evidence was given by Sharon Brownley, Finance Director, who also provided a supplemental statement; Guy McKenzie, Business Solutions Manager, who also provided a supplemental witness statement; Emma Wright, HR Manager, who also provided a supplemental witness statement; and Phil Morgan, Chief Executive Officer, who did not provide a supplemental witness statement.

8. The documents were contained in two lever arch files containing around 500 pages.

The Issues

9. A List of Issues was agreed between the parties, excluding jurisdictional issues which the respondent was not taking. The issues for determination by the Tribunal are therefore as follows:

(1) <u>Jurisdictional Issues</u>

(Not being taken)

(2) Unfair Dismissal

3.1 Was redundancy the true reason for the claimant's dismissal, as defined by section 139(1) Employment Rights Act 1996 ("ERA") and therefore permissible under section 98(2) ERA?

3.2 If so, did the respondent act reasonably in treating this as a sufficient reason for dismissing the claimant, applying section 98(4) ERA and in particular applying the guidelines from **Polkey v A E Dayton Services Ltd [1987]**?

3.3 Did the respondent's conduct and decision to dismiss fall within the band of reasonable responses available to an employer in the circumstances?

(3) Direct Disability Discrimination

3.1 Did the alleged acts take place as alleged below?

3.2 If so, did the alleged acts listed below amount to less favourable treatment of the claimant by the respondent because of his disability for the purposes of section 13 Equality Act 2010?

PoC para	**Details of Allegation**	**GoR para**
54(a)	R prevented C from returning to work on 25 January 2016 and from earning full pay	62.1
54(b)	R was delayed in communicating to C that his role was at risk or redundancy	62.2
54(c)(d)	R refused C's request to work remotely on Tuesdays whilst he received treatment. R did not pay C on this day.	62.3 & 62.4
54(e)	R required C to stay at home during redundancy consultation referred to as Garden Leave	62.5
54(f)	R failed to provide C with a list of alternative roles during redundancy consultation	48, 49 & 62.6
54(g)	R failed to pay C's statutory redundancy pay and notice pay in full	33 & 62.7
54(h)	R dismissed C because of his disability	34-36 & 62.8

(4) Discrimination arising from disability

4.1 With reference to section 15 Equality Act 2010, did any of the following arise in consequence of the claimant's disability; his

sick leave, his requirements or potential requirements for reasonable adjustments (paragraph 55 of the PoC)?

4.2 If so, did R treat C unfavourably as alleged at paragraphs 56(a)-(g) of the PoC because of any of these things?

4.3 If so, can R show that this treatment was a proportionate means of achieving a legitimate aim?

(5) Failure to make reasonable adjustments

5.1 In accordance with section 20(3) Equality Act 2010, was R under a duty to make reasonable adjustments?

5.1.1 What was the provision, criterion or practice ("PCP")?

5.1.2 Did the PCP put C at a substantial disadvantage, in comparison with persons who are not disabled?

5.1.3 Did R take reasonable steps, so as to avoid this disadvantage or did R fail to make reasonable adjustments as alleged at paragraphs 59(a)-(b) PoC?

(6) Victimisation

6.1 With reference to section 27 Equality Act 2010, did C complain to R of "discrimination harassment" in January 2015 (paragraph 4 PoC) and did this constitute a protected act?

6.2 If so, did C's dismissal constitute a detriment which was carried out because of the protected act?

(7) Redundancy Pay

7.1 Was there a shortfall in the redundancy payment made to C which resulted from any unjustified unilateral change of working hours by R?

(8) Unlawful deduction of Wages/Breach of Contract

8.1 With reference to section 13 ERA and/or contractual terms, did C suffer authorised deductions to his wages because of the following actions by R which were not agreed with C or justified by medical advice or otherwise:

8.1.1 R imposed a medical suspension during the period 25 January – 11 February 2016 and did not pay C during this time?

8.1.2 R did not pay C for Tuesdays when attending medical treatment in Glasgow?

8.1.3 R calculated notice pay on the basis of a four day week?

(9) Remedy

9.1 Is C entitled to any compensation in respect of the above claims?

9.2 If C is successful with any of the claims, should any award for compensation be reduced for any reason, for example:

9.2.1 If the Tribunal finds that R failed to follow a fair procedure in dismissing C, because C would have been dismissed in any event because of the genuine redundancy situation.

9.2.2 In accordance with section 123(6) ERA because C's conduct caused or contributed to his dismissal.

9.2.3 In accordance with section 122(2) ERA because C's conduct before his dismissal was such that it is just and equitable to do so.

9.2.4 Because C failed to mitigate his losses.

9.3 Does ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

9.3.1 If so, was there a failure, by either C and/or R, to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures resulting in either an uplift or reduction in compensation?

10. The Tribunal at this stage is dealing with questions of liability only.

The Facts

11. As set out above the claimant began employment with the respondent as IT Manager on 4 January 2011. The claimant came to them with considerable experience of Information Technology, having been involved with such matters for some 30 years since the age of 12. He regarded himself as being a workaholic, never taking more than a week off or holidaying abroad for 15 years. He was extremely hands on technically and was happy to be in a position that enabled him to be involved with matters technical and also matters strategic and managerial.

12. When he joined the respondent in his view the IT infrastructure was failing and so he spent his time improving it. According to him he worked approximately 80% of his time on matters technical and 20% on matters strategic. Funds were limited but there was hope of a management buyout in due course which would lead to expansion of the business and a new IT system.

13. The claimant usually had a team of two people. Initially there was someone dealing with user support and someone on a helpdesk, and then they were replaced by Stacy Sagar as lead technical support and subsequently Tom Eaton came in dealing with IT support.

14. The claimant reported directly to the Finance Director, Mrs Sharon Brownley. They would generally meet on a weekly basis to keep one another informed of relevant issues.

15. The management buyout took place in February 2014 and Phil Morgan and Sharon Brownley, both of whom feature in this case, became joint owners of the business together with Richard Wildsmith and Diane Anderton who do not figure. There was some finance from outside.

16. The claimant was initially involved in building the network etc., and after the buyout funding was provided to implement an Enterprise Resource Planning ("ERP") software system. The implementation of ERP is a large project spanning across all areas of the production process from sales order entry through to product dispatch. A number of managers from each section of the business needed to be heavily involved in the project when it was being developed.

17. In October 2013 Intuitus had provided a due diligence report on the respondent in which they said they were impressed by the improvements in the IT infrastructure and general management of IT that Howard Southworth had put in place in the last two years, and they noted no weaknesses in relation to the IT area. The close working relationship between Sharon Brownley and Howard Southworth was noted. There were said to be no weaknesses in the areas of monitoring and controlling of IT operations.

18. In the period from December 2013 to August 2014 the claimant was exceptionally busy, taking little time away from the office. According to his witness statement, he had been losing site in his left eye for a while and tried to dismiss it as strain due to overworking on computers, but it was consistently badly bloodshot and it became a concern to his family and friends. He obtained permission from Sharon Brownley to take time off to see an optician. The claimant was expected to travel to London with Sharon Brownley and others the next morning from 7.00am. The claimant worked for some hours into the night and having had no sleep caught the train as instructed and attended a series of meetings, but by the end of the day he could not see well enough even to read his train tickets.

19. Shortly thereafter the claimant visited his optician who quickly diagnosed him as having a "mass behind the eye" which the optician thought meant cancer. The claimant had an emergency appointment that afternoon at the Royal Preston Hospital and the unfortunate diagnosis was confirmed to be correct.

20. The claimant informed Sharon Brownley of his position, before telling his own family, and remained in close contact with her during the following week when he was undergoing various medical investigations and consultations.

21. A medical decision was taken to remove his left eye and the operation took place on 9 September 2014. According to the claimant some two hours after having had his eye removed he contacted Sharon Brownley by phone to assure her he was ok and would be back at work as soon as he could. The claimant was away for ten weeks but did a lot of work remotely. He attended meetings on site approximately five times during his period of absence and he also got involved in meetings via the telephone.

22. According to Sharon Brownley, there was no adverse impact on the business when the claimant was away from September to December 2014. The remaining IT team coped with the challenges and according to her Guy McKenzie was able to step in to offer some support, specifically regarding ensuring that the ERP system that was being bought fitted the IT platform. An IT task list was created and used to move matters forward in the claimant's absence.

23. According to Sharon Brownley the claimant provided information about his medical condition orally with nothing being provided in writing.

24. According to the claimant, he gave some information orally to Sharon Brownley as to his condition in November 2014, then on 2 December 2014 he obtained a fit note which he provided to her. The claimant was assessed by his GP on 2 December 2014 and because of “malignant melanoma of eye” he was not fit to work and this had been the case from 1 September 2014 to 2 December 2014. This was the only sick note obtained by the claimant and it was provided retrospectively.

25. Ms Brownley decided that she would like to have a medical report and a letter was sent to the claimant on 18 December 2014 requesting the claimant's consent to obtain a medical report. The company appears to have used a standard letter asking the claimant for consent, informing him of his rights under the Access to Medical Reports Act 1988. This was sent with a covering letter reminding the claimant that he had been eligible for company sick pay for 35 days or seven weeks, and confirming the company had exercised its discretion to pay him full salary for the duration of his absence to date. They referred to a gradual return to work being the most appropriate way forward, but the company deemed it “reasonable to request a medical report from your doctor”. The letter confirmed to the claimant that although he would be paid in full for January 2015 from 1 February 2015 the pay would be reduced pro rata based on actual days worked.

26. The claimant responded in an email on 22 December 2014. He noted the company requested permission to access medical records and that he had been given four days’ notice, and he had received some preliminary advice. The claimant asked if the company would detail their requirements, in order that a judgment could be made as to if these objectives were only achievable via full disclosure of an individual’s private medical records and for them to detail the reasoning and full scope of their request including any elements which may fall outside that of facilitating health and safety in the workplace. The company was to note that whilst permission to access full medical records was not granted at the preliminary stage, it had not been permanently refused so his email reply should not be interpreted as an unwillingness to cooperate with the company’s return to work requirements.

27. Sharon Brownley responded to the claimant asking if there was anything causing the claimant particular concern in regard to the questions that were being asked of the doctor.

28. On 9 January 2015 the claimant responded by providing his own answers to the questions numbered 1, 2, 3, 4, 5, 7, 8, 10 and 11 and with regards to questions 6 and 9 relating to the probability of reoccurrence the claimant also responded, saying that the infected eye had been removed entirely but as to the probability of future cancers he said speculation would not be of specific use to the respondent and may

even be damaging to the claimant. He requested that these questions be removed from the request.

29. In response to this the company sought permission to proceed without questions 6 and 9 and on 21 January 2015 the claimant replied saying that he saw little requirement for his doctor to confirm the answers that he had already given unless there were any specific answers given that were doubted by or caused concern to the company.

30. This would appear to be the end of the company's request for a medical report in January 2015.

31. The claimant having returned to work, although not every day, from 6 January 2015 onwards, he refers to attending one day to find that his desk in the IT office which he shared with Stacy Sagar and Tom Eaton had had its chair removed, its drawers emptied and there were boxes and folders piled high on it. The claimant was confused as to why his desk had become a dumping ground, but rather than ask for an explanation he started to move things from his desk. Guy McKenzie said, on putting his head around the door, that he was just looking for Stacy Sagar and very shortly after Sharon Brownley entered the IT office and told him they were looking at moving people around and he was to sit with the four accounts clerks in the accounts office. According to the claimant, no-one else was moved from their long held seating position. The change made the claimant's interaction with his staff much more difficult, and as far as he was concerned it was for no justified reason. He felt he was set apart from his own department and became a visitor to it. He missed out on key conversations by not being there.

32. According to Sharon Brownley, she believes the desk move was on the claimant's first day back at work in January 2015. She was keen to integrate the claimant back into a team of familiar and friendly faces and she requested that he sit in a larger office with the finance team rather than in the IT office with Tom who he did not know. According to her, she moved the claimant with the best of intentions wanting to support him at a difficult time. Although the claimant says he raised the issue with her many times she says had the claimant expressed the extent of his concerns they would have been addressed. By mid February 2015 the claimant had returned to the IT office with his two colleagues.

33. On 21 January 2015 the claimant sent an email to Sharon Brownley following their discussion in relation to 19 January. He set out the full details of his complaint as follows:

> "As Tom Eaton was leaving the accounts department office area around 10.00am 19/01/2015, Guy McKenzie, ERP Project Manager and member of the senior management team, asked Tom (within earshot of the entire accounts department – *I heard, and I'm seated at the back of the of the room)*: 'So, survived week one, eh?'.
>
> Clearly this statement was in reference to Stacy Sagar not having been in work for week one (of a two week holiday). I hope this was just a clumsy attempt at making conversation – however **I have absolutely no doubt that such a statement would NOT have been made prior to my illness. Such**

> **statements suggest to all within earshot (and my staff member, Tom) that my presence is now viewed as being of little benefit.**
>
> This statement was both embarrassing and concerning (especially as I have made special efforts to accelerate my return/availability in order to assist Tom and ensure ongoing IT operations)."

34. The claimant went on to say he had not discussed matters with Guy McKenzie but he had been advised that he must bring such issues to the attention of management because such statements, however they were intended, undermined his efforts to achieve normality in the workplace and undermined the company's support of that ambition through non discrimination.

35. The claimant found the comment hurtful and detrimental and he raised the issue to re-address any actions that had, and to avoid any actions that could, undermine efforts to achieve normality in the workplace as opposed to looking for punitive actions. He had therefore elected to raise it with the company trusting they would decide on the most appropriate way to deal with the situation. He then set out his additional concern that the comments of Guy McKenzie may reflect a genuinely held view that the claimant was now employed on the basis of reduced capacity. If this was the case there may be a more widespread educational issue to be addressed.

36. Following his meeting with Sharon Brownley the claimant sent her an email at 13:24 on 21 January 2015 referring to the issue of the 19 January as discussed.

37. The claimant, having sent the email to Sharon Brownley, met with her later on the afternoon of 21 January 2015 and the claimant made an audio recording of the meeting without the knowledge or consent of Sharon Brownley. The claimant had the conversation professionally transcribed and the transcription was provided in the hearing bundle set out over four pages.

38. Having started with matters medical the claimant went on to refer to what Guy McKenzie had said in his hearing, but that he did not wish to take it further. The meeting was inconclusive.

39. According to Sharon Brownley after sending that email on a Wednesday lunchtime the claimant did not return to the office either that day or that week. She genuinely felt that the claimant had misconstrued Mr McKenzie's comment and she chose to take no further action in respect of the claimant's email.

40. According to the claimant, in his witness statement, the company failed to address the issues he had raised concerning Guy McKenzie and Sharon Brownley showed an increasingly hostile attitude towards him, and things became worse:

> "Guy became more emboldened with his behaviour and I was ridiculed and often excluded. Guy seemed to become aware that I am blind in the peripheral vision to my left, as he would gesture always when he was to the left of me, yet never when he was on my right. Gestures like turning up one side of his mouth or tapping his head or shaking his head whilst smiling in ways that clearly suggested to others that he thought that what I had just said (typically in meetings) was stupid. This was consistent behaviour over the course of months that only ever happened if to my right side. Given the open

nature of this behaviour in front of other staff I felt increasingly diminished and isolated."

41. Again according to the claimant in February 2015 he was on his way to a meeting "so had just put my recorder on". The recording captured how dismissively Guy McKenzie spoke to him in front of others including his habit of calling the claimant "top man" or "big man" as a common put down despite the claimant asking him many times not to. The claimant is around 5ft 5ins tall and Mr McKenzie is over 6ft tall. According to the claimant he recorded an incident when they were in the corridor with people in it and glass fronted offices on both sides. Mr McKenzie shouted "there's top man, where's my big monitor? Everybody has big monitors apart from me". As he walked away passing others Mr McKenzie shouted at the claimant "It's unbelievable" and then pointing at him shouted "outrageous behaviour" and he left the claimant feeling totally embarrassed in front of other staff.

42. On 12 March 2015 the claimant discovered that Guy McKenzie had left him out of what he considered to be a key meeting – systems administration training for the new ERP system which was absolutely critical to his role. This caused the claimant at 10:46 on 12 March 2015 to send an email to Guy McKenzie copied to Sharon Brownley and to himself at his private email address under the heading "NAV Systems Administration", and the claimant typed "Do **not** omit me from any further such training – meetings etc".

43. At 10:50 Guy McKenzie responded to the claimant, "???? Really".

44. Guy McKenzie at 11:05 emailed Sharon Brownley forwarding the claimant's 10:46 email saying that the last thing they needed was a petty squabble between two managers but he was seriously unimpressed. He said he had reminded the claimant where he sat should he need to speak to him. There was absolutely no agenda behind it and he thought Stacy was covering the topic.

45. At 11:06 Sharon Brownley was sent an email by the claimant forwarding Guy McKenzie's response saying that as she was aware he had let two previous incidents with Guy go but ultimately nothing had changed and he genuinely needed things addressing. Sharon said she would pass the email to Emma Wright on Monday to deal with, and the claimant thanked her.

46. Emma Wright had joined the respondent on 2 February 2015 working three days a week. There had been no HR presence for four years before she started and she spent the first six months assessing what was required. She had experience in HR over a number of years having obtained the CIPD qualification in 2002.

47. Having received the emails from Sharon Brownley she was asked to investigate the allegations raised by the claimant and although no formal grievance had been raised she wanted to get to the bottom of what was going on. She met with the claimant and asked him why he thought he had been left out of the invitation to the meeting, to which the claimant is recorded as saying, "I don't know what he's got in for me, but it's the second time he's done it". The claimant did not express an opinion as to Mr McKenzie's motivation but she should ask him. The claimant thought he should have been invited to the meeting.

48. Ms Wright met with Guy McKenzie and asked why only Stacy Sagar had been invited. Guy McKenzie told her that Stacy was the IT representative who had attended all of the previous ERP meetings and he invited her as usual. The invitation told Stacy to bring her colleague, Tom Eaton, if she thought it relevant. He thought that Stacy had forwarded the invitation to the claimant for information, which the claimant took to be discrimination and gave the response set out above. According to Guy McKenzie he sent it to Stacy as the IT representative and the meeting related to a basic administrative function relating to ERP not a strategic matter so he did not feel it appropriate to send it to the claimant. Ms Wright could not understand why the claimant believed he should have been involved in the meeting as it seemed to her a low level matter.

49. Having looked at the various issues raised by the claimant and following the investigation she had undertaken she explained to the claimant that Guy appeared to have no intention of discriminating against him. The claimant really disagreed and was adamant that Guy was discriminating against him but he was unable to provide further information than that already provided. She therefore told the claimant she could find no evidence to support his contention that Guy McKenzie's actions were discriminatory in any way. She asked the claimant how he would like the situation to move forward and according to her the claimant suggested he would go for a pint with Guy to resolve the matter and put it behind them. This was not a management suggestion but according to her the claimant was happy to move on in this way, and she confirmed it in an email to the claimant setting out her understanding that he did not wish to take formal action or utilise formal mediation, but at the meeting he had suggested his version of informal mediation by way of a drink to cover matters off between them. She understood that they actually met in a meeting room at the office rather than going for a drink and as far as she was concerned matters were resolved informally, and she was content that this concluded matters.

50. According to the claimant Emma Wright gave him two options to resolve matters. The first would involve mediation and the second was a formal grievance, but if he raised a grievance there would need to be a full investigation and this could lead to delays in the ERP project going live so there would be consequences if there was a decision that his claims were unfounded. On the basis of this the claimant did not want to take the blame for failures in the ERP project and thought there was a thinly veiled threat against him.

51. According to the claimant his fears about the grievance process together with what he felt was increasing hostility led him to conclude his best course of action would be to drop his complaints. It was after this that he received the 24 March 2015 email from Emma Wright referred to above. The claimant thought the email was a face saver for the company and his best course of action would be to leave things and hope that they would in due course change.

52. On the following day Sharon Brownley instructed the claimant that she had set up a meeting between himself and Guy McKenzie, and Guy McKenzie gave a qualified apology and according to the claimant, the claimant said:

> "Look, we've never had a problem in the past. I'm back now, full-time, IT Manager, no reduced capacity or anything, just same old me and want to be treated exactly as before."

53. According to the claimant, Guy McKenzie became angry and said that if he had a problem he should have spoken to him man to man, which the claimant said he did many times. Guy McKenzie said that thanks to him, Sharon Brownley and Emma Wright had been all over him about how much trouble the company could get into because of the disability stuff. After some further discussion the claimant ended the meeting saying he wanted to draw a line under things and go back to how it was before he had been off.

54. Sharon Brownley does not accept that she was aware of this meeting and she did not set it up. In the view of the Tribunal it is the fact that the meeting happened rather than who set it up that is of importance.

55. On 23 June 2015 the claimant informed Sharon Brownley that he was having an MRI scan on 24 June 2015. A few days later the results of the scan showed abnormalities in the claimant's liver which were suspected to be cancer. The claimant had scans, consultations and an operation and eventually it was confirmed that the cancer of the eye had spread to his liver. Over the next two months the claimant was the subject of a series of scans, operations, procedures and consultations, but notwithstanding this he tried to attend work at least once every two weeks. He kept Sharon Brownley informed of what was going on.

56. The claimant appears to have had a period completely away from work from 16 July 2015 onwards.

57. The claimant was advised that he should enrol for a clinical trial based on immunotherapy as the best way forward by way of treatment, but this was only available in the Beatson Centre in Glasgow.

58. The immunotherapy treatment is given to the claimant as an outpatient in Glasgow on a Tuesday. It involves receiving the treatment via intravenous drip over 15 minutes and thereafter some blood tests. The claimant travels to Glasgow by train on a Monday evening, stays in a hotel next to the hospital and then returns by train later in the day.

59. A meeting of the Board of Directors of the respondent on 25 August 2015 minuted that the ERP project went live on 3 August 2015. Initial problems were encountered but overall the implementation went well. Expected efficiencies were not yet being seen but savings were anticipated over the course of the next couple of months. It was agreed that a redundancy exercise should not be undertaken prematurely.

60. The method of treatment of the claimant described above was not what was originally anticipated. On 12 October 2015 the claimant sent an email to Sharon Brownley saying that he had been accepted for a clinical trial based on intensive treatment one week in every four over six months. There would be a requirement for initial hospitalisation but thereafter treatment would be as an outpatient. The claimant hoped that there would be no major side effects so during the three weeks between treatment weeks he thought he would be able to work, and after the first set of treatments he thought he would be in a position to work remotely during the treatment weeks.

61. Sharon Brownley's response was to thank the claimant for the update on his progress and treatment. The claimant had not provided any sick notes and whilst this had been adequate so far she felt if they were to accommodate his suggestion of a return to work either remotely, on site or a phased return, as a responsible employer they needed to be in possession of a medical opinion providing narrative in support of his return, treatment and any indications for ongoing requirements they should make and how the treatment may affect his return. They did not want access to his full medical records but wanted third party confirmation from his chosen medical professional about his current condition and how his role and responsibilities should or could be adjusted if required to assist with a smooth return to work if that was what the doctor said. The claimant was told that he could help construct the correspondence to the doctor to ensure that the company only requested information of relevance to his role, and he could see the medical report before they did if he so chose. Given the duration and nature of his absence she did not feel they were in a position to make any accommodation without some medical opinion on the basis that she would hate to compromise his recovery simply because they were not aware of all the consequences or limitations on the basis of the treatment schedule he was following.

62. Having dealt with the medical issues she made the claimant aware that she had had to implement some temporary internal changes in IT. She had asked Guy McKenzie to project manage Stacy and Tom in his absence. This was a temporary measure to last until they had more information regarding his absence, and the arrangement was to continue until the claimant's return to work was accommodated.

63. Mr Southworth's response was to say that the email sent by Sharon Brownley required a much more considered response than he had hoped, but he would reply within the next two days.

64. The claimant responded on 19 October 2015. He asked for a full copy of the proposed medical report request and for confirmation whether the respondent's position was to refuse a return to work until a medical report had been produced by a medical adviser of his choosing.

65. Sharon Brownley involved Emma Wright who advised her as to the claimant needing to certify his period of absence. They could not prevent him from returning until a medical report was obtained but could prevent him from returning without a fit note. A medical report would highlight adjustments required and she felt it was too risky given what the claimant said he had been off with to allow him back to work without a sick note and a fit note.

66. On 28 October 2015 Stacy Sagar confirmed to Sharon Brownley and Emma Wright that the claimant had not read his company emails since the start of September therefore, as discussed, she had disabled his account until instructed otherwise. She confirmed this prevented the claimant from accessing email or the system in any way until either she or Tom enabled his account again.

67. Also towards the end of October 2015 the respondent was implementing a redundancy programme as a result of a reorganisation and restructure of the company's business and activities. Within the bundle there were letters concerning redundancy to a business development adviser and an area sales manager.

68. The claimant and Emma Wright spoke on the telephone on Monday 26 October 2015 and on Wednesday 28 October 2015 Emma Wright sent the claimant an email attaching a draft of a letter to the chosen medical adviser. The company was looking forward to his return upon provision of a sick note to cover the absence and a fit note to cover the date of return and specifying the conditions under which he would return. Ideally she would like to have a sick note, a fit note and a medical report to ensure the best return to the right environment. She felt that without that information they would not be able to offer him that chance. The draft letter referred to a form of consent under the Access to Medical Reports Act 1988 then went on to set out the background of the claimant's absence, and explained why the company needed a medical report to obtain a comprehensive overview of his condition. 21 questions were asked. Details were given of the claimant's work as an IT manager including management responsibility for two people.

69. The claimant responded on 2 November 2015 saying that the request was far more probing than he expected. Whilst he was keen to ensure that the company had information that was genuinely required, he believed the request to be in excess of those requirements. If the company insisted that the request for a medical report was a prerequisite to his return to work over and above a sick/fit note and full disclosure from him, then he was sure they would understand that he needed to take third party advice.

70. Emma Wright invited the claimant to explain what he thought was excessive. She confirmed she would be happy to have him back once the sick note and fit note had been provided. As to the list of questions, they were ones which if they had the answers to they would be able to give a considered degree of thought to his return and the environment he would return to giving the company and him the best chance to minimise any risk that he could be exposed to. They would also need to know how often and for how long he was likely to be away attending appointments.

71. In a brief conversation on 2 November 2015 Emma Wright records that the claimant had not yet got a sick note or fit note but was seeing the doctor the next day. He did not want to give consent for the medical report.

72. According to the claimant, it appeared that the company were doing everything they could to delay and frustrate the process of his return.

73. No further progress seems to have been made in connection with this request for a medical report.

74. On 16 November the claimant emailed Emma Wright to tell her that his treatment regime had been confirmed. In his view this superseded the fit note requested by the company which he was in the process of obtaining. The treatment involved an injection being given once a week on a Tuesday in Glasgow for 6 months. He intended to return to work at the first opportunity however they needed to establish how the Tuesdays could be accommodated during the six months.

75. Emma Wright forwarded this to Sharon Brownley setting out that in her view a fit note was still required and there was a need to understand the prognosis and the treatment plan which they had to accommodate. She wrote that “Salary in my view is pro rata for six months”.

76. The claimant's treatment in Glasgow started on 17 November 2015. After one treatment he had an allergic reaction which, in accordance with the drug testing protocol, led to hospitalisation for three days.

77. On 17 November 2015 Emma Wright emailed the claimant to thank him for his update and to say there were things they needed to understand in relation to his return. She knew they had discussed gaining medical advice and understood he had not wished or did not see the need for it, so she asked him to provide answers to an number of questions: when was the treatment to start; what was it for; could he provide the appointment times; what were the ramifications in relation to recovery; were there risks to him whilst undergoing the treatment, if so what; was there anything he would no longer be able to do as a result in relation to work; when would be the first available date that he would be able to return? She wished to pro rata his salary for four days in view of his treatment schedule which would accommodate the Tuesday when he would expect to be out of the business. Other than for the first two weeks they could then expect him to be in work on Monday, Wednesday, Thursday and Friday for full days. There was no response to this from the claimant.

78. According to the claimant he felt this was a very unfair decision as there had been no consultation and it was common practice for other managers to work remotely, some having one or two set days per week to work from home.

79. On 23 November 2015 the claimant informed Emma Wright that there had been a complication following the commencement of his treatment which resulted in him being transferred to a high dependency ward for the remainder of the week. Things were now stable but it may impact the treatment regime in the first few weeks. By 27 November 2015 the claimant had been in hospital all week with another severe reaction to the treatment, but reactions were expected to decrease each time.

80. In November the company appeared to be in consultation with other employees concerning redundancy. The affected employees were not required to attend for work in the consultation period.

81. Emma Wright communicated with the claimant by email on 9 December 2015 suggesting that the return to work would not be likely until the New Year. On 15 December 2015 she told the claimant she would not be in work until the next year and they would meet in the New Year.

82. On Tuesday 15 December 2015 at 16:59 Emma Wright invited the claimant to an absence review meeting on 11 January 2016. The time and date could be rearranged but she just wanted to get something in the calendar. In an email sent around the same time she asked the claimant to reconsider the request for a medical opinion prior to his return to work. She asked for the sick note and fit note to be provided prior to the meeting on 11 January 2016, but if neither were available she would postpone the meeting until they were. She hoped that in the meeting she would have a clear understanding of a timeline for the claimant's treatment and then they could establish how and if the Tuesdays could be accommodated during the six months of treatment.

83. The claimant responded to Emma Wright on 5 January 2016 to say that although he had intended to have a retrospective sick note created on 5 January

2016 he had learned that it could not be created by his consultant in Scotland but instead must be provided by the GP. He noted a significant concern that the company had shifted its position regarding previously agreed support of his treatment – from agreeing to support on an unpaid basis ("as set out in your email of 17/11/2015") to the most recent phraseology of "how and if the Tuesdays could be accommodated". According to the claimant this apparent shift called into the question the intention and scope of the proposed meeting which may fall outside of a standardised return to work interview so he sought clarification as to the purpose/scope and if there had been any change to what he believed, what was their shared aim of his return to work as IT manager. He said that he would not be able to obtain the sick note and fit note in advance of the meeting on 11 January 2016 and so it should be rearranged.

84. On 7 January 2016 Emma Wright responded to the claimant saying he needed a sick note to cover the period from 17 July 2015 until the date the GP felt he was able to return to work. The fit note should include any recommended adjustment. A return to work interview was paramount given the length of the absence, the claimant's condition and the illness he was experiencing as a result of it. They needed to assess fitness to return and what measures could be taken to support him. As to Tuesdays, she had information from the claimant but nothing medical. Given the absence of any medical report they would need to discuss matters at the meeting. She referred to the policy that where an employee refuses to give consent for the doctor being approached decisions will be taken on available information. All employees were treated the same in relation to return to work. He had been paid sick pay beyond his entitlement. He had not been made to provide regular sick notes. She would postpone the meeting until he had the necessary documents.

85. According to Sharon Brownley, a number of efficiencies were identified in the business in the months following the launch of the ERP on 3 August 2015 leading to a redundancy programme being started in October 2015. They did not consider redundancies in the IT team at the time because there was no need to. They were not sure when the claimant would return and the IT systems were running smoothly following the introduction of ERP.

86. The claimant obtained a statement of fitness for work from his GP on 13 January 2016 when the GP confirmed that because of secondary malignant neoplasm of liver he advised that the claimant may be fit for work taking account of the following advice:

> "If available, and with your employer's agreement, you may benefit from a phased return to work and altered hours."

87. The doctor added that:

> "The patient is currently undergoing immunotherapy for above. Initially had immunotherapy reaction requiring treatment. Was given as an inpatient. This has now settled and now having treatment as a day patient one day a week. He now feels fit to return to work and has been given blessing for this from his oncology consultants. Having been off work for some time a phased return with gradual re-establishment of normal hours and responsibility would be beneficial to his ongoing recovery."

This was said to be the case from 13 January to 7 February 2016, and the doctor would not need to assess for fitness for work again at the end of the period.

88. The return to work meeting took place on 25 January 2016 when the claimant met with Sharon Brownley and Emma Wright. The claimant was given permission to record the meeting but did not provide the respondent with a copy of the recording after the meeting. A transcript was provided in the bundle.

89. The claimant explained about his travel to Glasgow and how he was being treated. He was asked by Sharon Brownley what his intentions were in regard to work and he said "What I would aim for is to do a full week apart from a Tuesday". According to the transcript they were all happy with that.

90. After some more discussion about the treatment process, when the claimant explained how he went by train to Glasgow on Monday evening then returned on Tuesday after the treatment and how his time when not under treatment was his own so he could actually work remotely even though he would be physically unavailable, Sharon Brownley put it to the claimant that it was her understanding that his request in terms of longer term return to work was to work Monday, Wednesday to Friday and not Tuesday because they were in Glasgow and was that correct?

91. The claimant said no because he had put in his emails his ability to work would be all week but at the moment treatment was on Tuesday so there would be a part of Tuesday when he was unavailable but he would be available to work remotely. There was a day a week when he needed to be physically somewhere else. He could, however, be accessible using a mobile phone and/or a laptop. He confirmed there was equipment in the treatment centre to allow people to work via remote access which assisted people to return to normality via continuing to work. According to the claimant, at the end of the meeting that lasted nearly an hour they would write to him with their decision.

92. According to Sharon Brownley the claimant said no adjustments were needed. There was no medical evidence apart from the fit note. At the end of the meeting the claimant was fit and well to return to work, saying that he had never felt better. He would need ongoing treatment on Tuesdays. He wanted to work from Glasgow on the days when he was receiving treatment but she did not think it was appropriate to expect him to work when he was having treatment. She thought it was in his best interests that he should not be expected to work whilst undergoing treatment.

93. After the meeting she and Emma Wright considered matters and wrote a letter to the claimant on 26 January 2016. It recorded the medical questions and the answers the claimant had given on a separate document. It noted that on the basis of the medical evidence and the claimant's comments that he was now fit to return to work. It explained that he would require each Tuesday off work to attend the clinical trial and treatment, and in the circumstances they agreed to accommodate his request on a temporary basis to be reviewed in June 2016 when he expected the treatment plan to end. In the meantime his salary would be adjusted, on a pro rata basis, to reflect a 3-4 day working week.

94. The letter went on to refer to the recommendation on the fit note of a phased return to work and stated that the fit note indicated that he would be fit to return on 8

February. Although the claimant felt it was not necessary, they concurred with the doctor and felt that in the light of the doctor's recommendations they would ease him back into a routine he had been absent from for six months by implementing a phased return for a short period initially. In the first week he would return on Wednesday 10 February 2016 and complete three days. For the week commencing 15 February 2016 he would work Monday, Wednesday and Thursday and this would continue until the end of February when it would be reviewed and they would seek to include Friday as well and the salary would change accordingly. There is no reference in this letter to the claimant working remotely on a Tuesday.

95. When cross examined about the meeting Emma Wright said that she had misread the sick note such that she thought 8 February was the day when the claimant could come back. This was a Monday so he would have his treatment on Tuesday and then get back to work on Wednesday 10 February. Her misunderstanding correlated with the letter that she had sent. She accepted that it was her fault that she had misread the sick note.

96. According to Sharon Brownley she first thought about restructuring the IT department once the claimant had confirmed he was ready to come back and after the capability meeting had been completed. She remembered her shock when she realised that there was little or nothing for the claimant to do when he returned to work. Following the ERP going live with no subsequent infrastructure issues it should have been apparent that a lot of his role had disappeared. The infrastructure had been completed and no further infrastructure or security changes were needed. SPS required an IT support function, and according to her the IT manager role had fundamentally gone. She thought that the claimant would have known for some time that his role would have been significantly reduced following the implementation of the ERP and the infrastructure upgrades. She considered a pool for redundancy with the claimant being in a pool on his own. His role was strategic whereas Stacy and Tom were first line helpdesk support in much more junior roles. They placed the claimant's role at risk of redundancy on his first day back from his second sickness absence. They wanted to address the changes on the first day back rather than waiting longer.

97. There was an "at risk" meeting with the claimant on his return to work on 10 February. At the meeting the claimant was told he need not attend the workplace once the consultation had started. Although the respondent's written policy did not include this, following the management buyout the management team had decided that where someone was at risk of redundancy they would not be asked or expected to work. Also according to Ms Brownley the claimant having been off sick for a long time it would not in her view have been fair on him to bring him back into an environment where there was no work for him to do. In her witness statement she referred to a potential risk to the business if they allowed him back given that he had been hinting at legal action and had been difficult to manage for 12 months. They were concerned that putting him at risk of redundancy may sour his behaviour. His experience and expertise in IT made them feel vulnerable. They did not refer to "garden leave" in the meeting.

98. At the first consultation meeting on 22 February she thought the claimant came across as though he had been expecting it for a long time. He referred to a lack of service backups completed during his first sickness absence and a lack of documentation to support the IT function should anything go wrong. The claimant

said he was denied access to management information, resources and SPS employees. She confirmed they did not give him access to management information because this was mainly financial and she did not think it would have helped him. There was nothing about IT in it. She did, however, provide the claimant with a copy of the IT task list which she thought was more than enough information for him to engage with. They had good reason not to give him access to the computers but he should have been able to make suggestions due to his knowledge of the IT infrastructure and ERP. The claimant during the consultation described the task list as "deficient" but without explaining how or why. The respondent commissioned a review report from Intuitus which confirmed there were no problems with the proposed IT arrangements. It was mentioned in the first consultation meeting that Stacy Sagar had resigned and a decision had not yet been made as to whether or not to replace her, such was the extent to which the IT function had changed following the introduction of the ERP.

99. There was a second consultation meeting on 29 February 2016 when, according to Ms Brownley, the claimant did not seem willing to engage in a meaningful way. He said nothing to dissuade her from the proposed redundancy and the Intuitus report gave her confidence to maintain her view that the role of IT manager was redundant. According to her she mentioned roles that would be available but the claimant expressed no interest. The redundancy could not be avoided. The claimant had put forward nothing to suggest that it would be a mistake to remove the IT manager role and so she wrote to him on 15 March 2016, after the third consultation meeting on 14 March, to confirm his redundancy. According to her it had nothing to do with his medical condition or the previous allegations he had made against Guy McKenzie.

100. In cross examination of Sharon Brownley various points were covered including the matters set out below.

101. Mr McKenzie stepped in to help her. He was not formally appointed as acting IT manager.

102. She could not remember when the IT task list was introduced.

103. The lack of information from the claimant during his second period of absence meant that she did not feel she knew where she was with the claimant. It made the process very difficult for them as an employer. No other employees had been allowed sickness absence to this extent without third party documentation. When they met on 25 January 2016 this was the first time she had seen the claimant since 16 July 2015. She had no idea how he would be when they met on 25 January 2016.

104. The company was receiving more support from third party contractors in relation to the IT system. The business did not need the skill set of an IT manager to implement what was on the task list. It had probably been apparent somewhat earlier that an IT manager was not necessary but the decision could only be made when the claimant was ready to come back.

105. Before the management buyout there was a different view on whether or not people at risk of redundancy were expected to come in to the workplace. After the management buyout they were more compassionate. She imagined it would be difficult for all colleagues on consultation and also difficult for their teams. She said

that at no point did the claimant ask specifically to come in and sit down and speak to them. Whilst the words were there the actions were never there. There was no specific request to do anything different from what happened.

106. As to potential risk, there was nothing in the bundle about it but when the claimant was placed at risk she had a lack of trust in him. She felt he had a grudge and he could at the push of a button lose the data, wipe the systems – this was in the mix of why she was not allowing the claimant back in.

107. She was asked about the letter to the claimant sent on 10 February 2016 following the placing of the claimant's role at risk of redundancy when it was said that, "We wish to confirm your attendance at work is not required during this period of consultation and full payment will be provided during this time". She could understand why the claimant would be confused with this reference to getting full payment. The company's letter sent on 26 January made it clear that he would be paid for four days a week and the claimant never objected.

108. Looking at the transcript of the at risk meeting on 10 February 2016 the claimant was told by Emma Wright that whilst the process was going through they would not expect him to be in work, then the claimant asks about the pay situation and was it separate to this? Emma Wright answered "it's full pay" and Sharon Brownley said "Full pay, yeah, there's no difference there".

109. At the later meeting with a reference to Stacy Sagar's departure she confirmed that they had not made up their mind as to how she would be replaced.

110. At the 22 February 2016 meeting the claimant said nothing specific about what he wanted to happen. He did not specifically ask for the opportunity to do something. He did not ask for any specific documents. The claimant did not specifically ask to come on site. If he had wanted to engage then she felt there would have been something more specific.

111. She said the IT had run smoothly in his absence. She did not think they were exposed from the IT perspective. The decision on redundancy was based on the task list.

112. She was referred to the note made by Ms Wright of the meeting on 22 February 2016 in which she had referred to a security risk for someone in the claimant's position coming back. This did not appear in the transcript. The only response of Ms Brownley was that they were not her notes.

113. She believed the information she had supplied was sufficient for the claimant to respond to it. She felt that providing three pages of narrative was enough for him to provide counter proposals. The claimant had set up the infrastructure and knew where the company was going.

114. As to the Intuitus report, she did not suggest they contact the claimant. Although the claimant had described the IT task list as "deficient" he had not given any examples as to how it might be and so she brought in Intuitus as a third party to review the tasks and the need for an IT manager.

115. As to the failure to provide in writing a list of alternative roles they were remiss. It was an oversight but the vacancies were discussed in an earlier meeting.

She would not imagine the claimant would apply for a job paying a salary of £18,000. He made no proactive moves to enquire about the Stacy Sagar role.

116. From the claimant's perspective he attended work on 10 February 2016 but was instructed to attend a meeting before he started. He decided to record the meeting which was with Sharon Brownley and Emma Wright. Sharon Brownley read a letter to him stating that his job was at risk of redundancy and handed him a copy of it. The letter, dated 10 February 2016, refers to redundancy exercises elsewhere in the business following the ERP installation. They were now considering how the IT department and staffing needs were affected, proposing that the requirement for high level IT involvement to implement, manage and support the system may not be required and could be supported through two more junior employees dealing with first line and technical support. They did not have plans to procure further systems for the group, again impacting on the work required to be undertaken by an IT manager, and they were considering a proposal whereby IT support and/or facets of supply, negotiation and supporting administration could be accommodated by two junior employees. If the proposals were implemented they would no longer have a requirement for the role of IT manager and as such his employment was at risk of termination on the grounds of redundancy. The claimant could apply for voluntary redundancy if he wished. This would involve an enhanced payment of three months' salary in addition to the statutory redundancy payment. If he did not apply by 16 February 2016 they would conclude he did not wish to volunteer and they would implement a compulsory redundancy programme. The letter then went on to refer to how the consultation procedure would take place and then included the matters referred to above about the claimant not being required to attend work during the period of consultation and "full payment will be provided during this time".

117. According to the claimant in his witness statement he was told he was being placed on "garden leave". Looking at the transcript it is apparent that the claimant asked if he was on garden leave and the response was "yes, whilst the process goes through" and they would not expect him to be in work.

118. According to the claimant he was informed that he would be on full pay until the conclusion of the redundancy consultation period but it became apparent to him by his next wage that full pay was based on just a four day week even though he had never got to the stage of working a four day week.

119. The claimant thought evidence suggested that the decision to place his role at risk was taken around 1 February 2016 although they only decided to inform him on his return to work on 10 February 2016.

120. The claimant emailed Sharon Brownley on 11 February 2016 to tell her that he though the company had acted in an unnecessarily cruel fashion with the resulting stress forcing him to seek additional medical help. He loved his job and did not wish to apply for voluntary redundancy and instead intended to engage fully with the redundancy consultation process. It was difficult not to feel that the decision to make the IT manager role redundant was a foregone conclusion. He was told in the letter that to avoid redundancy he must put forward any viable suggestions or proposals but the letter only indicated two reasons for placing the role at risk, which were a reduced requirement for an IT support function and a reduction in future IT investment. With such minimal information it was impossible for him to set out any

specific counter proposals. He asked for the meeting scheduled for 17 February 2016 to be delayed to 22 February 2016.

121. Sharon Brownley responded on 15 February 2016 at some length. She did not feel that they had acted in an unnecessarily cruel fashion. On the question of the date when the IT manager's post was placed at risk, Sharon Brownley responded by stating that 25 January 2016 was their first opportunity following the six months' absence to meet him and assess his capability to return to work. In his absence decisions on IT had been taken by the directors with the support of the two IT staff and the ERP project manager. Having established on 25 January 2016 he was capable of returning to work they assessed the current workload by reference to the IT task list and the 2016 projects were listed. After due consideration with particular reference to expertise, timeframes and cost it was concluded that the projects could be handled by first line and technical support staff with external assistance if and when necessary. Consideration was given to the broader role of IT manager on a strategic basis but they were happy that they would have an appropriate level of IT skill without an IT manager. They did not feel it necessary to undergo any further strategic reviews. Following the review a decision was taken to place the role at risk in the week commencing 1 February 2016. Sharon Brownley was not able to give a specific date.

122. Although the claimant refers to Sharon Brownley completely avoiding the issue of his request to be allowed on site, a reading of the claimant's 11 February 2016 email shows that it does not contain such a request.

123. At 9:46 on 22 February 2016, prior to the first consultation meeting, the claimant sent an email to Sharon Brownley and Emma Wright summarising what had happened in the past three weeks and then setting out his concerns, which included but were not limited to:

(1) Previous discrimination, and the role of that person in the decision making process;

(2) The timeline involved in placing the IT manager's post at risk;

(3) The general lack of transparency throughout the process;

(4) The minimal level of information provided;

(5) The limitations imposed on me to obtain information;

(6) The restrictions imposed on me – thereby denying me the opportunity to work.

124. The claimant summarised why he thought the IT manager's post had been placed at risk:

(1) A reduced requirement for an IT support function;

(2) Reduction in future IT investment;

(3) Claimed reduction in requirement for strategic direction.

125. The claimant said that none of these areas were pivotal to the IT manager's role. He had been provided with a list of 12 IT projects but there were only titles and no details. He had been informed that Stacy Sagar had resigned but no information had been given as to plans to replace her. The claimant concluded by saying that:

> "Owing to the minimal information you have chosen to provide, together with the restrictions imposed, it has been made impossible for me to set out any substantial counter proposals."

126. The claimant recorded the consultation meeting on 22 February 2016 saying that he had raised many concerns and focussed on and detailed how the respondent's insistence on denying him access to the workplace systems, documentation, business plans, project plans, staff etc., continued to make it impossible for him to produce significant and verifiable counter proposals to redundancy. He says he offered many examples of why the role should not be at risk and also how only by him having access to the workplace would he be in a position to offer far more and be able to fully substantiate his reasoning. They stated it was not their policy to have staff at risk on site yet gave no written policy. According to the claimant the respondent displayed no interest whatsoever in working with him to find a solution and he left the meeting with the clear impression that his pending dismissal was not an issue that the company regretted or that they were going to work toward genuinely working with him to explore the available options.

127. Looking at the transcript of the meeting the claimant encapsulates it as follows:

> "But my problem with that because I don't want you to think that I'm going to go away and actually plough time into counter proposals when my key problem here, and this needs to be made absolutely clear, is that my key problem here is that those counter proposals would be made in a position of darkness. So it's not that I'm not going to do it. It is that I am not best placed and my problem is that I could have been much better placed."

128. The transcript notes a pause followed by Sharon Brownley saying "ok".

129. The claimant is then told that Guy McKenzie had not been involved in any decision making process concerning the placing of the claimant at risk of redundancy.

130. Later in the meeting the claimant made reference to the limitations of him not being in the business prior to receiving the "at risk" letter. Not being in the business meant that he was physically restricted from getting information, finding out things, physically checking them himself. Once his role was placed at risk he was very much in the dark because he was not in a place to be able to have discussions with the people to check the documentation, look at the systems, have meetings with external service providers and check over contracts. He was completely in the dark and although it was difficult his genuine interests have always been those of the company. The claimant indicated that the task list seemed to him to be full of holes and it was screaming that it was why an IT manager was needed.

131. After this exchange the claimant was asked again if he was going to provide any information and he said that he did not believe he could produce anything that

was anywhere near as substantial as it should be given the seriousness of the situation, and he could actually be putting forward something which could easily be shot down and actually be used as a piece of work. It could be used to justify the redundancy of the IT manager's post. He did not want to waste his time, their time or indeed shoot himself in the foot.

132. At the end of the meeting Sharon Brownley expected that they would hear from the claimant within a week and he agreed with this.

133. On 23 February 2016 the claimant asked for a breakdown of how his January and February wages had been calculated, and Emma Wright responded with reference to working a four day week.

134. According to the claimant a major issue for him related to the fact that he had been away from the workplace for over six months so it was impossible for him to produce substantial counter proposals without access to systems, documentation, project plans and staff.

135. Following the consultation meeting on 22 February 2016 a letter was sent to the claimant summarising the meeting from the perspective of the respondent. At the end of the letter it said that the claimant would continue to be paid in line with the four day working week they agreed and that he would also accrue holidays on this basis.

136. The second consultation meeting was scheduled for 29 February 2016 and in advance of it at 21:32 on 28 February 2016 the claimant emailed Sharon Brownley and Emma Wright saying that despite his continued attempts to engage fully in the process of forwarding viable suggestions or proposals to potentially avoid redundancy, owing to the minimal information provided together with the restrictions imposed it had been made impossible to him to set out substantial counter proposals but it remained his hope that the company would reconsider their position. He would attend the meeting.

137. According to the claimant the meeting lasted only three minutes and indeed the transcript ends at 3:57pm and is set out over two pages. The parties agreed that neither side had changed their position. It was not correct to say that the claimant did not want to put any proposals together. He had written down exactly what his views were on this – presumably as set out in his 28 February 2016 email.

138. Sharon Brownley said she would put together a list of vacancies with Stacy's role being one of them. There was a senior marketing executive position and a shift manager position, and then the transcript ends with the parties going into "without prejudice" discussion, with such discussions obviously not leading to anything given that the Tribunal proceedings followed.

139. A letter was sent to the claimant on 4 March 2016 confirming the progress to date in respect of the redundancy consultation and a third meeting was suggested for 14 March 2016. There was an email exchange prior to that meeting in which the claimant said on 7 March that nothing had been done to address the restrictions that were imposed upon him, which made it impossible for him to set out substantial counter proposals.

140. In response to this Sharon Brownley on 8 March said she assumed he was referring to not being allowed to come in to work and check the status of the IT department and its tasks. She would not put a role at risk of redundancy without a genuine business need, nor was it their policy for employees to be placed in a position where there were required to verify the "at risk" status of their role. She reassured the claimant that she had reviewed the workload of the department and the outstanding tasks and in her view she did not believe the outstanding tasks required an IT manager's involvement. If he wished to highlight deficiencies in the task list or any duties which he felt were pivotal to the role of IT manager which they had not considered then he should provide this information prior to the meeting. The claimant was asked to let her know what additional specific information he required about the IT support function and projects in the future and she would provide it. Also as far as she was aware it was not the case that the claimant had requested access to people, paperwork and systems.

141. The claimant responded on 9 March. He had consistently expressed his deep concern as to the restrictions placed upon him by the respondent. He was disappointed that no clear answers had been provided to him, whilst attempting to place the onus on him to produce substantial counter proposals whilst continuing with the restrictions that made it impossible for him to do so. He was concerned that the consultant, Intuitus, had been given access to people, paperwork and systems to submit their report whereas he had not.

142. The email exchange continued until the third consultation meeting held on 14 March 2016, which this time lasted for six minutes. According to the claimant the company confirmed that Intuitus had been on site and had not raised any issues causing the company to change its position. The claimant repeated his request for the same access that Intuitus had been given and expressed his disappointment that they had been allowed access when he had not been given it. The meeting concluded without any decision being reached.

143. On 15 March 2016 Sharon Brownley sent a letter to the claimant confirming that the role of IT manager was redundant following the company reviewing the structure of the IT department and its staffing needs. Reference was made to the claimant feeling that he had not been provided information sufficient to make any counter proposals. They felt that he had been well placed to offer counter proposals despite his "garden leave" because of his previous ownership of the IT strategy.

144. The letter made reference to other roles including a vacancy for first line support in the IT department together with purchasing administrator and marketing administrator, although these roles required previous experience, so they were not able to offer him an alternative post. They confirmed he would be given three months' notice that he did not need to work and his final pay and other calculations would be based upon his normal salary based on the agreed four day week. The statutory redundancy payment which was subject to the statutory cap, a payment in lieu of notice based on a four day week and a sum in lieu of accrued holiday again based on a four day working week. The right to appeal against the decision was given.

145. The claimant was shocked to see that his redundancy pay was to be calculated on the basis of a four day week even though he had never been allowed

back to work to even do a single four day week. He confirmed this point in an email on 18 March 2016.

146. The Intuitus report dated 14 March 2016 confirmed the view taken by the company and made various recommendations.

147. The claimant indicated his intention to appeal.

148. As to the claimant's appeal, it was to be before Phil Morgan, Chief Executive Officer. Mr Morgan emailed the claimant on 18 March 2016 to say that the company required him to establish the grounds for appeal. They must highlight, but need not be limited to, the reasons why he believed the role should not have been placed at risk of redundancy and therefore why the decision to make the role redundant was unacceptable.

149. The claimant responded saying that his grounds of appeal primarily centred around the events between the 25 January 2016 return to work interview and the 15 March 2016 redundancy with immediate effect, specifically the restrictions imposed on him which denied him the ability to fully assess the case for redundancy and to produce counter proposals. However, it should be noted that the entire return to work process and his documented concerns regarding disability discrimination (dating back to February 2015) led his concerns to be at a level of potential constructive dismissal and therefore would be included should future litigation be instructed. The claimant confirmed all of the above was detailed in emails and meeting notes involving himself, Sharon Brownley and Emma Wright, and he asked that they be made available to him. He also would relay during the course of the appeal hearing how the company had resorted to untruths in significant areas of which Emma Wright had been complicit. He requested he reconsidered the requirement for Emma Wright to attend the meeting.

150. In reply Mr Morgan said that Emma Wright would not be present at the hearing but the appeal would focus on his grounds for appeal in relation to redundancy and not the other issues he had referred. The claimant was given the opportunity to substantiate his grounds of appeal if he wanted to.

151. The claimant responded saying that a single issue was imposed on him as the only admissible ground, and his other stated grounds were dismissed. Given the restrictions imposed on him during the consultation phase which made it impossible to produce substantial counter proposals together with the restrictions imposed on the appeal hearing he was concerned that the appeal was looking deficient at the eleventh hour. He asked the company to reconsider its stance and inform him of any change ahead of the hearing.

152. According to Phil Morgan the claimant was deliberately misleading at the start of the appeal hearing. He appeared to take one recording device into the hearing. He was refused permission to record the hearing and the device was moved to one side, which falsely gave him the impression that the hearing would not be recorded however it was recorded. According to Mr Morgan he must have had another device on his person at the time which enabled him to do this.

153. The ground of appeal was that access to the workplace was critical to his ability to put forward reasons why the IT manager role should not be made

redundant. This request was considered and Mr Morgan disagreed that it was essential for him to have this information before he could make suggestions as to how the proposed redundancy might be avoided. He took the view that the claimant was an experienced IT professional who had been with the business for five years, had developed the IT strategy and had knowledge of all of the IT systems. He considered the Intuitus report which supported his view.

154. After the meeting Mr Morgan considered matters and decided nothing put forward by the claimant convinced him to change the decision as to the redundancy. There was nothing to change his mind in terms of access to the workplace either.

155. According to the claimant he attended the meeting which lasted 15 minutes and was audio recorded. He thought Phil Morgan was dismissive and uninterested and left the meeting feeling very despondent. He left with a clear impression that Phil Morgan's mind was already made up before the meeting.

156. On 29 March 2016 an email was sent to the claimant confirming that his appeal had been rejected. The reasons in the letter included the claimant's knowledge of the business, his experience as an IT professional and his knowledge of the IT strategy for the company which he had created. He had a high degree of insight with regard to the design and capability of the infrastructure and systems. He had been presented with the IT task list illustrating what the company believed were the requirements. The claimant stated it was deficient but did not allude to where those deficiencies were.

157. The claimant was asked what additional information he would require to make a counter proposal but the claimant did not confirm what it would be and no specific request was made. He did not provide information as to what tasks an IT manager would perform.

158. Mr Morgan was not convinced that being placed on garden leave prevented the claimant from submitting counter proposals. No evidence was provided in written form of a request to support essential access to the company systems to create a counter proposal. The decision was final that the appeal was rejected. The company did not consider there was a justifiable requirement for the role of an IT manager in the foreseeable future.

159. As to issues that did not relate to the redundancy decision, he had offered an opportunity to raise matters in the alternative appropriate forum. They would be willing to hear his concerns via a modified grievance process.

160. The claimant did not utilise this offer but decided instead to commence Employment Tribunal proceedings.

161. Following the appeal process the claimant was still raising with the company the question of what he believed was the underpayment to him of his contractual and statutory entitlements because the company based their calculation on a four day week rather than a five day week.

The Relevant Law

162. In relation to the unfair dismissal claim the relevant sections from the Employment Rights Act 1996 start with section 98 which provides that:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a) –

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

163. Section 139 defines redundancy as follows:

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

(a) the fact that his employer has ceased or intends to cease -

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business –

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

(6) In subsection (1) “cease” and “diminish” mean cease and diminish either permanently or temporarily and for whatever reason.

164. A week’s pay is defined in sections 220-224 which may fall to be considered below. Section 227 provides the maximum amount of a week’s pay and in respect of the claimant the maximum amount of a week’s pay was £475.

165. The claimant’s unlawful deduction from wages claims also come under the Employment Rights Act 1996 where section 13 deals with the right not to suffer unauthorised deductions and provides that:

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

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

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

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

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

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

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages

properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

166. The claimant's claim of direct discrimination is dealt with by section 13 of the Equality Act 2010 which provides as follows:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex –

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

167. Section 15 of the Equality Act 2010 deals with discrimination arising from disability and provides that:

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

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

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

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

168. A failure to make reasonable adjustments is dealt with at paragraphs 20 and 21 of the Equality Act 2010 which provide that:

> Section 20
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
>
> (6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.
>
> (7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.
>
> (8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.
>
> (9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to –
>
> (a) removing the physical feature in question,
>
> (b) altering it, or
>
> (c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to –

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

Part of this Act	**Applicable Schedule**
Part 3 (services and public functions)	Schedule 2
Part 4 (premises)	Schedule 4
Part 5 (work)	Schedule 8
Part 6 (education)	Schedule 13
Part 7 (associations)	Schedule 15
Each of the Parts mentioned above	Schedule 21

Section 21

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

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

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

Submissions

169. Having heard the evidence from 12-16 June 2017 the Tribunal met with the parties again on 27 September 2017 to receive their submissions.

170. Ms Amartey had prepared written submissions in advance of the hearing but for personal reasons was unable to attend before the Tribunal on 27 September 2017. Mr Gilbart, counsel from her chambers, attended on behalf of the respondent.

171. Each party presented written submissions and addressed the Tribunal. Given the length of the submissions we shall not rehearse them here but we may refer to them below.

Discussion and Conclusions

172. When reaching these conclusions we have taken into account the comprehensive written submissions made by the claimant and on behalf of the respondent. We shall proceed to work through the List of Issues as set out above.

Unfair dismissal

173. We are satisfied that the claimant was in a pool of one given the unique nature of the role.

174. There is no doubt in our mind that following the introduction of the ERP to the respondent's computer system with no subsequent infrastructure issues things were running well. In the view of Mrs Brownley there was no requirement for anyone to manage the IT function and the need for anyone to spend time maintaining the computer systems themselves had disappeared. The IT Manager role had gone.

175. Having examined the evidence the Tribunal is satisfied that the respondent's need for an employee to carry out work of a particular kind, that of an IT Manager, had ceased. We therefore conclude that the reason for the claimant's dismissal was the potentially fair reason of redundancy.

176. Did the respondent act reasonably in treating this as a sufficient reason for dismissing the claimant, applying section 98(4) of the Employment Rights Act 1996 and in particular the guidelines from **Polkey v A E Dayton Services Limited**? Did the respondent's conduct and decision to dismiss fall within the band of reasonable responses available to an employer in the circumstances?

177. As to process, the ACAS Code of Practice does not apply to redundancy dismissals.

178. The claimant attended an "at risk" meeting on 10 February 2016 when the relevant information was provided to him. The claimant attended the first consultation meeting on 22 February, the second consultation meeting on 29 February and a third consultation meeting on 14 March immediately before his dismissal was confirmed on 15 March. Following the dismissal the claimant took the opportunity to appeal with the appeal hearing taking place on 23 March before the outcome was given to the claimant in writing on 29 March when the appeal was dismissed. The respondent followed what is, in the experience of the Employment Tribunal, a typical redundancy process in terms of the number and type of meetings held with the claimant.

179. The main area of dispute in relation to the consultation process involves the claimant complaining that the respondent did not provide him with sufficient information upon which to base a reasoned response to the proposal to make his post redundant, and the respondent complaining that the claimant, on the basis of

the information provided to him at the first meeting and his knowledge of the respondent's IT systems, did not respond to the consultation by giving either his criticism of the IT task list or otherwise setting out why in his view the company would be wrong not to retain the post of IT Manager.

180. The claimant specifically complains that he was not allowed on to the premises with full access to the IT system and the ability to talk to his colleagues, such as might have enabled him to prepare a response during the consultation process.

181. As to the claimant not being allowed to return to work whilst "at risk", again it is the Tribunal's experience that people at risk of redundancy are not required to attend work and in respect of persons with access to the company's information technology systems they are almost invariably not allowed to remain at work with a view to protecting the company's information technology.

182. We are satisfied that the information provided by the respondent to the claimant in terms of the IT task list was sufficient for the claimant, who was familiar with the software system, to produce a response. We are satisfied that the claimant decided not to produce any written response to the consultation and that in the absence of anything from the claimant the respondent sought third party assistance from Intuitus. The consultants confirmed that in their view the respondent company did not need an IT Manager given the IT system then in place.

183. We are also satisfied that there were no suitable vacancies that should have been offered to the claimant as an alternative to dismissal.

184. In all the circumstances we find that the dismissal of the claimant by reason of redundancy was within the band of reasonable responses and was fair.

185. In terms of **Polkey** we have found that a fair procedure was followed but had we found that a fair procedure had not been followed we would not have found that there would have been any difference to the outcome. The role was redundant.

Direct Disability Discrimination

186. The List of Issues asks a number of questions as to whether or not certain alleged acts took place. If they did then did they amount to less favourable treatment of the claimant by the respondent because of his disability?

187. Did the respondent prevent the claimant from returning to work on 25 January 2016 and from earning full pay? We find that it did not provide for him to return until 10 February. We are not satisfied that he would have returned on full pay because of the GP's recommendation of a phased return.

188. Did the respondent delay in communicating to the claimant that his role was at risk of redundancy? In that Ms Brownley did not communicate this to the claimant immediately after her decision was made then yes, there was a delay.

189. Did the respondent refuse the claimant's request to work remotely on Tuesdays whilst he received treatment? From the return to work meeting on 25 January it can be inferred that he was asking to work remotely on Tuesdays whilst

he received treatment in Glasgow. It is correct that the respondent did not agree to the claimant working remotely on Tuesdays and they did not agree to pay him.

190. The respondent did require the claimant to stay at home during redundancy consultation with the first reference to garden leave being made by the claimant.

191. The respondent did fail to provide the claimant with a written list of alternative roles during redundancy consultation although the roles were made known to him orally.

192. Having considered the termination payments made to the claimant below we find that the redundancy payment was paid in full, even though calculated on the basis of payment four rather than five days per week, because of the statutory cap on a week's pay which was less than 80% of the claimant's full salary. We find that the other entitlements were not paid in full because they were based on 80% of full salary.

193. As a matter of fact we do not find that the claimant was dismissed because of his disability. We take the view that a comparator, someone returning to work after a prolonged absence but who was not disabled, would have found their position as an IT Manager with the respondent being made redundant following the introduction of new software which effectively removed the need for an IT Manager.

194. Did the acts that we have found amount to less favourable treatment of the claimant by the respondent because of his disability?

195. Was the delay in the claimant returning to work between 25 January and 10 February 2016 less favourable treatment because of his protected characteristic of disability? The comparator described at paragraph 193 is also appropriate to this allegation. The only explanation we have for what happened is the mistake on the part of Emma Wright in her reading of the claimant's sick note as set out in her letter to the claimant and confirmed in her evidence. We do not find that she misread the sick note and made the mistake because the claimant was a person with a disability. We find that the same error could have been made in respect of the comparator. We do not find that this amounted to direct discrimination.

196. As to the delay in communicating to the claimant that his role was at risk of redundancy, we have set out above that Sharon Brownley first thought about restructuring the IT Department after becoming aware that the claimant was ready to come back to work. She decided to hold the "at risk" meeting with the claimant on his agreed return to work date of 10 February. Had any manager been returning to work following a lengthy period of absence for a reason that did not relate to a disability then we are satisfied that the person would have been told of being placed at risk on the date of their planned return rather than inviting them in at an earlier date specifically to inform them that they were being placed at risk unless there was a significant period of time before the planned return or in circumstances where no return date was anticipated. We do not find that the delay between the decision to place the claimant at risk and actually meeting with him for that purpose was in any way related to the claimant's disability. We do not find that the claimant was treated less favourably than the comparator would have been treated and so we do not find direct discrimination.

197. Did the refusal to allow him to work remotely on Tuesdays amount to less favourable treatment because of his disability?

198. Looking at the notes of the 25 January meeting, the parties are discussing the claimant's return to work, and the claimant says that what he would aim for is to do a full week apart from a Tuesday in Blackpool. All parties were happy with this. They then went on to refer to the treatment the claimant was having on a Tuesday in Glasgow. It was after this that the claimant suggested he would have an ability to work all week but without specifically making a request to work remotely on Tuesdays.

199. When the respondent produced the outcome letter following the meeting they referred to the doctor's recommendation of a phased return to work on the fit note. In the light of the recommendation they thought it would be beneficial to implement a phased return working three days a week to the end of February which made Tuesdays and Fridays non working days.

200. An appropriate comparator would be someone without a disability returning to work after a lengthy period of sickness absence with a need for regular continuing treatment on one day a week and with a fit note suggesting a phased return. We are satisfied that the comparator's return would have been phased over three days initially, excluding the day of treatment, as was the claimant's. In these circumstances we do not find that this amounted to less favourable treatment of the claimant because of his disability.

201. As to requiring the claimant to stay at home during the redundancy consultation, we find that following the management buyout other people within the respondent who were not disabled were asked to stay at home during their redundancy consultation period. The claimant was not treated less favourably than his comparator colleagues. His treatment was the same. We do not find that there was less favourable treatment because of his disability.

202. As to the allegation of failing to provide the claimant with a list of alternative roles during redundancy consultation, there were a number of roles made known to him orally during the consultation process. The respondent did not provide a paper or an electronic list of alternative roles to the claimant. The claimant did not ask for one. The failure to provide the list was an error on the part of the respondent and this failure could in our judgment equally have occurred in a redundancy consultation with an employee who was not disabled. We do not find that the claimant's treatment in this respect was less favourable than that of the hypothetical comparator and we do not find that it was because of his protected characteristic of disability.

203. In relation to the termination payments a comparator would be a non disabled person leaving the respondent's employment by reason of redundancy in a period of phased return where the respondent believed that the employee had been told that they were being paid on a pro rata basis and where the employee had not responded to the proposal by way of objection. In such a case we take the view that the respondent would have calculated this person's entitlements on a pro rata basis as they did for the claimant. In such circumstances we do not find that the claimant was treated less favourably than others would have been treated because of his disability.

204. As to the dismissal we have not found that the claimant was dismissed because of his disability. We have found that he was dismissed because he was redundant.

Discrimination arising from disability

205. As to discrimination arising from disability, the claimant repeats the allegations referred to above from the particulars of claim at 54(a)-54(g), this time on the basis of them amounting to unfavourable treatment because of something arising in consequence of his disability.

206. We have found that the respondent prevented the claimant from returning to work on 25 January and from receiving some remuneration, not full pay, because of an error made by Emma Wright in her reading of the claimant's sick note. We conclude that this did amount to unfavourable treatment of the claimant who might otherwise have returned to work earlier. We do not find that the error arose from something in consequence of the disability but because of an error by Ms Wright in the reading of the fit note provided by the claimant's GP.

207. As to the delay in communicating the “at risk” position to the claimant, it seems to us to have been reasonable for the respondent to have decided to do it when the claimant was due to return to work rather than immediately after the decision was made. There was only a short period between the decision to put the claimant at risk and telling the claimant. Telling him earlier would potentially have shortened the length of the claimant’s paid employment. In these circumstances we do not find that this amounted to unfavourable treatment. Had we done so we would not have found that it was because of something arising in consequence of his disability. It arose as a normal consequence of a redundancy process which takes time to follow through.

208. As to the request to work remotely on Tuesdays, we have found that the respondent told the claimant that he would be on a phased return working three days a week excluding Tuesday and Friday in accordance with the advice from his GP until at least the end of February. There was therefore no requirement on the part of the respondent for the claimant to work on a Tuesday when he would be in Glasgow for medical treatment. In circumstances where the claimant was not required to work on a Tuesday we do not find that he was treated unfavourably because of something arising in consequence of his disability.

209. Had we not reached this conclusion we would have found that the respondent following the GP’s recommendation for a phased return was a proportionate means of achieving the legitimate aim of ensuring the claimant’s health and safety on returning to work following a lengthy period of absence.

210. As to requiring the claimant to stay at home during the redundancy consultation process the claimant found this to be unfavourable treatment. In our judgment this treatment of the claimant arose not in consequence of the claimant’s disability but in consequence of the redundancy process which, following the change of practice after the management buy out, had employees staying at home during the consultation period.

211. The failure to provide the claimant with the list of alternative roles that had been made known to him orally at a consultation meeting was a matter of error. Given that the claimant had been informed of the roles we do not find that this failure amounted to unfavourable treatment but had we considered it unfavourable treatment we would not have found that the failure arose in consequence of the claimant's disability. It was simply an error on the part of the respondent when undertaking the redundancy consultation process.

212. As to the payment of the claimant's entitlements on termination, save in respect of the statutory redundancy payment which was correctly calculated using the statutory maximum of a week's pay, was the claimant treated unfavourably in that the calculation was based on four days rather than five days per week providing the claimant with only 80% of what he expected? Did this happen because of something arising in consequence of the claimant's disability?

213. In her submissions Miss Amartey states that the respondent accepts that the claimant's requirement/potential requirement for reasonable adjustments arose in consequence of disability but it is denied that any of the acts or omissions complained of were because of the claimant's sick leave or any requirement/potential requirement for reasonable adjustments. If the Tribunal finds that there was unfavourable treatment then the respondent submits that it was a proportionate means of achieving a legitimate aims namely running its business efficiently and reducing unnecessary expenditure in relation to the claimant's dismissal. There are three further aims set out in the submissions but they do not relate to this particular allegation.

214. In our judgment the claimant was treated less favourably when he was only paid 80% of what he expected to receive on termination save in respect of the redundancy payment. The reason arose because of the reasonable adjustments to the number of days to be worked each week made in consequence of the claimant's disability without taking into account the subsequent clear oral and written statements to the effect that the claimant would be paid in full in respect of the consultation period.

215. Given the amount of money involved here - 20% of the claimant's salary for the number of weeks involved, and thereafter the complete saving of the claimant's salary - we do not find the treatment was a proportionate means of achieving a legitimate aim and so we find that the respondent did treat the claimant unfavourably because of something arising in consequence of his disability.

216. We note that the discrimination arising from disability claim does not include a reference to the dismissal.

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

217. In his claim form the claimant alleged that the respondent had the duty to make reasonable adjustments in respect of two matters.

218. The first was requiring the claimant to be in the office five days a week with no remote working which allegedly put him at a disadvantage because he lost out on a day's wages as he was unable to attend the office as he was having treatment for his cancer, and as a result of this he got a reduced rate of notice pay and redundancy

pay. A reasonable adjustment would have been to allow the claimant to work remotely on Tuesdays so that he would not have been placed at a disadvantage in respect of his pay, or to have allowed him to have paid time off and redundancy and notice pay as if he was working five days a week. A reasonable adjustment would also have been not to have allowed the four day week to impact on his notice and redundancy payments.

219. The second matter complained of was requiring the claimant when he was at risk of redundancy to be on garden leave which put him at a disadvantage because he lost out on the opportunity of a meaningful redundancy consultation process due to previously having time off sick preventing him from having up-to-date management information to put forward counterproposals to the respondent to prevent his redundancy. A reasonable adjustment would have been allowing him to work during the consultation or alternatively to be provided with access to management information, resources and access to employees as he had requested.

220. The first provision, criterion or practice ("PCP") of the respondent that is relied upon by the claimant is the requirement to be in the office 5 days a week with no remote working. As a matter of fact there was an agreement, reached when it was anticipated that the claimant would return to work in February 2016 that the claimant would be in the office for four days a week using the fifth day for treatment in Glasgow. Thereafter the respondent made reasonable adjustments to provide for working three days a week on the claimant's return to be reviewed at the end of February

221. In these circumstances the claimant has not satisfied us that the first PCP relied upon of being in the office for five days was in place and so the Tribunal does not find that there was a failure to make a reasonable adjustment

222. The second PCP of the respondent that is relied upon by the claimant is the requirement to be on garden leave after being placed at risk of redundancy following a lengthy period of sickness absence. We are satisfied that this PCP was applied to the claimant.

223. Did this PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled? We can accept the claimant's contention that it did place him at a disadvantage that was substantial, meaning more than trivial, in comparison with colleagues who had not had a long period of absence from work.

224. This placed upon the respondent an obligation to take such steps as it was reasonable to have to take to avoid the disadvantage.

225. As to the ability of the claimant to have a meaningful redundancy consultation following a period of disability related absence the respondent submits that this is principally a direct discrimination complaint not a matter of reasonable adjustment but the respondent maintains that it took all reasonable steps to avoid any substantial disadvantage and indeed went to great lengths to ensure that the claimant was given all the information that he would have had if he had been on site. It provided the claimant with the basic information in the form of the Task List and an explanation in writing of the reason for the proposal to make his role redundant and invited him to respond to it.

226. We are satisfied that the information provided to the claimant, coupled with his knowledge of the IT system, should have been sufficient to have allowed the claimant to engage with the consultation process. We do not find it would have been a reasonable adjustment for the respondent to have allowed the claimant access to the computer systems whilst he was in redundancy consultation for the reasons set out above with reference to unfair dismissal at 181. Nor do we see how management information would have been relevant to the particular consultation. We therefore find that the respondent complied with the duty to make adjustments in respect of the second PCP.

Victimisation

227. The List of Issues asks whether the claimant complained to the respondent of "discrimination harassment" in January 2015 and did this constitute a protected act? If so did the claimant's dismissal constitute a detriment which was carried out because of the protected act?

228. The claimant raised a complaint in January 2015 with Sharon Brownley and then he raised a further complaint which was investigated by Emma Wright. Emma Wright having investigated matters explained to the claimant that Guy McKenzie appeared to have no intention of discriminating against him. This outcome suggests that the respondent treated the claimant's complaint as one of discrimination under the Equality Act.

229. Whilst we do not find that the claimant necessarily did a protected act in January 2015, we do find that what he said in January taken together with his later complaint did amount to a protected act for the purposes of section 27(2) – he made an allegation (whether or not express) that someone had contravened the Equality Act 2010.

230. The claimant alleges his dismissal was a detriment carried out because he had done the protected act. The Tribunal is unable to find any connection between the claimant complaining about the behaviour of Guy McKenzie in early 2015 and the decision to terminate the claimant's employment by reason of redundancy in 2016 and so we do not find that the dismissal was an act of victimisation

Redundancy pay coupled with unlawful deduction of wages/breach of contract

231. These complaints all relate to the respondent calculating the claimant's entitlements on being dismissed as redundant on the basis of pay for a four day rather than a five day week.

232. In the "at risk" meeting on 10 February 2016, after the claimant had been told by Emma Wright that he would not be expected to be in work during the consultation period, the claimant asked about the pay situation and Emma Wright said "It's full pay" followed by Sharon Brownley saying "Full pay, yeah, there's no difference there". The letter from Sharon Brownley given to the claimant on 10 February at the "at risk" meeting, a pre-prepared letter, said:

> "Also given the nature of these discussions, and in recognition of the concern which has faced all of employees during these periods of uncertainty, we wish to confirm your attendance at work is not required during this period of consultation and full payment will be provided during this time."

233. We find that when the claimant was told both orally and in writing by a director that his pay during the consultation period would be full pay, without any reference to full pay being for four days rather than five, the claimant could reasonably expect to rely upon this statement and to be paid in full during the consultation period and that his entitlements would be calculated on the basis of full pay. The claimant had never expressly agreed to being paid for only four days. We therefore conclude that to the extent that the payments were based upon pay for a four day rather than a five day week the claimant was underpaid.

234. In the letter giving notice of termination there are four elements. Three of the elements being the normal salary to the date of termination, the payment in lieu of notice and the holiday pay entitlement should be recalculated based on five not four days pay per week. The fourth element, the statutory redundancy payment, has been calculated using the statutory maximum of £475 per week which would appear to be less than 80% of the claimant's full weekly pay and so this figure does not fall to be recalculated.

235. In the List of Issues there is reference to the respondent imposing a period of medical suspension from 25 January to 11 February 2016 when the claimant was not paid. We do not find that the respondent imposed a medical suspension on the claimant. Emma Wright made a mistake in understanding the claimant's fit note which resulted in her not offering him a return to work until 10 February.

236. Notwithstanding the content of the claimant's fit note which provided that he could return to work with reasonable adjustments from 13 January we find that there was an agreement for the claimant to return to work on 10 February and so we do not find that there was an underpayment for this period.

237. Our earlier finding that the claimant should have been paid in full during the period of redundancy consultation covers the remaining period of his employment when he attended for medical treatment in Glasgow.

238. We have found for the claimant in respect of one allegation of discrimination arising from disability and in respect of some unlawful deductions. We invite the parties to reach agreement on the question of remedy but if this does not prove possible the claimant must write to the Tribunal to ask for a remedy hearing.

Employment Judge Sherratt
27 November 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
28 November 2017

FOR THE TRIBUNAL OFFICE