# EMPLOYMENT TRIBUNALS

**Claimant:** Mr L Fisher

**Respondent:** Ministry of Defence

**HELD AT:** Manchester **ON:** 15-19 January 2018

**BEFORE:** Employment Judge Franey
Mr R W Harrison
Dr H Vahramian

**REPRESENTATION:**

**Claimant:** Mr B Henry, Counsel
**Respondent:** Ms R Levene, Counsel

# JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of discrimination arising from disability fails and is dismissed.

2. The complaint of a breach of the duty to make reasonable adjustments succeeds in relation to the failure to grant the claimant disability leave save upon termination of employment. The remedy for that breach will be determined at a remedy hearing on 30 and 31 August 2018.

3. The complaint of unfair dismissal is not well-founded and is dismissed.

# REASONS

## Introduction

1. These proceedings began with a claim form presented on 5 June 2017 in which the claimant brought complaints of unfair dismissal and disability discrimination arising out of the termination of his employment as an administration officer with the respondent in January 2017. The claim form made clear that at the

time he was dismissed a complaint of bullying and harassment he had made some time earlier was still outstanding.

2. There were three sets of further particulars provided by the claimant in which the basis for the disability claims was clarified. The claimant was said to be disabled by reason of anxiety and depression.

3. After an initial holding response the respondent supplied an amended response on 29 September 2017 which asserted that there had been a fair capability dismissal by agreement. Although the respondent accepted the claimant had been a disabled person and that it knew of this, it denied any discriminatory treatment.

## Issues

4. We discussed the issues with the parties at the outset of our hearing. In compliance with earlier Case Management Orders the parties had agreed a List of Issues. However, there were a number of points of detail which needed further consideration and the Tribunal produced a revised version of the List of Issues following that discussion. The final list agreed on the third day of the hearing was as follows:

**Discrimination Arising from Disability - section 15 Equality Act 2010**

**(1) Are the facts such that the Tribunal could conclude that:**

**(a) the respondent treated the claimant unfavourably in terminating his employment on 12 January 2017;**

**(b) it did so because he had been absent since March 2016 and was not fit to return to work, and**

**(c) that was something which arose in consequence of his disability of anxiety and depression?**

**(2) If so, can the respondent prove that it did not contravene section 15, whether because dismissal was a proportionate means of achieving a legitimate aim (complying with its duty of care to the claimant), or otherwise?**

**Breach of the Duty to Make Reasonable Adjustments – sections 20 and 21 Equality Act 2010**

**(3) Did the respondent apply a provision, criterion or practice ("PCP") by applying its attendance management, sick pay and capability policies to persons absent from work for medical reasons?**

**(4) If so, did that PCP put the claimant at a substantial disadvantage compared to a person without his disability of anxiety and depression because his disability made him more likely to be absent for long periods, and therefore more likely to be at risk of formal absence management measures (including dismissal) and/or of going on to reduced or nil pay during sick leave?**

**(5) If so, did the respondent fail in its duty to make such adjustments to the PCP as it would have been reasonable to have made to avoid that disadvantage? The adjustments for which the claimant contends are**

**(a) Not requiring the claimant to return to work or dismissing him for failing to do so until his bullying and harassment complaint had been resolved, and/or**

**(b) Treating his sick leave from March 2016 as disability leave so that he remained on full pay and was not at risk of dismissal?**

**<u>Unfair Dismissal – Part X Employment Rights Act 1996</u>**

**(6) Was the claimant dismissed within section 95(1)(a) ERA?**

**(7) If so, and it being agreed that the reason or principal reason related to his capability, was the dismissal fair or unfair under section 98(4)? The matters on which the claimant relies are**

**(a) The decision to dismiss was outside the band of reasonable responses;**

**(b) The respondent failed to carry out a reasonable investigation to establish whether the claimant's capability was a sufficient reason for dismissal;**

**(c) The view that the claimant would be unable to return to work in the foreseeable future was a view a reasonable employer would not have formed;**

**(d) The respondent failed to consider alternatives to dismissal such as redeployment or ill health retirement;**

**(e) the decision to dismiss was tainted by disability discrimination;**

**(f) the respondent should reasonably have made adjustments so as to avoid dismissal;**

**(g) it was unreasonable to dismiss the claimant whilst the outcome to his application for injury benefits was outstanding, and/or**

**(h) the respondent failed to follow a fair capability procedure by not following the stages in the attendance management procedure, not putting the claimant on notice that dismissal was being considered, not obtaining up to date medical evidence, and not consulting with the claimant prior to dismissal.**

5. This hearing had been listed to deal with liability only.

## Evidence

6. The Tribunal had an agreed bundle of documents in four lever arch files which ran to over 1,800 pages. Some policies were inserted by agreement during the hearing and allocated page numbers. Any reference to page numbers in these reasons is a reference to that bundle of documents unless indicated otherwise.

7. The Tribunal heard evidence from four witnesses, each of whom had prepared a written statement and answered questions from the Tribunal and the other party. The claimant gave evidence himself and also called his trade union representative, Gregg Fothergill. The respondent called Scott Turner, the Head of Civil Service Human Resources Casework, who was involved in discussions leading up to the termination of employment, and Phil Sprigg, who was a Business Support Manager who formally made the decision to terminate employment in January 2017.

## Relevant Legal Principles

8. The relevant legal principles can be summarised as follows:

Unfair Dismissal

9. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

10. Section 95 defines "dismissal". The claimant relied on section 95(1)(a) which provides that an employee is dismissed if

> **"the contract under which he is employed is terminated by the employer…"**

11. Termination by agreement falls outside this provision because it is not termination by the employer. The line can be difficult to draw. In **Birch and anor v University of Liverpool [1985] ICR 470** the Court of Appeal found that there was termination by consent, not a dismissal, where in a redundancy situation the claimants applied for premature retirement on enhanced terms. The Tribunal must look at the realities of the facts. In **Martin v Glynwed Distribution Ltd [1983] ICR 511** it was said that the Tribunal must:

> **"…make up its mind whether, on the evidence, the reality of the situation was that the employers terminated the employee's employment ..."**

12. If a dismissal is established, section 98(1) places the burden on the employer to show the reason or principal reason for the dismissal and that it is one of the potentially fair reasons identified within Section 98(2), or failing that some other substantial reason. Where the respondent shows that dismissal was for a potentially fair reason, the general test of fairness appears in Section 98(4).

Discrimination arising from disability

13. Section 39(2)(c) of the Equality Act 2010 prohibits discrimination against an employee by dismissing him; section 39(2)(d) prohibits discrimination by any other detriment.

14. Section 15 of the Act reads as follows:-

> **"(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."**

15. The Court of Appeal considered what will amount to "unfavourable treatment" in **Williams v Trustees of Swansea University Pension and Assurance Scheme [2017] IRLR 882.** It emphasised that this is not a comparative exercise. The claimant in that case received a lower pension than if he had not been disabled, but it was not "unfavourable treatment" because it was still advantageous treatment.

16. In **Pnaiser v NHS England and Coventry City Council EAT /0137/15** the EAT summarised the "because of" element under section 15 as requiring consideration of the thought processes, conscious or subconscious, of the decision maker to see whether the "something" relied upon had a significant (or more than trivial) influence on the unfavourable treatment.

Breach of Duty to Make Reasonable Adjustments

17. Section 39(5) of the Equality Act 2010 provides that a duty to make reasonable adjustments applies to an employer. Further provisions about that duty appear in Section 20, Section 21 and Schedule 8.

18. The duty appears in Section 20 as having three requirements, and the requirement of relevance in this case is the first requirement in Section 20(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".**

19. The importance of a Tribunal going through each of the constituent parts of that provision was emphasised by the EAT in **Environment Agency –v- Rowan [2008] IRLR 20**.

20. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is considered in the Equality and Human Rights Commission Code of Practice in Employment ("the Code"). A list of factors which might be taken into account appears at paragraph 6.28, but (as paragraph 6.29 makes clear) ultimately the test of reasonableness of any step is an objective one depending on the circumstances of the case.

21. The Code goes on to give examples of reasonable adjustments in practice. These appear in paragraphs 6.32 and 6.33. Allowing a period of disability leave for a worker with cancer who needs to undergo treatment and rehabilitation is one of the examples.

22. A different section of the Code deals with sickness and absence from work from paragraph 17.16 onwards. Paragraph 17.20 confirms that employers are not automatically obliged to disregard all disability related sickness absences. Paragraphs 17.21 and 17.22 read as follows:

> **"17.21 Workers who are absent because of disability-related sickness must be paid no less than the contractual sick pay which is due for the period in question. Although there is no automatic obligation for an employer to extend contractual sick pay beyond the usual entitlement when a worker is absent**

> **due to disability-related sickness, an employer should consider whether it would be reasonable for them to do so.**
>
> **17.22 However, if the reason for absence is due to an employer's delay in implementing a reasonable adjustment that would enable the worker to return to the workplace, maintaining full pay would be a further reasonable adjustment for the employer to make.**
>
> ***Example: A woman who has a visual impairment needs work documents to be enlarged. Her employer fails to make arrangements for a reasonable adjustment to provide her with these. As a result, she has a number of absences from work because of eye strain. After she has received full sick pay for four months, the employer is considering a reduction to half pay in line with its sickness policy. It is likely to be a reasonable adjustment to maintain full pay as her absence is caused by the employer's delay in making the original adjustment."***

23. An adjustment cannot be a reasonable adjustment unless it alleviates the substantial disadvantage resulting from the PCP. In **Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664** the EAT held that a failure to consult an employee about adjustments did not in itself amount to a failure to make a reasonable adjustment. Nor was the extension of a rehabilitation programme which offered no prospect of restoring the claimant to full duties: **Romec Ltd v Rudham EAT 0069/07.**

24. There are two occasions on which the Court of Appeal has considered the question of protecting the pay of a disabled employee on sick leave who would otherwise face a reduction. The first was in **Nottinghamshire County Council v Meikle [2005] ICR 1**. Sickness absence was prolonged due to a failure by the employer to make reasonable adjustments which would have got the claimant back to work. She complained that the reduction in sickness benefit to half pay amounted to a breach of the duty to make reasonable adjustments. The primary issue on the reasonable adjustments complaint was whether the sick pay in question was excluded by a different provision in the Disability Discrimination Act 1995. The Court of Appeal found that the exclusion did not apply, and the matter would have been remitted to the Employment Tribunal had it not been for the consideration of the alternative case that it was discrimination for a reason which related to disability (broadly, the equivalent of section 15 of the Equality Act 2010). On that matter the Court of Appeal concluded that the respondent had failed to make reasonable adjustments and could not therefore rely on the justification defence. Accordingly, the complaint of discrimination related to disability had to succeed.

25. The matter arose again in **O'Hanlon v Commissioners for HM Revenue and Customs.** The case was considered by the Employment Appeal Tribunal **(UKEAT/0109/06/0408)**. The claimant suffered from clinical depression and had significant sickness absence, of which much related to her disability. The effect of the sick pay rules applicable to her meant that she was on pension rate of pay for all absences after 13 October 2002. The policy provided for disability adjustment leave intended to cover periods where absence was due to the fact that reasonable adjustments needed to be made. Such periods did not count as sickness absence. The case was pursued as a reasonable adjustments complaint under the Disability Discrimination Act 1995, as well as discrimination related to disability. At paragraph 67 the judgment (delivered by Elias P on behalf of the EAT) said:

> **"In our view, it will be a very rare case indeed where the adjustment said to be applicable here, that is merely giving higher sick pay than would be payable to a non disabled person who in general does not suffer the same disability related absences, would be considered necessary as a reasonable adjustment. We do not believe that the legislation has perceived this as an appropriate adjustment, although we do not rule out the possibility that it could be in exceptional circumstances."**

26. The judgment went on to identify two reasons for this conclusion. The first was that in effect Tribunals would be usurping the management function of the employer, effectively deciding whether a particular disabled employee should receive sick pay without being aware of the other financial considerations which affect the employer.

27. The second was put as something arising out of the purpose of the legislation:

> **"…The purpose of this legislation is to assist the disabled to obtain employment and to integrate them into the workforce. All the examples given in section 18B(3) [**of the 1995 Act[1]] **are of this nature. True, they are stated to be examples of reasonable adjustments only and are not to be taken as exhaustive of what might be reasonable in any particular case, but none of them suggest that it will ever be necessary simply to put more money into the wage packet of the disabled. The Act is designed to recognise the dignity of the disabled and to require modifications which will enable them to play a full part in the world of world, important and laudable aims. It is not to treat them as objects of charity which, as the Tribunal pointed out, may in fact sometimes and for some people tend to act as a positive disincentive to return to work."**

28. The **Meikle** decision was an example of an exceptional case because the claimant's absence was caused by a failure to make reasonable adjustments. Further, the court had not found in **Meikle** that the payment of full pay was a reasonable adjustment independent of other specific adjustments which would have resulted in the employee returning to work.

29. **O'Hanlon** was pursued to the Court of Appeal: **O'Hanlon v Commissioners for HM Revenue and Customers [2007] ICR 1359**. Because the appeal turned on a different point the Court of Appeal did not need to address the issue in detail, but in paragraph 57 Hooper LJ said there was much force in the approach taken by the EAT summarised above.

30. The EAT (HHJ Richardson) considered the matter more recently in **G4S Cash Solutions (UK) Ltd v Powell [2016] IRLR 820**. Due to disability the claimant could not perform his substantive role but was offered a role at a 10% lower salary rate which was within his capabilities. It was argued that it would have been a reasonable adjustment to have maintained his salary level even after he transferred to the new role. The EAT said there was no reason in principle why section 20(3) should be read as excluding any requirement to protect pay in conjunction with other measures to counter the disadvantage through disability. The question was of reasonableness. Pay protection was a "step" within the legislation even though it was a solely financial measure. Support for that was found in the Code. In paragraph 54 the EAT emphasised that the objective was to keep employees in work, and pay protection could be part of a package of measures for that purpose which amounted to a reasonable adjustment. Such cases will be single claims turning on their own facts.

[1] Examples now found in the Code rather than the legislation.

The financial cost will have to be weighed in the balance by the Tribunal in considering reasonableness.

Burden of Proof

31. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> **"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

32. Consequently there must be facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If so, the burden shifts to the respondent to show that there has been no contravention.

**Relevant Findings of Fact**

33. This section of our reasons set out the broad chronology of events intended to put our decision into context. There were two disputes of primary fact of central importance to our decision making and they will be addressed in the discussions and conclusions section.

34. The volume of documentation before the Tribunal was explained in part by the long background to this case. The crucial period, however, was the period between November 2016 and January 2017 when there were discussions followed by termination of employment. It will be necessary consider in detail the exchanges during that period, but events prior to that will be summarised only briefly.

The Respondent and Its Policies

35. The respondent is a Government department with substantial resources and access to specialist human resources ("HR") advice. It employs many thousands of employees who are part of the Civil Service. They have access to Civil Service terms and conditions and pension schemes.

36. The respondent had a Bullying and Harassment Complaints Procedure which appeared at pages 1685-1801. Formal complaints could be lodged under the Grievance Procedure (from which an extract appeared at pages 1802-1812) and such complaints would be investigated without delay (page 1693).

37. The Managing Unsatisfactory Attendance Policy appeared at pages 1819A-1819N. It provided for three stages: a first written improvement warning, a final written improvement warning and then a dismissal decision.

38. The Policy on Managing Loss of Capability appeared at pages 1833-1842.. It was generally used in situations where performance had deteriorated for medical

reasons but the employee had not gone onto long-term sick leave. Stage 1 was an initial meeting and stage 2 was a dismissal decision by a Decision Manager. On page 1837 in paragraph 3.4 the policy set out steps to be taken prior to a stage 2 meeting, which included preparing an estimate of superannuation and compensation payments. Ill health retirement ("IHR" – see paragraph 42 below) was also to have been explored. Appeals were to be lodged within ten working days of receipt of the decision.

39. The respondent also had a Disability Policy which appeared at pages 1820-1832. It recognised the obligations of the respondent as employer to those of its employees who were disabled. It made provision for disability leave on pages 1826-1827 as follows:

> **"41. You may grant Disability Leave where an employee is absent because they are waiting for an agreed reasonable adjustment to be implemented, such as the provision or repair of specialist equipment. Disability Leave may only be allowed if the employee will be fit to carry out their duties if the adjustment was in place and if alternative solutions such as temporary change in duties are not available.**
>
> **42. You should always explore with the employee whether they are able to undertake any meaningful work whilst they wait for a reasonable adjustment to be put in place. You should discuss with the employee whether any temporary workplace adaptations (seeking advice from RAST as necessary) will enable them to continue to work or return to work until the reasonable adjustment is implemented. Disability Leave should only be given when this is not possible."**

40. The sick pay provision in the common Statement of Particulars for Permanent Staff (clause 11.5 on page 79) was for up to 6 months of full pay in any 12 months, followed by half pay, but limited to 12 months of sick pay in any rolling 4 year period. The significance of disability leave was that it would not be recorded as sick leave and therefore the employee would be paid in full during that period without eroding his sick pay entitlement.

Compensated Dismissal and IHR

41. Issues about capability could result in termination of employment under a policy known as "PIN 40". That dated from October 2001 but was renewed in November 2016 in a policy entitled "Efficiency Compensation 2016" (pages 1186-1193). The object of the policy was to compensate an employee dismissed for poor performance or poor attendance due to genuine ill health. Compensation was not guaranteed but was discretionary. A chart on pages 1192-1193 identified five broad levels of compensation from 0% to 100%. An employee who had cooperated with all measures to improve attendance, who had kept in touch and demonstrated a positive attitude, who had sought and cooperated with all attempts to make reasonable adjustments, and who had cooperated with Occupational Health ("OH") services and followed OH advice could expect 100% compensation. The shorthand phrase for dismissal under these provisions was "compensated dismissal".

42. That was to be contrasted with IHR, an aspect of the pension scheme of which the employee was a member. We were reliant on the oral explanations given by witnesses of their understanding of IHR; we were not taken to any of the documents. Neither the claimant nor Mr Fothergill had a complete understanding of IHR and how it operated. Mr Turner explained that IHR was not a management

decision but a decision for the pension scheme (operating through the agency known as “MyCSP”) based on medical criteria. It was effectively a matter for MyCSP rather than the respondent.

43. The precise medical criteria for IHR differed between different schemes within the Civil Service, but generally required a medical decision that the employee was permanently incapable of doing any future work. If medical advice suggested that the employee would be able to return to work in future, it was very unlikely that IHR would be granted. If granted, however, it brought an enhancement to the pension by way of added years’ service and an immediate pension upon retirement.

44. The role of the respondent if an employee applied for IHR was to provide information so that the MyCSP appointed doctor could assess whether the medical criteria were met. If IHR was granted by MyCSP the employee would be allowed resignation with retirement in about three months’ time to allow MyCSP to work out the financial figures.

45. According to Mr Turner, IHR was relevant only to the scheme of which the employee was an active contributing member, but a decision that the medical criteria for IHR were satisfied would in practice give the employee a good prospect of securing early payment of preserved benefits from a different scheme of which he had been a member at an earlier stage.

The Claimant

46. The claimant had been employed in the Civil Service for some years in a senior managerial role at the British Library in London, but was made redundant when the Library moved premises in 2006. He received a redundancy payment, of which £30,000 was free of tax as a termination payment.

47. In 2007 the claimant relocated to Blackpool and was employed as a new starter in a much lower grade with the Department for Work and Pensions. By the middle of 2012 he had transferred to the respondent as a helpline operator within Defence Business Services (“DBS”), and in August 2012 he signed a written statement of his terms of employment (pages 76-84).

Background to October 2016

48. A brief overview of relevant events in this period is as follows.

49. The claimant was recognised as disabled by longstanding anxiety and depression (OH report page 90-92). Following sick leave between April and August 2014, on 29 August 2014 he submitted a bullying and harassment complaint by way of a grievance directed against his helpline team managers Ms Bell and Ms Loftus. He was moved out of his helpline role into a document services role (colloquially known as the “post room”) at premises on Norcross Lane, a move that later became permanent.

50. The grievance was investigated by Ms Jeffries. Progress was extremely slow. It was rejected in June 2015, but managers recognised that it had not been handled correctly and he was advised to resubmit it. He received two apologies for this.

51. After a discussion with the Chief Operating Officer of DBS, Simon Freeman, in November 2015 where the claimant's suggestion of "compensated termination" was rejected (page 536-537), the claimant resubmitted his grievance (with some new matters) in January 2016. Once again progress was slow; the claimant was not interviewed by the investigator Mr Saunders until September 2016. A new element of his grievance about the way Ms Jeffries had investigated it first time round was not investigated because it was viewed as lodged too late (pages 874-875). The Saunders investigation was still pending by November 2016.

52. The claimant went off sick with stress in March 2016 and was never to return. He had no problems with his post room colleagues but was ill because his grievance remained unresolved. OH reported in May 2016 that a return to work would depend on resolution of his grievance (pages 607-608).

53. He was to go on to no pay in August 2016. A request for full pay by way of garden leave was refused in June 2016 (page 678). A request for disability leave was made to Mr Freeman's successor as Chief Operating Officer of DBS, Ms Woodeson (page 723-725), but nothing materialised. A further request for full pay made in August 2016 was addressed in an email of 2 September 2016 from Ms Simpson (pages 845-846). Disability leave was not appropriate because there was no guarantee of a return to work once the grievance concluded; special paid leave was possible but was up to Ms Woodeson as it would be outside policy. If his absence was due to an injury at work he could apply for injury benefit, and if successful this would put him back on to full pay.

54. The claimant remained on unpaid sick leave. He applied for injury benefit on the basis that the delay in investigating his grievance was the "injury". This was supported by Ms Jeffries in her statement (page 993) of 3 November 2016 that

> **"There were delays with the original complaint and then it was handled incorrectly resulting in Lionel having to submit another complaint. This was allocated to a new decision manager who subsequently left mid investigation. It is now being looked at again. My belief is that this considerable delay has contributed to Lionel's condition."**

55. Mr Saunders interviewed the claimant again about the grievance on 7 October 2016 (pages 923 -931). The last page recorded the claimant saying

> **"that he would like to return to work providing this is all dealt with satisfactorily. If it is not, or cannot,** [he] **said he would want to be medically retired or paid off."**

56. An OH report of 25 October 2016 (pages 968-969) confirmed that he remained unfit for work and that the solution was not a medical one. It said:

> **"Mr Fisher's symptoms are expected to improve once the work issues are addressed. His return to work remains very unlikely until a resolution is reached."**

<u>Claimant - Simpson emails 7 and 8 November 2016</u>

57. On 7 November 2016 the claimant sent an email to Nicola Simpson about various matters arising out of his position. It appeared at pages 1023-1025. It was triggered by the knowledge that Ms Jeffries had given a statement in relation to his injury benefit application. He took issue with a number of points she made. His email ended with the following passage on page 1025:

> **"I am embarrassed to work for an organisation that treats it staff so badly. My confidence and reputation are destroyed. Do you seriously expect me to come back and work under Maxine Jeffries? Knowing the length managers have gone to, to deal and frustrate any progress of my complaint, is it conceivable that I will ever feel safe and secure at work? That I won't spend half my day looking over my shoulder waiting for someone to trip me up or stab me in the back? Any decent employer would recognise the situation they have allowed to develop and for the sake of their organisational integrity brokered a solution. If you have any humanity you would medically retire me or terminate me with compensation on capability grounds and put an end to this charade."**

58. Ms Simpson responded the following day at pages 1030-1031. She said that Ms Jeffries was the best person to support the injury benefit application. The claim had gone to MyCSP and could take three or four months before an outcome was known. Mr Saunders was endeavouring to get the bullying and harassment investigation concluded as soon as possible. Her email said:

> **"You also mention that you would like the organisation to medically retire you or terminate you with compensation on capability grounds. I am sorry that you feel this way it would be premature for your line management chain to dismiss you at this point as the outcome of your complaint may mean that you are able to return to work. I understand an alternative post away from the respondents in your case was found for you so that you would be able to remain in work. This remains your post and is available for you when you feel able to return to work.**
>
> **If you would like to explore the option to apply for ill health retirement I can arrange for the application forms to be sent out to you. The completed application would be submitted to Health Assured with any OH reports and any medical evidence you supply so they can make a decision on this. Please be aware that the IHR can take around three months for a decision to be made. I have attached a document above with some more information.**
>
> **You state that you were assured that your pay issue was being dealt with as a priority. I am unsure what correspondence you received regarding this, however, while you remain too unwell to return to work normal sick pay regulations will apply."**

<u>Fothergill email to Barnes 11 November 2016</u>

59. Mr Fothergill now sought to open a new line of communication about the claimant's case. It is important to note the claimant's position at this stage.

60. His original complaints of bullying and harassment against Ms Loftus and Ms Bell were lodged in August 2014. He had resubmitted them in January 2016. They were being investigated by Mr Saunders. There was no real progress apparent to the claimant. In the meantime he had been off sick since 4 March 2016 and on no pay since 12 August 2016. Efforts to obtain pay by means of garden leave, disability leave or special leave had been fruitless. His injury benefit application was going to take three or four months. The claimant was solely responsible for his mortgage payments and Christmas was fast approaching. His financial position was becoming desperate.

61. On 11 November 2016 Mr Fothergill emailed the Chief Executive of DBS Kathy Barnes. This was outside normal management structures and was an effort to achieve an intervention at a very senior level to resolve the claimant's difficult situation. His email explained the background: the bullying and harassment complaint, the decision to re-open it and the pending investigation, the inaccuracy of

the information supplied in relation to the injury benefit claim and the fact that all this had made the claimant ill. He asked Ms Barnes to help to resolve the issue.

62. Ms Barnes passed the matter to Mr Turner. They spoke a few days later.

Unsatisfactory Attendance Meeting 16 November 2016

63. In the meantime there had been a further meeting under the unsatisfactory attendance procedure. It was conducted by Susan Barker and Debbie Cain. The notes appeared at pages 1076-1078. On page 1077 the note recorded the claimant saying:

> **"I made it clear to Andrew [**Stafford**] that I am trapped in this situation. Sack me on the grounds of incapability or absence as there is no sign of a resolution to the whole thing. I will lose my flat if it goes on for months longer. My MP has written twice more about this."**

64. He went on to say at page 1078:

> **"I can't see me coming back to work at the moment."**

65. After the meeting Ms Cain did make efforts to find out what was happening with the investigation (page 1082). The outcome letter from that meeting was dated 21 November 2016 and appeared at pages 1111-1112. It confirmed again that the matter would not progress to the next stage. The sickness absence would still be tolerated. The injury benefit claim was with MyCSP and could not be speeded up.

Turner – Fothergill Telephone Call 21 November 2016

66. That same day Mr Fothergill and Mr Turner spoke on the telephone. There was no note of the meeting itself. However, Mr Turner sent an email the following day confirming what had been discussed (pages 1107-1108). Mr Turner's evidence was contained in paragraphs 81-82 of his statement and he stood by the account at page 1107. Mr Fothergill gave his account in paragraphs 8-10 of his witness statement. There was only one part of the email which he did not think was accurate. We will return to that in our conclusions.

67. The email sent by Mr Turner on 22 November 2016 at page 1107 summarised the position as he saw it in relation to a range of issues. He said that under normal circumstances absence of such duration was unlikely to be sustained by the business but it was recognised that the case had not been handled well. The injury benefit claim had been supported by management. Under the heading "Resolution" the following paragraphs appeared (emphasis added):

> **"Kathy [**Barnes**] has asked that I discuss what you are trying to achieve for LF. Kathy is keen to find a workable solution for LF. <u>This cannot include reinstating full pay because this would be contrary to departmental policy</u>. We talked over the scenarios above. I explained that we would look generously on a supportive solution that was in keeping with what Lionel wanted to achieve now. I explained that the most efficient way to address LF's financial concerns was via the compensated dismissal route, this would need to be unopposed by TU and Lionel.**
>
> **We talked about the benefit of the department continuing with the B & H case. We [**talked**] about the likelihood of LF finding resolution. I explained that DBS were content**

> **to conclude the process but that any outcome was unlikely to meet Lionel's expectations.**
>
> **We talked about how Lionel was clearly now very aggrieved. You explained that LF was clearly in the place that returning to work was not considered by Lionel to be an option. Ultimately this took us back to the dismissal with compensation scenario.**
>
> **You agreed to go away and talk to Lionel about an expedited compensated dismissal. Following the meeting you updated Nicola [**Simpson**] that you would like seek further advice from TU colleagues. Similarly, LF [**is**] wanting to seek advice from Thompsons. Equally, after the meeting, you asked us to look into adding a supportive tone to LF's injury benefit application. It is not disputed by DBS that Lionel's case hasn't gone well. I see no reason why that couldn't be acknowledged by us in, for example, a letter confirming that the B & H case was [**being**] abandoned by mutual agreement because of the delays and unlikely prospect of getting a reasonable investigation.**
>
> **You indicated to Nicola that you would update us next week. This is ok, but please be aware that correspondence must stop until you confirm which scenario you are wanting us to take forward to help Lionel. In the absence of a response we will continue to take forward the B & H case. LF will be required to continue to submit fit notes."**

68. This email was forwarded by Nicola Simpson to Mr Fothergill and she added a paragraph about the figures payable on compensated dismissal:

> **"Also I have checked the new compensation regulations as requested and can confirm that the maximum (100%) compensation is calculation by using a tariff of three weeks per year of service, capped by 18 months' salary so hopefully this will give you some indication of a ball park figure which Mr Fisher can consider."**

69. At the same time there had been discussions between Mr Fothergill and Ms Woodeson about getting the claimant back to work and back onto full pay. On 24 November 2016 Ms Woodeson suggested a post in War Pensions (page 1130).

Emails 7 – 8 December 2016

70. Mr Fothergill and the claimant discussed the position. The claimant felt under pressure to make a decision. On 7 December 2016 the claimant sent an email to Mr Fothergill which was headed "response to verbal offer". He asked Mr Fothergill to forward it to Mr Turner, which happened the same day. The email in part read as follows (emphasis added):

> **"I feel that to present me with an ultimatum of accepting a verbal offer within 48 hours or face the withdrawal of that offer is unfair and not consistent with the timescales for a response that DBS have exercised when responding to TU or myself…Gregg [**Fothergill**] tells me that part of your eagerness to resolve so soon is to ensure I receive some money in my December salary. This is a very thoughtful gesture which I appreciate, but I would point out that payment of my salary under "disability/special leave" is and has always been in the gift of DBS. The shape of my Christmas is already set, I won't starve but my celebrations will be more measured than in previous years and any December payment will be too late to affect that now.**
>
> **I respect the verbal offer made and will give it considered thought. I can tell you I am awaiting written legal advice expected before Christmas and given my mental health issues and lack of support network I wish to take medical advice on the impact of my decision. I have secured a medical appointment for 21 December and via cancellation am making every effort to bring this forward.**

> **As you have conceded to Gregg that in light of the OHS reports provided you are able to support my absence as disability leave due to non completion of the reasonable adjustment (due to circumstances beyond your control), I would appreciate reinstatement of my salary without strings attached. This would be a good mark of faith that we may ultimately resolve other outstanding issues…"**

71. Mr Turner responded to Mr Fothergill and the claimant the same day (page 1139). He began by saying that the "offline approach" was a consequence of Mr Fothergill approaching Ms Barnes for an urgent and compassionate response. His email said (emphasis added):

> **"I was trying to identify a solution that would enable a compensation payment in accordance with policy. I was not conceding that your pay should be reinstated – it will not. You are [**currently**] on 'medically certified' sickness absence. I understand management are currently not seeking to take action. All actions will be in accordance with policy going forward.**
>
> **It would be wrong to think that I was trying to negotiate an offer/agreement. We were trying to find a solution, in an urgent and considerate way, to help you, that we could implement under existing HR policy. Gregg was pragmatic in seeing what was doable and made your case well, challenging us to 'think differently' and we did…"**

72. The claimant responded on 8 December 2016 (pages 1143-1145). His email began as follows:

> **"I am quite aware that you were 'not trying to negotiate'. I was presented with a specific set of circumstances. That I agree to termination on the grounds of capability and disability leave would supersede industrial injury benefit, in return I would have to withdraw the allegations of bullying and harassment which I first reported 28 months ago and DBS has failed to conclude an investigation into. I had two days to agree this or it would not be available to me…"**

73. He went on explain why the approach to Kathy Barnes had been made. He emphasised that the need remained urgent. He asked Mr Turner to rethink his request for time to seek advice/clarification on the two points that concerned him in accepting the "solution" which had been offered then withdrawn.

74. Mr Turner replied promptly and asked for a final response by 31 December 2016 (page 1143). At the same time he emailed Mr Wiggetts and others asking them to "pause" their actions because there was an ongoing conversation "offline". This meant that the investigation into the grievance was put on hold. Mr Fothergill was copied into that email so the claimant was aware of it.

14 – 15 December 2016

75. On 14 December 2016 (page 1157) Mr Wiggetts emailed Mr Turner to confirm that he had asked Mr Saunders to stand down from any further action, but said he had not been impressed with the focus and progress of Mr Saunders.

76. On 15 December 2016 (pages 1158-1159) Ms Simpson emailed Mr Fothergill saying:

> **"I understand that Mr Fisher has been given until 31 December to make a decision. If he decides that he would like to progress with the course of action offered, we would look to try and get this concluded in January. This would probably be progressed via the loss of capability policy.**

**In a previous dial-in Scott [**Turner**] did confirm that Mr Fisher would be paid for his notice. Once the dismissal has been actioned, Mr Fisher's line management will arrange payment for any outstanding leave which he may have.**

**Compensation is taxable if it is over £30,000."**

Emails 18 – 19 December 2016

77. Having seen his doctor and spoken to Mr Fothergill on 16 December 2016, the claimant put his position in an email on 18 December 2016 at page 1160. The relevant parts were as follows:

**"Firstly, I am working a little in the dark as discussions have only been verbal so I have set out below what I understand from Gregg to be the four key elements. If any of these are disputed due to miscommunication please contact me at the earliest opportunity:**

**(1) I will take ill health retirement at 100%.**

**(2) I will be paid at full rate from August 12 2016 to my date of termination (TBA).**

**(3) I will have my owing [**annual leave**] paid and be paid for my full notice period.**

**(4) I will continue my personal injury claim but will drop my bullying and harassment claim.**

**(1) Agreed.**

**(2) Agreed. I understand you are going to do this using disability leave/special leave. NB: My GP received last week complex forms from Health Matters (?) in relation to the industrial injury claim. IN light of events my GP has asked me to confirm ASAP that these still need completing and whether they require fast tracking.**

**(3) Agreed. This has already been confirmed to Gregg in writing from Nicola. NB: Since SSP ended in September I have claimed flat rate 'conts based' ESA to ensure my NI credits were paid. DWP will reclaim this money and they know I am entitled [**to**] paid notice. During that period of paid notice I am not entitled to claim ANY benefits or assistance. Given that my current sick/fit note runs to 01/04/2017 this will have a significant impact which is why I asked for confirmation from Nicola.**

**(4) I have taken advice on this from Thompsons/PCS Legal. I am advised not to withdraw the allegations I have made, as failure to investigation the B & H case (NB: not specific allegations contained within) significantly informs my personal injury claim. HOWEVER, if we have reached an agreement and DBS write to me stating *'In view of the agreement reached and accepting the failure of the process and your desire to make a clean break, we propose the following. DBS will cease the investigation into the bullying and harassment claim you made under ISP763. DBS can assure you we will be reviewing the case internally, and will take any necessary action to ensure that the process is robust and effective going forward. We hope this would give you assurance, closure and hasten your return to good health. Your personal injury claim will not be affected',* I would agree to that proposal. It is difficult for me to express here concisely the advice received but we (Gregg and myself) are very happy to discuss the detail of this with you and feel confident that there is a form of words we can agree that protects the integrity of both parties.**

**Thank you for your consideration."**

78. That email was sent at shortly before 11.00pm. At just after 6.00am the next day Mr Turner responded as follows (page 1161 – emphasis added):

> **"Thanks for your email.**
>
> **(1) <u>To clarify, 100% is not ill health retirement. The process is likely to be capability/absence</u>.**
>
> **(2) Noted.**
>
> **(3) Noted.**
>
> **(4) I will investigate this point and come back to you.**
>
> **Thank you for responding before 31/12/16. I will endeavour to take the proposal forward. It is unlikely that we will be able to take any further [**action**] before 03/01/16."**

79. The claimant replied three hours later (page 1161). His email concerned the completion of the injury benefit forms by the GP and what would be disclosed to a future employer, but began by saying:

> **"Thanks for your prompt reply. Re: clarification of point 1, Gregg has explained this to me."**

80. From the face of those emails, therefore, it appeared that the claimant now understood that the reference to "100%" did not relate to IHR but to a compensated dismissal under the capability procedure.

<u>Turner Email 22 December 2016</u>

81. Mr Turner offered a further update on 22 December 2016 at page 1164. He addressed the two questions raised in that email. His email said:

> **"In relation to your second point, I expect will will** [sic] **use the departmental capability process. What this means is that your employment will be terminated on the grounds of loss of capability. I will how this is communicated, I suspect it will be more or less the previous, if that** [sic]**."**

82. Two points should be emphasised about this email. Firstly, it did not say unequivocally that the capability process would be used. It was an expectation. Secondly, the paragraph quoted above contained some grammatical errors and the claimant found it difficult to understand.

<u>Fothergill – Turner Telephone Call 9 January 2017</u>

83. By email of 6 January 2017 at page 1169 Mr Fothergill emailed Mr Turner and Ms Simpson to ask what was happening. Mr Turner responded the same day (page 1169) saying:

> **"We are ready to move forward. Can you give me a call on Monday to discuss the logistics."**

84. Mr Fothergill and Mr Turner had a further telephone discussion on or around Monday 9 January 2017. It was a key discussion but there was no note of this conversation nor any attempt by either party to confirm its contents in the subsequent email. Neither of them had addressed this in detail in their witness

statements. Each gave an account in oral evidence. Broadly, the position of Mr Turner was that the discussion was simply to confirm implementation of the agreement reached in emails, and that Mr Fothergill said Mr Turner should proceed. It was agreed there would be no invitation to the claimant to attend a capability meeting. In contrast, Mr Fothergill's evidence was that the discussions were still "circling around" and that the question of IHR was still a sticking point. His evidence was that after the discussion Mr Turner decided unilaterally to proceed with the compensated dismissal. We will return to that important dispute of fact in our conclusions.

Termination 12 January 2017

85. Matters moved very quickly on 12 January 2017. At 12.49pm Ms Simpson emailed Mr Sprigg information regarding the claimant's case, which they had already discussed. The email appeared at page 1175. It included the email correspondence over the previous month or so, the most recent OH reports and the Cabinet Office guidance on efficiency compensation. Two minutes later (page 1194) Mr Turner emailed Mr Sprigg a draft outcome letter.

86. Mr Sprigg spoke to Mr Turner and it was explained that this was being done with the agreement of the claimant. That was why there was no meeting with the claimant.

87. Mr Sprigg emailed his decision letter to Ms Simpson at 1.27pm. The letter itself appeared at pages 1198-1199. It read as follows (emphasis added):

> **"As you have been advised by your TU representative Gregg Fothergill, I am writing to you in my capacity as Decision Manager in the Managing Loss of Capability case. You have already been correspondence with DBS regarding your capability and you have agreed that you will be unable to return to work in the foreseeable future.**
>
> **I have now carefully considered all the facts of your case including previous OH referrals and the email exchange you have had with Scott Turner, Head of CSHR MOD casework service. As per your email exchange it has been agreed that you will be dismissed from the department on the grounds of loss of capability.**
>
> **As agreed in the email exchange, DBS cannot change the rates of sick pay, we will consider your absence from 12 August 2016 until 12 January 2017 as disability leave and you will receive payment for this period; your untaken annual leave will also be paid in line with current policy. Your bullying and harassment complaint will be resolved without any further action or a decision being made. DBS also fully support the Civil Service injury benefit claim you have made.**
>
> **You are entitled to 10 weeks' notice, but you are not required to work your notice period. You will receive payment in lieu of notice. Your last day of service will be regarded as 12/01/2017. I have considered payment of compensation in line with the Cabinet Office Efficiency Compensation Guidance and have decided to award you 100% compensation on inefficiency grounds."**

88. The letter gave the claimant the right of appeal within ten working days by writing to Mr Sprigg. Tamsin Woodeson would act as any appeal manager.

89. Ms Simpson emailed the letter to colleagues so that the outstanding payments could be calculated (page 1200). Mr Turner's colleague, Christine March, emailed Mr Wiggetts about the bullying and harassment complaint later than

afternoon (page 1220). She told him that management had reached an agreement with the claimant that he would be dismissed with certain considerations, and that part of the agreement was that the complaint would be resolved without further action or a decision. The issue was closed and Mr Saunders was to cease his investigation. The papers would be included on the claimant's personnel file.

After Termination

90. The time limit of ten working days for the appeal was in line with the capability policy (page 1838). No appeal was lodged in that timescale.

91. There was no response from the claimant or Mr Fothergill to the dismissal letter until 27 January 2017 when Mr Fothergill forwarded to Mr Turner an email from the claimant the previous day at pages 1225-1226. That email concerned the compensation quote received from MyCSP. The claimant's reckonable service had been calculated as ending on 12 August 2016 when he went onto nil pay. It failed to recognise that he was going to be restored to pay from that date to 12 January 2017 by means of disability leave. The claimant's email said:

> **"This should be straightforward but needs to be a managed pay progression. Applying for everything at once can only result in mistakes."**

92. His email ended with the following:

> **"PLEASE NOTE: I have had it pointed out to me that although management decided to shortcut the ill health retirement process, presumably as they felt confident I would not meet the criteria under the current scheme, I have a 20 years frozen classic pension that is accessible under a different sent of criteria. DBS will need to assist in the completion of this paperwork. I will have the form EPPA1 in a few days. Who will deal with this?"**

93. It is important to note that in this email the claimant did not say that he had not expected to be dismissed. It was about the financial consequences of the decision and making sure that his reckonable service was correctly calculated.

94. The reply on the points raised came the same day from the Leavers and Early Release Manager, Mr Cornford (page 1227). His email missed the point and dealt only with the notice period. It did not address reckonable service. The form for early release of benefits from the preserved earlier pension scheme was to be sent to the injury benefits team.

95. The claimant replied on 2 February 2017 (pages 1228-1229). He thanked Mr Cornford for his help in "dotting the i's and crossing the t's" in relation to his departure. He addressed the annual leave position and said (emphasis added):

> **"Full payment of my outstanding [**annual leave**] was part of the 4 point agreement with Scott Turner and has been confirmed in writing to Gregg [**Fothergill**] by Nicola Simpson."**

96. Again there was no challenge by the claimant to the fact of the compensated dismissal. It was about the figures.

97. On 15 February 2017 the claimant raised a query about injury benefit (pages 1280-1281). It appeared that his injury benefit claim was going to be successful and

he wanted to know what impact that would have. The link between the handling of his complaint and his illness had been recognised. The main point of the email was to agree what wording would be used for prospective employers.

98. Mr Turner responded the same day. His email appeared at page 1280. He made the point that injury benefit made no difference to the monies paid because it simply took effect in place of disability leave payments. As to the reference, he said:

> **"Your employment was terminated on the basis of inefficiency. MOD can only give that reason. In practice we usually confirm employment periods…"**

99. On 17 February 2017 the claimant sent a further email. It began by saying:

> **"It is my understanding that I have been dismissed on capability due to a prolonged sickness absence. There is a direct link cause/effect between my illness and the failure of management over 29 months to investigate a formal complaint of bullying and harassment. This is acknowledged in writing by OHS, MyCSP and my current line management. It has resulted in an award of industrial injury benefit, recognising the department's active role in my continued sick absence. I am being forced to apply separately to MyCSP for access to my frozen pension. As part of the capability process this should have been done by DBS first. In your rush to get me off your books you didn't even provide MyCSP with the correct basic dates of my employment. It will be at least April before any compensation is paid…"**

100. After that introduction he went on to address the wording for future references. His email ended by saying that all he wanted was closure.

101. On 14 March 2017 it was formally confirmed that the claimant had been successful in his application for injury benefit and would be restored to full pay with effect from 4 March 2016 (page 1270).

102. That same day the claimant sent a further email chasing up a responses email of 17 February 2017. His email of 14 March 2017 appeared at pages 1278-1279. In that email he said:

> **"I did not appeal your decision to terminate my employment because DBS chose to deprive me of any income for five months (now found to be inappropriate) and I was in a financial mess. To compound the misery of your decision my final salary was incorrect as my line management failed to submit the appropriate forms and we are now over two months on [**but**] there is no sign of my compensation payment because you supplied incorrect information to MyCSP about by dates of reckonable service."**

103. Mr Turner responded the same day (page 1278) and confirmed that documents had been received that day from MyCSP and would be actioned, and that the agreed reference would be provided.

104. Some two weeks later the claimant has still heard nothing and he sent an email chasing matters up on 28 March 2017 at pages 1398-1399. He had not yet received injury benefit. He had learned that he could ask for retrospective medical retirement as well as early payment of his preserved award from his earlier pension. He said he wanted to apply for those as well as future payment of his industrial injury award.

105. Mr Turner responded the same day at pages 1397-1398. He confirmed that payment of the discretionary compensation was due at the end of the month. A

standard reference template was attached. As for the request for retrospective IHR, there was no statutory right to ask for it and it was subject to Cabinet Office approval. A request for such approval would be submitted. Early payment of earlier pension rights was outside the DBS HR team's remit.

106. The claimant responded the same day (page 1374). He suggested that retrospective IHR should be considered because it had not been considered at the time he had been dismissed. He raised some queries about the process.

31 March 2017 - Appeal

107. On 31 March 2017 the claimant sent an email to Kathy Barnes, copied to Mr Turner and others. He had received his compensation payment details from MyCSP. It had been reduced by over 36% because it had been taxed even though it was below £30,000. This was because the claimant had already received a tax free termination payment of £30,000 when he left the British Library in 2006. He said that if he had known the payment would be less than five months' pay:

> **"I would never have agreed to this without challenging you."**

108. That same day Mr Fothergill forwarded the claimant's email to Mr Turner asking that it be treated as an appeal against the decision to dismiss the claimant. He said it should be treated as within time because the notice of the reduced payment had only just been received. His email said:

> **"Lionel Fisher wishes to appeal on the grounds of this being a perverse decision based on the fact that no hearing took place and due to the absence now being supported by his successful industrial injury benefit claim (for an injury that was caused by work). We wish to appeal and seek reinstatement for Lionel as the outcome."**

109. The reply came on 4 April 2017 from Ms March (page 1476). It conveyed a decision by Kathy Barnes that the request to be allowed to appeal late was refused. An explanation was given for the reduction of the compensation payment due to tax, and it confirmed that action was being taken to progress early payment of the preserved pension, the injury award and the retrospective IHR application.

110. The application for retrospective IHR was made on 10 April 2017 (pages 1570-1572). The claimant was informed by email from Ms March of 13 April 2017 at page 1581 that it had been declined. The Cabinet Office had pointed out that the medical advice was that the claimant could return to work when issues had been resolved, and therefore there had been no application for IHR made at the time. Attention was drawn to the possibility of early payment of the preserved award, which was a matter already in progress.

111. The claimant had contacted ACAS to commence early conciliation on 5 April 2017. Early conciliation ended on 5 May 2017 and he presented his claim form on 5 June 2017.

## Submissions

112. Helpfully each of the advocates had produced a written closing submission, meaning that oral submissions were relatively brief. Reference should be made to

those written submissions as appropriate but for present purposes the position of the parties will be summarised only briefly.

Respondent's Submission

113. The core proposition on which Ms Levene based her submissions was that this had been an agreed termination. She identified the occasions going back to 2015 on which the claimant had expressed an interest in termination of employment. These became more frequent in November 2016 prior to the beginning of discussions between Mr Fothergill and Mr Turner. It was evident from those discussions and from the language used in the emails before and after termination that the parties had reached an agreement that compensated dismissal would be the vehicle to provide a mutually agreed exit package. That was consistent with the absence of any appeal or challenge to the decision until the claimant learned that his compensation payment was to be subject to tax.

114. Ms Levene then addressed each of the complaints in the agreed List of Issues. It was denied there was any unfavourable treatment because the terms agreed were generous and it was a solution which the claimant had engineered. Even if unfavourable treatment, the termination of employment was not because of absence: the absence was tolerated. It was because the claimant wanted it to happen. We were invited to dismiss the section 15 complaint.

115. In relation to reasonable adjustments, it was accepted that relevant policies were applied as PCPs, but denied that there was any substantial disadvantage to the claimant save for the sick pay policy which Ms Levene accepted placed him at a substantial disadvantage: his disability meant he was more likely to suffer a reduction in pay. As to the disability leave adjustment, she submitted that it would have been outside the policy criteria, and granting disability leave outside the policy would not have been reasonable because it would have tantamount to extending full pay and avoiding the sick pay rules. A dangerous precedent would have been created. That was different from a termination exit package where the disability leave removed the uncertainty of the injury benefit application. Ms Levene also relied on **O'Hanlon**, and the concerns expressed about the purpose of the reasonable adjustments provisions which are to enable disabled people to place a full part in the world of work, not to treat them as "objects of charity" in a way which disincentivises a return. In any event a number of other adjustments had been made: different roles were offered including the war pensions role in November 2016.

116. In relation to unfair dismissal Ms Levene submitted that there had been no dismissal but an agreed termination, but in any event if there had been a dismissal it was a capability dismissal which was fair in the unusual circumstances of the claimant where the claimant was clear he was not coming back.

Claimant's Submission

117. Mr Henry began by addressing the section 15 complaint. He submitted that termination was unfavourable treatment. Even though the claimant was accessing some money by a compensated dismissal, it was not advantageous because of necessity it involved him losing his job. In effect all the options open to him by the end of 2016 were unfavourable. This unfavourable treatment was because of his absence and could not be justified since a less discriminatory way of achieving the

same aim would have been to have maintained the claimant on pay by means of disability leave or otherwise.

118. In relation to reasonable adjustments Mr Henry concentrated on the sick pay policy rather than any other elements of the PCP. He argued that a restoration of pay would have removed the substantial disadvantage and relied on what was said in **G4S Cash Solutions** about the scope of section 20(3).

119. Finally Mr Henry addressed the unfair dismissal complaint. He submitted that this was in truth a dismissal. There was no resignation letter from the claimant and no signed settlement agreement. He was paid compensation in lieu of notice. The capability process was initiated by the employer not the employee. The terms of the dismissal letter were significant. As a capability dismissal it was unfair: in paragraph 5 of his written skeleton argument he identified six reasons why such a dismissal was unfair.

**Discussion and Conclusions – Agreed Termination ?**

120. The first matter the Tribunal addressed was a fundamental one: was there a dismissal or was it termination by agreement? We reminded ourselves of the case law summarised above. It was a dispute about who really ended the claimant's employment. It would ultimately turn on the substance of the termination, not the form in which it was presented. The Tribunal had to resolve some disputes of primary fact and then interpret the primary facts to answer that question. The factual context was important as it showed how the parties moved towards termination. We reviewed the relevant exchanges through to January 2017 and beyond

Requests by the Claimant for Termination

121. “Compensated termination” was first raised by the claimant in a discussion with Simon Freeman in late 2015 (page 536). Mr Freeman refused to progress it.

122. About a year later (Saunders interview 7 October 2016 page 931) there was reference to the claimant saying that he would like to return to work if the grievance was dealt with satisfactorily but if not then he would like to be medically retired.

123. On 7 November 2016 the claimant’s email to Ms Simpson at pages 1023-1025. ended by saying:

> **“If you have any humanity you would medically retire me or terminate me with compensation on capability grounds and put an end to this charade.”**

124. That statement showed that the claimant was aware that there was a difference between IHR and termination with compensation on capability grounds. It was a plea for humanity in the form of termination. That was a consequence, we concluded, of the financial position in which the claimant found himself after three months on no pay.

125. The invitation from Ms Simpson of 8 November 2016 at page 1030 to apply for ill health retirement was well-intentioned but of little immediate help: she indicated that that could take up to three months. Even then it was not guaranteed to succeed. It was a medical decision not a decision for the respondent.

126. The severity of the claimant's financial position was evident from his comment at the attendance meeting on 16 November 2016 (page 1077):

> **"Sack me on the grounds of incapability or absence as there is no sign of a resolution to the whole thing. I will lose my flat if it goes on for months longer."**

Fothergill – Turner Telephone call 21 November 2016

127. As a consequence of that Mr Fothergill approached the Chief Executive, Kathy Barnes 11 November page 1065), resulting in the discussion on the telephone between Mr Fothergill and Mr Turner on 21 November. There was no agreed note of what was discussed.

128. The only contemporaneous document was Mr Turner's email the following day at page 1107-1108. Mr Fothergill did not challenge that email save that in paragraph 10 of his witness statement he said that the context for him saying the claimant would not be returning to work was that he meant "whilst the grievance complaint was unresolved". It seemed to us the word "context" was significant and Mr Fothergill was implicitly accepting that he did not say that expressly. More broadly, he agreed that the email accurately recorded that he was asking for dismissal with compensation.

129. In cross examination Mr Turner gave us some detail which was not in his witness statement. That caused a difficulty because that detail had not been put to Mr Fothergill when he gave his evidence. However, Mr Turner explained clearly that Mr Fothergill approached him via Ms Barnes not to chase progress (because that was a procedural issue for managers lower down), but rather "to ask for money" (as he put it) via termination because the claimant "wanted out". Mr Turner asked whether that related to the site, the team or the business overall, and whether the claimant envisaged "crossing the gates of Norcross" again. Mr Fothergill said he did not think so, checked with the claimant and later said the claimant thought his time at Norcross was finished and he wanted to go on terms he could live with.

130. The Tribunal unanimously found as a fact that Mr Turner's account of those discussions in his email and in his oral evidence was accurate. His oral evidence was consistent with his email, and it was not disputed that the effect of the discussion was to give the claimant a choice of two possible scenarios.

131. The first scenario was the status quo. The bullying and harassment investigation by Mr Saunders would continue. The injury benefit application which had been lodged would take its course and the claimant would stay on unpaid sick leave.

132. The second scenario was a compensated termination by agreement.

December 2016

133. In his email of 7 December at page 1137 the claimant referred to the verbal offer and said he would give it thought. It was clear the claimant understood he had a decision to make. He also requested disability leave because Mr Turner had indicated to Mr Fothergill on 21 November on the telephone that disability leave would be a possible element of an agreed resolution. The reply the same day from

Mr Turner at page 1139 made clear that reinstatement of pay would not happen. That email also said that it was wrong to think Mr Turner was trying to negotiate an offer or reach an agreement.

134. We were satisfied that this was in one sense disingenuous on the part of Mr Turner because it was apparent the reality was that he would not proceed with a compensated dismissal unless he had the agreement of the claimant. However, that position was perhaps understandable. Mr Turner was concerned that the possibility of disability leave as part of a deal discussed on the telephone with the union had now been recorded by the claimant in an email, when his own email at page 1107 had said he could not reinstate pay. It was clear to us that Mr Turner was keen to ensure that the email trail adhered to policy even though in the verbal discussions "offline" he was prepared to be more creative.

135. The claimant responded to that email on 8 December at page 1143. He set out his understanding of what he was being asked to agree to, namely termination on the grounds of capability. He sought more time to the end of December and was granted it.

136. Five minutes later Mr Turner emailed his colleagues to get all the pending actions paused (page 1156). It was clear he anticipated the claimant would agree to what was being proposed. Although in the email of 22 November Mr Turner had said that the bullying and harassment investigation would continue, his change of view was due to the fact that the timescale for a response had now become elongated. There was a greater risk that managers might undertake substantive work which proved to be unnecessary. We noted that Mr Fothergill was copied in to the "pause" email and did not register any objection to it.

137. There followed the email of 15 December from Ms Simpson at pages 1158-1159. She said that compensation over £30,000 would be taxable. Ms Simpson had already explained in forwarding Mr Turner's email at page 1107 that the compensation would be three weeks per year of service, so although the claimant did not have specific figures he had "ball park information" on the package. The compensation would be three weeks for each year of service since he rejoined. He would receive full pay retrospectively from 12 August, either by means of the injury benefit application or disability leave if necessary. He would receive payment for outstanding annual leave and he would get ten weeks' notice pay based on full pay rather than his contractual nil pay at the time.

138. The claimant's response to the proposal, as he put it, came in his email at 11.00pm on 18 December (page 1160). He had seen his doctor and taken advice from his union. He recorded his understanding of the proposal because until then the discussions had been verbal only. There were four points:

(1) IHR at 100%.

(2) Full pay.

(3) Payment of annual leave and notice.

(4) That he would not withdraw his bullying and harassment allegations but wanted to agree a form of words to record that those matters would go no further.

139. Mr Turner responded very promptly at shortly after 6.00am the next morning (page 1161). He clarified that it was not IHR; 100% compensation did not relate to IHR. He said the process was likely to be capability/absence. He noted the agreement at points (2) and (3) and he said he could come back to the claimant on point (4) about the form of words to be agreed. It was clear from the email that Mr Turner would endeavour to take the proposal forward in the New Year.

140. The claimant responded on point (1) three hours later at page 1161. He said that Gregg Fothergill had explained it to him. This indicated he understood the difference between IHR and compensated dismissal. He also made some further points about the reference (point (4)), which of course were only pertinent if the claimant was accepting that his employment was coming to an end. He gave no indication that he was not prepared to leave if it was not IHR. He gave no indication that he had changed his mind and wanted to go for the first scenario, namely the status quo. Consequently we concluded that this email showed the claimant agreed to pursue the second scenario by way of a compensated dismissal with only the wording of the reference to be finalised.

141. Mr Turner replied on 22 December at page 1164. He confirmed that they were looking to move forward in January. His email went on to deal with point (4), explaining that the reference would say that there had been a termination on the ground of loss of capability. Although the relevant paragraph of the email was not easy to understand, being expressed in a very compressed manner and containing typographical errors, what was tolerably clear was that he was progressing the reference point and everything was moving forward towards termination in the New Year as agreed.

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142. Mr Fothergill chased matters up on 6 January 2017 by his email at page 1169, and the immediate reply from Mr Turner on the same page was to say:

**"We are ready to move forward."**

That could only mean compensated dismissal on the four points which had been agreed.

143. Following an email exchange Mr Fothergill and Mr Turner spoke on 10 January 2017. There was a dispute of primary fact as to what ensued during this discussion. Again neither side produced any notes of this, nor on this occasion was there any email shortly thereafter recording what had been discussed. Neither witness statement addressed this in detail. We were left with oral evidence only.

144. Mr Turner's evidence was that he rang Mr Fothergill to check that he was "good to go". He said Mr Fothergill confirmed that was so, saying nothing to indicate that Mr Turner should not proceed with compensated dismissal as per the emails. Mr Turner assumed that Mr Fothergill had fully consulted the claimant. They discussed whether the claimant should be invited to the meeting with the decision maker as per

policy, but agreed that was not appropriate. Mr Fothergill did not think that would be helpful to the claimant and doubted he would come anyway. The thrust of Mr Turner's evidence was that there was a common understanding Mr Turner would now proceed as per the emails. Mr Turner said he would send a letter and they discussed the timescale for payments.

145. In contrast Mr Fothergill's evidence was that the discussion was still the two sides "circling round each other". He made a reference in paragraph 11 of his witness statement to the claimant wanting IHR, and in oral evidence he said that was still in discussion but that the department decided unilaterally to proceed with the compensated dismissal instead.

146. On balance the Tribunal accepted Mr Turner's account. We accepted Mr Fothergill gave evidence in a truthful way to the best of his recollection, but we concluded he may well have been confusing the November discussion with the January discussion. Mr Fothergill's proposition that IHR was still a sticking point was not reconcilable with the emails of 18 and 19 December where IHR was clearly ruled out. In any event IHR was not within the gift of the respondent, as had been explained by Ms Simpson (8 November 2016 pages 1030-1031).

147. This discussion was a final opportunity for Mr Fothergill to say on behalf of the claimant that he did not want to proceed with the second scenario and thereby back out of the email agreement. That chance was not taken. Mr Turner was right to consider that the union was saying on behalf of the claimant that he should now action the compensated dismissal agreed upon before Christmas.

148. It followed that Mr Sprigg's involvement on 12 January 2017 was very limited. Mr Turner accurately described it as a "rubber stamp". The information was emailed to Mr Sprigg at 12:49 (page 1175) and his decision communicated at 13:27 (page 1996): less than an hour later. We were satisfied Mr Sprigg had no substantive input into the decision. Mr Turner made the decision.

<u>After Termination</u>

149. The decision letter gave the claimant ten days to appeal. That was in accordance with the policy at page 1199. Ten working days from Thursday 12 January would expire on Thursday 26 January. If it ran from the date of receipt then the time limit for an appeal might expire on Friday 27 or even Monday 30 January.

150. In that period there were no communications on behalf of the claimant until 26 January, still just within the appeal timescale. The claimant emailed Mr Fothergill raising a concern about the calculation of his reckonable service. He acknowledged in that email that he was not getting IHR but did not say words to the effect of "this is not what we agreed". Mr Fothergill forwarded it asking for the figures to be rectified. There was no challenge to the decision to terminate by way of a compensated dismissal.

151. Mr Cornford replied on the figures on 27 January, although missing the point slightly, but there was no further discussions at that stage until the claimant responded to Mr Cornford on 2 February 2017 at page 1228. He had had his payslip by then and he referred in that email to "the four point agreement" and said that he

was simply “dotting the i’s and crossing the t’s”, suggesting that this was the end of the process with minor details to be filled in.

152. The claimant sent a further email on 15 February 2017 at page 1280 regarding injury benefit. He raised again the question of the wording of the reference which was still not sorted out. He made a reference to “signing up to the small print”, again acknowledging that the outstanding details were relatively minor. The reply at page 1280 said there would be a factual reference only.

153. The claimant responded on 17 February 2017 at page 1279. Again he raised some concerns about the reference being misleading and that it should refer to him leaving due to an industrial injury. He said he did not wish to prolong the divorce proceedings. There was no reply and the issue of the reference remained unresolved.

154. The claimant chased it up on 14 March at page 1278. In that email he said he had not appealed the decision because he had been on no pay for five months and was in a financial mess. This was an indication that it was the financial situation which had driven him to accept the termination as it took place in January.

155. Mr Turner replied on the reference the same day (page 1278). It could be agreed as the claimant suggested. It appeared that point (4) of the four point agreement was now resolved.

156. The claimant chased matters up on 28 March concerned about the absence of any compensation payment. He wanted now to pursue a retrospective IHR application and seek early payment of his preserved benefits from his earlier frozen pension. In that email he acknowledged that he had accepted the arrangement. He said:

> **“I felt pressured into acceptance of the situation on a promise of closure and swift payment.”**

157. Mr Turner replied at page 1397. He dealt with the compensatory payment which would be made at the end of the month and said that no reason for termination would be given in the reference. He explained that there was no right to seek retrospective ill health retirement. The claimant responded on that point but without challenging the decision, and again it was clear that although he had regrets, he was not saying it had never been agreed.

158. On 31 March 2017 payment was made but tax was deducted because of the earlier termination payment made when the claimant left the British Library, although that was not explained to the claimant at the time. The claimant immediately emailed Kathy Barnes to protest (page 1428). In that email he said that if he had known his compensation payment would be around £8,000 and less than five months’ pay “I would never have agreed”. This was a second acknowledgement that he had agreed at the time, albeit now regretting having done so.

159. Mr Fothergill forwarded that email and for the first time (page 1428) said the claimant wanted to appeal the decision to terminate employment and sought reinstatement. That appeal was out of time and was refused by Ms Barnes, partly for that reason. It is clear that it was triggered by the delay in the payment and the fact

that when it arrived the compensation payment was less than the claimant had thought because of the impact of tax.

Conclusions

160. Putting these matters together the Tribunal concluded as follows.

161. Firstly, the claimant had initiated discussions about an agreed termination package when Mr Fothergill emailed Ms Barnes and spoke to Mr Turner in November 2016.

162. Secondly, those discussions had produced two scenarios for the claimant to choose: the status quo or an agreed termination by a compensated dismissal, not IHR. The claimant was not given any figures but the elements of the package were tolerably clear and he had a ball park indication of what this would mean in financial terms.

163. Thirdly, the claimant knew he had a decision to make and he asked for more time to make it and was granted that more time.

164. Fourthly, on 18 December at page 1160 he responded to the proposal and accepted it subject to two points: (a) clarity as to IHR (which was swiftly provided); (b) the reference.

165. Fifthly, the agreement was held over to the New Year before being actioned.

166. Sixthly, on 10 January 2017 Mr Turner received from Mr Fothergill confirmation that he could proceed as agreed and actioned it through Mr Sprigg on 12 January.

167. Seventhly, and importantly, the claimant did not appeal or challenge the termination of his employment. The concerns raised after the letter arrived were about reckonable service and the wording of the reference. We accepted Ms Levene's argument this was a significant indication the claimant had agreed to termination at the time.

168. Eighthly, the claimant twice said in March that he had accepted or agreed it: 28 March at page 1199 he said he had been pressured into acceptance; 31 March at pages 1428-1429 he said he would never have agreed to it had he known. This regret was triggered by the tax on the compensatory element, but it shows he had agreed to it at the time. Although he was in a very difficult financial position, there was no duress or undue pressure on him which would mean he did not really consent to it.

169. Therefore the Tribunal unanimously accepted the respondent's case that despite the use of the "compensated dismissal" procedure and the wording of the termination letter, in substance this was not a unilateral act by the respondent but an agreed action bringing the claimant's employment to an end.

**Discussion and Conclusion – List of Issues**

170. Having made that determination we turned to address the agreed List of Issues.

Issue 1(a) – Section 15: Unfavourable Treatment

171. The first matter was the complaint under section 15 of discrimination arising from disability. The first question was whether the termination of employment amounted to unfavourable treatment.

172. Ms Levene said not because it had been what the claimant wanted. Given his situation in early January, termination on generous terms was favourable treatment.

173. Mr Henry argued that it was unfavourable even though the other option, the status quo, was even more unfavourable. It had to be seen in context. The claimant had received no pay since 12 August.

174. We noted that the word "unfavourable" does not require any comparison of situations (see **Williams**) unlike a direct discrimination claim under section 13. On balance we preferred the claimant's view. The reality was that at the end of 2016 the claimant had two scenarios open to him: the status quo of staying on no pay pending the outcome of his grievance because disability leave or full pay had been refused; or taking a compensated dismissal as a means of generating some immediate income. Both of these were unfavourable options. The fact the claimant agreed in very difficult circumstances to termination did not prevent it being unfavourable treatment. It remained an unfavourable solution even if, as Mr Henry put it, the lesser of two evils. The favourable scenario would have been to have resolved the pay situation pending the grievance conclusion without the claimant losing his job, but that scenario was ruled out by Mr Turner on 7 December 2016 at page 1139. Losing employment after nine years with compensation of three weeks for each full year of employment amounting after tax to only five months' pay did not mean that the loss of the job was favourable: it was unfavourable treatment.

Issue 1(b) – Section 15: Reason for Termination

175. That took us to the second issue. The claimant's case (drawn from his further particulars at page 59) was that the reason for the agreed termination was because he had been absent since March 2016 and was not fit to return to work. We rejected that case. The reason for the decision to proceed was because the claimant asked for it. The absence was being tolerated under the attendance management procedure: the letter of 21 November 2016 at page 1111 made that clear.

176. It is true to say, of course, that the claimant was only asking for compensated dismissal because of his absence and the impact on his pay, but that was not the reason for termination in Mr Turner's mind. We considered his mental processes in accordance with the guidance given in **Pnaiser.** We found unanimously that the reason in Mr Turner's mind was the request made by the union for a package to be agreed. The sickness absence was the context for that decision but not a material cause of it.

177. Therefore the complaint under section 15 of the Equality Act 2010 as pleaded failed and was dismissed. Issues 1(c) and (2) fell away.

Issues (3) and (4) – Reasonable Adjustments: PCP and Disadvantage

178. We then turned to the complaint of a breach of the duty to make reasonable adjustments.

179. It was accepted that the respondent applied a PCP in the form of its policies and in his submissions on substantial disadvantage Mr Henry concentrated on the sick pay policy rather than attendance management or capability. In our view that was a sensible decision on his part. The attendance management policy created no substantial disadvantage for the claimant because his absence was tolerated and he was not being taken to stage 3. Similarly the capability policy, which was the mechanism by which his employment was terminated, did not create any substantial disadvantage because it was only applied to him because he asked for it.

180. The substantial disadvantage resulting from the application of the sick pay policy was the claimant's reduction to nil pay. Due to his disability the claimant was more likely to be off sick long enough to go onto no pay. Ms Levene accepted that this was a substantial disadvantage resulting from the application of that PCP.

Issue 5 – Reasonable Adjustments – Disability Leave

181. The question for the Tribunal, therefore, was whether the respondent failed in its duty to make such adjustments as it would have been reasonable to have made to avoid that disadvantage, namely the reduction to no pay. Disability leave was the adjustment for which the claimant contended in paragraph 5(b) of the List of Issues. The adjustment in paragraph 5(a) was not relevant to this PCP and this substantial disadvantage.

182. The claimant had made two requests for disability leave. The first request was made in August 2016 by Mr Fothergill but refused as communicated by Ms Simpson in her email of 2 September 2016 at pages 845-846. She said it was not appropriate because the managers could not presuppose that the outcome of the grievance would enable the claimant to return. That was based on the policy at page 1826 which requires that the employee will be fit to return if the reasonable adjustment which has been agreed is put in place, and of course in this situation no reasonable adjustment had been agreed.

183. The second request was refused by Mr Turner in his email of 7 December 2016 at page 1139. He said he would not reinstate full pay because the claimant remained on medically certified absence. He explained in oral evidence that disability leave applied where the employee was certified fit for work once adjusted. We noted that the fit notes supplied by the claimant for this period were not produced to us; although we inferred that the fit notes must have said the claimant was not fit for work rather than that he would be fit if adjustments were made. However, we had seen the OH advice in this period.

184. Although the position taken on both occasions was that disability leave would be outside the policy, nevertheless it was granted as part of the termination package.

Ms Levene suggested that supported the respondent's case, whereas of course Mr Henry said it undermined the argument that it could not be granted any earlier.

185. We approached this in two stages. The first was to consider whether, leaving aside the legal framework, a restoration of pay through disability leave would have been a reasonable step to have taken. The second was to consider such an adjustment (if otherwise reasonable) could be a reasonable adjustment given the authorities on the reasonable adjustments provisions.

186. Leaving aside the legal framework the Tribunal was unanimously satisfied that putting the claimant on disability leave was a step reasonably open to managers.

187. This was a case with some exceptional circumstances. Firstly, the bullying and harassment complaint lodged in August 2014 was still unresolved nearly 2½ years later. Secondly, management had accepted that they were at fault for that and the claimant had received an apology on two different occasions. Thirdly, the link between that delay and his absence and current symptoms was acknowledged by managers in supporting the injury benefit application. Fourthly, Mr Fothergill had drawn to the attention of Ms Barnes in his email of 11 November that the fact the claimant was not on no pay was aggravating his symptoms, a matter that can hardly have been a surprise.

188. Fifthly, the OH advice from October 2016 said there would be no prospect in reality of a return until the outcome of the grievance, but once the outcome was known the symptoms would improve. It is right to say that the OH advice was not entirely unambiguous. It could have been read as saying that a resolution either way would be beneficial for the claimant, but it fell short of saying whether that would necessarily result in a return to work. Equally it did not say in clear terms that only a positive outcome would enable a return to work. What was clear, however, was that it was very unlikely there would be any chance of a return to work until the grievance was resolved one way or another and then the prospects of a return to work would improve.

189. Against that background we considered the factors which appear in paragraph 6.28 of the Code. We considered that restoring full pay would have been effective to remove the disadvantage of being on nil pay. It would have relieved the claimant of the need to seek a termination package as a means to get some income to enable him to avoid the risk of defaulting on his mortgage and losing his flat.

190. It was also a step which we were satisfied would have been practicable. Mr Turner did it within the agreed settlement. It was plainly practicable at that stage to interpret the circumstances as falling within the policy or to act outside the policy in exceptional circumstances. Mr Turner did not adequately explain why he could not have done this outside the framework of a settlement agreement. There was no clear reason why that could not have been done as an exceptional measure, even without an agreed termination package.

191. We considered the cost to the respondent of restoring the claimant to full pay through disability leave. No figures were provided by either side, but in any event the Tribunal is not required to undertake a nice analysis of cost. A broad approach is sufficient. The costs were inherently finite. The injury benefit decision was expected in early 2017 and if successful (and of course it was supported by management)

would have provided 6 months of full pay. Further, the restoration of pay would only have been necessary until the outcome of grievance, the timescale for which was within the control of the respondent. Indeed, we noted that Mr Wiggetts had expressed some frustrations about the pace of Mr Saunders' investigation even after it had been formally paused (14 December 2016 page 1157).

192. We did not think that restoring pay as an exceptional measure would create a significant disruption to the respondent by means of a precedent because there were exceptional circumstances (see paragraphs 187 and 188 above).

193. There was no evidence before us of financial constraints which meant that the respondent could not afford to make this adjustment. The respondent was a large Government department with significant resources able to afford much of the extra cost of this adjustment upon termination.

194. There was no other assistance available to the respondent to help fund such an adjustment save for the fact that the injury benefit application would provide that funding if it was granted.

195. We also took into account two other matters: other adjustments and the claimant's statements about his wish to leave.

196. Ms Levene emphasised other adjustments which had been made by the respondent, but in the nil pay period the adjustment proposed was to get a different role in war pensions. However, that could not work because the OH advice was clear that the claimant would not be medically fit to return in any role for the respondent until the grievance was resolved one way or the other.

197. The claimant had from time to time made statements which the respondent interpreted as meaning he would not be coming back come what may. They included the comment at the end of the interview with Mr Saunders on 7 October at page 931 that he would be coming back only if matters were resolved satisfactorily. On 21 November Mr Fothergill said the claimant thought his time at Norcross was finished and he wanted to go. However, it should reasonably have been apparent to the respondent that this approach was a direct consequence of being on no pay and claimant's dire financial position. Mr Fothergill had made that clear in his email to Ms Barnes which initiated those discussions. Mr Turner's email of 22 November 2016 at page 1107-1108 (see paragraph 67 above) recognised that compensated dismissal was the way to address the claimant's "financial concerns". In our judgment it was not reasonable to proceed as if the claimant would never be coming back without any medical evidence to that effect.

198. Therefore the Tribunal was unanimously satisfied that putting the claimant on full pay by means of disability leave without requiring him to agree to termination of employment would have been a step which this employer could reasonably have taken.

199. That left the legal issue: whether, in the light of the case law and in particular **O'Hanlon** (which Ms Levene addressed in paragraph 16 of her written submissions) that was the kind of adjustment which is within the scope of the Equality Act.

200. The Tribunal considered carefully the comments of the EAT in **O'Hanlon** as endorsed by the Court of Appeal. There are generally two reasons why increasing the pay of a disabled person who remains absent will not be a reasonable adjustment within the Act.

201. The first is that in making that kind of decision the Tribunal might usurp the function of management without being aware of the broader picture. That reflects a concern that a decision by a Tribunal in an individual case might inevitably apply to many others.

202. In this case we were satisfied that was not a significant concern. There were exceptional circumstances (paragraphs 187 and 188 above) which one might anticipate applied only to the claimant. In particular, it was almost 2½ years since his complaints were first lodged and they had still not been resolved. He had had two apologies from management for that failing, and the Occupational Health advice was that he would not be fit to return whilst those complaints remained unresolved. In any event, this was a decision which the respondent was prepared to make upon termination without undue concern for setting an unhelpful precedent. Overall this objection to such an adjustment was not applicable here.

203. The second rationale for excluding adjustments to pay while someone remains absent is because the purpose of the disability provisions is to get the disabled person back to work, not to put more money into his wage packet whilst he remains off. It is feared that ameliorating the financial consequences of absence will act as a disincentive to a return to work.

204. However, in this case this adjustment would have been precisely to get the claimant back to work. It was to enable him to stay in employment until the main barrier preventing a return to work had been lifted. Further, the timescale for the lifting of that barrier was within the control of the respondent, not the claimant. The claimant had been interviewed twice by Mr Saunders. Mr Saunders was having difficulty getting Ms Loftus and Ms Bell to be interviewed, but there was reference in the papers to there being a right to insist that they attend (Mr Saunders' email 28 October 2016 page 981). That matter could have been addressed without an interview in any event given that they had been interviewed on two previous occasions. The respondent could reasonably have concluded the grievance in early 2017. If the matter were managed properly there was no risk that the adjustment would be required indefinitely.

205. We did not consider that this adjustment risked disincentivising a return to work. We accepted there was no guarantee the claimant would return. It did remain a matter of speculation, however informed, as to whether an outcome rejecting his complaints would improve symptoms sufficiently to get him back, but the whole point of the adjustment was to hold the position so that the respondent could then review matters once the claimant had received his outcome and revisit the question of disability leave at that point if he still did not return to work. Refusing to adjust his pay save upon termination meant that he was forced into agreeing to leave his employment. This adjustment would have prevented that.

206. We acknowledged that technically this would have been a sole adjustment, not part of a package of adjustments to get the claimant back into work. However, it was not a measure appropriate in isolation: it would have to be coupled with a drive

to conclude the grievance as swiftly as possible. It fell within the spirit of paragraphs 17.21 and 17.22 of the Code in that the absence was due to a failure to make reasonable progress with the grievance. To regard this as outside what was possible because procuring a swift conclusion to the grievance was not itself a "reasonable adjustment" was unreasonable.

207. Nor did we consider this adjustment to be the type of measure considered in **Tarbuck** and **Romec.** In this case the substantial disadvantage caused by the PCP was financial and the adjustment would have removed it.

208. Accordingly we were unanimously satisfied this was one of the rare and exceptional cases envisaged in **O'Hanlon** where protecting the pay of the disabled person whilst he remained absent from work was a reasonable adjustment within the scope of the Equality Act 2010. The complaint of a breach of the duty to make reasonable adjustments succeeded on that point.

Issue 6: Unfair Dismissal – Dismissal?

209. For reasons explained in paragraphs 120-169 above, the Tribunal was satisfied that in substance this termination was by agreement not a unilateral decision by the employer, even though the agreement was not formally documented or finalised. Both sides intended the employment to end by means of a compensated dismissal. IHR was not an issue by that stage.

210. Therefore we were satisfied that there was no dismissal within section 95 of the Employment Rights Act 1996. The unfair dismissal complaint failed and was dismissed.

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Employment Judge Franey

31 January 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

12 February 2018

FOR THE TRIBUNAL OFFICE