EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Gavin	**v**	**Hertfordshire Partnership University NHS Foundation Trust**

Heard at: Watford **On**: 18 to 23 January 2018

Before: Employment Judge Bedeau
Members: Mrs A Brosnan,
Mr J Cameron

Appearances

For the Claimant: Mr J Small, Counsel
For the Respondent: Miss R Azib, Counsel

RESERVED JUDGMENT

1. The claimant's constructive unfair dismissal claim is not well-founded and is dismissed.

2. The claimant's direct disability discrimination claim is not well-founded and is dismissed.

3. The claimant's indirect disability discrimination claim is not well-founded and is dismissed.

4. The claimant's discrimination arising from disability claim is not well-founded and is dismissed.

5. The claimant's claim of failure to make reasonable adjustments is not well-founded and is dismissed.

6. The claimant's claim of accrued unpaid holiday is dismissed upon withdrawal.

REASONS

1. In a claim form presented to the tribunal on 3 February 2017, the claimant made claims of constructive unfair dismissal; direct disability discrimination; indirect disability discrimination; discrimination arising from disability; failure to make reasonable adjustments and accrued unpaid holiday. These claims arise out of his employment with the respondent as a Healthcare Assistant. He stated that his employment commenced in 1997 and was terminated on 17 September 2016. His disability being right shoulder pain following an injury.

2. In the response presented to the tribunal on 6 March 2017, it is averred that the respondent did not conduct itself in any way that entitled the claimant to repudiate his contract of employment with it. It accepted that he is a disabled person under section 6, schedule 1 Equality Act 2010 but denied the disability discrimination claims. With regard to the holiday pay claim, he was paid 25 days accrued holiday upon termination.

3. In correspondence, he withdrew his holiday pay claim and it is formally dismissed by this tribunal.

4. At the preliminary hearing conducted by telephone on 5 May 2017, Employment Judge Lewis ordered that the claimant should send to the respondent, with a copy to the tribunal, further information on his existing claims based on the pleaded facts by 9 June 2017. The respondent was ordered to send the claimant its amended response. The case was listed for hearing before this tribunal for four days commencing on 18 January 2018.

The issues

5. The claimant's further information as ordered by the learned judge was used as the basis for the claims and issues in this case. Mr Small, counsel on behalf of the claimant, withdrew a number of acts relied upon. These were paragraphs 5.6(c) and (f), paragraph 5.7(d) which we include below and the paragraph on holiday pay. We set out below the claims and issues for this tribunal to hear and determine. The italicised paragraphs were withdrawn by the claimant.

   <u>Constructive Unfair Dismissal</u>

   5.1 The claimant relies upon the following act/s of conduct of the respondent:

      (a) Failing to carry out an investigation into his accident at work in May 2014;

      (b) Failing to adhere to its Absence Management Policy in respect of allowing him to remain at home until he was fully fit to work;

(c) Failing to enquire about any reasonable adjustments to be made;

(d) Failing to rearrange Absence Management Meetings to take into account his medical condition;

(e) Failing to make any referral to benefits that the respondent offered to its employees as a result of a work place accident;

(f) Being told on 4 July 2016 that he was at risk of dismissal and that if he was dismissed he would not be able to obtain future employment within the NHS again;

(g) Being invited to the Absence Review Meeting on 21 September 2016 without the respondent having an up to date picture of the claimant's medical condition.

Direct Disability Discrimination (the claimant relies on a hypothetical comparator)

5.2 The claimant relies upon the following act/s of conduct of the respondent.

(a) Failing to comply, consider or implement the respondent's policies in place in respect of disability namely equal opportunities and employment policy which is in place to assist those with a disability outlining responsibility and duty placed upon the respondent?

(b) Failing to adhere to its commitments as set out in its policies about being positive about disabled people?

(c) Failing to consult with the claimant regarding his disability and its impact in any detail?

(d) Failing to obtain appropriate medical advice as to:

i) The claimant's disability;
ii) The effect of the claimant's disability;
iii) What the claimant was or was not capable of; and
iv) Any adjustments that could be made?

Indirect Disability Discrimination

5.3 The PCPs and particular disadvantages relied upon by the claimant are:

(a) To attend the absence management meetings as and when required by the respondent (particular disadvantage: the claimant attended the absence management meetings on the dates suggested by the respondent in an unfit state due to having undergone medical procedures and thus was under the influence of heavy dosage medication).

(b) Return to work and the same role within a period of 2 years after an accident occurring in the work place (particular disadvantage: the claimant was unable to return to his position due to his disability).

(c) Adopting the Absence Management Policy regarding the claimant's absence rather than dealing with the policy for those with disabilities (particular disadvantage: as the claimant was disabled, reviewing the claimant's attendance under the absence management policy placed the claimant at a disadvantage due to his disability as the rehabilitation and phased return to work section was not implemented for the claimant).

(d) Holding Absence Management Meetings in the absence of adequate medical advice (particular disadvantage: at the meeting on the 4th July 2016, the Occupational Health report said to review the claimant's position in three months' time (ie October 2016) and that the respondent would obtain up to date medical evidence regarding prognosis and the claimant's health. This placed the claimant at a disadvantage as the respondent held the meeting prior to the expiration of the three month review period and without obtaining up to date medical evidence).

Discrimination arising from Disability

5.4 The "something arising" is the claimant's absence record due to his disability.

5.5 The claimant relies upon the following conduct as acts of unfavourable treatment by the respondent.

(a) Being told on 4 July 2016 that he was at risk of dismissal and that if he was dismissed he would not be able to obtain future employment within the NHS again;

(b) Being subjected to the Absence Review Meeting on 21 September 2016 with the probability of being dismissed.

Reasonable Adjustments

5.6 It is contended that the respondent applied the following PCPs:

(a) A requirement for a disabled person to have the same amount of absence as someone without a disability;

(b) A requirement for a disabled person to attend face to face meetings at the Trust's premises;

(c) A requirement for a disabled person to be terminated from employment due to absence rather than ill health retirement;

(d) A requirement for a disabled person to be terminated from employment due to absence;

(e) A requirement of having Absence Management Hearings in the absence of adequate medical evidence; and

(f) Payment of the same contractual sick pay to disabled people as to those without a disability.

5.7 The steps which the claimant alleges should have been taken are as follows:

(a) Making adjustments to the Absence Management Policy to incorporate the claimant's disability;

(b) Allowing the claimant to attend absence management meetings elsewhere than at the respondent's premises;

(c) Scheduling absence management meetings to take into account the claimant's disability;

(d) Implementing the correct policy in respect of the claimant including temporary injury benefit, injury allowance, permanent injury benefit or ill health retirement;

(e) Investigating all possible options such a modifying his duties, alternative employment/redeployment and carrying out a skills audit;

(f) Waiting to review the claimant's medical condition as recommended by Occupational Health;

(g) Allowing the claimant to return to work when fit and able to meet the same standards as other disabled employees in accordance with its policy.

The evidence

6. The tribunal heard evidence from the claimant who called Mr David Whittamore, Patients Assessor.

7. On behalf of the respondent, evidence was given by Ms Sue Hussey, Modern Matron; Ms Maggie Watson, former Ward Manager; and Mr Ashburn Svinurai, Modern Matron.

8. In addition to the oral evidence, the parties produced a joint bundle of documents comprising of 241 pages. References will be made to the documents as numbered in the bundle.

9. In summary, this case is about the treatment of the claimant following what he said was an injury at work that resulted in him being absent for two years before he resigned claiming disability discrimination and constructive unfair

dismissal as set out above. The respondent's case is that there were several meetings with the claimant to discuss his disability, reasonable adjustments and possible return to work. After two years and with no return to work date being given by occupational health, it scheduled a capability meeting at which there was the possibility of the claimant's dismissal. Before such a meeting was convened, the claimant resigned. It denied that it had behaved in the ways alleged by the claimant.

Findings of fact

10. Having considered the evidence, the tribunal made the following material findings of fact:

10.1 The respondent is a National Health Service Foundation Trust that provides healthcare and social care for people with physical and mental conditions and learning disabilities across Hertfordshire, Buckinghamshire, Norfolk and North Essex.

Absence management policy

10.2 It has an Absence Management Policy on short and long-term sickness absences. In paragraph 10 of the claimant's contract of employment it states;

> "Please note that policies and procedures may be varied from time to time subject to the National Health Service needs and/or the needs of the Trust, after consultation with Trade Unions. In such circumstances, your contract will be deemed to be varied automatically so that the current prevailing policies and procedures apply at all material times to your contract. Any breach of such rules may render you liable to disciplinary action." (118 to 129 of the joint bundle).

10.3 In paragraph 3 it states that the principles and aim of the policy are to;

- "Attain and maintain a healthy workforce
- Support staff in their return to the workplace with suitable rehabilitation in place for staff requiring support
- Support the Trust's commitment to its pledge to be a mindful employer
- Ensure all sickness absences reported, managed and monitored appropriately
- Ensure appropriate support is available for staff and managers
- To enable managers to know when to take action
- Achieve the Trust's objective of reducing the rate of absence
- Ensure a consistent and equitable approach is taken."

10.4 In relation to injuries at work, paragraph 10 provides;

"Employees must notify their manager of any injuries sustained due to an accident at work as soon as practicable. Failure to complete an incident form will affect an employee's ability to claim financial benefits. If there is concerns by the employee or manager about the injuries sustained then the employee must attend the local A&E to have the injury/ies assessed.

Shift leaders/managers must ensure that they notify the Health and Safety Manager of any injury due to an accident at work and must ensure that the Adverse Incident form is completed. Actions also to be taken to comply with relevant Trust policies such as infection control or health and safety."

10.5 In terms of recording and monitoring sickness absence, this is the line manager's duty and responsibility. Paragraph 11 states that;

"Any period of absence which is related to one of the protected characteristic i.e. disability and maternity, should be recorded separately from any other periods of absence."

10.6 Long-term absence is defined as four consecutive calendar weeks with no prospect of immediate return to work. The manager must have regard to an employee who has a disability.

10.7 There is a specific section on long-term sickness absence, section 6 states;

"16. Long term sickness absence

For the purpose of this policy long term sickness absence may be defined as a continuous period of four weeks or more of sickness absence relating to a single medical condition or recurrent periods of time with a serious health problem, or a disability.

The line manager should refer the member of staff to the Occupational Health Department explaining to the employee the reason for referral and the timescale. The manager must explain to the employee their responsibility to attend Occupational Health appointments, in line with the contract of employment. The line manager has the responsibility to;

- Maintain ongoing contact with the employee throughout the absence either by telephone or review meetings. The frequency of contact should be agreed by the line manager and employee, but as a minimum, contact/reviews should be maintained monthly. If appropriate, a home visit can be arranged.

- Discuss the likely date of return to duties with the employee or discuss the employee's current health and any interventions they are receiving. Update the employee of any relevant workplace matters.

- Maintain a record of all contact/review meetings and any other relevant information regarding the absence.

- Arrange for the employee to be seen by Occupational Health prior to their return to work. An employee who has been on a period of long-term sickness absence should where deem appropriate not return to work prior to being assessed if fit to do so by Occupational Health.

- Where the employee is not improving and there is concern over their ability to return to work, the employee should be referred again to Occupational Health. The line manager may delay seeking advice if it is obvious that the employee's absence can be predicted in advance (e.g. after a major operation).

Where absence is continuing, the manager should be considering the following options;

- Rehabilitation/temporary adjustments – this may involve restrictions on working practices, for an agreed period of time or a phased return to work
- Reasonable adjustments
- Redeployment if appropriate
- Early retirement on grounds of ill health through the NHS pension scheme/LGPS pension scheme. This should be considered where appropriate before termination of employment
- Termination on grounds of incapacity

Formal review meetings – long term sick

Employees who have been absent from work on long term sickness should be invited to a formal review meeting(s) either at their place of work or at their home if it is more appropriate. The meeting(s) will be with their line manager, who may be accompanied by a member of staff from HR, but this is not essential. The employee has the right of representation by an accredited Trade Union Representative or work colleague.

The purpose of the meeting(s) is so line managers can keep in touch with their member of staff to ensure that they are kept up to date with developments within the workplace and to ascertain if any further support is required.

Any referrals to Occupational Health and the subsequent reports should be discussed during these reviews. The employee should be kept informed regarding the process being followed during the period of long term absence and where appropriate the options available should also be discussed. Options could include return to work, reduced duties, returning to a different post temporarily, ill health retirement, and dismissal on the grounds of incapacity.

Final stage meeting

Any dismissal from the Trust on the grounds of sickness absence should be handled with sensitivity and will only be considered after all other possible options have been investigated. The decision to dismiss should never come as a surprise to the employee and should have been discussed as a possible outcome during the earlier meetings with the employee.

Dismissal may however be the ultimate outcome where;

- An unacceptable attendance record continues following any reasonable adjustment made in accordance with the Equality Act 2010.

- When a member of staff is unable to undertake the substantive role for which they were employed and there is no suitable alternative role for which they were employed and there was no suitable alternative role available and where ill health retirement is not applicable. At this point a final stage meeting should be arranged. As this is a formal meeting the employee has the right of representation by an accredited Trade Union Representative or work colleague. The employee should be given seven calendar days of the meeting and they should be informed of the possible outcome of the meeting. If the employee is unable to attend the given date they must arrange a subsequent date with the line manager within seven calendar days of the original hearing date. Human Resources will also be in attendance.

This meeting will be chaired by a senior manager with the authority to dismiss the employees. The senior manager will consider the stages of the process already undertaken, any Occupational Health advice, the requirements of the business and any mitigation presented by the employee.

Where appropriate every effort will be made to deliver the outcome of this meeting on the same day. The outcome of this meeting will be confirmed in writing within seven calendar days from the date of the hearing. The employee has a right to appeal against this decision as detailed at paragraph 23.

If there is no reasonable prospect of the employee returning to work, employment may be terminated before the employee has reached the end of the contractual paid sickness absence period."

10.8 In paragraph 20 it sets out the rehabilitation and phased return to work process. It provides;

"Some employees may be fit to work but unable to return to work in their contracted post or unable to work their full contracted hours because of illness or disability. In line with NHS best practice the Trust intends to provide every opportunity to rehabilitate staff and support their return to work and ongoing employment."

10.9 One course of action available is a phased return to work on full contractual pay up to a maximum of four weeks. This can be extended if there is medical evidence in support. This section also provides for the implementation of reasonable adjustments even though the sickness is not defined as a disability. It states;

"….. if reasonable adjustments cannot be made the employee will need to remain off sick until fully fit for duty or in the case of disabled employees whether permanent reasonable adjustments can be made."

It states further states that adjustments may include:

- "Modifying an employee's working hours

- Allowing an employee to be absent from work for rehabilitation treatment

- Enabling the employee to work in a more accessible area
- Providing new or modified equipment
- Providing additional training or coaching
- Modifying the duties of the role
- Providing help with transport to and from work
- Arranging home working
- Providing supervision
- Re-allocating work within the team
- Making alterations to the premises
- Providing new or modifying existing equipment …"

10.10 In relation to alternative employment/rehabilitation on health or disability grounds, section 40 provides;

> "If the Occupational Health report indicates the employee is incapable of carrying out the duties of the current post but may be able to perform suitable alternative duties, the Trust will support the individual to find such employment for an eight-week period. During this time, Human Resources will carry out a skills audit to identify the type of work the employee may be able to undertake within the recommendations made by Occupational Health.
>
> The Trust will support the employee to identify vacancies, however it is the responsibility of the employee to submit an application where there is more than one candidate for a role. If the employee is the only applicant, then they may 'slot in' to the role if they possess the required skills. There is no requirement for the Trust to create a post."

10.11 In relation to injury at work there is a provision in respect of injury allowance, section 28. This provides;

> "Injury allowance (IA) is paid by employers to staff who have an injury or disease wholly or mainly attributed to their employment. The injury, disease, or other health condition must have been sustained or contracted in the discharge of the employee's duties of employment or an injury that is not sustained on duty but is connected with or arising from the employee's employment.
>
> The attribution of injury, illness or other health condition will be determined by the employer who should seek appropriate medical advice from Occupational Health. Employees claiming injury allowance are required to provide all relevant information, including medical evidence, that is in their possession or that can reasonably be obtained, to enable the line manager to determine the claim**.** TIA tops up the employee's income to 85% of their average pay before they went on authorised absence. It is not paid if the employee's income is more than 85% of

> their average pay and it stops when they return to work or leave employment. TIA is subject to income tax deduction but not national insurance or pension contributions. The allowance will be restricted to a period of up to 12 months per episode."

10.12 In relation to ill-health retirement, section 27 provides;

> "Employees will be eligible to apply for ill health retirement where they have at least two years' pension scheme membership and Occupational Health or their GP has advised that they are permanently unfit to carry out their duties. Any decision to grant ill health retirement lies solely with the NHS Pensions Authority. Where redeployment is not an option for an employee they will be advised that they may be eligible to apply for ill health retirement and the procedure for doing so.
>
> Where the employee is a member of the NHS pension scheme, and in the opinion of the Occupational Health Physician is considered to be unfit for the foreseeable future, an application can be made to the NHS pensions for the employee to retire early on the grounds of their ill health.
>
> The manager, with the assistance of Human Resources will liaise with the individual to explain the procedure and monitor the progress of the application.
>
> Anyone who is a member of another pension scheme and requires advice about ill health retirement should speak to the Trust Pensions Department in the first instance."

10.13 In the policy there is a flow chart on long-term sickness absence and the steps required to be taken. Where the sickness absence is over four weeks, it states that the employee is referred automatically to occupational health. There is also 'keeping in touch' home visits to ensure that the absent employee is supported. Where the absence is ongoing, occupational health reports are reviewed and requests made to identify a return to work date. There then follows a review of the need for reasonable adjustments, redeployment and suitable alternative work, if required, as well as the possibility of the termination of employment if there is no return to work date. (68 to 94).

10.14 The claimant commenced employment with the respondent as a Healthcare Assistant on 2 September 2009. He was initially employed by the NHS in 1997 in the same position with Chase Farm Hospital part of the Royal Free London NHS Foundation Trust. His grading with the respondent was band 3.

<u>The incident in May 2014</u>

10.15 In May 2014 an incident occurred during which a patient caused injury to be sustained to another Healthcare Assistant, Mr Paolo Rodrigues. The claimant's case is that while he and Mr Rodrigues were attempting to restrain the patient, he was also injured. His evidence, however, differed from the documentary evidence in the joint bundle. He stated in his claim form, in paragraph 5, that his injury occurred either on or

around Saturday 24 or Sunday 25 May 2014. While on his shift a client or patient, who was in the area became verbally abusive and threatened staff. He, the claimant, together with a work colleague, used verbal de-escalation skills on the client but to no avail. As such, he and his work colleague used approved escort techniques to remove the client to a low stimuli environment, namely the client's bed space. In the bedroom the client was resisting, managed to get free from their hold and lashed out aggressively at the claimant's work colleague, Mr Rodrigues, who was knocked to the ground. The client then got the claimant in a headlock. The claimant's breakaway approved techniques were unsuccessful due to the client's heightened aggression. The claimant then wrote;

> "At this point it was necessary for the claimant to use all his strength to get loose from the client's hold which caused the injury to the claimant's right shoulder. However, due to the nature of the situation, the true level of pain was masked by the adrenalin. The pain in the claimant's shoulder increased later that day and he was unable to attend work for some days after the incident."

10.16 He attended on 30 May 2014, the Accident and Emergency Department at Watford General Hospital following his wife's insistence, where he was seen and assessed by a doctor. His arm was placed in a sling and he was advised to continue taking pain relief medication. After leaving the hospital he contacted Ms Maggie Watson, Ward Manager, at his place of work, Oak Unit, who was also his line manager. He informed her that he had been to the hospital as he had suffered a shoulder injury at work.

10.17 In paragraph 5 of his witness statement dated 10 January 2018, he stated that the injury to his right shoulder occurred on 18 May 2014 and that it happened in the corridor. He said that he had to use all of his strength to get loose from the client's headlock and that in so doing he caused the injury to his right shoulder. After the incident he went to the nurses' station on the ward and spoke to the nurse in charge of the shift, Ms Adeola Bakre, who completed a Datix report on 18 May at 19.39. Datix is the respondent's computer information system.

10.18 In the Datix form completed by Ms Bakre, she wrote that the incident occurred in the corridor in the afternoon. In her narrative she stated;

> "Service user who is on section 3 of the MHA was staring and using offensive words and calling names. He was escorted to his bed area using Trust approved two persons technique but while in the corridor service user pulled his arm away and attempted to put staff in a headlock. Both staff then managed to put service user on the floor, using approved Respect technique, alarm activated to call for help. During the process both staff went to the floor and service user raised his right knee and one of the staff landed on his right side and the service user's knee went into the ribcage thereby causing staff injury. Service user was escorted to the extra care area and then turned round to accuse staff of punching colleague as he does not want to accept the responsibility of what he did." (140 to 145)

10.19 Ms Bakre put the claimant's name down as a witness not as a victim of the attack.

10.20 Ms Eileen Kerins, Health, Safety and Security Officer, completed a Health and Safety Executive form regarding the incident. She wrote that the date of the incident was on 18 May 2014 at 4.00pm and gave a description of the patient's/client's behaviour. She stated that the injured person was Mr Rodrigues who sustained a "crush" to his "trunk". (137 to 139)

10.21 Ms Watson prepared a seven pages report dated 30 July 2014, after speaking to Mr Rodrigues and after reading other references to the incident. She was of a view that the only person injured in the incident was Mr Rodrigues who took sick leave and returned to work on 3 July 2014. (146 to 149).

10.22 Ms Watson recorded in the respondent's Electronic Staff Recording "ESR" system, that during the conversation she had with the claimant shortly after he left the Accident and Emergency Department of Watford General Hospital, he told her that he was injured at home while lifting up his child. This was in response to a question put to him, namely how he came by his injury. He did not mention to Ms Watson that he was injured at work. Accordingly, she entered on the ESR "shoulder (rotator cuff) injury at home". (173).

10.23 For his shoulder injury the claimant was treated by Mr Tony Corner, Consultant Orthopaedic Surgeon, West Hertfordshire Hospitals NHS Trust. Dr Corner provided a report dated 18 August 2014, to the claimant's general practitioner, Dr N J Brown, Hollywell Surgery, Watford, in which he wrote in the first paragraph, the following;

> "Diagnosis, frozen shoulder? Underlying labral cuff pathology.
>
> This pleasant gentleman who works in the Psychiatric Intensive Care Unit and is 41 hurt his shoulder at the beginning of June when he got involved in a restraint with a patient. His arm got wrenched and he felt pain in his right shoulder but managed to go and swing a golf club over the next few days. He did notice that the shoulder was hurting and then he went to lift his three year old daughter out of a trolley and he felt excruciating pain in his right arm. He came to A&E at Watford where an x-ray was performed with no abnormalities detected. They suspected a rotator cuff injury and referred him on for some physiotherapy. He had some physiotherapy which has improved things to a degree but they felt that he needed an MRI to exclude a cuff injury. He has been unable to go back to work as there is no scope for him to go back on light duties." (175 to 176).

10.24 The claimant did not complete an incident form but said that he reported the incident to Ms Bakre. There is no contemporaneous documentary evidence in the respondent's possession showing that he had been injured during the incident.

10.25 We find that the claimant did not sustain the right shoulder injury at work. He was unsure of the date of the incident. There is no documentary evidence that he disclosed the incident and his injury to Ms Bakre. The only person named as having been injured was Mr Rodrigues. The claimant knew that he was required to complete an incident form, particularly if he was to claim financial benefits as a result of a workplace injury. Reporting it to someone is not completing an incident report form as he was the person who could record precisely what had occurred.

10.26 The claimant submitted a fit note to the respondent after having worked 19, 20, 23 and 24 May 2014. He had stated in his claim form that he was on sick leave immediately after the incident but we find that that was not the case. His first fit note was dated 2 June 2014 diagnosing right shoulder pain and that he was unfit for work. No recommendations were made, such as, a phrased return to work, altered hours, amended duties and/or workplace adaptations. It remained the position throughout his period of sickness absence up to his resignation on 17 September 2016. The first period of sickness absence covered from 2 June to 9 June 2014; the rest were from 6 June to 20 June 2014; 20 June to 4 July 2014; 4 July to 25 July 2014; 25 July to 8 August 2014 and 8 August to 30 August 2014. He did not return to work after going on sick leave. (150 to 155).

10.27 In Dr Corner's report he stated that the claimant's main pathology was a frozen shoulder and that he had been referred for an urgent ultrasound scan. He also referred him for a MRI scan as well as for some physiotherapy sessions to try and improve his range of movement. He surmised that the ultrasound scan may result in an injection into the claimant's glenohumeral joint to help with his frozen shoulder. (175 to 176).

10.28 The claimant attended physiotherapy sessions at West Hertfordshire Hospitals NHS Trust and underwent an MRI scan on 17 September 2014. (178 to 180).

10.29 On 7 October 2014, Ms Martha Okoye, Human Resources Advisor, emailed Ms Watson requesting an update on the claimant and his injury. Ms Watson replied on 15 October stating the following;

> "Derek Gavin remains sick with a frozen shoulder, Sue has referred him to OH. He usually deals directly with Sue as I have been unable to manage this chap who is perpetually sick/carer's leave/etc etc etc etc."

10.30 Ms Okoye then asked whether the claimant was off due to an injury at work to which Ms Watson replied "No". (182 to 183).

10.31 Dr Corner submitted a further report to Dr Brown dated 27 October 2014 in which he gave an update on the claimant's treatment and condition. He wrote that the ultrasound scan did not reveal any

obvious abnormalities and that the claimant had a guided injection into his joint which was done in August 2014 which gave him some relief. The MRI scan had shown a possibility of a very small anterior labral tear, but Dr Corner did not think that it could be the cause of all of his symptoms. He attended physiotherapy sessions which were limited because of the amount of pain he was in. He was taking pain relieving medication including tramadol. He wrote that the claimant was not sleeping at night and had been unable to return to work as there were no light duties available. Upon examination, although he said that he was approximately 50% better, objectively his shoulder range movement was about the same as when he was last seen in August and given that there was the need for him to go back to work as he was shortly due to go on to reduced pay, Dr Corner thought that the best option for him would be a right shoulder capsular arthroscopic capsular release. Accordingly, the claimant was placed on the urgent waiting list this operation but in the meantime, he would continue with his physiotherapy sessions. (184).

10.32 The claimant had a right shoulder arthroscopic decompression and capsular release operation on or around 26 February 2015. (186 to 187).

10.33 We find that there was a strained relationship between Ms Watson and the claimant brought about his frequent requests for shift changes to accommodate his childcare responsibilities and his sickness absences. Initially, at his request, the respondent did not put him on night work because he is a type 1 diabetic. Ms Watson transferred her management of the claimant's attendance to Ms Sue Cumberland, now Hussey, Modern Matron, as she was unable to improve his attendance.

10.34 Ms Watson explained that she did not refer the claimant to occupational health after four weeks of long-term sickness absence because of his acute injury. We find that although the flow chart states that a referral should be made after four weeks of long-term sickness absence, in the policy under long-term sickness absence, section 16, already referred to earlier in our judgment, states that the line manager may delay seeking occupational health advice if it is obvious that the employee's absence can be predicted in advance after a major operation. In the claimant's case, he was due to undergo decompression surgery and all of the fit notes received stated that he was unfit for work and did not recommend adjustments.

10.35 We further find that the respondent should have taken steps to contact the claimant on a monthly basis while on long-term sick leave and to arrange a home visit. It was discretionary whether to refer an employee on long-term leave to occupational health. In this case Ms Watson took the view that as a result of the claimant's acute injury and the fact that there was no return to work date, there was little or no

benefit in referring him to occupational health. Ms Cumberland also took a similar view.

10.36 Following the claimant's surgery and after some physiotherapy sessions, a referral was made to occupational health on 4 June 2015 by Julie Madden who had taken over, on a temporary basis, from Ms Watson who had retired in the first week of April 2015. This was a year into his sick leave.

10.37 The claimant told the tribunal that he had not met Ms Madden before and did not know her. However, when he was taken to his resignation letter he referred to an absence review meeting held on 4 September 2015 at which Ms Madden was present. (237 to 238).

10.38 In Ms Madden's referral dated 4 June 2015, she wrote that the claimant remained on long- term sick suffering from a frozen shoulder and reported that he had a consultant appointment on 20 July 2015. She asked occupational health for advice on the following:-

> "What is the employee's current fitness for work?
>
> Likely date of return to work?
>
> What effect will this condition have on the employee's ability to carry out his/her duties?
>
> Are there any modifications/adjustments which would alleviate the condition or aid rehabilitation?
>
> Are there any particular duties the employee cannot do?
>
> What duties can the employee perform?
>
> Is the condition likely to reoccur in the future?"

10.39 She stated that the claimant had been on sick leave for over a year. (190 to 191).

10.40 The claimant was invited by occupational health to attend an appointment on 15 June 2015, but he did not do so. He said in evidence that he did not receive the invitation. The outcome was that occupational health provided a negative report. (192).

10.41 A further report provided by Dr S Jassim, Orthopaedic Registrar, on behalf of Dr Corner dated 20 July 2015, sent to Dr Brown but not provided at the time to the respondent. It, however, was disclosed in these proceedings. Dr Jassim wrote that the diagnosis was right shoulder adhesive capsulitis and arthroscopy subacromial decompression capsular release. The claimant's condition was that he suffered a relapse of his symptoms and he was added to the waiting

list for an urgent MUA and injection of right shoulder. He was also to continue with his physiotherapy sessions. The doctor continued;

> "I reviewed Mr Gavin in the clinic today. Unfortunately, his physiotherapy stopped in June. Up until this point he feels that he was making some excellent progress and I note from a letter from his physiotherapist Matthew Lee that his range of movement was up around 80 degrees flexion and abduction. Unfortunately, the sessions were stopped because of some concerns with funding as was put to the patient. It was requested that we were asked for an opinion whether this should continue but unfortunately there was no recent correspondent brought to our attention.
>
> Examining Mr Gavin today he does seem to have relapsed with his flexion and abduction limited to around 45 degrees and external rotation only to neutral.
>
> I have discussed the case with Mr Corner. I think that the most appropriate option at this stage would be to bring this gentleman urgently for a manipulation and an injection into the joint to try to put him back on track with his rehabilitation. I have made another referral back to Matthew Lee for him to carry on with the physiotherapy. I have explained some of the risks of the procedure and hopefully we will be able to bring him in at a convenient slot. We will keep you informed of any change of his progress." (197).

Sickness Absence Review meeting 4 September 2015

10.42 A sickness absence review meeting was held on 4 September 2015 at which the claimant attended and was accompanied by Mr David Whittamore, a work colleague. Also in attendance were Ms Madden, Ms Cumberland and Ms Shantal Earle, Human Resources Advisor. It would appear that Ms Earle was late in arriving, precisely how many minutes late is unclear. The claimant said that at the time he was in pain and had requested a postponement of the meeting to a date when he could participate fully. He said by the time the meeting took place following the arrival of Ms Earle, the pain he was experiencing became unbearable and he was tired at having to wait, he said, between 20 to 25 minutes for Ms Earle to arrive. He said that his request for a postponement was refused. The notes taken of the meeting could be described as very poor as they covered half a page and were not even a summary. This is surprising as they were taken by Ms Earle. In her notes, however, she referred to the claimant's shoulder condition and his physiotherapy sessions. It also records that he would be given annual leave. (201).

10.43 The claimant had a better relationship with Ms Cumberland than with Ms Watson. In Ms Cumberland's evidence, she said that during the meeting the claimant discussed his problems with the Trust and his treatment for his shoulder injury. He explained that he had an operation, but the physiotherapy sessions planned had not worked as effectively as he had hoped and that he would need another operation. Ms Cumberland was keen to find out if he was capable of carrying out any work. They discussed whether he could engage in administrative work for a couple of hours per week, but he responded by saying he

was unable to do anything. They also discussed a possible phased return to work, but he was not able to countenance it at that time. With regard to postponing the meeting, she said that he did not suggest that it be rearranged when she spoke to him on the telephone to schedule it. His reply was that he preferred that it be held at Oak Ward. During the meeting, he said that the injury was caused as a result of a restraint, but could not provide evidence as to where or how. This surprised Ms Cumberland and she decided to check the records but could not find anything that matched the claimant's explanation. She recalled the claimant being unable to identify the patient who had caused the injury and the circumstances. She discovered from her enquiry that there was no evidence of the claimant's injury being at work.

10.44 She stated that there are typically ten patients at any one time on the ward and they are likely to remember who had assaulted them. She said that at the meeting they also discussed the possibility of ill-health retirement, but the claimant had further surgery which could potentially resolve his shoulder injury and was about to commence further physiotherapy. It was possible that there would be a return to work date. Ill-health retirement was, therefore, not an option and the claimant did not want to engage in further discussion about it. As he had been off work for some time, 15 months, he was advised that one possible outcome may be the termination of his employment if he was unable to return to work, but that course of action was not something that his manager were considering at the time. It was decided to await the outcome of his further physiotherapy sessions and to engage in supporting him back to work. As he had raised concerns about his financial situation it was agreed that he would be paid some of his outstanding annual leave. He did not entertain the idea of redeployment as he insisted that he could not carry out any work and could not drive.

10.45 Two months later, on 3 November 2015, Ms Cumberland sent the claimant her outcome letter following the meeting on 4 September 2015. It is unclear why it took her two months for it to be sent. She wrote that it was agreed to place the claimant on annual leave from 1 September 2015 after which a referral would be made to occupational health to assess his fitness for work. If he was not fit to return to his substantive role, the options were: suitable alternative employment; reasonable adjustments; and ill-health retirement. She confirmed that he was advised that if he was unable to return to work due to sickness absence this could lead to the termination of his employment. He was reminded that he could access the respondent's Employee Assistance helpline and the telephone number was given. (202 to 203).

10.46 Contrary to what the claimant asserted, we find that he did engage with those present at the meeting. Many issues were discussed, such as the options should he be unable to fulfil his substantive role. He also discussed his financial circumstance at the time and it was agreed

that he would be on annual leave from 1 September 2015 for a short while. We know from the documents disclosed that he was paid holiday pay on 26 November 2015 in the sum of £3,226.66. He also discussed his medical condition and treatment. That information could only have come from him and from the fit notes provided.

10.47 The claimant continued to provide fit notes stating he was unfit for work from 29 August 2014 until 1 October 2016. (156 to 168).

10.48 On 11 November 2015, Ms Cumberland made a referral to occupational health in which she stated that the reason for it was the claimant's long-term absence. She asked that he be seen in person and for occupational health to consider a likely return to work date following his surgery. The points she sought advice on were the same as in Ms Madden's earlier referral to occupational health. This appears to be a standard form. The assessment was cancelled as the claimant said that he was in too much pain attend. A further referral was made on 3 December 2015 by Ms Cumberland. (204 to 207)

10.49 The claimant was seen by occupational health on 4 January 2016. He told Ms Sarah Bruno, Senior Occupational Health Advisor, that he had a specialist appointment on 7 January 2016 and that it would make sense to consult with occupational health after that date. Accordingly, the respondent was advised to refer him back to occupational health after that date and suggested that the consultation can be dealt with by telephone. (209).

10.50 Ms Cumberland then made a further referral on 5 January to occupational health seeking the same information as in her earlier referral. (210 to 211).

10.51 In the occupational health's report by Ms Sarah Vanzoelen, Occupational Health Advisor, dated 27 January 2016, she stated that the consultation was by way of telephone during which the claimant said that he was unable to drive, lift a kettle, had interrupted sleep due to pain and struggled with writing. In her opinion she wrote;

> "A frozen shoulder syndrome (FSS) is a painful and debilitating condition. It is a clinical diagnosis and is only very rarely the result of an underlying illness or pathology. A frozen shoulder is actually fairly common, affecting as many as 2% to 5% of the population. A frozen shoulder is somewhat of a medical enigma, for example, once it is cured it (almost) never comes back again on the same side. Frozen shoulder often appears for no apparent reason (primary) but can stem from an injury to the shoulder (secondary). A frozen shoulder tends to start with a 'tweak' in the shoulder that doesn't seem to resolve. This 'tweak' seems to occur in the region of the long head of the biceps – this is the cause of that horrible sharp "catching" pain Frozen Shoulder sufferers will be familiar with. Derek symptoms started following the trauma of a restraint process. He has however been very proactive with regards to his recovery and is actively exercising."

10.52 In her management advice she stated;

> "Derek is unfit at present, he is awaiting appointments for further pain relieving intervention from the pain management team. Derek continues with weekly physio at present. It would be useful to review Derek again in approximately eight to twelve weeks as we should have a better idea of a potential return to work at that stage. Once this condition has recovered, it is unlikely that it will reoccur." (212).

10.53 Ms Cumberland moved to another part of the Trust following re-organisation and handed over the management of the claimant's long-term sickness absence to Mr Ashburn Svinurai, Modern Matron and Team Leader, on the Oak Ward. We find that, using the information the respondent had in its possession, he tried to contact the claimant on the mobile and landline numbers. When the contact numbers were shown to the claimant he said in evidence that he did not recognise either of the two numbers on the referral forms to occupational health. When we asked Mr David Whittamore, Patients Assessor, and a witness for the claimant, whether he had been in contact with the claimant by telephone he said he had been. We then invited him to reveal the contact numbers on his mobile phone. One of those numbers was the same mobile number as on the respondent's records. It was, therefore, difficult to believe that the claimant did not recognise one of his contact numbers.

10.54 The claimant was due to attend a pain management clinic appointment at West Hertfordshire Hospitals NHS Trust on 19 May 2016 and for an injection to his right shoulder on 14 April 2016 at Watford General Hospital. (213 to 214).

10.55 In the letter to the claimant dated 31 May 2016, Mr Svinurai introduced himself as covering the roles of Modern Matron and Team Leader on the Oak Ward. He stated that he was writing to inform him that a referral had been made for him to be seen by occupational health on 8 June 2016 at 10.00am. The reason being that he had been on long-term sick leave and that he, Mr Svinurai, was required to make the referral in order to get a medical assessment and review. He stated that he had tried to contact the claimant on the numbers given and that occupational health also tried, unsuccessfully, to contact him. He advised the claimant that following his appointment, a meeting would be arranged to review his sickness and to consider the occupational health report. He gave 13 to 15 June as possible meeting dates at the respondent's premises in Kingsley Green. (217 to 218).

10.56 We find that the letter was received by the claimant, however, he did not attend the appointment. He was again written to on 9 June 2016 by Mr Svinurai who thanked him for the sick notes sent and invited him to provide his up to date contact details. He further stated that he would like to arrange a sickness review meeting on either of the three dates given in the June letter. He emphasised that it was important to get a review by the occupational health doctor in order that he be

given the right level of support. He would make another occupational health referral. (219).

10.57 The occupational health appointment was on 28 June 2016 but again the claimant did not attend. A negative report was sent by Dr Victor Olowookere on the same date. (220).

10.58 On 20 June the claimant spoke to Mr Svinurai and said that he could not attend the occupational health appointment because he had his gallbladder removed. It was the first time Mr Svinurai had spoken to him. From their discussion they agreed to meet for the review meeting on Monday 4 July 2016 at 11.00am at Kingsley Green. Mr Svinurai gave the claimant the option of either attending at Kingsley Green or at another address and he chose Kingsley Green. Of note, the claimant did not say that he would be unable to attend the meeting on 4 July. A letter was sent to him confirming the date of the review meeting. (221).

Sickness Absence Review meeting 4 July 2016

10.59 At the meeting on 4 July 2016 the claimant attended in the company of Mr Whittamore. Also in attendance were Ms Earle and Mr Svinurai. Ms Earle took very brief notes which could not even be described as a summary as they were simply jottings on a third of A4 paper and did not appear to conform with the respondent's requirement to keep a record of a review meeting. This was acknowledged by Ms Watson during her evidence before us. Having heard the evidence given by Mr Svinurai, the claimant and Mr Whittamore, we are satisfied that although Ms Earle was a few minutes late in arriving, the claimant did not specifically request a postponement and neither did Mr Whittamore.

10.60 At the start of the meeting after Mr Svinurai introduced himself to the claimant and to Mr Whittamore, the claimant was unable to shake Mr Svinurai's hand using his right hand but did with his left hand. They discussed the claimant's medical condition and options should he was unable to perform his substantive role. Mr Svinurai told us and we accepted his evidence, that the claimant was adamant that he was unable to perform any role. This is consistent with his approach during the earlier review hearing and what he was telling the consultant.

10.61 Both the claimant and Mr Whittamore alleged that during the meeting the claimant was asked for a potential return to work date, which he was unable to give due to his ongoing injury. Mr Svinurai and Ms Earle then had a private discussion and when they returned, Mr Whittamore wrote in his witness statement the following;

> "On their return they spoke about the next step in the process, that ie, formal hearing. It was explained that Derek would be able to attend this hearing and that despite him being able to have his say; they may choose to terminate his contract

> on health grounds. It was also explained that if the decision goes against him he would not be able to work for the Trust for five years following this result, therefore it may be in his best interest to resign.", (paragraph 9)

10.62 In paragraph 25 of the claimant's witness statement, he wrote;

> "At the meeting I was unequivocally told that I have two options, (1) either resign from the Trust where there may be an opportunity for me to come back to the NHS at a later date, the reason for this was because it could not be recorded on my personnel file as a termination and would therefore not reflect badly on me; or (2) I was told I could run the risk that at the next absence management meeting the Trust would dismiss me which would mean that I would not be able to obtain future employment in the NHS, I was told that this would count against me on my personal file because I have been dismissed from the Trust."

10.63 Neither Mr Whittamore nor the claimant made reference to who said that if the claimant was to be dismissed he would not be able to obtain future employment in the NHS. The claimant did not refer to the period of five years, whereas Mr Whittamore did. Of significance to us is that in his resignation letter the claimant failed to mention that it was said during that meeting.

10.64 The wording in paragraph 25 of the claimant's witness statement is more or less replicated in paragraph 19 of the claim form. (18).

10.65 Mr Whittamore in his evidence said that he was first asked to consider whether or not he would be prepared to make a witness statement prior to Christmas 2017 and at the time he could not say that the discussion on 4 July 2016, were fresh in his mind. He also said that he made notes at both meetings and handed them to the claimant. He was later told by the claimant's solicitor that the notes could not be found as the claimant had moved home. The point was made by Miss Azib, counsel for the respondent, that in 2016 to present the claimant lived at the same address. We find that when Mr Whittamore made his witness statement he had already spoken to the claimant.

10.66 On balance of probabilities, we came to the conclusion that the alleged statement made either by Mr Svinurai or by Ms Earle, was not made by either of them. That is, that the claimant was not told that if he was to be dismissed for a period of five years, he would not be allowed to work for the NHS. We also find that there is no written oral policy or practice in support of such a statement and we were not taken to any documents in support of it.

10.67 The claimant produced a report from Dr T Amir, Orthopaedic Registrar, dated 18 July 2016, but not shown to the respondent at the time until disclosure of documents in these proceedings. Dr Amir wrote that the claimant had a range of motion limited to only 10 degrees in all directions. He was unable to commence his amitriptyline as recommended by the pain team and shortly after his appointment with the pain team he was admitted for a cholecystectomy (the removal of

the gallbladder) which was complicated by post-operative pain and further re-admission. He was currently still on several medications. Once he was off medication he would recommence amitriptyline to see if it would help with his symptoms. He was referred by Dr Amir to the Upper Limb Clinic at the Royal National Orthopaedic Hospital as Dr Corner's team did not think they had anything further to offer him surgically. The doctor wrote that the claimant was happy with the plan and would be seen by his team in six months' time. (223 to 223b).

10.68 Of significance is that even if this report was disclosed to the respondent in July 2016, no prognosis was given as to the claimant's recovery and/or possible date for his return to work.

10.69 A letter was sent by Mr Svinurai to the claimant on 9 August 2016 setting out the outcome of the meeting held on 4 July in which he stated that a referral had been made to the occupational health for a sickness review and that they would write to the claimant to speak to him, but the next step in the process required that the case to be referred to a panel and that if the claimant was ultimately unable to return to work due to sickness absence, then an option may be dismissal on grounds of capability due to ill health. (224 to 225).

10.70 We bear in mind the claimant's evidence to us and what he said during the review meetings in relation to ill-health retirement. He was of the view that the age of 42 years he was too young to retire and was adamant that he would not accept ill-health early retirement.

10.71 Mr Svinurai made a referral to occupational health on 9 August 2016 in which he asked: whether the claimant was likely to be able to return to work; would he be able to work in a mental health clinic environment requiring the use of both arms; could reasonable adjustments be made; and as regards his other physical health conditions, would those effect his ability to carry out his role? (224 to 227).

10.72 Dr Victor Olowookere replied on 17 August 2016, giving his opinion. He wrote;

> "I had a fairly lengthy chat with Mr Gavin today, he could hardly move the right shoulder at all.
>
> In my opinion, he remains unfit for work and this is most likely going to be the case for at least the next three months as he awaits an appointment and further management at the National Orthopaedic Hospital in London.
>
> In response to your specific question;
>
> As Mr Gavin remains under treatment, it is difficult to comment on whether or not he will be able to return to work at this time. Unfortunately, it is difficult to put a date on when he will be able to return to work.

> Where and what Mr Gavin can do will depend on his response to the further treatments he is likely to receive.
>
> In my opinion, I cannot identify any reasonable adjustment that would relieve the condition or aid his rehabilitation. Mr Gavin's other physical health conditions are unlikely to affect his ability to perform his duties when he is fit." (228).

Invitation to attend panel meeting on 21 September 2016

10.73 In a letter dated 17 September 2016, sent by Catherine Pelley, Deputy Director Safer Care and Standards, to the claimant, he was invited to a management long-term absence meeting on 21 September 2016 at 1.00pm at Kingsley Green. The meeting would be conducted by a panel in accordance with the respondent's Absence Management Policy and the panel would consider whether it would be appropriate to dismiss him on grounds of capability due to ill-health. The names of the members of the panel were given. He was informed if he did not attend the hearing it may proceed in his absence. He was invited to supply any documentary evidence in support of his case and that a report detailing his sickness absence would be sent to him. He was reminded of his right to be represented by a trade union representative or to be accompanied by a friend. (229 to 230).

10.74 In Mr Svinurai's management statement of case, he gave an account of the claimant's work; his sickness absence record; occupational health's recommendations; and the claimant's current circumstances. He stated that occupational health were unable to put a date on his likely return to work and that he was unable to identify any reasonable adjustments to either relieve the claimant's condition or aid in his rehabilitation. As regards redeployment, no suitable alternative clinical roles could be identified as the claimant was currently unfit for work and unwell and the same applied to non-clinical roles. In relation to additional training, this was not a possibility as the claimant was unfit and unwell and had declined ill-health retirement. He was on a fit note covering him to 1 October 2016. It stated that he was unfit for work and no adjustments were recommended.

10.75 Of note, Mr Svinurai did not recommend in his statement that the claimant be dismissed. (231 to 236).

The claimant's resignation on 17 September 2016

10.76 The claimant said that being told during the meeting on 4 July 2016 that if he was dismissed by the panel he would be unable to obtain employment in the NHS for five years, was the principal reason why he tendered his resignation dated 17 September 2016. As we have already found, he made no reference to that statement in his resignation letter. It was sent to Mr Svinurai in which he wrote;

> "Re. resignation from the position of Healthcare Assistant band 3

> Please accept this letter as my formal resignation as Healthcare Assistant band 3 with immediate effect.
>
> It is with regret that considering after the years of service within the NHS and further to an injury that was sustained at work, that I am being forced to take this action.
>
> I have been left with no alternative, further to receiving a file of documents with a covering letter dated 7 September 2016 from Catherine Pelley and inviting me to an absence management meeting on 21 September 2016.
>
> I have reviewed your report dated 13 September 2016 and do not consider that the Absence Management Policy has been adhered to, nor has the Trust discharged its duties to me and this will be indicative of the scheduled absence management meeting on 21 September 2016.
>
> The Trust Absence Management Policy at page 15 places an onus on the manager to consider options, and this has not taken place. I have referred to your note of the meeting that took place on 4 July and there was no discussion of options available to me, it was entirely to ascertain my medical position and to advise of a referral to Occupational Health.
>
> In reference to the letter dated 3 November 2015 regarding the meeting that took place on 4 September 2015, it is not correct, that I was not unaccompanied at this meeting. I was accompanied by a colleague and Julie Madden was also in attendance, again there was no discussion about the options available to me.
>
> Notably when both these attendances in September 2015 and July 2016 were convened and attended by myself and my companion I had been recently discharged from hospital and taking considerable pain relief medication. Despite requests being made to rearrange such meetings they were deemed necessary despite my being heavily medicated and in substantial pain.
>
> While the Trust have obtained numerous Occupational Health reports and have been consistently aware of my medical position there is a notable absence of communication with me as a trust employee as to the options available to me and there is no evidence to support as to how the decision to proceed with this course of action was deemed the most appropriate in the circumstances.
>
> It is with regret that I'm left with no option and would be grateful if you could please inform HR and all parties of my decision." (237 to 238)

10.77 Mr Svinurai replied to the claimant on 21 September 2016 stating that he did not agree with his criticism of the process and that options were only appropriate in situations where there was a return to work in either the same role on reduced duties or to a different post on a temporary basis. He wrote that options were discussed and he, the claimant, confirmed that they were inappropriate due to the severity of his condition, namely his shoulder. Ill-health retirement was also discussed as an option, but he, he claimant, declined to explore it further. Mr Svinurai then wrote that further discussions could have taken place had the claimant attended the meeting on 21 September but as he had resigned that was no longer possible. He undertook to

inform human resources of the claimant's decision and that his resignation would be processed. He would be paid for 25 days accrued annual leave. He was reminded that all Trust's property should be returned to his manager. He hoped that the claimant would recover from his shoulder condition as soon as possible and wished him all the best in the future. (239 to 240).

10.78 In evidence the claimant said and we do find as fact, that he remained unfit for work until October 2017, when, as a result of a change in his treatment and care, he was thereafter able to enrol on a fast-track driving instructor's course.

Submissions

11. We have taken into account the oral submissions by Mr Small, counsel on behalf of the claimant and by Miss Azib, counsel on behalf of the respondent. We do not propose to repeat their submissions herein having regard to rule 62(5) Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, as amended. In addition, we have also taken into account the bundle of authorities handed to us by Mr Small.

The Law

12. Section 95(1)c Employment Rights Act 1996, provides,

> "(1) For the purposes of this Part an employee is dismissed by his employer if …..
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

13. It was held by the Court of Appeal in the case of Western Excavating (ECC) Ltd-v-Sharp [1978] IRLR 27, that whether an employee is entitled to terminate his contract of employment without notice by reason of the employer's conduct and claim constructive dismissal must be determined in accordance with the law of contract. Lord Denning MR said that an employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.

14. It is an implied term of any contract of employment that the employer shall not without reasonable cause conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee, Malik-v-Bank of Credit and Commerce International [1997] IRLR 462, House of Lords, Lord Nicholls.

15. In the case of Lewis-v-Motorworld Garages Ltd [1985] IRLR 465, the Court of Appeal held in relation to the "last straw" doctrine that,

> "…the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?", Glidewell LJ.

16. Dyson LJ giving the leading judgment in the case of London Borough of Waltham Forest-v-Omilaju [2005] IRLR 35, Court of Appeal, held:

> "A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with earlier acts on which the employee relies, it amounts to a breach of the implied term of mutual trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.
>
> I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be…. .
>
> If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.", pages 37 - 38.

17. The test of whether the employee's trust and confidence has been undermined is an objective one, Omilaju.

18. In the case of Tullett Prebon plc v BGC [2011] IRLR 420, on the issue of whether the first instance judge had applied a subjective test rather than an objective one to the actions of the alleged contract breaker, the Court of Appeal held, reading from the headnote,

> "The question of whether or not there has been a repudiatory breach of the duty of trust and confidence is a 'question of fact for the tribunal of fact'. It [is] a highly specific question. The legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract-breaker has clearly shown an intention to abandon and altogether refused to perform the contract. The issue is repudiatory breach in circumstances where the objectively assessed intention of the alleged contract breaker towards the employees is of paramount importance.
>
> In the present case, the judge had approached the issue correctly. He had not applied a subjective approach. He had objectively assessed the true intention of Tullett and had reached the conclusions that their intention was not to attack but to strengthen the employment relationship. That was a permissible and correct finding, reached after a careful consideration of all the circumstances which had to be taken into account in so

far as they bore on an objective assessment of the intention of the alleged contract breaker."

19. Guidance has been given in relation to the duty to make reasonable adjustments in the case of Environment Agency v Rowan [2008] IRLR 20**,** a judgment of the EAT. An employment tribunal considering a claim that an employer had discriminated against an employee by failing to comply with the duty to make reasonable adjustment must identify:

    (1) the provision, criterion or practice applied by or on behalf of an employer, or

    (2) the physical feature of premises occupied by the employer;

    (3) the identity of a non-disabled comparator (where appropriate), and

    (4) the identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the provision, criterion or practice applied by or on behalf of an employer and the physical feature of premises. Unless the tribunal has gone through that process, it cannot go on to judge if any proposed adjustment is reasonable because it will be unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.

    A tribunal deciding whether an employer is in breach of its duty under section 4A, now section 20 Equality Act 2010, must identify with some particularity what "step" it is that the employer is said to have failed to take.

20. The employer's process of reasoning is not a "step". In the case of General Dynamics Information Technology Ltd v Carranza [2015] ICR 169, the EAT held that the "steps" an employer was required to take by section 20(3) to avoid putting a disabled person at a disadvantage, were not mental processes, such as making an assessment, but practical actions to avoid the disadvantage. In order to decide what steps were reasonable, a tribunal should, firstly, identify the pcp. Secondly, the comparators. Thirdly, the disadvantage. In that case disregarding a final written warning was not considered to be a reasonable step.

21. In O'Hanlon v Revenue and Customs Commissioners [2007] EWCA Civ 283, [2007 ICR 1359, the Court of Appeal held that increasing the period during which the disabled employee could claim full pay while on sick leave to alleviate financial hardship following a reduction in pay, would not be a reasonable step to expect the employer to take as it would mean that the employer would have to assess the financial means and stress suffered by their disabled employees.

22. In the earlier case of Meikle v Nottinghamshire County Council [2005] ICR 1, the Court of Appeal held that where the disabled employee's sickness absence was caused by the employer's failure to implement a reasonable adjustment, it may be a reasonable adjustment to maintain full pay.

23. On sick pay, paragraph 17 of the EHCR Code 2011, states:

> "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., 17.21.
>
> 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." 17.22.

24. In relation to the shifting burden of proof, in the case of Project Management Institute v Latif [2007] IRLR 576, EAT, it was held that there must be evidence of a reasonable adjustment that could have been made. An arrangement causing substantial disadvantage establishes the duty. For the burden to shift;

> "…it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.", Elias J (President).

25. Paragraph 6.10 of the Code 2011 provides:

> "The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one off decisions and actions."

26. In relation to the comparative assessment to be undertaken in a reasonable adjustment case, paragraph 6.16 of the Code states:

> "The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly and unlike direct or indirect discrimination - under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's."

27. The proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements. It is not with the population generally who do not have a disability, Smith v Churchills Stairlifts plc [2006] IRLR 41, Court of Session.

28. In the case of Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216, a judgment of the Court of Appeal, Elias LJ gave the leading judgment. In that case the claimant, an administrative officer, was employed by the Secretary of State for Work and Pensions. She started to experience symptoms of a disability identified as viral fatigue and fibromyalgia. She was absent for 62 days for a disability related sickness. After her return to work her employer held an attendance review meeting. Its attendance management policy provided that it would consider a formal action against an employee if their absence reached an unsatisfactory level known as “the consideration point". “The consideration point” was 8 days per year but could be increased as a reasonable adjustment for disabled employees. The employer decided not to extend the consideration point in relation to the claimant and gave her a written improvement notice which was the first formal stage for regular absences under the policy. She raised a grievance contending that the employer was required to make two reasonable adjustments in relation to her disability, firstly, that the 62 days disability related absence should be disregarded under the policy and the notice be withdrawn. Secondly, that in future “the consideration point” be extended by adding 12 days to the eight days already conferred upon all employees. Her employer rejected her grievance and proposals.

29. Before the Employment Tribunal the claimant argued that her employer failed to make the adjustments and was in breach of the section 20 EqA 2010, the duty to make reasonable adjustments. It was conceded that she was disabled within the meaning of the Act. The tribunal, by a majority, found that the section 20 duty was not engaged as the provision, criterion or practice, namely the requirement to attend work at a certain level in order to avoid receiving warnings and possible dismissal, applied equally to all employees. The Employment Appeal Tribunal dismissed the claimant’s appeal upholding the tribunal's findings and adding that the proposed adjustments did not fall within the concept of "steps". It further held that the comparison should be with those who but for the disability are in like circumstances as the claimant.

30. The Court of Appeal held that the section 20 duty to make reasonable adjustments had been engaged as the attendance management policy had put the claimant at a substantial disadvantage but that the proposed adjustments had not been steps which the employer could reasonably have been expected to take. The appropriate formulation of the relevant pcp in a case of this kind is that the employee had to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. Once the relevant pcp was formulated in that way, it was clear that a disabled employee's disability increased the likelihood of absence from work on ill health grounds and that employee was disadvantaged in more than a minor or trivial way. Whilst it was no doubt true that both disabled and able-bodied alike would, to a greater or lesser extent, suffer stress and anxiety if they were ill in circumstances which might lead to disciplinary sanctions, the risk of this occurring was obviously greater for that group of disabled workers whose disability resulted in more frequent, and perhaps longer, absences. They would find it more difficult to comply with the requirements relating to absenteeism and would be disadvantaged by it.

31. The nature of the comparison exercise under section 20 is to ask whether the pcp puts the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they are treated equally and may both be subject to the same disadvantage when absent for the same period of time does not eliminate the disadvantage if the pcp bites harder on the disabled, or a category of them, than it does on the able-bodied. If the particular form of disability means that the disabled employee is no more likely to be absent than a non-disabled colleague, there is no disadvantage arising out of the disability but if the disability leads to disability related absences which would not be the case with the able-bodied, then there is a substantial disadvantage suffered by the category of disabled employees. Thereafter the whole purpose of the section 20 duty is to require the employer to take such steps as may be reasonable, treating the disabled differently than the non-disabled would be treated, in order to remove a disadvantage. The fact that the able-bodied are also to some extent disadvantaged by the rule is irrelevant. The Employment Tribunal and the Employment Appeal Tribunal were wrong to hold that the section 20 was not engaged simply because the attendance management policy applied equally to everyone.

32. There is no reason artificially to narrow the concept of what constitutes a "step" within the meaning of section 20(3). Any modification of or qualification to, the pcp in question which would or might remove a substantial disadvantage caused by the pcp is in principle capable of amounting to a relevant step. Whether the proposed steps were reasonable is a matter for the Employment Tribunal and has to be determined objectively.

33. In the case of Kenny v Hampshire Constabulary [1999] IRLR 76, a judgment of the Employment Appeal Tribunal, it was held that the statutory definition directs employers to make reasonable adjustments to the way the job is structured and organised so as to accommodate those who cannot fit into existing arrangements.

34. In the case of South Staffordshire & Shropshire Healthcare NHS Foundation Trust v Billingsley [2016] UKEAT/0341/15/DM, the EAT, Mitting J, held that an Employment Tribunal was entitled to find that a performance review and the dismissal of the claimant, who was dyspraxic, were discriminatory and unfair because the respondent had not made reasonable adjustments which had a chance of allowing her to achieve an acceptable level of performance at work. "The prospects of achieving the desired objective must be weighed in the balance against the cost and difficulty of making the adjustment.", Lewison LJ in Paulley v FirstGroup plc [2015] IWLR 3384, paragraph 45, referred to in the Billingsley case.

35. In Griffiths, however, Elias LJ was of the view that though it may be reasonable to take the step notwithstanding that success is not guaranteed, the uncertainty is one of the factors to weigh up when assessing the question of reasonableness, paragraph 29. Mitting J in Billingsley, that cost and the size of the employer are also relevant factors in the assessment, paragraph 18.

36. The test under is an objective test. The employer must take "such steps as….is reasonable in all the circumstances of the case." Smith v Churchills Stairlifts plc [2006] IRLR 41.

37. In relation to discrimination arising in consequence of disability, section 15 provides,

> "(1) A person (A) discriminates against a disabled person (B) if --
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

38. In paragraph 5.7, Equality and Human Rights Commission Code of Practice on Employment (2011), unfavourable treatment means being put at a disadvantage. This will include, for example, having been refused a job; denied a work opportunity; and dismissal from employment, paragraph 5.7.

39. In paragraph 4.9 it states the following,

> " 'Disadvantage' is not defined by the Act. It could include denial of an opportunity of choice, deterrence, rejection or exclusion. The courts have found that 'detriment', a similar concept, was something that a reasonable person would complain about - so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker could reasonably say that they would have preferred to be treated differently."

40. In the case of Pnaiser v NHS England [2016] IRLR 170, the EAT, Mrs Justice Simler DBE, held that the "something" that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant or more than trivial, influence on the unfavourable treatment and amount to an effective reason for or cause of it. A tribunal should not fall into the trap of substituting motive for causation in deciding whether the burden has shifted. A tribunal must, first, identify whether there was unfavourable treatment and by whom in the respects relied on by the claimant. Secondly, the tribunal must determine what caused the treatment or what was the reason for it. An examination of the conscious and unconscious thought processes of the alleged discriminator will be required. Thirdly, motive is irrelevant as the focus is on the reason or cause of the treatment of the claimant. Fourthly, whether the reason or cause of it was something arising in consequence of the claimant's disability. The causation test is an objective question and does not depend on the thought processes of the alleged discriminator. Fifthly, the knowledge required in section 15(2) is of the disability.

41. A similar approach was taken in the case of City of York Council v Grosset UKEAT/0015/16 relying on the guidance in Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305, Langstaff P.

42. Section 19 EqA prohibits indirect discrimination where a pcp is applied that puts a claimant or persons with whom he/she shares the protected characteristic at a particular disadvantage when compared with persons with whom that claimant does not share that characteristic. It puts or would put the claimant at that disadvantage and it cannot be justified.

43. In determining justification, an Employment Tribunal is required to make its own judgment as to whether, on a fair and detailed analysis of working practices and business considerations involved, a discriminatory practice was reasonably necessary and not apply a range of reasonable responses approach, Hardy & Hansons plc v Lax [2005] ICR 1565.

44. Under section 13, EqA direct discrimination is defined:

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

45. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

> "There must be no material difference between the circumstances relating to each case."

46. Section 136 EqA is the burden of proof provision. It provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred."
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

47. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions have an important role to play where there is room for doubt as to the facts, they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other.

48. In Madarassy v Nomura International plc [2007IRLR 246, CA, the Court of Appeal approved the dicta in Igen Ltd v Wong [2005] IRLR 258. In Madarassy, the claimant alleged sex discrimination, victimisation and unfair

dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

49. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more , sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

50. The Court then went on to give a helpful guide, "Could conclude" [now "could decide"] must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.

51. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

52. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic,

for example, either race, sex, religion or belief, sexual orientation, pregnancy, gender reassignment or disability.

53. In the case of EB-v-BA [2006] IRLR 471, a judgment of the Court of Appeal, the employment tribunal applied the wrong test to the respondent's case. EB was employed by BA, a worldwide management consultancy firm. She alleged that following her male to female gender reassignment, BA selected her for redundancy, ostensibly on the ground of her low number of billable hours. EB claimed that BA had reduced the amount of billable project work allocated to her and thus her ability to reach billing targets, as a result of her gender reassignment. Her claim was dismissed by the employment tribunal and the Employment Appeal Tribunal. She appealed to the Court of Appeal and her argument was accepted that the employment tribunal had erred in its approach to the burden of proof under what was then section 63A Sex Discrimination Act 1975, now section 136 Equality Act 2010. Although the tribunal had correctly found that EB had raised a prima facie case of discrimination and that the burden of proof had shifted to the employer, it had mistakenly gone on to find that the employer had discharged that burden, since all its explanations were inherently plausible and had not been discredited by EB. In doing so, the tribunal had not in fact placed the burden of proof on the employer because it had wrongly looked at EB to disprove what were the respondent's explanations. It was not for EB to identify projects to which she should have been assigned. Instead, the employer should have produced documents or schedules setting out all the projects taking place over the relevant period along with reasons why EB was not allocated to any of them. Although the tribunal had commented on the lack of documents or schedules from BA, it failed to appreciate that the consequences of their absence could only be adverse to BA. The Court of Appeal held that the tribunal's approach amounted to requiring EB to prove her case when the burden of proof had shifted to the respondent.

54. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory. In the case of B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not lead to the legal conclusion that the dismissal occurred because she was a woman.

55. The tribunal could pass the first stage in the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age or sex.

56. A similar approach was approved by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.

57. We have also taken into account the case of Birmingham City Council v Lawrence [2017] UKEAT/0182/16/DM.

Conclusion

58. We have taken into account the issues set out in paragraph 5 in this judgment.

Constructive unfair dismissal

59. In relation to the constructive unfair dismissal claim, we have found in respect of paragraph 5.1(a), "failing to carry out an investigation into the claimant's accident at work in May 2014", that the claimant did not sustain his injury at work. There was no documentary evidence that he had sustained an injury at work either on 18, 24 or 25 May 2014. He was aware at the time of the respondent's reporting procedures yet there is no recorded evidence that he submitted and incident report or that one was completed on his behalf. The respondent genuinely believed on the evidence before it, that the claimant was not injured at work.

60. As regards 5.1(b), failing to adhere to the respondent's Absence Management Policy "in respect of allowing him to remain at home until he was fully fit for work", the respondent did allow the claimant to remain at home until fully fit for work. It did not require him to attend work, at any stage, and it complied with the recommendations by occupational health.

61. In relation to 5.1(c), "failing to enquire about any reasonable adjustments to be made", the respondent did make such enquires of occupational health and of the claimant. The made it clear that he was unable to work and would not contemplate a return to work under the circumstances. Occupational health were of the view that the claimant was unfit to work. The claimant was unfit for work until October 2017 when he embarked on a fast-track driving instructor's course. It is difficult to see what else the respondent could have done.

62. In relation to 5.1(d), "failing to arrange absence management meetings to take into account his medical condition", we have found that there was never an express request for a postponement of the meetings and from the conduct of the meetings, the claimant, as well as his work colleague, Mr Whittamore, participated fully in them. The claimant agreed the date of the 4 July meeting during his telephone discussion with Mr Svinurai on 20 June 2016. The earlier date was also agreed with Ms Cumberland with whom he had a better relationship than with Ms Watson.

63. As regards 5.1(e), "failing to make any referral to benefits that the respondent offered to its employees as a result of workplace accident", we have already found that the

claimant was not injured at work. He did not complete an incident form knowing that this was the procedure having been employed by the respondent for many years. If there was no injury at work, which the respondent believed and understood, there could not be any discussions about injury allowance or benefits following an accident at work.

64. As regards 5.1 (f) "being told on 4 July 2016 that he was at risk of dismissal and that if he was dismissed he would not be able to obtain future employment within the NHS again", we have already found that such a statement was not made.

65. In relation to "being invited to the absence review meeting on 21 September 2016, without the respondent having an up to date picture of the claimant's medical condition", 5.1(g), the claimant was referred to occupational health. The purpose being for such a report to be available for discussion prior to the meeting on 21 September 2016. In fact, a report was prepared by Dr Olowookere dated 17 August 2016. The respondent had the up to date information on the claimant. He remained unfit for work and he did not countenance ill-health retirement. We repeat, he was unfit up to October 2017.

66. Having considered the above matters, we have come to the conclusion that the respondent did not commit the acts or behave in the manner alleged by the claimant constituting a fundamental breach of his contract of employment entitling him to resign. It follows that we have come to the conclusion that the constructive unfair dismissal claim is not well-founded and is dismissed.

Direct disability discrimination

67. In relation to the direct disability discrimination claim, the claimant relies on a hypothetical comparator either without a disability or with a disability, but not a shoulder injury. This would be a Healthcare Assistant with a similar period of sickness absence and with no return to work date at the material time. In relation to paragraph 5.2(a) "failing to comply, consider or implement the respondent's policies in place in respect of disability, namely equality opportunities to assist those with a disability", in our view the hypothetical comparator would be the subject of the respondent's long-term sickness absence policy. That person would be the subject of review meetings leading, ultimately, to a final review before a panel and would be at risk of dismissal if there was no return to work date. They would have been, based on the evidence we heard, dismissed much earlier than after two years' sickness absence. In the claimant's case, the respondent waited for the outcome of occupational health reports and the outcome of other medical appointments and surgery and could not discount entirely two years' sickness absence for a shoulder injury.

68. In relation to 5.2(b) "failing to adhere to its commitments as set out in its policies about being positive about disabled people", the respondent was prepared for the claimant to remain on sick leave until, hopefully, he was fit to return to work. He remained on sick leave for over two years and no decision was taken to terminate his employment was taken earlier. He was referred to occupational health and adjustments were considered by the respondent but the claimant as a result of his shoulder condition was unable to carry out any work and he

did not agree to ill-health retirement. The comparator would have been treated in a similar manner though his/her employment would have been terminated within two years.

69. In relation to 5.2(c), "failing to consult with the claimant regarding his disability and its impact in any detail", the respondent did consult with the claimant on 4 September 2015 and 4 July 2016. It also had the occupational health reports and the claimant's fit notes. This same approach would apply if it was a non-disabled person or a person without the claimant's disability in similar circumstances as the respondent would arrange meetings to discuss their sickness and their absence as well as when they were expected to return to work.

70. In relation to 5.2(d), "failing to take appropriate medical advice as to the claimant's disability; the effect of the claimant's disability; what the claimant was and was not capable of doing; and any adjustments that could be made?" The occupational health referrals asked for advice specifically on these issues and we are satisfied that at both meetings on 4 September 2015 and 4 July 2016, all of those matters were discussed including possible options. The difficulty for the claimant and for the respondent, was that he was unfit for work, would not contemplate any other role including his substantive post, and there was no confirmed prognosis as to when he would be able to return to work.

71. Having considered these matters, we have come to the conclusion that the claimant was not treated less favourably because of his disability. Accordingly, this claim is not well-founded and is dismissed.

Indirect disability discrimination

72. In relation to the indirect disability discrimination claim, in paragraph 5.3 the claimant relies on a number of provisions, criteria or practices. Firstly, to attend the absence management meetings as and when required by the respondent. The assertion being that he was in an unfit state due to having undergone medical procedures and thus was under the influence of a lot of medication. It was a pcp to attend absence management meetings though not as and when required by the respondent. The meetings were arranged at the claimant's convenience and as such, would not have placed persons with the claimant's disability at a particular disadvantage. As we have found, the claimant agreed to the meeting dates and did not ask for a postponement. The pcp as articulated by him was not a pcp applied by the respondent.

73. Secondly, the claimant argued that he was required to return to work in the same role within a period of two years after an accident occurring in the workplace. There was no such pcp applied by the respondent. The respondent was looking at alternatives roles for the claimant as required in the sickness absence policy. It first had to consider the employee's substantive role and whether he/she could return to it with adjustments and if that is not possible due to their medical condition, then to consider redeployment, rehabilitation, phased return to work and in the final analysis,

ill-health retirement. We do not accept that the pcp as advanced by the claimant was applied by the respondent.

74. The third pcp was "adopting the absence management policy regarding the claimant's absence rather than dealing with the policy for those disabilities". The particular disadvantage being that as the was disabled, reviewing his attendance under the absence management policy placed him at a disadvantage due to his disability as a rehabilitation and phased return to work were not implemented. We conclude that this was not a pcp as the Absence Management Policy specifically refers to having regard to an employee's disability. It is also makes provision for reasonable adjustments. As already referred to, reasonable adjustments were considered but discounted by the claimant or could not be implemented as the claimant was still unfit for work.

75. The fourth pcp was, holding absence management meetings in the absence of adequate medical advice. The claimant asserted that at the meeting on 4 July 2016, the occupational health report recommended a review in three months, that being by October 2016 and to obtain medical evidence regarding his health and prognosis. The disadvantage to him was that the final review meeting was held prior to the expiration of the three months. There was no evidence that the respondent's pcp was to hold absence management meetings in the absence of adequate medical advice. It is for the respondent to assess whether it has adequate medical information prior to holding a final review meeting. It had the report by Dr Olowookere dated 17 August 2017. It also had the claimant fit notes. All the medical evidence stated he was unfit for work. The meeting scheduled to take place on 21 September 2016, even if the claimant's right in relation to this pcp, was a one-off event. A one-off incident could not be a provision, criterion or practice. There has to be the element of repetition. We also conclude that the pcp relied upon by the claimant was not applied by the respondent.

76. It follows from the above that we have concluded that the claimant's indirect disability discrimination is not well-founded as he failed to establish that the alleged pcps applied in his case. Accordingly, this claim is dismissed.

<u>Discrimination because of something arising in consequence of disability</u>

77. In respect of discrimination arising in consequence of disability, the claimant submitted that the something arising was his absence record, paragraph 5.4 and that the unfavourable treatment were the disadvantages he suffered, namely being told on 4 July 2016 that he was at risk of dismissal and that if he was dismissed he would not be able to obtain future employment within the NHS again, paragraph 5.5(a). In addition, being subjected to the absence review meeting on 21 September 2016 with the probability of being dismissed, paragraph 5.5(b).

78. In relation to paragraph 5.5(a), we have already found that the alleged statement was not made on 4 July 2016.

79. As regards being subjected to the absence review meeting on 21 September 2016, we take the view that the invitation to attend arose out of the claimant's disability as he had been absent for a considerable period of time as a result of his shoulder injury, which the respondent accepted is a disability under section 6, schedule 1, Equality Act 2010. We do, however, take the view and agree with the respondent that the claimant's treatment could be justified. The legitimate aim is set out in the purpose of the sickness absence policy, to attain and maintain a healthy workforce and to ensure that an equitable and consistent approach is taken in relation to sickness absences. As to proportionate means, the claimant was invited to attend the absence review meetings on 4 September 2015 and 4 July 2016. He was also required to attend occupational health appointments. The respondent obtained occupational health reports and, in particular, the report dated 17 August 2016, prior to conducting the scheduled meeting on 21 September 2016. Although there was no certainty that the claimant would be dismissed, we do accept that having regard to his sickness absence record there was that possibility. Accordingly, this claim is not well-founded and is dismissed.

Failure to make reasonable adjustments

80. Finally, in relation to failure to make reasonable adjustments claim, paragraph 5.6(a), "a requirement for a disabled person to have the same amount of absence as someone without a disability", there was no such requirement. In fact, the respondent knowing of the claimant's disability allowed him to remain on sick leave for over two years. The was no evidence that disabled and non-disabled persons were required to have the same amount of sickness absence.

81. In relation to 5.6(b) "a requirement for a disabled person to attend face to face meetings at the Trust's premises", there was no such requirement as the respondent, having regard to the policy, could arrange home visits. The claimant could also have requested a home visit.

82. In relation 5.6(d), "a requirement for a disabled person to be terminated from employment due to absence", this applied irrespective of whether the employee is disabled or non-disabled. If the absence is long-term, the respondent would follow its procedures. The length of the absence has to be reasonable before a decision is taken to dismiss having regard to the needs of the business. In the claimant's case the final review was after 27 months sickness absence.

83. As regards 5.6(e), "a requirement to have absence management hearings in the absence of adequate medical evidence", in accordance with the policy and in practice, the requirement is to have occupational health reports prior to conducting absence management meetings. Exceptionally, in cases of acute injury or disability, the respondent has a discretion to delay seeking medical advice if the employee's absence could be predicted in advance, for example, after a major operation. The respondent attempted to get the medical evidence, but the claimant did not attend the occupational health appointments. The respondent also had the fit notes on his current state of health. We have concluded that 5.6(e) is not a PCP.

84. Paragraphs 5.6(c) and (f) were withdrawn by the claimant during the course of the hearing.

85. Even if we are in error as regards the provisions, criteria or practices, we would have found, in any event, that adjustments were made in that the claimant was allowed to remain on sick leave as a disabled person for over two years before being subjected to the final absence review meeting and there were discussions about a return to his substantive role or any other role but the respondent could not implement any reasonable adjustments until there was a return to work date. The claimant was given the option of having the meetings held at the respondent's premises or elsewhere. He willingly agreed to attend at the respondent's site in Kingsley Green. The respondent also explored, on more than one occasion with him, possible options, but as long as there was the absence of a return to work date and the claimant was unfit for any work, those options could not be put into effect.

86. Although occupational health in the 17 August 2016 report stated that the claimant would be unfit for at least three months, it did not state that he would be fit to return to work after three months. In fact, the tribunal know that the claimant remained unfit for work until October 2017. There was no clear prognosis that he would be fit to return to work and to engage either in his substantive post either on a phased return basis or in any other role after three months from 17 August 2016. In relation to allowing him to return to work when fit and able to meet the same standards as other disabled employees in accordance with its policy, this would be a reasonable step, but the respondent was anxious to explore reasonable adjustments prior to the claimant's return to work, if there was a viable return to work date.

87. Having considered all of the claims, we have come to the conclusion that they are not well-founded and are dismissed.

Employment Judge Bedeau

Date: 8 June 2018

Sent to the parties on: .....

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For the Tribunal Office