# EMPLOYMENT TRIBUNALS

**Claimant** **Respondent**

**Mr R Jakkhu** **v** **Network Rail Infrastructure Ltd**

**Heard at:** Cambridge Employment Tribunal

**On:**
22, 23, 24, 25 and 26 January 2018.
9 March 2018 (Discussion Day at Bury St Edmunds - no parties in attendance)

**Before:** Employment Judge King

**Members:** Mr Davies and Mrs Smith

**Appearances**
**For the Claimant:** Mr B Uduje, Counsel.
**For the Respondent:** Ms G Hicks, Counsel.

## RESERVED JUDGMENT

1. The claims for direct discrimination fail and are dismissed.

2. The claims for discrimination arising from a disability fail and are dismissed.

3. The claims for failure to make reasonable adjustments fail and are dismissed.

4. The claims for victimisation fail and are dismissed.

5. The only claims found are out of time and we do not consider it to be just and equitable to extend time.

# RESERVED REASONS

## Evidence

1. Both parties were represented. The claimant was represented by Mr Uduje of Counsel and the respondent by Ms G Hicks of Counsel. On behalf of the claimant, we heard evidence from the claimant. On behalf of the respondent, we heard evidence from Ms Rakhi Jethwa (Senior HR Business Partner for Group Business Services); Mr Ian Hindler (Practice Manager); Ms Joanna Duke (Strategic Analyst); and Mr Mark Smith (Global Human Resources Lead for Network Rail Consulting Ltd). The claimant and respondent exchanged witness statements in advance and prepared an agreed bundle of documents which ran from pages 1 to 760. In addition, the respondent provided the index to the preliminary hearing bundle but the panel were only referred to one document within the same and a further bundle of documents labelled the 'claimant's supplementary bundle index' which ran from page 1 to 460 but again, the panel was not taken to many documents within this bundle.

## Issues

2. At the outset of the final hearing, the claims were identified as direct disability discrimination under s.13 Equality Act 2010; discrimination arising from disability; and a s.21 claim for failure to make reasonable adjustments; and victimisation under s.27 of the Equality Act 2010.

3. The issues as to liability were identified from an agreed draft list of the issues with parties as amended by the Tribunal at the outset of the hearing as follows.

4. <u>Jurisdiction - time (s.123A of the Equality Act 2010)</u>

   (1) Did the claimant present his claim in time?

   (2) The ACAS conciliation period started on 1 June 2015 and ended on 1 July 2015;

   (3) The claimant presented his claim on 31 July 2015. The claimant contends his claims have been presented on time.

   (4) If, which is not admitted, the tribunal finds that any of the alleged acts are out of time, the claimant contends that it is just and equitable to extend time and/or the acts are a series of connected acts done at the end of that period.

   (5) The respondent contends that the claims were not presented on time.

   <u>Disability (s.6 of the Equality Act 2010)</u>

(6) The respondent accepts that the claimant was at all material times disabled within the meaning of s.6 Equality Act 2010 by reason of Ulcerative Colitis.

Direct disability discrimination (s.13 of the Equality Act 2010)

(7) Has the respondent subjected the claimant to the treatments listed 7.1 to 7.8 below?:-

7.1 Dismissing him on 24 September 2014.

7.2 Failing to offer him a permanent role on or before 4 February 2015 and continuing.

7.3 Failing to appoint the claimant to the role of senior IT support analyst on or after 2 March 2015.

7.4 Failing to address the claimant's concerns (sent 20 April 2015) adequately or at all relating to the failure to appoint him to the role of senior IT support analyst.

7.5 Failing to provide additional supervisory guidance/support since 2011 and continuing.

7.6 Failing to provide training since 2011 and continuing.

7.7 Failing to redeploy or offer permanent suitable alternative roles on 25 May 2014 and continuing.

7.8 Denying full bonus since 2010 and continuing because of failure to discount disability absences and/or failing to discount any performance impairment due to a disability.

(8) Has the respondent treated the claimant less favourably than it would treat comparators? The claimant relies on the following comparators:-

8.1 Chris Fordham, Duncan Riddle, Andy Latta and Wagner Cassilgoli (allegation 7.1, 7.2, 7.5, 7.6, 7.7, 7.8).

8.2 Rachelle Chippendale, working in IT band 5 suffering from multiple sclerosis and permitted to work from home (allegation 7.1 to 7.8).

8.3 Mark Daley (allegation 7.2 and 7.3).

8.4 Joss Bates (MOSS training), Reubina Kadari (SQL server training) (allegation 7.6).

8.5 Hypothetical comparator (allegation 7.1 to 7.8).

(9) If so, was the difference in treatment because of the protected characteristics, namely the claimant's considered disability?

(10) If yes, what is the respondent's explanation?

Discrimination arising from a disability (s.15 of the Equality Act 2010)

(11) Did the respondent treat the claimant unfavourably in the ways alleged at 7.1 to 7.8 above?

(12) If so, was this because of a reason arising in consequence of his disability, namely his need to take time off work and/or work from home (s.15(1)(a) Equality Act 2010)?

(13) If so, has the respondent shown that such treatment was/is a proportionate means of achieving a legitimate aim? The respondent relies on the following legitimate aims:-

13.1 [Bonus] Requiring a certain level of attendance to be eligible for a bonus.

13.2 [Redundancy process] Concluding a redundancy process fairly both substantively and procedurally.

13.3 [Redeployment/promotion] Securing a suitable role for the claimant that suited his skills, qualifications and experience.

13.4 [Senior IT support analyst role] Appointing based on merit of candidate.

13.5 [Grievance 20 April 2015] Dealing proportionately with the claimant's grievance.

13.6 [Sickness absence/work performance] Ensuring the claimant was well enough to benefit from any additional support and/or guidance and training.

13.7 [Training/coaching/mentoring] Redeploying into suitable open vacancies.

Failure to make reasonable adjustments (s.20 and s.21 of the Equality Act 2010)

(14) Did the respondent apply to the claimant a provision, criterion or practice (PCP)? The claimant relies on the following PCPs:-

14.1 Requiring the claimant to maintain a certain level of attendance at work so as not to be subject to the risk of redundancy.

14.2 Requiring the claimant to maintain a certain level of attendance at work so as to be eligible for promotion, training, support and/or redeployment.

14.3 Requiring the claimant to carry out his substantive post at fixed work location only.

14.4 Not allowing the claimant to work reduced or flexible hours in his substantive post.

14.5 Not allowing the claimant to have access to disabled toilets at work and at train stations.

14.6 Requiring the claimant to maintain a certain level of attendance to be eligible for a bonus.

14.7 Arrangements for sick pay.

(15) Did the application of such PCP put the claimant to a substantial disadvantage in comparison to non-disabled person because of his disability and/or attendance record?:-

15.1 He was put at risk of redundancy on 25 March 2014.

15.2 He was not redeployed or offered an alternative permanent job during the six month notice period 25 March 2014 to 24 September 2014.

15.3 He was put at risk of redundancy (second time) on 20 January 2015.

15.4 He was put in a temporary role (as opposed to a permanent role) on 4 February 2015 to date of claim and continuing.

15.5 He was not redeployed or shortlisted or interviewed for the role of senior support analyst (band 4) on around 2 March 2015.

15.6 Specifically during the redeployment period he was not offered training or support to regress/promote to an alternative role or to a band 4 role. For example, he was not given any or any sufficient support such as skills training, coaching and mentoring.

15.7 He was denied a full bonus from 2010 to date of submission of claim and continuing.

15.8 He was denied flexible work in substantive post e.g. working from home and/or working from home during ‘colitis flare ups’.

15.9 Long periods without pay or reduced pay.

(16) If so, did the respondent take such steps as are reasonable to avoid the disadvantage (s.21(2) of the Equality Act 2010)? The claimant says the following would have been reasonable adjustments:-

16.1 Relaxing the respondent's absence policy and attendance targets to exclude all disability-related absence when considering promotion, training, support, redundancy, bonus and/or redeployment.

16.2 Allowing a temporary reduction of the claimant's working hours during a flare up of his colitis.

16.3 Allowing the claimant to work flexibly from home and the office during a colitis flare up.

16.4 Providing the claimant with a radar key so he could access disabled toilets at work and train stations (whilst travelling to/from work).

16.5 Providing support or additional support such as mentoring/coaching, work shadowing, skills training.

16.6 Redeploying the claimant to the role of senior support analyst and/or removing or redacting some of the duties of the role and/or offering skills training so as the claimant could meet or comply with the essential requirements, for example if the respondent genuinely and reasonably believed there was an actual or perceived skills gap.

(17) Did the respondent know the claimant would have been placed at a disadvantage?

<u>Victimisation (s.27 of the Equality Act 2010)</u>

(18) Has the claimant performed a protected act within the meaning of s.27(2)(d) of the Equality Act 2010? The claimant relies on the grievance dated January 2014 and/or the claimant's email dated 20 April 2015?

(19) Did the respondent carry out any of the treatment set out below because the claimant has done a protected act?

(20) The claimant relies on the following alleged detrimental acts:-

20.1 Dismissal on 24 September 2014.

20.2 Failure to offer a permanent role on or before 4 February 2015 and continuing.

20.3 Failure to appoint to the role of senior IT support analyst on or after 2 March 2014.

20.4 Failing to address the claimant's concerns adequately or at all relating to the failure to appoint him to the role of senior IT support analyst.

20.6 Failing to redeploy or offer suitable alternative employment since 25 March 2014 and continuing.

## The Law

5. Section 6 Equality Act 2010 (Disability) states as follows:

> "**6 Disability**
>
> (1) A person (P) has a disability if –
>
> (a) P has a medical or physical impairment; and
> (b) The impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities …"

6. Section 13 Equality Act 2010 (Direct Discrimination) states as follows:

> "**13 Direct discrimination**
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2) ….
>
> (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B. …"

7. Section 15 Equality Act 2010 (Discrimination arising from disability)

> "**15 Discrimination arising from disability**
>
> (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."

8. Section 20 Equality Act 2010 (Duty to make adjustments)

> "**20 Duty to make adjustments**

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) …

(5) …

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement …

(10) …

(11) …

(12) …

(13) …"

9. Section 21 Equality Act 2010 (Failure to comply with duty):

**"21 Failure to comply with duty**

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

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

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

10. Section 27 Equality Act 2010 (Victimisation):

> **"27 Victimisation**
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
>
> (a) bringing proceedings under this Act;
> (b) giving evidence or information in connection with proceedings under this Act;
> (c) doing any other thing for the purposes of or in connection with this Act;
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
>
> (4) This section applies only where the person subjected to a detriment is an individual.
>
> (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

11. Section 39 Equality Act 2010:

> "**39 Employees and applicants**
>
> (1) An employer (A) must not discriminate against a person (B)—
>
> (a) in the arrangements A makes for deciding to whom to offer employment;
> (b) as to the terms on which A offers B employment;
> (c) by not offering B employment.
>
> (2) An employer (A) must not discriminate against an employee of A's (B)—
>
> (a) as to B's terms of employment;
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
> (c) by dismissing B;
> (d) by subjecting B to any other detriment.
>
> (3) An employer (A) must not victimise a person (B)—
>
> (a) in the arrangements A makes for deciding to whom to offer employment;
> (b) as to the terms on which A offers B employment;
> (c) by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B)—

(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment.

(5) A duty to make reasonable adjustments applies to an employer.

(6) …

(7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

(a) by the expiry of a period (including a period expiring by reference to an event or circumstance);
(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

(8) Subsection (7)(a) does not apply if, immediately after the termination, the employment is renewed on the same terms."

## 12. Section 123(1) Equality Act 2010 (Time Limits)

**"123 Time limits**

(1) Subject to section 140(a) and 140(b) proceedings on a complaint within section 120 may not be brought after the end of —

(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

(2) …
(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

13. On behalf of the claimant, we have been referred to a number of cases in the written closing submissions as follows:

Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL;
Glasgow City Council v Zafar [1998] ICR 120 HL;
Anya v University of Oxford and Another [2001] ICR 847 CA;
Ministry of Defence v Jeremiah [1980] ICR 13 CA;
Secretary of State for Justice and Another v Dunn EAT 0234/16;
Williams v The Trustees of Swansea University Pensions & Assurance Scheme and Another [2017] IRLR 882 CA;
T-Systems Limited v Lewis EAT 0042/15;
Pnaiser v NHS England and Another [2016] IRLR 170 EAT;
Risby v London Borough of Walthamstow Forest EAT 0318/15;
Archibald v Fyfe Council [2004] ICR 954 HL;
Smith v Churchills Stairlifts Plc [2006] ICR 524 CA;
HM Prison Service v Johnstone [2007] IRLR 951 EAT;
General Dynamics Information Technology Ltd v Carranza [2015] ICR 169 EAT;
Leeds Teaching Hospital NHS Trust v Foster EAT 05/10;
Norr v Foreign & Commonwealth Office [2011] ICR 695 EAT;
Griffiths v Secretary of State for Work and Pensions [2017] ICR 160 CA;
South Staffordshire Shropshire Healthcare NHS Foundation Trust v Billingsley EAT 0341/15;
Chief Constable of West Yorkshire Police and anor v Homer [2012] ICR 704

and we were also referred to Chapter 6 of the Equality Act 2010 Statutory Code of Practice.

14. The respondent also provided written closing submissions and referred to a number of cases:

Clarke v Hampshire Electro-plating Company Ltd [1991] IRLR 490 EAT;
Barclays Bank Plc v Kapur [1989] IRLR 387 CA;
Hendricks v Metropolitan Police Commissioner [2013] IRLR 96;
Oxfordshire County Council v Meade UKEAT/0410/14;
Bexley Community Centre (t/a Leisurelink) v Robertson [2003] IRLR 434;
Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13;
Edomobi v La Retraite RC Girls' School UKEAT/0181/16;
Accurist Watches Limited v Wadher [2009] ALL England ER(D) 189;
British Coal Corporation v Keeble [1997] IRLR 336;
Miller v Ministry of Justice UKEAT/003/15;
Smith v Churchills Stairlifts Plc [2006] IRLR 41;
Carranza v General Dynamics Information Technology Limited [2015] IRLR 43;
Higgins v Secretary of State for Work and Pensions (Job Centre Plus) [2014] ICR 341;
North Lancashire Teaching Primary Care NHS Trust v Howorth UKEAT/0487/13;

O'Hanlon v HM Commissioners of Revenue & Customs [2007] IRLR 404;
Lincolnshire Police v Weaver [2008] ALL ER (D) 291;
Wilson v The Secretary of State for Work and Pensions & Others [2010] ALL ER (D) 96;
Conway v Community Options Ltd UKEAT/0034/12;
HM Prison Service v Johnson [2007] IRLR 951;
London Borough of Islington v Ladele [2009] IRLR 154;
Efobi v Royal Mail Group Ltd UKEAT/02/03/16/DA;
Laing v Manchester City Council [2006] IRLR 748;
Madarassy v Nomura International Plc [2007] IRLR 246;
Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305;
City of York Council v Grosset UKEAT/0015/16;
Riordan v War Office [1959] 3 ALL ER 552.

15. In addition, we had regard to London Probation Board v Kirkpatrick [2005] IRLR 443.

**Findings of fact**

16. The claimant was employed by the respondent from 22 March 2004. His employment continued at the time of the Tribunal hearing. The claimant commenced his role as application support analyst on 28 August 2008, Band 5 and originally based in London Fitzroy House, Euston Road, London. This was an office-based role. The claimant's line manager was Martin Emes and the practice manager was Jim McKenzie.

17. In 2004 the clamant was diagnosed with Ulcerative Colitis. The claimant took medication to control his symptoms. The claimant also suffered from two other conditions during the relevant period, sleep apnoea and depression. At a preliminary hearing on 11 February 2016, Employment Judge Palmer determined that the claimant was a disabled person by reason of ulcerative colitis as defined in s.6 of the Equality Act 2010. Further that depression and/or sleep apnoea were not disabilities within the meaning of the Act. This was the subject of an appeal but those findings were upheld. The claimant's conditions are complex in this case because the periods of absence often related to more than one condition and not just the disability which was the subject of these proceedings. This Tribunal is therefore only concerned with the condition of ulcerative colitis as a disability under the Act.

18. There was a company wide re-organisation which took place in 2012. The claimant's office moved from London to Milton Keynes as part of a centralisation of IT support. The claimant commuted from London to Milton Keynes.

19. Between 2008 and 2010 there were no work issues raised. From 2008 the respondent was aware that the claimant had ulcerative colitis and that this was a condition that could amount to a disability.

20. The respondent's financial year runs from 1 April to 31 March. We have reviewed the agreed sickness absence record for the claimant with absence reasons provided in the bundle. In the records we have seen for the financial year 2007/2008, the claimant had a period of sickness absence of 19 days for colitis and this was disability related.

21. In the financial year 2008/2009, the claimant had 3 days absence which was disability related. He had 54 days of absence which were not identified as being disability related. In the financial year 2009/2010, the claimant had 6 days of disability related absence and 135 days which is not identified as being disability related.

22. In the financial year 2010/2011, the claimant had 12 days absence which was disability related. He had 15 days of absence which was not identified as being disability related.

23. In the financial year 2011/2012, the claimant had 118 days absence which was disability related. He had 16 days of absence which was not identified as being disability related.

24. In the financial year 2012/2013, the claimant had 68 days absence which was disability related. He had 60 days of absence which was not identified as being disability related.

25. In the financial year 2013/2014, the claimant had 65 days absence which was disability related. He had 23 days of absence which was not identified as being disability related.

26. In the financial year 2014/2015, the claimant had 167 days absence which was disability related. He had 0 days of absence which is not identified as being disability related. Since July 2015 the claimant has been absent with depression and work stress (a non-disability related reason). The claimant's manager at the time, Nick Barrett, had not marked the claimant as being sick on the company system so he has been on an extended of period of paid leave and the sickness absence figures are less accurate (albeit not related to the issues of this case). This was discovered when Nick Barrett left Network Rail employ on 2 February 2017.

27. By any standard, the claimant's sickness absence record is high and his attendance is poor through a mixture of disability and non-disability related reasons.

28. Ian Hindler became the hybrid practice manager of the claimant in 2011. Wendy Monaghan became the claimant's line manager around the same time. Debbie Washington became the claimant's line manager in 2012. In September 2013, Nick Barrett became the claimant's new line manager. The claimant had a line manager and a named practice manager who oversaw extended matters outside the day to day work such as OH referrals.

29. In June 2011 the claimant's then line manager Martin Emes, referred the claimant to BUPA Occupational Health as he had been off on long term sick since April 2011 with Colitis. To this point the claimant had very high levels of sickness absence. 2011/12 was the year his absence deteriorated but in the three years previously the claimant had had 21 days disability related absence and 204 days non-disability related absence. It is therefore clear that since the records produced for us he has struggled to maintain his absence for a variety of medical reasons the majority of which were not disability related absences.

30. In July 2011, Ian Hindler also made a referral to BUPA Occupational Health concerning the sickness absence levels and whether the claimant was capable of maintaining his contractual employment obligations long term and asked that he (Ian Hindler) be the main contact for the referral.

31. BUPA Occupational Health provided an initial assessment on 27 July 2011 to Mr Hindler. We found this assessment helpful as it describes the condition of the claimant, prognosis and adjustments. It is clear from this report that the claimant can suffer flare ups:

> *"Mr Jakkhu confirmed he was off work from 11/04/2011 and returned to work on 13/07/2011. ..." "Advised mgr regarding condition in general. Specific adjustments – work from home and having occasional bad days/had bad night – ready access to toilet facilities." "Recommended adjustments "ulcerative colitis is a serious chronic inflammatory bowel disease (IBD) involving the large intestine (colon) and are characterised by ulceration episodes of bloody diarrhoea.*
>
> *Inflammation involves the lining of the large intestine, causing diarrhoea. Tiny open sores (ulcers form in places where inflammation has killed the cells lining the colon. The ulcers bleed and produce mucus and pus.*
>
> *Ulcerative colitis varies greatly in severity from mild to severe.*
>
> *When severe, symptoms cannot be controlled through medication, the individual made need surgery to remove portion of diseased colon.*
>
> *Individuals who are treated with medication may have long periods of remission when symptoms disappear or are under control if they adhere to the medication regime, watch their diet and keep stress to a minimum. However, most often symptoms eventually return. Surgery is the only cure for ulcerative colitis and is carried out only in extreme cases.*
>
> *Individuals in whom stress causes extreme symptoms may need to be transferred to a lower stress job. Accommodations for immediate access to a nearby toilet will need to be made for individuals with recurrent diarrhoea.*
>
> *Unfortunately, the nature of the condition is that individuals have periods of remission when symptoms disappear. These may last for months or even years, but symptoms generally return. On average, individuals with ulcerative colitis have a 50% chance of having their next flare up within two years and for some it is more frequent.*
>
> ....

*Mr Jakkhu may be able to continue working during a minor flare up if he is able to work from home on those days or when he has a disturbed night. If the Business is able to accommodate this it would be considered a reasonable adjustment.*

The Equality Act 2010 likely to apply – Yes."

32. In November 2011 the claimant was again referred to Occupational Health following four short term absences since the last report. Wendy Monaghan set out the absence pattern and requested advice on suitable reasonable adjustments that could be made to assist the claimant in the future. She highlighted that colitis was the underlying condition which she understood to be covered by DDA.

33. We accept that at this point the respondent had full knowledge of the claimant's disability and that adjustments could be requested under the Equality Act.

34. BUPA Occupational Health provided a report on 18 November 2011 to Wendy Monaghan.

*"Fitness for work and recommendations*

- *In my opinion, Mr Jakkhu is fit to carry out his normal duties at work. In my opinion, a Work Station Assessment should be beneficial to identify if there are any factors that could be causing the migraines to occur. I would also suggest that if he has a severe flare up of colitis symptoms in the future it may be prudent to consider him having the opportunity to work from home occasionally, if he is able to do. There may be occasions where he is unable to travel to and from work when he is well enough to carry out some work from home.*
- *I fully accept that the availability of adjusted work is a matter for an individual's employer. It is for management to decide if any recommendations or operations are feasible and can be accommodated in the workplace.*
- ***During acute exacerbation of this condition, he may require short term sickness absence but with prompt treatment he should be able to return to work within seven days.** The timing and frequency of these events cannot be predicted medically.*

**Bold - our emphasis**

*The Equality Act*

*It is my opinion the Equality Act would be likely to be seen as applicable by the courts on the account of the possibility of disability attributed to his medical circumstances. Under the Act, reasonable adjustments to facilitate working need to be made."*

35. On 4 January 2012 the claimant was invited to attend a stage 1 hearing to discuss concerns about his sickness absence by Wendy Monaghan. The claimant does not recall receiving the written warning given by letter dated 13 January 2012, but it matters not for the purposes of this tribunal.

Certainly, at the time it was issued, the claimant's attendance record had deteriorated further and given the high levels of sickness absence for non-disability related matters, it was appropriate.

36. Following a period of absence in 2012, the claimant was again referred to BUPA Occupational Health. A report was produced dated 16 October 2012.

> *"He stated two of the sickness absences were due to a flare up of his colitis condition and the other one was due to him having a surgery, to help improve his symptoms and sleep apnoea. He reported that he has had to take sickness absence from work when he had flare ups of his colitis condition, as he was not accommodated with the timing from work to home as previously recommended by occupational health and that as a result this has impacted on his attendance at work.*
>
> - *...*
> - *"He reported that his digestive systems have now settled and is under control.*
> - *In view of the unpredictable nature of his condition, it is likely that a severe flare up will occur from time to time, which may impact on his future attendance at work. The timing and frequency of any future episodes occurring cannot be predicted medically.*
> - *Mr Jakkhu has been signed and unfit for work by his GP until 21 October 2012 and is keen to return to work after the expiration of his fitness for work certificate.*
> - *I have requested for medical report from his GP today with his consent and I will update you upon receipt of this.*
>
> *<u>Fitness for work and recommendations</u>*
>
> - *In my opinion, Mr Jakkhu is fit for his normal duties as of Monday 22 October 2012. However, I would suggest that if Mr Jakkhu has a severe flare up of his colitis symptoms in the future, it may be prudent for management to consider him working from home, if operationally feasible. There may be occasions when he is unable to travel to and from work and he is well enough to carry out some work from home.*
> - *It is my opinion that the Equality Act would be seen as applicable by the Courts on account of the possibility of disability attributable to his medical circumstances. Under the Act, reasonable adjustments to facilitate working need to be made and the adjustment suggested is stated above.*
> - *I fully accept that the availability of the adjusted work is a matter for the individual's employer and it is for the management to decide if any recommendations are operationally feasible and be accommodated in the workplace."*

37. The claimant's GP was asked by BUPA Occupational Health to provide a report regarding his condition. This was dated 23 October 2012.

> *"Thank you for your letter requesting a report on the above patient.*
>
> *Mr Jakkhu has been diagnosed with ulcerative colitis since 2003 and has since been getting frequent flare ups. Sometimes the condition is severe and he is unable to work due to the excessive diarrhoea, abdominal pains and lethargy. This is a*

*chronic disease and flare ups are common and it is expected to be ongoing in the future. He is under specialist care for his condition and was last seen one month ago and things were relatively stable.*

*Since September, he has also been complaining of low mood and lethargy. He has been given a diagnosis of depression and was started on antidepressant treatment. He has not been able to go to work because of severe tiredness and difficulty in concentration. The depression is largely attributable to his chronic disease and frequent flare ups of his ulcerative colitis.*

*He has been diagnosed with mild obstructive sleep apnoea which may also contribute to his tiredness. He is currently waiting for a second operation on his nose which may help his snoring and breathing and obstructive sleep apnoea.*

*Mr Jakkhu suffers from frequent flare ups of his ulcerative colitis which results in him having profuse diarrhoea and sometimes with blood. He can open his bowels with mucus and wind up to ten times daily which he is unable to control voluntarily. During these episodes he is unable to travel to work because he needs to get to a toilet immediately and he cannot control his diarrhoea. Adjustments which I think would be appropriate during these periods include for him to work at home until his flare ups have subsided and also for him to be seated near the toilet at his workplace. As long as Mr Jakkhu is free from his symptoms of ulcerative colitis then he should be able to offer a regular and effective service especially if he is able to work from home during periods of relapse. His mental stress can be improved from him having periods from working at home. This may in turn improve his mood, tiredness and energy levels to give him more effective service.*

*His obstructive sleep apnoea should be improved after his second operation on his nose.*

*Kind regards*
*Dr Stephen Cheung BSE DFFP MRCGP*
*General Practitioner***"**

38. This was sent to the employer along with a case update from occupational health on 23rd October 2012.

*"We have received the report from the GP and it confirms the medical condition which is already known to you to be ulcerative colitis, mild obstructive sleep apnoea with depression.*

*Following my consideration of the report, I can advise that his GP supports that Mr Jakkhu works from home during periods of flare up of his ulcerative colitis condition until his flare ups have subsided for him to be seated near the toilet in his workplace in order to support his need of accessibility to toilet facility.*

*I fully accept that the availability of adjusted work is a matter of the individual employer and it is for the management to decide if the recommendations are operationally feasible and can be accommodated in the workplace."*

39. On 8 January 2013, the claimant has a return to work meeting with Ian Hindler. Ian Hindler asked what could be done to assist with the absences and the main issue was highlighted as being near a toilet when he had a colitis attack. He stated that the claimant's role did not support

working from home and looking at a local office when required still required travelling so was only an option. Ian Hindler further highlighted the claimant's pattern of having leave or training and then having a period of sickness with colitis. No underlying reasons were given and diet was discussed.

40. Ian Hindler discussed with the claimant the need for his attendance to improve and a discussion took place regarding reasonable adjustments but the current view was that if the claimant was not well enough to work he should be signed off sick. The claimant was advised to use Soft Skills when off sick and the claimant agreed it would be good for his personal development to do something with the time off.

41. Following another sickness absence period, the claimant was once again referred to BUPA Occupational Health for an assessment. They prepared a report dated 3 June 2013. The report was sent to Debbie Washington.

*"Fitness for work and recommendations*

- *In my opinion, Mr Jakkhu is fit for work for his normal duties.*
- *I suggest he has a desk near the toilet facilities in order to help him manage his gastro internal and neurological conditions – if the business can accommodate this adjustment.*
- *I fully accept that the availability of adjusted work is a matter of the individual's employer.*

*Specific questions*

- *Is the condition likely to affect regular service in the future?*
- *He has a chronic gastro intestinal conditions which may flare up again in the future. Unfortunately, I am unable to predict the frequency and duration of any future flare ups/absences related to this condition.*
- *I am unable to predict the frequency of his migraines. I re-inform you he does not suffer from migraines very often.*
- *He is due to have another surgery for his sleep apnoea hopefully symptoms will improve. However, I cannot state at the present time whether his symptoms will be resolved.*

*Equality Act in relation to his gastro intestinal condition.*

- *It is my opinion that the Equality Act would be seen as applicable by the Courts on account of the possibility of disability attributable to his medical circumstances. Under the Act, reasonable adjustments to facilitate working to be made.*

*Equality Act in relation to migraines and sleep apnoea.*

- *Mr Jakkhu's medical circumstances do not in my opinion suggest that the Equality Act would be seen as applicable by the Courts on account of disability."*

42. The claimant attended a welfare meeting with Ian Hindler and Nick Barrett on 4 October 2013, to discuss his previous and existing health absences. In preparation for that meeting, Ian Hindler prepared a script which was discussed with HR direct. In this he highlighted that with working from home they had real concerns about people working from home when not well. He highlighted that doing some self-development work when off sick was discussed to show that you can "work" when off work but not travel but that the claimant had not done so. Ian Hindler highlighted that they were starting to run out of options as to how to support the claimant and still get the work done. They really needed the claimant to make some positive moves to help improve the situation

43. At the meeting a number of matters were discussed including a number of reasonable adjustments and the minutes of the meeting confirmed a number of these.

> *"The report recommended that RJ be near a toilet at work. RG confirmed that he is near a toilet. However, over the past month he has noticed the disabled toilets for the first floor have been out of order on occasion but are working now.*
>
> *RG did confirm there is an operation for his colitis issue. However, the medical team's view is that as his damaged area is so low in his colon, the benefits do not outweigh the risks so have advised against operation. This means his condition is likely to continue with flare ups. He has a greater than 50% chance of a flare up in any two-year period.*
>
> *IH discussed the reasonable adjustment had previously been offered by flexible start and finish times. RJ said that when he had a flare up it was for the whole day. Therefore, flexible start/finish times were not a help.*
>
> *IH asked RJ if he had undertaken any learning whilst he was off on his recent last long-term sickness. IH had previously asked RJ to look into this as RJ had suggested a reasonable adjustment was allowing him to work from home. NR policy is that if you are sick you should not work. IH had suggested in the past that if RJ could show that he was able to work but not able to travel by doing some training it would support the suggestion to work from home. IH discusses again with RJ. RJ confirmed he had read a book on Windows Installer. He has not progressed this or taken any exams on this, since being back. He has not done any skills courses, which are auditable, so agreed we have not progressed any opportunity to work from home as we have no proof he was able to do it.*
>
> *IH asked RJ if he could think of any suggestions that could be made to make RJ's situation easier.*
>
> - *RJ suggested that it would be easier if he was to work from Eversholt Street/another London office. IH confirmed that WFH was not an option (see above).*
> - *IH confirmed that as a business and for his support role it would be difficult for us to accommodate this. IH will investigate.*
> - *IH asked RJ to drop NB a note over the next couple of weeks with any ideas he has for making reasonable adjustments and if he cannot think of any to just confirm this.*
>
> ---

- *IH to investigate the issue of RJ to work from Eversholt Street/another London office.*
- *IH to investigate the issues with disabled toilets on the first Caldecotte.*

*----------"*

44. The claimant attended another Occupational Health referral on 18 October 2013, a report dated 18 October 2013 was prepared and addressed to Nick Barrett which confirmed the following:

> *"Fitness for work and recommendations*
>
> - *In my opinion Mr Jakkhu is fit for work for his normal duties.*
> - *As stated in the previous report I recommend that he has a desk near the toilet facilities in order to help him manage the symptoms of his gastro internal and neurological conditions.*
> - *You may wish to consider allowing him to work from home/or a local office when his gastro internal symptoms flare up in order to help him manage his condition and reduce the likelihood of sickness absence.*

45. There was another meeting between Nick Barrett, Ian Hindler and claimant on 31 October 2013. Nick Barrett emailed Ian Hindler with notes of the meeting on 18 November 2013. In this meeting the claimant provided the respondent with print outs from the colitis website outlining possible reasonable adjustments. The notes of that meeting confirm that

> *"Ranjit asked for HR to be at the meeting.*
>
> *IH asked why he wanted HR to be there.*
>
> *RJ commented – Seems to be the same questions being asked every time and actually confirmed that the consultant said she would cut and paste the old details from PHP report into the new one. Ian explained that we don't work directly with HR business support and why there wouldn't be an attendance.*
>
> *IH asked RJ if he had thought of any suggestions to help him with the situation of his illness. RJ confirmed he had no further suggestions apart from those he had already suggested previously. RJ to email NB with no suggestions confirmation – COMPLETED.*
>
> *WFH was mentioned and IH confirmed this is not policy.*
>
> *Ian will review this with HR.*
>
> *Ian mentioned the email he sent Ranjit re tabasco sauce, Ian asked what else triggers his condition. RJ mentioned sweetcorn/corn was an issue. Ian mentioned about corn syrup.*
>
> *We asked RJ about what work/reading/work he could do from home when he was on long term sick. RJ mentioned he would to learn further on Windows Installer. He asked if there is an exam. NB to speak to John and Adrian.*

*IH mentioned about the breakfast and lunch breaks. RJ said that he thought they were allowed two 15 minute breaks. IH confirmed this is not the case.*

*IH mentioned that he had seen RJ leave early: RJ confirmed he does not have a lunchtime sometimes and always made up his time. IH stressed this was only mentioned because RJ won't be at the next practice meeting."*

46. On the 18 November 2013, Ian Hindler emailed the claimant with a copy to Nick Barrett with a reasonable adjustments update.

*"Ranjit*

*Further to our meeting on 18 October. Thank you for sight of the document you obtained from the colitis website. I have reviewed all the reasonable adjustment suggestions. Please find my response below.*

1. *Allowing time off for medical appointments or treatment that are not counted as annual leave.*

   *You are given time off on full pay for appointments and treatments (as long as these are regarded as reasonable and do not exceed your entitlements). All we ask, in the case of appointments, is that you try and make these earlier or later in the day to minimise business impact and record these in Oracle for our records (have you updated records for this year?)*

2. *Limited toilet breaks.*

   *There are no restrictions in QMK on anyone for comfort breaks.*

3. *Moving the workstation close to the toilet.*

   *While you are not that far from the toilet, we have offered to move you closer but you have declined this.*

4. *Providing car parking space close to the entrance of work.*

   *You do not drive to work.*

5. *Adjusting performance targets to take into account the effect of sick leave or fatigue.*

   *You are measured against how you achieve your objectives whilst at work. Absence is not a part of our assessment criteria.*

6. *Offering shorter, different or flexible working hours.*

   *We have agreed that you can work 08:00 to 16:00 hours at your request. We recently clarified a misunderstanding that you had in relation to be entitled to two 15 minute breaks morning and afternoon. To confirm you are contracted to work seven hours a day with 60 minutes unpaid break usually taken as an hour at lunchtime. If you wish to finish earlier that 16:00 hours, please check with your manager first.*

   *We would be willing to consider your working shorter hours if this would benefit you, but this would of course impact on your take home salary.*

*7. Offering another place of work or the option to work from home.*

*Network Rail has a programme to close all its London offices so looking at a more local office is not a viable option.*

*As far as working from home is concerned. We have looked at this and whilst on a one-off basis (for instance to be able to available for a delivery) it can be sanctioned. The role you perform and the team you work with, along with requirement for supervision and support means this is not a viable option on an ad hoc basis and therefore cannot be made as a reasonable adjustment."*

47. Following the meeting, Mr Hindler sent a further email on 25 November 2013 concerning the bonus.

*"Ranjit*
*I didn't respond to one of your points as I wanted clarification.*

*5. Adjusting performance targets taking account of the effect of sick leave or fatigue.*

*You are measured against how you achieve your objectives whilst at work. Absence is not part of our assessment criteria. The question was about my bonus which is affected as my disability sickness is counted as part of all other sicknesses and the bonus is calculated as a whole and minus your absences which are on the leaflet obtained from NACC states this is classed as discrimination.*

*The bonus is a discretionary payment and the company decides how it is calculated. Everyone is treated the same on the basis of the calculation."*

48. The claimant replied as he was concerned that his bonus payments had taken into account his absences. Ian Hindler replied to the claimant by email dated 27 November 2013 providing him with the general Bonus Scheme 2013-2014 and that this covered all his questions.

49. The claimant replied to Ian Hindler by email dated 28 November 2013 quoting from the scheme rules:

*"If you are absent for 20 or more working days, your participation in the scheme will be maintained, however your bonus payment will be subject to deduction based on the total number of working days you have been absent for. Working days are calculated on the basis of a standard five day working week (dependent on the role this could include rostered weekend working but not rest days). If you are absent due to maternity, adoption or paternity or parental leave, the first 20 days will not form part of the deduction. If you are absent due to jury service, volunteer leave or territorial army leave this will not trigger an absence reduction."*

He then queried that "*As the majority of my absences are due to my disability, will this still apply as I am sure this contravenes under the Disability Discrimination Act?"*

50. Ian Hindler replied by email dated 28 November 2013 (the same day) to the claimant:

> *"Ranjit*
> *I am not sure how it would contravene the DDA as we are treating everyone equally and fairly but I have escalated to get a view from our advisers.*
> *Regards Ian."*

51. Ian Hinder emailed the claimant again later that day to tell him that he had been advised that we do not differentiate between causes of the absence outside what is described in the booklet.

52. On the 27 November 2013 the claimant emailed Ian Hindler with a copy to Nick Barrett requesting a meeting to discuss the BUPA recommendations and to understand the business objectives/limitations to adopting them. Ian Hindler replied by email dated 4 December 2013 stating that all recommendations BUPA made were considered but they have to be considered and balanced in line with business requirements. Following the last BUPA review, he had set out the reasonable adjustments made by the organisation and why they could not support the two options of working from London or from home when the claimant was unfit to travel. He could see little to be gained from another meeting to discuss the same recommendations. He offered to speak to the train company about guaranteeing a seat near the toilet when the claimant travelled to Milton Keynes.

53. The claimant replied to Nick Barrett on 4 December 2013, requesting that the matter be made formal as he did not see this as an acceptable response. The claimant was on leave until January thereafter and Nick Barrett suggested they discuss it on his return.

54. On the 13 January 2014 a consultation paper was produced which proposed a TUPE transfer of desktop packaging services. The claimant was the only employee affected in bands 5-8. The transfer was to an external provider. The claimant's evidence was that he was unhappy with the proposal and raised this with Nick Barrett. We accept that evidence. Other employees in lower bands were also affected so the claimant was not the only one being transferred.

55. On or around 20 January 2014 the claimant raised a grievance against Ian Hindler concerning failure to make reasonable adjustments, training courses and being subjected to excessive scrutiny in respect of his diet and breaks. He cited his disabilities as (ulcerative colitis and sleep apnoea) or his race as the issue. The respondent acknowledged the grievance by letter dated 28 January 2014. By letter dated 28 January 2014 the respondent invited the claimant to a grievance meeting on 5 February 2014 to discuss his grievance concerning race discrimination. The respondent made no reference to the disability related complaint. The respondent met with the claimant on 5 February 2014 to discuss his grievance. Joanne Duke heard the grievance on behalf of the respondent.

56. On 27 February 2014 the respondent confirmed by letter that the TUPE transfer proposal was no longer to go ahead. The respondent confirmed instead the claimant's role would relocate to Manchester due to the band 5 to 8 re-organisation within group business services with effect from 1 April 2014. The claimant was therefore put at risk of redundancy.

57. Joanne Duke met with the claimant again on 26 February 2014 to discuss his grievance. In the intervening period the respondent also interviewed Nick Barrett, Ian Hindler and Wendy Monaghan.

58. By letter dated 3 March 2014 the claimant received the outcome of his grievance from Joanne Duke. The grievance found no evidence of race or disability discrimination by Ian Hindler, no less favourable treatment, no harassment or victimisation and that reasonable adjustments had been made where possible and operationally viable. The grievance was not upheld but the respondent made a number of recommendations. These were:

- *Runjit to record all disability related sickness separately from other sicknesses now and in the future going forward.*
- *Line manager consider adjusting performance targets and manage workloads taking into account the effect of fatigue (if applicable).*
- *New practice manager put in place.*
- *Contact procedure put in place by line manager and new practice manager to maintain contact when Runjit is absent.*

At this point Karen Pettit was appointed the claimant's practice manager.

59. On 5 March 2014 the claimant appealed against the grievance outcome.

60. On 6 March 2014 the claimant attended a redundancy consultation meeting with Nick Barrett and Rakhi Jethwa. The meeting was to discuss redundancy options. The claimant expressed an interest in a role in Waterloo and relocation.

61. On 11 March 2014 Ian Hindler raised a grievance about the claimant and that he himself had been the subject of a grievance. The grievance was under the harassment policy against the claimant for his nefarious accusation against Ian Hindler of racial and disability discrimination. He requested an apology or if he was unwilling to do so disciplinary action should be considered.

62. By letter dated 18 March 2014 the claimant was invited to a grievance appeal meeting on 27 March 2014 to consider his grievance for race and disability discrimination.

63. Between 17 – 21 March 2014 the claimant was off sick. By letter dated 21 March 2014 the claimant was invited to a meeting to consider termination of his employment by reason of redundancy.

64. On 25 March 2014 the claimant returned to work and his redundancy notice meeting was held with Nick Barrett and Rakhi Jethwa. The claimant confirmed he wished to have redundancy and to not be progressed for the Waterloo role. The claimant was served with notice of redundancy in the meeting to take effect on 24 September 2014.

65. On 27 March 2014 the claimant met with Barry Chesterman to discuss his grievance appeal. Minutes of the meeting were taken.

66. By letter dated 17 April 2014 the claimant was invited to an investigatory meeting in respect of Ian Hindler's grievance. An identical letter was sent to Ian Hindler on 10 February 2014 when he was interviewed in respect of the claimant's grievance. The meeting took place on 25 April 2014. No action was taken against the claimant in respect of Ian Hindler's grievance. His grievance was not upheld and this was confirmed to Ian Hindler by letter dated 29 June 2014. We are not told of any appeal.

67. The claimant's notice of dismissal was confirmed in a letter dated 2 June 2014 which confirmed his termination date of 24 September 2014 and his exit arrangements. Also, on this date the respondent confirmed the outcome concerning the bonus payments and that for the financial year 2013-2014 no pro-rata'd deductions would be made for disability related absences but that the respondent was not prepared to make any retrospective payments to the claimant for earlier years.

68. During the claimant's notice period Andy Latta, Duncan Riddle and Wagner Cassilgoli were all band 5 but applied and were successful for band 4 roles. This was in effect a promotion. The claimant did not apply for any of the roles in question.

69. Rachelle Chippendale was based in Manchester and took another role in April 2014 at band 5. The claimant did not wish to relocate to Manchester. Chris Fordham who was already a band 4 and had been for almost 3 years secured another role this time at band 3.

70. During the notice period a further welfare meeting and occupational health referral were made. This was odd given the approaching termination date. On 24 September 2014 the claimant's notice expired whilst he was off sick. In fact, the claimant was off sick from 6 May 2014 until 22 December 2014 and did not return to work until 4th February 2015.

71. On 29 September 2014 the respondent received a BUPA report. The claimant's condition was continuing and he was unfit for work due to a chronic gastroenterital condition and symptoms of stress.

72. On 22 October 2014 (termination of employment having been on 24th September 2014) Nick Barrett called the claimant to inform him that the respondent was extending his notice period. This was confirmed by letter dated 31 October 2014. A national agreement between TSSA and RMT

had been reached in 2014 so that no compulsory redundancies in bands 5 - 8 would take place until 31 December 2014. The claimant's notice period was extended until 31 January 2015.

73. On 31 October 2014 the claimant emailed Nick Barrett and Rakhi Jethwa concerning the extended notice period and that he was unfit for work. He requested an update on Ian Hindler's grievance. By email dated 1 December 2014 Rakhi Jethwa replied confirming that the grievance was closed. The respondent offered to send vacancy lists to the claimant.

74. On 2 December 2014 the claimant confirmed he would like copies of vacancies as he no longer had access to the national rail systems. By email dated 2 December 2014 Rakhi Jethwa sent the band 5 vacancies for the London area and south east and asked the claimant to confirm if he wished to see other areas.

75. On 17 December 2014 Nick Barrett emailed Dan Lindsell asking if he had any band 5 vacancies. Dan Lindsell confirmed by return he had two system support assistant posts vacant and would send the job descriptions.

76. The claimant attended a return to work meeting on 7th January 2015 and the claimant told the respondent that he would look at voluntary redundancy or look for alternative roles. At a further meeting, on 20th January 2015, the claimant confirmed that he would look at other roles instead.

77. On 3 February 2015 the respondent wrote to the claimant retracting his notice of redundancy that he would remain at risk and would return to work and seek alternative employment in the interim. This confirmed the earlier discussions but there was a substantial delay in providing the written confirmation. During this period the claimant continued to be paid.

78. On 4 February 2015 the claimant returned to work, he joined Nick Barrett's team in Milton Keynes in a temporary role doing project work. Nick Barrett had given him two pieces of work to do, one relating to on-site merger and the second relating to Microsoft support role. From this point the claimant was permitted to work from home during a colitis flare up.

79. On 6 February 2015 the claimant emailed Nick Barrett to confirm he was interested in one of Dan Lindsell's roles as it "may be suitable depending on flexible working hours being suitable due to his disability".

80. On 2 March 2015 Dan Lindsell confirmed to Karen Pettit that Urvish did not feel that the claimant's skill set would suit his team but he was happy to allocate one of the vacant posts in performance analyst systems to the claimant. It is not clear what happened to this role as the claimant does not appear to have applied for it.

81. Also, on 2 March 2015 the claimant applied for the role of Senior IT Support Analyst. This was a band 4 role within the group based at Eversholt Street

in London so would have been a promotion for the claimant. The claimant's application was not progressed and Mark Daley was appointed.

82. We heard evidence from Mark Smith about the selection process. Four applications were received. One band 4 and three band 5 applicants including the claimant. The application was by CV only.

83. Mark Smith reviewed the CVs against the job description. One candidate stood out as being the best on paper, Mark Daley, who was subsequently appointed.

84. Mark Smith did not call the claimant to interview as he felt he had the least qualifications and commercial experience. Mark Smith's evidence was that he did not know about the claimant's attendance record and disability, and we accept that evidence. Mark Daley was better qualified for the role which the claimant accepted on cross examination.

85. On 14 April 2015 the claimant had adjustments made to his role so that he could work from home or in London three days a week and only work two days in Milton Keynes.

86. On 20 April 2015 the claimant complained about not getting the senior IT support analyst role and the lack of a permanent role. He said he was being discriminated against and victimised. The respondent did not treat this as a grievance but did look into the allegations and responded by email with a letter dated 22 April 2015 from Mark Smith to give feedback to the claimant on his application.

87. On 22 April 2015 the claimant said he was not happy with Mr Smith's written response. A series of emails were exchanged on 23 April 2015 to the 7 July 2015 concerning the process that had been followed in Mark Daley's appointment.

88. On 12 May 2015 the claimant met his new practice manager to discuss his future with the business and stated that working from home was helping with his condition. By this point an adjustment had been made.

89. Notwithstanding the above confirmation, on 20 July 2015 the claimant went off work and has remained off sick at the time of this hearing (2.5 years later) and at the time of the hearing he remained in employment. Before this and after his return to work, in March 2015 the claimant had two days off sick, a further 3 days in April 2015 and 9 days in June 2015. Of these only 2 were disability related and the other 12 days before he left work on 20th July 2015 were for non-disability related reasons.

90. On 1 June 2015 the claimant commenced ACAS early conciliation.

91. On 1 July 2015 the claimant received the ACAS early conciliation certificate.

92. On 31 July 2015 the claimant presented the claim which is the subject matter of these proceedings.

93. The parties provided details of the claimant's training record and those of his comparators for the Tribunal within the agreed bundle.

**Conclusions**

94. The tribunal's conclusions are as follows.

**Direct disability discrimination (s.13 of the Equality Act 2010).**

**Has the response subjected the claimant to the treatments referred to below?**

7.1 Dismissing him on 24 September 2014.

95. The claimant's employment came to an end on 24th September 2014 but on 22nd October 2014, the claimant was told that his notice period was extending to 31st January 2015. The claimant accepted this although he remained off sick, he continued to treat himself as employed by the respondent. He attended the return to work meetings in January 2015.

96. We have considered the legal position on the "vanishing dismissal" and the case law differs from the current facts in that it is in respect of an appeal and reinstatement. It is trite law that this extinguishes the dismissal but here there was no appeal.

97. We have in mind the EAT's suggestion in *London Probation Board v Kirkpatrick* that reinstatement nullified a dismissal and restored continuity. Further that the EAT considered that this point of general application represents what the lay members consider to be absolutely standard practice since the whole point of an internal appeal is to allow a bad/unfair decision to be put right.

98. Whilst there was no appeal we have considered that in effect the respondent was putting right a bad decision. There was a breach of the terms agreed by the union. Whilst we could well criticise the respondent for not only allowing this state of affairs to occur in the first place, or for it taking almost a month to realise its errors, the claimant was oblivious to the issue of the union agreement and his employment could have ended at that point with him being none the wiser.

99. We consider that he has in effect been reinstated. We consider this to be a question of fact for the tribunal to answer. He was regarded by the respondent as not having been dismissed, was paid during this period (as required given he was off work sick in any event) and all his employment rights were restored. The claimant considered himself to be an employee.

100. We have also considered whether the gap between 24th September 2014 and 22nd October 2014 is material but in effect the claimant treated himself as not having been dismissed thereafter. We therefore find that there was

no dismissal on 24th September 2014 as the dismissal was extinguished by the subsequent reinstatement.

7.2 Failing to offer him a permanent role on or before 4 February 2015 and continuing.

101. The claimant was offered roles. He declined the role at Waterloo. He was offered relocation to the Manchester office and did not wish to take it.

102. The claimant did not apply in the notice period for any of the roles, his comparators did. It is not correct to say that he was not offered a permanent role, he was offered the network DL role and also the role in Manchester.

103. We spent some time discussing the role in Dan Linsell's team as we were concerned by the comments Urvish made that the claimant's skill set did not suit his team and whether his absence was a factor in this view. However, a post was allocated to the claimant but he appears to not have applied for it.

104. We therefore find that the respondent did not fail to offer the claimant a permanent role as outlined.

7.3 Failing to appoint the claimant to the role of senior IT support analyst on or after 2 March 2015.

105. The respondent accepts that it did not appoint the claimant into the role as Mark Daley was so appointed.

7.4 Failing to address the claimant's concerns (sent 20 April 2015) adequately or at all in relation to the failure to appoint him to the role of senior IT support analyst.

106. This is in relation to the claimant's concerns about his application for the band 4 role given to Mark Daley instead. Rakhi Jethwa went to Mark Smith and asked questions and had those answered. She did however not treat it as a grievance in accordance with the respondent's grievance procedure.

107. The claimant did not label this email as a grievance on this occasion despite knowing the procedure for raising a grievance as he had previously done so against Ian Hindler. It is written in a different tone. It is clear however that the email is a grievance. The claimant is making an allegation of discrimination and victimisation. It most certainly should have been clear to the Senior HR Business Partner that it ought to have been treated as a grievance. It is a concern that she failed to recognise this or even if she was in doubt failed to ask the claimant if his complaint was intended to be a formal grievance.

108. The respondent did address some of the claimant's concerns. However, the respondent did not deal with the allegations of victimisation and discrimination. They did not follow grievance process between April and

July 2015. This prolonged the correspondence on the issue which took place in this period.

109. We therefore find that the respondent did fail to deal with the grievance adequately at the time. Rakhi Jethwa was in HR and ought to have known and dealt with it in accordance with the grievance procedure. She did send the grievance to the person against whom the claimant was complaining, and also took some steps to investigate it. There was no formal process and no formal response, which we consider to be inadequate.

7.5 Failing to provide additional supervisory guidance/support since 2011 and continuing

110. With regards to support, it is not clear to the Tribunal what additional supervisory guidance or support the claimant was looking for. The claimant's further and better particulars make reference to this being able to work from home, help and support to get him back to work and training, coaching and mentoring during the redeployment process. None of the respondent's employees received this additional support.

111. In 2015, the claimant told Karen Pettit that he was happy with the support he received.

112. The claimant submits that supervision was denied because the claimant was absent on sick leave. It is not entirely clear what he would require supervising with whilst he was on sick leave. It is clear he had a good working relationship with Nick Barrett when he was at work. There has been no evidence before us that others received the additional supervisory guidance or support and the claimant has failed to clearly set out and establish this head of claim.

113. However, in terms of support during sickness absence the respondent did conduct welfare meetings, it made numerous referrals to BUPA and occupational health. It requested medical reports from the GP and discussed reasonable adjustments. We therefore do not find that the respondent failed to provide additional supervisory guidance/support since 2011 and continuing.

7.6 Failing to provide training since 2011 and continuing.

114. The claimant was offered training whilst he was off sick by the respondent on its soft skills course. The claimant did not take this offer up. This would have been home led training that the claimant could have done whilst signed off work as and when he felt able.

115. Again, the claimant has not specified as to what training exactly he did not receive except referring to MOSS/SQL training courses. He did not receive any training since 2011, but there were no training courses that were essential to his role and the respondent did offer soft skills training online at

home. The claimant had to apply for training and this was not merely provided by the respondent. The claimant only applied for one such course.

116. It is correct that the claimant did not have the MOSS and SQL training. The respondent's evidence was that each training request made was considered on its merits and the claimant was only declined for one such request being too far away from home for the budget to permit it to be authorised and this was in or around 2013. This request was not for the MOSS/SQL training course. The claimant made no such request for this training specifically.

117. As such we do not find that the respondent failed to provide training since 2011 and continuing. The claimant made no such requests for training. The only training course he did apply for was declined for business reasons but he did not carry out the home led training on offer.

118. The claimant should have been proactive to request the training like other employees did. There was an obligation on him to do so as with all of the respondent's other employees so we cannot criticise the respondent for not providing the claimant with training when the claimant made no such requests.

<u>7.7 Failing to redeploy or offer permanent suitable alternative roles on 25 May 2014 and continuing.</u>

119. This has been dealt with above by reference to the permanent role but we are conscious that between 6 May 2014 and 20 December 2014 the claimant was off sick. We heard no evidence as to the suitable alternative employment that he ought to have been given (save for the role of Senior IT Support Analyst which is a separate head of claim). The claimant did not apply for any of those roles that his comparators did and as such they did receive alternative roles.

120. During this period the claimant was offered redeployment in Manchester which he declined although we accept that due to its geographical location it was not a suitable alternative role.

121. There was no obligation on the respondent to offer the claimant an alternative role. It was clear from the redundancy guidance provided to the claimant, that all employees had to apply for roles in the usual way.

122. Whilst Nick Barrett did make some enquiries of roles we have considered why these were not progressed. We have had regard to the fact that the claimant did not apply for the role specifically. We therefore do not uphold this element of the claim.

<u>7.8 Denying full bonus since 2010 and continuing because of failure to discount disability absences and/or failing to discount any performance impairment due to disability.</u>

123. It is clear from the table that the claimant did not receive his full bonus in 2010/2011, 2011/2012, or in 2012/2013. He did however receive his full

entitlement in the financial year 2013/2014. The financial year 2014/2015 ran from the 1 April 2014 to 31 March 2015. There was a large period of time when the claimant was either in his notice period or absent in excess of 20 days. The claimant was however not marked correctly for his absence during this period so received a full bonus in 2014/2015. The claim was submitted in July 2015 so the Tribunal is not being asked to determine matters beyond the financial year 2014/2015.

124. In 2013/2014 the respondent discounted disability related absence but they confirmed they would not go back in time. We therefore find that the respondent did deny the claimant full bonus in the financial years 2010/2011, 2011/2012 and 2012/2013.

125. The respondent's policy is clear that for absences in excess of 20 days the bonus is impacted. There has been no evidence before the Tribunal that the claimant did not perform or that any performance was impaired due to his disability. We therefore find that the claimant was denied his full bonus because of a failure to discount the disability absences. The difficulty is that this would have also happened in respect of his non-disability related absence as this absence was also high and over the 20 days per annum threshold.

126. However, in 2010/2011 there was a failure to pay a bonus due to the combination of disability related (12 days) and non-disability related absence (15 days). Had the respondent discounted the disability related absence the claimant would have got his full bonus. As such he did fail to receive his full bonus because of the disability related absence because the non-disability related absence was not in itself enough to preclude him being awarded full bonus.

127. In respect of 2011/12 and 2012/13 our findings show that he had 118 and 68 days of disability related absences respectively and this had an impact on his bonus as he was denied full bonus. In 2012/13 this would have been the case anyway even if the disability related absence had been discounted as he had 60 days non-disability related absence but in 2011/12 he was denied full bonus due to disability related absences and had these been discounted he would have had his full bonus.

128. In light of the above we find that the relevant financial years in which the claimant was denied full bonus because of a failure to discount disability related absences were 2010/11 and 2011/12.

**Has the respondent treated the claimant less favourably than it would treat comparators?**

129. There must be no material difference between the circumstances of the claimant and his comparators. The claimant relies on the following comparators – Chris Fordham, Duncan Riddle, Andy Latta and Wagner Cassilgoli. These comparators are only relevant in so far as they are in comparable circumstances ie band 5.

130. Chris Fordham was a band 4 and had been for almost three years so we do not consider him to be a comparator. The others named could be comparators so we concluded that these would need to be examined on a case by case basis.

131. Duncan Riddle and Wagner Cassilgoli were both band 5's until July 2014 when they became a band 4 and thus the claimant was not in materially different circumstances until then. Similarly, Andy Latta was only a band 5 until May 2014 when he was promoted.

Allegation 7.1 - dismissing the claimant on 24 September 2014.

132. We have of course found that there was no dismissal in law as alleged under this allegation. For completeness we have nevertheless dealt with the comparators relied upon here. Chris Fordham was materially different to the claimant and is not a comparator.

133. Turning now to Duncan Riddle, Andy Latta and Wagner Cassilgoli. At the relevant time none of these employees were comparators with the claimant. At 24th September 2014, they were all band 4's and as such the claimant cannot use them as comparators for this allegation.

134. The claimant also relied on Rachelle Chippendale who was based in Manchester. She was never at risk of redundancy as she was based in Manchester so we consider that the claimant and Rachelle Chippendale have material differences. She is based at a different location and cannot be a comparator. Even if we discounted this we would be bound to say that the less favourable treatment was not because of protected characteristics (she herself is disabled in any event) but because she is in Manchester and thus was not at risk of redundancy from the decision to transfer the work from Milton Keynes to Manchester.

135. The claimant also relies on the hypothetical comparator in respect of this allegation. As such we have gone onto consider below whether the difference in treatment (even if we had found any such difference) was because of the protected characteristic namely disability.

Allegation 7.2 – failing to offer him a permanent role on or before 4 February 2015 and continuing.

136. We have of course found that there was no treatment as alleged under this allegation. For completeness we have nevertheless dealt with the comparators relied upon here. Chris Fordham was materially different to the claimant and is not a comparator.

137. Turning now to Duncan Riddle, Andy Latta and Wagner Cassilgoli. At the relevant time none of these employees were comparators with the claimant. At 4th February 2015, they were all band 4's and as such the claimant cannot use them as comparators for this allegation.

138. The claimant also relied on Rachelle Chippendale who was based in Manchester. She was never at risk of redundancy as she was based in Manchester so we consider that the claimant and Rachelle Chippendale have material differences. She is based at a different location and cannot be a comparator. Even if we discounted this we would be bound to say that the less favourable treatment was not because of protected characteristics (she herself is disabled in any event) but because she is in Manchester and thus was not at risk of redundancy from the decision to transfer the work from Milton Keynes to Manchester.

139. The claimant relies on Mark Daley but he was a band 4 and therefore not a comparator and materially different from the claimant.

140. The claimant also relies on the hypothetical comparator in respect of this allegation. However, it is quite clear from the facts of this case that the claimant was offered permanent roles and as such we have not gone onto consider below whether the difference in treatment (even if we had found any such difference) was because of the protected characteristic namely disability as in essence there is little factual dispute between the parties on this, the evidence is clear.

Allegation 7.3 – failing to appoint the claimant to the role of senior IT Support Analyst on or after 2 March 2015

141. The claimant relies on a number of comparators for this allegation. Rachelle Chippendale, Mark Daley and the hypothetical comparator.

142. We have already dealt with Rachelle Chippendale and Mark Daley above in that we do not consider them to be comparators as there are material differences between the claimant and these comparators. Most notably of course in this allegation that Rachelle Chippendale did not apply for the role so this is an additional material difference between her and the claimant aside from those referred to above. As the claimant relies on the hypothetical comparator we have considered the next stage below.

Allegation 7.4 – Failing to address the claimant's concerns (sent 20 April 2015) adequately or at all relating to the failure to appoint him to the role of Senior IT Support Analyst

143. The claimant relies on Rachelle Chippendale and the hypothetical comparator in respect of this allegation. As stated above we do not find that Rachelle Chippendale is a comparator due to the material differences between her and the claimant.

144. We have found that the treatment did occur and the claimant relies on the hypothetical comparator so we have considered the next stage below.

Allegation 7.5 – failing to provide additional supervisory guidance/support since 2011 and continuing

145. We do not find that the respondent has failed to provide additional guidance/support since 2011 and continuing. Without this head of claim being properly particularised it is difficult to apply the material differences test to the comparators. The claimant relies on Chris Fordham, Duncan Riddle, Andy Latta and Wagner Cassilgoli as comparators. He also relied on Rachelle Chippendale and the hypothetical comparator. Had the claim been particularised we would be bound to say that none of the named comparators are materially the same as the claimant for the reasons already given but note that the claimant could have relied on the hypothetical comparator in this regard.

Allegation 7.6 – failing to provide training since 2011 and continuing

146. As set out above, we do not find that the respondent failed to provide training as alleged in any event. For completeness, we have had regard to the table of training produced for the bundle. We make the same comments about comparators and their material differences as before. Notwithstanding that he is not a comparator, Chris Fordham had no training post 2011 and so the claimant has not been less favourably treated than Chris Fordham in any event. Duncan Riddle, Andy Latta and Wagner Cassilgoli did have some training between 2011 and 2014 when they were no longer comparators. None of them had the MOSS or SQL training upon which the claimant relies.

147. The claimant also relies on Jon Bates in respect of the MOSS training and Reubina Kadari in respect of the SQL training. Joss Bates is in a different band to the claimant and in a different role. He is therefore not a comparator within the meaning of Act. Reubina Kadari is in a senior role to the claimant and there is no evidence that she carried out any such training. Again, she is not a comparator within the meaning of the Act.

148. As such this allegation has not been considered further even with the hypothetical comparator.

Allegation 7.7 – failing to redeploy or offer permanent suitable roles on 25 May 2014 and continuing.

149. As set out above the comparators applied for roles and that is a material difference between them. The claimant made no such applications.

Allegation 7.8 - Denying full bonus since 2010 and continuing

150. This is said to be because of the failure to discount disability absences and/or failing to discount any performance impairment due to disability.

151. The tribunal had no evidence as to the bonuses of the comparators or indeed their sickness records to make an accurate comparison. We therefore have no evidence to suggest that the claimant has been less favourably treated as a result than any of the named comparators upon

which he relies namely Chris Fordham, Duncan Riddle, Andy Latta, Wagner Cassilgoli and Rachel Chippendale.

152. With regard to Rachelle Chippendale at 8.2 – she was based in Manchester carrying out a different role, although she was a band 5. She also had a different disability, it is therefore not correct to say that she is a comparator as there are other material differences between her and the claimant other than the claimant's protected characteristic.

153. It is quite possible that some of the named comparators within the period 2010/11 and 2011/12 were comparators as the difference in bands did not exist but we have no bonus data to compare for these individuals. We instead consider the next step using the hypothetical comparator.

**If so, was there a difference in treatment because of the protected characteristic, namely the claimant's considered disability?**

Allegation 7.1 – dismissing the claimant on 24 September 2014

154. Notwithstanding that we have found that the treatment did not occur, we have gone onto consider the position between the claimant and his named comparators. None are valid comparators for this heading but even if they were, none of the others were at risk and dismissed at the relevant time.

155. If the dismissal was because of the claimant's disability we do not consider that the respondent would have voluntarily reinstated him in circumstances where the claimant had not complained and not appealed, if they had dismissed him because of his disability. He had had the disability for a number of years and not been recently diagnosed with it, equally the respondent did offer him alternative employment which again is contrary to the suggestion that the respondent wanted to dismiss the claimant because of his disability.

156. As we have set out above the respondent should not have dismissed the claimant as this was contrary to the agreement with the unions. The way this was handled was poor, with the time elapsing before it was noted and then taking some time to set out the error in writing. The fact it happened at all suggests that one part of the organisation does not know what the other is doing and is disorganised with poor communication skills. Notwithstanding this we do not find that this conduct was because of the claimant's disability but rather inept management.

157. It therefore follows that if our decision had differed on this, contrary to our conclusions that there was no dismissal and no named comparator, we would not have found the difference in treatment to be because of the claimant's protected characteristic namely disability.

Allegation 7.2 Failing to offer the claimant a permanent role on or before 4 February 2015 and continuing.

158. We have not found that the respondent failed to offer the claimant a permanent role on or before 4th February 2015 and continuing so we do not need to consider this further.

Allegation 7.3 - Failing to appoint the claimant to the role of senior IT support analyst on or before 2 March 2015.

159. Mark Smith's evidence was that he was not aware that the claimant had a disability. Mark Daley was better qualified for the role. The claimant accepted this in cross examination.

160. We have accepted Mark Smith's evidence that he had no knowledge that the claimant was disabled or his poor attendance record. He based his decision on paper. There is no reason to conclude that he knew Ian Hindler or anybody else in connection with the business as Mark Smith was in a separate area of the business, a separate legal entity connected with the respondent.

161. Whilst it is clear that the claimant did not get appointed we do not find that the difference in treatment to be because of the claimant's protected characteristic namely disability but because Mark Daley was a better candidate for the role, he was quite simply better qualified which the claimant accepted before us.

Allegation 7.4 - Failure to address the claimant's concerns (sent 20 April 2015) adequately or at all relating to failure to appoint him to the role of senior IT support analyst.

162. We have found that the respondent did not handle this matter appropriately. We do not consider that this was because of the claimant's disability. We have considered the thought processes of the decision maker. She made some efforts but there was a whole scale failure to realise the severity of the allegation and follow process. Given the claimant had previously used the grievance process and he was disabled, we would have expected Rakhi Jethwa to have recognised that this was a grievance. She should have appreciated that. The claimant was clearly aggrieved. However, it is not a case that she ignored the grievance altogether, she did make some attempts to provide feedback which whilst not impressive over a prolonged period it cannot be said she did nothing.

163. We do not however find that this was because of the claimant's disability but merely a lack of the understanding of the claimant's concerns and a failure to recognise the matter as a grievance despite her HR background. One could certainly criticise the respondent in this regard but we do not believe that the treatment was because of the claimant's protected characteristic namely disability. We do not consider her failures to be because of any disability but a training need. We believe that she would have failed to spot an email complaining about anything in this manner as a grievance and her treatment of it was not because of the claimant's disability. The claimant did not refer to a grievance and whilst it should have done so given her role, it

put simply did not cross her mind that it was a grievance but merely someone asking for feedback from an unsuccessful application.

Allegation 7.5 – Failing to provide additional supervisory guidance/support since 2011 and continuing

164. We have not found that the respondent failed to provide additional supervisory guidance/support so need not consider this further.

Allegation 7.6 - Failure to provide training since 2011 and continuing

165. We did not consider that the respondent had failed to provide training since 2011 and continuing so we need not consider this further.

Allegation 7.7 - Failure to provide or offer permanent or suitable alternative roles on 25 May 2014 and continuing

166. We have not found that the respondent failed to offer the claimant a permanent role on or before 4th February 2015 and continuing so need not consider this further.

Allegation 7.8 - Denying full bonus since 2010 and continuing because of failure to discount disability absences and/or failing to discount any performance impairment due to disability.

167. We do not find that this was because of the claimant's disability. We have found that the Respondent failed to discount disability related absences for 2010/11 and 2011/12 which denied the Claimant a full bonus.

168. However, we do not find that this was because of his disability but was because of his absence and thus ought to be dealt with under the s15 complaint properly which we have dealt with below. As we have set out above the failure to pay the full bonus in 2012/13 was because of absence that was non-disability related and as such he would have failed to be paid full bonus for both those years even if he had no disability due to his high non-disability related absence.

**Disability discrimination arising from disability, s.15 of the Equality Act 2010.**

**Did the respondent treat the claimant unfavourably, in the ways alleged at 7.1 – 7.8 above?**

Allegation 7.1 Dismissing him on 24 September 2014.

169. For the reasons set out in the section 13 complaint we therefore find that there was no dismissal on 24th September 2014 as the dismissal was extinguished by the subsequent reinstatement.

Allegation 7.2 Failing to offer him a permanent role on or before 4 February 2015 and continuing.

170. For the reasons set out in the section 13 complaint we therefore find that the respondent did not fail to offer the claimant a permanent role as outlined.

Allegation 7.3 Failing to appoint the claimant to the role of senior IT support analyst on or after 2 March 2015.

171. The respondent accepts that it did not appoint the claimant into the role as Mark Daley was so appointed.

Allegation 7.4 Failing to address the claimant's concerns (sent 20 April 2015) adequately or at all in relation to the failure to appoint him to the role of senior IT support analyst.

172. For the reasons set out in the section 13 complaint we therefore find that the respondent did fail to deal with the grievance adequately at the time. Rakhi Jethwa was in HR and ought to have known and dealt with it in accordance with the grievance procedure. She did send the grievance to the person against whom the claimant was complaining, and also took some steps to investigate it. There was no formal process and no formal response, which we consider to be inadequate.

Allegation 7.5 Failing to provide additional supervisory guidance/support since 2011 and continuing

173. For the reasons set out in the section 13 complaint we therefore do not find that the respondent failed to provide additional supervisory guidance support since 2011 and continuing.

Allegation 7.6 Failing to provide training since 2011 and continuing.

174. For the reasons set out in the section 13 complaint we do not find that the respondent failed to provide training since 2011 and continuing. The claimant made no such requests for training. The only training course he did apply for was declined for business reasons but he did not carry out the home led training on offer.

Allegation 7.7 Failing to redeploy or offer permanent suitable alternative roles on 25 May 2014 and continuing.

175. For the reasons set out in the section 13 complaint we do not find that the respondent failed to redeploy or offer permanent suitable roles on 25 May 2014 and continuing.

Allegation 7.8 Denying full bonus since 2010 and continuing because of failure to discount disability absences and/or failing to discount any performance impairment due to disability.

176. For the reasons set out in the section 13 complaint we therefore find that the respondent did not pay the claimant his full bonus due to disability related absence in 2010/11 and 2011/12.

**If so, was this because of a reason arising in consequence of the claimant's disability, namely his need to take time off work and/or work from home?**

Allegation 7.1 Dismissing him on 24 September 2014.

177. Even if we had found that the claimant was dismissed on 24 September 2014 we would not have found that this was because of a reason arising in consequence of the claimant's disability, namely his need to take time off work and/or work from home.

178. We would have found as a matter of fact that his dismissal was by reason of redundancy and that the claimant did not want any of the other roles which we do not consider in the case of the Manchester role to be suitable alternative employment. It therefore follows that the dismissal would have been for this reason not for a reason arising in consequence of his disability.

Allegation 7.2 Failing to offer him a permanent role on or before 4 February 2015 and continuing.

179. For the reasons set out above we do not find that the respondent failed to offer the claimant a permanent role as outlined so have not gone on further to consider the reasons why.

Allegation 7.3 Failing to appoint the claimant to the role of senior IT support analyst on or after 2 March 2015.

180. The respondent accepts that it did not appoint the claimant into the role as Mark Daley was so appointed. We do not consider that this was because of a reason arising in consequence of the claimant's disability either namely his need to take time off work and/or work from home.

181. For the same reasons as set out above in the direct discrimination complaint we believe that the failure to appoint the claimant to the role of senior IT support analyst was because he was not the better qualified person for the role which he accepted in cross examination. We accepted the evidence of Mark Smith that he was unaware of the claimant's disability and the consequences for it.

Allegation 7.4 Failing to address the claimant's concerns (sent 20 April 2015) adequately or at all in relation to the failure to appoint him to the role of senior IT support analyst.

182. For the reasons set out in the section 13 complaint we therefore find that the respondent did fail to deal with the grievance adequately at the time.

Rakhi Jethwa was in HR and ought to have known and dealt with it in accordance with the grievance procedure. She did send the grievance to the person against whom the claimant was complaining, and also took some steps to investigate it. There was no formal process and no formal response, which we consider to be inadequate.

183. We do not consider that this was because of the claimant's need to take time off work for disability related illness or because of his need to work from home. Whilst he was absent for some of that period the inadequate handling of this by the respondent was not for disability related reasons but merely a lack of the understanding of the claimant's concerns and a failure to recognise the matter as a grievance despite her HR background. Rather it is a training need. We believe that she would have treated any such complaint in this way as set out above and the claimant's sickness absence or need to work from home were immaterial to this.

Allegation 7.5 Failing to provide additional supervisory guidance/support since 2011 and continuing

184. For the reasons set out above we do not find that the respondent failed to provide additional supervisory guidance/support since 2011 and continuing so have not gone on further to consider the reasons why.

Allegation 7.6 Failing to provide training since 2011 and continuing.

185. For the reasons set out above we do not find that the respondent failed to provide training since 2011 and continuing but we were troubled by a comment Nick Barrett made in the grievance investigation.

186. The facts in this matter occupied the panel for some time. We are however troubled by Nick Barrett's comments that the lack of training opportunities was not down to race discrimination but because the claimant was hardly in the office. This could be said to be due to his need to take time off work or work from home. That said, the claimant was provided with skill soft and did not take this up. There was no training that was essential for his role and the claimant made no requests. In the circumstances, we find that had the claimant made those requests and they had been refused then we would have upheld his claim here, however as the claimant made no such requests we do not find that the lack of training is down to the claimant's absence for disability related reasons rather his failure to carry out the training on offer or make a request for it.

Allegation 7.7 Failing to redeploy or offer permanent suitable alternative roles on 25 May 2014 and continuing.

187. For the reasons set out above we do not find that the respondent failed to redeploy or offer permanent suitable alternative roles on 25 May 2014 and continuing so have not gone on further to consider the reasons why.

Allegation 7.8 Denying full bonus since 2010 and continuing because of failure to discount disability absences and/or failing to discount any performance impairment due to disability.

188. For the reasons set out above we therefore find that the respondent did deny the claimant his full bonus due to disability related absence (the something in consequence of his disability) in 2010/11 and 2011/12 only as his non-disability related absences in other years would have precluded him from getting the full bonus and this was corrected in more recent years.

**If so, has the respondent shown that each treatment was or is in proportionate means of achieving a legitimate aim?**

The respondent relies on the legitimate aim for the bonus as requiring a certain level of attendance to be eligible for the bonus.

189. We do not consider this to be a proportionate means of achieving a legitimate aim. Whilst a bonus scheme can award attendance and incentivise employees to perform well and attend work it should not treat the claimant unfavourably as a consequence of his disability. It is proportionate to factor attendance in the bonus for non-disability related absence but not for disability. There are other ways the respondent could have achieved the aim without discrimination.

190. We have considered the additional submissions from both parties on the *Hoyland* case that the tribunal highlighted to the parties and in particular the case of *Chief Constable of West Yorkshire Police and anor v Homer [2012] ICR 704*. To be proportionate, a measure has to be an appropriate means of achieving a legitimate aim and reasonable necessary to do so. In this case we consider that the measure may be appropriate to achieving the aim but go further than is reasonably necessary and it is therefore disproportionate.

191. The respondent clearly agreed that this was not a legitimate aim as it agreed to discount the disability related absences for 2013/2014 and award the claimant a full bonus in that year once the claimant highlighted this. We heard no further evidence to support the justification point from the respondent so will need to consider whether it is just and equitable to extend time in relation to this complaint below.

**Failure to make reasonable adjustments, s.20-21 of the Equality Act 2010**.

**Did the respondent apply to the claimant a provision, criterion or practice (PCP)? The claimant relies on the following PCP's.**

PCP 14.1 Requiring the claimant to maintain a certain level of attendance at work so as not to be subject to the risk of redundancy.

192. We do not consider that the respondent has such a PCP. There was no practice and we heard no evidence that attendance was a criterion. During the reorganisation the whole of the team in which the claimant was relocated to Manchester. This included the claimant but attendance was not a criterion that factored in any way into this decision. All those based within the relevant team and band were relocated from Milton Keynes to Manchester and were placed at risk, attendance was irrelevant.

PCP 14.2 Requiring the claimant to maintain a certain level of attendance at work so as to be eligible for promotion, training, support and redeployment.

193. We do not accept that attendance was a factor in any eligibility for promotion, support or redeployment.

194. In this regard we rely on the findings above but in summary in respect of the promotion, the only role identified as a promotion that the claimant applied for is the senior IT support analyst role which as we have dealt with above we accept as the claimant did that Mark Daley was the better qualified for the role and further that the decision maker had no knowledge of the claimant's attendance record or disability. It therefore follows that there was no requirement to maintain a certain level of attendance at work in this regard.

195. With regard to the support this part of the claimant's case is not well particularised and is dealt with already in respect of 7.5 above. Aside from being unclear there was no PCP that the claimant had to maintain a certain level of attendance at work to be eligible for support and we have already set out above that whilst the claimant was off sick he was in fact well supported with OH referrals.

196. With regard to the redeployment we have considered above when looking at allegations 7.2 and 7.7 above that the claimant did not apply for roles which would have seen him redeployed. There is no evidence to support the claimant's assertion that there was a PCP which required him to maintain a certain level of attendance to be eligible for redeployment. He was offered redeployment to Manchester. It was not suitable and attendance at work was irrelevant to this position. We have considered again here the comments by Urvish which we examined in more detail as set out above but again there is no evidence to support the suggestion that attendance was a factor here.

197. Turning finally to training which took us longer to discuss. As set out above there was evidence from Nick Barrett that the lack of training was not racially motivated but if any thing to do with the amount of time off the claimant had. The difficulty here for the claimant is that he failed to carry out the training he was offered and did not apply for any training. Had he done so and this had been refused (other than on the cost/benefit analysis of one course which we accepted as a rationale having heard the evidence on this) then we would have felt that the respondent did have such a practice given Nick Barrett's comments.

PCP 14.3 Requiring the claimant to carry out his substantive post at fixed work location only.

198. The respondent did have such a practice. There is evidence that the respondent felt that the claimant could not work from home when he had a flare up and that "the claimant's role did not support working from home." As explained by Ian Hindler in the 8th January 2013 meeting. Some exceptions to the rule were made on adhoc occasions when the claimant had to attend medical appointments. However, this was further explained in Ian Hindler's email to the claimant on 18 November 2013.

199. The claimant returned to work on 4th February 2015 and from that point was not carrying out his substantive role and permitted to work from home during flare ups and further from 14th April 2015 had adjustments made to his place of work so he could work three days a week from home or a London office.

200. The respondent submits that some employees were permitted to work from home on occasions following a flexible working request or reasonable adjustment. This supports the fact such a practice did exist as if there was no requirement to carry out the substantive post at a fixed work location only, an exception would not have been required otherwise. We have therefore gone onto consider whether this PCP placed the claimant at a substantial disadvantage below.

PCP 14.4 Not allowing the claimant to work reduced or flexible hours in the substantive post.

201. We accept the respondent's submission that this is not capable of being a PCP. It is not a neutral practice and is instead something that could be an adjustment if the PCP was that the claimant was required to work full time hours. This is not how the case was brought but in any event is puzzling as it is quite clear from the evidence that the respondent did make this offer.

202. In the meeting on 4th October 2013 the claimant confirmed that this had been offered but that when he had a flare up it was for the whole of the day so flexible start times were not a help. Further on 18th November 2013 the claimant was offered a shorter day but he did not take the respondent up on this offer. We therefore do not accept that the respondent had a practice or a criterion/provision that it would not allow the claimant to work reduced or flexible hours in the substantive post. This was offered and declined by the claimant.

PCP 14.5 Not allowing the claimant to have access to disabled toilets at work and at train stations.

203. Again, this is not a PCP, it is not a neutral practice but more a reasonable adjustment. Even if the claimant's case had been correctly pleaded on this point, dealing first with the access to disabled toilet at work. The claimant was relocated close to a toilet and raised an issue that in his welfare meeting on 4 October 2013 the disabled toilet had been out of order. This was said to be working now but the claimant confirmed in this meeting he had such

access (he noted there was an issue and it had been rectified so must have had such access) and also confirmed he was near a toilet. We therefore do not accept that the respondent had a provision criterion or practice that the claimant was not allowed access to disabled toilets at work. He was clearly having such access in 2013 and had been located near a toilet already and declined a move closer to the toilet which was confirmed in the email dated 18th November 2013.

204. Turning now to the issue of toilets at train stations, this is not something the respondent could have as a provision criteria or practice as it was not the respondent's premises or the claimant's place of work. It had no power to make such an adjustment and we have already set out that this is not a PCP in any event. The respondent also offered first class travel to be near a toilet which was not taken up.

PCP 14.6 Requiring the claimant to maintain a certain level of attendance to be eligible for a bonus.

205. The way this has been pleaded is with regards to the eligibility of the bonus. The claimant was eligible at all times for a bonus. Absence impacted on the amount of the bonus payment but the eligibility was maintained. We therefore cannot find that it was a PCP that the claimant had to maintain a certain level of attendance to be eligible for a bonus. Had the case been brought on the basis not of eligibility but payment of full bonus we would have made the same findings in respect of the 2010/11 and 2011/12 bonus year only but that is not how the case has been brought.

PCP 14.7 arrangements for sick pay

206. We accept the respondent's submission on this point that this claim has not been particularised por advanced by the claimant. Even if it had been then we would have heard no evidence as to the substantial disadvantage suffered by the claimant because of the PCP and further it is trite law following *O'Hanlon v Commissioners for Revenue and Customs [2007] IRLR 404* that the requirement to pay full sick pay (if indeed this was the claim the claimant intended to bring) is not a reasonable adjustment.

**Did the application of such PCP put the claimant to a substantial disadvantage in comparison to a non-disabled person because of his disability and/or attendance record?**

207. We have only found that the respondent operated one PCP out of the 7 advanced and this was the requirement to carry out his substantive post at a fixed work location only. Where no relevant PCP has been identified there is no duty to make reasonable adjustments. The claimant relies on 9 ways the claimant was disadvantaged at 15.1 to 15.9 of the list of issues. We consider that against this PCP the only relevant one was that the claimant was denied flexible work in his substantive post e.g working from home and/or working from home during a colitis flare up.

208. For the avoidance of doubt, we do not consider the other disadvantages at 15.1-15.9 to result from the application of the PCP we have found.

209. Again, with substantial disadvantage, this is a matter which has occupied the panel's time considerably. We have considered whether the claimant was put at substantial disadvantage by the operation of the PCP. We accept that the case of *Noor v Foreign and Commonwealth Office [2011] ICR 695* says that the law is not that the adjustment will only be reasonable if it is completely effective. Quite often a Tribunal has to contend with a situation where the adjustment has never been made and it is looking at the hypothetical. We were more fortunate in that there was a period of 6 months from February 2015 where the adjustments were put in place and we can see if they had any effect.

210. The difficulty with the claimant's case is that when he was offered this flexibility which was in place from February 2015 his attendance did not improve significantly and in fact deteriorated. He had been unable to maintain his attendance, and in fact his sickness attendance record has got worse. As such, it is hard to see how the claimant can maintain a case of substantial disadvantage when having had the adjustments his attendance has remained poor. Between February 2015 and July 2015, he had 14 days off sick even when the adjustments were made and 12 of those were for non-disability related reasons. Clearly when the claimant brought this case he anticipated that more than one of his conditions would be a disability but even when he was given the flexibility he had 14 days off in less than six months. His absence for non-disability related absence for the financial years 2008-9 to 2013-2014 was higher than his disability related absence. We can say that the adjustment was not effective in allowing him to maintain his attendance as a reality rather than the hypothetical. It does not have to be completely effective but here we can see it did not work. The claimant's longest period of absence came when the adjustment was actually in place. We do not have to deal with the chance as much of the case law but we can see the reality and that the adjustment did not have the positive effect.

211. We have also considered whether the claimant could have worked from home during this period. He had the chance to undertake training and never took this opportunity either during the 272 days of disability related absence or the 303 non-disability related absence over this period. This was not progressed by the claimant whilst off sick and as such we have no evidence that he was capable of working from home.

212. We also note that the claimant was signed off by the GP often for long periods of time which are inconsistent with a flare up which we are told in the medical evidence of the OH report in November 2011 that with prompt treatment he should be able to return to work during seven days. The claimant has a history of a few short periods off sick but periods of absence that are far greater and given the mix of disability and non-disability related absences it is hard for us to say with any certainty that he was substantially disadvantaged by the PCP as this only relates to his disability and would not have assisted with the larger amounts of time off which are non-disability

related. The claimant's evidence was that he was too unwell to work in September – December 2012.

**If so, did the respondent take such steps as are reasonable to avoid the disadvantage?**

213. The claimant relies on 6 reasonable adjustments but the only relevant one given the PCP identified is that of 16.3 in the list of issues allowing the claimant to work flexibly from home and the office during a colitis flare up.

214. We are conscious of the fact that a duty to make reasonable adjustments only arises where the adjustment would have avoided the disadvantage complained of *Higgins v Secretary of State for Work and Pensions (Job centre plus) [2014] ICR 341.* Given our comments above as to substantial disadvantage we are not persuaded that the adjustment sought would have avoided the disadvantage claimed. Had we seen that the claimant's attendance improved drastically after the adjustment was implemented we may have been persuaded as to the benefit of making the adjustment which given the sole disability we are dealing with her is absent in this case.

215. In light of the above conclusions under s20-s21 we find that the duty to make reasonable adjustments falls away as set out in *HM Prison Service v Johnson* as the claimant was too unwell to work.

216. Even if we had felt that the respondent had failed to make reasonable adjustments for this PCP this claim would have been out of time as the claimant accepts that the adjustment was made by 4th February 2015 and as such any claim had to be brought by 3rd May 2015. The claimant did not start ACAS early conciliation until 1st June 2015 and then present a claim until 31st July 2015.

217. There is a further argument raised by the respondent that as the claimant was last at work 6th May 2014 this is the date from which the claim ought to be brought. We do not accept that as during the period at least in part the claimant was off work signed off so the failure to make reasonable adjustments continued until he returned and they were made. We have instead used the 4th February 2015 as the date the failure to make reasonable adjustments ended and the claim is still out of time. For completeness we have considered below whether it is just and equitable to extend time in this regard.

**<u>Victimisation, s.27 of the Equality Act 2010</u>**

**Has the claimant performed a protected act within the meaning of s.27(2)(d) of the Equality Act 2010? The claimant relies on the grievance dated January 2014 and/or the claimant's email dated 20 April 2015.**

218. We accept that the claimant has raised a grievance and therefore then a protected act within the meaning of Equality Act 2010. The earliest of these dates was the January 2014 grievance.

**Did the respondent carry out any of the treatments set out below because the claimant has done a protected act?**

Detriment 20.1 Dismissal on 24 September 2014.

219. We rely on our earlier conclusions in respect of allegation 7.1 under this detriment. We do not find as a matter of law that the claimant was dismissed on 24th September 2014 as his reinstatement extinguished for all the reasons we have already set out related to allegation 7.1.

220. Even if we did consider the claimant had been subject to a detriment here by being dismissed we would not have felt that this was because he had done a protected act. It was because his role was redundant and he did not wish to take the alternative roles which were not suitable alternative employment.

Detriment 20.2 Failure to offer a permanent role on or before 4 February 2015 and continuing.

221. We rely on our earlier conclusions in respect of allegation 7.2 under this detriment. We do not find that the respondent failed to offer the claimant a permanent role on or before 4th February 2015 and continuing for all the reasons we have already set out related to allegation 7.2. Roles were available but the claimant did not apply for them and there was no obligation to offer a role without an application.

Detriment 20.3 Failure to appoint to role of senior IT support analyst on or after 2 March 2015.

222. We rely on our earlier conclusions in respect of allegation 7.3 under this detriment. Whilst this detriment did occur, we do not find that the respondent failed to appoint the claimant to the role of senior IT support analyst on or after 2nd March 2015 because the claimant had done a protected act but instead for the reasons we have already set out related to allegation 7.3. Mark Daley was more qualified for the role as the claimant accepted.

Detriment 20.4 Failure to address the claimant's concerns adequately or at all relating to the failure to appoint him to the role of senior IT support analyst.

223. We rely on our earlier conclusions in respect of allegation 7.4 under this detriment. Whilst this detriment did occur, we do not find that the respondent failed to address the claimant's concerns adequately or at all relating to the failure to appoint him to the role of senior IT support analyst because the claimant had done a protected act but instead for the reasons we have already set out related to allegation 7.4. There was a failure to recognise that the claimant was raising a grievance which was a training issue not because he had already done so.

Detriment 20.5 Failing to redeploy or offer suitable alternative employment since 25 March 2014 and continuing.

224. We rely on our earlier conclusions in respect of allegation 7.7 under this detriment. We do not find that the respondent failed to offer the claimant redeployment or suitable alternative employment since 25 March 2014 and continuing for all the reasons we have already set out related to allegation 7.7. Roles were available but the claimant did not apply for them and there was no obligation to offer a role without an application.

**Jurisdiction – Time under s123A Equality Act 2010**

225. Having reached factual conclusions, the only claim the claimant succeeds with is the s15 Discrimination arising from disability complaint in respect of the bonus for 2010/11 and 2011/12 financial years. Disability related absence was discounted in the financial year 2013/2014 and the claimant received a full bonus for 2014/15 as the claimant's absence was not recorded correctly by Nick Barrett.

226. The claimant knew that the respondent would not look at previous years in June 2014. This was then the practice of discrimination arising from disability in respect of the bonus ended. Even if we take this as the latest date the cause of action took effect the claim is out of time. It would have needed to be brought by 1st September 2014 but the claimant did not start ACAS early conciliation until 1st June 2015 and then present a claim until 31st July 2015.The claim by that time was 9 months out of time.

227. The onus is on the claimant to establish that it is just and equitable to extend time but he has not provided us with any evidence as to why a claim was not brought in 2014 or why there was the delay. The claimant's position is that all claims are in time which cannot be right. He has provided us with no evidence as to the reasons for the delay.

228. So, we bear in mind what we do know from hearing the evidence in this case not on this issue but what was happening at the time. We have in mind the factors in the *British Coal Corporation v Keeble [1997] IRLR 336* case.

229. The claimant did not raise a grievance following the letter concerning the bonus in June 2014, he was aware of the procedure at that time. From the correspondence art the relevant time he was aware of his disability and the legal obligations of the respondent since he raised matters about reasonable adjustments in his earlier grievance but further raised with Ian Hindler as early as November 2013 that he thought the bonus issue may be discrimination arising from disability. He knew of the facts as early as November 2013 but did not act for another 16 months so this cannot be prompt.

230. We heard no evidence as to what stage the claimant took steps to obtain advice but clearly had either taken some advice or was knowledgeable from his own research as to the possibility of taking action given the email to Ian Hindler in November 2013.

231. Given the discrete factual issue we are not concerned by the cogency of the evidence being affected by the delay. In actual fact there has been a long tribunal process which has substantially impacted on this delay as the claim was in the tribunal system for almost 2 ½ years before it came to us. We do not consider it right to say the delay impacts on the cogency of the evidence given the longer delays since.

232. We also consider that at the relevant time he was initially on gardening leave so had more opportunity to seek advice or take action than if he had been off sick or working. This was a discrete one-off act and not part of a continuing act beyond June 2014. We do not accept the claimant's submission that the respondent is a public body and that there is a public interest in having any allegation of discrimination scrutinised by the tribunal. All claimants deserve this but it is not a reason alone for us to exercise our discretion. The merits of the claim cannot rescue the claimant from the consequences of the delay. *Edomobi v La Retraite RC Girls School UKEAT/0180/16*

233. Given the above we see no reason to extend time in this case and do not consider it just and equitable to do so in respect of the s15 discrimination arising from disability claims in respect of the bonus.

234. We have already outlined above that the s20/21 complaints in respect of the failure to make reasonable adjustments fail as we do not consider in respect of the working from home during a colitis flare up that this was a reasonable adjustment as it is not clear that the claimant was substantially disadvantaged by the PCP but even though this claim was less out of time than the bonus claim by one month we would not have exercised our discretion to extend time in this case as the claimant has failed to provide any explanation for why the claim was out of time and why the further period of delay was reasonable. We would therefore apply the above arguments as to time to this claim too.

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Employment Judge S King

Date: 31/7/2018

Sent to the parties on: .....

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For the Tribunals Office