EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Nigel Andrews	AND	Cornwall Partnership NHS Foundation Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin **ON** 26, 27, and 28 November 2018

EMPLOYMENT JUDGE N J Roper **MEMBERS** Mrs E A Uppington
Ms S Long

Representation

For the Claimant: Mr D Leach of Counsel
For the Respondent: Mr J Heard of Counsel

JUDGMENT

The unanimous judgment of the tribunal is that:

1 The claimant succeeds in his claims of unfair dismissal and disability discrimination; and

2 By consent, judgment is made in the sum of £23,687.37.

RESERVED REASONS

1. In this case the claimant Mr Nigel Andrews, who was dismissed by reason of capability, claims that he has been unfairly dismissed, and that he was discriminated against because of a protected characteristic, namely his disability. The claim is for discrimination arising from disability, and because of the respondent's alleged failure to make reasonable

adjustments. The respondent concedes that the claimant is disabled, but contends that the reason for the dismissal was capability, that the dismissal was fair, and that there was no discrimination.

2. We have heard from the claimant. For the respondent we have heard from Mrs Sue Newman, Mrs Mary Hosken, Mrs Alison Cook and Mr Nick Lewis.
3. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence and have observed their demeanour in the witness box. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The respondent is the Cornwall Partnership NHS Foundation Trust, which mainly provides community, mental health and children's health services. The claimant Mr Nigel Andrews was born on 23 September 1963. He qualified as a Registered Learning Disabilities Nurse in 1988, and was first employed by the respondent in 1991. The claimant became an experienced and knowledgeable Learning Disabilities Nurse. In 2008 he was permanently redeployed as a Band 5 in the Child & Adolescent Mental Health Service (CAMHS) and his role involved supporting individuals with mild to moderate learning disabilities, autism and/or other mental health issues.
5. The claimant had previously suffered from depression and anxiety, and he found this redeployment process to be stressful. It also coincided with the death of his mother. From the end of 2008 the claimant was absent on certified sick leave for more than five months with depression and anxiety. He recovered and returned, and in November 2010 was promoted to band 6 in the CAMHS Learning Disabilities service. The CAMHS service was divided into two geographical sections, West and East, and the claimant worked for CAHMS West. In 2011 the support provided by Cornwall Council changed which led to an increase of individuals being referred to the respondent's service, many of whom had far more significant needs. The claimant's role changed to the extent that he began working with children with much more significant learning disabilities and severe behavioural problems. His role began to change from a clinical role to one which was therapy based and which required more behavioural assessments, support plans, and an increase in the relevant supporting paperwork. At about this time the claimant became unwell again with a further relapse of depression and anxiety.
6. In around 2015 the claimant began to encounter difficulties with a special needs school which he covered as part of his role. A number of the children had severe difficulties and extremely challenging behaviours, and the claimant began to struggle with his duties. He felt that there was animosity towards him from the school and parents and eventually the school made a formal complaint against him. His mental health declined and in October 2015 he suffered a further relapse of depression and anxiety. He tried to return to work in January 2016, but became unwell again and was off for a further three months.
7. As is to be expected of a large public sector employer, the respondent has a number of policies and procedures. These include a Capability Procedure, and a Sickness Absence Management Policy. On 9 March 2016 the claimant attended a formal sickness absence meeting under the Sickness Absence Management Policy. The claimant was accompanied by his Royal College of Nursing (RCN) trade union representative. It was a supportive meeting at which various options were discussed against the background of the significant changes which had occurred in the Learning Disabilities Service over the previous three years. The two main options open to the claimant were identified as returning to his current role as a Band 6 with a temporary relocation to CAHMS East to avoid the school which had complained against him, with continuing monitoring. The second option was to look at alternative Band 6 and Band 5 roles within the CAMHS service. He was notified of the appropriate website on which all vacancies were advertised, and the parties agreed to meet again subsequently.
8. The parties then agreed that the claimant should be seconded to the Autism and Spectrum Disorder Assessment Team (ASDAT), which was confirmed at a further sickness review meeting on 5 May 2016. This secondment was for a year with effect from 3 May 2016, and

the assumption was that at the end of that one-year period the claimant would return to his substantive position.

9. The ASDAT team is a small specialist team which undertakes assessments for children and young service users from 5.5 years to 18 years old, and is a multi-professional team consisting of CAMHS nurses, clinical psychologist assistants, speech and language therapists, and occupational therapists. An important aspect of the claimant's role within the ASDAT team was to undertake assessments of children by way of an observation of the child at an interview with the child's parents, to take comprehensive developmental histories, to be followed by the preparation of a report. The reports would then be discussed at a multidisciplinary diagnostic meeting. Funding for the claimant's secondment and his role had been arranged because of a significant backlog of children who required autism assessments. It was therefore important to the respondent to be able to establish that the claimant's secondment was making an impact on the waiting list in order to demonstrate that the funding for the secondment was well spent.
10. The claimant accepts that completing these reports in a timely manner was a crucial aspect of his job and that it was important for the child or service user to receive the report as soon as possible. This was to ensure that if there was a diagnosis of autism then the service user would have access to support services as soon as possible together with the appropriate advice. Any delay in that process means that the appropriate analysis and treatment also becomes delayed.
11. At the sickness review meeting on 5 May 2016 the claimant was offered support by way of an agreement to meet any training needs, and an open referral to the respondent's Occupational Health Department in the event that the claimant felt that he needed any additional support. On 27 June 2016 the claimant's line manager Mrs Sue Newman (from whom we have heard) suggested a weekly workplan, which the claimant accepted and agreed with the words: "Yes - sounds reasonable". It is also clear from an email on 29 July 2016 that the claimant told Mrs Newman that he had settled well into the new role and that his confidence was growing. He agreed that he felt able to raise any concerns which he might have with Mrs Newman, or another manager Mrs Mary Hosken (from whom we have also heard) who was responsible for undertaking the claimant's appraisals. As at that time therefore the claimant had no workplace issues which caused any significant concerns or further absences.
12. By September 2016 it had become clear that the claimant was beginning to struggle to complete his normal duties, and in particular was falling behind in preparing the required reports. Mrs Newman set out her concerns in an email to Mrs Hosken on 2 September 2016. These included performance concerns about outstanding reports, uncompleted appointments, time management and general capability. She stated: "He seems to be in a spin and his IBS has flared up. We need to look at putting in what we can and starting any processes just in case he goes off sick." She also commented that she was not happy that an apparent one-year secondment was now being talked of as a permanent redeployment. By email dated 8 September 2016 Mrs Hosken drew to the claimant's attention that she had not been fully aware of how behind he had become with his reports and that 13 reports were outstanding following 17 appointments, plus another four which had recently been added to the system. She encouraged the claimant to make better use of the respondent's computerised diary system and offered the use of a dictaphone to dictate reports so that administrative support staff could type them, rather than the claimant having to type them himself.
13. By email dated 19 September 2016 Mrs Hosken reported to Mrs Newman that there was no evidence that the claimant had written any more reports and that he was failing to reply to her emails. On 28 September 2016 the claimant's work partner Ms Saltzman complained to Mrs Hosken that she was having difficulty with her working partnership with the claimant because of the claimant's failure to follow up appointments and complete reports. She was concerned at having to cover the claimant's performance deficiencies when questioned by parents.
14. Mrs Hosken and the claimant then had a supervision meeting on 11 October 2016. The claimant accepts that by this stage he was fully aware that the respondent had concerns

about his performance. They agreed a detailed action plan, and ways in which the respondent could support the claimant by way of the respondent's computerised tracking system, and typing support (which was not ordinarily provided). The claimant did not request any further assistance over and above that offered by the respondent. There was a further supervision meeting on 18 October 2016 in which Mrs Newman discussed these concerns and the parties agreed a further action plan. The claimant agreed that he would seek to improve not least because his assessment partner was "carrying the load for the partnership". Again the claimant did not request any further assistance over and above that offered by the respondent.

15. There was then a further detailed supervision meeting on 24 October 2016 at which the respondent made a number of adjustments to the claimant's working practices in order to assist him. They agreed an action plan, and agreed that all outstanding reports would be completed by 31 October 2016. In order to assist the claimant to achieve this he was provided with typing assistance and removed from any further patient face-to-face activity. He was also removed from other team duties and allowed to work at home to complete reports if he wished. He accepted that this was a helpful programme of support and that the respondent was doing what it could to help him.
16. It is worth noting at this that stage the claimant gave evidence at this hearing that the respondent was not being supportive and was actively seeking to manoeuvre the claimant into a position whereby he necessarily failed with his duties so that the respondent could take action to dismiss him. We do not accept that evidence and find that the opposite was the case, and that Mrs Newman and Mrs Hosken were being supportive in the hope that the claimant's performance would improve. The claimant had every opportunity with the support of his RCN representative to raise any such complaints at the time and did not do so.
17. The claimant was unable to complete the action plan agreed by 31 October 2016, and the respondent agreed to extend this to 25 November 2016, which is further evidence of the support and assistance which the respondent was offering to enable the claimant to catch up with his backlog of reports. The claimant did not ask the respondent to provide any further support other than that which was already on offer.
18. Mrs Newman met with the claimant on 11 November 2016. The purpose of that meeting was to make the claimant aware of the outstanding capability concerns which had been raised by Mrs Newman and Mrs Hosken. Mrs Newman asked him if there was anything which she could do to help and the claimant replied that there was not. Mrs Newman offered to refer the claimant to the Occupational Health counselling service but he declined, and stated that if he felt it was needed he would do it himself.
19. There was then a further review meeting on 22 November 2016 at which it became clear that a significant number of reports (at least 14) were still outstanding. This led to the respondent commencing the Capability Policy and a Stage One Capability Meeting was arranged on 7 December 2016. It has been suggested at this hearing that this was the first stage of an orchestrated attempt to manufacture the claimant's dismissal. We accept Mrs Newman's evidence that this was not the case, and that her experience and considered view is that the Capability Procedure is generally a positive process which assists both the respondent and its employees to resolve existing and potential performance problems, and to avoid dismissal except in the most extreme cases. The claimant was notified of that meeting in a letter from Mrs Newman which explained that the respondent believed that the claimant was working below the standard required in the following five areas: all aspects of record-keeping; time and diary management; partnership working; completing targets set during supervision; and misrepresentation of tasks completed to both Mrs Newman and Mrs Hosken.
20. At that meeting the claimant accepted the performance criticisms against him, but commented that he felt he was beginning to turn a corner by coming back to the office to complete reports rather than trying to work at home. He agreed to explore the possibility of receiving counselling through his professional organisation. There was then an agreed Improvement Plan going forwards from 7 December 2016 at which the respondent agreed to put in place adjustments to support the claimant. These were more administrative

support; removal from patient face-to-face time to complete reports; support and supervision; and access to available office space in Truro where the claimant could work. The parties agreed to review the matter in January 2017. Mrs Newman also issued a First Written Warning under the Capability Policy. The claimant did not appeal that decision.

21. There were then further review meetings on 29 December 2016 and 10 January 2017 at which it became clear that despite the adjustments and the agreed Improvement Plan the claimant had still not completed all outstanding reports. This resulted in a Stage Two meeting under the Capability Policy which was held on 27 January 2017. The claimant was then signed off as unfit for work between 23 January 2017 and 6 February 2017 for "anxiety states". The fitness certificate from the claimant's GP did not suggest any specific adjustments might assist.
22. In the meantime, the respondent had also arranged for an Occupational Health report, and Dr J Smith, a Consultant Occupational Health Physician, prepared a report dated 24 January 2017 ("the First OH Report"). This report referred to performance concerns from October 2015 following absence because of anxiety and stress, with subsequent OH counselling from January to March 2016. The report went on to say: "I understand his work performance has not improved over 2016. With such an outcome established since 2015 it is hard to be optimistic about his future prospects as relevant interventions (use of an antidepressant and talking therapy) and workplace adjustments have not improved either his mental health status or associated work performance. Under the circumstances, the emergence of a capability response from the employer is not surprising as his established continuing poor performance has the potential to put patient care at risk. I am not in a position to reassure you these performance issues will resolve now. There is no evidence of any such improvement since the 2015 concerns, despite subsequent medical and workplace interventions. Do you wish to proceed with the capability procedure or allow him to have another trial of talking therapy in case this might improve his mental health status? There is a high risk it will not do so now." For the record, the claimant accepts that the phrase "talking therapy" includes counselling and cognitive behavioural therapy ("CBT").
23. The claimant was not well enough to attend the Stage 2 Capability Review Meeting on 27 January 2017 and Mrs Newman wrote to the claimant on 1 February 2017 to confirm that the meeting had taken place in his absence. She set out 13 specific areas of concern with regard to the claimant's performance. She confirmed that his performance remained unsatisfactory and that he had failed to improve to the standards required in the agreed Improvement Plan. She therefore issued the claimant with a Final Written Warning and notified him of his right of appeal. She notified the claimant that when he was well enough to return to work the Capability Procedure would continue and this would require a further review meeting. The claimant did not appeal against that decision.
24. The claimant's absence also triggered the respondent's Sickness Absence Management Policy, and Mrs Cook decided to put the Capability Procedure on hold pending this process. Mrs Cook, from whom we have heard, is the respondent's Associate Director of Children's Services and Mrs Newman's line manager. As at February 2017 therefore the claimant was on a Final Written Warning under the Capability Procedure, but this was on hold pending his sickness absence which was now the subject of the Sickness Absence Management Policy.
25. The claimant remained on certified sick leave. The fit note records that this was for "anxiety states" from 3 February 2017 until 3 March 2017, and again the certificate did not suggest any adjustments that might assist. The claimant was able subsequently to attend a Second Formal Absence Review Meeting on 24 March 2017. He confirmed that his anxiety was work-related in origin and that he was unable to cope in relation to his performance and quality of work. He had discussed appropriate medication with his GP but they had recognised that the anxiety and stress was work-related. The claimant also confirmed he was accessing counselling through Outlook SW. He confirmed that he had had some counselling with Occupational Health before but this was not in-depth enough. The claimant also confirmed that he was now certified as unfit for work until 3 June 2017. He also confirmed that he was aware that his substantive post was still that of CAHMS

Learnings Disabilities nurse, and that he had accepted the secondment to ASDAT because he felt unable to return to that substantive post.

26. The claimant confirmed at that Second Formal Absence Review Meeting on 24 March 2017 that he had been reviewing his options for the future and advised that he was considering five options. The first was that the claimant had MHO status, namely Mental Health Officer, and this status enabled claimant to take early retirement at age 55 (at this stage the claimant was aged 53). Secondly, the claimant's pension position was such that retiring at 55 would not have an adverse impact on his pension payments. Thirdly he intended to seek further advice from the Pension Manager about early retirement. Fourthly he was making enquiries about ill-health retirement and was aware of redeployment as a possible option. The claimant was aware that his current secondment to ASDAT was due to finish on 3 May 2017 but that he refused to consider a return to his earlier substantive post in CAMHS. Finally, the claimant confirmed that if there was no change to his current health position then returning to work might not be an option.
27. Mrs Newman confirmed to the claimant that if he was unable to return to his current role or his previous substantive role within a reasonable amount of time then the respondent would need to progress to a Final Absence Meeting under the Sickness Policy which could well result in the termination of his employment on the grounds of ill-health capability. At that stage the respondent would consider redeployment and seek to identify a suitable alternative post during the claimant's notice period. The claimant was therefore aware at this stage that this was the likely outcome if he was unable to return to work.
28. The respondent also obtained a further Occupational Health report from Dr Smith dated 19 April 2017 ("the Second OH Report"). Dr Smith identified a "significant loss of professional confidence with the emergence of an anxiety state". Following his redeployment his anxiety state had "spilled over" and he found himself "struggling to complete reports". He was at that stage awaiting counselling from Outlook SW and "he needs to develop some very specific coping strategies as he does wish work resumption." Dr Smith also reported: "Taking into account his current anxiety state in relation to historical adverse CAMHS experiences, he would like to apply for flexible working and resume to part-time working for the longer term."
29. In late April 2017 the respondent's managers then discussed how to proceed. Mrs Newman confirmed with the HR Department that the funding for the secondment had ceased and that this gave rise to the presumption that the claimant ought to return to his substantive role, and that funding would be found for this. Nonetheless he did not want to do so and the CAMHS team were apparently not keen to have him back. At that stage it seemed that the likely outcome was that if the claimant did not wish to return to his substantive role then his employment might be terminated under either the Sickness Absence Management Policy, or if he returned to work, and continued to underperform, under the Capability Procedure. If his employment were to be terminated then he would be placed on the Redeployment Register in the hope of finding suitable redeployment.
30. There was then a further Formal Absence Review meeting on 27 April 2017, which was described to be a follow-up meeting after the Second Formal Absence Review. The claimant was accompanied by his trade union representative. The claimant reported that his health was improving and that he had arranged for counselling but this had not yet started, and that there was a positive change in his well-being. He confirmed that following the discussion with Dr Smith his first choice was to return to ASDAT, but failing that he would consider returning to a different section of CAMHS. The claimant requested a reduction in his contracted hours to 22.5 hours per week and not have to work on a Wednesday. The respondent agreed to this request, and also agreed a four-week phased return to work. The claimant was reminded that his Final Written Warning dated 29 January 2017 was still in place and that if the claimant remained unable to meet the required work standards, even with the appropriate level of support, then the respondent would move to stage 3 of the Capability Process. A formal Capability Meeting was to be arranged for the week commencing 19 June 2017, and the claimant was notified that if his agreed return to work plan did not work, and/or if he failed to return to work on 8 May 2017, then the process would move to a Final Absence Meeting.

31. At this stage therefore the claimant's understanding was that his secondment at ASDAT would be extended, and that he would be given the opportunity to clear his backlog of reports and finish his workload without having to undertake new face-to-face assessments. Although the claimant suggested at this hearing that this left him isolated, it was an agreed adjustment at that time to enable the claimant to clear his backlog of reports. It has been suggested at this hearing that the extension of the claimant's secondment was artificial and was effectively engineered in order to manufacture the claimant's dismissal for performance related reasons. We accept Mrs Newman's evidence that this was not the case and that the aim was to support the claimant and encourage him to return to work following his extended sickness absence.
32. About that time, at the end of April 2017, the claimant also requested details of his pension entitlement which were provided on the basis that he might retire on 30 September 2017.
33. The claimant returned to work as agreed and there were further supervision meetings on 9 May 2017 and 6 June 2017. The claimant was aware that he was at liberty to approach Mrs Newman and/or Mrs Hosken to request any further support if needed. There was no such request and the parties appeared to be in agreement that the claimant had been given a reasonable work schedule.
34. The Formal Capability process was then resumed following the claimant's return, and the next meeting (still under Stage 2) took place on 19 June 2017. The claimant arrived late because he had forgotten it was taking place and had failed to arrange to be accompanied by his trade union representative. In her letter dated 22 June 2017 Mrs Newman summarised what had taken place at the meeting and stressed to the claimant that it was important he engaged with the process and planned and prepared for meetings as well as seeking the support of his union. Continuing performance deficiencies were identified, namely completing clinical reports and associated recording for interviews which the claimant had carried out, and improving the quality of the evidence which he obtained from families. The claimant agreed to complete outstanding and/or partially completed reports, and the parties agreed to review the matter on 7 July 2017.
35. Mrs Newman again set out the required improvements which had been agreed, namely reports to be written contemporaneously; reports to be comprehensive and of a high quality; additional recording points to be completed; participation in the Duty Rota; and completing other outstanding tasks. Mrs Newman prepared a revised Performance Improvement Plan which removed reference to the phased return to work because the claimant was now back in the workplace. Mrs Newman reported that to assist the claimant in achieving and sustaining these required improvements supportive measures had already been put in place including: a phased return to work to readjust gradually after the period of ill-health; a reduction of the working week to three days a week to achieve a better home and work balance; the provision of audio typing for several months (but which had now been discontinued because it had not improved efficiency), but with the renewed offer of voice recognition software; access to supervision; additional office space in Truro; and continued supervision from Mrs Hosken on a weekly basis. Mrs Newman also confirmed that she was available to support the claimant and to provide regular feedback. The claimant agreed that there were no additional support measures identified because he had already seen Dr Price of Occupational Health. Mrs Newman made it clear that in the absence of satisfactory improvement with the Final Written Warning in place, the respondent would move to Stage 3 under the policy which might involve dismissal.
36. There was a review supervision meeting on 4 July 2017 and the review period was then extended to 25 July 2017 at the claimant's request. In the meantime, another supervision meeting on 18 July 2017 revealed four further outstanding reports, and the claimant confirmed that he felt that he would be able to catch up and that understood the importance of completing these.
37. Mrs Newman and the claimant met on 27 July 2017, with the result that owing to continued failure by the claimant to meet the performance concerns and the agreed action plan she recommended that stage 3 of the Capability Procedure should be instigated. She urged the claimant to seek support from his trade union at that meeting. The meeting was then arranged for 21 August 2017. Mrs Cook wrote to the claimant to confirm: "Consideration

will be given to your continued employment with the Trust at the hearing. Therefore I must advise you that a possible outcome of the hearing may include redeployment, downgrading to a post with less responsibility or termination of your contract of employment on the grounds of capability." The claimant was notified of his right to be accompanied by a trade union representative. The claimant was also advised that he was able to contact Occupational Health for further support. Mrs Newman had prepared the management statement of case and Mrs Cook sent two copies of this to the claimant under cover of a letter dated 10 August 2017. She again reminded the claimant that he could seek support from Occupational Health. Owing to the claimant's continued sickness absence the hearing was rearranged for 7 September 2017.

38. The claimant's representative requested a further postponement on the basis that the claimant had arranged to meet with Dr Price of Occupational Health on 6 September 2017. The respondent declined to postpone the hearing on the basis that Dr Price's report would be available to all concerned. Dr Price was able to forward a report by way of an email dated 6 September 2017 to Mrs Newman and to the claimant ("the Third OH Report"). He confirmed that the claimant was fit to attend the capability meeting on the following day and that his trade union representative would accompany him. Dr Price reported: "From my perspective his anxiety state remains significant and he has recently been assessed by Outlook SW as meeting their criteria for talking therapy which will start in mid-October. I do not have any difficulties linking his sub-optimal performance within ASDAT to his underlying anxiety state. I have discussed the original workplace triggers in my April report. As he has 26 years NHS service and MHO status (he's aged 55 in just over a year etc) would his employer defer any dismissal decision until he has completed the Outlook SW therapy program? Admittedly this might take him to the end of November 2017. If he has achieved condition remission at that point could he then have a trial of work return to either West or East CAMHS Learning Disabilities as a Band 5, being part-time, until September 2018? I understand the ASDAT secondment ended in August 2017. He understands OH cannot commit his employer to any particular course of action. If his contract does end due to ill-health capability he does have the option of applying for ill-health retirement, accepting the uncertainties of a successful application."
39. The claimant prepared a written supporting statement in reply to the respondent's management statement of case, which he forwarded to Mrs Cook before the Stage 3 hearing. In that letter the claimant confirmed: "I'm now acutely aware of how poor that performance has been, consistently far below that of a Band 6 nurse. I now realise how unwell I have been and what effect it has had on my performance and in the delivery of service to our patients … I acknowledge that in this state I have also failed to engage with processes and supportive measures provided for me and this must have been very frustrating for those who are managing me at the time … I must acknowledge that I've had particular difficulty in completing written work, especially reports for the ASDAT team, and have been struggling to explain why this is even to myself … I have recently had an assessment with Outlook SW who have offered me a course of CBT therapy, starting on 13 October 2017. I hope that this will help me develop strategies to overcome this difficulty with written work, and will do my utmost to engage with the therapy and put what I learnt into practice. In short I would very much like to continue working and to have the opportunity to make the changes that I need to, though I fully appreciate that I'm not likely to continue in a Band 6 post so am requesting that you consider offering a Band 5 role or post if that is possible."
40. The stage 3 Capability Hearing took place on 7 September 2017. Mrs Cook chaired the hearing, and was accompanied by Mrs Wendy Underwood, an HR Manager, and Ms Carrie Leicester, an HR Advisor. The claimant attended with his regional trade union representative. Mrs Newman presented the management statement of case and confirmed that in her opinion both she and Mrs Hosken had done everything possible to support and help the claimant alongside the formal process. The claimant confirmed to us at this hearing that he did not dispute that conclusion at the time, although he now says that a stress risk assessment should have been undertaken. When asked at that Stage 3 hearing whether there was anything else which the respondent could have done by way of support

the claimant answered: “CBT strategies and coping techniques”. The claimant did not suggest that there was anything else which the respondent could have done. When asked how his stress and anxiety would affect his role in the future the claimant replied: “It would depend on the role and what I learned from CBT. If the role heavily involves writing reports that would be a struggle, but then, who knows what I could learn from CBT that could help me with writing the report.” The claimant’s trade union representative also confirmed that the claimant intended to attend CBT sessions and was keen to remain in employment and “get to the point where he can retain his retirement and hope that there is something out there that can help that”.

41. Following consideration the panel decided to terminate the claimant’s employment on grounds of capability and the claimant was given 12 weeks’ notice of the termination of his employment. The panel concluded: “It is clear that your mental health issues have had a direct impact on your performance at work, and the panel is pleased to see that you are now accessing suitable support in CBT. It is evident that despite the extensive support to help you achieve a sustainable improvement in your performance, you are unable to perform to the standard in your current role. We are concerned that your underperformance has had a significant impact on the small team you work with and on the well-being of the children and young people. We have considered the options available and confirm that we are unable to sustain your employment as a Band 6 nurse in the ASDAT team.”
42. The decision to dismiss the claimant was confirmed by Mrs Cook in a letter dated 12 September 2017, which afforded the claimant the right of appeal. In addition that letter confirmed: “Having considered redeployment to a lower band, I have decided to offer you the option of being placed on the redeployment register for the duration of your notice period. Please note there is no guarantee that a suitable post will be available during this time. I have enclosed the relevant paperwork for you to complete if you wish to be considered for potential redeployment. I would encourage you to complete the paperwork at the earliest opportunity so potential opportunities can be explored. Sue Newman will notify you of any potential employment options within the Trust. However please ensure you check the vacancies within the Trust and notify Sue Newman should you feel there are any posts you feel may be suitable. In the event there is a potentially suitable post available arrangements will be made for you to meet the recruiting manager to discuss your suitability and if appropriate agree a trial of work. If it is agreed by all parties that the work trial is successful arrangements will be made to confirm the new role as your substantive role. In the event there are no suitable posts or work trial is unsuccessful your last day of service will be 29 November 2017 … I would like to remind you that you may access support from Occupational Health … until your last day of service.”
43. Mrs Cook was a senior manager with responsibility for the various departments in which the claimant might have worked. She confirmed (and we so find) that there were no vacancies for a part-time Band 5 nurse with either Children’s or Adults’ Learning Disabilities Services. This position had not changed during November 2017, nor by the end of December 2017. Indeed, the position remained the same with no part-time Band 5 vacancies until at least Easter 2018. Mrs Cook also confirmed that if the claimant had requested a return to his substantive post then she would have arranged this to avoid the termination of his employment. She denied that there was a preconceived plan to arrange the claimant’s dismissal, and that the opposite was the case, namely that he would have been returned to his substantive post but for his refusal to do so. Mrs Cook confirmed that although the secondment to ASDAT had effectively come to an end, the claimant’s position was not redundant because his substantive role was still available.
44. The claimant accepted in his evidence that the panel had valid concerns about his performance difficulties at the time they took that decision and that these concerns were very important. The claimant also confirmed that notwithstanding the encouragement to complete the forms and apply for redeployment he failed to do so until two days before the end of his notice period, despite knowing that the search for alternative employment would start once he had completed the form. When the claimant eventually completed and returned the form on 27 November 2017 he confirmed that he had been watching the respondent’s vacancies website and had “not seen anything suitable to date”.

45. Mrs Cook also confirmed her understanding of the position concerning CBT as follows. The term Counselling is an overarching term which includes talking therapy generally. It includes CBT but does not always mean CBT. She effectively disregarded the suggestion that the process should have been halted pending a course of CBT to be undertaken by the claimant, because the claimant had already accessed counselling support and despite the other supportive measures put in place was still not able to maintain satisfactory performance. Mrs Cook did not conclude that the claimant had already undertaken a course of CBT, and that this was not successful, but rather she recognised that the claimant had undertaken talking therapy generally including counselling, but that this had not been successful despite the many other adjustments in place.
46. The claimant submitted an appeal against his dismissal by letter dated 26 September 2017. There was a panel of four senior managers to hear the appeal, and this panel was chaired by Mr Nick Lewis, a non-executive director of the respondent, from whom we have heard, on 30 November 2017. Under the relevant procedure the purpose of the appeal was not to hold a re-hearing, but rather to review the decision taken by the earlier panel to ensure that there were reasonable grounds for reaching its decision. The claimant attended and was represented by his trade union representative. The claimant's appeal was rejected and Mr Lewis wrote to the claimant on 5 December 2017 giving the panel's reasons in reply to each of the claimant's six grounds of appeal. These were as follows.
47. First, the claimant complained that his performance was related to his disability. The respondent agreed that the claimant's performance and disability were related but did not consider this to be a point of appeal. Secondly, the claimant suggested that the outcome was unduly harsh and unreasonable because of his continuous employment since 1991 and the fact that he would have been able to access an NHS pension in 12 months' time. The panel noted that a number of reasonable adjustments had been agreed and implemented including the OH support, reducing hours, reducing the role, providing administrative support, the use of a dictaphone, permitting homeworking, regular supervision, a review of support, and an offer of redeployment. The panel found that the claimant did not engage in the process and apart from CBT and medical suspension was unable to identify any other support which might have assisted. In addition, the claimant failed to submit any redeployment paperwork or engage in that process constructively.
48. Thirdly the claimant complained that the panel had failed to consider the Third Occupational Health report fully, but the panel decided that the First and Second Reports were included in the management case, and the Third Report was provided with sufficient time for all parties to consider it before the hearing. The panel felt that there was no new information over above the adjustments already implemented that would have made any material difference.
49. Fourthly, the claimant complained that he should have been given the opportunity to complete a CBT course whilst remaining in employment and that his role could have been temporarily reduced, or placed on medical suspension, whilst undertaking CBT. The panel decided that the Occupational Health advice had not at any stage advised that CBT was an appropriate course of action and that in the First Report talking therapy was offered but expectations remained low as of the success of a further course of sessions. The panel also formed the view that the course of CBT followed a referral from the claimant's GP and not Occupational Health and only began on 17 November 2017. Mr Lewis confirmed that the panel did not see fit to suspend the process pending either CBT therapy, or a further OH report on its potential success, because the panel saw its role under the procedure as having to determine whether the initial dismissal decision was reasonable or not. The panel concluded that it was reasonable, and effectively that Mrs Cook was entitled to reach a decision that talking therapy generally had already taken place but was ineffective despite adjustments.
50. The fifth point of appeal was that the respondent promotes itself as being a "mindful employer" and that the claimant had not been supported appropriately in line with this. The panel rejected this is not being a valid point of appeal and noted that there had been a significant level of support as evidenced in the range of adjustments which were implemented and as set out in the second ground of appeal described above.

51. Finally, the claimant complained that a formal stress risk assessment had not been completed, such as might be recommended by the Health and Safety Executive. The panel accepted that a specific HSE assessment tool had not been completed but decided it was evident from the documentation and the evidence of Mrs Newman that there been sufficient assessment of the principles of the toolkit discussed in both the sickness and capability processes.
52. During his notice period the claimant commenced a course of CBT, which was planned for six sessions. He completed two of them during that time, but did not complete the course thereafter, following notification that his appeal had been rejected.
53. The claimant then obtained an ACAS Early Conciliation Certificate on 22 December 2017 and issued these proceedings on 19 January 2018.
54. Having established the above facts, we now apply the law.
55. The reason for the dismissal was capability which is a potentially fair reason for dismissal under section 98(2)(a) of the Employment Rights Act 1996 ("the Act").
56. This is also a claim alleging discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges discrimination arising from his disability, and failure by the respondent to comply with its duty to make adjustments.
57. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.
58. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. This 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.
59. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that 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, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person. However, under paragraph 20(1)(b) of Schedule 8 of the EqA A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know – (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.
60. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
61. The remedies available to the tribunal are to be found in section 124 of the EqA. The tribunal may make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate; may order the respondent to pay compensation to the complainant (on a tortious measure, including injury to feelings); and

make an appropriate recommendation. In addition the tribunal may also award interest on any award pursuant to section 139 of the EqA.

62. The interest payable on discrimination awards is to be calculated in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ("the Interest Regulations"). Under regulation 2 the tribunal shall consider whether to award interest, and if it chooses to do so then under regulation 3 the interest is to be calculated as simple interest accruing from day to day. Under regulation 6 the interest on an award for injury to feelings is to be from the period beginning on the date of the act of discrimination complained of and ending on the day of calculation. All other sums are to be calculated for a period beginning with a mid-point date between the act of discrimination and ending on the day of calculation
63. We have considered the cases of Environment Agency v Rowan [2008] IRLR 20 EAT; Archibald v Fife Council [2004] IRLR 651 HL; Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265; Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075 EAT; Pnaiser v NHS England [2016] IRLR 170 EAT; City of York Council v Grosset [2018] IRLR 746 CA; O'Brien v Ministry of Defence [2013] IRLR 315 SC; Homer v West Yorkshire Police [2012] IRLR 601 SC; Spencer v Paragon Wallpapers Ltd [1976] IRLR 373 EAT; GE Daubney v East Lindsey District Council [1977] IRLR 181 EAT; BS v Dundee City Council [2013] IRLR 131 CS; and O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145.
64. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").
65. Disability Status:
66. The claimant has suffered from anxiety and depression for many years. This is a mental impairment which has had a substantial and long-term adverse effect on his normal day to day activities. The respondent concedes that the claimant was a disabled person at the times material to this claim, and that it knew of this disability, and we so find.
67. The Issues:
68. The issues to be determined between the parties had been agreed following two previous case management preliminary hearings, and the agreed list of issues was reduced and further clarified at the commencement of this hearing. The claimant's claims are for discrimination arising from disability, failure to make reasonable adjustments, and for unfair dismissal, and we deal with each of these claims in turn. There is a degree of overlap between the claims because the same issues and complaints feed into each of the three claims. In short, the claimant contends that the respondent should have waited before terminating his contract of employment with effect from 29 November 2017, or alternatively it should have upheld his appeal on 30 November 2017 to achieve the same effect. The claimant asserts he was undergoing CBT treatment at the time (which he had not previously received) and that if the respondent had waited for a short additional period during this treatment then there was a realistic prospect of the claimant's position improving such that he would be fit for work, and capable of performing a part-time Band 5 role. Upon conclusion of the CBT and being fit for work (after his sickness certificate to December 2017 had expired) he could have been placed on the redeployment register which would at the very least had "a prospect" of resulting in a position being found for him.
69. Background Findings:
70. The following are the key findings from our findings of fact above. In the first place we reject the claimant's assertion that there was a concerted effort to manipulate the process and procedures in order to manufacture his dismissal, whether to avoid complications about the end of his secondment, or otherwise. We find that the process leading up to the hearing at which the claimant was dismissed was entirely fair, reasonable and appropriate, and we commend both Mrs Newman and Mrs Hosken on the extensive support and adjustments which they put in place. They made significant positive efforts to improve the claimant's performance and to seek to assist the claimant in managing a return to work. Unfortunately, their efforts were to no avail.

71. The position was summarised by the claimant in his own words in his supporting statement to the panel on 6 September 2017, which was the day before the hearing took place at which he was dismissed. The claimant confirmed that he was acutely aware of how poor his performance had been and that it was consistently below that of a Band 6 nurse; he understood the effect that that this had had upon the delivery of service to patients; he acknowledged that he had failed to engage with the processes and supporting measures provided for him, and that this must have been very frustrating for his managers; and he acknowledged particular difficulties in completing written work especially ASDAT reports. Against this background, and the extensive adjustments and support which had been put in place to no avail, it was not surprising that the respondent took the decision to dismiss the claimant by reason of continued poor performance.
72. However, although the claimant accepted that he was not likely to continue in a Band 6 post, and asked the respondent to consider offering a Band 5 role if that were possible, he did make it clear that he would like to have the opportunity to make changes to his working practices and to continue working, and confirmed that he had been offered a course of CBT therapy with effect from 13 October 2017. He wished to have the opportunity to engage with that therapy and to put into practice any positive improvements.
73. This coincided with the Third Report from Dr Price. He did not as such advise on the merits of any course of CBT, but did ask (given the claimant's length of service and MHO status) whether the respondent might defer any dismissal decision until he had completed the therapy programme. Mrs Cook declined to do so, partly on the basis that the claimant had already undertaken other talking therapy which had not been successful, despite the there extensive adjustments.
74. The claimant's grounds of appeal specifically included his fourth ground, namely that he should have been given the opportunity to complete the CBT course whilst remaining in employment. By that stage the course of CBT was underway, and the claimant had completed two sessions. The appeal panel declined to defer or revoke the decision to dismiss on the basis that its role was not to rehear the matter, but to determine whether a reasonable decision had been reached by the dismissal panel, which it thought had been the case.
75. In our judgment both the dismissing panel and the appeal panel should have deferred the decision to dismiss pending confirmation of the merits or otherwise of the claimant's course of CBT. Although CBT is part of the generic classes of talking therapy, it is a distinct therapy of its own. Despite the pessimistic tone of Dr Price's reports, the failure of the claimant to engage and improve despite extensive supportive measures and adjustments, and in our judgment the likelihood that a short course of CBT would not have had a significant and positive effect on the claimant when all other supportive measures had not, it would not have been a significant disadvantage to the respondent to ascertain the exact position before proceeding with the proposed dismissal.
76. Against this background we now deal with the claimant's specific claims.
77. Discrimination Arising From Disability:
78. The proper approach to section 15 EqA claims was considered by Simler P in the case of Pnaiser v NHS England at paragraph 31: (a) Having identified the unfavourable treatment by A, the ET must determine what caused it, i.e. what the "something" was. The focus is on the reason in the mind of A; it involves an examination of the conscious or unconscious thought processes of A. It does not have to be the sole or main cause of the unfavourable treatment but it must have a significant influence on it. (b) The ET must then consider whether it was something "arising in consequence of B's disability". The question is one of objective fact to be robustly assessed by the ET in each case. Furthermore: (c) It does not matter in precisely what order the two questions are addressed but, it is clear, each of the two questions must be addressed, (d) the expression "arising in consequence of" could describe a range of causal links … the causal link between the something that causes unfavourable treatment and the disability may include more than one link, and (e) the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

79. The dismissal was because of the claimant's performance, which the respondent has accepted was caused by his disability. The respondent does not effectively dispute that the dismissal was because of something arising in consequence of the claimant's disability, that something being his continued poor performance. There is a clear causal link between the claimant's illness, his poor performance, and his subsequent dismissal. The remaining issue to determine is therefore the extent to which the dismissal can be said to have been objectively justified.
80. In order to be objectively justified, the dismissal of the claimant has to be a proportionate means of achieving a legitimate aim. We find that the dismissal was pursuant to a legitimate aim, namely the respondent's requirement to have an efficient workforce to ensure the delivery of its services to patients. To what extent therefore was a dismissal a proportionate means of achieving this legitimate aim? Per Baroness Hale in Homer v West Yorkshire Police "a measure has to be both an appropriate means of achieving a legitimate aim and (reasonably) necessary in order to do so". The discriminatory effect of the treatment has to be balanced against the employer's reasons for it, and cost does not constitute a legitimate aim: O'Brien v Ministry of Defence.
81. We find that there was a less discriminatory option open to the respondent, namely deferring the dismissal decision pending confirmation of whether the CBT course had been successful. There is no compelling evidence from the respondent that deferring that decision would have had any significant impact on its delivery of services, and the cost of doing so (a few more weeks' pay at sick pay rates) would not have been significant either (not that cost is a legitimate aim for justification purposes anyway). For these reasons we find that the dismissal was disproportionate and is not justified, and the claimant succeeds in his claim under s15 EqA.
82. Reasonable Adjustments:
83. We now turn to the claim in respect of the alleged failure by the respondent to make reasonable adjustments. The provision criterion or practice (PCP) relied upon by the claimant is the application of the respondent's Capability Procedure which is said to have put the claimant had a substantial disadvantage in comparison with non-disabled persons in that he was at increased risk of dismissal under that policy in comparison with non-disabled persons because of his disability-related performance issues. Applying Griffiths v Secretary of State for Work and Pensions we agree with that contention, and we find that the respondent's statutory duty to make such adjustments as were reasonable has been engaged.
84. The claimant asserts that the following two reasonable adjustments should have been made: (i) refraining from dismissal pending the outcome of CBT treatment as advised by Occupational Health; and (ii) redeployment to a part-time Band 5 post thereafter, whether via the redeployment register or otherwise. We deal with each of these in turn.
85. For the reasons set out above we find that the respondent should have made the first adjustment relied upon. For the record it is inaccurate for the claimant to suggest that Occupational Health advised refraining from dismissal pending the outcome of CBT, because Dr Price did not give that advice. Nonetheless the claimant specifically raised CBT in his statement to the panel and his grounds of appeal, and Dr Price had posed the question. In our judgment it would have been reasonable for the respondent to have made that adjustment in the hope of ameliorating the substantial disadvantage caused to the claimant by reason of his disability, namely his likely dismissal. The claimant therefore succeeds in this claim.
86. We reject the second suggested reasonable adjustment. The claimant was invited to enter the Redeployment Register and was offered support and assistance in doing so, but failed to do so for almost the entirety of his 12 week notice period. Nonetheless he confirmed that he had been reviewing the respondent's list of redeployment opportunities, and none had been available. We accept Mrs Cook's evidence that from the claimant's dismissal until about Easter 2018 there were no Band 5 roles available in any event. In the circumstances we do not accept that it would have been a reasonable adjustment for the respondent effectively to have created a new Band 5 role which did otherwise not exist.
87. Unfair Dismissal:

88. We have considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
89. The starting point should always be the words of section 98(4) themselves. In applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to a set of factual circumstances within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.
90. It is clear from BS v Dundee City Council that three important themes emerge from the decisions in Spencer and Daubney. First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. This is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered.
91. It is not for the tribunal to substitute its view for that of the respondent. Nonetheless on balance we do not think that the respondent had to hand sufficient medical evidence at the time it took the decision to dismiss the claimant, by which we mean that it did not know the nature of the CBT therapy being undertaken by the claimant, when it would be completed, and whether it was likely to have a positive impact and enable the claimant to return to work. It would have been very straightforward for the respondent to have asked Dr Price to advise on these issues, having met with or spoken with the claimant beforehand.
92. In addition, having considered O'Brien v Bolton St Catherine's Academy and City of York Council v Grosset we note that (as indicated by Underhill LJ) if dismissal is disproportionate for the purposes of section 15 EqA, it will also usually be outside the range of reasonable responses open to the employer, and therefore an unfair dismissal. There is no rule of law to that effect, and the legal tests for the section 15 EqA and unfair dismissal claims are different, but the same issues fall to be considered under both claims. Given that the dismissal process was tainted by discrimination and the discrimination claims were successful under both section 15 and for reasonable adjustments, we find that, given the size and administrative resources of the respondent, the decision to dismiss in these circumstances was not within the band of responses reasonably open to the respondent, and was not fair and reasonable in all the circumstances of the case. We find therefore that the claimant was also unfairly dismissed.
93. Compensation:
94. Following promulgation of our judgment to the above effect, we encouraged the parties to seek to agree potential compensation. Helpfully they have done so, and by consent judgment is now made in the sum of £23,687.37.
95. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 53; a concise identification of the relevant

law is at paragraphs 55 to 64; how that law has been applied to those findings in order to decide the issues is at paragraphs 65 to 93; and how the amount of the financial award has been calculated is at paragraph 94.

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Employment Judge N J Roper
Dated 29 November 2018