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EMPLOYMENT TRIBUNALS

Claimant: **Mr M Baker**

Respondent: **London Borough of Hackney**

Heard at: **East London Hearing Centre**

On: **8-10 May, 25-26 September 2018, & Monday 8 October 2018 (tribunal only)**

Before: **Employment Judge Prichard**
Members: **Mrs G A Everett**
Mr D Kendall

Representation

Claimant: In person

Respondent: Mr R Kohanzad (counsel, instructed by London Borough of Hackney Legal Services, London E8)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that: -

1. **The claimant was fairly dismissed and his claim for unfair dismissal fails and is dismissed.**
2. **The claimant's claims of disability discrimination all fail and are dismissed.**

REASONS

1 The claimant, Michael Baker, is now 56 years old. He worked for the respondent for nearly 12 years from 15 June 2005 until 17 February 2017.

2 He was a NRSWA inspector (highways). That stands for New Roads and Street

Works Act 1991. His work consisted of visiting sites in the borough where street works were taking place, and to inspect that they were being carried out properly, and that the contractors were running to time. It is subject to regulation. Contractors / utility companies can be liable to penalties if they overrun on the time allowed on their permits.

3 He was dismissed following a capability procedure undertaken during an extended absence from work. He now brings claims of unfair dismissal, and of disability discrimination of 4 kinds: direct discrimination, harassment, a failure to make reasonable adjustments, and s 15 of the Equality Act 2010 - discrimination because of something arising in consequence of disability.

4 His immediate manager at this time was Steve Goodson who is a senior engineer within that team. The manager above that was Brian Foxton whose job title was "Group Engineer – Street Management".

5 The claimant's disability relied upon for purpose of these proceedings is epilepsy. While it had been generally well controlled there had been episodes.

6 The claimant had a seizure here at the tribunal in the first part of this hearing, in the morning of the 3rd day. That meant the rest of that day and whole of the next day were vacated and the tribunal adjourned part-heard to these later dates. The claimant's seizure occurred at 10:15am, but the parties did not leave until we had agreed adjournment dates. We rose at 12:15. Following that, when we reconvened, we made adjustments for the claimant in the tribunal hearing. He requested that the room should not be too full of witnesses from the respondent, especially Brian Foxton. He said he was finding their presence stressful.

7 The claimant had some sickness absence of no particular significance with a frozen shoulder, sometime in 2014. It was unrelated to epilepsy.

8 The claimant has had epilepsy since the age of 16. There has been medical uncertainty as to the precise type of epilepsy, as is evident from the reports we have seen. The distinctions are not of great moment because all the forms involve seizures. That has been the claimant's problem in this case. That was the respondent's concern.

9 In a medical report from a neurology consultant in the Royal London, dated 11 January 2016, it was recorded that the claimant had had 2 to 3 complex focal seizures over a 6-month period. The next report from the consultant stated the same, with a diagnosis of focal epilepsy. An earlier report 6 January 2015 said the diagnosis was complex partial seizures. In the past it was stated that the claimant had tonic-clonic seizures.

10 It is a feature of the claimant's job that he travels around the borough inspecting sites on his own. The job is almost completely lone working apart from a small amount of time spent in the office. The claimant also found travelling round the borough harder than it was for others because he did not drive. The claimant is prevented from driving by DVLA because of his long-term condition.

11 The focus of this hearing has been the possibility of the claimant doing work that did not involve so much lone working.

12 The proceedings which led to the claimant's dismissal start on Tuesday 2 February 2016. Steve Goodson sent an email to Brian Foxton, copying it to the claimant, expressing concern about the claimant's health. It reads as follows:

> "Brian,
>
> I had a short meeting with Mick this morning, at his request, where he explained to me that he had recently been to his GP with regards to some problems he has been having, and has since been to Hospital for a brain scan. The problem is he has told me, is he has been having some mild dizziness/seizures, which is a big concern to him, and me also, as he is a lone worker on the streets of Hackney, and he travels by local transport services, buses, trains and on foot. The hospital believe this could be stress related, and I am concerned for his safety whilst travelling around the borough alone.
>
> His work is suffering a little at the moment as he is not clearing his allocated daily inspections and is struggling to catch up the following day. This appears to be putting extra pressure on him, which is not helping his health, in the current situation. I am informing you of the situation Brian, as my line manager to offer me any advice to me or Mick, in taking this through the Occupational Health channels.
>
> Regards"

13 Mr Foxton replied promptly to Mr Goodson, and the claimant, stating:

> "Steve has discussed your conversation with me and I am concerned over your welfare and to that end have submitted an Occupational Health referral as mentioned in your meeting. You will be contacted in due course by one of the health team (I stated on the submission that you would prefer Fridays to be avoided, as I note you are tending to have that day as leave) …
>
> I trust this turns out to be nothing serious but we must always take the right steps to help where we can.
>
> Regards"

14 On 3 February in the morning, Jenny Ewen senior OH advisor with the council's OH consultants, wrote to Mr Foxton:

> "Hi Brian
>
> I had tried to contact you yesterday regarding your referral for M Baker to review recent health issues. Your referral states that you are worried about Mr Baker working alone and his safety when travelling on public transport. I have discussed this with Clare Piper our Chief Medical Officer for your contract and we would suggest that until he is assessed by HML [Health Management Ltd] you restrict Mr Baker from completing safety critical work and lone working. It may be helpful to revisit his risk assessment specific to his role which may help in identifying any issues at present to help ensure his safety.
>
> I hope you find this helpful and feel free to contact me if you wish to discuss further.
>
> Regards"

It is of note that this was referred to the Chief Medical Officer in occupational health. It therefore received priority. The tribunal also note Steve Goodson was not a party to that later exchange.

15 Mr Foxton involved his line manager, Paul Bowker, who reaffirmed this advice when he got involved in the email thread stating: "Sure but I think the situation is we can't let him go out!".

16 It is a fact that on Wednesday and Thursday 3 & 4 February, the claimant did go out carrying out inspections. Neither Mr Foxton nor Mr Bowker would have countenanced the claimant going out. Steve Goodson apparently knew, only indirectly, of the occupational health advice, and nonetheless let the claimant go out.

17 The claimant took Friday as leave as he usually did and he next reported for work on Monday 8 February. He was then suspended. The respondent has described this as "special leave". Whatever it is called it is clear what the intention of it was. The claimant was not describing himself as unfit for work. He considered that he was fit for work. The respondent was apprehensive because of the occupational health advice and the way it appeared to them in the first place but, in the circumstances, it would have been wrong to call it sick leave or annual leave. It was akin to a form of medical suspension, on full pay.

18 The claimant was told that his special leave would continue until: -

> 18.1 "Your medical practitioner advises that you are not fit for work…
>
> 18.2 Your medical practitioner signs you as being fit for work and this is supported by our Occupational Health advisers
>
> 18.3 I or another manager informs you to return to work."

It was signed by Mr Foxton.

19 The special leave lasted from 8 February until the 19 February when Hackney received a conditional sick note. They then regarded the claimant as off sick and therefore the claimant began to use up his sick pay entitlement. The respondent took the view that when he had a conditional sick note, the conditions of which they could not meet, then the claimant was off sick, not on special leave.

20 Conditions at the foot of Mr Foxton's letter of special leave were set out above. This is not precisely one of those conditions because the GP did not advise that the claimant was "not fit for work" nor did they advise that he was fit to work, just that he might be fit. The respondent's interpretation of that was that if it is subject to conditions which they cannot meet then he is not fit. That was their interpretation, and definitely not the claimant's.

21 The claimant and his family also felt strongly that this process was horribly abrupt and peremptory, and it left the claimant feeling demoralised and de-valued. It is a harassment claim. They feel ever since that day the claimant has been left to "fester" at home without any real contact or apparent care for his welfare or in-depth discussion

about accommodating him back to work in some form. As a point of sympathy, the tribunal can understand their point. The first contact from the respondent was an invitation to a formal capability meeting under their absence management procedure. As a point of substance, as opposed to sympathy, the tribunal cannot see how, logically, this special leave and enforced sick leave might have affected any of the issues we need to decide. There is no evidence to suggest that regular contact with a welfare officer might have shortened the claimant's absence, or made redeployment any easier, in any practical way.

22 The first sick note we have in this case was dated 19 February 2016 when the claimant was examined. This was not an absolute sick note. It was conditional. A Med 3 form contains 2 options which are:

> "not fit for work
> may be fit for work taking into account the following advice…"

This was the latter. The diagnosis was given as "epilepsy", the advice given was:

> "Poorly controlled epilepsy at present, not safe to work alone in the open, suggest he has office type duties until control improved".

23 On that day too the first occupational health report was completed. The claimant had attended clinic on 18 February 2016 with his wife. The report identifies that, prior to 2014, the claimant had not had a seizure for 19 years but in mid-2014 he started to develop a specific type of focal seizure: "…which is associated with periods of absence whereby he does not remember what has happened."

24 On 19 February after his occupational health assessment, the GP medical records (of which we were given a full set) stated:

> "… has had occupational health assessment to say he cannot work alone. Suggest office work. Has had an absence attack on the tube after the interview and associated memory loss."

The Med 3 certificate was 19 February to 8 April - 7 weeks.

25 The occupational health report was written by Dr Clare Piper, the Chief Medical Officer, (Hackney contract). She stated:

> "There does appear to be a relationship with stress in that he reports the seizures are triggered/occur when he is stressed …
>
> Mr Baker also described to me that sometimes at work during the day he would become very stressed and that sometimes he would remain at the bus stop 'until his head had cleared' … and his wife described that on Sunday evenings or evenings after work he could have an epileptic episode."

Towards the end of the report she suggested adaptations:

> "He could undertake non-safety critical work such as work in an office environment with colleagues if such an adjustment could be accommodated."

She also suggests:

> "Mr Baker could also potentially resume his role if for example, he could work with a colleague who would be able to identify and provide support were he to have an episode during a working shift. Ideally one would wish to see an improvement and reduced frequency of seizure episodes before this was considered.
>
> However, I appreciate that operationally, this may be difficult to accommodate. Ultimately, this is a management decision in relation to business and operational needs. If this could not be accommodated he may need to discuss sickness certification with his GP [i.e. whether to certify him as not fit for work]."

26 The report continued:

> "The Driver Vehicle Licencing Agency guidance for epilepsy is often used as a proxy marker for safety critical work. It may well be that a 6-month to one-year seizure free period would be recommended before Mr Baker resumed lone work in the community…
>
> Unfortunately, Mr Baker does not have any warning signs of these episodes and is often unaware that they have happened."

Then the report mentioned his neurology consultant:

> "Before providing a definitive option regarding potential time frames for restrictions and seizure free periods before resuming safety critical work (such as lone work) I would like to seek the view of his specialist. I will therefore plan to provide further advice once a report is received from Mr Baker's specialist."

27 The claimant composed an addition to the Piper report which he asked to be included as an appendix. It references the Trimble trouble. He wrote:

> "Since returning to work in June 2015, there is ongoing work stress due to various work issues: handheld problems/additional work duties/forced pressures/comparing of inspector's work figures and an information gathering/investigation, all of which have been well documented. There seems to be regular work issues/problems raised and it is at these times that the seizures occur."

28 Dr Piper advised that the current disciplinary proceedings process that the claimant was facing should be put on hold on the basis that he would be at high risk of having a seizure if he attended a formal disciplinary.

29 By way of explanation of the disciplinary hearing and the Trimble trouble, although it is not of fundamental importance to the issues at this hearing, it is relevant background. It caused stress and seizures. The claimant appeared to be struggling using the new Trimble hand-held electronic advice for record-keeping of his street work inspections. According to management he was the only inspector who seemed to have a problem using it. The Trimble trouble was recorded in the claimant's annual appraisal for 2014/2015. Trimble was potentially a great time saver. In the claimant's case it seemed to be the opposite. He was developing alternative parallel and additional means of record-keeping. The claimant claimed that the machine was unreliable, constantly breaking down, and more trouble than it was worth. The respondent disputed this, although they acknowledged there had been teething problems.

30 The disciplinary referred to above was that, to break this impasse, the respondent had taken the hard line that that the claimant's refusal to use the Trimble should be characterised as refusing to carry out a reasonable management instruction. Unsurprisingly, the issue was a major source of stress and therefore could well have contributed to increased frequency of the claimant's seizures.

31 The disciplinary was never pursued after that, and the claimant never returned to work before his employment was formally terminated. That is why the Trimble is background only and not a matter the tribunal has to express a view on. In the history, it may have precipitated the sharp decline which led to the claimant's suspension and then dismissal.

32 A month later, on 21 March 2016, there was a medical report from Dr Andrew Kelso, consultant neurologist at the Royal London. He gave a more tentative diagnosis:

> "Current seizure type unclear (dissociative?)"

Lamotrigine (which has been the only medication the claimant took at this stage), was continued. Video telemetry was recommended, and there would be a review in 6 to 8 months.

33 (Video telemetry consists of taking video footage of a patient during a seizure. Ultimately this was done by the claimant's wife who took videos on her phone to show the consultant at the next consultation). There were, as the history goes on to relate, later increases of the dose of Lamotrigine.

34 In view of the medical situation, the respondent considered it had to implement its sickness absence management procedure. On 22 March Mr Foxton wrote to the claimant proposing a meeting under the procedure on Friday 8 April. That was the first contact the respondent had had with the claimant since his suspension on 08 February 2016. Mr Foxton stated:

> "The discussion we will have at our meeting will help me to determine what actions I need to take, as your current absence is as a result of the lack of office-based activity that is possible within your role and the conflict with lone working that your condition is causing."

35 After the sickness management meeting of 8 April, Mr Foxton sent an outcome letter stating:

> "… I reminded those present that you had been medically suspended from work due to an underlying medical condition you have, that currently precludes you from carrying out the full duties of your role. I also confirmed that the matter had been discussed with my colleague in Human Resources, who is of the opinion that recording your absence as sickness absence as opposed to special leave was correct in the circumstances."

Mr Foxton stated:

> "I have not been able to identify any vacancies within the service area that align themselves with my general understanding of your current skill-sets, however I will be happy to give this matter

> ongoing consideration. In the meantime, it would also be useful to hear any suggestion you have in this regard as you have been in the service area for a considerable number of years and of course will have a far better comprehension of your various skill sets."

36 We note that the previous problems with the Trimble which had been deemed by the respondent to be severe, and had led to threat of disciplinary process did not recommend the claimant to his management as a suitable person to undertake an office based IT role, as evidenced in an email from Andy Cunningham, the Head of Streetscene, to Paul Bowker and Brian Foxton on 26 April 2016:

> "It is also my understanding that his ICT skills are not one of his core skills and would hamper his performance in other roles within the office."

The claimant characterises this as making unfounded assumptions but the concern was clearly substantial because it is extreme for a perceived refusal to use an IT system as meriting disciplinary process. In the course of redeployment discussions with the respondent the claimant never sought to correct this wrong assumption or to promote his IT or office-based skills.

37 Despite the fact there had been a specialist neurological report, and contrary to the prediction, there was no extra report from occupational health following the neurology report.

38 There was a later extra report from Dr Kelso on 19 May 2016 stating that the diagnosis was still unclear and reiterating that video telemetry was needed.

39 This report prompted a supplementary report from Dr Piper, but merely echoing what the consultant had said.

40 As we have said above, the precise diagnosis of the type of seizure does not seem to be particularly important. Under the disability discrimination legislation, we are encouraged to focus more on the effects of a disability than the diagnosis, and the old "clinically well recognised" criterion.

41 In the meantime, the claimant was referred for the second stage of the sickness absence procedure. By a letter of 29 June 2016, the claimant was asked to a meeting on 13 July.

42 The suggestion the claimant made was that the two NRSWA inspection areas be combined and that the claimant and the other inspector carry out all the inspection duties within the combined area and that a pool vehicle be utilised to carry them both. By a letter of 22 July Mr Foxton recorded in his outcome letter that the claimant's suggestion did not meet with his approval. Mr Foxton stated:

> "After consideration, this suggestion has been discounted for the following reasons; the combining of two areas is not a practical solution. Two inspectors effectively undertaking the same inspections is not an effective use of time and resource. The continued separation of areas allows the service to maximise the number of inspections undertaken whilst leaving some time to carry out the office work related to these inspections."

43 The claimant's second suggestion was a temporary job swap with the permitting

team and that the claimant should take on a permitting officer role while the permitting officer took an inspector's role.

44 The permitting team is mainly (but by no means exclusively) an office based team. They are the team that grants the permits for contractors and utility companies to undertake roadworks and they stipulate the conditions and time limits of those permits. The response to this was as follows:

> "It is accepted that, on occasions some Permitting Officers have expressed an interest in undertaking site inspection duties. It has been requested as a learning and development matter, however it was not envisaged that these would be ongoing. It should also be noted that the vacant inspectors post was advertised in February 2016 and there were no internal/Hackney applications/candidates. I have also taken the opportunity to speak to the staff in the Permitting Team about any interest in transferring, on an interim basis, to an inspector's role and none of them wished to take up this opportunity.
>
> In view of the current position and the fact that there is no clear indication as to your return to undertake the full duties of your present role, I will be progressing this matter to the next level of the Sickness Management process."

45 By letter of 8 August, the claimant was asked to the next meeting on 26 August. Throughout this period the sick notes continued with the almost same wording as the first already quoted.

46 In the meantime, on 22 August, the claimant wrote a detailed formal grievance to Tim Shields who was the Chief Executive of Hackney.

47 The grievance made clear that he was complaining under the terms of the Equality Act 2010 relying upon his disability. As often when the subject matter of a grievance merges and is intertwined with the subject matter of a respondent initiated procedure (disciplinary / capability), the two became merged. The claimant states that his grievance was completely mis-represented by being so merged but it remains a fact that no formal objection was taken, even by his union representative. They are usually particularly alive to procedural issues and often have strong views, particularly on merger of processes which commonly occurs.

48 There was an extra report from occupational health dated 21 July about redeployment, from Dr Piper. It has been a major point in this case that at this stage during the sickness absence management process the only redeployment considered was within the same directorate, the directorate known in Hackney as "Streetscene". There is another form of redeployment which we later heard about. It is the same process that is also used for employees who would otherwise be compulsorily redundant. That redeployment process is council-wide.

49 The claimant did eventually get that formal redeployment process, but similarly to otherwise redundant employees, he only received a period of 12 weeks after his notice of dismissal, during his contractual notice period.

50 It seemed during the hearing that this was an extra issue which had not been previously noted during case management hearings. It was not in the agreed list of issues. Should the claimant have been put into the council-wide redeployment pool

earlier than he was? It emerged from questioning from the tribunal. Ultimately, this was not and could not be pursued as an issue at this hearing. One of the reasons was that the respondent had understandably only provided a printout of posted vacancies for the 12 weeks that the claimant was in the pool, in his notice period and the extension. It was too late to widen the agenda.

51 On 21 July, Ms Piper wrote to Mr Foxton:

> "My understanding of the criteria for medical redeployment is that an individual is deemed to be likely permanently incapable of undertaking the duties of their substantive role due to medical reasons. At this point it is not possible to provide a definitive medical prognosis. This is because the consultant neurologist indicated that his diagnosis is unclear and a period of investigation had been recommended …
>
> Therefore, in answer to your question, it would be premature to conclude from a medical perspective that Mr Baker would be permanently incapable of undertaking his full substantive duties."

It was hard for the claimant to go anywhere; we can understand how it was intensely frustrating.

52 The claimant has made full disclosure of all medical evidence relating to his epilepsy. He even provided a note from his GP which was provided to Redbridge Council for him to apply for a disabled travel permit (Freedom Pass) from TfL. It states:

> "Mr Baker has a diagnosis of complex focal seizures diagnosed in 1978.
>
> He has a fit roughly about once every two weeks, the most recent being 5 August 2016.
>
> The fits happen while he is aware.
>
> He is on regular medication called Lamotrigine for control of his fits.
>
> Mr Baker suffers from regular seizures during the day and therefore does not currently meet the DVLA requirements to drive."

53 The claimant's original grievance was heard on 8 September 2016. It was presided over by Mr Cunningham the Head of Streetscene. Mo Akpore was from HR. The claimant was again represented by Tom McCotter, his union representative. In a prepared statement from Mr McCotter he said that it should be heard as part of a different procedure than the sickness procedure which was contrary to the view stated by Mo Akpore on behalf of HR that the grievance should be dealt with "solely under the sickness procedure", as the grievance related to the same arguments which the claimant relied on in the sickness management procedure.

54 There was a long outcome letter from Mr Cunningham dated 28 September. In it, as far as the procedure is concerned, he stated:

> "All parties at the meeting agreed, after further deliberation, that all the issues you have raised in your grievance are related and linked to your sickness absence and will now be considered under the Council's Management of Sickness Absence Procedure. There was therefore no longer a separate grievance issue to be considered and this part of the meeting ended with all parties agreeing [sic] this way forward."

And that appears to be the final position despite the controversy. It is factually true that the content of the grievance was more or less coterminous with the content of sickness absence management process.

55 In fact Tom McCotter later went back on his apparent agreement to merging the two processes, by an email.

56 The letter is of special interest because it goes into a detailed analysis of Streetscene, of which Mr Cunningham had oversight. He stated:

> "BF also stated that he had consulted myself as to whether there were other opportunities wider within Streetscene and that I was unable to identify any."

He then went into some detail over 4 services. He stated:

> "I have about 90 FTE that work within the Service. This excludes the school crossing patrol service that generally works about 11 hours a week, term time only… now more recently only four areas having combined two of the highway areas. Taking these areas in turn:
>
> 1. Design and Engineering
> 2. Highways
> 3. Sustainable Transport and Engagement Team
> 4. Network and Transportation Team."

The tribunal need not quote the full detail. It appears to be a thorough and comprehensive analysis of opportunities within the directorate, of which Mr Foxton's part was a minor sub-section.

57 Mr Kohanzad, who has his bundle on his laptop, pasted that entire passage relating to the 4 departments into his closing submission. We can understand why. It appears to be a thorough analysis of the opportunities in Streetscene. There was no criticism or challenge made by the claimant in evidence.

58 The claimant had a salary of approximately £28,000 per annum and his grade was SO1. Next below SO1 is Scale 6. One of the considerations when finding alternative work is that it should be on a comparable grade and salary expectation. It is a condition in the redeployment policy there should be no promotion, and demotion of no more than 2 grades, with 6 months' salary protection. If a role fell outside these parameters, employees could apply for it in the way that any Hackney employee could apply for any vacancy at any stage, but it would not be on a ringfenced or salary-protected basis, and they might well be competing with outside applicants.

59 Redeployment at the claimant's grade was not easy for him. He had highly specialised non-transferable skills. Other roles at that grade had other specialist skills.

60 There are special provisions for redeployment due to ill-health or disability under the redeployment policy. It mentions a "relaxation" in the principle set out in Para 2.6 of the redeployment policy (redundancy):

> "… for example, a post 1 grade higher may be offered provided it is suitable in the

> circumstances"

and

> "where an alternative position as identified it would be offered on a grade applicable to the role where an employee accepts redeployment to do a job one grade below the current grade the employee's salary will be protected for a maximum of 6 months."

61 Mr Cunningham noted that the claimant had been absent for 204 days of sick / special leave. He also emphasised:

> "It was suggested by TM [Tom McCotter] that you could possibly be able to return to full duties once you have been free from seizures for 6 months. However, you said you have had several occurrences over the last few months and one about 2 weeks ago. This gives a clear impression that they are not under control.
>
> We have looked at reasonable adjustments to your substantive role and unfortunately we have not been able to identify anything."

Notwithstanding that he stated:

> "I therefore intend to defer my decision to provide you with an opportunity to make contact with Access to Work."

And:

> "I will therefore reconvene this meeting on receipt of information on the outcome of discussions with Access to Work and will invite you to a meeting at an appropriate time."

62 Once again, unfortunately, the claimant found himself in a frustrating impasse because Access to Work would not begin considering adjustments unless there was a projected return to work date. There was none. Therefore, this could not go forward.

63 And therefore, on 7 November 2016, Mr Cunningham sent a final outcome to the whole process. At that stage the claimant had an 8-week sick note commencing 31 October 2016. Contrary to the recommendation of Ms Piper in her earlier report, the GP was never asked to reconsider certification of leave considering the protracted failure of the respondent to accommodate the necessary conditions on the Med3 to enable the claimant to return to any form of work.

64 Mr Cunningham again went through the 4 divisions of the Streetscene directorate as he had done in his provisional outcome letter. It looks like a copy and paste.

65 The claimant's repeated concerns were (1) status of his absence and (2) his pay. If someone is said to be conditionally fit for work and the business cannot accommodate those conditions, they are unfit for work. They are sick and their absence is categorised as sickness absence. It seems to the tribunal a not unreasonable view for an employer to take this interpretation. It is likely that many other reasonable employers would too.

66 Further, going ahead to legal argument, the case of *O'Hanlon -v- Inland Revenue Commissioners* [2007] IRLR, 404, CA confirms that it cannot be a reasonable adjustment under disability discrimination legislation to extend sick pay for a person absent with a disability and that such a clause would run counter to the entire intention of disability discrimination legislation which is to promote adaptation to facilitate attendance at work, not absence from work. The claimant's 2 complaints are 2 sides of the same coin. They both have this same legal flaw.

67 Mr Cunningham stated:

> "The Council will now give you 12 weeks notice, effective from the date of this letter…
>
> In the event you do not find alternative employment by the end of the redeployment search, your employment will end on 30 January 2017 when you will then be paid your contractual notice in lieu and any outstanding annual leave.
>
> Please note that you have the right to appeal…"

68 In fact, the claimant did not immediately have access to the portal for the redeployment and subsequently on 15 November, over a week later, Mo Akpore the senior HR BP, communicated with him to say:

> "I have just been informed by our Recruitment Team that the link you were forwarded to access current internal vacancies within the Council, can only work if you are at work or if not at work, if you have registered to work from home, which means that you are able to put in your log in details and you can then access the vacancies.
>
> I have spoken to your line manager Brian, who confirms that you will not normally work from home and will not be expected to do so in your role, hence you do not have log in details.

She then made arrangements for the claimant to have a remote login.

69 Sometime after that the claimant succeeded in logging onto the redeployment portal. It appears that it took another 9 days before the claimant accessed the redeployment link on 24 November 2016 i.e. 17 days after the termination of employment.

70 The claimant appealed his dismissal by a 2-line email, dated 21 November 2016 to Mr Aled Richards - the Director of Public Realm which is the Directorate within which Streetscene sits. The claimant said his dismissal was "unreasonable". No more than that.

71 On 12 December 2016 there was another report from Dr Kelso. This one was much more significant. Originally, the claimant had been on Lamotrigine 75mg in the morning and 100mg at night. The recommendation was:

> "To try any better control of epilepsy, I would recommend increasing the dose of Lamotrigine by 25 mg every 2 weeks, until you are taking 200 mg twice a day. I have given you a treatment plan detailing how this should be done, with a copy for your GP."

72 This was more than doubling the dose. The tribunal did a rough calculation. At that rate, according to the tribunal's estimate this could have taken up to 20 weeks to reach the full dose. It was in this period the claimant's appeal against his dismissal

was refused. We are reliably informed that from his final day of service on 30 January 2017, the claimant never had another seizure until he attended this tribunal in May 2018. It does however suggest that whenever the claimant had any sort of contact with his work, there was a risk of seizure. We cannot help feeling the same misgivings over his seizure during this final tribunal hearing, and his desire to clear the LBH witnesses from the tribunal room, as far as practicable.

73 There was an appeal hearing on 27 January in Hackney. Mr Richards was supported by Mr Dhillon of HR. Andy Cunningham presented the respondent's case and Tom McCotter appeared for the claimant again, although it is evident that most of the talking was done by the claimant and not by Mr McCotter.

74 An outcome letter followed on 6 February. It was another thorough and lengthy letter. As in all appeals, the agenda is largely set by the appealing employee. He had 4 principal points, but they were over-general to the point of vagueness: -

(1) Procedure not applied fairly in line with its own requirements.
(2) Treatment was contrary to the Equality Act.
(3) Medical opinion was not given due weighting.
(4) The grievance was not considered.

75 At that meeting the claimant was presented with the minutes of the meeting of 8 September which he had apparently not received previously. No point was made about needing an adjournment which Mr McCotter would surely have insisted on if justice could not have been done without.

76 Mr Richards placed reliance on the GP's Med 3 certificate, perhaps not helpfully either, because the Barts consultant's report gave far more detail. We cannot understand why he did this. The Barts report is dated 12 December and the Med 3 was dated 4 days later on 16 December. Logically it should have prevailed as the principal reference point for the claimant's state of health. Mr Richard's evidence on this was not easy to understand, or particularly satisfactory, considering that the Med 3 diagnosis and advice was reiterated in the same form from 18 February to 16 December 2016. It had become routine, whereas some thought had gone into Dr Kelso's report.

77 He had recommended the Lamotrigine dose increases and, this time, there had been a clear diagnosis of focal epilepsy. The GP should have received a copy of that report as it had been cc'd to them. The GP should have had time to consider it if s/he had wanted to or needed to. The medical records show on 16 December that an attachment was the admin letter from the hospital medication dose timetable the same date the claimant attended for an examination stated to the doctor, that he was reluctant to increase the Lamotrigine dose. It records: -

> ".. no longer being paid at work as just been assessed for PIP awaiting redeployment" and "has continued to have occasional episodes of fits".

78 Dr Kelso's report explained how the diagnosis was clarified. He stated:

> "I was able to view two videos, on your wife's mobile phone. The first of these showed you unresponsive, rocking back and forth, looking around in a confused manner, with some oral automatisms, lasting for around 1 minute. This is relatively nonspecific, but would be consistent with a complex partial seizure. Looking back, it is possible your epilepsy has not been fully controlled since you were a teenager, and you may be having very minor events with full awareness, sometimes associated with stressful situations. However, things have significantly deteriorated since 2013, possibly associated with a decrease in the dose of your Phenytoin prior to this."

79 The tribunal was informed that the claimant had come off Phenytoin and transferred to Lamotrigine when the Phenytoin was superseded, became obsolete, and was no longer prescribed for epilepsy.

80 The claimant placed heavy reliance on the next paragraph of the Kelso report:

> "Your diagnosis of epilepsy would be classed as a disability for the purposes of employment, and your employer is required [sic] to offer you suitable alternative employment, if you feel you are unable to work in your current job because of epilepsy."

As the tribunal remarked it is not the part of the medical professional to comment on a matter which is ultimately a conclusion which the tribunal, or at least a disability discrimination lawyer, has to make. The doctor considerably overstates the extent of an employer's legal duty, and it is without context. It was not helpful. The claimant has clearly relied on it as a professional opinion. That is the substantive decision that we must make. The extent to which that duty is reasonable and the extent to which any reasonable duty has not been complied with is a matter for this tribunal to assess.

81 It was confirmed at the final meeting there was a short break as the claimant had felt unwell and the meeting reconvened after 10 minutes. The fact was on the available medical evidence as it was and the fact that there had been recent seizures with still no projected return date.

82 However, Mr Richards noted finally that the claimant had been unable to access the redeployment portal because of the detail was given that Mo Akpore had raised. He was unable to access it until 24 November and therefore had lost some weeks of redeployment opportunity and he stated as follows:

> "I understand that you were unable to access the redeployment link until 24 November 2016, and therefore I can confirm this has been extended and you will remain in the redeployment pool until 16 February 2017. If you are unsuccessful in securing a suitable alternative post, this will be your last day of service [tribunal's emphasis]."

83 That is the evidence, and the findings, from which we must decide the case.

Jurisdictional time point

84 The respondent's counsel took the point that this raised a jurisdictional time point that he had not noticed before. It is always fair, and our duty, to take jurisdictional time points, it is a matter we must consider regardless of who raises it, if anyone, regardless of when.

85 In his ET1 the claimant states his final day of employment as 17 February 2017. The original outcome letter dated 7 November 2016 had stated that employment would end on 30 January 2017.

86 The claimant's first reference to ACAS was made on 2 May 2017 had to have been made on 29 April for it to be within 3 months of 30/01/2017. It is well within time relative to a final date of 16 February 2017.

87 The tribunal was concerned about this because there was a very clear statement by Mr Richards, presumably on HR advice to treat that as his final day - "last day of service".

88 This was an appeal. If the appeal had, theoretically, succeeded totally, the dismissal would have "disappeared". (See *Roberts v West Coast Trains* [2004] IRLR, 788, CA). That is the generally accepted legal view of the effect of a successful workplace appeal. That is even though employees have been appealing as an "ex-employees" who then become reinstated and are paid anything that is owed because of their being out of the service between dismissal and the appeal outcome. Statutory continuity of employment is restored by a successful appeal.

89 The fact that this decision by Mr Richards was made after the effective date of termination is not material in our view. We consider that he had all powers to overturn the dismissal from whenever he made and published an appeal decision. If he had the power to overturn a dismissal, *a fortiori* he also had the power to defer the dismissal / termination. That is what he seems to have done, legally.

90 As we have seen, the claimant received no pay, having totally exhausted sick pay and having qualified for a personal independence plan (PIP). It would not have made any financial difference but as far as employment status is concerned we think the claimant's argument is quite correct and that 16 February (not 17 February) was his last day of service. The latter was not a material difference. The claim is still in time relative to the EDT.

91 Theoretically, had we held that the claim was out of time as far as the disability discrimination claim was concerned, it would certainly have held it would be just and equitable to extend time for the discrimination claims. We consider that the claimant's employment was extended until 16 February. It was only another 10 days after the date of the appeal letter. The claimant still had the work phone he needed. The system only allows for people who are regarded as employed to access this portal.

92 We would also have regarded it as not reasonably practicable to present the claim before it was presented under s111 of the Employment Rights Act 1996, due to an entirely reasonable misreading of the situation (if that is what it was).

Unfair dismissal

93 On this evidence, we are first asked whether the claimant was unfairly dismissed. The respondent's counsel stated that while he could deal with the discrimination claims in his closing address he needed more detail on the claimant's

unfair dismissal claim and what the claimant said was unfair about it. The claimant then helpfully produced a 13-point list the next day stating just that.

94 To start, the tribunal cannot accept Mr Goodson stated he wanted the claimant to resign and leave. We accept his denial of this comment. It was completely out of character with some conscientious correspondence we saw, responsibly focussing on legitimate health & safety, which appeared to be professional (quoted above).

95 The point the claimant makes at first is the lack of any "welfare" meeting, (a term that the tribunal used originally).

96 The claimant seemed then to be raising other things that are not part of the originally generally decided list of issues e.g. the point (referred to above) about the claimant being placed into a general council-wide redeployment at an earlier stage. However, there is no evidence that this adjustment would have actually found a suitable position anywhere near SO1 grade. We remind ourselves that it is always more difficult to deploy at the more senior grades, relatively easy to redeploy at unskilled grades. The higher the grade, the more untransferrable skills are involved.

97 We made a formal decision not to include this in the list of issues, principally on procedural grounds. (See above)

98 The claimant says "LBH did not take my disability into consideration". He would not have been suspended from work if they did not take the disability into consideration. He may mean his illness was not considered as a formal legal "disability". That may possibly have been so at the time, but as we stated above, not likely. But it reflects the claimant's misapprehension that legal disabled status creates an absolute legal right to re-deployment. That is legally not correct.

99 The point about the permitting team was that they could not force the permitting officer into a job swap. That is not generally mandated by unfair dismissal law or disability discrimination reasonable adjustments law.

100 Apart from which, Permitting Officers are not in exclusively office based roles. They may need to see the proposed sites of streets works before issuing a permit which would dictate the conditions which attach to such permits. Sometimes photographs are not enough. Phasing of traffic lights is often a consideration, and how to regulate traffic with temporary lights.

101 We remind ourselves that the claimant's disability made it hazardous even for him to be on public transport. It is not clear how the claimant says that the sickness procedure was not properly implemented. He refers to it without giving detailed worked examples of how the application of it was not fair. The tribunal looked for examples, proactively, but we cannot see an obvious instance which is outside the range of reasonable responses for s 98(4) of the Employment Rights Act 1996.

102 The claimant says that the borough was not fair in dismissing him without giving him a chance to achieve a 6-month seizure free period. However, in prospect at the time that could have gone on for years with the respondent unable to terminate his

employment. There would have to have been a soundly projected return date within a reasonable period otherwise the respondent could not be said to have acted unreasonably. At the time of termination and at the time of the refusal of the appeal there was no such projected return date. There were unspecific longer term hopes.

103 The tribunal's duty is to judge the fairness of the dismissal at the time of the dismissal, and not in the light of later events. It is always hard judging this at a final hearing in the tribunal. We know now what happened 18 months later. The respondent must be tested on a range of reasonable responses at the point of dismissal, and then the appeal outcome. Even so the stress of a return to work might have caused the same stresses which occurred in this final hearing resulting in a seizure - particularly as it would have involved contact with individuals who increased the claimant's stress.

104 The claimant points out, as is true, the respondent did not make any suggested reasonable adjustments. They appeared at a loss to do so. The claimant originated the 2 suggestions of 2 inspectors driving in the same car, also a job swap with the Permitting Officers. As a point of disability discrimination law, the business of one of the officers simply driving the car was characterised by respondent's counsel as the second inspector being a "cab driver" could be considered for reasonable adjustments law to be a personal service being performed by a colleague such as was deemed not to be reasonable adjustment.

105 The distinction between adjustments to help you do your work and adjustments that are purely personal, (in *Kenny* it was toileting), was made in *Kenny v Hampshire Constabulary* [1999] IRLR, 76, EAT. We consider the principle would apply to chauffeuring.

106 We know that the claimant feels strongly about merging the grievance and sickness procedure. We do not consider it was unreasonable of the respondent to merge them. We know of many reasonable employers who would have done the same. It is not prohibited by the ACAS code on disciplinary proceedings, by analogy. It may be that the ACAS code applies to sickness absence procedures. We do not need to decide this. We know there is no code on redundancy.

107 Perhaps the best point the claimant makes is about the timing of the dismissal. There was a report from his consultant stating that there was a prospect of improved condition with substantial increase the dose of Lamotrigine more than 100% over a period of 20 weeks (as we calculate).

108 As at the date of the appeal which was some time the dismissal, there were still recent seizures (2 weeks). The respondent was obviously aware throughout that the workplace setting itself and the entire process, the impending disciplinary process, but now this, had itself been a stress which seemed to be provoking increased seizures.

109 Sadly we have to take it for granted in any dismissal case, particularly when there is, as in this case, over 10 years' service, it takes a very heavy toll on people personally and in their family life. We can only deal with the law we are bound to apply. We cannot substitute our view for the respondent's.

110 We should remind ourselves of the words of section 98(2)(a) of the Employment Rights Act 1996. A reason is a fair reason if it:

> "… relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do [tribunal's emphasis]".

There is no doubt that being an NRSWA inspector was that work. That was the claimant's contract. There is not a primary duty under section 98(2)(a) to find other work. That comes into consideration under section 98(4) of the Employment Rights Act 1996 - the general consideration of justice and the equity of the case.

111 There was a detailed survey in Mr Cunningham's termination letter which the respondent's counsel pasted into his submission about the survey of Streetscene which at that level was the pool in which other opportunities were being sought. We remind ourselves the claimant was SO1. He would not have been considered, and we do not consider it would have been fair to expect the respondent to offer him, a completely unskilled job way below his existing grade of SO1, and salary of £28,000 per annum.

112 The claimant has since, as a matter of history, taken unskilled work. In his current position any work is better than none, for morale and getting him out of the house. He did some shelf-stacking. The points are frankly unfounded.

113 Doing the best we can, and with sympathy for the claimant, we cannot find that dismissal at that time in those circumstances, fell outside the band of reasonable responses.

114 We cannot find an obvious structural procedural unfairness here in the process. The claimant always stated that the respondent did not follow their procedure but we have not been persuaded that they did fail in any identifiable way. There has been no detailed procedural criticism from the claimant.

115 The claimant was continuously off sick from 8 February 2016 until 16 February 2017, apart from the 10 days at the start when he was on "special leave" before his GP certified him as conditionally fit to work.

116 On the redeployment list we have seen a list of vacancies roughly from 2 November to 13 January. We have not actually seen an extended list of vacancies going all the way to 16 February 2017 which was the claimant's last day of service. Nonetheless, we saw no suitable, even near, matches around about SO1 or scale 5. We have seen no concrete evidence that the claimant engaged fully with the redeployment process rather than complaining as a matter of principle that he missed redeployment time (which was then given back to him at the appeal, so remedied).

117 The evidence is simply not there to sustain the complaint about the Sustainable Transport Manager. Mr Cunningham in his analysis of the Sustainable Transport role confirmed that it would involve a significant amount of lone-working and he gave detailed descriptions of the roles. The roles to his knowledge were all taken at the time. The claimant would have been surplus to requirements.

118 The respondent's counsel reminded us that the claimant was extraordinarily vague about alternative employment. The tribunal questioned the claimant closely. He mentioned applying for a Sustainable Transport Planner job which we understand he did simply as a Hackney employee i.e. not on a ringfenced basis but when pressed by the tribunal about it all he could say was that he "thought" he had applied which, for a matter of that sort of importance to his case, is too vague. Mo Akpore later looked into this, and gave an additional later witness statement, saying there was no record of the claimant ever having applied. She also described the later redeployment process.

Reasonable Adjustments

119 The claimant is claiming that there are 6 reasonable adjustments which should have been made:

(1) risk assessment;

(2) redeploying in the permitting team;

(3) redeploying within the wider Streetscene (the evidence of Mr Cunningham);

(4) putting the claimant into the electric pool car travelling with a colleague doing inspection;

(5) Re-deployment to the sustainable transport planner job in July 2016;

(6) Re-deploying the claimant to any other admin job within the council.

120 As the respondent's counsel rightly said and we discussed in the closing stages of the hearing, failure to carry out a risk assessment *per se* is not failure to make a reasonable adjustment -*Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664.

121 Apart from that, the claimant seems to have an over-formal view of what a "risk assessment" is. It is eminently arguable that a reference to occupational health is itself a "risk assessment". Just because it does not come back on a formal template headed "Risk Assessment" does not mean it is not, broadly speaking, a risk assessment, especially in the context of a case like this where the claimant's medical condition was the primary focus .

122 Mr Richards explained there are some more hazardous jobs within the council for which formal "risk assessments" are mandated. The claimant's was not such a job.

123 We do not regard it would have been reasonable for the respondent to have put the claimant to the permitting team as (a) it would not have been a complete solution to the problem because it is not an exclusively office-bound team and (b) it would have had to force another employee out, against their will, otherwise the claimant would have been surplus to requirements within the permitting team. There is much established case law which establishes that that would not be a reasonable

adjustment.

124 The failure to redeploy the claimant within the Streetscene service is not *per se* a failure to make reasonable adjustment. They investigated the entire Streetscene service of which Andy Cunningham had a reliable overview, he knew what the opportunities were, he knew that they had nothing for the claimant at his skill or salary grade level, or near.

125 We have already dealt with the idea of 2 inspectors travelling together. The electric pool car idea was not a required reasonable adjustment (a) because it was personal rather than work related – effectively providing a chauffeur, and (b) this would have constituted an extremely wasteful use of personnel.

126 Despite the printout of roles available within the wider council this relates to the final redeployment in the claimant's notice period, we could not see anything remotely suitable in that specimen list of 12 weeks of posted vacancies, as the respondent's counsel urged us to find.

127 The respondent cannot be criticised for not making a reasonable effort to get a result, even if there were no results. We cannot find that the respondent has failed to make any reasonable adjustment to the redeployment process.

128 For those reasons, we cannot uphold the claim for failure to make reasonable adjustments.

<u>Detriment / Less Favourable Treatment / Harrassment/ s15 Disability Discrimination</u>

129 There are 4 instances of detriment/less favourable treatment relied upon for direct discrimination, s 15 discrimination, and s 26 harassment. They are: -

129.1 putting the claimant on special leave on 8 February;
129.2 the entire capability dismissal process;
129.3 not allowing the claimant to come into work on a conditional sick note
129.4 his dismissal.

130 The Court of Appeal in *O'Brian v Bolton St Catherine's Academy* [2017] IRLR 547 CA, compared the test of reasonableness under section 98(4) of the Employment Rights Act 1996 with the word "proportionate" in section 15(1)(b) of the Equality Act 2010. The tribunal can see the force of the parallel. These tests are objective.

131 By way of direct discrimination, the tribunal cannot possibly see that a non-disabled person who had been off sick with a conditional sick note which the respondent could not comply with for the length of time the claimant had been, would not have similarly been dismissed. We cannot see that a similar person who had been having repeated dizzy spells or blackouts at work would not have been suspended if they had not been formally disabled.

132 For section 13 discrimination - for the purposes of section 23 – the claimant's circumstances were materially different from any hypothetical or actual comparator.

133 The overall pace of the capability dismissal process itself was slow, in measured steps which were held up to allow the claimant extra time, for instance, to contact Access to Work.

134 The claimant characterises his removal from work to "rot" or/"fester" at home; as an act of harassment. The respondent knew enough to know that the claimant was someone likely to be suffering from a disability. Most people with epilepsy qualify as disabled under section 6 of the Equality Act 2010.

135 The claimant was suspended because of the effects of his disability. The claimant perceived it as a violation of his dignity, humiliation, and degradation.

136 Where this claim fails is that the claimant was not reasonable in his perception of this for the purpose of s 26(4)(a) of the Equality Act 2010. The respondent did no less than the duty of care of a prudent employer in trying to avert an untoward incident due to the claimant's epilepsy. It was their responsibility as employers. They were trying to protect the claimant, and themselves. This is the duty of care.

137 The fact that the claimant went to work on 3 and 4 February, seems to have been a lack of judgment on Mr Goodson's part or a lack of proper communication between management. It is of no great significance because the matter was regularised as at Monday 8 February, when the claimant was put on special leave.

138 Employers regularly face these arguments. At the tribunal, it is usually the other way round - that employers get criticised for contacting employees who are off work sick. Employees often complain to this tribunal that they are being harassed by such contact. In this case the claimant complains bitterly that there was no such contact, but as far as the respondent could see, every effort to communicate with him in any purposeful way seemed to cause him great stress and to precipitate seizures. They were in a difficult position.

139 It is only after the event that the claimant is making this complaint, not at the time. He never e-mailed saying: "why doesn't some welfare officer come and see me". We feel sure that if he had made such a request the respondent would have responded. There was never such a request.

140 The third detriment which the claimant relies upon is really what the whole case is about, not allowing the claimant to come into work on a conditional sick note. We have dealt with this above sufficiently under the whole issue of redeployment.

141 There was no suitable alternative employment within Streetscene then, or within the wider LBH council.

142 We are critical of the fact that the recommendation of Clare Piper that the whole business of certification be revisited with the GP was not done given the protracted length of time that the respondent, as we consider conscientiously, had failed to accommodate the claimant into any other role.

143 The final act complained of is dismissal. By reference to s13 direct discrimination, we cannot think that a non-disabled person who is absent for that length of time in circumstances where there was no return to work date in prospect would not have been treated in the same way.

144 We find it was a proportionate reaction under section 15(1)(b) and it was a legitimate aim of the service to get the street works inspected by someone who could do it without creating risk to themselves and possibly the council.

145 The special leave on 8 February was similarly proportionate.

Employment Judge Prichard

Date 3 December 2018