# EMPLOYMENT TRIBUNALS

Claimant: Mr G Wilson

Respondent: Pennine Acute Hospitals NHS Trust

**HELD AT:** Manchester **ON:** 15 – 18 January 2018
14,16 March 2018
2, 4, 8, 11, 14, 18 May 2018

**IN CHAMBERS:** 23 and 24 July 2018
2 August 2018
22 November 2018

**BEFORE:** Employment Judge Porter
Mrs D Radcliffe
Mrs S J Ensell

**REPRESENTATION:**

**Claimant:** Mrs L Wilson, the claimant's wife

**Respondent:** Mr A Gibson, solicitor

# RESERVED JUDGMENT

1. The claims under the Equality Act 2010 are not well-founded and are hereby dismissed.

2. The claimant was fairly dismissed. His claim of unfair dismissal is not well-founded and is hereby dismissed.

# REASONS

**Issues to be determined**

1. At the outset it was confirmed by both parties that the issues to be determined were as set out in the Case Management Orders made at a preliminary hearing held on 27 June 2017 and sent to the parties on 10 July 2017, a copy of which appears at pages 40-46 of the bundle (the CMO sent to the parties on 10 July 2017).

2. The claimant did not, either at the commencement, or during the course, of the hearing, make any application for leave to amend the claim to add new causes of action or complaints of discriminatory acts or omissions.

3. The written submissions raise, for the first time, some disagreement as to the precise identification of the relevant issues. The tribunal has therefore considered the previous Orders to identify the issues for determination. The tribunal bears in mind that the aim of the identification of the issues in advance of the hearing is to protect both parties' right to a fair hearing, to ensure that both parties have had the opportunity to adduce relevant evidence in support, or in defence, of the claim. It is consistent with the overriding objective and the interest of justice to ensure that neither party is taken by surprise by any new matter, raised for the first time during the course of the hearing itself. The tribunal notes in particular that the respondent's right to a fair hearing would be prejudiced by the determination of new allegations of discriminatory treatment. The tribunal notes the following.

4. The Claim Form was presented on 21 March 2017 (p5). Paragraph 8.1 identified the claims as unfair dismissal and disability discrimination. The claimant did not tick the box to say he was claiming notice pay.

5. The claims were identified at paragraph 8 of the CMO sent to the parties on 10 July 2017 as claims of disability discrimination under sections 13, 15, 20, 26 and 27 of the Equality Act 2010 and a claim of unfair dismissal. Claims of breach of contract and indirect discrimination under s19 Equality Act 2010 were not identified.

6. The CMO sent to the parties on 10 July 2017 noted that:

    6.1. (At paragraph 4) The claimant made application for leave to amend the claim to include the particulars set out in the attachments to the claimant's representative's emails dated 23 May 2017 ("Extra information for preliminary hearing"), 25 May 2017 at 8:51 ("Extra information") and 25 May 2017 at 23.45 ("Further Information");

6.2. (At paragraph 5) The respondent raised no objection to the application, which was granted.

6.3. (At paragraph 6) The claimant was satisfied that each and every allegation of discriminatory treatment was contained in the claim form as amended by the Further and Extra Information. He pursued each allegation, in the alternative, as a claim of direct discrimination under s13 Equality Act, discrimination arising from something connected with his disability under s15 Equality Act, harassment under s26 Equality Act and victimisation under s 27 Equality Act;

6.4. (At paragraph 7) It was noted that the claimant had, in the completed agenda identified claims which were not within the jurisdiction of the tribunal, for example, fraud, abuse of position of power, breach of confidentiality. The claimant confirmed that these allegations were pursued as allegations of discriminatory treatment;

6.5. (At paragraph 9) The claimant confirmed that he did not pursue a claim of indirect discrimination;

6.6. (At paragraph 10) In relation to the claim of victimisation, the claimant asserts that:

6.6.1. he did a protected act on receipt of his diagnosis in September 2013, by asking for reasonable adjustments;

6.6.2. he did a further protected act each time he complained that the adjustments were not being made or when he requested a further adjustment;

6.6.3. he was subject to detrimental treatment, for example, he was removed from his Nurse bank position without any warning or explanation

6.7. (At paragraph 11) In relation to the failure to make reasonable adjustments, the claimant asserts that:

6.7.1. the respondent was fully aware of the claimant's disability as he informed Tracy Shaw of the condition following his diagnosis in September 2013;

6.7.2. the respondent applied a PCP, the requirement to work a full shift with only one lunch break;

6.7.3. this put the claimant at a substantial disadvantage: he could not work without regular breaks;

6.7.4. Tracy Shaw agreed a reasonable adjustment, namely, to allow the claimant to take additional breaks as and when needed;

6.7.5. Contrary to the agreement the claimant was not allowed to take breaks;

6.7.6. As a result, the claimant's condition deteriorated and he required further adjustments;

6.7.7. the respondent applied a PCP, the requirement to work late shifts;

6.7.8. this put the claimant at a substantial disadvantage: he could not work late shifts because of his chronic fatigue, which worsened as the day progressed;

6.7.9. the respondent agreed a reasonable adjustment, namely, an agreement that the claimant only be required to work early shifts;

6.7.10. this agreement was only in operation for a short while, following which the claimant was placed back on late shifts and again his condition deteriorated;

6.7.11. the respondent applied a PCP, the requirement to work on a busy active ward;

6.7.12. this put the claimant at a substantial disadvantage: he could not work on a busy active ward because he was running around the ward, meeting constant demands, and his requirement to take breaks could not easily be accommodated;

6.7.13. the claimant was referred to OH. As a consequence it was recommended that the claimant be moved from shift work on the wards to work either in the clinic or in day services;

6.7.14. that was a reasonable adjustment but the claimant was not moved as recommended by OH.

6.8. (At paragraph 12). The respondent sought clarification on certain allegations of discriminatory treatment. The claimant asserts that:

6.8.1. the respondent acted in breach of procedure by placing the claimant under short term sickness procedure and applying the trigger points system. As a result the claimant was threatened with a caution, causing him more stress. This was detrimental treatment relating to the claimant's disability. The claimant's trade union representative pointed out the error and the respondent moved the claimant to the long term sickness absence procedure. No further trigger points were applied;

6.8.2. the dismissal as a Bank nurse was a complaint of victimisation, not breach of contract;

6.8.3. in September 2015 the claimant was refused training "because of ME";

6.8.4. the claimant was refused time off to attend medical appointments. In or around February 2016 the claimant requested time off to attend the Integrated Care Centre. Emma Connolly refused this request. The claimant had to reschedule the medical appointment to go on a day of rest. Other employees, for example, Tracy Taylor and Becky Hogan, were allowed time off during work hours to attend medical appointments;

6.8.5. the claimant was forcibly placed on the redeployment list. He was not asked to complete an "aspirational list", contrary to policy. As a result he was repeatedly offered completely unsuitable jobs, for example, patient watch and a return to G1, a busy active ward. Following his complaint the claimant was removed from the list;

6.8.6. Julia Riley refused to organise a case conference with the claimant in attendance, she said she would carry out a risk assessment but failed to do so;

6.8.7. The respondent organised a case conference in the absence of the claimant. The claimant did not consent to that. This was a breach of confidentiality as disclosures of information were made during, and as a consequence of, that case conference without the claimant's consent. This breached procedure;

7. The claimant did not, when confirming the point set out at paragraph 6.3 above, assert that he intended to pursue any additional claims.

8. The "Extra information for preliminary hearing" (p29 of the bundle) sets out a background and under the heading disability discrimination (p36 of the Bundle) asserted that:

8.1. He had been dismissed because of his disability;

8.2. the respondent had failed to make reasonable adjustments;

8.3. he was directly discriminated against because of his disability by being refused training (NVQ 2), not being allowed to go to medical appointments while others were allowed and placed on four weekends a month when no other HCA had to do this;

8.4. it was discriminatory treatment to offer the jobs (a reference to the offer of going back to ward G1 or a Patient Watch role as described at paragraph 27 of the Extra Information for Preliminary hearing);

8.5. the respondent had caused stress bullying and harassment victimisation as well as conspiracy to defraud by concealment of evidence in disability discrimination and had colluded and misled the claimant since missing his grievance.

9. The "Extra information for Preliminary Hearing", under the description of "Background", includes the following allegations of discrimination and/or bullying and harassment:

9.1. the reduction of hours from 37.5 hours to 30 hours per week;

9.2. OH sent its report to Susan Howard without the claimant's consent;

9.3. The letter requesting further information from the claimant's GP was significantly delayed;

9.4. The respondent shared confidential information from a without prejudice meeting with the claimant;

9.5. The alleged missing referral containing derogatory comments describing the claimant as "a burden to the ward" and that the referring manager had said she wanted to place the claimant on the Redeployment List;

9.6. Sue Howard asked the claimant "how long are you going to be going on with this disability thing?", and in an email to Julia Riley Sue Howard referred to the claimant as "different"

10. The Extra Information for Preliminary Hearing includes the following (p35):

> I do not know if I have been paid the correct payment at dismissal….I have ..been employed at the trust for 9 years, not 4 years, as I have been employed on Nurse Bank since 2008.

11. The Extra Information (p38) and Further Information (p39) (included in the amendment to the claim referred to at paragraphs 6.1 and 6.2 above) do not contain any additional claims or allegations of discrimination against the respondent.

12. The respondent presented an Amended Grounds of resistance (p47) which:

12.1. set out the respondent's reply to the amended Claim;

12.2. confirmed its assertion that there was no continuing act of discrimination and parts of the claim were presented out of time.

13. Further Orders were made at a preliminary hearing held on 18 August 2017 and sent to the parties on 29 August 2017, a copy of which appears at pages 65-66 of the bundle (the CMO sent to the parties on 29 August 2017), which noted that:

13.1. (At paragraph 4.2) The respondent conceded that the claimant was a disabled person within the meaning of the Equality Act 2010 in relation to the impairment of Chronic Fatigue Syndrome and was disabled between the date of his diagnosis with that condition in September 2013 to the date of his dismissal.

13.2. (At paragraph 6) The issues to be determined are as described in the Case Management Order sent to the parties on 10 July 2017.

13.3. (At paragraph 19) The respondent sought further information in relation to the claimant's assertion that he was dismissed from the Nurse Bank position.

13.4. (At paragraph 20) The claimant asserts that:

13.4.1. the respondent originally operated the Nurse Bank arrangements;

13.4.2. standard terms of engagement were sent to the claimant in 2008 indicating that he was employed as a Bank Nurse by the respondent;

13.4.3. the claimant was advised that NH professionals were taking over the operation of the Nurse Bank on behalf of the respondent and he was invited to a meeting to sign up to their terms;

13.4.4. however, before he could attend the meeting the claimant received a P45 indicating that he had been dismissed from the Nurse bank position by the respondent;

13.4.5. the claimant therefore did not attend the meeting with NH professionals;

13.4.6. the claimant suffered a detriment because, although he has not been fit enough to return to any work since his dismissal from his permanent position and the Nurse Bank, if he had been retained on the Nurse Bank then he would have been able to return to work on his choice of restricted duties and restricted hours to suit his needs and medical condition. His dismissal from the Nurse Bank deprives him of that opportunity;

14. During the course of the final hearing before this tribunal the claimant introduced evidence, both in his written witness statement and in oral evidence, relating to events which had taken place **after** the preliminary hearing on 18 August 2017 namely:

14.1.1. the failure of the respondent to provide a reference for the claimant’s application to join NHS Professionals;

14.1.2. The terms upon which the respondent proposed to provide any future reference.

15. It follows that neither of these events were identified as relevant issues at either of the preliminary hearings. During the course of the final hearing additional documents were added to the bundle, with agreement, relating to those events. The claimant did not, at that time, make application for leave to amend the claim to introduce these new allegations as part of the pleaded claim. Neither did he or his wife give any indication that it was the intention to do so. The tribunal was simply notified that the parties had agreed to add two additional documents to the bundle. Neither the claimant nor his wife are legally qualified. The claimant is a litigant in person assisted by his wife. The tribunal

has made suitable adjustments to the proceedings to reflect that. The tribunal has where appropriate advised the claimant and his wife of the tribunal procedure, of the ways in which the claimant may wish to pursue the claim, and to make appropriate applications for orders. The claimant and his wife did make applications for orders during the course of the hearing as indicated in the paragraphs below. The tribunal is satisfied and finds that following attendance at the two preliminary hearings the claimant, as a litigant in person, was aware of the need to make application for leave to amend the claim to introduce new issues, and yet failed to give any indication that it was his intention to do so in relation to these new events. It was the understanding of the tribunal that the claimant raised these new matters of evidence in support of the existing claims of discriminatory treatment in relation to the termination of the claimant's engagement on the Nurse Bank. On balance, it is not in the interest of justice to introduce these new events as part of the issues to be determined in this claim. The respondent has not had fair opportunity to answer the new allegations.

16. In all these circumstances, the tribunal confirms that the issues to be determined by the tribunal are as follows:

16.1. Whether any part of the claim of disability discrimination was presented out of time and if so whether time should be extended to allow the claim to proceed;

16.2. Whether the respondent failed in its duty to make reasonable adjustments as identified at paragraph 6.7 above and in particular:

16.2.1. Did the respondent have the following provisions, criteria or practices -PCP(s):

16.2.1.1. The requirement to work on a busy active ward;

16.2.1.2. The requirement to work a full shift with only one lunch break;

16.2.1.3. The requirement to work late shifts.

16.2.2. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time;

16.2.3. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage;

16.2.4. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage;

16.2.5. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

16.3. Whether the following acts of alleged discriminatory treatment under either s13 (direct discrimination), 15 (discrimination arising from a disability), 26 (harassment) Equality Act 2010 took place:

16.3.1. placing the claimant under the short term sickness absence procedure and applying the trigger points system;

16.3.2. in September 2015 the claimant was refused training "because of ME";

16.3.3. the claimant was refused time off to attend medical appointments;

16.3.4. the claimant was placed on four weekends a month when no other HCA had to do this;

16.3.5. Sue Howard asked the claimant "how long are you going to be going on with this disability thing?", and in an email to Julia Riley Sue Howard referred to the claimant as "different"

16.3.6. a referral to OH contained derogatory comments describing the claimant as "a burden to the ward" and the referring manager had said she wanted to place the claimant on the Redeployment List

16.3.7. the claimant was forcibly placed on the redeployment list;

16.3.8. the claimant was not asked to complete an "aspirational list";

16.3.9. the claimant was offered a job on Patient Watch and a return to G1, a busy active ward;

16.3.10. Julia Riley refused to organise a case conference with the claimant in attendance;

16.3.11. Julia Riley said she would carry out a risk assessment but failed to do so;

16.3.12. The claimant's hours were reduced from 37.5 hours to 30 hours per week;

16.3.13. OH sent its report to Susan Howard without the claimant's consent;

16.3.14. The letter requesting further information from the claimant's GP was significantly delayed;

16.3.15. The respondent organised a case conference in the absence of the claimant;

16.3.16. The respondent shared confidential information obtained in a without prejudice meeting;

16.3.17. the claimant was dismissed;

16.3.18. the claimant was dismissed from the Nurse Bank.

16.4. If so, whether they amounted to direct discrimination, discrimination arising from a disability or harassment within the meaning of the Equality Act;

16.5. Whether the claimant made any protected acts within the meaning of s27 Equality Act 2010 as identified at paragraph 6.6 above;

16.6. If so, whether any of the acts referred to at paragraph 16.3 above took place;

16.7. If so whether such acts amounted to victimisation within the meaning of s27 Equality Act 2010;

16.8. Whether the claimant was unfairly dismissed within the meaning of s98 Employment Rights Act 1996

17. The tribunal is satisfied and finds that these are the issues identified in the CMO sent to the parties on 10 July 2017. The respondent has had full opportunity to respond to each of those issues, each of which was included either in the original Claim form and/or the Amended Claim. It is not in the interest of justice to allow the claimant to pursue any additional issues. The respondent's right to a fair hearing is prejudiced by the inclusion of any additional allegations of discriminatory acts. The respondent has adduced only the relevant evidence to defend the issues previously identified.

18. The tribunal finds that it does not have jurisdiction to hear the claims of:

18.1. Breach of contract for failure to provide the appropriate notice of termination of employment. This was never identified as a separate cause of action. It was raised, at its highest, as a matter of remedy arising from the termination of the contract of employment;

18.2. Victimisation and/or indirect discrimination in relation to the new events described at paragraph 14 above. The claimant, in raising these new matters of evidence, did not indicate that the purpose of the new evidence was to support a new cause of action. The claimant did not make application for leave to amend his claim to include these new matters, which had arisen during the course of conduct of these proceedings.

**Orders**

19. A number of orders were made for the conduct and good management of the proceedings during the course of the Hearing. In making the orders the tribunal considered the overriding objective and the Employment Tribunals Rules of Procedure 2013. Orders included the following.

20. Orders were made at the preliminary hearing on 18 August 2017 for the conduct of the hearing, as recorded in the CMO sent to the parties on 29 August 2017 Pursuant to those orders:

20.1. the claimant and his wife attended to give evidence. However, neither the claimant nor his wife were in attendance at the tribunal when the respondent's witnesses gave evidence. Mrs Wilson conducted the cross-examination of the respondent's witnesses by way of a Skype connection;

20.2. hearing dates were fixed over 10 days between 15 January 2018 and 29 January 2018

21. On 18 January 2018 the claimant made a request to postpone the hearing as his wife was too ill to act as his representative. The hearing was postponed and it was ordered that the hearing continue as then listed between 22 January 2018 – 24 January 2018 and Friday, 26 January 2018.

22. A further request by the claimant to postpone the hearing was granted on the grounds that his wife remained too ill to attend the hearing and/or act as the claimant's representative.

23. A further preliminary hearing took place by conference call on 26 January 2018 to make orders for the continuation of the hearing, and to consider further adjustments for the claimant and his wife. There was some delay in relisting the hearing due to the non-availability of the tribunal panel and the respondent's representative.

24. The postponed hearing was eventually relisted for 14, 16 March 2018 and 2, 4, 8, 11, 14 and 18 May 2018. The order in which evidence was heard was agreed between the parties.

25. During the course of giving her evidence on 14 March 2018 Vanessa Genesis, when questioned in cross-examination about paragraph 7 of her witness statement, said that she had sent an email to Tracy Shaw enquiring about a request for annual leave and that she had a copy of that email with her. It was noted that that email had not been disclosed to the claimant prior to the hearing. Vanessa Genesis said that she did pass the email over to the respondent's solicitors. The respondent's solicitor agreed that this email should have been disclosed and included in the bundle. With the agreement of the parties Vanessa Genesis introduced that email into the evidence and read it out. She was questioned on it. It was agreed that the respondent would send a copy of that email to the claimant before the next hearing date.

26. On 16 March 2018, the respondent provided a copy of the e-mail provided by Vanessa Genesis during the course of her evidence. The copy e-mail was introduced as page 220A of the bundle. It was noted that the claimant questioned whether the e-mail was a redacted copy of the original e-mail. EJ Porter asked the claimant if she wished to recall either Tracy Shaw or Vanessa Genesis to question the veracity of the document at page 220A. The claimant's wife indicated that Tracy Shaw had not referred to any such email in her witness statement, she did not wish to recall Tracy Shaw, but would leave the matter to submissions. Document 220A was therefore allowed into the evidence, acknowledging that the claimant did not accept that it was a complete document.

27. On 16 March 2018, Nick Hayes gave evidence. He was questioned about a conference he had with Occupational Health on 15 December 2016. He confirmed that solicitors were in attendance and that he was unable to say what had been discussed during the course of that meeting because the content of the meeting was protected by legal privilege. It was agreed and ordered that this issue be dealt with after Mr Hayes had completed giving his evidence. The claimant made application for disclosure of the notes of the case conference which took place on 15 December 2016. Solicitor for the respondent opposed the application indicating that:

    27.1. The claimant had made a request for disclosure of the notes and the meta data of the notes in the preparation for the hearing;

    27.2. Solicitor for the respondent had rejected the request for disclosure by letter dated 18 October 2017 on the grounds that:

        27.2.1. the meeting was held with the deputy HR director and the manager of the OH service with a solicitor, to seek advice on how to respond to concerns raised by the claimant;

        27.2.2. it is a meeting protected by legal professional privilege

28. EJ Porter noted that:

28.1. this tribunal was unable to deal with any such application for disclosure;

28.2. if the claimant wished to pursue such an application then he must do so in writing prior to the next hearing date;

28.3. that application would be heard by a different judge who would be invited to rule on whether or not the case conference notes were protected by legal professional privilege;

28.4. the claimant may at the same time, wish to pursue an application for disclosure in relation to his assertion that the email introduced at page 220A of the bundle had been redacted, was not a complete document.

29. At the commencement of the hearing on 2 May 2018:-

29.1. it was noted that the claimant had not, in the intervening period, pursued an application for specific disclosure in relation to the notes of the Case Conference on 15 December 2016 or the meta data of the email at document page 220A;

29.2. The claimant did not seek a postponement to pursue such an application;

29.3. The parties agreed that an email from the claimant to Nick Hayes requesting a reference and the reply from Mr Gibson should be included in the bundle at pages 879 and 880;

29.4. The claimant made application to introduce new documents namely rotas in the AMU from 2013/14 which supported the claimant's assertion that:

29.4.1. Juliet Faith went on holiday at Christmas time;

29.4.2. the claimant was placed on six late shifts not five late shifts;

29.5. The claimant asserted that these new documents had only recently been found;

29.6. the respondent objected to the disclosure of these new documents on the grounds that:

29.6.1. it was impossible to check whether these were the actual rotas used back in 2013/ 2014;

29.6.2. the issue of Juliet Faith was not part of the proceedings;

29.6.3. the respondent's right to a fair hearing is prejudiced by the introduction of these documents. They should have been produced much earlier;

29.7. the claimant made application for disclosure of written proof of the date that Dr Osunsanya left the Occupational Health Department, as requested by letter dated 18 October 2017 (p632A) on the grounds that:

29.7.1. this was relevant to the claimant's assertion that the respondent had delayed in making its request of the claimant's GP for further information;

29.7.2. the respondent had been unable to explain why it had taken so long for the letter to arrive at the claimant's GP – seven weeks and four days;

29.7.3. the claimant had been told that Dr Osunsanya left Occupational Health on 20 December 2016 but the claimant did not accept that and thought that he must have left a lot sooner, which would explain why the letter was not sent;

29.8. solicitor for the respondent left the matter to the discretion of the tribunal as he could not understand the relevance of the question.

30. After considering the applications in chambers the tribunal ordered that:

30.1. the request to introduce the rotas was refused on the grounds that:

30.1.1. it was far too late in the day to introduce this new evidence;

30.1.2. the introduction of this new evidence would require an investigation of the veracity of the documents, which the claimant accepts contain amendments;

30.1.3. The relevant witnesses for the respondent have already given their evidence;

30.1.4. The introduction of these documents would lead to an unnecessary escalation in costs and would lead to a further delay in the hearing;

30.1.5. The respondent's right to a fair hearing is prejudiced by the late disclosure of documentation;

30.1.6. In all the circumstances it is not in the interest of justice, it is contrary to the overriding objective, to allow these late disclosed documents to form part of the evidence;

30.2. the request for written proof of the date upon which Dr Osunsanya left Occupational Health is refused on the grounds that:

30.2.1. the relevance of the information is not clear;

30.2.2. the claimant makes assumptions about the date upon which Dr Osunsanya in fact left the Occupational Health and puts forward no evidence to support her assertion that he left earlier than December 2016;

30.2.3. It is not clear on what grounds the claimant challenges the information given to him, namely that Dr Osunsanya left OH in December 2016. These are questions which the claimant can put to the respondent's witnesses in cross-examination. The request for written proof appears to be in the nature of a fishing expedition;

30.2.4. the respondent accepts that there was a delay in the request for further information arriving with the claimant's GP. The tribunal will consider the reason for, and the effect of that delay, having heard the evidence;

30.2.5. In all the circumstances it is not in the interest of justice, it is contrary to the overriding objective, to grant the request for disclosure of written proof of the date Dr Osunsanya left OH.

31. At a preliminary hearing held on 18 August 2017 it was agreed and ordered that neither party would be required to attend tribunal to make closing submissions. On 18 May 2018, at the conclusion of hearing the evidence, an Order was made for the exchange of written submissions and the provision of copies for the tribunal's deliberations in chambers.

**Submissions**

32. The parties exchanged written submissions in accordance with the Order referred to at paragraph 31 above.

33. The tribunal has considered all the written submissions with care but does not repeat them here.

**Evidence**

34. The claimant gave evidence. In addition, he relied upon the evidence of his wife, Mrs Lesley Wilson.

35. The respondent relied upon the evidence of: -

35.1. Tracy Shaw, Clinical Matron on the AMU ward from January 2008 until March 2014;

35.2. Julia Riley, Assistant Director of Nursing;

35.3. Karen Jackson, Divisional Clinical Governance Manager;

35.4. Susan Howard, Unit manager on G1 Ward;

35.5. Kelly Burns, Clinical Matron for the Acute Medical Unit (AMU);

35.6. Vanessa Genesis, Clinical Matron on AMU April 2014 to August 2015;

35.7. Pauline Abraham, Quality Matron;

35.8. Nick Hayes, Associate Director of Workforce;

35.9. John Goodenough, Divisional Nurse Director – Medicine;

35.10. Alexandra Barker, Assistant Director of Nursing Services for North Manchester Community;

36. The witnesses provided their evidence from written witness statements. They were subject to cross-examination, questioning by the tribunal and, where appropriate, re-examination.

37. Agreed bundles of documents were presented. Additional documents were presented during the course of the Hearing, either in accordance with the Orders outlined above or with consent. References to page numbers in these Reasons are references to the page numbers in the agreed Bundle.

**Facts**

38. Having considered all the evidence, the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

39. The claimant was engaged in work by the respondent as a health care assistant (HCA) on the Pennine Acute nurse bank at The Royal Oldham Hospital from 11 January 2008 to April 2013. The terms of his engagement were set out in an

agreement which appears at pages 84 – 88 of the bundle. The claimant accepts that he was not guaranteed a shift on any given day, he was not obliged to work any shift which was offered to him, he was not entitled to sick pay under the terms of the agreement. The tribunal has received no satisfactory evidence relating to: -

39.1. how the claimant was allocated shifts on the Nurse bank;

39.2. the frequency of the shifts worked by the claimant;

39.3. the total number of hours worked by the claimant in the period 2008 - 2013.

40. The claimant commenced work as a HCA on the Acute Medical Unit (AMU) at the Royal Oldham Hospital on a fixed term contract for 6 months on 15 April 2013 (p112). His statement of Main Terms and Conditions (p112) indicated that the claimant's employment began on 15 April 2013. It made no reference to the claimant's engagement on the Nurse Bank being treated as part of the claimant's continuous service. The claimant was doing well on the ward. His attendance and standard of work was good. Following a review by Tracy Shaw, Clinical Matron of the AMU at that time, the claimant's contract was changed to a permanent contract on 16 October 2013. The claimant was employed to work on the AMU for 37.5 hours per week.

41. At the start of his employment the claimant informed Tracy Shaw that he was going to be diagnosed with Chronic Fatigue Syndrome ("CFS") and that the consultant would recommend that he would need three breaks. Tracy Shaw stated that a few extra breaks would be no problem. The claimant was allowed to take the requested additional breaks.

*[There is no satisfactory evidence to support the claimant's assertion that he was denied these additional breaks. He gives no satisfactory evidence as to being denied additional breaks. It was not put to Tracy Shaw in cross-examination that she had denied him the additional breaks as promised.]*

42. The AMU is a 48 bed ward, employing 100+ FTE staff, a third of whom are HCAs. The allocation of the hours and pattern of work was determined by the Head of Department from time to time to reflect the needs of the service. Rotas were prepared to indicate the shifts to be worked by each of the employees. All staff were required to work two out of four weekends. On occasion there was a requirement for staff to work more than 5 consecutive days. There was a requirement for all Health Care Assistants and nurses on the AMU ward to:

42.1. work a full shift with only one lunch break;

42.2. work any shifts in accordance with the prepared rota, including late shifts and weekend work;

42.3. to work on the AMU, a busy active ward.

43. At the six month review meeting on 16 October 2013 the claimant advised Tracy Shaw of a recent diagnosis which he had received from Dr A Syed, and provided a copy of a letter from Dr A. Syed consultant physician to Dr. S. J. Clark dated 14 September 2013 (p.120-121) which confirmed a diagnosis of chronic fatigue syndrome. The claimant and Mrs Shaw discussed the claimant's request for adjustments to his duties arising from that diagnosis.

44. As a result, Tracy Shaw requested a medical review from the respondent's Occupational Health service to identify the need for any required adjustments for the claimant. It is the standard practice of the respondent to seek such advice from the OH department. Copies of referrals and the ensuing reports are retained on the employee's personal or p-file. Whilst awaiting the OH report certain adjustments were made for the claimant's work, as referred to in the documentary evidence. No satisfactory evidence has been adduced relating to the precise nature of the adjustments, for example, as referred to by Dr Dodman in the letter dated 8 November 2013 (p126-127) (see paragraph 45 below). It is clear that the claimant was happy with the modifications to his rota which had been made up to that point. He raised no complaint about them until the Return to Work interview on 6 January 2014.

45. By letter dated 8 November 2013 (p126-127) Dr J. Dodman, ST5 in Occupational Health reported to Tracy Shaw as follows:

'Graham has been suffering with symptoms of lethargy, low energy and poor concentration for over a year and as you are aware he has recently been diagnosed with Chronic Fatigue Syndrome. He has been referred to a specialist but tells me that, due to waiting times, it may be some time before he can access this.

…

I am of the opinion that Graham is fit for work, to undertake a full range of duties. He informs me that the modifications that you have made to his rota to date are helpful. He is likely to benefit from a regular shift pattern and blocks of up to 5 consecutive early shifts or late shifts broken by off days is appropriate.

It may be the case that late shifts become difficult as he experiences sleep difficulties following late shifts. If this becomes the case, you may wish to consider moving him to working early shifts only. It is unlikely that he will be able to provide a sustained and efficient service on night shifts or long days. I advise that he may require short additional breaks during a shift. These adjustments are likely to be required on an on-going basis.'

46. On 24 December 2013 there was a Return to Work Interview (p.128-9) which recorded that the claimant had been 'absent from work from 20 December 2013 to 22 December 2013 due to chronic fatigue, and that the claimant was "struggling with the late shifts"

47. In December 2013 (p130) the claimant wrote a handwritten note (p130) to managers, including Louise Mortimer, requesting that they stop using the claimant's annual leave to "prop up their rotas" without the claimant's permission.

48. The claimant attended a return to work interview on 6 January 2014 with assistant manager Kath McGuinness and Louise Mortimer. This was clearly a return to work interview, as evidenced by the document at page 128, signed by the claimant. The fact that he cannot recall signing the document does not cast doubt on its authenticity. During that meeting the claimant reiterated his complaint about his annual leave being used without his consent. Kath McGuinness told the claimant that the management were doing him a favour using his annual leave days to prop up the rota. Louise Mortimer said "we don't like notes that aren't nice." The claimant made it clear that the adjustments made because of his medical condition were not adequate and that he needed further adjustments to his work pattern because of his disability.

    *[The claimant has failed to provide satisfactory evidence to support his assertion that he was humiliated in this meeting, that the managers ignored all occupational guidelines, that they were not interested in his medical condition or what occupational health had advised. The claimant's evidence on this is vague. Neither Kath McGuinness nor Louise Mortimer have been called to give evidence. We accept the claimant's evidence that they made the comments noted in the paragraph above.]*

49. In a report of the Return to Work Interview dated 7 January 2014 (p. 132-133) it was noted:

    Graeme's shift pattern has been adjusted to accommodate his needs – however – still not adequate for Graeme. To meet with HR advisor and Matron Shaw to discuss.'

50. By undated handwritten letters (p. 125 and 134), sent in or around December 2013, the claimant made a request to Tracy Shaw to go on permanent early shifts in the following terms:

    (p134) 'I request that I be put on permanent early (shifts), and that provision is made to have regular breaks (as stated in letter from OH) some months ago, with immediate effect.
    If there is a problem could you please refer me to OH, as also stated in letter.'

(p125) the late shifts are affecting my chronic fatigue syndrome, in terms of sleep patterns, fatigue, and has recently affected my work - which has led to a period of sickness. Could this be taken onto the 5th January rota onwards.

51. On 24 January 2014 the claimant attended a meeting with Tracy Shaw, Clinical Matron on the AMU, accompanied by his trade union representative, Mr Gareth Griffin. During that meeting:

51.1. it was confirmed that the claimant was currently not rostered to do any more than one or two late shifts in a week. The claimant advised that he was able to manage this amount of late shifts. He told Tracy Shaw that he only struggled when asked to do more than this in a week. It was agreed that the claimant would try his current rota pattern for six weeks, and then they would meet again to discuss any further changes needed;

51.2. The claimant made his complaint about the use of his annual leave without his consent. Tracy Shaw explained that this had been done with best intentions to assist the claimant in obtaining rest breaks between shifts. She explained that any outstanding annual leave had to be used by the year end and that sometimes the rotas did include any outstanding annual leave which would otherwise be lost. The claimant was satisfied with this explanation;

51.3. The claimant did not raise any complaint about being unable to take regular breaks during shifts, or weekend working, or being placed on “floating” duties;

51.4. Tracy Shaw advised the claimant that if he had any further problems he should contact her or one of the senior nurses immediately.

*[On this the tribunal accepts the evidence of Tracy Shaw, in part supported by the handwritten notes of the meeting (pages 138-9). The tribunal notes that the claimant was represented at the meeting, the contents of which were in part confirmed in the letter dated 27 January 2014 (see the paragraph below). The claimant did not challenge the accuracy of that letter at the time, did not pursue his complaint about the use of his annual leave in 2013.]*

52. By letter dated 27 January 2014 (p.136-7) Tracy Shaw advised the claimant:

‘Thank you for attending the meeting with me today at The Royal Oldham Hospital. Also in attendance at this meeting was Laura Ferris, HR Advisor. You were accompanied at this meeting by your trade union representative, Mr Gareth Griffin.

I explained that the purpose of this meeting was to discuss concerns you have raised in writing in relation to your difficulty in managing your current shift patterns due to your Chronic Fatigue Syndrome. You advised that you had been working lots of late

shifts and are very fatigued by the end of the late shift. You stated that you cannot manage 4 or 5 late shifts but can manage 1 or 2 per week.

I reviewed both the current and the next monthly rota with you and confirmed that you have not been rostered for more than 1 or 2 lates in any of the weeks. You agreed that this shift pattern has been much easier for you.

You advised that you struggle to work more than 5 shifts consecutively. I informed you that, although Sister Mortimer and Sister Lockton-Brown are trying to accommodate your requests for shorter spans of shifts, it can be difficult with seven day working and that the rota must be fair for the whole team in terms of weekends and lates. Laura asked you if you would be happy to work your current rota pattern for six weeks to see how you manage and then we will meet again. You agreed to try this. Laura advised that we will meet to review the situation in 6 weeks. If at this time, you are not managing the rota pattern, we can discuss whether redeployment to an area with a more consistent shift pattern is an option to be considered. A review by occupational health can also be explored at this time.

Gareth advised that he had got the impression that you were not being looked after, but stated that he can see that you are. […]

You also raised concerns that annual leave was being allocated for you without discussion. I advised that this usually occurs towards the end of the year as staff are asked to get in any outstanding leave and it is allocated if they do not do so. I advised that Sister Mortimer has allocated leave on the current rota to support your rest periods between rostered shifts.'

53. The adjustments to the rotas, as discussed and agreed at the meeting between Tracy Shaw, the claimant and his trade union representative on the 24 January 2014, were implemented by the respondent in the period January – March 2014. The claimant was allowed to take additional breaks.

*[There is no satisfactory evidence to support the claimant's assertion, repeated by his trade union representative in his e-mail dated 18 June 2014 (page 190), that the adjustments to the rotas, as discussed and agreed at the meeting on the 24 January 2014, were not implemented in the period January – March 2014. There is no satisfactory evidence to support the claimant's assertion that he was prevented from taking additional breaks during shifts in the period January – March 2014. These assertions are in direct conflict with the information provided by the claimant in the appraisal on 25 March 2014 (see paragraph 54 below). The fact that the respondent stated that it was struggling to accommodate the adjustments, as indicated in the referral to OH dated 20 March 2014, (see paragraph 55 below) does not mean that the adjustments were not made.]*

54. The claimant took part in an appraisal on 25 March 2014 (page 157). Questions and the claimant's answers were recorded as follows

Q. How does what you are doing now fit in with your career aspirations / what you want out of a job?
A Develop skills and enhance training and work towards HCB level 3.

Q. How does your job / role / workplace affect your health and wellbeing? If it does, what support (if any) is required?
A. Shift patterns have been adjusted to my needs and I have learned to take rest before I get too tired.

55. Tracy Shaw made a Referral for Occupational Health Opinion dated 20 March 2014 (p149-149), which included the following:

'Dates of absence

20-22 December 2013
4-5 January 2014
6-21 March 2014

I met with Graeme in January following his mediscreen review to discuss his rota patterns. We have been trying to break his shifts up with regular days off but this is difficult to sustain on a busy AMU with a 7 day variable roster pattern. Graeme previously requested to work predominantly early shifts but the roster cannot support this. As Graeme is again off sick, I would welcome your advice on how we can sustain his attendance in work.'

56. By letter dated 28 April 2014 (p.174) Dr J. Dodman of Occupational Health advised Vanessa Genesis :

'Graeme has a diagnosis of Chronic Fatigue Syndrome. He is under the care of a specialist and has also been referred to a Chronic Fatigue specialist service, for which he is awaiting an appointment. […]

He reports symptoms of extreme fatigue, which is worse after working consecutive shifts. He reports that he struggles to work any more than 5 consecutive shifts and that he has particular difficulty sleeping after late shifts.

His symptoms and situation are largely unchanged since I last saw him in November 2013. The advice I gave him regarding his work remains current and I have attached a copy of the report dated 8 November 2013 for your information.

It may be the case that other measures such as reduced hours or a temporary redeployment need to be considered in the future if he is unable to sustain his attendance with adjustments at work.

I am not able to say how long these adjustments will be required for as it will be largely dependent upon how his condition responds to the rehabilitation. I recommend that it would be appropriate to arrange a case conference here in the Occupational Health Department to discuss this. This has been arranged for 20 May 2014 at 11:45 at The Royal Oldham Hospital'

57. On 10 May 2014, at a Return to Work Interview between the claimant and Louise Mortimer (p.178-179 ) signed on 10 May 2014 it was noted that:

57.1. The claimant was absent from work from 5th April to 11th April … a total of 7 days;

57.2. Graeme says he had done 6 consecutive shifts after period of sickness in March – he feels this contributed to fatigue and therefore sickness episode;

57.3. Graeme says that Nov sick note from GP recommended normal break each shift plus 10 mins x2 as well each shift. Graeme and I have discussed that he needs to be assertive in asking for his break and co-coordinating with his colleagues so he can take these breaks to prevent fatigue and sickness.'

58. The claimant did not work 18 consecutive weekends prior to his meeting with Mrs J Sloan on 5 June 2014.

*[The tribunal does not accept the claimant's evidence on this point. It is unsupported by any satisfactory evidence. The claimant did raise that allegation with Mrs Sloan at the meeting but the notes (p185) show that this allegation was not discussed, and was not pursued. The letter dated 11 June 2014 (p188) (see paragraph 60 below) shows that the claimant was able to work any combination of shifts as long as he did not work over 5 days in succession, and confirmed that he was able to work weekends. The letter also confirms that the claimant had said that over the last 4 weeks the rota had worked well for him. That is inconsistent with the claimant's assertion that he had worked 18 consecutive weekends. The claimant's trade union representative was in attendance at that meeting and did complain about the claimant being on the short term absence procedure. Neither the claimant nor his representative pursued any complaint re excessive weekend working at that time. Although the claimant now challenges the contents of the letter dated 11 June 2014, and the notes of the meeting (p185), he did not do so at the time.]*

59. On 5 June 2014 the claimant attended a meeting with Mrs J Sloan, Divisional Nurse Manager, under the short-term sickness absence procedure. The claimant was accompanied by Gareth Griffiths Union Representative. Also in attendance for procedural advice was Paul Cunningham, HR Advisor. At that meeting the claimant confirmed that:

59.1. he was able to work any combination of shifts as long as he did not work over 5 days in succession;

59.2. he was able to work weekends and late shifts, as long as these fell before another late or a day off, as he found it difficult to do an early start after a late shift;

59.3. for the last 4 weeks the rota had worked well for him and he had been able to sustain his attendance.

60. By letter dated 11 June 2014 (p.188-189) Mrs J. Sloan confirmed the discussions and outcome of the meeting to the claimant as follows:.

> … the purpose of the meeting was to formally discuss the episodes of sickness that you have had in the last 6 months which triggered this meeting as your sickness absence had reached a level of concern. … 3 episodes of sickness as set out below […]
> 20th-21st December 2013 due to Chronic Fatigue
> 4th January 2014 due to Fatigue
> 6th-23rd March 2014 due to Chronic Fatigue Syndrome exacerbated by Viral illness
>
> In the process of arranging the meeting to discuss your first trigger point, you had a further episode of sickness on 5th-11th April 2014.
>
> Whilst I listened to your reasons for absence, I feel your level of attendance since November 2013 has been unacceptable and therefore advised you that one further sickness episode between now and the 23rd of September 2014 will trigger attendance at a second stage sickness meeting at which point, whilst your long term condition would be taken into consideration, you may be issued with a caution. Ultimately, should your attendance not improve, your employment with the Trust could be at risk. However, it was generally anticipated with the current adjustments your sickness absence will improve.
>
> We discussed your current long term condition in some depth and your ongoing Occupational Health recommendations, having only been diagnosed last October. You explained that you are able to work any combination of shifts as long as you do not work over 5 days in succession; so on occasion your days off may need to be split. You are able to work weekends and late shifts (as long as these fall before another late or a day off, as you find it difficult to do an early start after a late shift).
>
> You advised that for the last 4 weeks your rota has worked well for you and you have been able to sustain your attendance. We have planned to meet in 4 weeks' time to assess how this adjustment continues to support your ME and attendance in work.
>
> In addition to your GP and Occupational Health Consultant, you advised that you are under the care of an ME Consultant Specialist and you agreed to provide me with a copy of the letter following your recent consultation for completeness in your P file. I also reminded you of the ongoing support available from Occupational Health/confidential counselling service'

*[The tribunal accepts that this was an accurate record of the discussion at the meeting on 5 June 2014. The claimant was accompanied by his trade union representative. Neither the claimant nor his trade union representative challenged the accuracy of that letter at the time, although the claimant representative did challenge the action – see next paragraph.]*

61. By email dated 18 June 2014 (p190) the claimant's trade union representative challenged the outcome, asserting that the claimant should not have been placed at stage one of sickness review. The representative did not raise any complaint about the manner in which Ms Sloan had conducted the review procedure or the meeting. The claimant did not find the behaviour or actions of Mrs Sloan intimidating, hostile, degrading, humiliating or offensive.

    *[ The tribunal does not accept the claimant's evidence on this point. Neither the claimant nor the representative were slow in raising complaints. It is simply not credible that, if there were any genuine complaint about the conduct of Mrs Sloan, or the effect of the meeting and procedure on the claimant, that it would not have been raised at the time.]*

62. No further action was taken against the claimant under the short-term absence procedure. The trigger points were not activated following further sickness absence.

63. A further meeting took place on 4 July 2014 between the claimant, accompanied by his trade union representative, and Mrs J. Sloan

64. By letter dated 4 July 2014 from Mrs J. Sloan to the claimant (p.191) Mrs Sloan confirmed the discussions at, and outcome of, the meeting as follows:

    'We had a general discussion around your health and wellbeing. You reported that the shift patterns previously agreed have been sustained, which has in turn supported you in your work.

    We discussed the possibility of you reducing your hours; you had spoken of this with Sister Jo Lockton-Brown. I said that I could support this on either a temporary or permanent basis. I have advised you to let me know if this is a practical option for you in the future.

    We agreed to meet again in 3 months time to touch base unless a prior need arises. I am therefore proposing that we meet on Friday, 3rd October 2014 at 2:00pm'

65. The claimant voluntarily decided to reduce his hours to 30 hours per week. He was not pressured or forced in to doing so by any of the respondent's managers. By e-mail dated 3 August 2014 (p.193) the claimant advised Mrs J. Sloan that

    After much consideration, I have decided to reduce my hours to thirty.
    This is in line with how I how I feel …, I would like to start reduced hours ASAP.
    For six months trial period.'

    *[There is no satisfactory evidence to support the claimant's assertion that he was forced by the respondent to change his hours of work]*

66. The claimant continued to work 30 hours per week. This was worked as 4 shifts per week. He made no request to return to full-time working.

67. In the period March – September 2014 the respondent continued to operate the adjustments to the claimant's shift patterns as recommended by OH.

*[This finding is supported by the documentary evidence, including in particular the letters dated 11 June and 4 July from Mrs J Sloan. There is no satisfactory evidence to support the claimant's assertion that there was a failure to provide the recommended adjustments, other than an isolated incident in September 2014, referred to in the following paragraphs 69 and 70 below.]*

68. In August 2014 the claimant sought advice from a trade union representative about rotas, leave and disability discrimination.

69. By e-mail dated 11 September 2014 (p.195/6) the claimant advised Mrs J. Sloan that Louise Mortimer had put him in a cycle of two late shifts on a forthcoming rota, against the advice of Occupational health. The claimant demanded that the rota be altered.

70. Mrs J. Sloan asked Ms L. Mortimer (p.195) to speak to the claimant re shift patterns and investigated the complaint. As a result the shift was changed. By email dated 24 September 2014 (p.200) Mrs Sloan confirmed this, adding:

> Louise apologised for this and advised this was a genuine human error on her part that she would have rectified at the time had you alerted her to her mistake.

71. The claimant was absent from work between 19 September 2014 and 12 January 2015. He provided the following fit notes:

71.1. dated 24 September 2014 indicating that the claimant was not fit for work by reason of CFS from 19/9/2014 to 7/10/2014 (p.202);

71.2. dated 6 October 2014 indicating that the claimant was not fit for work by reason of CFS from 6/10/2014 to 20/10/14 (p.221)

71.3. dated 20 October 2014 indicating that the claimant was not fit for work by reason of CFS and tonsillitis from 20/10/2014 to 10/11/14 (p.224);

71.4. dated 12 November 2014 indicating that the claimant was not fit for work by reason of CFS and stress related problems from 11 November 2014 to 9 December 2014 (p.241);

71.5. dated 10 December 2014 (p.247) indicating the claimant was unfit for work from 9 December 2014 to 11 January 2015 because of ME/CFS;

71.6. dated 5 January 2015 (p.251) indicating that the claimant was unfit for work from 5/1/15 to 12/1/15 because of ME/CFS.

72. On 24 September 2014 the claimant forwarded to Mrs J. Sloan a letter from Tina Betts Specialist Physiotherapist dated 18 September 2014 (p.198/9) extracts from which include:

> 'I am a Neurological Physiotherapist working for the East Manchester ME/CFS Service. I am writing to provide medical support for Mr Wilson, to assist him in managing his working conditions and to enable him to remain in work while benefitting from the ME/CFS support I wish to give him.
>
> **Date when patient last seen:** 18.09.2014
>
> **Diagnosis: ME/CFS**
>
> Mr Wilson is attending an ME/CFS clinic for one to one support to enable him to manage the symptoms of ME/CFS.
>
> ME/CFS is a complex neurological condition, with no predictable prognosis.
> […]
>
> NICE Clinical Guideline 53 (2007) states that myalgic encephalomyelitis/ chronic fatigue syndrome (ME/CFS) "involves a complex range of symptoms that includes fatigue, limited concentration, malaise, headaches, sleep disturbance and muscle pain. The pattern and intensity of symptoms vary from person to person and during the course of each person's illness." In general the presentation of this condition is that these symptoms fluctuate, and individual may be able to perform a take on one day or repeat the task a limited number of times, but cannot always reliably, safely and effectively repeat the task. When there is an increase in physical or mental stress the individual will expect to experience an increase in symptoms and a reduction in physical and mental functioning. Management aims to enable the individual to stabilize and manage their symptoms effectively.
>
> Advice and management provided by the ME/CFS service aims to allow the patient to stabilise symptoms, and eventually manage symptoms; thus achieving a degree of control over this unpredictable condition. This includes:
>
> Taking rest periods; to schedule quiet, supported rests into a working or active day, 15 minutes or more are advocated.
> Applying a paced approach to activities is encouraged. Being able to work to a regular timetable is beneficial; erratic lifestyle habits or erratic working conditions generally have a detrimental influence on symptoms and severity of the condition. Manage stress effectively, or avoid situations that provoke stress. Situations and environments that provoke stress responses generally have a negative influence on symptoms and the ability of the individual to manage their symptoms.
>
> During the course of ME/CFS sessions it had become evident that stress at work and erratic shift patterns are having a negative influence on Mr Wilson's ability to achieve stability of symptoms and engage in a rehabilitation approach. Mr Wilson

finds his energy levels are best in the morning following a restful night; this then enables him to pace activities as recommended in the NICE Guidelines. Mr Wilson is very grateful for the acknowledgment of his needs at work regarding his need to take regular rests, however the erratic shift patterns still continue to contribute to an increase in symptoms and an inability to pace effectively.

Both Mr Wilson and I would be grateful if this could be taken into consideration when planning Mr Wilson's work rota.'

73. There was a further referral to OH. By letter dated 23 October 2014 (p.225), Dr J. Dodman of Occupational Health advised Matron V. Genesis of the outcome of a clinic appointment on 22 October 2014. Extracts from the letter read as follows:

Graeme has been absent from work since 20 September 2014. He suffers from Chronic Fatigue Syndrome and is under a specialist rehabilitation team for management. His condition causes excessive fatigue and he reports that this is made worse by activity.

…..

Graeme has suffered a recent set-back in his symptoms, which may have been triggered when he suffered an infection. However, he reports prior to this, he had been struggling at work, particular [sic] with working late shifts. He reports that he feels more able at the start of the day and that early shifts are more manageable, causing fewer symptoms.

Graeme reports that his shifts follow a pattern of 2 early shifts, followed by a break of at least 1 day, followed by 2 late shifts and so forth. He had a recent reduction in hours to 30 per week, which seems like an appropriate measure and may help him better control his symptoms.

Graeme's medical certificate expires on 11 November 2014 and I advise him that a return to work can be planned for then. In the meantime, I advise that meeting with him to discuss and plan adjustments for his return would be appropriate. Adjustment that you may consider, if operationally possible are:

A regular working pattern and working early shifts rather than late and no more than 2 consecutively;

Provision of short rest periods during the day;

Communication with staff in charge of the ward to inform them of provisions for breaks.

….

I also advise that you undertake a stress risk assessment, in order to minimise the impact of any work place stressors on his symptoms.'

74. From October 2014 the claimant struggled to work on late shifts. It caused him problems because he became very fatigued and could not take his normal rest before his evening meal. He became overtired and had problems sleeping, which exacerbated the problem.

*[On this we accept, in part, the evidence of the claimant, as supported by the OH reports of Dr Dodman. We do not accept the evidence of the claimant that he suffered from this problem with late shifts before that date.]*

75. On 16 November 2014 the claimant made an Application for Flexible Working (p.242), requesting:

'A change to the days worked or timing of work.

….

I would like this change to be permanent EARLIES'

76. On 17 November 2014 the claimant attended a meeting with Mrs J. Sloan, accompanied by his trade union representative, to discuss his long-term sickness absence and return to work.

77. By letter dated 17 November 2014 (p.244) Mrs Sloan confirmed the discussion as follows:

'You have been off sick continuously since the 20th September 2014. Dr Dodman, in her report of 23rd October 2014 advises that you would be in a position to plan a return to work on the expiry of your current sicknote (11th November 2014). However, you informed me today that you are still unwell and currently have a chest infection and tonsillitis and as such your GP has provided you with a further sicknote which expires on the 5th December 2014.

We talked about your return to work […] at your request, we have planned your return to ward G1 to support the beds that have been opened in preparation for winter. This is a temporary arrangement and on its closure at the end of March 2015, you will return to your substantive post on AMU.

You have completed an application request for flexible working in line with the current work being undertaken to harmonise shift patterns and centralised rostering. You have requested all early shifts as you find difficulties sleeping after working late shifts. I have forwarded your application to the Divisional Management Team for their consideration and with your permission, I have attached the Occupational Health report of 23rd October 2014, which supports your request for early shifts.'

78. By email dated 17 November 2014 (p.243) the claimant wrote to seek guidance from Occupational Health seeking assistance. That was not sent to Mrs Sloan or any other manager. The email includes:

After a meeting this morning with Gareth Griffiths (Unite Rep) and Joanne Sloan (Divisional manager), the subject of 'redeployment' came up.
Both Gareth and Joanne said I should speak to Dr Dodman in regard to the matter and to be frank I am uncertain how to deal with the matter.'

79. By letter dated 20 November 2014 (p.245) Dr Dodman responded to the claimant in the following terms:

> 'While you mention that you are uncertain how to deal with the matter of redeployment, I am unclear about what your specific queries are.
>
> …
> It may be that a Case Conference here in the Occupational Health Department would be helpful to discuss matters along with your manager, HR and Union Rep.
>
> However, if you have questions regarding the redeployment process itself, then Human Resources, your Union Representative and Manager would be best placed to answer these for you.'

That letter was marked in strictest confidence addressee only.

80. The claimant did not pursue a request for redeployment to a different unit. The claimant agreed to a phased return on G1 ward.

81. By undated letter (p.248) the claimant's wife requested leave for the claimant from 19 December 2014 – 28 December 2014, stating:

> 'I know my husband put in a request form in June & you have still not replied to this.
> This holiday was ok'd in January at the meeting he had with Tracy Shaw, HR & a union rep present, I therefore booked the holiday
> …
> Additional to this the ME consultant said it would be beneficial to our ME condition to go away in the winter to get some sun.
>
> Can you please authorise this A/L as having no reply is causing a lot of stress.'

It is not clear when the original request was made or how it was addressed. Vanessa Genesis, Clinical Matron on AMU investigated the request. She had no recollection of any earlier request and asked Tracy Shaw whether she had agreed anything with the claimant relating to annual leave over the Christmas period. Tracy Shaw confirmed that any such agreement would have been documented. Vanessa Genesis noted that no such agreement had been documented. She was unable to investigate this with the claimant, who was absent from work between 19 September 2014 and 12 January 2015 (see paragraph 71 above). On 10 December 2014 the claimant was in possession of a fit note stating he was unfit to work until 11 January 2015. The claimant was not in work over the Christmas period and knew he would not be working in that period, from 10 December 2014 at the latest.

82. In late 2014 Mrs Sloan was seconded to work elsewhere and Mrs Karen Jackson, Divisional Clinical Manager, took over responsibility for review of the claimant's sickness absence. By letter dated 10 December 2014 (p.250) Mrs Jackson notified the claimant that his application for flexible working to work early shifts only had been granted for a period of six months on resuming to

work. The letter concluded 'Should you wish to continue to work flexibly beyond this date, a further application must be made in line with trust policy.'

83. On 9 January 2015 the claimant met with Karen Jackson to discuss his return to work. By letter dated 14 January 2015 (p.253) Karen Jackson confirmed:

> I note Dr Dodman has recommended, where operationally possible, the following:
> A regular working pattern, working early shifts, where feasible, with no more than two consecutive shifts
> Provision of short rest periods
>
> I will also request that Sister Howard / Sister Connolly carry out a stress risk assessment during your phased return.
>
> It was agreed that on your 30 hours, your phased return would be as follows:
>
> Week commencing 12th January – 1 shift & 3 phased
> Week commencing 19th January – 2 shifts & 2 phased
> Week commencing 26th January – 2 shifts & 2 phased
> Week commencing 2nd February – 3 shifts & 1 phased'

84. In January 2015 the claimant returned to work on a temporary transfer to the G1 ward, a busy active ward. It was agreed by all that this was a less busy ward than AMU. Ward G1 had 8-900 patients per month and included the discharge lounge, which was a busy area. The ward was less busy at weekends and at night time as there were fewer discharges to deal with. Rotas were prepared by the managers on the basis that each member of staff worked a combination of early, late and weekend shifts. There was a requirement for all Health Care Assistants and nurses on the G1 ward to:

    84.1. work a full shift with only one lunch break;

    84.2. work any shifts in accordance with the prepared rota, including late shifts and weekend work;

    84.3. to work on G1, a busy active ward.

85. The claimant as part of his duties on ward G1 worked with a staff nurse in a bay, providing care to patients. The average age of the patients was around 85 years, a lot suffering from dementia. The claimant was expected to prepare the patients for discharge, for example, helping them with showering.

86. Susan Howard was the Unit manager on G1 ward. She allowed the claimant to have regular breaks. He tended to take three breaks during his shift, usually of around 30 minutes each time. Sue Howard told the claimant to ask the nurse he was working with when he wanted to take his break, because sometimes due to patient need it was not something that could happen at the

same time every day. Susan Howard did not tell the claimant that he had to go and find her to ask permission to go for a break.

*[On this the tribunal accepts the evidence of Sue Howard, in part supported by the evidence of Karen Jackson and her review meeting with the claimant on 16 March 2015, when the claimant confirmed to her that he had been able to take regular breaks on ward G1 – see paragraph 88 below ]*

87. A case conference was fixed by Occupational Health for 13 February 2015 by email with Mrs J. Sloan. Karen Jackson did not attend the case conference because she did not receive the e-mail inviting her to the case conference. By email dated 13 February 2015 (p.255) Karen Jackson explained to the Occupational Health Department that:

'I didn't receive the email, Graham [sic] is on a phased return currently, I will meet with him and following this request if necessary, sorry I have only recently taken over his case, thanks Karen.'

*[On this the tribunal accepts the evidence of Karen Jackson, as supported in part by the documentary evidence. There is no satisfactory evidence to support an assertion that Karen Jackson was aware of the case conference and that she deliberately failed to attend.]*

88. A review meeting took place on 16 March 2015 between Mrs Jackson and the claimant. By letter to the claimant dated 16 March 2015 (p.257) Mrs Jackson confirmed what had been said during the meeting in the following terms:

'Thank you for attending your review meeting with myself today, Monday 16th March 2015 with regard your temporary redeployment during your phased return to work.

It was discussed after utilising your remaining annual leave you will resume to 4 shifts per week commencing from the 16th March i.e. this week.

You confirmed that you have been able to take regular breaks on Ward G1 as the workload is able to be organised in a more structured way and that this has benefited you.

I note that you have been advised to split your shifts with no more than 2 consecutive shifts and no long days. We will ensure that this is agreed with central rostering now that you have resumed to your normal contracted hours.

I have referred you to Dr Dodman for a review following your phased return and your current temporary redeployment to Ward G1 with a view to any further recommendations or adjustments required to maintain your attendance.'

That letter was copied to Susan Howard and Vanessa Genesis.

89. By an undated letter (p.260B) the claimant told Sister Sue Howard, his current ward manager, that he was happy to work weekends.

90. In the period January 2015 to May 2015 the claimant worked early shifts, pursuant to the agreed Flexible working arrangement, was allowed to take additional breaks, and the respondent provided the adjustments to shifts as recommended by OH, as confirmed by Karen Jackson's letter dated 16 March 2015.

91. In an appraisal dated 26 March 2015 (p260A) the claimant confirmed that

> "At present the workplace environment is both helpful, and aiding my health."

92. The move to G1 ward had been expressed as a temporary measure. The claimant expressed a preference to stay on ward G1, rather than move back to AMU.

93. By letter dated 16 March 2015 (p.258) Mrs Jackson wrote to Dr Dodman of Occupational Health as follows:

> 'Mr Wilson returned to work in January 2015 following a prolonged absence. Following your advice, we have temporarily redeployed him to Ward G1 in the Discharge Unit, where the workload, although busy, is more structured allowing for regular breaks.
>
> We have facilitated an extended phased return utilising annual leave and Mr Wilson is returning to his 30 hours week commencing 16th March 2015. I have noted that it would be beneficial for him to work no more than 2 consecutive shifts […] and these will be implemented on the new central roster arrangement.
>
> Please could you now review Mr Wilson with a view to whether it is appropriate for him to return to his substantive post on Acute Medical Unit and whether any further adjustments need to be considered for him to maintain his attendance at an acceptable level.'

94. By letter dated 29 April 2015 (p.262) Dr Dodman of Occupational Health advised Vanessa Genesis, Matron on ACU:

> 'Graeme returned to work in January 2015, to a role on the discharge unit. He reports that he has been working early shifts, with no more than two consecutive, and with three short breaks per shift. He reports that the activity on the ward is more structured, and that this enables him to place [sic] his activity and take his breaks.
>
> His symptoms have improved overall; compared with this time last year. He reports that the current arrangement on the discharge unit has enabled him to manage his symptoms well and he is currently in work and undertaking full duties, with the above adjustments.

You asked specifically about the possibility of a return to the Acute Medical unit. I advise that the same adjustments should apply to a role on the AMU; see report dated 23 October 2014. However, Graeme reports that due to the busy and unpredictable nature of the activity on AMU, it is not always possible for these adjustments to be fulfilled to the extent that it is on the discharge unit. For this reason, he is not confident about returning to AMU, and reports that he would be keen for a permanent move to the discharge unit if available. If a permanent position is available on the discharge unit, I would be in support of this move.

Whilst, in my opinion, Graeme is fit for a return to AMU with adjustments, I tend to agree with his concerns that due to the inherent nature of the activity on the ward, it may not be possible for the adjustments to be consistently applied. I advise that if this is the case, it may impact Graeme's symptoms and future attendance at work.'

95. By letter dated 28 May 2015 (p264) Mrs Karen Jackson informed the claimant that she was leaving her current post and that she had arranged for the claimant to attend a meeting on 19 June 2015 with Matron Julia Riley, Acting Lead Nurse, to discuss Dr Dodman's report. The claimant's case was passed to Julia Riley to deal with. Julia Riley had access to the claimant's records including the so-called p-file, in which all personal information is recorded. Following the handover between Julia Riley and Karen Jackson Julia Riley was aware of the OH recommendations and the agreed working arrangements for the claimant, including the previous OH recommendation and working arrangement that the claimant would only work early shifts.

*[ Julia Riley's evidence as to her knowledge of documents recorded as being copied on the claimant's p-file is unsatisfactory. The tribunal does not accept Julia Riley's evidence that she was unaware of the flexible working arrangement, as confirmed by Mrs Karen Jackson by letter dated 10 December 2014 (see paragraph 82 above) a document which was copied to the P file. The tribunal does not accept Julia Riley's evidence that she was unaware that the claimant had been put on earlies, that she was unaware of OH recommendations. It is simply not credible that Julia Riley would not have received this information from Mrs Jackson directly as part of the hand-over and/or would not have access to that information on the claimant's p-file.]*

96. On 8 June 2015 the claimant attended a meeting with Julia Riley. The claimant chose to be unaccompanied at that meeting. Julia Riley explained that the respondent was able to meet the claimant's preference to stay on Ward G1, but it was not possible to continue with the arrangement for all early shifts. Julia Riley made it clear to the claimant that she was not prepared to continue with the previous arrangement and that the claimant would have to work late shifts. The claimant reluctantly agreed that he could work late shifts provided that he worked two late shifts together, preferably before his day off, to give him chance to have an adequate rest. He did not want a mix of early and late shifts. There was no reference during this conversation to the flexible working agreement.

*[On this we accept for the large part the evidence of the claimant, in part supported by the documentary evidence. We refer in particular to the email dated 8 June 2015 (p265) (see paragraph 97 below.) in which Julia Riley states quite clearly that she had explained to the claimant that it was not possible for him to continue working early shifts. This was also confirmed by letter dated 9 June 2015 (see paragraph 98 below). The tribunal rejects the evidence of Julia Riley that the claimant willingly agreed to this arrangement.)*

97. By email dated 8 June 2015 (p.265) Julia Riley advised Susan Howard:

'I have met with GW today, and he will be transferring to you from Monday 15th June on 30hrs over 4 days. GW advised me he has been doing all early shifts and I have explained that it will not be possible to continue this. He has accepted this and has requested that he works lates together, preferably before his days off to give him chance [sic] to have adequate rest, rather than late, early mix.'

98. By letter dated 9 June 2015 (p.268) Julia Riley wrote to the claimant about the meeting on 8 June 2015 as follows:

'You stated that you were managing well at the moment on 30 hours over four days on Ward G1, at present you are working early shifts. You felt that a return to AMU would have a negative impact on your wellbeing. The current level of support would be difficult to maintain on AMU due to the nature of the work.

I advised you that you could be transferred to Ward G1 on 30 hours, but could not be on earlies, as this would be difficult to accommodate. You asked if you could do two lates together, rather than late, early, late. I felt this was reasonable and I will inform Sister Howard.

Therefore, you will transfer to Ward G1 from Monday, 15 June 2015.'

99. By letter dated 24 July 2015 (p.269) Julia Riley confirmed that the claimant

'will remain on your first choice of Ward G1 at The Royal Oldham Hospital. Your Ward Manager will continue to be Sister Susan Howard/

Your contractual terms and conditions of employment will not be affected by the reconfiguration.'

100. For the period 15 June 2015 to 6 December 2015 the claimant worked the rostered hours which he had reluctantly agreed with Julia Riley on 8 June 2015. He worked late shifts. It was agreed that he would work no more than two shifts together, followed by a day off. He was not required to work a mixture of early and late shifts. He was allowed to take rest breaks during the day.

101. In the period 1 May to 24 July 2015 the claimant worked 7 out of 12 weekends (p347/8). He worked for both days on the 5 of those weekends

(9/10 May, 16/17May, 23/24 May, 27/28 June, 11/12 July 2015). He worked 1 day of 2 of the weekends (13/14 June and 4/5 July). He did not complain about the number of weekends worked at the time.

102. The claimant was absent from work from 24 July 2015 to 23 August 2015. He provided Fit Notes (p. 271 + 272) indicating the reasons for his absence as:

'uncarial rash possible allergic reaction
atopic eczema / dermatitis'

'Atopic dermatitis / eczema'

103. At a Return to Work Interview with Susan Howard on 25 August 2015 it was noted that the claimant's absence was from 24 July – 25 August 2015 (p.273), the reason for the absence being skin disorders, allergy. The claimant did not say that his illness related to his CFS, did not complain that the shift pattern was causing him problems, did not complain about weekend working. The Return to Work form, signed by the claimant, confirms that the illness did not relate to any issues in the workplace.

104. Susan Howard did not say to the claimant:

- I hope you like weekends lad
- How long are you going on with this disability thing
- I don't even believe you have a disability.

*[On this the tribunal accepts the evidence of Susan Howard.]*

105. Following his return to work on 25 August 2015 to the commencement of his sickness absence on 5 October 2015 the claimant worked 5 out of 6 weekends (p348/9). In the period 12 September 2015 to 4 October 2015 the claimant worked every weekend. He worked both days on the weekends of 12/13 September 2015 and 3/4 October 2015, he worked I day of the weekends 19/20 and 26/27 September 2015. This was an unusual number of weekends to work. The normal requirement was for every member of staff to work 2 out of every 4 weekends.

106. By email dated 22 September 2015 (p.277) the claimant requested a meeting with Julia Riley with some urgency. He did not explain the reason for his request. Louise McMahon, Matron for Medicine, came on to the ward to discuss the claimant's request. The claimant went to see her after his shift and informed Louise McMahon that:

106.1. he was tired of doing all weekend work;

106.2. doing the late shifts made his CFS worse;

106.3. he was not getting his breaks.

107. Louise McMahon agreed to make a referral to Occupational Health to consider any adjustments needed, including possible redeployment.

108. On 30 September 2015 Susan Howard conducted an appraisal with the claimant. Susan Howard did not tell the claimant that she was not going to put the claimant forward to do his NVQ2 because of his M.E. or Chronic Fatigue Syndrome.

*[On this the tribunal accepts the evidence of Susan Howard. The tribunal notes that the respondent has been unable to locate the complete appraisal document. Only an extract appears at page 276A. The tribunal rejects the assertion that the respondent has deliberately withheld the complete appraisal document. In reaching this decision the tribunal notes that the claimant's evidence is unsatisfactory and inconsistent. In the grievance ( see paragraph 151 below) he asserts that it was Louise McMahon who said that the claimant was not suitable for NVQ level 2 because of his M.E. That appears to be a misquote of Louise McMahon's letter dated 4 November 2015 (see paragraph 117 below). The tribunal also notes that the claimant omitted to raise this serious allegation in his email of complaint dated 5 October 2015 (p278) – see paragraph 111 below. ]*

109. By letter dated 1 October 2015 (p.278) Louise McMahon, Matron for Medicine, asked for a review by Occupational Health stating:

'Graeme works 30 hours per week but feels he has struggled over the past few weeks, especially following working late shifts. He had been advised by the M.E. clinic that he requires 3x breaks per shift.'

110. Rotas for the shift work on the wards were prepared in advance, usually for a 4 week period. The employees were therefore able to view their forthcoming work patterns in advance. During 2015 the respondent introduced the e-rostering system, which allowed details of the rotas to be accessed by staff on the intranet, prior to the commencement of the 4 week shift period. The rotas published on the e-rostering system were not always an accurate reflection of the shifts actually worked, as staff could make a request to change their shifts, and the rotas could be changed. A written record was kept on the ward, which would contain certain handwritten amendments.

*[On this the tribunal accepts the evidence of Julia Riley.]*

111. On or around 5 October 2015 the claimant examined the rota for the forthcoming 4 weeks and by email dated 5 October 2015 (p.279) the claimant made a complaint to A. Coric about the rota saying:

'Sorry to have to email (twice) today, the Rota that I have received this week is totally unacceptable to [sic] have reported the matter to both the Union and Remploy.
I believe the rota is not done on e-roster, as it is mathematically impossible to be rostered on two months in a row. Every weekend.
I am also having my reasonable adjustments ignored, which is again having a detrimental affect on my M.E.
After my wife had to go to Victoria unit, Work causing me further stress does not help.
…
I would like the Rota (as it stands) to be removed and redone'

112. A Coric forwarded this email to Julia Riley, who considered the rostered shifts for the following month. She concluded that the rostered shifts did not require the claimant to work every weekend, and that the shift pattern adhered to the adjustment agreed of no more than two shifts worked consecutively. She wished to gain further information from the claimant about his assertion that his reasonable adjustments had been breached before any changes were made to the rostered shifts.

*[On this the tribunal accepts the evidence of Julia Riley. The documentary evidence of rosters and shifts worked is at times contradictory. ]*

113. By email dated 5 October 2015 (p.280) Julia Riley replied:

'Angela has forwarded this to me.
…
As I understand it you have a day off every couple of days to allow you time to rest, the option is there for requests, can I ask if you are using this option? I am unclear what you are referring to when you say your reasonable adjustments are being ignored can you please give me details of this. Unfortunately the rota as it stands cannot be removed as this has an impact on everyone, and of most importance, the safe staffing of the ward.'

114. The claimant was absent from work from 6 October 2015 to 6 December 2015. He did not work any of the rostered shifts about which he made complaint. He provided a statement (p.282) indicating that the absence was caused by 'Chronic Fatigue Syndrome Relapse' together with Fit Notes (p.281, 286, 298) indicating his absence was cause by chronic fatigue syndrome.

115. By letter dated 15 October 2015 (p.283) Tina Betts, ME/CFS Specialist Physiotherapist provided information about the claimant's condition including the following:

'Problems Mr Wilson has related to ME/CFS are:

Limited concentration
Disrupted cognitive functioning; exacerbated by stress and fatigue
Physical weakness

Anxiety
Muscle and joint paint

Advice and management has been provided by the ME/CFS service to help Mr Wilson manage symptoms; thus achieving a degree of control over this unpredictable condition. This includes:

Taking rest periods; it is recommended that scheduled quiet rests are timetabled into a working day, ideally before fatigue is experienced. The frequency of rest periods may vary depending on the intensity of the activity, be it physical or mental
Applying a paced approach to mental and physical activities is encouraged.
Manage stress effectively, or avoid situations that provoke stress. Situations and environments that provoke stress responses generally have a negative influence on symptoms. An environment that allows the individual to manage stress has a very positive influence on their symptoms.

As mentioned in the general description of ME/CFS, and the particular difficulties Mr Wilson presents with; stress and its influence on his cognitive problems is his main difficulty. It is therefore recommended that any work environment appreciates the influence excursion and stress will have on his general ME/CFS symptoms, and his ability to function effectively.'

116. The claimant gave a copy of that letter to Susan Howard.

117. By letter dated 4 November 2015 (p.287) Miss L. McMahon, Matron for Medicine, reported a meeting with the claimant on the same day as follows:

'At the meeting we discussed your recent sickness and your working pattern prior to your current sickness episode. You raised concerns that you no longer feel you are supported on the Ward with the regular breaks that you require as per Occupational Health advice.

You also expressed concerns about working late shifts as this is exacerbating your M.E. We all agreed that if the option of redeployment is available then this would be in your best interests. I informed you that I would look into this and contact you.

You also discussed your financial situation and you commented that you still have several weeks Annual Leave outstanding. Julie Burton suggested taking the next 2 weeks Annual Leave prior to your sick note expiring. I will discuss this with Julia Riley – Lead Nurse for Medicine and contact you with an update.

You also stated that you have been informed by your current Ward Manager that she felt you were not suitable to undertake your NVQ Level 2. However you disagree and feel you would be able to undertake the programme as it would help you manage your condition.

You are due to see Occupational Health on 8th November 2015 and I will contact you following their report to discuss a further plan.'

118. By email dated 6 November 2015 (p.289) Louise McMahon wrote to Occupational Health about the Occupational Health appointment to be attended by the claimant, stating as follows:

'Mr Wilson has raised some concerns relating to his breaks on the ward and how he feels he is unsupported by his Ward manager. At present Mr Wilson works early and late shifts however he is recently struggling to work late shifts as he feels they are exacerbating his condition.

At the meeting we discussed a possible redeployment to a clinic/ outpatients [sic] however I do not know if this is possible as Mr Wilson has previously been redeployed and also this would likely mean he is working a 5 day stretch and he currently has days off between his working days.

Please could you advise what would be the best long term plan for Mr Wilson.'

119. The claimant attended an Occupational Health appointment on 10 November 2015. Dr Dodman reported to Ms McMahon by letter dated 11 November 2015 (p.292) extracts from which read as follows:

'Graeme was redeployed to the Discharge Unit (G1) at Oldham in the Spring. I understand that he had a trial period before becoming a permanent member of staff on the unit. He tells me that during the trial period he was working 30 hours per week, just early shifts and no more than two consecutively. He also tells me that during this time he was having three breaks per shift (20 minutes for lunch and two 15 minute breaks that were take flexibly throughout the day).

Graeme reports that during the trial period he felt well and was enjoying his work. He sustained his attendance during this time. He then became a permanent member of staff on the unit after the successful trial period. Unfortunately the adjustments that were put into place do not seem to have been sustained. Graeme is now suffering from an exacerbation of the symptoms of his underlying medical condition and has been absent for around five weeks.

Graeme is keen to return to work. In my opinion he is fit for work with adjustments. The relevant adjustments are outlined in my previous reports dated 23 October 2014.

These are:

A regular working pattern and working early shifts rather than late with no more than 2 consecutively;

Provision of short rest periods during the day, lunch plus two short breaks would be reasonable in my opinion;

Communication with staff in charge of the ward inform them of provisions for breaks.

Given that with the above adjustments in place, Graeme was feeling well and sustaining his attendance at work on G1; it would be reasonable to suggest that if operationally possible this arrangement should continue. If it is not possible then

redeployment may be a consideration (as you mentioned in your email); however, the above advice regarding adjustments will still apply.'

120. By email dated 20 November 2015 (p.300a) J. Riley enquired whether there were 'any vacancies for band 2 support workers in out patients?' adding:

I have a member of staff who I may have to offer redeployment on health grounds, and he is looking for set days and times. I can no longer accommodate these, plus he requires regular breaks, and is not always able to get them. I have explained that working in outpatients has different stresses and pressures and there will be no guarantees there, however under Equality Act [sic], I have to look at options.'

121. The claimant attended a meeting with Julia Riley on 2 December 2015. During that meeting: -

121.1. The claimant said that he had not received the breaks to which he was entitled;

121.2. Julia Riley explained that he ought to let staff know on the ward when he needed a break – on a ward setting it was not always easy to pre-set break times or grant a break there and then depending on patient need, but his request for breaks could be accommodated by discussion and agreement with the registered nurse he was working with, who would need to ensure that patient care was not compromised. Mrs Riley explained that she could not give him a set time every day for a break because it would be dependent on ward activity. She asked the claimant to let her know if he faced any issues about taking breaks;

121.3. Julia Riley expressed concern as to whether or not the ward could run efficiently with the claimant working only on earlies. She agreed to give this a trial of two months, to be reviewed in six weeks' time.

121.4. Julia Riley confirmed that she had made enquiries with outpatients but there were currently no vacancies there;

121.5. Julia Riley confirmed that she would ask for a risk assessment to be done by H& S

*[On this we accept for the large part the evidence of Julia Riley, supported in part by the documentary evidence in particular the notes of that meeting which appear at p.321 of the bundle and the letter dated 8 December 2015 (p309).]*

122. Julia Riley confirmed the outcome of the meeting by letter dated 8 December 2015 (p309). She confirmed that:

122.1. for a period of two months the claimant would work only on early shifts;

122.2. the claimant would not be required to work more than two days together;

122.3. she had asked for a risk assessment to be carried out on the ward with the claimant and Susan Howard.

123. The claimant returned to work on 7 December 2015 on an agreed phased return as follows: (p.304)

Monday 7th Tuesday 8th 7-30 until 12-30
Monday 14th Tuesday 15th and Thursday 17th 7-30 until 12-30
Monday 21st Tuesday 22nd and Thursday 24th and Friday 25th 7-30 until 12-30
I did chat to Graeme to say have Christmas Day as annual leave but he wants to work it.

Then all January, Monday, Tuesday, Thursday, and Friday earlies,
Then review
Plus extra breaks'

124. By email dated 14 December 2015 (p311) the claimant advised his trade union representative that he had taken outside legal advice on his assertion that the respondent had deliberately flouted OH/GP advice.

125. On 5 January 2016 Susan Howard had a meeting with the claimant because she genuinely but mistakenly believed that he had gone home early the previous day without permission. Susan Howard did not shout at the claimant. The claimant told Susan Howard that he was struggling at work and he had left the shit. Susan Howard was worried about the impact of the claimant's fitness to work on the running of the ward, particularly if he left in the middle of a shift if he could not cope, and told the claimant that he could not just go home without telling anyone. They discussed the arrangements in place for the claimant's return to work and the continuing shift pattern. The claimant said he was struggling to continue to work on the unit because it was too busy. Susan Howard suggested that he might want to consider reducing his hours if he could not cope. The claimant said he could not afford to do that. Susan Howard told the claimant that she could not afford to carry him. The claimant was very upset by this remark.

*[On this we accept, in part, the evidence of the claimant. The tribunal does not accept the claimant's evidence that Susan Howard shouted at him. We do accept the claimant's evidence that Susan Howard said that she could not afford to "carry him". That is consistent with the documentary evidence, including the email dated 5 January 2016 set out in the paragraph below.]*

126. By email dated 5 January 2016 (p.313) Susan Howard advised Julia Riley:

'Morning, Graeme has been on half days since returning December, he was on annual leave last week which I didn't know about. Yesterday I went to look for him to be told he had gone home. This was 12:30.
I have spoken to him this morning to ask about yesterday and to say he's month off half days have finished. It was agreed that he would Mon/Tuesday, day off Wed, Thurs/Fri all earlies in January. When I asked him about yesterday, he said he's struggling to work, I said you can't just go home, which he agreed.
…
I don't think I can offer him a position on here, I have kindly spoken about reducing his hours which he says he can't afford, I have explained I can't afford to "carry him" on here.'

127. Julia Riley had a discussion about this email with Susan Howard, who said that she was putting adjustments in place for the claimant, including putting him on one to one care as this was less physically demanding. However, Susan Howard said that the adjustments made for the claimant were not enough and were an added burden or pressure on the ward.

*[The tribunal noted that in giving this evidence Julia Riley recalled that Susan Howard had said that the adjustments were an added burden, but quickly corrected herself and said that "burden" was the incorrect word and that Susan Howard had used the word "pressure" on the ward. Julia Riley used both words. The tribunal finds that whatever word was used Ms Howard was expressing her view that continuing with the adjustments for the claimant was difficult, and something which adversely affected the running of the ward – that is consistent with her clear statement to the claimant that she could not carry him.]*

128. By email dated 7 January 2016 (p.316) Michael McAiney, trade union representative, advised Julia Riley as follows:

'I am concerned that Graeme Wilsons work place issues have not been resolved so Graeme can manage [h]is disability ( M.E) at work. These have been on-going since 2013 the main concern from Graeme is that he cannot manage [h]is disability while working a late shift. Overall Graeme is happy working on G1 and if this issue could be resolved along with him needing a few minutes extra recuperation breaks he feels he could cope.

This situation is causing him unnecessary stress which has a detrimental to his disability. Graeme is desperate to avoid another disability related absence as a consequence he needs a resolution to these issues.

Graeme does not want to consider redeployment at this stage. I ask that the meeting scheduled for Friday 8th be cancelled and a case conference with occupational health is organised so the trust can support my member ….

129. By email dated 7 January 2016 Julia Riley responded as follows:

'I am somewhat surprised by your email.

> For January Graeme is working Monday, Tuesday, Thursday and Friday all earlies, no more than two days together. I understand he has been having his breaks. All of this is as agreed in the meeting on 2nd December. He has not worked or been allocated to late shifts, and all of the above follows the advice given by Occupational Health, therefore I feel that we are doing everything we agreed to do to support him.'

130. Julia Riley took HR advice and refused the request to cancel the meeting on 8 January 2016 and call a case conference with Occupational Health. She considered that the respondent had put in place the recommendations from Occupational Health and the case conference was not necessary, would take them no further.

131. The claimant attended the meeting with Julia Riley on 8 January 2016. The claimant was accompanied by his trade union representative. During that meeting:

131.1. The claimant confirmed that he had completed the phased return, was now on full early shifts and was managing with his breaks;

131.2. Julia Riley explained that for the next six months the respondent would accommodate the claimant working just early shifts, with no more than two together. For the time being this would be Monday, Tuesday and Thursday, Friday;

131.3. The claimant expressed concern that he was feeling tired after an early shift because the ward was busy during the day. Julia Riley said that the ward was less busy at night and suggested that the claimant consider if working nights would be an option. The claimant said he would speak to his specialist about this;

131.4. The claimant said he wanted to stay on ward G1 and did not want to be considered for redeployment at that stage;

131.5. There was no discussion relating to the failure to carry out a risk assessment

*[On this we accept the evidence of Mrs Riley, in part confirmed by the documentary evidence, in particular the letter dated 12 January 2016 (p.317) from J. Riley to the claimant confirming what had been said at the meeting.]*

132. Neither the claimant nor his representative pursued the request for a case conference with occupational health.

133. A risk assessment was not carried out. Neither the claimant nor his trade union representative raised any complaint about this.

134. After the meeting on 8 January 2016 Julia Riley met with the claimant on the ward from time to time while he was performing his duties. They would exchange a few words, each enquiring how they were getting on. The claimant did not raise any complaints with Julia Riley in the period 8 January 2016 to 29 April 2016, other than the complaint made via his trade union representative, which Julia Riley resolved (see paragraph 142 below).

135. On 27 January 2016 the claimant wrote to his trade union representative (p319) advising him:

> I received a follow up letter to go to my Excema clinic on Monday the 1st Feb.
> I rang GI to inform them I would need to pop out for this meeting, and was refused permission to go. Consequently I have now had to rebook on a rest day….Yet other members of staff are able to meet their appointments.

136. The trade union representative advised the claimant (p319) that if he felt he was being treated less favourably than other staff he could raise a grievance. The claimant did not raise a grievance at that time.

137. In March 2016 the claimant agreed to work two early weekend shifts, in the rota for 18 April to 15 May 2016, to let his colleagues have the weekend off.

*[On this we accept the evidence of Susan Howard, in part supported by the documentary evidence, in particular, the e-mail exchange between S. Bethall and S. Howard at pages 320 and 321 of the bundle.]*

138. In or around January 2016 the claimant received a follow up letter to attend his eczema clinic on 1 February 2016. He requested permission to attend that clinic during his shift but was refused. He was told that he should attend the appointment on a rest day.

139. By e-mail to Julia Riley dated 4 May 2016 (p.322) Susan Howard stated:

> 'Hi Julia, when you next meet with Graeme, I would like to point out that I cannot carry on with him working his shift pattern.
> This wasn't agreed long term and I cannot meet his requirements as other team members are working a lot of lates and weekends.
> This is a rotational post, lovely gentleman but I feel he is struggling to keep the pace up on here, which is totally different than acute wards, their pace is a lot quicker than here.
> I have to look at all the team and treat them all equally.
> Graeme is now off with exhaustion!'

140. In the period January 2016 to 28 April 2016 the claimant worked just early shifts, with no more than two together, meaning he worked Monday, Tuesday, Thursday and Friday. He was allowed to take regular breaks. This was in accordance with the recommendations from OH.

141. By email dated 24 April 2016 (p.326) the claimant made a complaint to his trade union representative in the following terms:

> 'I had hoped not to have to write to you after meeting with JR. But it is quite clear that when jr specified that I only do mon/tues thurs/fri until middle of june.
> I looked at this weeks rota and was surprised to find that i was on mon, tues, weds, when i raised this matter i was told only saturday was available? After looking at uncertain how this was concluded.
> the Rota i am –which goes directly against Occupational health and my working patterns.'

142. That email was forwarded to Julia Riley who investigated the complaint. She noted that there had been an error on e-rostering whereby the claimant had been rostered to work three consecutive days. Following the complaint from the claimant this error was rectified. The claimant was not made to work three consecutive shifts. The sister who made the error apologised to the claimant and asked him if he could work on the Saturday to allow for an appropriate level of cover on the ward.

*[On this the tribunal accepts the evidence of Julia Riley in part supported by the documentary evidence including the email at page 325 of the bundle between Julia Riley and Michael McAiney]*

143. The claimant was absent from work from 29 April 2016 onwards. He never returned to work. He started his long-term sickness because he suffered a diarrhoea vomiting bug which badly affected his CFS. He suffered a dramatic effect on his fatigue and other symptoms and he has not yet fully recovered.

*[This is the evidence of the claimant, as supported by the documentary evidence.]*

144. The claimant provided the respondent with:

144.1. On 6 May 2016 a Statement of Fitness (p.324) indicating an absence from working from 29 April 2016 to 6 May 2016 by reason of 'diarrhoea & vomiting';

144.2. a Fit note dated 6 May 2016 (p. 323) confirming that the claimant was unfit to working from 6 May 2016 to 13 May 2016 because of 'Diarrhoea & vomiting, symptom';

144.3. a Fit Note dated 12 May 2016 (p.328) – indicating the claimant would be absent for 1 week from 12 May 2016 because of 'abdominal pain'.

145. By email dated 16 May 2016 (p.330) Susan Howard advised Julia Riley:

I have a sick note today from Graeme, it's for 1 week, nature=Abdo pain.
As Graeme is "different", shall I refer to Occ Health or send for him.
I don't want to do anything his Union will question.
…
This is week 3 with 3 different illnesses.'

146. On 19 May 2016 Susan Howard made a referral (p.353) to Occupational Health, stating:

'This HCA was moved to me last year, he has ME, I was asked to allow him to have extra breaks and set shifts, he works only 2 days in a row and has had a Monday to Friday pattern for at least 6 months.
I am concerned that the Unit is too busy for him, he has been seen by Julia Riley my lead nurse and she is due to review his case soon. He is now off sick. This is his 4th week; he has phoned first care with different problems. I have listed them above.

…
Graeme has been fully supported; he has extra breaks throughout the day. He works 30hrs, Monday and Tuesday early, wed day off and Thursday, Friday early, weekend off.
I cannot support any further as this may impact on the rest of the team as all staff are working shifts, the team support Graeme as much as possible.'

147. The tribunal finds that the document at page 353 was the referral sent by Susan Howard on 19 May 2016. There is no satisfactory evidence to support the claimant's assertion that a more derogatory referral was sent, containing Susan Howard's opinion that the claimant could no longer do his job, that he was a burden to the ward and that she wanted him on the redeployment list. The tribunal rejects the claimant's assertion that the respondent deliberately re-wrote the original referral, to exclude the most derogatory remarks, and have deliberately failed to disclose the original referral, referred to as the "missing referral". On balance the tribunal accepts the evidence of the respondent's witnesses that only two referrals were sent to OH at this time: the referral dated 19 May 2016 at page 353, and the referral at page 363, sent on 17 June 2016 but wrongly dated 19 May 2016 (see paragraph 150 below). The tribunal accepts the written evidence of the respondent's IT department, that only two emails were sent by Susan Howard to Occupational Health at this time.

148. On 1 June 2016 the claimant attended an appointment with Dr Osunsanya of Occupational Health, accompanied by his wife. At that appointment Dr Osunsanya referred to the referral by Susan Howard. He did not read out a referral which stated that Susan Howard's opinion was that the claimant could no longer do his job, that he was a burden to the ward and that she wanted him on the redeployment list.

*[On balance, the tribunal does not accept the evidence of the claimant and his wife on this point. The tribunal has considered, in particular, any contemporaneous documentation which supports the claimant's assertion. The tribunal notes in particular that the claimant asserts that he and his wife were extremely upset at this appointment with Dr Osunsanya. However, in the grievance submitted by the claimant on 16 June 2016 (see paragraph 151 below), the claimant provides detailed complaints but makes no reference to Dr Osunsanya reading out such comments from a referral. The claimant refers in his grievance to comments made by his current manager who, the claimant stated, ' has referred me to occupational health stating that I can "no longer do my job, as an HCA" and she wants to put me "on the Redeployment list"". The claimant does not in his grievance explain where he obtained that information, why it is in quotation marks. He also makes reference in his grievance to being called a "Burden to other staff and the ward", by another manager, Tracy Taylor. The claimant did not at the grievance hearing (see paragraph 154 below) report what had happened at the appointment with Dr Osunsanya, even though there was a discussion about being placed on the redeployment list. On balance the tribunal finds that it is not credible that if the claimant and his wife were so upset at the appointment on 1 June 2016 with Dr Osunsanya, that if the referral had been read out to them in the way they now describe, that the claimant would not have included this specific complaint in his grievance. The respondent carried out an investigation of this complaint and as part of that investigation Dr Osunsanya stated that he could not recall having such a conversation with the claimant and it would have been uncharacteristic of him to have done so. He could not see anywhere in his notes where the alleged comments were made (p446) ]*

149. By letter dated 2 June 2016 (p.361) Dr Osunsanya wrote to Louise McMahon as follows:

> Graeme informs me that he has been absent from work for 4 weeks on account of an unexplained abdominal complaint which he feels has been having an impact on his underlying and disabling M.E. condition as you are already aware.
>
> On the basis that this abdominal complaint has yet to be identified to pave the way for appropriate treatment, I consider Graeme to be medically unfit for work at the present time.'

This report was addressed to Louise McMahon, and was copied to the referring manager Susan Howard. The claimant was unaware at the time that the report had been just copied to Susan Howard, because he did not notice that the report had been addressed to Louise McMahon. The claimant's copy of the report did not indicate that it had been copied to Susan Howard (p362A). If asked, the claimant would have agreed to the report being copied to Susan Howard. The claimant's evidence that there has been some deliberate falsification of records on his file is unsupported by the evidence and is without merit.

150. Susan Howard made a further reference to Occupational Health (p.363) which was sent on 17 June 2016 but wrongly dated 19 May 2016. Extracts read as follows:

> The HCA was moved to me last year, he has ME, I was asked to allow him to have extra breaks and set shifts, he works only 2 days in a row and has had a Monday to Friday pattern for at least 6 months.
>
> Graeme has been seen in Occ Health 1st June and is due to [be] seen again 28th June.
>
> From your assessment and report (Thank you), please could I ask, if this Gentleman is medically fit on his next appointment that you possibly give me a breakdown of his further adjustments if the root cause of his symptoms have been identified? I have asked Capsticks if it is reasonable for me to ask you about further adjustments.
>
> I have listed below adjusted work pattern.
>
> Graeme has been fully supported; he has extra breaks throughout the day. He works 30hrs, Monday and Tuesday early, wed day off and Thursday, Friday early weekend off. No night shifts
>
> It is a busy unit and Graeme does work hard to his potential, however, he does struggle to keep the pace up, I have chatted to him about this, I do worry as he does not appear that healthy.'

151. The claimant submitted a Formal Grievance (undated), sent to the respondent on 16 June 2016 (p.385 – 398). The grievance raised a number of complaints including:

151.1. Failure to follow the Equality Act;

151.2. Systematic refusal to follow OH advice in respect of his disability from November 2013 onwards by named managers, Tracy Shaw, Joanne Sloan, Cath McGuinness, Vanessa Genesis, Julia Riley and Sue Howard;

151.3. Rostered to work every weekend;

151.4. The conduct of Cath McGuinness and Louise Mortimer at a meeting on 6 January 2014, including being patronised because of his CFS/ME condition;

151.5. Management using the claimant's annual leave to prop up the rota;

151.6. Failure by managers, including Vanessa Genesis, Cath McGuinness and Louse Mortimer, to attend a case conference on 20 May 2014 arranged by Dr Dodman of OH;

151.7. Loss of earnings arising from sickness absence, loss of shift pay/increments/7.5 hours caused by the respondent's failure to make reasonable adjustments;

151.8. Personal injury caused by the respondent's failure to make reasonable adjustments, including atopic eczema;

151.9. Miss McMahon stating that the claimant was not suitable for NVQ level 2 because of his M.E.;

151.10. Failure to undertake risk assessments;

151.11. The conduct of Joanne Sloan in relation to a first stage absence meeting and the issue of a trigger warning letter;

152. Extracts from the Formal Grievance read as follows:

> 'My Grievance is that through systematic refusal of Management in the Royal Oldham Hospital to follow Occupational Health Advice and their systematic abuse of Disability and Equality law of 2010; has lead to the substantial loss of earnings
>
> …
> My health has become increasingly worse to the point where my current manager has referred me to occupational health stating that I can ***"no longer do my job, as an HCA"*** and she wants to put me ***"on the Redeployment list"***
>
> ……
> As to being a ***"Burden to other staff and the ward"***, stated by the manager, that is Tracy Taylor

153. A grievance hearing was held on 29 July 2016. Mr John Goodenough, Divisional Director of Nursing, chaired the meeting. The claimant was accompanied by his wife. There were no agreed minutes of the hearing. The respondent's notes of the meeting appear at page 405. The notetaker was Elaine Singleton. The claimant provided additional Notes of the meeting which he asserted had been omitted from the respondent's notes (p438-9).

154. During the Grievance hearing on 29 July 2016:

154.1. the claimant complained that:

154.1.1. he had not been allowed the breaks he needed;

154.1.2. he was put on the rota to work weekends;

154.1.3. when he went to work on G1 he worked every weekend for 6 months;

154.1.4. he had holidays removed without permission;

154.2. the claimant and/or his wife stated that:

154.2.1. only Karen Jackson and Louise McMahon had tried to help;

154.2.2. Louise McMahon had tried to move the claimant to Day services, as an alternative place of work, with 9 - 5 hours;

154.2.3. Julia Riley suggested that he go on the redeployment list to find something more suitable but his union advised him against this because if nothing could be found in 12 weeks he could lose his job;

154.2.4. he did not want to go back to work on ward G1;

154.2.5. the Policy was not followed as he was put on the system re triggering sickness absence, when he should have been on the system as suffering a chronic condition. The claimant was taken off the trigger system at the request of his trade union;

154.2.6. a decrease to 30 hours per week was suggested and the claimant agreed as he was so tired;

154.3. Mr Goodenough asked the claimant what he wanted as a resolution to the grievance. The claimant wanted further time to consider this;

154.4. Mr Goodenough assured the claimant that he could return to ward G1 with appropriate adjustments in place.

154.5. The claimant did not:

154.5.1. assert that he had been forced to reduce his hours to 30 hours per week against his will;

154.5.2. ask for a transfer to day services, as previously suggested by Louise McMahon. A transfer to day services was not discussed;

*[On this the tribunal accepts the evidence of Mr Goodenough supported, in part, by the documentary evidence]*

154.5.3. report what had happened at the appointment with Dr Osunsanya on 1 June 2016, did not allege that Susan Howard had

been derogatory to him in the OH referral, describing him as a "burden to the ward or other staff".

*[On this final point the tribunal accepts the evidence of Mr Goodenough supported, in part, by the documentary evidence. There is no reference to this complaint, the alleged reading out of a derogatory referral, in either the respondent's or claimant's additional notes of the hearing]*

155. After a short adjournment Mr Goodenough returned to the hearing and announced that he upheld the claimant's grievance. Mr Goodenough asked the claimant to consider a role on Patient Watch, possibly at a different site, as an alternative to returning to ward G1, both with appropriate reasonable adjustments. The claimant stated that he wanted further time to consider this.

156. Mr Goodenough did not carry out an investigation before announcing his decision.

157. By letter dated 4 August 2016 (p.411-413) Mr Goodenough, informed the claimant of his Grievance Hearing Outcome, stating:

'In essence, you took the opportunity to describe a situation that has accumulated over a period of time that focussed on failures to make reasonable adjustments recommended by Occupational Health to accommodate your health issues. (p.411)

…

I understood from you that recommendations from Occupational Health have stated that required adjustments in the workplace owing to your underlying M.E. condition are put in place which are likely to be required for the foreseeable future including short additional breaks during a shift, working early shifts only and at least a day off in your working week so that you do not work more than two concurrent days in a row.

You advised that you felt there had been a repeated failure of management over a period of time to respond when recommended breaks were not allocated in line with Occupational Health advice resulting in a deterioration of your health.

You stated that you felt this has led to a cycle of relapsing on numerous occasions over a period of time due to not getting your breaks when on shift and becoming exhausted and having to go off sick; and then being referred to Occupational Health again who advise that reasonable adjustments are put in place which are then not applied consistently so you relapse again.

You explained you felt this situation has been exacerbated by other issues including an inclusion of annual leave on rotas without your request in numerous occasions. Additionally, you felt there had been an unfair allocation of weekend shifts exemplified by you working every weekend for 6 months which was 12 months' worth in six months. You mentioned the stress caused by not receiving positive responses to these concerns over a period of time.

I asked you what resolution you were seeking to your grievance. You advised that you were not sure how you see this being resolved so I left the meeting room to give you the opportunity to think about this in more detail. On return you explained that you still did not know how you would like the issues to be resolved.

I then advised that based on the information you provided I have accepted that recommendations made to allocate breaks when on shift have not been applied consistently over a period of time and on that basis I have decided to uphold your grievance. By way of resolution I asked you if it would be acceptable to return to work if an assurance could be given that the recommended reasonable adjustments could be accommodated. However, you indicated that you did not consider it practical to return to your existing post even under those circumstances.

In light of the above, I reviewed my recommended resolution and proposed an alternative to transfer to the role of Health Care Assistant undertaking Patient Watch duties as part of a new central team approach to meeting the enhanced care requirements for some of our patients, with all your conditions of service maintained. I explained that in my view, given your health issues, I believe that this is a more suitable role in which the adjustments you require could be more easily accommodated. In addition, I explained that I felt a new job in a new environment provides the opportunity to address the other associated concerns raised around off duty and rota management. (p.412)

Since the hearing I have now clarified with your manager Julia Riley that in your present role the same adjustments can be applied and therefore the option remains open for you to return to work to your current role.

You acknowledged the alternative role at the hearing and asked for time to consider it and to take advice from your Trade Union representative. I agreed to this and request a response within 5 working days of the date of this letter as to whether you want to accept this alternative role or return to work in your present role. If I do not receive a response from you by 12th August 2016 you will remain in your current role and should you remain unwell support will be offered to help you return to work with the required adjustments accommodated.' (p.413)

158. Mr Goodenough upheld the grievance in relation to only one of the complaints – that the claimant had not been allowed additional breaks during shifts. He made no findings in relation to any other of the claimant's complaints. Having upheld one of the complaints he decided that the best way forward was to look for a resolution to move forward so that the claimant could be retained by the respondent. He did not consider that matters would be resolved if he became engaged in a detailed analysis of what had or had not been done.

159. On 5 September 2016 the claimant sent a letter (p.419 – 422) to Mr Dalton, joint Chief Executive of the respondent. The claimant asked the letter to be treated as a formal grievance. It raised complaints relating to:

159.1. failure to implement reasonable adjustments because of his disability (ME/CFS); and

159.2. the manager on G1 stating she would not put him forward for NVQ level 2 training because of his disability (ME/CFS);

159.3. Being refused to attend a medical appointment for his skin condition when other members of staff, who were not disabled, had been allowed to attend their medical appointments.

The claimant indicated that he was not satisfied with the outcome of his grievance heard by John Goodenough. The letter was treated as an appeal against that outcome.

160. The claimant was invited to attend a Grievance Appeal Hearing on 28 October 2016, confirming that the appeal would be heard by Steve Taylor, Divisional Director of Medicine, and Diana Finlayson, Divisional Director. The claimant was asked to prepare a Statement of Case.

161. By email dated 15 September 2016 (p.429) the claimant wrote to David Dalton in the following terms:

'After receiving my referrals from mediscreen, I received them today, in their edited form.
Manager sue howards derogatory "he is a burden to the ward" & "a burden to other staff" comments have been expunged from them. This in itself is both criminal and allowing your senior staff to bully staff.

162. Mr Nick Hayes, then Deputy Director of workforce, carried out an investigation of that complaint. The referrals to Occupational health were located and considered. As part of that investigation Alison Brophy, HR Business Partner, visited the claimant at his home on 4 October 2016 to obtain further information. The claimant asserted that:

162.1. he was shocked when Dr Osunsanya read out the referral;

162.2. both he and his wife visibly reacted to the comments;

162.3. Dr Osunsanya read the referral verbatim, did not paraphrase it.

Mrs Brophy agreed to discuss the complaint with Dr Osunsanya

163. By email (p.446) dated 05 October 2016, Dr Tolani Osunsanya was asked:

'Please can you give Alison Brophy a call on her mobile (details below) regarding an allegation made by a member of staff, Grahame Wilson i.e. Manager sue howards

> derogatory “he is a burden to the ward” & “a burden to other staff” comments have been expunged from them
>
> Apparently he has alleged that you read these comments out to him at his last appointment (according to cohort this was 29 June 2016) but on recieving a copy of the referrals following a subject access request they have been removed.

164. By undated email (p.446) Dr Tolani Osunsanya responded:

> ‘I cannot recall having such a conversation with Mr Wilson and it would have been uncharacteristic of me to have done so.
> I could also not see anywhere in his notes where the alleged comments were made. However, I can see, from the email trail, that Mr Wilson has requested his OH referrals, which should assist with the enquiry.’

165. By letter dated 18 October (p.453-454) Alison Brophy advised the claimant that:

> Dr Osunsanya has replied to me that he cannot recall any comments as alleged being included in the referral and there is nothing in his consultation notes that would indicate there having been. He has confirmed that if there is an indication that a member of staff is not clear why they have been asked to attend occupational health he will explain them based on the information in the referral. He does not remember using those comments in your case and does not feel that it would have been usual to have done so. From reviewing the referrals he was able to say that as far as he can recall, the referral that you are in receipt of was the one that he had seen.

166. The claimant was invited to a hearing of his grievance appeal on 28 October 2016. The claimant was unable to attend that hearing and requested that the meeting proceed in his absence. The claimant was asked if he wished to attend a rescheduled meeting or provide written submissions for the panel to consider. On 1 November the claimant confirmed that he did not wish to attend a rearranged appeal hearing and provided written submissions for the panel. The appeal panel convened on 7 November 2016 in the claimant’s absence.

167. Prior to the meeting on 7 November 2016 the appeal panel members exchanged emails about the merit of convening the hearing when the claimant had indicated he was unable to attend, and they had already read the documents upon which the claimant relied (p473). The exchange of emails suggested that the panel members had already made up their minds on the outcome. However, the appeal meeting did take place on 7 November 2016, when the Panel was provided with HR support, and there was a short meeting of half an hour to consider the outcome.

168. Neither of the appeal panel members has been called to give evidence. There is no evidence as to the nature of any investigation carried out by the panel prior to reaching their decision.

169. By letter dated 11 November 2016 (p.478 – 482) Steve Taylor, Divisional Director of Medicine, advised the claimant of the outcome of the appeal. Extracts from the letter read as follows:

> You appealed against his [John Goodenough's] decision on the following points requesting the following outcomes:
>
> 1. The panel to acknowledge that reasonable adjustments have not been implemented leading to stress and an adverse effect on your health.
>
> 2. Compensation to be awarded for damage to your health, loss of earnings, future loss of earnings and stress caused to your wife and daughter over the last three years.
>
> 3. Procedures to be put in place to minimise this happening to staff again.
>
> 4. You feel it would be difficult to return to work as you feel you can no longer undertake your current post as an HCA due to physical demands. Other areas of work such as clerical jobs may be difficult for you to undertake as the stress and reasonable adjustments not being implement has affected your ME/CFS which has made your dyslexia and memory worse.
>
> 5. You are realistically only able to work at TROH as you do not drive and travelling on public transport exacerbates your fatigue making your ME/CFS worse. It would also be stressful for you as you would come in to contact with senior staff who have not implemented reasonable adjustments and acted in a discriminatory way towards you.
>
> 6. You feel it is unacceptable that you are "placed on ill health retirement" due to the fact that your health has deteriorated because reasonable adjustments, including breaks, have not been implemented for the last three years.
>
> 7. Further stress has been caused by the first grievance not being dealt with.
>
> 8. There has been a breakdown of trust between yourself and the Trust.
>
> These written submissions have been considered by the panel as follows:
>
> 1. Your desired outcome would be the panel acknowledging that reasonable adjustments have not been implemented, leading to stress and an adverse effect on your health.
>
>    The panel have reviewed John's outcome letter dated 4 August 2016 and his statement of case. John's outcome to you stated that he "accepted that recommendations made to allocate breaks when on shift have not been applied consistently over a period of time". John stated that on this basis he upheld your grievance. (p.479)

The panel feel that this point was addressed and discussed in detail with John at the hearing on 29 July 2016 and therefore the panel upheld John's decision.

2. Compensation to be awarded for damage to your health, loss of earnings, future loss of earnings and stress caused to your wife and daughter over the last three years.

   The panel have reviewed your list of grounds for compensation and the resolution options which have been offered to you by John which appear to be suitable and reasonable.

   The panel have considered the point you made previously regarding the decrease in your hours from 37.5 to 30 hours per week. The panel have reviewed documents available in your p file which contains an email from you dated 3 August 2014 requesting a reduction in hours to 30 on a six month trial period which was subsequently agreed.

   The panel have also considered the Occupational Health report dated 28 April 2014 which states "It may be the case that other measures such as reduced hours or a temporary redeployment need to be considered in future".

   A further Occupational Health report dated 23 October 2014 states that "a recent reduction in hours to 30 per week… may help him to better control your symptoms".

   The panel feel that the Trust has considered the advice by Occupational Health and made a reasonable adjustment by way of a reduction in your work hours, which was requested and agreed by you. Therefore the panel do not uphold this point.

3. Procedures to be put in place to minimise this happening to staff again.

The Trust expects management of all levels to support staff with reasonable adjustments in line with Occupational Health advice. This includes meeting with staff regularly and referring for Occupational Health advice where appropriate. Staff also have the ability to self refer if they feel they require additional support.

This is a procedure which is in place across all levels of the organisation. Therefore the panel do not uphold this point.

4. You feel it would be difficult to return to work as you feel you can no longer undertake your current post as an HCA due to physical demands. Other areas of work such as clerical jobs may be difficult for you to undertake as the stress and reasonable adjustments not being implement has affected your ME/CFS which has made your dyslexia and memory worse.

5. You are realistically only able to work at TROH as you do not drive and travelling on public transport exacerbates your fatigue making your ME/CFS worse. It would also be stressful for you as you would come in to

(p.480) contact with senior staff who have no implemented reasonable adjustments and acted in a discriminatory way towards you.

In his outcome letter to you, John suggested the role of Patient Watch as an alternative role to you and asked that you contact him to confirm or decline his offer. John has informed the panel that to date you have not made and contact with him whatsoever.

The panel do not consider that there is no longer employment opportunity at the Trust for you if you are fit enough to work. As such the panel encourages you to contact John, to discuss all the available options. This includes discussing reasonable adjustments where appropriate and ensuring you are provided with adequate support and training for your role, including an escalation route to the correct manager. The Trust does not tolerate discriminatory behaviour from any staff member, regardless of grade and encourage you to raise any issues you encounter so they can be dealt with in a timely manner.

Therefore the panel do not uphold this point.

6. You feel it unacceptable that you are placed on ill health retirement due to the fact that my health has deteriorated because reasonable adjustments, including breaks, have not been implemented for the last three years.

The panel is aware that you are currently on a period of long term sick leave from the Trust. Beyond this the panel are not privy to the details of your sickness absence management.

It is the Pensions Agency who determine whether an application for ill health retirement is accepted, not the Trust. If Occupational Health supports the application, then the staff member is supported by management with their application. This is not an option that is enforced by the Trust.

Therefore the panel do not uphold this point.

7. Further stress has been caused by the first grievance not being dealt with.

The panel are not aware of any evidence that a “first” grievance was raised by you. John confirmed to the panel that at your grievance hearing you raised several points of complaint which he listened to and addressed.

As the panel cannot find any evidence that a prior grievance has been raised, the panel do not uphold this point.

8. There has been a breakdown of trust between yourself and the Trust.

The panel considered the procedure which has taken place to this point. John upheld your point regarding reasonable adjustments not being put in place. John also discussed your position with Julia Riley, who confirmed to John that reasonable adjustments can be (p.481) applied in your present role and to an alternative role which has been offered to you.

> The panel believe that two options have been put to you which you have not responded to. The panel also believe that in or to achieve a resolution to the current situation your participation is essential in order to move forward within your employment with the Trust.
>
> Therefore the panel do not uphold this point.' (p.482)

170. The appeal panel did not address all the points of the appeal. They did not address the second and third grounds of complaint raised in the claimant's letter dated 5 September 2016 (see paragraph 159 above).

171. Elaine Singleton was copied in to some of the correspondence about the appeal.

172. The claimant was dissatisfied with the appeal outcome and he and his wife wrote letters of complaint to Mr David Dalton and others in November 2016 (pages 483 and 487) asserting, amongst other things that the respondent had breached the terms of the Equality Act and had committed direct and indirect discrimination within the meaning of the Equality Act.

173. By letter dated 23 November 2016 (p491) Mr Nick Hayes replied to the claimant's letters of complaint, setting out Mr Hayes' understanding of the outcome of the claimant's grievance and appeal. Extracts from the letter read as follows:

> If you do not feel well enough to return to your current role or to the alternative role offered to you by John Goodenough, and the medical advice from OH supports this, then I can arrange for you to be placed on the Trust's redeployment register in order that you can apply preferentially for other band 2 roles in the Trust, such as administrative roles, to enable you to return to work to a role more suitable for your health. If this is something you would like to be arranged please let your line manager and John Goodenough know as soon as possible so that this can be actioned.
>
> ..
>
> I would like to assure you that I take allegations of disability discrimination very seriously and consider it to be unacceptable. I understand from your grievance that certain things could have been done better by the Trust and this has been acknowledged by John Goodenough. I do not however accept that the trust has discriminated against you…..
>
> In order to resolve your concerns Mr Goodenough assured you that reasonable adjustments would be made to your current role and further offered you alternative employment if you would feel happier with that, which was supported by the appeal panel. I also fully support this approach and have also explained that the Trust will endeavour to find different employment for you should this be preferential and more accommodating of your health needs

174. The claimant and his wife met with Mr Hayes on 30 November 2016, to discuss his possible return to work. A copy of the meeting notes are at pages 498 - 499 of the bundle. The claimant indicated during the meeting that he felt

he would be unable to return to his role as a healthcare assistant. He indicated that he was not sure that he would be able to return to work at all in the future, as his health was at the lowest and he was unable to leave the house for more than an hour at a time without feeling tired. The claimant stated that he thought the previous offer of a HCA Patient Watch role was a zero hours contract, which he considered to be unacceptable. Mr Hayes reassured the claimant that a phased return to work would be available to him if he so chooses. The meeting continued with an agreed "without prejudice' discussion in which the parties sought a resolution to the claimant's complaints. No notes were taken of that part of the meeting.

175. On 15 December 2016 Nick Hayes attended a meeting with the respondent's solicitors and the manager of the OH service, to seek legal advice on the complaints raised by the claimant. Nick Hayes referred to this meeting in his letter dated 9 January 2017 as a case conference.

176. By letter dated 9 January 2017 (p. 518 – 519) Nick Hayes, confirmed his understanding of the "open part" of the meeting with the claimant on 30 November 2016. The letter included the following:

> 'In order to assist you to return to work you have been placed on the Trust's redeployment register. This will ensure that you receive access to the Trust's vacancies in order that you can apply for band 2 roles on a preferential basis. (p.518)
>
> If you have the necessary skills for the role you should alert your manager and Catherine Gardner, Senior Workforce Adviser, to this and the Recruiting Manager will arrange an interview for you.
>
> A case conference was held with Occupational Health on 15th December 2016 to discuss your current health and medical fitness to work. They are waiting for your GP to provide medical records so they can give a more comprehensive assessment, and will be contact your GP to expedite this process as these records have not yet been received.
>
> I would like to be very clear to you about the Trust's offers of employment to assist you to return to work. These are
>
> 1) Healthcare Assistant – Your current role
> G1, Royal Oldham Hospital
> £15,944 per annum £12,755.20 pro rata
> Hours: Flexible
> Line manager: Susan Howard
>
> 2) Healthcare Assistant – Patient Watch Dept
> £15,944 per annum £12,755.20 pro rata
> Hours: Flexible

Reasonable adjustments recommended by Occupational Health over the last two years, all of which can be accommodated in the above two roles, are:

- A phased return to work
- Allowing you reasonable time to attend appointments for treatment, assessment or rehabilitation
- A trial if an alternative role is commenced
- Breaks which can be taken flexibly
- Communication with staff in charge of the ward to discuss provisions of breaks
- Flexibility around shift start times (I understand that early shifts are more supportive of your condition)
- A working pattern of no more than 2 shifts consecutively
- The undertaking of a stress risk assessment

In addition, if any further adjustments are recommended following receipt of further medical advice from your GP and Occupational Health, the Trust will endeavour to accommodate such recommendations in either of the above two roles or an alternative suitable role identified via the Redeployment Register.' (p.519)

177. The letter dated 9 January 2017 (p518-519) did not include details of the without prejudice discussion which had taken place on 30 November 2016.

178. Mr Nick Hayes made the decision to place the claimant on the redeployment list to ensure that the claimant received details of any available vacancies on a preferential basis, to assist him in any effort to return to work. There was no indication of the length of time the claimant would be on that list. The claimant was not issued with a notice indicating that if he failed to find a position within 12 weeks, or any other period of time, that he would be dismissed.

179. Mr Hayes did not follow the written procedure when he placed the claimant on the Redeployment Register as he did not request the claimant to complete an Aspirational Interview, he did not ask any line manager to review existing vacancies to establish if any were suitable for the claimant.

180. The claimant had been advised by his trade union representative that where employees are placed on the redeployment list it is normal practice for the respondent to issue them with a notice of termination of employment, usually twelve weeks. The consequence of that is that if the employee has not found a suitable vacancy their employment will terminate at the end of the notice period.

181. By undated letter (p.522 – 523) the claimant responded to Nick Hayes as follows:

'I am surprised by the letter I received today, I will be brief;

The NHS Occupational health department cannot refer me / or other members of staff arbitrarily to the Redeployment list. I have to agree to go on redeployment list and also have to be fit to work.

… I am currently off sick-so cannot apply for vacancies.

…Yourself, Alison Brophy, Julia Jones, John Goodenogh, Julia Riley, Steve Taylor and Michelle Waite have wilfully ignored Equality Act 2010, Public sector Equality, Disciplinary procedures, conspired to tamper with medical evidence, altered and doctored consent forms, lied to both myself and wife suggesting that there was something wrong with us –when in fact the above named have repeatedly distorted and hidden evidence of criminal behaviour.

And due to your attitude of victimising the victim and not following policies you have increased the stress levels, and further damage to my health not only for myself but my family, whom also have M.E/CFS, although judging by the attempted cover-up you have attempted, and gross derelictions of duty, and GROSS MISCONDUCT that you and your team have committed repeatedly. (p.522)

As to coming back to work at the TRUST now that is an ironic word considering what levels of abuse you are prepared to sink too, and how many Departments are contaminated by people like yourself and the damage that you have done to my health this is not a viable option.' (p.523)

182. By letter dated 9 January 2017 (p.527 – 529) the claimant informed David Dalton that:

'I will not be attending any other appointments and I will be withdrawing my consent for the medical report from my GP due to the obvious fraud and corruption that has taken place in Occupational Health. I will be attending a medical appointment with an independent specialist instead (I will obtain a receipt so that you can reimburse me the cost.)

I am absolutely disgusted by the conduct of your staff and the lengths they will go to cover up disability discrimination (it is not even 2 months since the scandal in maternity at Oldham hospital and then I find again that there is no transparency or candour within this Trust). There is then the victimisation that I have received since raising a grievance.

All the members of staff involved in this have committed GROSS MISCONDUCT and some of them criminal acts also.

183. The respondent has a Policy for Organisational Change (p741). It includes the following:

3.5 Redeployment of employee due to ill health

If it has been deemed that an employee should be considered for redeployment as they are unable to carry out the role due to ill-health, the Trust will endeavour to find

a suitable alternative role. The employee will therefore be placed on the redeployment register.

The Employee's aspiration form will be forwarded to the Recruitment team. The Recruitment team will share on a weekly basis open vacancies within the Trust with both the redeploying manager and redeployee. The redeploying manager should identify any posts that may be deemed as suitable alternative employment and advise recruitment. This may include posts that are not a clear match but the redeployee is happy to consider.
..
The Trust will make all reasonable attempts to identify suitable redeployment opportunities within three months of the recommendation being made by occupational health. This period is considered to be a period of notice in terms of the employment contract. If, at the end of this period, no suitable post has been identified or any trial redeployment has been unsuccessful or unreasonably refused by the at-risk employee, the Trust may be required to terminate the contract of employment on the grounds of incapacity…
Staff place on redeployment due to ill-health will only be on redeployment for the period of their notice (i.e. minimum 4 weeks to a maximum 12 weeks)

184. The claimant was absent from work continuously from 29 April 2016. His absence was managed under the respondent's Attendance Management policy (p643) extracts from which read as follows:

184.1. Appendix 8: long term sickness attendance management procedure

1. It is expected that employees would contact their manager to provide an update on their current condition and progress on a regular basis. Regular monthly long-term health review meetings will be arranged as appropriate to the situation and agreed with the employee.

2. If an employee cannot attend a meeting, a telephone conversation/conference or a visit to their home or an alternative place of choice should be discussed with the individual to facilitate a review and staff should be reminded of their right of representation and union support…..

3. Where it is clear that the employee will be absent for 4 weeks or more or if there is no way of knowing when they will be able to return to work, the employee may be referred to Occupational Health for a confidential report on their condition. Managers should use their discretion on a case-by-case review and access the referral line if needed.

4. Upon receipt of the occupational health report a meeting must be arranged with the employee to discuss the options available using the return to work form as a prompt. By way of illustration only these options may include the following:….

ii) the employee may be fit to return to work but not in the near future. The situation should continue to be monitored to ensure that a return to work is achievable within

the foreseeable future… It is an option for managers to issue a notification at this point if there is no foreseeable return to work. If none is issued here then at the next review meeting a notification must be issued prior to moving to termination of contract of employment.

iii) The report states that the employee is unfit to perform their present duties, but is capable of other work (in the same or other department, with or without reasonable adjustments). In this case their manager will attempt to identify reasonable alternative positions based on the advice of the Occupational Health department. There is no onus on the employer to create a job but reasonable attempts must be made to identify alternative posts, either temporary or permanent and managers must explain the reason and rationale for not being able to make these adjustments.

6. Where an agreed alternative post is not available or the medical report states that the employee will be unfit to return to work to their current (or alternative role) or the employee is declared unfit to continue in any capacity for the foreseeable future the individual's employment may be terminated with appropriate notice ….Prior to any decision to dismiss the manager must ensure a notification has been issued and so in these cases it may be necessary to hold a meeting and issue the notification before holding the final hearing

184.2 Appendix 9: Other considerations

It is open for the employee to provide their own independent medical report, but the employee will be responsible for making the necessary arrangements and for any costs incurred.

184.3 Time off to attend medical appointments

….. Employees requiring time off to attend GP, dentist or hospital outpatient appointments should, wherever possible, arrange appointments outside of normal working hours or if working flexibly or flexitime not usually in their core hours were possible.
However, in urgent cases or where this is otherwise not possible, line managers will be expected to allow employees to attend, up to 2 hours, and staff may use time worked over time to take an appointment in core time as time claimed back should they need to exceed the 2 hour allowance.

185. The claimant was called to a number of meetings under the long term sickness absence procedure in July and August 2016 with Julia Riley and Susan Howard. The claimant was unable to attend those meetings either because of lack of availability of a trade union representative, or because short notice was given, or because the claimant was too ill to attend.

186. Kelly Burns, Quality Matron for Medicine, invited the claimant to attend a meeting on 7 September 2016, and agreed to the claimant's request that it

take place at his home. The claimant was unable to predict when he would be fit to return to work.

187. By private and confidential letter dated 7 September 2016 (p.427 – 428) Matron Kelly Burns informed the claimant:

> 'I am writing to confirm the main points of the formal meeting held on 7/9/16 which was held under the Attendance Management Policy. The meeting was held at your home address at your request your wife Mrs Wilson was present at the meeting and you were happy to proceed without union representation. You have been absent from work due to sickness since 29th April 2016, your absence has been due to a number of reasons including abdominal pain, work related stress and you are currently off with a flare up of your ME.
>
> …
>
> I asked you when you thought you would be fit to attend work. You did not know when you would be able to return to work, due to your current flare up of ME. […] I advised you that I would send a new referral to the occupational health department to determine what, if any further adjustments are required in addition to the current ones agreed would be required to assist you in returning to ward G1. We will arrange to meet following this appointment so that we can plan to support you back to work. You discussed that following a meeting with John Goodenough (Divisional Nurse Manager), your understanding was that John did not think you could return to the ward environment. Since our meeting today I have spoken to John for clarification on this matter and there appears to have been a misunderstanding as John has confirmed that he feels you can return to your current role when fit to do so. John also confirmed at your last meeting, you were offered a post within the Trust working as an enhanced care worker.
>
> …
>
> I advised you that if you remain absent due to sickness, you will continue to be paid at the full rate until 15th September at which point your pay will be reduced to half pay.
>
> As you were unfortunately unfit to return to work, you were advised that we would need to meet with you again with the intention that unless you are able to confirm a date to return to work in the coming weeks, then I may have to convene a final health review meeting under the Attendance Management Policy. The next review meeting will take place in the next few weeks following your occupational health appointment and at that meeting you may be issued with a written notification if there is no confirmed date to support a return to work in a reasonable time frame'

188. On 7 September 2016 Kelly Burns made a referral to Occupational Health (p424) in the following terms:

> 'Graham has been off sick since 29th April with a number of issues, he initially went off with abdominal pain which has since resolved and has no follow up with his Dr for this condition.
> Graham also suffers from ME for which he is currently seeking a counsellor for. He has a current sick note which he has just extended for a further month. Graham has been on sick since 29th April 2016 and at my meeting today he was unable to

> predict when he would be fit to return to work. He is due to go onto half pay on 15th September as he has on previous episodes of sickness.
> He was off long term last July and again in December.
> …
> There are a number of adjustments in place in his work day but he still does not feel he can come back to work, he is struggling with the workload. He currently works on G1 which is the ward with patients with the least acuity. He did not specify what he was struggling with.
> I wonder whether he needs to be considered for a reduction in his hours or whether nights or weekends would be best as the unit has less activity as these times.
> Can we also look at whether he will require a phased return.
> Does he need to be considered for ill health retirement? (p.424)

189. By letter dated 21 September 2016 Mrs Kelly Burns sent the claimant (p.230) a 'Notification of a long-term health review meeting', extracts of which are as follows:

> 'I am writing to invite you to a meeting to discuss your health, your current absence from work and any support which I can offer you. This is in accordance with the Trust's Attendance Management policy (enclosed). The meeting will take place on Wednesday, 12 October 2016 at 9am at your home.
> …
> I must make you aware that due to the length of your current absence you may be issued with a notification at the meeting in line with the policy if there is no foreseeable return to work date.'

190. Following email exchanges about the availability of the claimant's trade representative the hearing was rearranged to take place on 24 October 2016.

191. By letter dated 11 October (p.451) Dr Osunsanya provided a further OH report, extracts from which read as follows:

> Graeme informs me that he has felt no better since when I last assessed him on 28 June 2016. He states that he has continued to be bothered by his ongoing abdominal problems for which he is now scheduled to undergo further tests on 17 October 2016. He says this has had an impact on his mood as well as his underlying ME condition, as you are already aware.
>
> From my assessment, Graeme's underlying medical conditions appear to have remained essentially the same since I last assessed him on 28 June 2016. In order to gain a better understanding of the nature of these underlying conditions, I shall be seeking additional information from his GP and I will update you as soon as a I receive a response. In the meantime, I consider him to be medically unfit to return to work in any capacity and I find it difficult to proffer a realistic return to work date at this point in time.

192. On 11 October 2016 Dr Osunsanya dictated a letter (p448A) to the claimant's GP which included the following:

> I understand that he (the claimant) has been absent from work from 29 April 2016 on account of a combination of abdominal, fatigue -related and mental health conditions.
>
> ….
>
> I am in the process of commenting on his fitness for work as well as giving guidance to his employers on his short, medium and long-term prospects for work. I, therefore, require additional information from you to corroborate my views. I would be grateful if you could kindly provide me with a report detailing his history and diagnoses, the management plan; including details of current treatment or proposed interventions, and his prognosis as you see it. Your opinion on prognosis will go a long way in helping us to determine long-term outlook in this case..
>
> The letter to the GP did not include a job description or a list of the claimant's duties

193. Dr Osunsanya's letter did not arrive at the claimant's GP surgery until 2 December 2016. The respondent is unable to provide an explanation for the delay.

194. By letter dated 3 January 2017 (p512) the Occupational Health Department advised the claimant that Dr Osunsanya's contract had come to an end and that the claimant was invited to attend an appointment with Dr Nasir. The respondent expressed the hope that Dr Hunjan, the claimant's GP, would be in a position to provide his report prior to that appointment.

195. By letter dated 9 January 2017 (p520) the claimant informed the respondent that:

195.1. he would not attend the appointment with Dr Nasir because, amongst other things, the OH had conspired with Alison Brophy and Nick Hayes to lie and defraud the claimant;

195.2. he withdrew his consent to his GP to write a report in reply to Dr Osunsanya's request;

195.3. he would obtain his own independent medical report.

196. Matron Kelly Burns met with the claimant at his home on 24 October 2016. The claimant was represented by his trade union representative. The claimant said he was feeling a little better as he was having counselling, but he did not think he could return to his existing role and asked whether he could be redeployed. Matron Kelly explained that they could look into this as and when the claimant was fit to return, noting that at that stage the claimant had another fit note covering his absence until 5 December 2016. As the claimant remained unfit for work Matron Kelly issued the claimant with a notification under the Managing Attendance policy. She explained that it was not a step

which questioned in any way the genuineness of the claimant's absence, but rather made clear that continued long-term absence may eventually result in termination of employment on capability grounds.

197. By letter dated 24th October 2016 (p.460 – 461) Matron Kelly Burns wrote the claimant as follows:

'I am writing to confirm the main points of the formal meeting held on Monday, 24th October 2016 which was held under the Attendance Management Policy. The meeting was held at your home address at your request due to your current health issues. You were accompanied by Michael McAiney, your Union representative and Elizabeth Burquest, HR Advisor was also in attendance.

You have been absent from work due to sickness since the 29th April 2016 as a result of a flare up of your ME, which you informed me you were currently seeing a counsellor for which you felt was helping. You had also been having abdominal problems which you have recently undergone investigations for.

…

You advised me that you did not feel that you could return to your current role as health care assistant as you felt this would be too physically demanding and you asked whether redeployment would be an option.

…

At the meeting we also discussed your latest occupational health report dated 11th October 2016 from your review on the 10th October 2016. the report states your (p.460) condition has not changed since your previous appointment on 28th June 2016 and that the Consultant could not advise of any realistic return to work date in the foreseeable future. The Occupational Health Consultant has sought further advice and clarification of your mental conditions and treatment from your own General Practitioner (GP) and will advise on receipt of these records.

As you were still unfortunately unfit to return to work, I had to issue you with a notification. The notification is in accordance with the Managing Attendance Policy and in no way questions the genuineness of your sickness absence. The caution is the next step in the procedure which must be followed to reiterate that unfortunately the service cannot sustain your current levels of absence on an on-going basis. I do hope that your health improves and that you are able to return to work soon.

198. By letter dated 21 November 2016 (p.489 – 490) Matron Kelly Burns contacted the claimant regarding a 'Notification of sickness absence health review meeting', extracts of which are as follows:

'I am writing to invite you to a meeting to discuss your health, your current absence from work and any support which I can offer you. This is in accordance with the Trust's Attendance Management policy (enclosed). The meeting will take place on Thursday, 1 December 2016 at 13:30 at your home.

…

You have been absent since 29 April 2016, and at your last meeting on the 24th October 2016 you were issued with a notification due to the length of your absence and the fact that you do not foresee a return to work in the near future. In this next

> meeting we will discuss your current health, any advice from Occupational Health and, if you are still unfit to return to work, other options in respect of your employment such as ill health retirement, redeployment or the ending of your contract on the grounds of ill health. (p.489)

199. Pauline Abraham, Quality Matron, then took over from Matron Kelly in the conduct of the long-term sickness absence procedure. The health review meeting was rearranged for 14 December 2016.

200. Ms Abraham visited the claimant at his home on 14 December 2016. The claimant advised Ms Abraham that he did not know when he would be able to return to work as he had been suffering with a chest infection together with his other abdominal problems and CFS. He had a fit note to cover him until 9 January 2017, but indicated that he did not consider he would be likely to coming back to work after that date.

201. By letter dated 9 February 2017 (p.545 – 546) Matron Pauline Abraham contacted the claimant regarding a 'Notification of sickness absence health review meeting' as follows:

> 'I am writing to invite you to a meeting to discuss your health, your current absence from work and any support which I can offer you. This is in accordance with the Trust's Attendance Management policy (enclosed). The meeting will take place on Wednesday 15th February 2017, 9:30am, at your home.' (p. 545)

202. The claimant was unable to attend that meeting because he was unwell. The claimant then informed the respondent that his sickness absence had been extended to 31 May 2017.

203. The respondent decided to move to a final meeting under the Attendance Management policy because:

203.1. the claimant was not attending absence review meetings;

203.2. he refused to engage with the occupational health advisers and indicated he intended to get his own medical evidence;

203.3. the claimant was submitting continuous fit notes, taking him to the end of May 2017;

203.4. the claimant had not been at work since the previous April.

Matron Abraham was therefore asked to prepare the Management report (564-576) for the next stage.

204. The 'Management Statement of Case' 'Report regarding the Long Term Sickness Absence of: Graeme Wilson' dated 22 February 2017 (p.565 – 576) was prepared by Matron Abraham and includes the following:

> 'Graeme commenced permanent employment with the Trust on 15 April 2013…… Prior to this permanent position he worked at the Pennine nurse bank at The Royal Oldham…
> The Occupational Health Department have not been able to state when Graeme will be able to return to work and Graeme himself is unable to give any indication of when he thinks he would possibly return to work either to his contracted role or another alternative role within the Trust. Graeme has not attended his last Occupational Health meeting and has not consented to information being available to Occupational health from his treating GP. Graeme did not attend the recent health review meeting and communication to inform that he would not be attending was received from his wife. All adjustments to support a return to work have been considered including working hours and formal redeployment and there is currently no further update to consider to allow an understanding of how a return to work may be achieved and whether this can be achieved in the foreseeable future. The Trust is unable to sustain sickness absence indefinitely without a plan to support a return to work due to the impact of sickness absence upon colleagues, resource, patient care, cost and service. As Graeme has not engaged with management to attend the recent Occupational Health appointment and has not attended his Health review meeting there remains no anticipated return to work in the foreseeable future and on this basis this report will be considered at a final hearing in line with Attendance Management Policy for long-term sickness absence.
>
> Graeme was issued with a notification on 24th October 2016 under the Trust's Attendance Management and Sickness Absence Policy to make him aware that his employment may be at risk without a plan to support a return to work in a reasonable timescale.'

*[On this the tribunal accepts the evidence of Matron Abraham. One letter within the bundle (p596B) states that the Management Statement of Case was prepared by Suzanne Aylett. The tribunal accepts the respondent's witnesses' evidence that this was a typographical error.]*

205. By letter dated 14 March 2017 (p584) the claimant was invited to a final stage long-term health review meeting on 22 March 2017. The claimant was advised of his right to be accompanied at the meeting and that one outcome of the meeting could be the ending of his contract on the grounds of capability due to ill-health. The claimant was provided with a copy of the Management Statement of case.

206. The claimant replied to that letter (p587) challenging the accuracy of the Statement of case and repeating complaints he had made during the course of the grievance procedure.

207. The final stage long-term health review meeting was delayed. The claimant indicated he had not received a letter dated 23 March 2017 inviting him to a meeting.

208. By letter dated 5 April 2017 (p597) Alexandra Barker, Lead Nurse for Urgent Care Medicine, invited the claimant to a meeting on 11 April 2017. The claimant was advised of his right to be accompanied at the meeting by a trade union representative or work colleague. The claimant was advised that one outcome of the meeting could be the ending of his contract on the grounds of capability due to ill – health.

209. At this time Alexandra Barker was Lead Nurse for Urgent Care Medicine, working at the Oldham site. She had no prior involvement in the management of the claimant. Her PA was Angela Coric, who was also PA to other people in the organisation and who, in her capacity as personal assistant had been engaged in correspondence relating to the claimant. Alexandra Barker's secretary was E Singleton, who was the note-taker at the grievance hearing on 29 July 2016 before John Goodenough, was John Goodenough's PA, and had some involvement in the procedure relating to the Grievance Appeal. Alexandra Barker was unaware of her secretary's involvement in the claimant's grievance.

210. The claimant attended the meeting on 11 April 2017 accompanied by his wife. The claimant was given full opportunity to state his case. The claimant did not raise objection to Alexandra Barker conducting the hearing, did not raise any allegations of bias against her.

*[Neither the respondent's notes of the hearing (p600) nor the claimant's corrections (p605A) contain any reference to any such allegation of bias.]*

211. At the hearing on 11 April 2017 Alexandra Barker was accompanied by Elizabeth Burquest, from HR, who prepared notes (p600-604). The claimant asked for copies of notes made during the hearing to enable the claimant and/or his wife to review and agree the notes during the course of the hearing. This request was refused. The claimant was told that he would be provided with copies of the notes after the hearing.

*[On this the tribunal accepts the evidence of Alexandra Barker. The tribunal rejects Mrs Wilson's evidence that the notes at pages 600-604 were prepared by Alexandra Barker and have been wrongly represented as being the notes of E Burquest.]*

212. During the hearing on 11 April 2017:

212.1. The claimant repeated his complaints about the conduct of his existing and previous managers, asserting that the respondent had failed

to provide reasonable adjustments and that accordingly he was unable to return to work;

212.2. Alexandra Barker asked the claimant whether he would be able to return to work with the adjustments mentioned in the report from North West fatigue clinic. The claimant stated that he felt he could not return to work for the respondent due to a lack of trust he had in the management. He further stated that due to the continued stress the respondent had caused him he could not work for more than 1.5 hours at a time due to extreme tiredness. The claimant did not identify any adjustment which could be made to secure his return to work;

212.3. The possibility of redeployment to a different role was discussed. The claimant did not say that he could return to work in a non-ward setting, in outpatients or in day services. The claimant made it clear that he was unfit to return to work in any capacity and was unable to give an estimated date for return;

212.4. The position held by the claimant on the Nurse Bank was not discussed. Ms Barker did not confirm that termination of his employment would automatically terminate his engagement on the Nurse bank. The claimant did not ask any questions about his position on the Nurse bank, did not say that he was able to work on the nurse bank and wanted to retain his engagement on it;

212.5. Alexandra Barker indicated that she would consider what had been said and write to the claimant with her outcome.

213. Following the conclusion of this meeting Alexandra Barker wrote to the claimant on 13 April 2017 (page 605), asking him whether he would agree to Alexandra Barker sending on to Occupational Health the report from the North West fatigue clinic and asking occupational health to comment on it.

214. On 16th April 2017 the claimant refused consent for that document to be passed on to Occupational Health.

215. Having considered all the information provided to her both in the Management Statement of Case and the information provided by the claimant, Alexandra Barker decided to dismiss the claimant on the grounds of lack of capability due to ill-health. In reaching this decision Ms Barker took into account the following:

215.1. the information contained within the Management Statement of Case produced by Matron Abraham. The majority of the information contained in that document was not out of date. The key relevant information had not changed – in particular, the claimant remained unfit to work in any capacity,

there was no foreseeable return to work date, the claimant did not want to return;

215.2. the report provided by the claimant from Northwest fatigue clinic dated 14 February 2017 (pages 555-556).

215.3. the claimant had been off work since April 2016;

215.4. the claimant remained unable to return to work and had stated in the meeting with her that he felt he could not return to work for the Trust ever;

215.5. the claimant's complaints relating to failure to make reasonable adjustments and the conduct of prior managers had been considered in the formal grievance process and Ms Barker decided that this should not form part of her decision to dismiss;

215.6. the claimant had been unable to identify any adjustment which could assist the claimant in a return to work;

215.7. efforts had been made in the past to secure the claimant alternative work by offering him different posts and placing him on the redeployment register. However, no suitable role had been identified;

Before reaching her decision, Ms Barker did not investigate the claimant's complaint about failure to make reasonable adjustments in the past.

216. By letter dated 21 April 2017 Alexandra Barker, Lead Nurse, Urgent Care informed the claimant (p.606 – 608) of the decision to dismiss. Extracts include:

'My decision

I have considered whether the option of redeployment would be appropriate for you. Following your grievance, you have been placed on the redeployment register as a supportive mechanism to ensure you had access to any available roles you were interested in on a preferential basis, in addition to your current role being available to you and the offer of HCA in Patient Watch.

Regrettably, due to the length of your sickness absence and the fact that there is unfortunately no foreseeable return to work for you, together with your position that you do not feel able to return to any role at the Trust, I am confirming the termination of your contract of employment with the Trust (p. 607) on the grounds of capability due to ill health. Your last date of employment with the Trust will be Friday 21 April 2017 and I can confirm that you will be paid four weeks' notice period contractual pay in lieu of notice (based on your length of continuous Trust service) which will be subject to tax and National Insurance, together with any annual leave outstanding from the previous and current year.

You do have the right to appeal against this decision and any such appeal should be made in writing within 14 days of receipt of this letter to John Lenney, Executive Director of Human Resources and organisational Development, Trust Headquarters, North Manchester General Hospital, Delaunays Road, Crumpsall, Manchester, M8 5RB.' (p.608)

217. The claimant did not appeal the decision.

218. The claimant did not work on the respondent's Nurse bank after October 2013.

219. By letter dated 28 April 2017 (p609) NHS Professionals advised the claimant of the proposal that the management of the respondent's Nurse bank would transfer to NHS Professionals on 5 June 2017. The claimant was asked to attend a registration event. The letter advised that unless the claimant attended an ID verification session this would affect NHS Professional's ability to offer him assignments after 5 August 2017.

220. On 13 May 2017 the claimant received a P45 (p 615) from the respondent relating to his engagement on the Nurse bank, indicating the leaving date to be 21 April 2017. The P 45 stated the same leaving date as the P 45 the claimant received from the respondent in relation to his employment on Ward G1. The P 45 arrived with no letter explaining that the engagement with the respondent on the Nurse Bank had been terminated.

221. The termination of employment with the respondent Trust leads to an automatic termination of any engagement on the respondent's Nurse Bank, unless steps are taken to secure the employee's retention on the Nurse Bank.

*[On this the tribunal accepts the evidence of the respondent's witnesses, as supported in part by the documentary evidence. The claimant has adduced no satisfactory evidence to challenge the evidence of the respondent's witnesses.]*

222. During the course of the Attendance Management procedure in relation to the termination of the claimant's employment with the respondent no reference was made to the claimant's engagement on the Nurse bank. It was not explained during the course of that procedure that the claimant's engagement on the Nurse bank would also be terminated. The claimant made no enquiry about his position on the Nurse Bank.

223. The claimant did not attend the registration event to be transferred across to NHS professionals.

224. In August 2017 the claimant made an enquiry and NHS Professionals stated that the claimant had been working with them since 16 May 2017 (p617).

225. The claimant made an enquiry with NHS Professionals office as to whether he had transferred under the TUPE regulations from the respondents Nurse Bank to NHS professionals. The claimant makes complaint about the conduct of the employees of NHS professionals in relation to this enquiry. There is no satisfactory evidence to support the claimant's assertion that the employees of NHS professionals acted in this way on instruction of the respondent's managers.

226. By letter dated 11 September 2017 (p625) (sent by email) the claimant advised Sue Howard that he had been told by NHS professionals that he needed to get his last manager to fill in a "Statement of Service, Competency and Consent – Bank Exclusive applicant form so that he could continue to work for the Bank system.

227. By letter dated 13 September 2017 (p626) the claimant complained to Alison Brophy, HR Business Partner, that Julia Riley or Susan Howard had failed to respond to his email, and asked Alison Brophy to chase them for a response.

228. By email dated 15 September 2017 (p629) Alison Brophy advised the claimant that the Trust was unable to complete the Statement of Service, Competency and Consent form, because it required the Trust to certify that the claimant was suitable for NHS professionals to supply him from the bank. The email continued:

> You have not worked for the Trust since 28 April 2016 and when you attended a final review meeting under the Trust's Attendance Management Policy on 11 April 2017, you confirmed that you remained unfit for work and that because you could not trust management, you did not ever think you could return to work for the Trust even if you were fit. You were therefore dismissed by reason of incapacity and never sought to appeal that decision.
>
> You will appreciate that in the circumstances that any application for a return to work for the Trust, even if on the bank and through NHS professionals, will need in advance to explore your fitness to work and more generally whether and if so why you now say that you can work for the Trust again, despite what you said in April. We cannot sponsor your application, but that is not to say that you cannot make an application to NHS professionals in the usual way for full bank membership

229. The claimant did not wish to work for the respondent again. He did wish to pursue his application to join NHS professionals to enable him to work for different NHS Trusts at some time in the future when he was fit to do so. The claimant applied to the respondent for a reference for this purpose. There was some delay in providing the reference. The claimant has not yet reached the level of fitness where he feels able to work on the Nurse Bank.

230. The claim was presented to this tribunal on 21 March 2017. The claimant made an Early Conciliation notification to ACAS on 17 November 2016. The Early Conciliation Certificate was issued on 1 December 2016.

231. While Mr Hayes was giving evidence to the tribunal as part of this hearing he indicated that the respondent would be able to provide a reference for the claimant to pursue his application to NHS Professionals.

232. In April 2018 the claimant asked for that reference.

233. By email dated 19 April 2018 (p880) the respondent's solicitor replied to the claimant in the following terms:

> It is not the practice of the Trust to "do a reference" unless it is asked for one by any prospective employer. The Trust has no problem in providing such a reference for you. It will be a factual reference which will confirm your dates of employment with the Trust and your job title. To ensure that it is not misleading to any potential employer, it will need to confirm that your dismissal came about on capability grounds following a lengthy period of sickness absence.

234. The claimant was informed that any request for a reference should be referred to Alexandra Barker, the dismissing manager.

235. In November 2017 the claimant contacted ACAS under the Early Conciliation procedure.

236. The claimant presented his claim on 21 March 2017 as a litigant in person.

**The Law**

237. A claim concerning work-related discrimination under Part 5 of the Equality Act 2010 (EqA) (other than an equal pay claim) must be presented to the employment tribunal within the period of three months beginning with the date of the act complained of — S.123(1)(a) EqA. Conduct extending over a period is to be treated as done at the end of that period — S.123(3)(a). Where there is a series of distinct acts, the time limit begins to run when each act is completed, whereas if there is continuing discrimination, time only begins to run when the last act is completed.

238. In **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA,** the Court of Appeal stated that when employment tribunals consider exercising the discretion under what is now S.123(1)(b) EqA, 'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.' However, this does not mean that exceptional circumstances are required before the time limit can be

extended on just and equitable grounds. The law does not require this but simply requires that an extension of time should be just and equitable — **Pathan v South London Islamic Centre EAT 0312/13**

239. In **Barclays Bank plc v Kapur and ors 1991 ICR 208, HL** the House of Lords drew a distinction between a continuing act and an act that has continuing consequences. It held that where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. Where, however, there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing, even though that act has ramifications which extend over a period of time.

240. In **Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA,** the Court of Appeal made it clear that it is not appropriate for employment tribunals to take too literal an approach to the question of what amounts to 'continuing acts' by focusing on whether the concepts of 'policy, rule, scheme, regime or practice' fit the facts of the particular case. Those concepts are merely examples of when an act extends over a period and should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'. The Court of Appeal held that the focus should have been on the substance of the claimant's allegations that the employer was responsible for an ongoing situation or a continuing state of affairs in which discrimination took place.

241. The Court of Appeal in **Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548, CA.** clarified that the correct test in determining whether there is a continuing act of discrimination is that set out in Hendricks. Thus, tribunals should look at the substance of the complaints in question — as opposed to the existence of a policy or regime — and determine whether they can be said to be part of one continuing act by the employer.

242. In a claim of failure to make reasonable adjustments the question is when time begins to run for bringing the claim which is a claim relating to an omission to act. Under S.123(3)(b) EqA a failure to do something is to be 'treated as occurring when the person in question decided on it'.

243. In **Kingston upon Hull City Council v Matuszowicz 2009 ICR 1170, CA**, the Court of Appeal noted that, for the purposes of claims where the employer was not deliberately failing to comply with the duty, and the omission was due to lack of diligence or competence or any reason other than conscious refusal, it is to be treated as having decided upon the omission at what is in one sense an artificial date. In the absence of evidence as to when the omission was decided upon, the legislation provides two alternatives for defining that point (see S.123(4) EqA). The first is when the person does an act inconsistent with doing the omitted act. The second option requires an inquiry that is by no means straightforward. It presupposes that the person in question has carried on for a time without doing anything inconsistent with doing the omitted act,

and it then requires consideration of the period within which he or she might reasonably have been expected do the omitted act if it was to be done. In terms of the duty to make reasonable adjustments, that seems to require an inquiry as to when, if the employer had been acting reasonably, it would have made the reasonable adjustments. That is not the same as inquiring whether the employer did in fact decide upon doing it at that time. Both Lord Justice Lloyd and Lord Justice Sedley acknowledged that imposing an artificial date from which time starts to run is not entirely satisfactory, but they pointed out that the uncertainty and even injustice that may be caused could be, to a certain extent, alleviated by the tribunal's discretion to extend the time limit where it is just and equitable to do so. The Court of Appeal stressed that the power to extend time should be considered in situations 'where the employee does not realise that the start date has occurred, or… the employer's decision has not been communicated to him' or if 'the employer were to seek to lull the employee into a false sense of security by professing to continue to consider what adjustments it ought reasonably to make, at a time long after the moment has arrived… when the employee is entitled to make a claim and time has started to run'. Lord Justice Sedley noted that in deciding whether to extend time under S.123(1)(b) EqA employment tribunals 'can be expected to have sympathetic regard' to the difficulty created for some claimants.

244. The Tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so. The Tribunal has a wide discretion to do what it thinks is just and equitable in the circumstances **Hutchinson v Westward Television Ltd** [1997] IRLR 69. The Tribunal should consider the prejudice which each party would suffer as a result of granting or refusing an extension and have regard to all the other circumstances of the case including in particular the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be effected by the delay, the extent to which the parties sued had cooperated with any request for information, the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate professional advice once he or she knew the possibility of taking action; **British Coal Corporation v Keeble** [1997] IRLR 336

245. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other. **Pathan v South London Islamic Centre EAT 0312/13.**

246. Section 39 Equality Act 2010 provides:-

An employer (A) must not discriminate against an employee of A's (B)-

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment

247. Section 136 Equality Act 2010 provides:

***Burden of Proof***

*(1) This section applies to any proceedings relating to a contravention of this Act.*

*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

*(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

248. Section 108 Equality Act 2010 provides:

Relationships that have ended

(1) A person (A) must not discriminate against another (B) if –

(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and

(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.

249. Section 13 Equality Act 2010 provides:

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

250. Section 23 Equality Act 2010 provides:-

On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case;

251. When considering the appropriate comparator the tribunal notes that like must be compared with like. Previous case law is of assistance in this exercise. Relevant circumstances to consider include those that the alleged discriminator takes into account when deciding to treat the claimant as he did. **Shamoon v Chief Constable of the Royal Ulster Constabulary (2003) ICR 337.** If no

actual comparator can be shown then the tribunal is under a duty to test the claimant's treatment against a hypothetical comparator. **Balamoody v United Kingdom Central Council for Nursing Midwifery and Health Visiting (2002) ICR 646.**

252. As regards direct discrimination, a person may be less favourably treated "because of" a protected characteristic *either* if the act complained of is inherently discriminatory *or* if the characteristic in question influenced the "mental processes" of the putative discriminator, whether consciously or unconsciously, to any significant extent: **Amnesty International v Ahmed [2009] ICR 1450.**

253. The tribunal has considered the decision of the EAT in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332**, and its observations on the correct approach to the burden of proof in discrimination cases. The tribunal notes the Court of Appeal's decision in **Igen Ltd v Wong [2005] IRLR 258** where the **Barton** guidelines were amended and clarified and it was confirmed that the correct approach, in applying the burden of proof regulations, is to adopt a two stage approach namely (1) has the claimant proved, on the balance of probabilities) the existence of facts from which the tribunal could, in the absence of an adequate explanation, conclude that the respondent has committed an act of unlawful discrimination? and, if so, (2) has the respondent proved that it did not commit (or is not to be treated as having committed) the unlawful act? We note also the case of **Madarassy v Nomura [2007] IRLR 246**, which confirmed the guidance in **Igen**:

> "The employment tribunal did not err by failing to apply a two-stage test when concluding that race was not the ground for the treatment complained of by the claimant. The EAT correctly held that it was permissible for the tribunal to go straight to the "reason why" question…It is not an error of law for a tribunal not to apply the two-stage approach to the burden of proof laid down by the Court of Appeal in **Igen Ld v Wong**. Although in general, it is good practice to apply the two-stage test and to require the claimant to establish a prima facie case before looking to the adequacy of the respondent's explanation for the offending treatment, there are cases in which the claimant is not prejudiced by the tribunal omitting express consideration of the first stage of the test, moving straight to the second stage of the test and concluding that the respondent has discharged the burden on him under the second stage of the test by proving that the treatment was not on the proscribed ground."

254. In **The Law Society v Bahl 2003 [IRLR] 640** the EAT held that a Tribunal is not entitled to draw an inference of discrimination from the mere fact that the employer has treated the employee unreasonably. All unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory, and it is not shown to be so merely because the victim is either a woman or of a minority race or colour. The tribunal must consider all the relevant circumstances to determine the reason for the unreasonable treatment.

255. In the case of **Hammonds LLP v C Mwitta [2010] UKEAT** the EAT (Slade J) reiterated that the possibility that a respondent "could have" committed an act of discrimination is insufficient to establish a prima facie case so as to move the burden of proof to the respondent for the purposes of (now) s136 Equality Act 2010. The tribunal must find facts from which they could conclude that there had been discrimination on the grounds of race. The absence of an explanation for differential treatment may not be relied upon to establish the prima facie case.

256. The approach to be adopted as described in **Igen** was approved by the Supreme Court in **Hewage v Grampian Health Board [2012] ICR 1054**.

257. This approach was confirmed by the Court of Appeal in **Ayodele v Citylink Limited** [2017] EWCA Civ 1913, when the decision of the EAT in **Efobi v Royal Mail Group Limited (UKEAT/0203/16)** was held to be incorrectly decided.

258. Section 15(1) Equality Act 2010 provides:

> A person (A) discriminates against a disabled person (B) if-
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

259. To succeed in the claim under section 15 the claimant must establish that he has suffered unfavourable treatment and that that treatment is because of something arising in consequence of his disability.

260. The term "unfavourably" in section 15(1) is not defined although the EHRC Employment Code states that it means that a disabled person must have been put at a disadvantage.

261. In **IPC Media Limited v Millar [2013] IRLR 707** the EAT considered the application of s15 Equality Act and noted that:

> As with other species of discrimination, an act or omission can occur "because of" a proscribed factor as long as that factor operates on the mind of the putative discriminator (consciously or subconsciously) to a significant extent. The starting-point in a case which depends on the thought processes, conscious or unconscious, of the putative discriminator, is to identify the individual(s) responsible for the act or omission in question.

The EAT commented that the difference between the two claims (s13 and s15) is under s13 the claimant asserts that the alleged discriminator was motivated by the claimant's disability as such whereas under s15 the claimant asserts only that the alleged discriminator was motivated by a consequence of the claimant's disability, such as absence from work.

262. The Code of Practice on Employment 2011 provides:

4.9 'Disadvantage' …..could include denial of an opportunity or choice, deterrence, rejection, exclusion. The courts have found that 'detriment', a similar concept, is something that a reasonable person would complain about……. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise);

5.11 Unfavourable treatment will not amount to discrimination arising from disability if the employer can show that the treatment is a proportionate means of achieving a legitimate aim. This objective justification test is explained in detail in paragraphs 4.25 to 4.32.

5.12 It is for the employer to justify the treatment. They must produce evidence to support the assertion that it is justified and not rely on mere generalisations.

4.28 The concept of legitimate aim is taken from European Union law and relevant decisions of the Court of Justice of the European Union… it is not defined by the Act. The aim of the provision criterion or practice should be legal, should not be discriminatory in itself, and must represent a real objective consideration.

4.29 Although reasonable business needs and economic efficiency may be legitimate aims, an employer solely aiming to reduce costs cannot expect to satisfy the test.

4.30 Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts.

4.31 Although not defined by the Act, the term proportionate is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an appropriate and necessary means of achieving a legitimate aim. But necessary does not mean that the provision criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.

4.32 The greater financial cost of using a less discriminatory approach cannot, by itself, provide a justification for applying a particular provision criterion or practice. Cost can only be taken into account as part of the employer's justification for the provision criterion or practice if there are other good reasons for adopting it.

263. Section 20 Equality Act 2010 provides that the duty to make reasonable adjustments comprises of three requirements, set out in s20(3), (4) and (5): Section 21(1) provides that a failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments.

264. s20(3) states:

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

265. The Code of Practice on Employment 2011, which we have considered with care, sets out, at chapter 6, principles and application of the duty to make reasonable adjustments for disabled people in employment. It describes the duty to make reasonable adjustments as 'a cornerstone of the Act which requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled'. This can, as HHJ Peter Clark said in **Redcar and Cleveland Primary Care Trust v Lonsdale UKEAT/0090/12, [2013] EqLR 791, [2013] All ER (D) 34**, involve 'treating disabled people more favourably than those who are not disabled'.

266. The Code of Practice includes:

> 6.10 The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions (see also paragraph 4.5).
>
> 6.15 -The Act says that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, and is assessed on an objective basis.
>
> 6.16The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly – and unlike direct or indirect discrimination – under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's.
>
> 6.19 For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, place at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will **depend** on the circumstances. This is an objective assessment. When making enquiries about disability,

employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

6.21 If an employer's agent or employee (such as an occupational health adviser, HR officer or a recruitment agent) knows, in that capacity, of a worker's or applicant's or potential applicant's disability, the employer will not usually be able to claim that they do not know of the disability and that they therefore have no obligation to make a reasonable adjustment. Employers therefore need to ensure that where information about disabled people may come through different channels, there is a means -- suitably confidential and subject to the disabled person's consent -- for bringing that information together to make it easier for the employer to fulfil their duties under the Act

6.23 The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all circumstances of the case, in order to make adjustments. The act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

6.24 There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.

6.25 Effective and practicable adjustments for disabled workers often involve little or no cost or disruption and are therefore very likely to be reasonable for an employer to have to make. Even if an adjustment has a significant cost associated with it, it may still be cost-effective in overall terms -- for example, compared with the costs of recruiting and training a new member of staff -- and so may still be a reasonable adjustment to have to make.

6.26 If making a particular adjustment would increase the risk to health and safety of any person (including the disabled worker in question) then this is a relevant factor in deciding whether it is reasonable to make that adjustment. Suitable and sufficient risk assessments should be used to help determine whether such risk is likely to arise.

6.28 The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- whether taking any particular steps would be effective in preventing the substantial disadvantage;
- the practicability of the step;
- the financial and other costs of making the adjustment and the extent of any disruption caused;
- the extent of the employer's financial or other resources;
- the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

- the type and size of the employer

6.29 Ultimately the test of the reasonableness of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

6.32 It is a good starting point for an employer to conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments may be required. Any necessary adjustments should be implemented in a timely fashion, and it may also be necessary for an employer to make more than one adjustment. It is advisable to agree any proposed adjustments with the disabled worker in question before they are made.

267. Paragraph 20(1) of Schedule 8 of the Equality Act provides that a person is not subject to the duty to make reasonable adjustments if he does not know, and could not reasonably be expected to know that an interested disabled person has a disability and is likely to be placed at a disadvantage by the employer's PCP, the physical features of the workplace, or a failure to provide an auxiliary aid. Thus, the employer must have knowledge of both the disability and the disadvantage in order for the adjustment duty to be triggered.

268. Section 26 Equality Act 2010 provides: -

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating these dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B

269. There are three essential elements of harassment claim under section 26(1):

269.1. Unwanted conduct

269.2. That has the proscribed purpose or effect, and

269.3. Which relates to a relevant protected characteristic

270. The EHRC Employment code confirms that "unwanted" is essentially the same as unwelcome or uninvited. In applying the second leg of the statutory definition the tribunal must consider whether the unwanted conduct has the purpose or effect of

- Violating the claimant's dignity, or

- Creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

271. The Tribunal must consider all surrounding circumstances and may draw any appropriate adverse inference in deciding whether the unwanted conduct did have that purpose

272. In deciding whether conduct has the effect referred to in section 26(1)(b) the Tribunal must take into account:

- The perception of the claimant;
- The circumstances of the case; and
- Whether it is reasonable for the conduct to have that effect.

273. The cases relating to harassment claims under the legislation prior to the Equality Act are of some assistance. We note **Richmond Pharmacology v Dhaliwal 2009 ICR 724** in which the EAT noted that the claimant must actually have felt, or perceived, his or her dignity to have been violated or an adverse environment to have been created. If the claimant has experienced those feelings or perceptions the tribunal should then consider whether it was reasonable for him or her to do so. In deciding whether the claimant did experience these feelings or perceptions the tribunal must apply a subjective test. However, we note the decision of the Court of Appeal in **Land Registry v Grant 2011 ICR 1390** in which the court commented that tribunals must not cheapen the significance of the words (violation of dignity or intimidating hostile degrading humiliating or offensive environment) because they are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. It follows from this that the fact that a claimant is slightly upset or mildly offended by the conduct in question may not be enough to bring about a violation of dignity or offensive environment.

274. In deciding whether it was reasonable for conduct to have that effect an objective test is applied. Whether it was reasonable for a claimant to have felt his/her dignity to have been violated is a matter for the factual assessment of the Tribunal taking into account all the relevant circumstances including the context of the conduct in question. The Tribunal must consider whether it was reasonable for the conduct to have that effect on that particular claimant.

275. Section 27 Equality Act 2010 Victimisation states:

A person (A) victimises another person (B) if A subjects B to a detriment because –

- B does a protected act, or
- A believes that B has done, or may do, a protected act.

276. Each of the following is a protected act –

- bringing proceedings under this Act;
- giving evidence or information in connection with proceedings under this Act;
- doing any other thing for the purposes of or in connection with this Act;
- making an allegation (whether or not express) that A or another person has contravened this Act.

277. In a claim under s27 Equality Act 2010 there is no requirement to identify or construct a comparator. The question is whether the claimant suffered a detriment because he had done the protected act, or because the employer believes, rightly or wrongly, that the claimant has done a protected act or intends to do a protected act.

278. The EHRC Employment Code, drawing on the case law under the previous discrimination legislation, contains a useful summary of treatment that may amount to a 'detriment': 'Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards… A detriment might also include a threat made to the complainant which they take seriously and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment'.

279. In **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR** *337* the House of Lords established that a detriment exists if a *reasonable* worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage. The House of Lords felt that an unjustified sense of grievance could not amount to a detriment but did emphasise that whether or not a claimant has been disadvantaged is to be viewed subjectively.

280. This detriment test was subsequently confirmed by the House of Lords in **Derbyshire and ors v St Helens Metropolitan Borough Council and ors *2007 ICR*** 841. Lord Neuberger stressed that the test is not satisfied merely by

the claimant showing that he or she has suffered mental distress: it would have to be objectively reasonable in all the circumstances.

281. Where there are a number of different factors affecting the respondent's act or omission, victimisation will be made out if the protected act had a "significant influence" on the outcome**. Nagarajan v London Regional Transport 1999 ICR 877. Nagarajan** was considered by the Court of Appeal in **Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931, CA,** in which Lord Justice Peter Gibson clarified that for an influence to be 'significant' it does not have to be of great importance. A significant influence is rather 'an influence which is more than trivial. We find it hard to believe that the principle of equal treatment would be breached by the merely trivial.'

282. Under section 98 Employment Rights Act 1996 (ERA 1996) the onus is on the employer to show the actual or principal reason for dismissal. It is sufficient that the employer honestly believes on reasonable grounds that the employee is incapable or incompetent. It is not necessary for the employer to prove that the claimant is in fact incapable or incompetent.

283. Once the employer has shown a potentially fair reason for dismissing, the Tribunal must decide whether that employer acted reasonably or unreasonably in dismissing for that reason. The burden of proof is neutral. It is for the Tribunal to decide. Section 98(4) ERA 1996 states: -

> *"The determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend upon 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 that question shall be determined in accordance with equity and the substantial merits of the case".*

284. The test of whether or not the employer acted reasonably is an objective one, that is, Tribunals must as industrial juries determine the way in which a reasonable employer in those circumstances in that line of business would have behaved. There is a band of reasonable responses. The Tribunal must determine whether the employer's action fell within a band of reasonable responses. **Iceland Frozen Foods Limited v Jones [1983] ICR 17**. (Approved by the Court of Appeal in **Post Office v Foley**, **HSBC Bank plc (formerly Midland Bank plc) v Madden [2000] IRLR 827**. The range of reasonable responses test (the need for the tribunal to apply the objective standards of the reasonable employer) must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed**. Sainsbury's Supermarkets Ltd v Hitt.** The tribunal bears that in mind and applies that test in considering all questions concerning the fairness of the dismissal.

285. In determining whether dismissal fell within the band of reasonable responses it is appropriate to consider whether there has been reasonable consultation with the employee, a reasonable medical investigation and consideration, where appropriate, of alternative employment.

286. The tribunal notes the decision of the EAT in **Schenker Rail (UK) Ltd v Doolan** [**2010] UKEAT 0053-09-130**. The tribunal notes in particular its finding that:

- The **Burchell** analysis is relevant in a capability dismissal where there was an issue as the sufficiency of the reason for dismissal. The tribunal is required to address the three questions, namely whether the respondent's officers genuinely believed in their stated reason, whether it was the reason reached after a reasonable investigation and whether they had reasonable grounds on which to conclude as they did.

- The **East Lindsey District Council** case is not to be read as requiring a higher standard of enquiry for the capability dismissal than is required if the reason for dismissal was misconduct.

- The issue was whether a reasonable management could find from the material before them that the claimant was not capable of returning to his or her post; that it is not for the tribunal to substitute its own view for that of the reasonable employer. The tribunal is required to guard against being carried along by sympathy for a long-standing employee whose employer has concluded that he is not fit to return to his job.

The EAT stated at paragraph 35.

> Applying that approach to the present case, the issue for the Tribunal was whether a reasonable management could find, from the material before them that the Claimant was not capable of returning to the post of Production Manager. The Tribunal also required to bear in mind that the decision to dismiss is, properly, a managerial one, not a medical one. Whilst medical or other expert reports may assist an employer to make an informed decision on the issue of capability, the decision to allow someone to return to work or to dismiss for reasons relating to capability is, ultimately, one which the employer has to make. It is not a decision that is to be dictated by the author of a report. Quite apart from considerations of his duty not to dismiss an employee unfairly, an employer owes a common law duty of reasonable care to the employee and, in cases, such as the present, requires to make his own assessment of the risk of a return to work causing a recurrence of the employee's ill health, albeit that any such assessment will normally be informed by the content of an expert report or reports.

287. In **BS v Dundee City Council [2013]** CSIH 91 the Court of Session reviewed the relevant authorities and held:

> 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. We would emphasise, however, that 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….

288. The tribunal has considered and where appropriate applied the authorities referred to in submissions.

**Determination of the Issues**

289. This includes, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence.

**Failure to make reasonable adjustments**

290. The claimant asserts that there was a continuing failure by the respondent to make reasonable adjustments.

291. The respondent did apply the following PCPs:

291.1. The requirement to work on a busy active ward;

291.2. The requirement to work a full shift with only one lunch break;

291.3. The requirement to work late shifts.

292. The respondent was aware of the claimant's disability from September 2013 and took OH advice on the effect of that disability on the claimant's ability to perform his duties and the adjustments needed in the work place. It was reasonable for the respondent to rely on OH advice, rather than agree to any adjustment requested by the claimant without enquiry. The respondent and each of its managers had knowledge of the OH advice as to the nature of the claimant's disability, its adverse effect on his ability to perform his duties and the steps recommended by OH to reduce or eliminate the adverse effects.

293. The requirement to work on a full shift with only one lunch break did put the claimant at a substantial disadvantage in comparison with persons who are not disabled. This was identified by the claimant at the commencement of his employment. It was confirmed in the Occupational Health report sent on 8 December 2013 (p126-127) see paragraph 45 above, that the claimant had been suffering from symptoms of lethargy, low energy and poor concentration over a year. Subsequent OH reports confirmed that the claimant continued to suffer from fatigue.

294. The respondent did know that the claimant was likely to be placed at that disadvantage. The claimant advised Tracy Shaw from the outset that he had chronic fatigue syndrome and that he required additional breaks.

295. Tracy Shaw authorised the taking of additional breaks. The claimant was allowed to take these additional breaks throughout his employment. The respondent allowed the claimant to take additional breaks, as and when he needed them, subject to patients' needs on the ward at the time. There is no satisfactory evidence to support the claimant's assertion that throughout his period of employment he was prevented from taking any additional breaks. It was reasonable for the respondent to say that any such additional breaks could not be at a fixed time, that they would have to suit the needs of the patients, and that it was for the claimant to request breaks from his immediate supervisor on each shift, as and when he needed them. The claimant may have, from time to time, failed to take additional breaks during the course of his shift. However, there is no satisfactory evidence that he was at any time prevented from taking those additional breaks. Susan Howard did not tell the claimant that he could only take such additional breaks with her personal authority.

296. The requirement to work late shifts did not put the claimant at a substantial disadvantage in comparison with persons who are not disabled throughout his period of employment. The tribunal does not accept the claimant's evidence on that. It is unsupported by any satisfactory medical evidence. The tribunal notes in particular that:

296.1. The Occupational health report dated 8 November 2013 (page 126) (see paragraph 45) confirmed that the claimant was fit to undertake a full range of duties, that he was likely to benefit from a regular shift pattern and blocks of up to 5 consecutive early shifts or late shifts. There was no indication that the claimant was unable to undertake late shifts at that time. Dr Dodman said that it may be the case that late shifts become difficult for the claimant in the future;

296.2. the Occupational health report dated 28 April 2014 (page 174) (see paragraph 56) confirmed that the claimant's symptoms and situation were largely unchanged since Dr Dodman saw the claimant in November 2013.

Dr Dodman advised the respondent that the advice given in the report dated 8 November 2013 remained current. There was an indication that other measures may be required in the future, but no additional adjustments were recommended at that stage;

296.3. the letter from Tina Betts dated 18 September 2014 (p198) (see paragraph 72) did not identify any particular problem with working late shifts. The problem identified was working erratic shifts, which was said to contribute to an increase in the claimant's symptoms and an inability to pace effectively;

296.4. The Occupational health report dated 23 October 2014 (page 225) (see paragraph 73) indicated that the claimant was struggling with working late shifts and that he felt more able at the start of the day, and that early shifts were more manageable for him. Dr Dodman recommended:

Adjustment that you may consider, if operationally possible are:

A regular working pattern and working early shifts rather than late and no more than 2 consecutively;

Provision of short rest periods during the day;

296.5. The Occupational health report dated 29 April 2015 (page 262) (see paragraph 94) indicated that the current arrangement on the G1 ward had enabled the claimant to manage his symptoms well and he was able to work and undertake full duties with the adjustments in place, namely, working early shifts, with no more than two consecutive, and with three short breaks per shift;

296.6. the Occupational health report dated 11 November 2015 (p292) (see paragraph 119) confirmed the adjustments as outlined in previous reports commenting that when the adjustments were in place the claimant was feeling well and sustaining his attendance at work. It was therefore reasonable to suggest that if operationally possible this arrangement should continue. If not possible then redeployment may be a consideration

297. Therefore, from October 2014 onwards the requirement to work late shifts did put the claimant at a substantial disadvantage in comparison with persons who are not disabled. The respondent was aware of that from the OH reports.

298. The next question is whether the respondent took such steps as were reasonable to avoid that disadvantage.

299. The tribunal notes that:

299.1. The claimant was absent from work from 19 September 2014 to 12 January 2015.

299.2. From 12 January 2015 to 14 June 2015 the claimant worked on the G1 ward, working only early shifts, with no more than two consecutive shifts, in accordance with the recommendations made by Dr Dodman. This was assisted by the claimant's successful application for flexible working;

299.3. From 15 June 2015 to 6 October 2015 the claimant worked the rostered hours which he had reluctantly agreed with Julia Riley. He did work late shifts. Julia Riley ignored the Occupational Health advice and told the claimant that it was not possible to continue doing all early shifts;

299.4. The claimant was absent from work from 6 October 2015 to 6 December 2015.

299.5. From 7 December 2015 to 28 April 2016 the claimant worked only early shifts, rostered as recommended by Dr Dodman in her letter dated 11 November 2015 except that:

299.5.1. the claimant agreed to work two weekends on early shifts (see paragraph 137 above);

299.5.2. in April 2016 a mistake was made in the preparation of the roster, a mistake which was rectified following a complaint by the claimant (see paragraph 142 above)

300. The requirement to work on a busy active ward did put the claimant at a substantial disadvantage in comparison with persons who are not disabled throughout his period of employment, as identified in the OH reports and the letters from Tina Betts. The reports made it clear that the claimant was struggling with certain aspects of the work which aggravated his symptoms, which caused him increased fatigue. The respondent was aware of that.

301. The next question is whether is the respondent took such steps as were reasonable to avoid that disadvantage.

302. The tribunal notes in particular that:

302.1. The Occupational health report dated 8 November 2013 (page 126) (see paragraph 45) confirmed that the claimant was fit to undertake a full range of duties, subject to the recommended adjustments as to shift patterns and the taking of breaks. There was no suggestion that the claimant was unable to work on a busy ward, no recommendation of redeployment to a different area;

302.2. the Occupational health report dated 28 April 2014 (page 174) (see paragraph 56) confirmed that the claimant's symptoms and situation were largely unchanged since Dr Dodman saw the claimant in November 2013. Dr Dodman advised the respondent that the advice given in the report dated 8 November 2013 remained current.

302.3. The Occupational health report dated 23 October 2014 (page 225) (see paragraph 73) indicated that the claimant was fit to work on the ward, subject to the recommended adjustments being put in place. There was no recommendation of redeployment to a different area;

302.4. The Occupational health report dated 29 April 2015 (page 262) (see paragraph 94) resulted from the referral by Mrs Jackson, enquiring whether it was appropriate for the claimant to return to his substantive post on the AMU, and whether any further adjustments needed to be considered for him to maintain his attendance at an acceptable level. Dr Dodman expressed her opinion that the claimant was fit to return to AMU with the same adjustments recommended in her report dated 23 October 2014. Dr Dodman expressed the view that it would be better for the claimant to remain on G1 because of the busy and unpredictable nature of the activity on AMU, which meant that it was not always possible for the adjustments to be fulfilled to the extent that it was on ward G1. Dr Dodman did not express the opinion that the claimant was not fit to work on any ward, did not make a recommendation that the claimant be redeployed to a non-ward post;

302.5. the Occupational health report dated 11 November 2015 (p292) (see paragraph 119) confirmed that the claimant was fit to work on the ward provided that adjustments were made as outlined in her previous report. Dr Dodman mentioned that if it was not operationally possible to implement those adjustments then redeployment should be considered.

303. The Occupational Health advice made it clear that, provided the recommended adjustments were made, the claimant would be able to work on the busy active ward, redeployment to a different work activity was not necessary. The letters provided by the claimant from Tina Betts do not challenge the accuracy of the OH advice received by the respondent.

304. In the period from October 2013 to 29 April 2016 the respondent did make reasonable adjustments, except in the period 15 June 2015 to 6 October 2015, when Julia Riley ignored the OH advice and imposed the working of late shifts on the claimant. The claimant did not willingly consent to working late shifts. He felt he had no choice but to agree. The respondent has failed to establish what were the working conditions, what were the operational issues, which prevented Julia Riley from continuing with the adjustments put in place previously by Karen Jackson, as assisted by the claimant's successful

application for flexible working. Allowing the claimant only to work early shifts was a reasonable step. If Julia Riley believed that she was unable to provide the recommended adjustments then the duty fell on her to either return to Occupational Health for further advice or to take other reasonable steps. Julia Riley made only one enquiry to establish if there was alternative work for the claimant elsewhere. When she was told that there was no immediate vacancy elsewhere she took no further steps. She simply imposed late shifts on the claimant.

305. In all the circumstances the tribunal finds that the respondent failed in its duty to make reasonable adjustments in the period 15 June 2015 to 6 October 2015.

306. From the claimant's return to work in December 2015 the adjustments recommended by Occupational Health were put in place. The claimant worked early shifts only in the rostered pattern recommended by Occupational Health, except when the claimant volunteered to work two early weekend shifts. The fact that Julia Riley expressed the arrangement to be subject to review, first in two months, and then six months, was a reasonable step. It is reasonable for an employer to review the effect of the adjustment on the operation of the business on a regular basis. The claimant did not, at the time, indicate that the statement that the arrangements would be in place for six months, would be reviewed at the end of that period, was a provision criterion or practice which put him at a substantial disadvantage and/or caused him additional stress and/or anxiety. The tribunal does not accept the evidence of the claimant that it did. The claimant was satisfied with the arrangements for his work patterns between January 2016 and April 2016. He did not ask for any further or different adjustments in this period. His only complaint was to his trade union representative (see paragraph 141 above) when the rota contained an error in listing the claimant for work shifts on three consecutive days, contrary to the recommendations of OH. That error was rectified after an investigation by Julia Riley (see paragraph 142 above). The claimant was not made to work three consecutive shifts. All reasonable adjustments were put in place from the claimant's return to work in December 2015 to the start of his long-term sickness absence in April 2016. On his own evidence the reason for his sickness absence in April 2016 was unrelated to work.

307. The claimant commenced his long-term sickness absence on 29 April 2016. Thereafter, the Occupational Health reports, and the claimant himself, made it clear that the claimant was unfit to attend any work. No adjustments were identified by either Occupational Health or the claimant to enable the claimant to return to work.

308. There was no breach of the duty to make reasonable adjustments from 6 October 2015 onwards. The failure of the respondent to redeploy the claimant to a different role away from an active ward, to put him on day services, was

not a breach of the duty to make reasonable adjustments. These steps were discussed from time to time, and it was clearly, at times, the claimant's wish to be redeployed. However, prior to the claimant's long-term sickness absence the advice from Occupational Health was that, with reasonable adjustments in place, the claimant was able to work on the wards. There was no recommendation that the claimant be redeployed. After the claimant started his long-term sickness absence there were no reasonable adjustments which the respondent could make to secure the claimant's return to work, to avoid dismissal. The decision by Matron Kelly Burns to delay the claimant's request for redeployment to a non-ward position until the claimant was fit to attend work was reasonable. There was no evidence before the respondent that a redeployment to a different department, during the course of the claimant's long-term sickness absence, would assist the claimant in a return to work.

**Discrimination**

309. The claimant has made a number of allegations of discriminatory treatment as identified at paragraph 16.3 above. The claimant pleads each of the alleged discriminatory acts or omissions, in the alternative, as discrimination within the meaning of s13 and/or s15 and/or s26 and/or s27 of the Equality Act 2010. The tribunal has therefore considered each allegation of discriminatory treatment in turn.

310. In relation to the claim of victimisation under s27 Equality Act 2010, the tribunal finds that the claimant made his first protected act on 16 October 2013, when the claimant advised Tracy Shaw of his recent diagnosis and discussed the claimant's request for reasonable adjustments (see paragraph 43 above). The claimant made a number of further protected acts when he made complaints that the respondent had failed to comply with the duty to make reasonable adjustments and had committed other discriminatory acts within the meaning of the Equality Act. The tribunal notes in particular the formal grievance, the appeal against the outcome and the letters of complaint to the joint Chief executive, Mr David Dalton. Each of those actions were protected acts within the meaning of s27 Equality Act 2010

**Dismissal**

311. The claimant was dismissed and the effective date of termination was 21 April 2017. In deciding whether dismissal was direct discrimination within the meaning of section 13 Equality Act 2010 the tribunal has considered whether there was less favourable treatment of the claimant when compared to an actual or hypothetical comparator:

312. The claimant has not named an actual comparator.

313. The tribunal has constructed a hypothetical comparator bearing in mind the relevant circumstances, namely:

313.1. The claimant had completed 4 years' service as an employee on wards AMU and G1, following 5 years' service on the respondent's Nurse bank;

313.2. The claimant had been absent from work since April 2016 by reason of ill-health;

313.3. Occupational Health advice was that the claimant remained unfit to return to work;

313.4. neither Occupational Health nor the claimant was able to give a likely date of return;

313.5. the claimant asserted that he did not want to return to work for the respondent because he had lost trust in them;

313.6. the claimant did not during the course of the hearings indicate that he would be able to return to work either then, or in the foreseeable future, if a reasonable adjustment, for example, redeployment to a different post, was made;

314. The tribunal has considered whether the respondent would have treated a hypothetical comparator any differently, that is, a healthcare assistant:

314.1. with four years continuous service as an employee with 5 years prior engagement as a bank nurse;

314.2. who had been absent from work by reason of ill-health for nearly 12 months;

314.3. In relation to whom Occupational Health advice was that he/she remained unfit to return to work;

314.4. in relation to whom neither Occupational Health nor the hypothetical comparator was able to give a likely date of return;

314.5. who asserted that he did not want to return to work for the respondent because he had lost trust in them;

The tribunal finds that the respondent would have treated the hypothetical comparator in the same way; the hypothetical comparator would have been dismissed. There was no difference in treatment.

315. Further, and in any event, the tribunal has considered all the circumstances to decide whether are any facts from which the tribunal could infer that the reason for dismissal was the claimant's disability. The tribunal notes in particular as follows:

315.1. The fact that the claimant made complaints directly to David Dalton, the Chief Executive of the Trust, and that David Dalton failed to address those complaints personally, are not facts from which we could fairly conclude that the dismissing officer, Alexandra Barker, had been motivated by the claimant's disability. The complaints were not ignored. David Dalton instructed Nick Hayes, Deputy Director of Workforce at that time, to deal directly with the claimant's complaints. The suggestion that the Chief Executive would normally personally deal with complaints of this nature, however serious, from Health Care Assistants is unsupported by the evidence and is without merit. Nick Hayes took some time to investigate the claimant's complaints, which were addressed;

315.2. The fact that Julia Riley had failed to provide reasonable adjustments, the fact that Susan Howard told the claimant that she could not "carry him" on G1 ward, are not facts from which we could fairly conclude that the dismissing officer, Alexandra Barker, had been motivated by the claimant's disability. Alexandra Barker was not involved in any way in the management of the claimant when he worked on AMU and G1 wards, or in the decision by Julia Riley to require the claimant to work late shifts, contrary to the advice of Occupational Health;

315.3. The fact that Alexandra Barker's PA, Angela Coric, was also PA to other managers previously involved in the claimant's case, is not a fact from which the tribunal could fairly conclude that the dismissing officer, Alexandra Barker, had been motivated by the claimant's disability. The suggestion that Alexandra Barker's decision making would be influenced by her PA is unsupported by any satisfactory evidence and is without merit;

315.4. The fact that Alexandra Barker's secretary, Elaine Singleton, was involved as note-taker in the grievance hearing and had some involvement in the Appeal process in a secretarial or administrative capacity is not a fact from which the tribunal could fairly conclude that the dismissing officer, Alexandra Barker, had been motivated by the claimant's disability. The suggestion that Alexandra Barker's decision making would be influenced by her secretary is unsupported by any satisfactory evidence and is without merit;

315.5. The fact that Alexandra Barker did not re-open the claimant's grievance, did not investigate whether there had been a previous failure to make reasonable adjustments, did not investigate the claimant's assertion that his long-term absence had been caused by the actions of the

respondent, are not facts from which the tribunal could fairly conclude that Alexandra Barker was motivated by the claimant's disability. She did conduct an investigation of the length and reasons for the claimant's sickness absence, the possibility of any reasonable adjustments to facilitate the claimant's return and the likelihood of him being able to return to work in the future;

315.6. The tribunal has considered with care the claimant's grievance, the handling of that grievance by Mr Goodenough, the claimant's appeal against the outcome and the handling of that appeal. The tribunal has considered with care the evidence of Mr Goodenough and the documentary evidence relating to both the grievance hearing and the appeal. Whereas the claimant has not asserted that the conduct of the grievance and appeal and/or their outcomes were discriminatory acts, the tribunal has considered whether the handling of the grievance and/or appeal raises facts from which it could be reasonably inferred that the dismissing officer was motivated by, or influenced in any way, by either the claimant's disability or his protected acts, including the complaints of discrimination under the Equality Act. The tribunal agrees with the claimant that Mr Goodenough did not address each of the claimant's complaints, he did not carry out a reasonable investigation of the claimant's complaints. The appeal panel did not deal with two of the claimant's key complaints (see paragraph 170 above). However, these failures are not facts from which the tribunal could reasonably and fairly infer that the decision of Alexandra Barker was motivated by the claimant's disability or influenced by the protected acts. Mr Goodenough did uphold the claimant's grievance and identified an alternative role for the claimant to consider. The appeal panel did provide a detailed response to the appeal (see paragraph 169 above). Two points may have been missed, but the appeal panel clearly addressed the majority of the points raised by the claimant. Having viewed the grievance and appeal procedures the tribunal finds that they do not raise any facts from which the tribunal could fairly conclude that Alexandra Barker was motivated by the claimant's disability or influenced by the protected acts. In particular, the tribunal rejects the claimant's assertion that Alexandra Barker was in some way involved in any misrepresentation or fabrication of the notes of the hearing on 11 April 2017. There was no such misrepresentation or fabrication of notes.

In all the circumstances, the tribunal concludes that there are no facts from which the tribunal could infer that the reason for dismissal was the claimant's disability.

316. Further, and in any event, the tribunal accepts the evidence of Alexandra Barker and finds that the real reason for dismissal was the claimant's long-term absence and the absence of any likely return date. Alexandra Barker investigated whether any adjustments could be made to facilitate the claimant's

return to work. The investigation showed that at that time there were no reasonable adjustments which could be put in place to secure the claimant's return to work and that it was highly unlikely that the claimant would ever return to work for the respondent because he had declared a loss of trust in his managers and had said that he never wanted to return. The claimant has placed great emphasis before this tribunal on the failure of the respondent to provide him with other work, outside the ward, for example, in day services. However, after April 2016 the claimant was never in a position to return to work in any capacity because he was medically unfit to do so. Neither he nor Occupational Health stated that the claimant was fit to return to work in a non-ward position.

317. In reaching her decision to dismiss Alexandra Barker was not motivated or influenced by the claimant's disability

318. The claim that dismissal was an act of direct discrimination is not well-founded.

319. The claimant was dismissed because of his long-term absence, something arising in consequence of his disability. That is unfavourable treatment within the meaning of s15 Equality Act 2010.

320. The tribunal has considered whether the respondent has shown that the treatment is a proportionate means of achieving a legitimate aim. The respondent asserts that the legitimate aim was ensuring that the respondent has adequate staffing levels to meet the demands of the service and avoiding a detrimental impact on the respondent's resources by sustaining an employee on long term-sickness absence. That is a legitimate aim. The tribunal has conducted a balancing exercise, weighing the discriminatory effect of the unfavourable treatment, dismissal, as against the employer's reasons for applying it, taking into account all the relevant facts. The tribunal has considered, in particular, whether the respondent could have taken alternative steps and/or could have waited longer before dismissing. The tribunal notes that there was no indication from either Occupational Health or the claimant himself that he would be able to return to work in any capacity in the foreseeable future. To the contrary, the claimant gave a clear indication that he could never foresee a return to work for the respondent. The claimant criticises the respondent for failing to re-open his grievance, for failing to investigate whether the claimant's long-term sickness absence was caused by the respondent. However, failing to carry out that investigation at that stage was a reasonable and proportionate step. The respondent had conducted a grievance procedure, the claimant was dissatisfied with the outcome of the grievance and the appeal. The claimant had exhausted all internal procedures. It was reasonable and proportionate for Alexandra Barker to refuse to re-open it. In any event, there is no suggestion that the further investigation of these issues would have affected the decision faced by Alexandra Barker. The claimant

remained unfit to return to work. There is no suggestion that the re-opening of the grievance would secure the claimant's return to work in the foreseeable future.

321. In all the circumstances the tribunal finds that dismissal of the claimant was a proportionate means of achieving a legitimate aim.

322. The claim under s15 Equality Act, relating to dismissal, is not well-founded.

323. In relation to the claim of victimisation under s27 Equality Act 2010, the tribunal notes that Alexandra Barker was aware of previous protected acts, in particular the claimant's previous history of requests for reasonable adjustments and his Formal Grievance alleging a continuing course of discriminatory conduct by a number of the respondent's management team. The tribunal has, as indicated above, examined with care the reason for dismissal. The tribunal has also considered with care the fact that the claimant made repeated serious complaints (each protected acts) to the joint Chief Executive Officer, David Dalton, and the fact that David Dalton did not deal with those complaints himself. The tribunal refers to its findings at paragraph 316 above. There are no facts from which the tribunal could infer that the decision to dismiss was influenced by the protected acts. The tribunal accepts the evidence of Alexandra Barker and finds that the reason for dismissal was the claimant's long-term sickness absence and she was not influenced in any way by the protected acts of the claimant.

324. The claim that dismissal was an act of victimisation under s27 Equality Act 2010 is also without merit.

**Placing the claimant under the short-term sickness procedure and applying the trigger points system**

325. In June 2014 the claimant was placed under the short-term sickness procedure and the trigger points system. The claimant was called to a meeting to discuss his sickness absence. He was advised by Mrs Sloan that a future absence would trigger a second stage sickness meeting, which may result in a caution (see paragraph 60 above.) However, no future action was taken following the challenge to the outcome by the claimant's trade union representative (see paragraphs 61 and 62 above). The claimant was not issued with a caution or threat of dismissal. There is no satisfactory evidence to support the claimant's assertion that he suffered stress and anxiety by the issue of Ms Sloan's letter dated 11 June 2014. His trade union representative successfully challenged the outcome. The trade union representative made no reference in his email of complaint (p190) to any detrimental effect of the procedure on the claimant. The tribunal does not accept that the claimant suffered any anxiety or stress by reason of being placed on the short-term sickness absence procedure. There was no detriment to the claimant, there

was no unfavourable treatment. The claims of direct discrimination, discrimination arising from disability and victimisation are not well-founded.

326. There is no satisfactory evidence to support the assertion that Mrs Sloan acted in a bullying and intimidating manner during the course of the meetings, that the conduct of Mrs Sloan had violated the claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The claimant was accompanied by his trade union representative, who has not been called to give evidence. The trade union representative challenged the outcome of the meeting with Mrs Sloan. He raised no complaint about the conduct of Mrs Sloan during the process. No complaint was made at the time that the claimant found this process stressful, humiliating or offensive. The tribunal does not accept that the claimant found the behaviour or actions of Mrs Sloan intimidating, hostile, degrading, humiliating or offensive. The complaint, in the alternative, of bullying and harassment is without merit.

**In September 2015 the claimant was refused training "because of ME"**

327. The claimant was not, in September 2015, refused training "because of ME". On this the tribunal accepts the evidence of Sue Howard – see paragraph 108 above. There was no such detrimental and/or less favourable treatment. There was no unwanted conduct. This complaint, under sections 13,15,26 and 27 Equality Act 2010, is without merit.

**The claimant was refused time off to attend medical appointments**

328. In January 2016 he claimant was refused time off during the course of his shift to attend a non-urgent medical appointment relating to his eczema (see paragraph 135 above). There is no satisfactory evidence to support the claimant's assertion that this was either an urgent appointment or related to his disability. The refusal of time off in these circumstances is consistent with the policy which states:

> Employees requiring time off to attend GP, dentist or hospital outpatient appointments should, wherever possible, arrange appointments outside of normal working hours or if working flexibly or flexitime not usually in their core hours were possible.

329. The claimant names two comparators, Tracy Taylor and Becky Hogan. However, the claimant has failed to provide the dates upon, and circumstances in which, these work colleagues were allowed time off. It is noted that the policy does allow for time off for urgent appointments (see paragraph 184 above). There is insufficient evidence to establish whether the named comparators were given time off in materially similar circumstances to the claimant, who accepts that he does not know the circumstances in which either of the comparators were given time off. The tribunal has constructed a hypothetical comparator and finds that a hypothetical comparator would have been treated

in the same way, consistent with the policy. There was no difference in treatment.

330. Further, and in any event, there are no facts from which the tribunal could infer that the reason for the refusal to allow the claimant time off was the claimant's disability.

331. The complaint of direct discrimination is without merit.

332. The refusal of time off during a shift for an appointment at an eczema clinic is not unfavourable treatment for a reason arising from the claimant's disability. This complaint under s15 Equality Act is without merit.

333. The claimant has failed to provide satisfactory evidence as to the identity of the member of G1 who refused the request. There is no satisfactory evidence to support a finding that the refusal was influenced in any way by the protected acts. The refusal is consistent with the correct operation of the respondent's written policy. This complaint under s27 Equality Act is without merit.

334. The refusal of time off during a shift for an appointment at an eczema clinic is not conduct relating to the claimant's disability. There is no satisfactory evidence to support any finding that the claimant found this refusal stressful, humiliating or offensive. The tribunal does not accept that the claimant found the refusal to be intimidating, hostile, degrading, humiliating or offensive. The complaint, in the alternative, of bullying and harassment under s26 Equality Act 2010 is without merit.

**The claimant was placed on four weekends a month when no other HCA had to do this.**

335. There is no satisfactory evidence to support the claimant's assertion that:

335.1. he worked 26 weekends from 15 April 2013 to 5 October 2013;

335.2. He worked 18 consecutive weekends prior to his meeting with J Sloan on 4 June 2014 (see paragraph 58 above)

336. In the period 1 May 2015 to 24 July 2015 the claimant worked 7 out of 12 weekends (p348). The claimant raised no complaint about this at the time. He had consented to do weekend work (p260B). It was not part of any reasonable adjustment recommended by Occupational Health that the claimant refrain from weekend work at that time. The recommendation from OH in October 2014 (see paragraph 73), was that the claimant have a regular working pattern, working early shifts rather than late and no more than two consecutively. There was no recommendation of non - weekend working. In April 2015 those recommended adjustments were confirmed (see paragraph 94). The claimant raised no complaint about the number of weekends worked at the Return to work meeting with Susan Howard on 25 August 2015 (see paragraph 103).

337. In the period 12 September 2015 to 4 October 2015 the claimant was rostered to, and did work every weekend. He worked both days on the weekends of 12/13 September 2015 and 3/4 October 2015. He worked I day of the weekends 19/20 and 26/27 September 2015. This was an unusual number of weekends to work. The normal requirement was for every member of staff to work 2 out of every 4 weekends.

338. On 22 September 2015 the claimant raised his complaint about weekend working. As a consequence, a referral was made to OH for further advice. The claimant raised a further complaint about weekend working rostered for the following month (see paragraph 111 above). Julia Riley investigated that complaint and was satisfied that the actual rota did not require the claimant to work the following 4 weekends. She sought further information from the claimant. The claimant was absent from work from 6 October 2015 to 6 December 2015, never worked the rostered pattern and did not provide the requested information. On his return, it was agreed that he would work set weekdays, no weekends (see paragraphs 123, 129 and 131). That agreed working pattern continued until the claimant went on long term sickness absence in April 2016. During that time the claimant agreed to work two early weekend shifts.

339. In all the circumstances the tribunal finds that the claimant did work for 4 consecutive weekends in the period 12 September 2015 to 4 October 2015. That weekend working had been rostered before the beginning of that period, before the claimant made his complaint, on 22 September 2015, that he was tired of doing weekend work. The claimant was not placed on weekend working prior to that date against his will. He consented to working at weekends. Once he made his complaint it was investigated and advice of Occupational Health sought. He did not do any further weekend working after that 4 week roster for the period 12 September 2015 to 4 October 2015 had been completed There was no detriment to, no unfavourable treatment of, the claimant in the working of weekends. This complaint, under s13, 15 and 27 Equality Act 2010 is without merit. The claimant, in the alternative that this was harassment within the meaning of s26 Equality Act 2010 is also without merit. The placing of the claimant on weekend working was not unwanted conduct and did not relate to his disability.

**Sue Howard asked the claimant "how long are you going to be going on with this disability thing?" and in an email to Julia Riley Sue Howard referred to the claimant as "different".**

340. Sue Howard did not ask the claimant "how long are you going to be going on with this disability thing?". This did not happen.

341. Sue Howard did refer to the claimant as "different", in an email to Julia Riley (see paragraph 145 above.) However, the claimant did not receive a copy of this email during the course of his employment. Sue Howard did not call the

claimant “different” to his face. It is perhaps indicative of her feelings towards the claimant, and supports the finding that she did tell the claimant that she could not afford to carry him. However, the sending of the private email from Sue Howard to Julia Riley is not detrimental or unfavourable treatment of the claimant. The email did not create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. At the time it was sent the claimant was unaware of it. This complaint is without merit.

**A referral to OH contained derogatory comments describing the claimant as “a burden to the ward” and the referring manager had said she wanted to place the claimant on the Redeployment List.**

342. The tribunal refers to its findings at paragraphs, 146 -147 above. There was no such referral. This did not happen. This complaint is without merit.

**The claimant was forcibly placed on the redeployment list.**

343. Mr Hayes made the decision to place the claimant on the Redeployment Register (see paragraphs 176 and 178). This was contrary to policy as clearly the claimant had not, at that time, been deemed unable to carry out his role due to ill health. In his letter dated 9 January 2017 Mr Hayes, at the same time as informing the claimant that he had been placed on the redeployment register, confirmed that the respondent was offering the claimant the opportunity to stay in his current role or as a Healthcare Assistant in the Patient Watch department. No notice of termination was served on the claimant. His employment was not placed at risk by reason of being placed on the redeployment list. The claimant was placed on the redeployment list in a clear and genuine attempt by the respondent to find the claimant alternative employment. Mr Hayes took this step to ensure that the claimant received details of any vacancies on a preferential basis. The claimant suffered no detriment. This was not unfavourable treatment. The claimant has given wholly unsatisfactory evidence as to what outcome he did want, and in what way the actions of the respondent placed him at a disadvantage and/or amounted to detrimental or unfavourable treatment.

344. Having considered all the surrounding circumstances, it is clear and the tribunal finds that the placing of the claimant on the redeployment list was not done by Mr Hayes with the intent or purpose of offending the claimant, of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The tribunal does not accept that the claimant was genuinely offended by the actions of Mr Hayes. The claimant has been wholly inconsistent in this regard. He has at times stated that he wished to be redeployed to a different area of work, but his wishes were deliberately ignored. It is part of his complaint before this tribunal that he was not redeployed to a different area. The claimant at the same time as complaining about being placed on the redeployment list complains about being offered his existing job and/or a named alternative role.

345. Further, and in any event, if the claimant was genuinely offended by this action, the tribunal has considered all the circumstances and notes that at the time the claimant was placed on the redeployment list he was absent from work, suffering from long term sickness absence and on his own evidence was unable to return to work on a busy ward. He had shared this view with Nick Hayes at the meeting on 30 November 2016. The letter dated 9 January 2017 (p. 518 – 519) from Nick Hayes, advised the claimant that he had been placed on the redeployment list and made it clear that this action was taken to assist the claimant to return to work, as it would ensure that the claimant would receive access to the Trust's vacancies on a preferential basis.

346. Having considered all the circumstances the tribunal finds that it was not reasonable for the conduct to have the effect.

347. The complaints under s13, 15, 26 and 27 Equality Act 2010 are not well-founded.

**The claimant was not asked to complete an "aspirational list".**

348. In placing the claimant on the redeployment register Mr Hayes did not follow the normal procedure of requesting the claimant to complete an Aspiration form, or attend an aspiration interview, to enable the claimant to explain his skills and the roles he was interested in. However, the claimant suffered no detriment. This was not unfavourable treatment. He was not put at any disadvantage by this. He received, for a short time, complete vacancy lists. He was not required to do anything with them. He could choose to look at them, and make any appropriate enquiry or application, as he wished.

349. Having considered all the surrounding circumstances, it is clear and the tribunal finds that the placing of the claimant on the redeployment list without first requiring the claimant to attend an aspirational interview or complete an aspirational list, was not done by Mr Hayes with the intent or purpose of offending the claimant, of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The tribunal does not accept that the claimant was genuinely offended by the actions of Mr Hayes in this regard. The claimant's evidence on this has been unsatisfactory.

350. Further, and in any event, if the claimant was genuinely offended by this action, the tribunal has considered all the circumstances and notes in particular that the letter dated 9 January 2017 (p. 518 – 519) from Nick Hayes, made it clear that if the claimant felt that he had the necessary skills for any role then she should alert his manager and Catherine Gardner, Senior Workforce Adviser. The Recruiting Manager would then arrange an interview for the claimant. This action was taken to assist the claimant to return to work, as it would ensure that the claimant would receive access to the Trust's vacancies

on a preferential basis. Having considered all the circumstances the tribunal finds that it was not reasonable for the conduct to have the effect.

351. The complaints under s13, 15, 26 and 27 Equality Act 2010 are not well-founded.

**The claimant was offered a job on Patient Watch and a return to G1, a busy active ward.**

352. By letter dated 9 January 2017 (see paragraph 176) this offer was made by Nick Hayes. The claimant suffered no detriment by the making of this offer. The claimant was not put at any disadvantage by the offer. This was not unfavourable treatment.

353. This offer was not made by Mr Hayes with the intent or purpose of offending the claimant, of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The offer was made in a clear and genuine attempt by the respondent to keep the claimant in work and/or to find the claimant alternative employment. The tribunal does not accept that the claimant was genuinely offended by the actions of Mr Hayes in this regard. The claimant's evidence on this has been unsatisfactory.

354. Further, and in any event, if the claimant was genuinely offended by this action, the tribunal has considered all the circumstances and notes in particular that the letter dated 9 January 2017 from Nick Hayes, made it clear that the offer of work was made with the reassurance that for either position the reasonable adjustments as recommended following OH advice would be put in place. Having considered all the circumstances the tribunal finds that it was not reasonable for the conduct to have the effect.

355. The complaints under s13, 15, 26 and 27 Equality Act 2010 are not well-founded.

**Julia Riley refused to organise a case conference with the claimant in attendance**

356. This complaint relates to the request by the claimant's trade union representative in January 2016 referred to at paragraph 128 above. There was no detriment to the claimant arising from the failure of Julia Riley to organise a case conference with Occupational Health. The respondent had made a referral to OH, a meeting had been held with the claimant and the recommended adjustments had been put in place, firstly in December 2015, for a period of 2 months, and then confirmed in January 2016 for a period of 6 months. There is no satisfactory evidence to suggest that the holding of a case conference with OH at this stage would have produced any different recommendations. At the meeting on 8 January 2016 Julia Riley confirmed that the recommendations would remain in place for 6 months. The claimant did

not, at that time, pursue any request for different adjustments. He said he was happy to stay on the ward and did not seek redeployment. He was, in the period from January 2016 to April 2016, satisfied with the adjustments made. He made no complaint about them, except for the one incident raised via his trade union representative (see paragraphs 141 and 142 above) which was resolved. The claimant did not repeat the request for a case conference, did not complain about the failure of Julia Riley to arrange the case conference, at the time. There was no detriment.

357. Further, and in any event, the claimant has not named an actual comparator. There is no satisfactory evidence that a request by a trade union representative for a case conference with OH would normally lead to such a case conference. The tribunal is satisfied that a hypothetical comparator would have been treated in the same way. There was no difference in treatment.

358. The failure to call a case conference was not unfavourable treatment of the claimant, for the same reasons it was not detrimental treatment, as set out at paragraph 355 above.

359. The failure to call a case conference was not done by Julia Riley with the intent or purpose of offending the claimant, of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The tribunal accepts that evidence of Julia Riley that she did this after receiving HR advice because she saw no purpose in doing so because the recommendations from OH had been put in place. The tribunal does not accept that the claimant was genuinely offended by the actions of Julia Riley in this regard. The claimant's evidence on this has been unsatisfactory.

360. Further, and in any event, if the claimant was genuinely offended by this failure, the tribunal has considered all the circumstances the tribunal finds that it was not reasonable for the conduct to have the effect.

361. Further and in any event the tribunal is satisfied and finds that the failure of Julia Riley to organise a case conference was not because of the claimant's disability, nor was it any way influenced by the protected acts.

362. The complaints under s13, 15, 26 and 27 Equality Act 2010 are not well-founded.

**Julia Riley said she would carry out a risk assessment but failed to do so**

363. Julia Riley did, at the meeting on 2 December 2015 and by letter dated 8 December 2015 promise that a risk assessment would be carried out (see paragraph 122 above). The risk assessment was not done. There was no detriment to the claimant in this failure to act. Julia Riley had put in place each of the adjustments recommended by OH. The claimant did not, at that time, pursue any request for different adjustments. He was, in the period from

January 2016 to April 2016, satisfied with the adjustments made. There were no problems in the workplace in the period January 2016 to April 2016, other than the one incident which was reported by the claimant's trade union representative (see paragraphs 141 and 142 above) and was resolved. Neither the claimant nor his trade union representative raised any complaint about this failure to act.

364. There was no unfavourable treatment of the claimant. This complaint is without merit.

**The claimant's hours were reduced from 37.5 hours to 30 hours per week.**

365. The reduction in hours took place following a decision made voluntarily by the claimant, not the respondent. The respondent did not place any pressure on the claimant to reduce his hours. There is no satisfactory evidence to support the assertion that the claimant had no choice but to do this because of the failure by the respondent to observe the adjustments to his shift pattern as recommended by OH. At the meetings on 5 June 2014 and 4 July 2014 with Mrs J Sloan the claimant had confirmed that the rotas were working well, that the shift patterns as agreed had been sustained. The claimant notified the respondent of the change to his working hours by email dated 3 August 2014 (see paragraph 65 above). The claimant did not at the time lay the blame for this decision at the respondent's feet. At no time did the claimant make a request for his hours to be increased. This complaint is without merit.

**OH sent its report to Susan Howard without the claimant's consent**

366. OH addressed its report dated 2 June 2016 (see paragraph 149 above) to Louise McMahon, rather than the referring officer, Susan Howard. The fact that the report was, at the same time, copied to Susan Howard, the claimant's line manager and referring officer, does not amount to detrimental or unfavourable treatment of the claimant. The claimant's evidence on this is unsatisfactory. This complaint is without merit.

**The letter requesting Further Information from the claimant's GP was significantly delayed.**

367. In his OH report dated 11 October 2016 (see paragraph 191 above) Dr Osunsanya reported that he would be seeking additional evidence from the claimant's GP, in order to gain a better understanding of the claimant's condition. Dr Osunsanya dictated his letter to the claimant's GP on the same day (see paragraph 192 above). That request for information did not arrive at the claimant's GP surgery until 2 December 2016. Dr Osunsanya made the request for information to assist him in preparing a report as to the claimant's prognosis, the date upon which the claimant was likely to be able to return to work. Clearly Dr Osunsanya was looking for information as to the claimant's medical condition and any treatment, to assist in the preparation of his report

to be considered under the Sickness Absence Procedure. The failure to include a job description or list of duties does not invalidate the request for information, does not support the claimant's assertion that Dr Osunsanya was looking for irrelevant information or was on a "fishing expedition". One of the relevant factors for the respondent to consider under the Sickness Absence Procedure is the likelihood of the claimant being in a fit state to return to work, and how soon that was likely to happen. Medical evidence from the claimant's GP as to any underlying medical condition, any prognosis, any planned treatment was relevant. No disciplinary action was taken, no decision was taken by the respondent under its long-term absence procedure during the course of the delay in obtaining that medical evidence. The respondent was genuinely making attempts to seek any further relevant medical evidence from the claimant's own GP, while the claimant was absent from work. Once the delay had been discovered the claimant withdrew his consent for the respondent to access his GP for such advice. The respondent cannot provide a satisfactory explanation for the delay in Dr Osunsanya's letter arriving with the claimant's GP. However, the suggestion that the delay between the date upon which the letter from Dr Osunsanya was dictated and/or sent and its arrival at the claimant's GP was a discriminatory act is without merit. There was no detrimental or unfavourable treatment of the claimant arising from any such delay.

**The respondent organised a case conference in the absence of the claimant**

368. This complaint is a reference to the meeting on 15 December 2016 when Nick Hayes sought legal advice relating to the issues raised by the claimant (see paragraph 175 above). Nick Hayes incorrectly described this meeting in later correspondence to the claimant as a case conference (see paragraph 176 above). This led to the claimant's mistaken belief that he should have been invited to take part in any discussion with Occupational Health to discuss his health. The claimant was aware that his complaints of discrimination to Mr David Dalton had been referred to Nick Hayes to handle, and had met with Nick Hayes to discuss them. There was no detrimental or unfavourable treatment of the claimant arising from the respondent seeking legal advice. This complaint is without merit.

**The respondent shared confidential information obtained in a without prejudice meeting**

369. This complaint is a reference to the "without prejudice" part of the meeting on 30 November 2016 (see paragraph 174 above). No satisfactory evidence has been led to support the assertion that the respondent shared confidential information from the meeting. The sharing of the letter dated 9 January 2017 with others, the placing of that letter on the claimant's personal file was not a sharing of confidential information from the without prejudice part of the meeting. This alleged conduct did not occur. This complaint is without merit.

**The claimant was dismissed from the Nurse Bank**.

370. In deciding whether dismissal was direct discrimination within the meaning of section 13 Equality Act 2010 the tribunal has considered whether there was less favourable treatment of the claimant when compared to an actual or hypothetical comparator:

371. The claimant has not named an actual comparator.

372. The tribunal has constructed a hypothetical comparator bearing in mind the relevant circumstances. The hypothetical comparator is the same as identified when considering the dismissal from the claimant's employment on G1 ward, as set out at paragraph 314 above, the hypothetical comparator having been dismissed for the same reason and in the same circumstances as the claimant. The tribunal is satisfied and finds that the hypothetical comparator would have been treated in the same manner. The tribunal has accepted the respondent's evidence and finds that dismissal from the Nurse Bank in these circumstances is automatic, unless steps are taken to secure the employee's retention on the Nurse Bank. The claimant did not, during the sickness absence procedure, ask to be retained on the Nurse Bank. This was not discussed by either party. This is hardly surprising as the claimant repeatedly indicated that he was not fit to return to work in any capacity, and did not want to work for the respondent due to a lack of trust. There was no difference in treatment. Further, and in any event, there are no facts from which the tribunal could infer that the reason for the dismissal from the Nurse Bank was because of the claimant's disability. The dismissal from the Nurse bank automatically arose from Alexandra Barker's decision to dismiss. It is clear that she did not specifically address the impact of her decision on the claimant's position on the Nurse bank: the claimant did not tell her that he remained on the Nurse Bank and/or that he wished to remain on it. The reason for dismissal, and the consequent dismissal from the Nurse Bank, is the same, as set out at paragraph 316 above. In reaching this decision the tribunal has considered the evidence given in support of the claimant's assertion that the respondent acted in a discriminatory manner when the claimant made subsequent application to return to the Nurse Bank. The question is whether the failure of the respondent to retain the claimant on the Nurse Bank when he was dismissed from his employment on the ward, was a discriminatory act. [The subsequent actions of the respondent in relation to the return of the claimant to the Nurse Bank being outside this tribunal's determination]. The tribunal has decided that the subsequent actions of the respondent are not facts from which the tribunal could fairly infer that the dismissal of the claimant from the Nurse Bank was a discriminatory act. The tribunal notes that the respondent refused to confirm to NHS professionals that the claimant was suitable to be supplied as a health care assistant to the respondent. That refusal is consistent with the decision to dismiss, which was not a discriminatory act. The claimant had given a clear indication that he did not want to work for the respondent again. The tribunal rejects the claimant's

assertion that the terms of the reference which the respondent was prepared to give to NHS professionals was either inherently discriminatory or showed a discriminatory intent. The respondent's practice is to provide a factual reference, including the reason for dismissal. The proposed reference was a factual reference stating the correct information, namely, that the claimant had been dismissed for long term sickness absence.

373. For the reasons stated at paragraph 323 above the tribunal is satisfied and finds that Alexandra Barker's decision to dismiss, and the consequent dismissal from the Nurse Bank, was not influenced by the protected acts.

374. The allegation that the removal from the Nurse Bank was a discriminatory act is not well-founded.

375. Each of the allegations of discriminatory treatment under s13, 15, 26 and 27 Equality Act 2010 is not well-founded.

376. The only complaint which is well founded is the complaint that the respondent failed in its duty to make reasonable adjustments in 2015. There were no continuing acts of discrimination after that time.

377. The question is whether the claim of failure to make reasonable adjustments was presented out of time.

378. The first question is when time began to run. It is clearly arguable that time ran from 8 June 2015, the day Julia Riley had decided not to implement the recommendations of Occupational Health and told the claimant that he could no longer do just early shifts. The alternative argument is that there was a continuing failure to make reasonable adjustment until either, 6 October 2015, when the claimant went on sickness absence, or at the latest, on 7 December 2015 when the claimant returned to work and the duty to make reasonable adjustments was met.

379. Whichever date is used, the claim was presented out of time, more than 3 months after the failure to provide reasonable adjustments was rectified.

380. The tribunal has considered whether it is just and equitable to extend time.

381. The tribunal notes that there is a wide discretion to extend time. The tribunal is required to consider the prejudice suffered by each party as the result of the decision and to consider all circumstances of the case. The tribunal notes in particular:

381.1. the length of and reasons for the delay. The tribunal has considered all the circumstances including the following: -

381.1.1. The three month time limit expired on either 7 September 2015, or 5 January 2016 or 6 March 2016. No extension of time is available by operation of the Early Conciliation procedure. Bearing in mind that the claimant was, and remains, a litigant in person, the tribunal has calculated the delay in proceedings from the last possible date, namely 6 March 2016, three months after 7 December 2015, when the failure to make reasonable adjustments was rectified. From that date reasonable adjustments were in place and the claimant had no further ground of complaint in relation to this issue;

381.1.2. The claim was presented on 21 March 2017. The complaint was therefore presented at least 1 year out of time, some 15 months after the last omission complained of. The reason for the delay is not clear. What is clear is that the claimant was from the beginning of his employment fully aware of the employer's duty to make reasonable adjustments and made allegations from an early stage in his employment that the respondent was breaching that duty. The claimant was also aware of the right to bring a claim to the employment tribunal in relation to such a breach. He had taken legal advice from an external source in or around December 2015 (see paragraph 124 above). The claimant had the benefit of trade union representation while he was at work. The claimant was not slow to make a complaint, to put his complaints in writing, to seek the advice of the trade union representative and obtain his involvement in the resolution of any dispute. It is noted that the claimant had involved his trade union representative in his complaint in January 2016 see page 316 and paragraph 128 above;

381.1.3. The claimant was at work and able to conduct his affairs until he left work by reason of ill-health absence on 29 April 2016;

381.1.4. The claimant did not present a grievance until June 2016. He raised an appeal against its outcome in September 2016. He was advised of the outcome of the appeal in November 2016. The claimant was dissatisfied with the outcome and wrote letters in November 2016 to Mr David Dalton and others making allegations of discrimination within the meaning of the Equality Act 2010. It is not clear why the claimant did not, at that time, take immediate steps to present his claim. In November 2016 the claimant contacted ACAS under the Early Conciliation procedure but took no further steps until March 2017. There had been no satisfactory explanation for that delay;

381.1.5. Throughout his period of absence, the claimant was able to continue to communicate, and raise a number of complaints, with Mr Dalton, joint Chief Executive. There is no suggestion, no satisfactory

medical evidence to support an assertion, that the claimant was medically unfit to pursue a claim;

381.2. the extent to which the cogency of the evidence is likely to be affected by the delay. It is well over a year since the final act complained of. There have been difficulties during the hearing with witnesses, including the claimant and his wife, recollecting these events. Heavy reliance has been placed on documentary evidence rather than genuine recollection of certain events. The veracity of the documents has at times been challenged. Cogency of the evidence has been adversely affected by the delay.

The claimant was fully aware of his right to claim and had access to appropriate professional advice about the possibility of taking timely action in relation to what he had identified as failure to make reasonable adjustments, discrimination under the Equality Act. He chose not to take any such action at that stage. In all the circumstances it is not just and equitable to extend time.

382. The claim of failure to make reasonable adjustments is therefore unsuccessful and is hereby dismissed.

**Unfair dismissal**

383. The claimant was dismissed. The tribunal has accepted that the reason for the dismissal was the claimant's long-term absence and the absence of any likely return date. The dismissing officer held the honest and genuine belief that the claimant had been absent from work since April 2016 and there was no likelihood of him being able to return to work in the foreseeable future. That is capability and a potentially fair reason for dismissal within the meaning of s98 Employment Rights Act 1996.

384. The tribunal has considered all the circumstances to decide whether dismissal fell within the band of reasonable responses. The tribunal notes in particular the following:

384.1. The respondent carried out a reasonable investigation of the claimant's absence and the likelihood of his return to work. The claimant accepted that he had been off on long term sickness absence and gave a clear indication that, whether fully recovered or not, he would never return to employment;

384.2. The dismissing officer was reasonable relying on the information contained within the Management Statement of Case, even though it was some weeks old. It was not out of date as the key relevant information had not changed – in particular, the claimant remained unfit to work in any

capacity, there was no foreseeable return to work date, the claimant did not want to return;

384.3. The failure of the dismissing officer to reconsider the complaints made under the grievance does not render this dismissal unfair. The claimant had raised a grievance and an appeal had been considered. The claimant had exhausted the internal procedures. It was reasonable not to re-open the grievance, to give the claimant, in effect, a second right of appeal;

384.4. The failure of the dismissing officer to investigate the reason for the claimant's sickness, which caused the absence, does not render this dismissal unfair. It is in certain circumstances reasonable for a respondent to wait a little longer before dismissing where the cause of the illness lies at the feet of the respondent. However, the claimant gave a clear indication that he would never return to work for the respondent – a short delay to the decision would have made no difference;

384.5. The dismissing officer took in to account the length of the claimant's service and was reasonable in deciding that the length of service as an employee was 4 years, ignoring the claimant's engagement before then on the Nurse Bank. The respondent was reasonable in calculating the length of service from the information provided in the Main Statement of Terms and Conditions (p112), which noted that employment commenced on 15 April 2013. Further and in any event, there is no satisfactory evidence to support an assertion that a longer length of service would have made any difference to the outcome. The dismissing officer was more concerned with the time it would take the claimant to return to work, rather than the time he had already spent in work;

384.6. The respondent followed a fair procedure, advising the claimant of his right of representation at meetings, consulting with the claimant as to the reason for his absence, and considering his responses before reaching the decision to dismiss;

384.7. The respondent acted reasonably in seeking to obtain medical evidence relating to the claimant's ill-health and the likelihood of his return. The respondent was reasonable in relying on advice from Occupational Health. It was reasonable in seeking further advice from the claimant's GP. It was unfortunate that that process was delayed. However, the respondent took no further action under its sickness absence procedure pending receipt of that advice. It was the claimant who then withdrew his consent to the respondent obtaining the advice from his GP. The respondent was happy for the respondent to provide his own medical evidence and gave the claimant the opportunity for that medical evidence to be considered by the respondent's OH. It was reasonable for the respondent to want its own

medical expert to comment on the advice from the claimant's medical expert. The claimant refused that opportunity;

384.8. The respondent did, throughout the claimant's period of absence, regularly throughout his period of absence, consult with the claimant and consider whether any adjustments could be made to facilitate the claimant's return to work. The respondent looked at alternative employment. The claimant was placed on the redeployment register to give him access to any suitable vacancies. Neither the claimant nor the OH identified any adjustment which would secure the claimant's return in any capacity;

384.9. The claimant complained about being placed on the redeployment register and, as a consequence, was removed from the redeployment register and was not sent any further vacancy lists following that complaint. That was reasonable;

384.10. The failure of the respondent to redeploy the claimant to a job in Day Services or other non-ward position does not render this dismissal unfair. The claimant was unfit to return to any position – at no time did either the claimant or OH, or the claimant's own medical report, state that the claimant could return to a job on Day Services. Matron Kelly Burns acted reasonably in October 2016 when she explained to the claimant that they could look into the possibility of redeployment to a non-ward position as and when the claimant was fit to return, noting that at that stage the claimant had another fit note covering his absence until 5 December 2016 (see paragraph 196). Redeploying the claimant to a job on Day Services while the claimant was absent form work would have made no difference to the key issue - the claimant remained unfit to work in any capacity, there was no foreseeable return to work date. At the time this was considered by the dismissing officer the claimant had given a clear indication that he did not want to return to work for the Trust in any capacity;

384.11. The claimant was dismissed, was provided with the reasons for dismissal and given the right of appeal. The claimant did not exercise that right;

384.12. There is no satisfactory evidence to support the claimant's assertion that the respondent was taking steps to secure the claimant's dismissal. To the contrary, the evidence shows that the respondent took many steps to try to secure the claimant's return to work. The respondent investigated the claimant's complaints, sought medical advice as to any steps which could be taken to secure the claimant's return, placed the claimant on the redeployment register to give him the chance to apply for any job in which he was interested, took steps to arrange meetings with the claimant for appropriate consultation to take place;

In all the circumstances the tribunal finds that dismissal fell within the band of reasonable responses. A fair procedure was followed.

385. The claimant was fairly dismissed.

**Further and in the alternative**

**Breach of contract**

386. If the tribunal is wrong in its determination that the claim for breach of contract does not fall within its jurisdiction, then the tribunal has considered the claimant's assertion that the respondent failed to provide the appropriate notice of termination of employment. The claimant has failed to provide any satisfactory evidence to support his assertion that he was an employee of the respondent when engaged on the respondent's Nurse Bank. No satisfactory evidence has been led as to the hours worked by the claimant, the mutuality of obligation between the parties, the amount of control exercised by the respondent over the claimant, whether the claimant was engaged in other work for a different organisation at the same time. The tribunal cannot find that the claimant was an employee when engaged on the Nurse Bank. His continuity of employment with the respondent began on 15 April 2013. He was dismissed with an effective date of termination of 21 April 2017. The respondent paid 4 weeks' pay in lieu of notice, the correct amount.

387. The complaint of breach of contract is not well-founded.

**Acts of discrimination relating to the claimant's application to join NHS Professionals**

388. If the tribunal is wrong in its determination that it does not have jurisdiction to determine these allegations, the tribunal has, in the alternative, considered the merit of these claims (see paragraphs 14 and 17 above).

389. The claimant has suffered no detriment arising from the failure of the respondent to complete the Statement of Service, Competency and Consent Form for the claimant's application to join NHS Professionals (see paragraph 228 above). The claimant did not and does not wish to the work for the respondent again, whether as an employee or as a bank nurse supplied to the respondent by NHS Professionals.

390. The claimant has suffered no detriment arising from the delay in providing a reference for NHS Professionals. The claimant remains unfit to attend work. He cannot perform any shift on the Nurse Bank operated by NHS Professionals.

391. The respondent has now agreed to provide a reference in the terms set out at paragraph 233 The tribunal accepts that it is normal practice for the respondent to provide any former employee with a factual reference confirming the dates of employment, job title, and the way in which the contract came to an end, including the reason for dismissal. The tribunal is satisfied and finds that the respondent sends such factual references to any employee. The claimant has not adduced any satisfactory evidence to contradict the respondent on this point. There is no difference in treatment. The claimant asserts that the offered reference is untruthful and indirectly discriminatory. That reference is not untruthful. The claimant was dismissed on capability grounds following a lengthy period of absence. As to the allegation of indirect discrimination:

391.1. A “PCP” is a provision, criterion or practice. The respondent does have the following PCP, namely the practice to provide any former employee with a factual reference confirming the dates of employment, job title, and the way in which the contract came to an end, including the reason for dismissal;

391.2. The respondent did apply the PCP to persons with whom the claimant does not share the characteristic, namely non-disabled employees;

391.3. There is no satisfactory evidence to support the assertion that the PCP put persons with whom the claimant shares the characteristic, that is, disabled persons. at one or more particular disadvantage when compared with persons with whom the claimant does not share the characteristic, that is non-disabled persons. The claimant has adduced no satisfactory evidence to support his assertion that disabled persons are less likely to be successful in seeking alternative employment than non-disabled persons.

391.4. There is no satisfactory evidence that the PCP put the claimant at any disadvantage at any relevant time. The claimant has not applied for any job and therefore has not applied for a reference from the respondent in any terms.

392. This claim is without merit.

**Further and in the alternative**

**Additional allegations of bullying and harassment under s26 Equality Act 2010**

393. As indicated at paragraph 16 above, the tribunal reviewed the allegations of discriminatory treatment and reached its findings as to the extent of the alleged discriminatory treatment to be determined by the tribunal. In reaching

its findings the tribunal noted that the respondent's right to a fair hearing is prejudiced if it is not, in advance of the final hearing date, fully aware of each and every allegation so that it knows the case it has to meet and decide what evidence to adduce and, in particular, which witnesses to call. In submissions the claimant seeks to rely on the following additional allegations of bullying and harassment, which were not identified prior to the final hearing, were not identified at the two preliminary hearings:

393.1. The so-called bullying meeting with K McGuiness and L Mortimer;

393.2. Discriminatory comments by Vicky Taylor;

393.3. Sue Howard telling the claimant "I can't carry you";

394. It is not in the interest of justice to allow the claimant to pursue these new allegations against K McGuiness, L Mortimer and Vicky Taylor. None of those alleged harassers have been called to give evidence. The respondent's right to a fair hearing is prejudiced by the failure of the claimant to identify these allegations prior to the hearing.

395. The respondent was aware, prior to the hearing, that allegations had been made about the conduct of Susan Howard, who did give evidence to the tribunal and was questioned about the alleged derogatory remarks, including this new allegation - that she had told the claimant "I can't carry you." This new allegation was contained in the claimant's witness statement, served upon the respondent in advance of the hearing. It is therefore in the interest of justice to determine this matter. The respondent's right to a fair hearing is not prejudiced.

396. On 5 January 2016 Susan Howard did tell the claimant that she could not afford to carry him (see paragraph 125 above). This remark related to the claimant's disability. There had been a discussion about the adjustments made for the claimant relating to his disability and the claimant was making it clear that he was still struggling. This was unwanted conduct. The claimant was genuinely upset by this remark.

397. The tribunal finds that the remark was not made by Susan Howard with the intent or purpose of offending the claimant, of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The tribunal does not accept the claimant's assertion that Susan Howard was shouting at the claimant. It is clear that Susan Howard was worried about the impact of the claimant's fitness to work on the running of the ward, particularly if he left in the middle of a shift if he could not cope.

398. The tribunal accepts that the claimant was genuinely upset by Susan Howard's comment. It did have the effect of violating the claimant's dignity, or

creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

399. Having considered all the circumstances the tribunal finds that it was reasonable for the conduct to have the effect. It is offensive for a manager to tell a disabled employee that they are being “carried”.

400. The next question is whether this claim of harassment was presented in time.

401. Time began to run on 5 January 2016, when the comment was made.

402. This would be the second discriminatory act relating to the claimant’s disability. The tribunal has made its findings in relation to the failure to make reasonable adjustments (see paragraph 379 above). The tribunal is satisfied that these two acts, or failures to act, amount to a continuing act of discrimination. Therefore, for both claims, in the alternative, time began to run on 5 January 2016

403. The claim was presented out of time, more than 3 months after the last act in the series.

404. The tribunal has considered whether it is just and equitable to extend time.

405. The tribunal has considered all the circumstances again, as set out at paragraphs 379 above. The addition of a new claim does affect the circumstances. In particular, it is noted:

405.1. the length of and reasons for the delay. The tribunal has considered all the circumstances including the following: -

405.1.1. The three month time limit expired on 4 April 2016. No extension of time is available by operation of the Early Conciliation procedure.

405.1.2. The claim was presented on 21 March 2017. The complaint was therefore presented nearly 1 year out of time. The reason for the delay is not clear. The tribunal refers to and adopts the reasoning set out at paragraph 379 above. It is noted, in particular, that the claimant did involve his trade union representative in his complaint very quickly after this final act in the series, the exchange with Susan Howard (see page 316 and paragraph 128 above). The claimant has an immediate opportunity to pursue his claim at that point. He chose not to do so. The claimant has failed to provide a satisfactory explanation for the delay;

406. The tribunal has considered all the circumstances, and the slight variation in the length of delay in commencing the claim, and adopts the same reasoning as set out at paragraph 379 above. In all the circumstances it is not just and equitable to extend time.

407. The complaints of harassment, in relation to the incident on 5 January 2016, and the complaint of continuing discriminatory acts and/or omissions ending with that incident of harassment on 5 January 2016, were presented out of time, are therefore unsuccessful and are hereby dismissed.

Employment Judge Porter

Date: 10 December 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

13 December 2018

FOR THE TRIBUNAL OFFICE