



EMPLOYMENT TRIBUNALS

Claimant Mr J Kemp

Respondent: Apple Retail UK Limited

HELD AT: Leeds

ON: 1 to 3 October 2018
12 November 2018
(reserved decision in chambers)

BEFORE: Employment Judge Cox

MEMBERS: Miss Y Fisher
Mrs J Rathbone

REPRESENTATION:

Claimant: In person

Respondent: Mr McHugh, counsel

RESERVED JUDGMENT

These claims fail and are dismissed.

REASONS

1. Mr Kemp presented a claim to the Tribunal on 8 January 2018 alleging various acts of disability discrimination by his then employer, Apple Retail UK Ltd (referred to in these reasons as “the Company”).
2. The Company sells mobile communication and media devices, personal computers and portable digital music players. Mr Kemp worked at its Leeds store from 25 February 2017 until 27 January 2018 as a Technical Specialist, providing

technical support to customers who had problems with or questions about their Apple devices or services.

3. At a Preliminary Hearing for case management on 5 March 2018 the Tribunal clarified Mr Kemp's allegations with him and gave him leave to amend his claim to add further claims under the Equality Act 2010 (EqA) and a complaint of unfair constructive dismissal, he having by then resigned.
4. At a public Preliminary Hearing held on 9 May and 19 and 20 July 2018 the Tribunal dismissed Mr Kemp's claim of unfair dismissal, having concluded that he did not have the necessary two years' qualifying service to bring that claim. The Tribunal also decided that Mr Kemp met the definition of a disabled person in section 6 of the Equality Act 2010 (EqA) at the relevant time because of a mental impairment. This was diagnosed in September 2017 as "reaction to severe stress and adjustment disorders, mixed anxiety and depressive reaction".
5. During the course of the main Hearing, Mr Kemp further clarified his allegations in dialogue with the Employment Judge. The allegations were amended in minor respects and the Judge produced a final version of the allegations which was agreed as an accurate record by both parties.
6. At the Hearing, the Tribunal heard oral evidence from Mr Kemp. On behalf of the Company, the Tribunal heard oral evidence from Mr Jaime Lunn, Mr Kemp's line manager at the relevant time; Mr Adrian Robson, the store manager at the Leeds store; and Mr Sean McManus, manager of the Genius Bar (the after-sales technical support area of the store), who was involved in the recruitment for Genius Administrator and Technical Expert roles in the store for which Mr Kemp applied.
7. On the basis of that evidence and the documents to which the witnesses referred it, the Tribunal made the following findings on Mr Kemp's allegations.

Allegations 1 to 4

8. Mr Kemp's first four allegations were that the Company had failed to meet its duty to make reasonable adjustments for him as a disabled person.
9. If an employer has a practice that puts a disabled employee at a particular disadvantage in comparison with those who are not disabled, it is under a duty to take reasonable steps to avoid the disadvantage (Section 20(3) EqA). The practices that Mr Kemp alleged the Company applied, and the dates at or between which he said those practices put him at a particular disadvantage, were as follows:

Allegation 1: From mid-August to 10 November 2017 the Company's practice was to require employees who needed to report their absence from work to contact the Company themselves, whether by telephone, voicemail or email.

Allegation 2: From 19 September 2017 to 6 October 2017 the Company's practice was to require Technical Specialists to work a 38-hour week.

Allegation 3: From 30 September 2017 onwards, the Company's practice was to require Technical Specialists to carry out duties involving dealing directly with customers who had complaints about or issues with Apple products they had purchased.

Allegation 4: At an investigatory interview on 10 October 2017 and for the purposes of a proposed investigatory interview the Company's practice was to not allow employees to be accompanied.

10. An employer is not under a duty to make adjustments for a disabled employee if it does not know, and cannot reasonably be expected to know that the employee has a disability and is likely to be placed at a disadvantage by the practice at issue (paragraph 20 of Schedule 8 EqA). The Tribunal therefore needed to decide whether the Company knew or could reasonably have been expected to know that Mr Kemp was a disabled person. That turned on what information it had or could reasonably have been expected to have had about Mr Kemp's impairment at the relevant time.
11. In response to questions in cross-examination, Mr Kemp said that in January 2017 he had had a conversation with Mr Clough, a manager at the Leeds store, during which he had said that he had been the subject of an attack in September 2016 when in China. Mr Kemp was not a Company employee at this point, although he had recently worked for the Company on a seasonal contract for a month between 14 November and 10 December 2016. Mr Kemp could not recall exactly what he had said to Mr Clough. The Tribunal was prepared to accept that Mr Kemp mentioned the attack to Mr Clough, but there was insufficient evidence to establish that this conversation gave any information to the Company from which it would know, or from which it could reasonably be expected to know, that Mr Kemp had any form of mental impairment as a result of the attack.
12. Again in response to questions in cross-examination, Mr Kemp said that he had another conversation with Mr Clough in May 2017 explaining why he was late for work. He explained that he was upset because of seeing friends' Facebook postings. Again, he could not recall exactly what he had said. The Tribunal did not accept that this conversation provided any information to the Company from which it would know, or could reasonably be expected to know, that Mr Kemp had any form of mental impairment. In evidence, Mr Kemp himself said that he had recovered quite quickly after his upset in May.

13. On 11 and 12 August 2017 Mr Kemp was off work sick. He did not call the store on 11 August to explain his absence, as he should have done under the Company's absence reporting procedure. On 12 August he called and left a voicemail message saying that he was struggling with his mental health and could not bring himself to speak to the Company. At his return to work interview on 13 August, Mr Kemp told Mr Lunn that he had had a post-traumatic stress disorder (PTSD) diagnosis in November 2016 after an assault in China but he had thought that he was okay until now. (Mr Kemp has never in fact had a PTSD diagnosis.) At this point Mr Lunn arranged for Mr Kemp to be referred to the Company's occupational health advisors, AXA PPP Healthcare, for assessment.
14. Mr Kemp was off work sick again on 14 and 15 August. At his return to work interview with Mr Lunn on 20 August, Mr Kemp said he was still down, was not motivated and that his GP had referred him for specialist assessment. Mr Kemp had a further six days' sick leave in August, which he reported as being due to stress and difficulties sleeping. He had a total of 10 days' sick leave in August. Mr Kemp had 12 days sick leave in September covered by a GP Fit Note citing "stress/anxiety". In October he had 5 days' sick leave which he reported as being due to "stress/anxiety" or panic attacks. In November he had 7 days' sick leave due to what was recorded in his return to work interview notes as "mental health issues". In December he had 21 days' sickness absence, where the reason was either mental health issues, including three days covered by a GP Fit Note citing "low mood/depression", or a surgical procedure and recovery from it. In January 2018 he had 11 days' sickness absence, which were recorded as being due to recovery from surgery and, on the final two days of his employment on 26 and 27 January, were covered by a GP Fit Note citing "stress related problem".
15. On 26 August Mr Kemp sent Mr Lunn an email in which he mentioned that had started taking sertraline, which he said was an antidepressant recommended for PTSD sufferers (although, as noted above, Mr Kemp has never had a PTSD diagnosis). On 10 October Mr Kemp had a telephone consultation with an Occupational Health Advisor for AXA PPP Healthcare. On 14 October Mr Kemp emailed the Company the first page only of a mental health assessment of him that had been carried out by a Mental Health Practitioner at the Lancashire Care NHS Foundation Trust. This gave a diagnosis of "reaction to severe stress, and adjustment disorders. Mixed anxiety and depressive reaction."
16. On 16 October 2017 the Company received a report on Mr Kemp from the AXA PPP advisor who had assessed Mr Kemp's case. Under the heading "Key Medical Information" the report said this:

Mr Kemp has advised that in December 2016 he commenced upon medication to assist with his anxiety following a traumatic incident which happened earlier on a university placement in China. He took this medication for approximately one month as at the time, as he moved from France back to the UK. He advises that he undertook private medical treatment.

Mr Kemp has advised that he experienced further anxiety in April 2017, as there were personal issues ongoing, and he was struggling with his timekeeping, and was late for work on more than one occasion. His attendance was unaffected at this time.

By August 2017 Mr Kemp was experiencing further stress and anxiety. He was very emotional with a low mood, he had difficulties sleeping, his concentration and motivation was also affected. He did attend his General Practitioner (GP) who has commenced him upon medication which he has been taking for a number of weeks, he has noticed an improvement in his symptoms overall, but he is still experiencing some difficulty sleeping and he feels lethargy and fatigue during the day. He has been referred to the mental health team and an appointment has been planned for 16th October. It is likely that psychological therapy will be forth coming and also a formal diagnosis.

17. Under the heading "Relevant Legislation" the report stated:

From a legal perspective, only an Employment Tribunal or a higher court can reach a conclusion on whether an individual is covered by disability provisions of the Equality Act (EA) 2010. Therefore, as clinicians, we cannot provide definitive advice on this matter. However, below is the relevant criteria which is followed when the decision is being made, along with my professional opinion on whether the underlying stress and anxiety described above would fulfil that criteria:

Is there a substantial physical or mental impairment of the ability to undertake daily activities?

No as this is not significantly affecting his daily activities.

Is the impairment "long-term" i.e. has it lasted, or is it expected to last 12 months?

N/A

18. The report went on to say that Mr Kemp was fit for work in a limited capacity for the next three weeks to help him rebuild his stamina on his return to work. He would be fit to attend any workplace meetings if required and he would be fit to resume his full working hours within four weeks of his return.

19. Under a heading "Future Capacity for Regular and Efficient Service", the report stated:

Mr Kemp has intermittent symptoms which are likely to flare up until he has benefited fully from appropriate treatment. At this time his absence levels are

likely to be higher than average. However once he has stabilised his absence levels are likely to return to average.

20. The Tribunal considered whether, in the light of all this information, the Company knew or ought reasonably to have been expected to know that Mr Kemp was a disabled person.
21. The Tribunal accepted that an employer is entitled to rely on advice from specialist occupational health advisors, unless there is something so inadequate about that advice that it should reasonably have queried it. In this case, the Tribunal accepted that there were shortcomings in the occupational health report. In particular, in concluding that Mr Kemp's impairment was not significantly affecting his daily activities, the advisor did not make clear whether she had taken into account that the effect of Mr Kemp's condition had to be assessed after discounting any effect antidepressants were having on his symptoms (paragraph 5(1) of Schedule 1 EqA).
22. The Tribunal considered what other information the Company had that might mean it could reasonably have been expected to know that Mr Kemp was disabled. The Company knew from 26 August 2017 that Mr Kemp had a sufficiently significant mental impairment as to have been prescribed with anti-depressant medication. The Company also knew that from August 2017 he was unfit for work on numerous occasions because of anxiety and depression. On that basis, the Tribunal accepted that by the end of September 2017, when Mr Kemp had had 22 days off work due to mental health issues, the Company knew that he had a mental impairment that was having a substantial effect on his day to day activities.
23. There remained the issue, however, of whether and when the Company knew or could reasonably have been expected to have known that the effect of Mr Kemp's impairment was long-term, that is, had lasted 12 months or more or was likely to do so (paragraph 2(1) of Schedule 1 EqA). For these purposes, if an impairment ceases to have a substantial effect, it is treated as continuing to have that effect if the effect is likely to recur (paragraph 2(2) EqA).
24. The earlier Tribunal that decided that Mr Kemp was a disabled person found this the most difficult question it had to answer. It decided that Mr Kemp's disability became long-term when he went to see his GP in August 2017. By that time the effect of his impairment had already recurred and was likely to recur in the future. On that basis, it could well happen that the substantial adverse effects of Mr Kemp's impairment would last twelve months *as from that date*.
25. This Tribunal therefore needed to assess whether there came a point at which the Company had knowledge, or could reasonably have been expected to have had knowledge, that the substantial adverse effects of Mr Kemp's impairment could well last twelve months from August 2017.

26. When deciding that the substantial adverse effects of Mr Kemp's impairment could well last twelve months from August 2017, the earlier Tribunal had the benefit of a substantial amount of significant and relevant information that the Company did not have. This included Mr Kemp's witness statement describing the effects and history of his condition, his GP records, the full text of the GP referral to and five-page report from the Lancashire Care NHS Foundation Trust that led to the first formal diagnosis of his impairment and the report from a French doctor who saw Mr Kemp in January 2017.
27. The information that the Company had was much more limited.
28. On 26 August 2017, Mr Kemp told Mr Lunn in an email that he did not want to talk to the Company about his current symptoms because he found it stressful. Mr Kemp also decided not to share the bulk of the Lancashire Care assessment with the Company, sending it only the first page of the report, which contained the diagnosis. On 19 October he told Mr Clough that he withdrew his permission for the Company to use the occupational health report because AXA would not make a correction to it that he had requested. He said that he was happy for the Company to have contact details for his GP and ongoing updates on any appointments and treatment.
29. The Company knew that Mr Kemp had been the subject of an assault in China in 2016 and had received medical treatment and taken medication for a month to help with anxiety in December of that year, because it had read that in the occupational health report before Mr Kemp withdrew his permission for the Company to use it. The Company did not know that Mr Kemp had returned early from a further university placement in France because of his mental ill-health and had taken time off from his university course for that reason. It knew that Mr Kemp had had an episode of anxiety in April 2017, because the occupational health report said he had, but it did not know that that anxiety was due to any underlying mental health condition, since the report referred only to "personal issues ongoing", nor did the Company know whether that episode in April had had a substantial adverse effect on Mr Kemp's day-to-day activities. Mr Kemp had told the Company that he was upset about his peers' Facebook postings in May 2017, but that had led to him being late for work on a couple of days, not taking any days' sick leave, and he himself admitted in evidence that he recovered quickly from that.
30. The Tribunal concluded that the Company did not have enough information from which it could know, or could reasonably have been expected to know, that the substantial adverse effect of Mr Kemp's mental impairment was likely to last for 12 months or more from August 2017. By September 2017 it knew that he had a mental impairment that was having a substantial adverse effect on him, but the occupational health report it received in October 2017 indicated that, whilst the effects of Mr Kemp's condition were currently liable to flare up, he was likely to

stabilise once he had benefited from appropriate treatment. That gave the Company a reasonable basis for waiting some time to see whether Mr Kemp's condition would stabilise and the substantial adverse effect would end. Mr Kemp's sickness absences in December and January 2017 were due also to a surgical procedure and his recovery from that.

31. When Mr Kemp had a further two days' absence on 26 and 27 January 2018 covered by a GP Fit Note citing only "stress related problem", the Company might reasonably have been expected to obtain an updated occupational health report. Such a report might have given the Company information about whether or not the substantial adverse effects of his impairment were likely to reduce within the next few months. By then, however, Mr Kemp's employment had come to an end, after his notice of resignation on 13 January 2018.
32. As the Tribunal did not accept that the Company knew or could reasonably have been expected to know that Mr Kemp was a disabled person at the relevant time, his four allegations relating to the Company's alleged failure to meet its duty to make reasonable adjustments all failed.

Allegation 5

33. Mr Kemp also alleged that the Company's practice of not allowing employees to be accompanied at investigatory interviews amounted to indirect discrimination.
34. Indirect discrimination arises where an employer applies a practice that puts or would put persons with the disabled employee's disability at a particular disadvantage compared with other people, and puts the employee himself at that disadvantage, unless the employer can show that the practice is a proportionate means of achieving a legitimate aim (Section 19 EqA). It is unlawful to subject an employee to a detriment by indirect discrimination (Section 39(2)(b) EqA). Treatment amounts to a detriment if a reasonable employee would or might take the view that he had been disadvantaged in the circumstances in which he was required to work (Shamoon v Chief Constable of the Royal Ulster Constabulary (2003) ICR 337).
35. The Company accepted that its practice was to not allow employees to be accompanied at investigatory interviews. The Tribunal did not accept, however, on the evidence it heard, that Mr Kemp was in fact put at a disadvantage and/or subjected to a detriment by that practice. Mr Kemp attended an investigatory interview with Mr Lunn on 10 October 2017. It is apparent from the notes of that meeting that Mr Kemp's concern, which he articulated promptly and clearly to Mr Lunn, was that he had not had notice of what the meeting was to be about. Having taken advice from the Company's Human Resources Department, Mr Lunn agreed to adjourn the meeting and reconvene it in 48 hours' time, to enable Mr Kemp to have time to prepare. He went on to clarify that the interview was going to be about Mr Kemp's failure to comply with the Company's absence

reporting procedures on 12 and 13 August, between 2 and 6 September and 3 October. Mr Kemp was able to represent himself and secured an adjournment of the interview. He did not explain in his evidence what disadvantage or detriment he had suffered in that short interview because he was not accompanied.

36. In the event, the meeting was not rescheduled because on 18 October 2017 Mr Kemp lodged a formal grievance. Mr Kemp did not explain in his evidence what disadvantage or detriment he had suffered in relation to not having the right to be accompanied to a meeting that was due to be rescheduled but then was not.

37. On that basis, Mr Kemp's claim of indirect discrimination failed.

Allegation 6

38. On 10 September 2017 Mr Lunn wrote to the Claimant inviting him to attend a disciplinary meeting to respond to allegations of job abandonment. Mr Kemp alleged that this amounted to harassment. It is unlawful for an employer to engage in unwanted conduct related to disability that has the purpose or effect of creating a hostile environment for an employee (Sections 26 and 40 EqA).

39. Mr Kemp was being asked to attend a disciplinary meeting because he had repeatedly failed to keep the Company informed of why he was absent from work. The Tribunal accepted that his failure to keep in touch with the Company arose from his disability, in that he found it difficult to bring himself to contact the Company because of his anxiety. The Tribunal did not, however, accept that Mr Lunn's invitation to Mr Kemp to attend a disciplinary meeting could properly be said to relate to Mr Kemp's disability. Rather, it related to something that arose from Mr Kemp's disability. Mr Lunn was taking a step in the Company's procedure to deal with unauthorised absence. There was no evidence before the Tribunal that Mr Lunn would not have taken this step with any employee who had repeatedly failed to notify the Company why they were absent from work. If this type of management action were to fall within the definition of harassment, then any act that an employer took to manage the sickness absence of a disabled employee whose absence was due to their disability, whether through a disciplinary or absence management process or otherwise, would be likely to amount to harassment. The Tribunal did not accept that this was the intention of the legislation.

40. Because the Tribunal did not accept that the invitation to a disciplinary meeting related to Mr Kemp's disability, this claim failed.

Allegation 7

41. In January 2018 Mr Robson recorded Mr Kemp as "out of store" on the computerised system that the Company uses to allocate staff to duties within the store. The Company uses the "out of store" designation when an employee is

due to be at work but is not being allocated to particular duties in the store on that day. Mr Kemp alleged that this was unfavourable treatment because of something arising in consequence of the Kemp's disability, that is, his sickness absence. That form of treatment, if it amounts to a detriment, is potentially unlawful under Sections 15 and 39(2)(b) EqA.

42. Mr Robson did schedule Mr Kemp as "out of store" on the day in question. The Tribunal accepted his evidence, which was clear and credible, that the reason he did so was because, in the light of Mr Kemp's unreliable attendance record, he was not confident that Mr Kemp would turn up to work on that day. The Tribunal accepted that that was something that arose in consequence of Mr Kemp's disability.
43. This kind of treatment is not, however, unlawful if the employer can show that it did not know, and could not reasonably have been expected to know, that the employee was disabled (Section 15(2) EqA). As already noted above, the Tribunal was not satisfied that the Company knew or could reasonably have been expected to know that Mr Kemp was disabled. This part of his claim therefore failed on that basis.
44. Furthermore, this kind of treatment is not unlawful if the employer can show that the treatment is a "proportionate means of achieving a legitimate aim" (Section 15(1)(b) EqA). The Tribunal accepted Mr Robson's evidence that his aims in not allocating Mr Kemp to a particular duty on the day in question were: to make sure there would be adequate staffing in the store to meet the expectations of the store's customers; to protect Mr Kemp from being put under undue pressure if he turned up for work in a state where he was not fit to undertake duties involving the pressures of dealing with customers; and to ensure that other staff did not have to cover the duties Mr Kemp would otherwise be allocated if he did not turn up for work. The Tribunal accepted that these were all legitimate aims and that Mr Robson's decision was an entirely proportionate means of achieving them. This allegation therefore failed on that basis also.

Allegation 8

45. Mr Kemp alleged that Mr Lunn's invitation to him on 10 October 2017 to attend the investigation meeting amounted to victimising him for doing a protected act. Under Sections 27 and 39(2)(d) EqA it is unlawful for an employer to subject an employee to a detriment because they have, amongst other things, alleged that the employer or any other person has contravened the EqA.
46. Mr Kemp alleged that an email he sent Mr Lunn on 11 September 2017 contained a protected act. The relevant parts of the email read as follows, the underlined text being the alleged protected act:

I would also like to note that Apple made no attempt to contact me nor my emergency contact on Saturday 2nd or Sunday 3rd which I believe demonstrates a breach in Apple's duty of care. This is particularly alarming given I had previously advised I had hoped to be work on Saturday 2nd and given the type of absence. I have since contacted the company via an agreed channel (iMessage Wednesday 6th) advising I would not be attending until at least Monday 11th and as noted I had tried to send the required Med3 note prior to Saturday 2nd. I will send evidence as advised to this effect.

My Med3 fit note is now in the post and I believe will arrive with you Tuesday 12th

I acknowledge I have struggled to properly follow reporting procedure and this is less than I would expect of myself. however this is something I made Apple aware could be an issue.

47. Mr Kemp alleged that these last two sentences amounted to an allegation that the Company was breaching its duty to make reasonable adjustments for him as a disabled person. The Tribunal did not accept this. In his email, Mr Kemp was informing Mr Lunn about the difficulty he was having and saying that he had already told the Company this could be an issue. He was not going so far as to allege that the Company was failing to respond to his difficulty by making reasonable adjustments for him.
48. in any event, the Tribunal did not accept that the reason Mr Lunn was inviting Mr Kemp to an investigatory interview was because of the contents of that email. Mr Kemp had not met the Company's absence reporting procedure in relation to some of his days' absence. The Tribunal accepted Mr Lunn's evidence, which was clear and credible on this point, that that was why Mr Kemp had been invited to the investigatory interview.
49. For both these reasons, this allegation failed.

Allegation 9

50. On 14 October 2017 Mr Lunn sent Mr Kemp home two hours before the end of his working day. The Company did not pay him for those hours on the due date. Mr Kemp alleged these were acts of victimisation because of the email he had sent to Mr Lunn on 11 September 2017.
51. As noted above, the Tribunal did not accept that Mr Kemp's email amounted to a protected act. This allegation failed on that basis.
52. In any event, the Tribunal accepted Mr Lunn's evidence, which was clear and credible on this point, that the reason he sent Mr Kemp home on that day was because Mr Kemp said he did not feel up to doing the job that he had been

scheduled to do, not because of any email Mr Kemp had sent him. Mr Lunn did not want to offer Mr Kemp other duties on that day as an alternative to being sent home because he did not want to set a precedent that an individual who said they were not fit to do their normal work would be given another job to do.

53. The Tribunal heard no evidence on why Mr Kemp was not paid on time for the two hours when he was sent home. Because it found that there had been no protected act by this date, the Tribunal did not need to decide whether the reason for the late payment of Mr Kemp for those hours was a protected act or some other reason. Had the Tribunal needed to make a finding on the reason for the delay in payment, it would have decided that the most likely explanation was that, as Mr Kemp was responsible for recording the reason why he was not in work for those two hours and he himself did not believe that the reason for his absence was illness, the Company's systems did not initially record those two hours as sick leave.

Allegation 10

54. On 18 October 2017 Mr Kemp presented a grievance to the Company alleging that he had been discriminated against because of his disability. That clearly was a protected act.
55. By an email of 4 January 2018 Mr Robson told Mr Kemp that he proposed to resume the investigation into Mr Kemp's time and attendance reporting of sickness absences (which had been suspended whilst Mr Kemp's grievance was investigated) once the grievance process was complete. Mr Kemp alleged that this was an act of victimisation, done because of his grievance.
56. The Tribunal accepted Mr Robson's evidence, which was clear and credible, that he informed Mr Kemp that the investigation now needed to be resumed was because it was necessary to establish the facts and make the position on absence reporting clear. There was simply no evidence before the Tribunal to indicate that the reason Mr Robson was acting as he did was because Mr Kemp had presented his grievance.

Allegations 11 and 12

57. Mr Kemp's final two allegations were also of victimisation, that is, that he had been subjected to a detriment because he had presented his grievance. Allegation 11 related to the Company's decision in January 2018 not to appoint Mr Kemp to the post of "Genius Administrator". Mr McManus and Mr Clough were the managers who conducted this recruitment exercise. Allegation 12 related to the Company's decision in January 2018 not to appoint Mr Kemp to either of the two posts of Technical Expert. Mr Lunn and Mr McManus were the managers responsible for this recruitment exercise.

58. From the notes made by the interviewing managers and Mr McManus's evidence, the Tribunal found that the assessment of candidates for these recruitment exercises was based on interviews. The Tribunal accepted Mr McManus's evidence, which was clear and credible, that, although they had not given the candidates scores, all three managers involved in the two exercises had agreed on their assessment of the relative strengths of the candidates. There were no points of contention between them or debate: the successful candidates were clearly the strongest in the field. Mr McManus himself did not even know that Mr Kemp had lodged a grievance. The other two managers were aware of that fact, but all three managers concurred in their reasoning and they did not discuss anything other than the candidates' performance in their interviews. They all concluded that Mr Kemp was not the strongest candidate for the roles and in his evidence Mr McManus explained the reasons why. The Tribunal accepted that evidence as clear and credible.
59. Mr Kemp provided no evidence to the Tribunal that would have supported an inference that the managers' decisions were based on the fact that he had lodged a grievance. He clearly believed that he was the best candidate for these posts, but that view was not shared by the recruiting managers. The Tribunal also accepted Mr McManus's evidence that most of the interviews for the posts were held in October and November 2017. The Company could not interview Mr Kemp at that time because of his absences from work. It therefore kept the recruitment process open until January 2018 so that he could be interviewed then. The Company considered that it was unlikely that the Company would have taken that step to accommodate Mr Kemp had it intended to subject him to a detriment for presenting his grievance.
60. These allegations therefore also failed.

Employment Judge Cox
Date: 27 November 2018