EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Gordon Flemming	**v**	East of England Ambulance Services NHS Trust

Heard at: Norwich **On:** 20, 21, 26, 27, 28, 29, 30 November 2018
In Chambers: 3, 4 December 2018

Before: Employment Judge Cassel

Members: Mr C Davie and Mrs L Gaywood.

Appearances
For the Claimant: In person.
For the Respondent: Mr S Brittenden, Counsel.

RESERVED JUDGMENT

1. The claimant's claim that he was unfairly dismissed is well founded.

2. The claim of discrimination arising from disability under the Equality Act 2010, is well founded. The other claims under the Equality Act 2010 are not well founded and are dismissed.

3. A remedy hearing has been set down at Norwich Employment Tribunal sitting at Norwich Magistrates Court on 4 February 2019.

RESERVED REASONS

1. The claimant, Mr Gordon Flemming, brings complaints of unlawful discrimination under the Equality Act 2010 and unfair dismissal under the Employment Rights Act 1996. Case management discussions were held and orders made on 23 February 2016, 29 April 2016, 27 July 2016, 23 May 2018 and 17 August 2018.

2. On 6 November 2017, the employment appeal tribunal determined the admissibility of a transcript of the recording of conversation involving internal panel members during breaks in a disciplinary hearing which took place on 13 August 2015. As was explained in tribunal, as we understood that some of the conversation was found to be legally privileged and was referred to on the tribunal files, the tribunal files remained unopened by us to avoid any possibility of us seeing or reading reference to the inadmissible evidence. We relied entirely on the parties to assist us in these proceedings. Reference was made by us to those case management orders and other documents that were contained within the three bundles of documents which extended to over 2,200 pages.

3. It was admitted by the respondent that the claimant has a mental impairment, namely mixed anxiety depression disorder from 22 April 2015 on which date he was asked to attend an Occupational Health appointment, and at all relevant times thereafter and was and is a disabled person within the definition of section 6 of the Equality Act 2010. A report was prepared by Doctor Ashish Pandey at the request of the employment tribunal. He provided a report dated 15 April 2016. At paragraph 11 of that report, and indeed elsewhere, Dr Pandey found that the claimant,

   "continues to experience associated symptoms… on an ongoing basis. This particular episode has adversely affected his self-confidence, self-esteem, ability to socialise, as well as his ability to carry out his normal day to day life chores."

4. At the beginning of these proceedings the judge explained to the claimant, who appeared in person, that we had to consider making reasonable adjustments to the proceedings so that he would not be placed at a substantial disadvantage in the presentation of his claim in comparison with persons who are not disabled.

5. The judge explained at some length to the claimant the provisions of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, at rule 2 entitled, 'The Overriding Objective'. Throughout the proceedings the judge took appropriate steps to ensure that the parties were on an equal footing and, among other things avoided unnecessary formality and sought flexibility in the proceedings. At the end of the hearing the tribunal acknowledged the considerable lengths to which Mr Brittenden had gone, in that while representing the respondent he had assisted the tribunal throughout to give effect to the overriding objective and was supportive of our approach.

The Hearing

6. The parties confirmed their understanding that the hearing was for liability only and that if any, or some, of the claimant's claims succeeded, that there be a further hearing on the issue of liability. Ten days of tribunal time had been allocated to the determination of the claims and it was envisaged, and indeed proved to be appropriate and that one and a half

days was given to reading the written statements and cross-referring them to the exhibits to which reference had been made, approximately five and a half days for evidence to be heard, half a day for submissions and for a day for the tribunal to make findings of fact and deliver this reserved judgment with reasons. The parties agreed that the respondent's witnesses should be called to give evidence first and for the claimant to give evidence thereafter.

The Evidence

7. We heard from the following witnesses, all of whom read from prepared statements:

   Mr Paul Henry, Deputy Director of Operations Support;
   Ms Karen Barry, Head of HR;
   Mr Robert Ashford, Deputy Director for Operations;
   Ms Helen Adams, HR Locality Manager for Bedfordshire and Hertfordshire;
   Mr Sandy Brown, formally Director of Nursing and Clinical Quality;
   The claimant.

8. We were provided with three ring binders of documents comprising over 2,200 pages, supplemental bundle index with additional documentation provided by the claimant. We were also provided with a chronology of key events and a 'cast list' of those employed, or still employed by the respondent.

The Relevant Law

9. Unfair dismissal is provided for under section 98 of the Employment Rights Act 1996, in which we are told that in determining whether the dismissal of an employee is fair or unfair, (it is for the employer to show the reason, or if more than one, the principal reason) for the dismissal and if it relates to the conduct of the employee. Throughout, the respondent has averred that the reason for the claimant's dismissal related to his conduct.

10. Section 98(4) Employment Rights Act 1996. That provision provides as follows:

    (4) [In any other case where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

    (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

11. As was explained to the claimant, the tribunal has to take particular care to assess the evidence that was available to the decision maker, or makers, at the time that the decision was made and it is not for us to substitute our own views. We noted that there was no claim for breach of contract and our findings of fact reflected this.

12. Under section 4 of the Equality Act 2010, there is reference to the protected characteristics. Disability is one of those protected characteristics and under section 6 of the Act, we are told that a person has a disability if he or she has a physical or mental impairment and the impairment has a substantial and long term adverse effect on his or her ability to carry out normal day to day activities. As we have noted above, there is no dispute that at the relevant time the claimant was a disabled person at all relevant times.

13. Direct discrimination is dealt with under section 13 of the Equality Act 2010, and in order to succeed, the claimant has to establish the detrimental action relied on, that is has the claimant been treated less favourably than the respondent would treat others, a comparator, who is actual or hypothetical. On such a comparison of cases there has to be no material difference between the circumstances relating to each case and the tribunal's duty is to find whether the less favourable treatment is because of the protected characteristic.

14. Section 15 of the Equality Act 2010, deals with discrimination arising from disability. A claimant has to establish some unfavourable treatment in particular that the respondent has treated the claimant unfavourably because of something arising in consequence of the claimant's disability. No comparator is required although the respondent may argue a justification defence, namely that the treatment, in this claim the dismissal, was a proportionate means of achieving a legitimate aim in the circumstances.

15. Section 20 of the Equality Act 2010, deals with the duty to make adjustments. It is for the claimant to establish detrimental acts. The respondent discriminates if it fails to comply with its duty to make reasonable adjustments. If the respondent applies a provision criterion or practice, (PCP), that puts a disabled person at a substantial disadvantage in relation to a relevant matter compared to a non-disabled person, the employer is required to take such steps as is reasonable to have to avoid the disadvantage in question.

16. Section 26 of the Equality Act 2010, deals with harassment. We are told in the act that harassment occurs if a person engages in unwanted conduct related to the protected characteristic and the 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.

17. Section 27 of the Equality Act 2010, deals with victimisation. A person victimises another if he or she subjects that person to a detriment because that person does a protected act. A protected act includes bringing proceedings under the Equality Act 2010.

18. Section 136 of the Equality Act 2010, deals with the burden of proof and we are told that if there are facts from which the court could decide, then in the absence of any other explanation, that a person has contravened the provision concerned, the court must hold that the contravention occurred.

The Findings of Fact

19. We make the following findings of fact based on the balance of probabilities having considered those documents to which our attention has been drawn and which are relevant to these proceedings:

    19.1 The claimant commenced employment with the respondent on 1 April 2009 as a motor vehicle technician. He was based in Hellesdon in Norwich. He gave evidence that he had worked his whole life in the motor vehicle industry and was highly qualified and when he applied for the post to which he was appointed he had a history of mild mental illness which the claimant was certain did not impede him carrying out his duties.

    19.2 The respondent is a National Health Service Trust and was created on 1 July 2006 by the merger of three NHS services covering Bedfordshire, Cambridgeshire, Hertfordshire, Norfolk, Suffolk and Essex. The respondent provides emergency care to the communities of the Eastern Region covering approximately 7,500 square miles, as well as transporting patients to routine hospital appointments. The respondent employs approximately 4,000 people across the various sites in the Eastern Region.

    19.3 Until 30 April 2012, the claimant was employed without incident or difficulty. The claimant maintained that he was fully committed to work and was an integral part of the hard working and dedicated team.

    19.4 On 30 April 2012, the claimant found that he had difficulty in locating his line manager, Mr A Meiszner, in order to obtain instructions regarding the allocation of work. There was some kind of altercation. We were not given specific details as to what was said or by whom and make no finding of fact in this regard. However, and this was not in dispute, the claimant became very upset and stressed and experienced chest pains and shortness of breath. He called for help and paramedics that were in the building attended and conveyed him to hospital where he was diagnosed as having suffered a myocardial infarction. He was kept in hospital for three days undergoing tests and treatment and was discharged on

2 May 2012 and prescribed a course of medication. He was signed off work.

19.5 In a letter dated 4 July 2012, a report from Dr Mark Ferris who is a doctor specialising in occupational medicine, the claimant was considered to be well enough to return to work on a phased basis and the recommendation given was,

"I advise that, as well as the gradual increase in day's work a week, during the phased return he starts with the less physically demanding task of his role, gradually increasing as he feels able, with the anticipation that he will be able to do all the necessary tasks by the end of the phased return. I would suggest a further Occupational Health referral if he is not able to resume his full duties by the end of the phased return."

19.6 On 6 August 2012, an internal work mediation was arranged between the claimant and Mr Meiszner. We heard evidence from the claimant that the environment was very hostile, that he was not at all happy with the treatment he received and he became extremely distressed with the symptoms of his heart attack returning. The only witness who gave evidence who was present at the mediation was the claimant whose comment was that he had been given an ultimatum that he would have to shake his accusers hand before he was permitted to return to work. He was again admitted to hospital. The claimant gave evidence that both management and the Human Resources department were informed of his admission but there was no contact by any person working for the respondent and he became upset that no one had contacted him to enquire about his health and well-being. The claimant's perception was that his mental illness started to manifest itself as he could not come to terms with the treatment to which he had been subjected.

19.7 There was a further Occupational Health assessment by Dr Ferris and in a letter dated 13 September 2012, a number of observations were made, including the following,

"Gordon has experienced psychological symptoms since I saw him last and has been started on some treatment for these by his GP. I do not think that he should return to work until he has had the hospital appointment on 10 September and has taken the new treatment for long enough for it to be effective."

He went on to make the following comments,

"I do not consider that a return to his normal role, (following a phased return to full duties) will be detrimental to Gordon's health. It is important to his health that his sickness absence is not substantially prolonged. I am aware that there are issues that still

need to be resolved regarding a mediation meeting; I consider it important for Gordon's health that these are addressed and where possible resolved, as soon as possible."

He added,

"Please note that this advice is based on the information Workplace Health and Well-being have received from your referral and from Gordon Flemming at the appointment. Workplace Health and Well-being provide this information for management purposes and the responsibility for the implementation of this advice rests with management."

19.8 There were a number of policies that were part of the claimant's contract of employment. At pages 228 and subsequent, there was a policy which was entitled, 'Managing Stress and Enhancing Psychological Well-being Policy'. At paragraph 1 of the policy was a statement in which it is claimed at 1.2,

"The trust is committed to maintaining the health and safety of its employees in the work environment. The trust recognises that this duty of care extends to psychological health as well as physical health."

19.9 At paragraph 5, there are general principles and at 5.1.2 is the following,

"To manage stress through both effective leadership and management practices by providing mandatory training for managers and supervisors and by encouraging employees to recognise and to be involved in the management of stresses which affect them."

19.10 At paragraph 6, which is entitled, 'Roles and Responsibilities', the responsibilities of the Chief Executive is to ensure that the general principles of the policies are followed is at 6.1. At 6.2 and 6.3, the responsibilities of managers in the Human Resources department are fully laid out.

19.11 At paragraph 10, which is entitled 'Managing Stress Related Illness' and particularly at 10.5, is the following,

"Good management technique should alert managers to changes in their employees such as personality changes, performance etc. that may indicate that an individual is unable to cope with the work load. However, some people will not display overt signs and managers cannot always predict when someone is stressed. Often the first indication is when an episode of sickness occurs with stress / anxiety or depression on the certificate. Once alerted to a potential issue, managers should discuss this with the employee concerned

and if necessary complete a referral to the EAP for ongoing support. Referral forms can be found on the Trust's intranet."

19.12 On 2 October 2012, the claimant was invited to a meeting to discuss facilitating his return to work and on 12 October 2012, he returned to work on a phased basis. However, on 30 October 2012, the claimant was again signed off as unfit to work with a chest infection, shortness of breath and panic attack. He returned to work on 22 November 2012.

19.13 On 5 December 2012, there was a further incident involving the claimant and Mr Meiszner. We make no findings of fact as to what happened, but from that date the claimant did not return to work. At page 361 was the first of several statements of fitness for work. In that statement was recorded the following,

"Panic disorder, awaiting resolution of aggravation at work",

and advice that he was not fit for work.

19.14 On 1 February 2013, the claimant was invited to attend an informal sickness review meeting with John Hole but was unable to return to work on an agreed phased basis from 5 February 2013. On that date his GP again advised that he was unfit for work and made the following comment,

"Depression after MI due to stressful situation at work."

19.15 There was an investigation into the events of 5 December 2012 and a report was prepared by David Wright, Logistics Manager. We did not hear any evidence as to how that investigation report was compiled but, so far as is relevant to these proceedings, the conclusion reached by Mr Wright was that there was no evidence that Mr Meiszner's conduct had been inappropriate but,

"Gordon, by his own admission is struggling with the legacy of ongoing medical conditions. In the event that Gordon is deemed well enough to return to work, I would recommend mediation run by an external organisation as long as both parties are willing to participate."

19.16 The claimant was never deemed well enough to return to work but significantly, no efforts to run mediation by an external organiser were ever made.

19.17 There was a further Occupational Health report on 14 March 2013 from Dr Ferris. He commented that the claimant had been absent from work again because of depressive symptoms since October 2012 and makes the following comment,

"I do not consider that Mr Flemming's psychological symptoms are likely to improve until he perceives that his concerns regarding work have been addressed and where possible resolved… It is not possible to put a timescale on fitness to return to work as it is dependent on his perception of the resolution of outstanding issues regarding the workplace and his response to psychological therapy… I do not consider that any of Mr Flemming's medical conditions precludes sustained attendance at work in the long term. He will however, remain vulnerable to recurrence of similar psychological symptoms in response to significant stress."

19.18 In a report from Dr Perez Morales dated 4 April 2013, which is addressed 'To whom it may concern', there is reference to his contact with the claimant. We are unclear as to whether, or how, this letter reached the respondent. The doctor commented as follows,

"The difficulties at work that precipitated this attack haven't changed and he is finding it very difficult to remain in his actual place of work… I understand that an external investigator is involved to assess his situation. He tells me that he will be very keen to go back to work, but he would find it very stressful to go back to exactly the same team as he was working with before as he feels that issues within the team precipitated last May's episode."

19.19 On the 24 April 2013, there was a further Occupational Health report from Dr Ferris. Within that letter there is reference to the claimant having started sessions with a counsellor following referral by his GP. He had an arrangement for six appointments to see Dr Matthews and a comment was made that Dr Matthews would like him to complete these sessions before she starts any therapeutic sessions with him. He added,

"I do not consider that there has been a change in his psychological health since his appointment with me on 12 March 2013, so my advice regarding his present and future fitness to work is unchanged."

19.20 There was a letter from Mr John Hole, Head of Fleet, in May 2013 in which the claimant was invited to assist in the arrangements for a meeting with him and his representative to discuss the contents of the investigation report and the recommendations. That meeting never took place. However, on 16 May 2013, the claimant submitted a statement which covered four and a half pages. Attached to the grievance was Appendix A which listed 49 separate and detailed complaints. The evidence is unclear as to how within the grievance statement there is reference to the sickness review meeting which subsequently took place on 15 July. However, for the purposes of these proceedings, the claimant was asked what outcome he was looking for and has written at page 399,

"All I have ever wanted to do is to return to my job once fit enough to do so and considered that I was. My GP supported this, the Trust's Occupational Health physician supported this and a return to work package had been established and therefore, would and should have returned to my role last year had I received the support of my management team / employer… I seek an acknowledgment of and compensation for the appalling lack of regard, welfare and / or support demonstrated by my employer which has meant that a return to work I loved and was so keen to return to is no longer a tenable option due to the detrimental effect of their action, (and inaction), has had upon my physical and psychological health and well-being."

He also sought that he be,

"appropriately redeployed to another position within the Trust"

19.21 On 28 May 2013, the claimant was invited to a sickness review meeting which subsequently took place on 15 July when Mark Wade, Head of Ops Analysis chaired the meeting. In a letter dated 23 July 2013 there was reference to the claimant's advice which was in the following terms,

"You confirmed your GP advice was that your mental health would not improve until you perceived your workplace issues had been resolved… You advise us you do not think you will be able to return to work at the trust. You feel it would be untenable for you to return to work in an environment or to work with people you feel have made you unwell. You advise us that you do not wish to resign. You feel that the trust thinks you are a problem and just wants you to go away. You feel that you have already been dismissed and you were advised that you could not return."

19.22 Within the letter five options were outlined for the future which can be summarised as follows:

a. to resign on the grounds that return to his substantive post is no longer tenable;

b. to return to his role as Vehicle Technician but with adjustments where appropriate;

c. to return to work in an alternative role or in other words to be permanently redeployed, (with adjustments where appropriate), if a suitable role exists;

d. to take ill health retirement;

e. for the termination of his contract on the grounds of capability.

19.23 In a letter dated 8 July 2013, Dr Ferris again reported on the claimant's circumstances and confirmed that,

"His fitness for work is affected by his current psychological and physical symptoms… I am not able to state that this leads him to be permanently unfit to return to his normal role as his physical symptoms are likely to improve once his psychological health is better. I consider that improvement of his psychological symptoms is dependent on resolution of outstanding issues regarding his employment… I do not consider that Mr Flemming will be able to return to work with the trust until he perceives that his concerns regarding his employment have been resolved. I consider that he is fit to attend meetings to discuss practice regarding his employment but with adjustments."

19.24 On 19 July, Mrs Matthews, Consultant Clinical Psychologist, wrote to Dr Ferris. Among other comments, the results of his psychological questionnaire were recorded and a comment made that,

"As can be seen from these results, there is no significant change in Gordon's psychological functioning and his experiences of distress and anxiety were heightened during our discussions when topics relating to his employment were considered… Since I have now completed the six sessions that were funded for Gordon I await your instructions of whether a formal report of Gordon's psychological sessions would be useful."

19.25 In a letter from his union representative, Jackie Robinson, of 3 September through Lorna Taylor, the HR Business Partner, she made the comment,

"Could somebody please arrange for OH to make contact with Dr Matthews and request this report without further delay because without it how can the Trust claim to be taking all relevant information into account when addressing his absence."

Apparently, no such report was ever requested by the respondent.

19.26 A further Occupational Health report was prepared on 10 September 2013 by Irene Barrowman, Occupational Health Adviser. She provides an opinion in the following terms,

"He talked at length why he is off sick and in my opinion until his perceptions and concerns are resolved he will remain unfit for work."

19.27 In an email dated 24 August 2013, the claimant wrote to Mark Wade and commented among other things,

"The fact that the Trust had not even requested a report from the psychologist during a period of time that they are considering the option of dismissal on medical grounds absolutely beggars belief".

19.28 In a referral dated 30 August 2013, Mr Wade did request,

"feedback from Dr Matthews on her findings"

and he confirmed this request to the claimant in an email the following day, (produced at 442a).

19.29 In an email dated third of September 2013, Jackie Robinson both Lorna Taylor and Mark Wade in the following terms *"I have been advised by Gordon this morning that having made some enquiries, neither PAM or our former OH providers have received a request for Dr Matthew's report despite this being the one assessing his psychological well-being and given the nature of Gordon's current health concerns, a crucial item of supporting medical information. Could somebody please arrange for OH to make contact with Dr Matthews and request this report without further delay because without it how can the trust claim to be taking all relevant information into account when addressing his absence. An employment solicitor would have a field day with this I am sure and I am currently awaiting feedback from Unison and/or Thompson respect of Gordon's capability/grievance situation*."

19.30 A further Occupational Health report was provided dated 28 November 2013. This was from Malcolm Smith, Well-being Manager. An earlier report was prepared on 10 September 2013 by Irene Barrowman. A further Occupational Health Report was prepared dated 15 December 2013 from Janet O'Neil. This last report was significant. The following comments were provided,

"Gordon indicates bitterness towards the Trust which he feels will never resolve no matter what intervention is put in place and feels a successful return may not be feasible although he does not want his employment terminated... "

It has become increasingly clear that current clinical descriptions and diagnostic clarifications are inadequate and one widely seen type of pathological reaction can be classified as Post Traumatic Embitterment Disorder, (PTED)… The symptoms of PTED can be chronic, hard to treat and often result in disability in almost all areas of life". The following advice was provided,

"Although no physical barrier is apparent that would prevent a return to work, it is unlikely this will be successful in the near foreseeable future… Unless his perceived stresses are resolved to his total satisfaction a recovery is not possible."

19.31 In relation to the review period the following comment was made,

"It is unlikely that a further Occupational Health review or other clinical intervention will impact upon this case which now appears to be an issue to be resolved by management intervention and negotiation."

19.32 On 20 December 2013, the claimant signed a consent form requesting a full psychiatric report from Dr Matthews.

19.33 The grievance hearing took place on 12 December 2013. It was reconvened on four subsequent occasions. The meeting was chaired by Mr Les Clarke who was the Head of Procurement and present was Karen Barry, HR Manager. Ms Barry gave evidence and it was clear that these meetings were difficult ones. Additional time was needed because of the volume of evidence that was presented by the claimant and as she described it, adjustments were made in view of the claimant's poor health and a need for interventions resulting in the claimant being taken to hospital. During the meetings he raised six further issues. Ms Barry gave further evidence that it was concluded that there had been some shortcomings on the part of the respondent and five of the claimant's complaints were upheld. Although we did not hear from Mr Clarke, we had the opportunity of seeing his outcome letter produced at pages 579 – 592. It is a carefully constructed letter which appears to deal at some length with the grievances raised and the conclusion that we reach is that Mr Clarke undertook a fair and full examination of the grievances raised by the claimant dealing with them in a diligent and well structured manner.

19.34 The claimant submitted an appeal on 10 March 2014.

19.35 On 3 April 2014, there was a further Occupational Health report from Janet O'Neil. She expressed the following opinion,

"It was clear during the consultation today Gordon remains very embittered towards his employer; that the relationship is irretrievably broken down from his perspective and this is a situation which seems unlikely to change."

She offered the following advice,

"To answer your questions. Gordon is unlikely to successfully return to work at present while so embittered towards the Trust and

people within it. I do not think a successful return is possible until such time as any outcome of discussions between himself and his employer are resolved to his satisfaction. Gordon's mental health has not changed significantly, although it is improving."

She referred to the claimant reporting that his cardiac concerns were being treated with medication and appeared to be stable, although still causing him some distress.

19.36 Invitations were made to him to attend a final sickness review meeting and in an email of 4 June 2014 he referred to reasons,

"which are quite clearly documented in the document",

that show why he would not be able to attend the meeting which had been scheduled for 18 June.

19.37 A further Occupational Health review meeting was arranged. On 15 September the claimant confirmed that he would attend but he subsequently did not. In giving evidence, the claimant explained that he had believed that the respondent had broken an agreement to,

"Park the sickness absence process until the outcome of my grievance appeal."

He also added that he believed that he had asked for external mediation which he considered was a way forward. Significantly, we could find no evidence of either party making any efforts to try to resolve matters by external mediation and in our view, it was up to the respondent's Human Resource department actively to consider this recommendation that had been made on previous occasions.

19.38 A final formal review meeting was arranged for 11 December 2014. In an email produced at page 640, the date of which is unclear, the claimant indicated that he was not able to attend the meeting as, in his words,

"So, in answer to the question is there a possibility of my imminent return to my post? Mark already knows the answer to that I can assure you so it is not necessary to make me say it again."

19.39 In an email from the claimant to Sarah Jane Cunningham, HR Business Partner, who is now sadly deceased in tragic circumstances, the claimant made it clear that he was no longer represented by his representative or anyone from UNISON. That in our view was particularly significant. The claimant had very limited support from his wife and looked at reasonably and sensibly, was in particular need of support. We make this comment in view of the email referred to below from Ms Ruth McAll, HR Director.

19.40 The final review meeting took place on 11 December 2014. At page 653 Sarah Jane Cunningham outlined various options which she characterised as redeployment, ill health retirement and dismissal on the grounds of capability due to ill health. As regards the last option, she added in her letter,

"In line with the Trust's Sickness Absence Management policy procedure, it is therefore necessary for us to proceed to a capability hearing. I will arrange this for the new year after your grievance appeal meeting."

19.41 There was correspondence between the respondent and the claimant regarding an Occupational Health appointment that had been made for 29 January 2015. In an email produced to us at page 809, was the view that the claimant had taken, that the person to whom he had been referred was not qualified to assess his mental illness. That email was sent to Richard Kirk, Head of Medical Devices, who responded simply in terms by referring to the respondent's absence management policy citing a requirement for an employee to attend an Occupational Health appointment which are referred to as being a supportive measure for employees. The claimant appeared to vacillate between whether or not he should attend and we accept, that having decided on a further Occupational Health report as being necessary, it was difficult for the respondent to manage this part of the process. Indeed, as we have and do comment in this judgement, it was far from easy to manage the claimant who was still exhibiting clear symptoms of mental illness. The claimant described this deterioration repeatedly to the lack of urgency and care he considered the respondent to exhibit and an apparent unwillingness to deal with what he perceived as being the central issues that faced him. As was clear in subsequent emails which included diagrams which have been described as disturbing and threats of suicide, his mental health was certainly not improving and probably deteriorating. Although we remind ourselves we are not medically qualified to make such an assessment, we simply have regard to the contents of the correspondence from the claimant which we find was very disturbing. In any event, the claimant did not attend the Occupational Health appointment that had been arranged for 29 January.

19.42 The grievance appeal hearing was heard by Ms Liz McKewan, who is, or was, the Head of Non-Emergency Services. We did not hear from Ms McKewan but have had the opportunity of considering the various notes that were taken on 23 January, 19 February and 20 February. We have also seen the outcome letter exhibited at pages 890 – 897. We also heard from Karen Barry as to the conduct of the grievance appeal her role in which was to offer support. The grievance appeal has all the appearance of a fair and

thorough procedure and a well reasoned and structured outcome letter was sent.

19.43 In March 2015 Ms Ruth McAll was appointed as Director of Human Resources. We did not hear evidence from her. Within a few weeks of her appointment on 22 April 2014, John Hole, Head of Fleet, wrote to the claimant in terms that he was to attend an Occupational Health appointment and he added,

"I therefore formally request as a reasonable management instruction, that you attend an appointment with OH."

We did not hear from Mr Hole as to why he had decided to make the request, *"as a reasonable management instruction"*, but the receipt of that letter clearly affected the claimant. He took the view that anything presented by the Occupational Health department would have been used for punitive means, that earlier reports had been ignored, that the respondent was already fully aware of his mental state and illness and that in his words, *"a steam roller continued towards me".*

19.44 We had difficulty understanding why there had been a change in the approach taken by the respondent. We understand the sense of frustration in the management of the claimant but all of the respondent's management and HR advisers were aware that the claimant was mentally ill and had on previous occasions declined to undertake tasks or take steps which the respondent saw as reasonable. The claimant in giving evidence, made it apparent that he had a difficulty in appreciating that absence management came under the umbrella description as a potential dismissal for 'capability'. He maintained in giving evidence that he was capable of undertaking the tasks for which he was employed and that it would have been unfair to dismiss him on those grounds. In giving evidence, although dealing with events that post dated this, *"reasonable management instruction"* Karen Barry stated the following,

"We knew that the claimant was unwell mentally but he was refusing to engage, to COH and to provide fit notes to support his continued absence from work… We knew he was not satisfied with the outcomes… I accept whether we had gone down the capability route or conduct, in my view the outcome would have been the same based on the claimant's behaviour to date."

We refer back to the options that were outlined in Sarah Jane Cunningham's letter of 29 December 2014 when ill health retirement was described as one of the options. We have seen no evidence that at any stage, members of the Human Resource department offered any assistance to the claimant in pursuing this option. In spite of his mental illness, his lack of representation and

support the respondent simply appeared to rely on him as an employee to pursue that option.

19.45 From 3 June 2015, there was a series of correspondence asking the claimant to submit fit notes. In a letter sent by email of 26 May 2017, Ruth McAll, Interim Director of HR wrote in the following terms that he had been absent from work since 6 December 2012 and had not submitted any fit notes since December 2013 which she pointed out was a requirement of his employment. She maintained that the respondent was reliant on Occupational Health to advise on the status of his health and his ability to attend work and that his last appointment had been on 3 April 2014. That letter was followed up by a further letter from John Hole, Head of Fleet, on 3 June 2015 in which he formally requests as a reasonable management instruction that he attended an appointment with OH and that if he failed to do so it could result in him taking formal action and / or stopping his pay.

19.46 The claimant responded in an email dated 13 June to Debbie Bowman who was the Executive PA to Ms Ruth McAll and to Paul Henry, Assistant Director Operations Support, in the following terms,

"I am suffering from a severe and crippling mental illness Mr Henry as everyone knows already, as for the reasons for my continued absence the Barstard (sic) is leaving on 15 July 2015 please do not give me any more ultimatums. Mr Henry as I told Karen at our last meeting I have had enough, are you really interested in what has happened to me Mr Henry, corporate bullying on such a scale that I have contemplated ended it all, does nobody care about that? If you want to stop my pay then that is what you must do, the facts of the matter are that Fleet Management have blocked my return to work, refused to let me come back to my job… I have it documented, I have complained, been through your grievance procedure both of which were so corrupt it beggars belief. I appealed to you for help before and you ignored my request. Now it appears you are to jump on the band wagon and join in… On the level as I see it, I do not have to hand in sick notes if sickness is not my reason for continued absence which it is not, I do not need to attend OH if sickness is not my reason for absence. As I said earlier my condition is chronic I would need to see a proper psychiatrist somebody with a Doctorate… So, Mr Hole and his cronies have failed in their attempt to push me over the edge. I made complaints about Fleet Management and as a result they have made my life hell and my position untenable… I have attended nine Occupational Health appointments, reports have been sent to the Trust management by the Doctor concerned and they have all been ignored, nobody met with me to discuss the reports that is the whole point of going is it not? On the last one in April 2014."

19.47 There was a response from Ruth McAll on 14 June 2015. This was quite a remarkable email from the Director of HR who is responsible for the direction of Human Resources and a key figure in determining the culture of the organisation. We repeat the contents of the email in full as follows,

"Dear Gordon,

I appreciate you may have mental health problems, but this letter is not acceptable. In future do not write to anyone else in the Trust except me. If you continue to write such letters we will refer them to our solicitors.

Ruth"

19.48 Thereafter, there was email correspondence between the claimant and Mr Paul Henry. The thrust of the correspondence was to have the claimant attend a meeting on 6 July. The email comprises 16 separate paragraphs and the claimant reiterated many of the issues that he has raised in the past. Among those matters is the following comment,

"Following 8 months of being forgotten about and no meeting arranged following the last referral out of the blue a final review meeting is arranged for December 11th, this followed the cancellation of my grievance appeal hearing which it had been agreed with Mr Wade would be put back until my appeal had been heard as the two processes are intrinsically linked."

Pausing there, in evidence the claimant conceded that there was no written confirmation, or indeed reference by the respondent to the delay in the process but that was apparently his perception. He concluded at paragraph 16,

"On reflection after reading your email I do not consider you are in the least bit interested in taking an objective view regarding all of this and would like to take the option of a disciplinary hearing rather than meeting with you."

The claimant did not attend the meeting arranged. We have seen some and we have heard reference to a large number of emails sent by the claimant to various individuals within the respondent and accept that if anything it was becoming increasingly difficult to manage the claimant in any process. His emails, or some of those that we have seen, are particularly distressing. At page 1017 for example, there is a disturbing diagram which appears to show a demon like figure on his back. It is headed in capital letters,

"WANT TO KNOW HOW IT FEELS, I FIGHT THIS DEMON EVERY DAY, 1159 DAYS SINCE THAT HEART ATTACK AND MY GOD HAVE I BEEN PUNISHED FOR IT. YOU FIGHT OFF ONE DEMON THERE IS ALWAYS ONE TO TAKE ITS PLACE AT THE TRUST."

We make two comments. It must have been particularly distressing to be one of the four named recipients at the respondent of such an email. Paul Henry described it as a very disturbing email and Karen Barry recalled it as being,

"A particularly distressing email… The email was very distressing to receive."

However, she went on to state that,

"The claimant needed help and support and given his stance about refusing to meet with OH it was difficult to see what we could do to progress the matter."

19.49 Any doubts about how to resolve matters appear to have been resolved by 14 July 2015 when Mr Ashford wrote to the claimant in terms that he was to attend a formal disciplinary hearing on Thursday 13 August under the Trust's disciplinary policy. The allegations that he faced were that his conduct by refusing to follow a reasonable management instruction to attend meetings arranged with Occupational Health and Paul Henry rendered it impracticable to continue his employment,

"The purpose of the disciplinary hearing is to consider whether the above allegations amount to gross misconduct… and if you are found guilty of gross misconduct you may be dismissed without notice."

19.50 The disciplinary hearing was arranged for 13 August 2015, it was chaired by Mr Rob Ashford. The management report was exhibited at pages 1060 onwards. It was sent to the claimant by Mr Henry in an email of 30 July 2015. The management statement of case dealt chronologically with the background to the hearing and dealt with each stage of the grievance procedure that had been followed and at paragraph 3 of that report conclusions were reached. At 3.3 of the conclusions is the following comment,

"GF has not provided a satisfactory explanation for refusing to obey a reasonable management instruction requiring him to attend an appointment with OH on 10 June 2010 for the meeting on 6 July 2015.

3.4 GF's conduct, by refusing to attend an appointment with OH and a meeting to establish the reasons for his continued

absence from work, (in the absence of CAP Fit, CAP Notes), and what can be done to assist his return back to work, renders it impracticable to continue his employment."

19.51 As part of the management case there were a number of appendices which outlined the correspondence and emails and other documentation that led up to the disciplinary hearing.

19.52 There was a note of a disciplinary hearing produced at pages 1266 onwards. We heard extensive evidence from Mr Ashford who produced a statement which extended over 17 pages and he was closely questioned by the claimant when he gave evidence. We paid particular regard to his evidence as in our judgment the disciplinary hearing is critical in this appeal. The notes of the disciplinary hearing were the ones on which the respondent initially relied. However, unbeknownst to the respondent, the claimant left his mobile phone in the hearing room which recorded conversations during adjournments and deliberations. The contents of this recording have been the subject of proceedings before the Employment Appeal Tribunal and we relied entirely on the parties to advise us as to those parts of the conversation that are admissible in evidence and in an excess of caution declined to open the tribunal files in which the litigation was detailed so as not to read parts of the conversation that had been deemed inadmissible. The note at page 1267 recorded the claimant as making the following comment,

"At this moment in time I suffer from severe mental disability and Trust policy states that they will not discriminate against someone with disability and have been discriminated against."

We should add, at this stage the claimant's wife, Mrs Karen Flemming attended as his personal representative.

19.53 Mr Henry presented the management case and the presentation is shown as ending at 11:27 hours with the following comment, *"for the panel to take further advice",* and reconvened at 12:03 hours.

19.54 The notes of the adjournment based on the covert recording made by the claimant make for interesting reading. They are exhibited at pages 1969 onwards. We know that prior to that discussion that the claimant, his wife, Mr Henry and Miss Barry who provided HR support to management, left the room. Remaining in the room were Mr Ashford who chaired the meeting and Helen Adams who provided HR support to him. The notes, which we understand were agreed as being a fair reflection of what was said cover three pages and start with Mr Ashford stating,

"We'll just continue to try and get through Paul's bit, let him do his bit and then give Paul the opportunity to adjourn to take into consideration because he's just all over the place isn't he".

Helen Adams responded,

"He can't sit still and listen that's the problem, he cannot".

Mr Ashford stated,

"No someone with surprising lack of insight."

Miss Adams responded,

"He just seemed really ill, or was that a ploy?"

19.55 There was then a comment as follows,

'HA / RA they both have a good laugh at Gordon's expense'

Mr Ashford then stated,

"Stepping around the process as long as we give him time to digest what we said."

Miss Adams then commented,

"This isn't about his sickness, this is about his failure to comply."

With some insight, Mr Ashford then commented,

"It does overlap though doesn't it because if his failure to comply is a result of his sickness."

That to us seems exactly the nub of what Mr Ashford was required to consider during the disciplinary hearing.

19.56 Miss Adams then commented,

"It doesn't feel comfortable why he hasn't been dismissed under capability because surely if his manager had turned up he would hold those meetings in his absence and you'd go through capability".

Mr Ashford responded,

"This was my view when I read it."

Miss Adams responded,

"Yes, I still think it should have been kept under sickness management."

To which Mr Ashford stated,

"I agree."

Miss Adams then made the following comment,

"But they are doing it under failure to comply with a management instruction."

To which Mr Ashford responded,

"But if his failure to comply is a result of his ill health,"

Miss Adams then said,

"Yes, I am with you."

Mr Ashford responded,

"That's the bit I am struggling with, it doesn't add up."

Miss Adams then commented,

"But should we just move the sickness absence process forward?"

19.57 There was then discussion of the claimant's Post Traumatic Embitterment Disorder. Miss Adams then appeared to quote from a report, dated 15 December 2013 in which Janet O'Neill described the disorder from which the claimant has been assessed as having. Mr Ashford made the following comment,

"This needs to be capability."

At this point, the note taker, Ms Andrea Johnson, the Senior Personal Assistant, was recorded as making the following comment,

"Have you got a box of tissues in here?"

To which Mr Ashford responded,

"No, just those, who's upset?"

Ms Johnson added the following comment,

"Both of them."

19.58 Mr Ashford added,

"And the fact that we have stripped him rather than explore the two points in the disability he's been disciplined and it's making it worse."

Miss Adams agreed and then Mr Ashford was recorded as saying,

"We are in a no win here."

To which Miss Adams stated the following,

"Yes, it feels really uncomfortable."

Mr Ashford added,

"Yes, because if we stick to those two points he doesn't get his opportunity to speak, given his display today we are on a very, very sticky wicket."

Miss Adams then commented,

"Can you imagine an ET?"

To which Mr Ashford responded,

"Oh don't. So, what's our options?"

Miss Adams advised as follows,

"We don't dismiss, final written warning, tell him he is to comply with meetings which is on and then I still think we should manage him under sickness."

Mr Ashford then responded,

"Well we know he is non-compliant with the attendance at the meetings he is going to be too, so, with his ill health that goes straight back into…"

Miss Adams then added,

"Capability."

19.59 The disciplinary hearing proceeded and those parties that were absent returned. The meeting was then adjourned at 12:20 hours and the note relied on by the respondent is as follows,

'For the panel to take further advise and reconvened at 13:36 hours.'

19.60 The covert recording led to a transcription which is produced at pages 1990 – 1999. The transcription relating to much of the dialogue has been redacted and again, in tribunal, we were careful not to ask questions nor seek evidence, as to the parts that were redacted. The note showed the following however, and the first comment recorded is one from Mr Ashford in the following terms,

"This needs to go down the capability route, disciplinary is not a bloody option, this is farcical."

Mr Ashford left the room to take advice and the note taker, Andrea Johnson, made the following comment,

"We are going around in circles; the notes are shite."

Mr Ashford then returned some time later. There was comment about the manner in which the claimant was conducting himself and Miss Adams commented,

"He's just so rude."

Mr Ashford responded,

"I'm holding my temper most of the time."

Miss Adams added,

"I'll let you carry on, I'm doing it but I don't want to come across too [sick] he has already accused us of being aggressive and that HR are sitting here and letting you follow incorrect policies because when you went out of the room I had a barrage of him talking to his 'Mrs' saying two frigging HR personnel in here and a manager and not following correct procedure."

There are other various comments and Mr Ashford then stated,

"Agreeing with when I read it last night, I thought why have we not gone down capability route because actually… "

Miss Adams then stated,

"and I don't know what my argument is in defence to that because I am actually sitting here thinking I agree with you because actually we have already held the final review meeting already in his absence and made a decision based on… Or have they got to a final review yet?"

The options apparently in Mr Ashford's mind were incapsulated at the top of page 1993 in the following terms,

*"Er, no because that is the purpose of the Occupational Health, isn't it? Do we need to run that past Surbhi, (the Legal Adviser)? Or should we just f**** get on with it?"*

19.61 Advice was then taken and Miss Adams responded,

"See he's quite clever in that sense, he's playing the system, the reason why he wouldn't attend the final review."

Mr Ashford then commented,

"The trouble is when you look at ETs you know how bloody wishy washy they are. A recent one was bloody overturned, I was bloody gobsmacked."

There was then further discussion and Miss Adams asked the following question,

"Did you want to speak to Ruth?"

By Ruth we understand that to mean the Director of Human Resources, Ruth McAll.

Mr Ashford responded,

"Well if she wants to make any other different decision she can get her arse down here and do it."

Miss Adams stated,

"I'm happy to speak with her about the decision but I was just saying did you want to speak to her?"

Mr Ashford responded,

"No, you can do it if you like I'm not fussed, I'm not going to change my frigging mind if she don't like it she can come and chair it."

Miss Johnson made a comment subsequently,

"He just doesn't make sense does he just rambling?"

Mr Ashford commented,

"He's not going to be able to represent himself appropriately is he?"

Miss Adams then left the room and returned commenting to Mr Ashford,

"You might just need to empathise a bit."

Mr Ashford responded,

"Yes, all right."

There was then discussion about not wanting to agitate him and Mr Ashford made the following comment,

"I mean getting up and pummelling it into him with my fists is probably not appropriate in terms of policy, is it?"

19.62 There was then discussion about continuing on the course of a reasonable management instruction, to which Miss Adams made the comment,

"It's shitty."

And Mr Ashford as follows,

"I am really disappointed it has to go down this route, it doesn't fit."

Towards the end of the adjournment, Mr Ashford made the following comment,

"No, it's got to be ill health, dismissal on capability."

The meeting then resumed when Mr Ashford announced that he had made the decision to adjourn to get further advice from Occupational Health. The agreement was that the claimant would attend an Occupational Health meeting and discuss matters further. Significantly before the meeting was adjourned, the claimant referred to a need for the respondent to look again at their disability policy.

19.63 The claimant was subsequently able to listen to the recording and a transcription was made. In evidence, he referred to paragraph 43 of his statement which is in the following terms,

"The transcript of the audio evidence is damning when I heard it, it was absolutely clear what was going on, it had a catastrophic effect on my mental health, the writing was on the wall, a decision had been made before I even turned up. I made my employer and in particular Mr Ashford aware of the fact I had witnessed what had been said and requested that the proceedings should be suspended while an investigation took place in point 6.1 of the policy but my employer took no notice and the bullying, victimisation and discrimination continued unbridled."

19.64 It is unclear from the correspondence from the claimant to the respondent as to whether or not he clearly indicated that he had made a covert recording of private discussions. There was reference in his email of 26 August 2015 to,

"I think Rob pummelling me in the face with his fist is not quite appropriate, although easier to take than what I have been subjected to in the past and perhaps less cowardly than those who hide behind their positions and the ladies in the HR department."

That was reference to part of the covert recording and we note that the email was sent to a number of the respondent's staff including Mr Ashford. We accept that Mr Ashford did not know the full extent of the claimant's knowledge of the private discussions and that the series of emails that he sent were long and rambling and it was easy to overlook some of the salient matters that now have been highlighted in evidence. In cross examination Mr Ashford did however state that he had become aware that the claimant had covertly recorded private conversations although it was not entirely clear when that knowledge was acquired. Mr Ashford gave evidence in the following terms,

"I received numerous emails alluding to recordings, some referred to words used but I don't recall receiving full recording or transcript prior to the reconvened hearing."

19.65 In any event the claimant did not attend a further meeting with Occupational Health, nor with Mr Henry. The claimant did advise Mr Henry that he had been seen by Hellesdon Hospital Mental Health services and we accept that Mr Henry did seek the consent of the claimant and Occupational Health to contact Hellesdon Mental Health Services but the claimant refused giving reasons in an email of 8 September which is produced at page 1303. The claimant was of the opinion that,

"There is no requirement for me to meet with Occupational Health for what is a mental disability at 7.3 of the disability policy, perhaps Karen could advise you on that one and the huge amount of points you are in violation of regarding bringing me to a disciplinary hearing in the first place."

Later on in the email he added,

"No, I do not give you consent to see my private mental health records. If it is my health you are concerned about I can tell you it is getting a good deal worse as a direct result of your continued harassment and bullying."

19.66 In evidence the claimant stated that there had never been a respondent management meeting following an Occupational Health

report. He also stated that at no stage had he received any assistance from the respondent management to help him consider the ill health retirement option that had been, 'floated' in earlier correspondence.

19.67 In any event, the disciplinary hearing was reconvened on the 16 November 2015. On 11 November the claimant sent an email to Mr Ashford, copied to Miss Adams, making it clear that he would not attend the meeting and referring to what he considered to be, *"very valid reason"* for not attending the two meetings that had been arranged.

19.68 Mr Henry gave evidence that there were a series of detailed and lengthy emails to him from the claimant and we accept his evidence that he was doing his best to try to encourage the claimant to attend the meetings. In paragraph 76 of his statement, he recognised that an Occupational Health report was necessary to determine what adjustments should be made, if any, to ensure that the claimant returned to work and expressing frustration that the claimant was in his words, *"not engaging with us to progress matters".*

He commented that,

"If Occupational Health said he was too unwell then I hope that would unlock ill health retirement for the claimant."

However, as the claimant pointed out in evidence, no one from the respondent's management had in any way assisted him in the progression of the ill health retirement option.

19.69 We accept the claimant's evidence that the covert recording had impacted dramatically on the claimant's ill health and given the circumstances and the large number of the complex and in some cases disturbing, emails to the respondent that his mental health had deteriorated.

19.70 The adjourned disciplinary hearing took place on 16 November 2015. It was again chaired by Rob Ashford with Paul Henry presenting the management case, Helen Adams giving HR support to Mr Ashford and Karen Barry giving HR support to management. Andrea Johnson again attended as the note taker. It was common ground that the claimant did not attend the meeting and information was given to them that he had been seen at the place where the disciplinary hearing was taking place, Longwater Ambulance station, earlier in the morning where paperwork had been found placed around the station. A copy of the note was produced at pages 1660 – 1662. Mr Ashford adjourned the hearing and was able to receive a copy of the document which amounted to a large series of complaints phrased in terms of questions by the claimant.

19.71 Mr Ashford decided to proceed with the adjourned disciplinary hearing, Mr Henry presented the management case and produced a large number of documents to support the management case.

19.72 Mr Ashford was questioned closely as to his reasoning to decide to dismiss the claimant. In his evidence at paragraph 59 he stated,

"I was genuinely disappointed that the claimant had been at the station that morning and deliberately chosen not to attend the disciplinary hearing. I was aware that the claimant was experiencing difficulties coping with the process but in the absence of any advice from Occupational Health and up to date medical evidence, it was difficult for us to assess whether he was deliberately refusing to co-operate or whether it was a case that he could not. The claimant's emails seemed to indicate that it was a case of him not wanting to engage because he had been unhappy about how his sickness absence and about how his grievance had been dealt with. The claimant's conduct in my view rendered it impossible to continue employing him. The claimant was simply refusing to engage and follow reasonable management instruction. I did consider alternatives to dismissal but given the claimant's conduct I felt that I had no option but to dismiss him for gross misconduct in accordance with the trust disciplinary policy.

19.73 In answer to questions from us, Mr Ashford stated that he had considered giving the claimant a warning but in his words said,

"But what would I do then? It had been going on a long time. I had to consider his mental health and welfare and thought of the impact on him. A warning would have taken us back to the beginning and I could see no alternative."

In answer to a further question, he stated,

"If I had given him a warning it would have left him in the same position."

19.74 He also gave further evidence in answer to questions from us that he,

"Struggled to understand why the claimant acted in the way that he did."

He confirmed that he had a copy of the three page series of questions referred to above but had not read it, simply looked at the format before reaching the decision that he did. He conceded in evidence that,

"His emails led me to have concerns that the claimant was displaying potential mental health problems."

He added,

"My view was that the claimant was struggling between ill health and deliberately acting in the way that he did and my view there was a combination of the two."

19.75 He was then asked by the panel whether Mr Ashford thought the claimant was acting rationally. He responded that he was struggling between understanding whether it was through ill health or a deliberate act and his view was that it was a combination of the two and that his non-attendance was deliberate. He recognised that the claimant showed anxiety when questioned but at the earlier hearing had been articulate and calm when presenting evidence but disruptive when challenged. However, Mr Ashford concluded that the claimant was guilty of gross misconduct failing to attend the earlier meetings and dismissed him.

19.76 In a letter of 23 November produced at pages 1664 – 1673, Mr Ashford gave reasons for his decision to dismiss and at page 10 of that letter, (produced at page 1673) took into account the following,

"The fact that you failed to attend the disciplinary hearing without reasonable excuse; your continual refusal to meet with Occupational Health appointments; your conduct and lack of co-operation during the disciplinary process including choosing to distribute inappropriate documents on the morning of the disciplinary hearing rather than attend the disciplinary hearing; your length of service; the fact this is the first time you have been subject to disciplinary proceedings."

19.77 The panel asked Mr Ashford to clarify how his failure to attend the disciplinary hearing without reasonable excuse, his length of service and this being the first time that he had been subject to disciplinary proceedings had affected his decision making and we had difficulty in understanding his reasoning and how these factors impacted on his decision.

19.78 In any event, the claimant appealed against the decision to dismiss him and gave his reasons in a letter of 25 November 2015, produced at pages 1693 – 1695.

19.79 An appeal hearing was convened on 21 January 2016 and was chaired by Sandy Brown who was then the Director of Nursing and Clinical Quality. He later became Chief Executive on an interim basis for about six weeks. Mr Brown referred to the appeal process as a review rather than a re-hearing and notes of the appeal hearing were produced at pages 2032 – 2187. The claimant

attended and was unaccompanied. Mr Brown chaired the meeting and was supported by Brett Norton, EOC Manager and Tricia Orr, HR Manager. Mr Ashford presented the management response and was supported by Helen Adams, HR Manager. Lynn Feavyour attended as a note taker. The appeal hearing lasted from 10:30 am until 4:30 pm and was then adjourned. At paragraph 28 of his statement, Mr Brown commented as follows,

"I recall there was a point in the appeal hearing when I genuinely believed that the claimant was struggling to understand the purpose of the appeal hearing. I adjourned the appeal hearing to confer with Brett Norton and Tricia Orr. We discussed whether the claimant was well enough to continue and we reached the view that we needed to ask him if he wanted to continue. I was concerned by his behaviour and his health. I wanted to make the point that he would be better served by having representation. The claimant struggled to understand how the appeal process worked… The claimant stated that he was severely ill and that his mental health had become more acute following what he considered to be corrupt processes. I repeatedly asked the claimant if he was well enough to continue. Although we continued with the appeal hearing at the claimant's insistence, I was not happy to do so. In my opinion the claimant continued to struggle."

19.80 The appeal hearing was reconvened on 23 February. At paragraph 41 of his statement, Mr Brown stated,

"I recall that the claimant on challenging a point of the management statement, would go back to a point after it had already been covered. I often felt that we were going around in circles… The claimant also appeared to believe that the reason he was dismissed was because he had inappropriately distributed material on the morning of the readjourned disciplinary hearing held on 16 November 2016. That was not my understanding. In my opinion the disciplinary panel were correct as concluded that the claimant was able to attend the reconvened disciplinary hearing but deliberately chose not to do so as stated in Rob Ashford's letter dated 23 November 2015."

19.81 Following the appeal hearing, Mr Brown wrote to the claimant by letter dated 8 March to confirm that the decision to dismiss him for gross misconduct was the appropriate sanction and that he did not uphold the appeal.

19.82 We find that the claimant was dismissed and the final day of his contract of employment was 23 November 2015.

Submissions

20. Mr Brittendon provided full written submissions for which we are grateful. He added to those submissions orally, all of which we considered.

21. The claimant made helpful written and oral submissions, for which we are also grateful. He referred us to the appeal of Mr T Risby v Waltham Forest LBC UK EAT/0318/15, which he submitted was entirely relevant in the consideration of his claim.

Conclusions

22. The tribunal recognises that the claimant was at times in his employment very difficult to manage, had difficulty in following management instructions and on occasion simply would not co-operate in what, at times, had been genuine efforts to resolve his employment difficulties.

23. We are not medical experts and we are not dealing with a personal injury claim that is said to have arisen during his employment but we note, and it was not challenged by the respondent, that when the claimant commenced his employment he had a history of mild mental illness which in his words,

    "did not pose a problem in gaining employment and was not of any concern with regards to carrying out my duties."

    We note that at the end of his employment he was seriously mentally ill and his illness was clearly recognised by the respondent's management.

24. We did not hear evidence about the two incidents involving his manager, Mr Meiszner, but there was no evidence to suggest that as far as the internal enquiry was concerned, any conclusion reached was anything other than sustainable. However, the possibility of external mediation which might have resolved the continuing workplace issues was not pursued by the respondent for reasons we do not fully understand.

25. The respondent has and had comprehensive policies and procedures, was and remains a public body and was well provided for in Human Resources. It seems to us though, the policies were viewed in isolation and there was a tendency to view issues according to a particular policy, for example grievance or ill health management, rather than take a holistic view of the workplace difficulties experienced by the claimant. In correspondence to the respondent he repeatedly challenged the approach taken by the respondent which in many regards appeared to have little effect. The impression we gained was that there was a mechanistic approach to the issues that the claimant raised or presented to them by reason of the claimant's employment. There were nine Occupational Health reports and again, for reasons we do not understand, the contents or recommendations were not dealt with adequately or with insight. The

severity of his mental illness was identified certainly no later than 15 December 2013 when Janet O'Neil provided a classification of his disorder as, 'Post Traumatic Embitterment Disorder', (PTED). On that occasion her advice was quite succinct in the following terms,

"Although no physical barrier is apparent that would prevent a return to work, it is unlikely this will be successful in the near, foreseeable future."

She considered that,

"It is unlikely that a further Occupational Health review or other clinical intervention will impact on this case which now appears to be an issue to be resolved by management intervention and negotiation."

Although matters moved to a disciplinary hearing many months later we failed to understand why, faced with that advice and diagnosis, the respondent was so insistent on a further Occupational Health report. We recognise however, that of course, the respondent's management were entitled under the terms of his contract of employment to request such a report, but the issue as to why it was really considered as necessary was something that we were unable to comprehend.

26. We referred at length to the email from Ruth McAll produced at page 1555. It was a response to an email from the claimant to Debbie Bowman, who was the Executive PA to Ruth McAll who was then interim Director of Human Resources and was forwarded to her. It was sent on 13 June at 12:41 am and starts in the following terms,

"I am suffering from a severe and crippling mental illness Mr Henry as everyone knows already… I have had enough are you really interested in what has happened to me Mr Henry, corporate bullying on such a scale that I have contemplated ending it all does nobody care about that?"

The response sent on Sunday 14 June at 21:57 hours from Ruth McAll was referred to above at paragraph 19.47.

The tribunal comment that in our combined 60 years' judicial experience we have not before seen such an appalling response. We use the word *'appalling'* advisedly. An employee having indicated that he was seriously contemplating suicide was told not to write accordingly otherwise such letters would be referred to the Trust's solicitors. The claimant in giving evidence said that he felt that he had been cut adrift and that he had no access to Human Resources. We remind ourselves that as interim Director of HR she was the head of HR for a substantial employer in the public sector employing 4,000 members of staff. She was responsible for the direction of HR as the guardian of good practice. We have recorded the times at which the emails were sent and note that the email from Ruth McAll was sent on a Sunday night. We did not hear from Ruth McAll and we can only speculate as to why she responded as she did but it

demonstrated no insight at all into the likely impact on a person contemplating suicide.

27. We have already commented on the resources available to the Human Resource department and an apparent reluctance to refer matters to outside mediation. We also note that although ill health retirement had been posited in correspondence from Sarah Jane Cunningham, there was no evidence at all of any efforts to contact him and to assist him in any application for ill health retirement. We accept that there is no requirement as such on an employer to assist in this process but recognising that the situation presented by the claimant was a difficult one to resolve and having suggested that this was a potential solution to his employment relationship and its termination we simply comment that it was surprising that this course was not apparently pursued. We note also that in the documentary evidence there is repeated reference to the five options, including ill health retirement.

28. We were taken on a number of occasions to the disability policy which was produced at page 313 onwards. We have no evidence of anyone being trained against the policy save that of Helen Adams who received training as part of her CIPD course in mind training in the last 12 months and which she accepted followed in time the claimant's dismissal.

29. Robert Ashford provided a lengthy witness statement that covered 17 pages. He was extensively cross examined and referred to his experience in disciplinary and other matters at paragraph 3 of his statement in which he stated,

"I've chaired a number of disciplinary, capability and appeal panels both within this Trust and in previous positions held with previous employers."

There was no evidence that he had any training in managing people with mental or physical disabilities, yet at paragraph 77 of his statement he concluded,

"In my view the Trust's disability policy and the psychological well-being policy were complied with where appropriate."

30. Similarly, there was no evidence that he had any medical training whatsoever, yet he felt confident in the evidence that he gave and felt sufficiently qualified to give a considered view that the claimant's behaviour was a combination of behaviour generated by his ill health and a decision to perform deliberate acts, or indeed omissions. He gave evidence that he thought that the claimant had entered the premises at Longwater on the morning of the disciplinary hearing with the intention of disrupting the panel which was consistent with his earlier behaviour and then deliberately not attending the hearing. We note comments made by Mr Ashford during the adjournment which was the subject of covert recording by the claimant. We struggle to understand how there could have been any realistic prospect of a fair procedure when the dismissing

officer used the language that he was recorded as having used. We also failed to understand why, having been so certain on 13 August 2015, in the comments that he made and were recorded, that the capability route was the more appropriate route why he had apparently changed his mind, faced with further evidence of mental illness on the part of the claimant, by 30 October. We note that at the hearing before the EAT there was a comment that "The course taken by Mr Ashford does not indicate any kind of animus against him." With respect to the EAT, it did not have the benefit of hearing evidence from Mr Ashford nor an opportunity to consider the totality of the evidence that was presented to us. The issue before the EAT, as we understand it, was the admissibility of evidence and not to consider the statutory breaches alleged.

31. We note that under the disability policy at 9.2.1 essential actions are identified. At 9.3.2 was the following essential action,

"Ensure there is a mechanism in place for them to consider all the options should an employee become disabled or if an employee's existing disability becomes worse."

At 9.3.11,

"Where it proves impossible to retain the person within the Trust assisting the disabled person in their job search. An employer could consider giving a disabled employee time off to look for another job."

At 9.4,

"Commitment for: retaining people who become disabled: to make every effort when employees become disabled to make sure they stay in employment. The aim of this commitment is to provide awareness of disability issues to all staff in order to improve the working of the department."

32. Under the disciplinary policy at 2.3 there is the following note,

"This policy does not apply to the management of ill health capability up to and including the final review meeting where the Trust's sickness absence management / disability policy would apply."

There was no credible evidence that Mr Ashford had taken into account these policy statements or essential actions or commitments. We note that Mr Ashford was supported by Karen Barry as Head of HR and there is no credible evidence that she directed Mr Ashford to consider the disability policy and simply stated at paragraph 68 of her statement that,

"I do not accept that the claimant has been treated less favourably or unfavourably because of his disability. At no point did I take the claimant's health into account such that I or anyone else treated him less favourably."

33. The respondent has accepted at paragraph 62 of the response that the claimant has a mental impairment, namely mixed anxiety depression disorder and that he was suffering from the impairment from 22 April 2015 when he was asked to attend the Occupational Health appointment as a reasonable management instruction and at all relevant times thereafter and that the claimant is and was therefore a disabled person within section 6 of the Equality Act 2010.

34. As submitted by the claimant, we have looked carefully at the decision in Mr T Risby v Waltham Forest LBC which was heard by the Employment Appeal Tribunal on 18 March 2016 before Mr Justice Mitting and Members.

35. We follow the advice in paragraph 9 of the judgment and start by considering section 15 of the Equality Act 2010.

36. We note that there is no requirement for a direct connection to be established between disability and conduct which led to the claimant's dismissal. We are reminded at paragraph 15 of Risby that the intention of parliament was to loosen the causal connection which is required between the disability and any unfavourable treatment. We also note the analysis by Langstaff J in Basildon and Thurrock NHS Foundation Trust v Weerasinghe on 29 July 2015 which was unreported, that there was no requirement for a direct linkage between a claimant's disability and his conduct. All that had to be established was that the claimant's conduct arose in consequence of his disability or that was an effective cause or more than one on his conduct.

37. Had it not been for his disability he would not have been required to attend either of the meetings which was the subject of the disciplinary hearing. We accept the submission made by the claimant supported by his evidence that his "misconduct" in failing to attend was the product of his sense of anger which was caused firstly by that decision and secondly by his discovery of what was said about him and the manner in which it was said during the adjournments on the first date of the disciplinary hearing. We remind ourselves that it was part of the agreement following that hearing that he attend an Occupational Health meeting. His disability was an effective cause of that anger and so of his conduct.

38. We are required to address the question as to whether the respondent had shown the unfavourable treatment to which the claimant had been subjected, namely dismissal, was a proportionate means of achieving a legitimate aim encapsulated in the respondent's absence policy in dealing with employees who are on long term sickness absence and ensuring that its staff are able to provide a safe and effective ambulance service to the general public.

39. There is of course provision within the disciplinary policy in the event that an employee cannot be encouraged to co-operate.

40. Our attention has been draw to the case of Hardy and Hansons Plc v Lax [2005] EWCA CIV 846. The Court of Appeal in this case of course, had to consider a provision of what was then the Sex Discrimination Act. The guidance on justification is given by Pill J at paragraph 32 as follows,

"It must be objectively justifiable", (Barry), and I accept that the word "necessary" used in Bilka is to be qualified by the word "reasonably". That qualification does not however permit the margin of discretion of range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full time appointment, is justified objectively not withstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment upon a fair and detailed analysis of the working practices and business considerations involved as to whether the proposal is reasonably necessary".

41. In his submissions, Mr Brittendon, submited that the legitimate aims of the respondent are encapsulated in its absence policy in dealing with employees who are on long term sickness absence and ensuring that its staff are able to provide a safe and effective ambulance service.

42. It is beyond sensible argument to suggest that the respondent was not entitled to call the claimant to a disciplinary hearing and to consider disciplining him to uphold its standards. Section 1 of the Employment Rights Act 1996 and the Acas Code of Practice number 1 give clear guidance to employers as to the need for a disciplinary procedure and there can be no doubt that as such the proposal was objectively justifiable and reasonably necessary.

43. It is not suggested in evidence or submission that necessarily a breach of discipline will lead to dismissal. What is 'necessary' and that which is suggested, in effect, is for the respondent to investigate, to consider the available evidence and to reach a decision based on that evidence. It is also recognised that section 15 is not to be deployed in such a way so as to provide disabled persons with immunity from dismissal, or otherwise intended to prevent an employer taking any action where a disabled person commits an offence of gross misconduct. It is a perfectly legitimate aim to maintain high standards. But to do so without regard to fairness or reasonableness cannot be a proportionate means to achieve that aim. There is no logical necessity that a breach will lead inevitably to dismissal or indeed to a disciplinary sanction. We have looked carefully at the manner in which the hearing was conducted. The onus of justification is on the respondent. In our assessment of the relevant facts there was a signal failure to follow a fair procedure. We have commented on the attitudes displayed by Mr Ashford and have already commented that it seems to us beyond belief that someone conducting a disciplinary hearing would have felt it appropriate to use the language that he did. Having

heard from him we consider that his language betrayed a complete inability to recognise that the claimant's behaviour was in some way linked to his disability. He made a value judgment as to the reasons for the claimant's behaviour. That judgment was based neither on experience, training nor indeed any justifiable qualification. As we noted above, the respondent recognised that the claimant is a disabled person in the amended particulars of response. Mr Ashford had provided to him as part of the management case, copies of the Occupational Health reports, which we have noted above recognised as early as 15 December 2013 that the claimant had PTED and although the label of 'disability' may not have been applied in that particular report, it must have been obvious to a person of his senior management responsibility and experience that if this was not a disability or if he was in doubt, further enquiries were necessary. We of course have to consider whether the provisions of the sub-section are met, and in the circumstances, we have described they clearly are not and we are satisfied that the respondent discriminated against the claimant contrary to section 15.

44. We then go on to consider unfair dismissal which is provided for under section 92 of the Employment Rights Act 1996. We then have to consider the provisions of section 98(4) to which we refer in paragraph 10 above.

45. It is of course for the respondent to show the reason or principal reason for dismissal. The evidence points to the principal reason in the mind of the dismissing officer as being the conduct of the claimant. We have already commented on the linkage between the claimant's disability and his behaviour. We have also commented on the attitude displayed by Mr Ashford as reflected in his language. The process was fatally contaminated by the approach taken by Mr Ashford. We accept that he genuinely believed that in some way he was doing the claimant a "favour" by bringing the process to an end. Mr Brittendon described it in the following terms,

"The parties would have found themselves locked in the same cycle of impasse."

However, that is not what section 98(4) refers to and the emphasis under (a) is whether in the circumstances, which includes the size and administrative resources of the employer's undertaking, the employer acting reasonably or unreasonably in treating it as a sufficient reason for dismissing him. In British Home Stores Ltd. v Burchell [1980] ICR 303, the tests are laid out carefully and are well known and often cited. The second and third questions, the reasonable grounds for the belief based on a reasonable investigation go to the question of reasonableness under section 98(4) and there the burden is neutral. We must not of course substitute our own views. We have already commented on how Mr Ashford initially identified the issue as being one of capability, and that became an issue of conduct notwithstanding the obvious, and we use that word advisedly, deterioration in the claimant's mental health which Mr Ashford had recognised as being questionable at the earlier hearing. The

appeal hearing did nothing to rectify the situation. Mr Brown, in our judgment did little but go through the motions of an appeal hearing. It was an opportunity to reconsider the inherent and obvious unfairness in dismissing the claimant in the circumstances that were apparent. He simply endorsed the earlier decision. For these reasons we find that the dismissal was unfair.

46. Part of the claim made by the claimant is of direct disability discrimination. We note the written submissions of Mr Brittendon at paragraph 53 and agree with him that there is no evidence to support any suggestion that Mr Ashford would have reached a different decision in respect of a hypothetical non-disabled comparator in the same circumstances. We agree that the claimant does not discharge the initial burden of proof in relation to this complaint and dismiss it.

47. There is also a complaint of a failure to make reasonable adjustments. Again, we agree with the submissions made by Mr Brittendon at paragraph 54 and subsequent in his written submissions and that the relevant provision, criterion or practice has not been identified. It was not thus possible for the respondent to formulate its position as to whether or not there is a PCP, whether it has a knowledge defence and it remains unclear what adjustments the claimant contends for and whether in the circumstances these were reasonable. We dismiss this claim.

48. As far as the claim of victimisation, again we accept the submission made by Mr Brittendon that the claimant has failed to identify the protected act upon which he relies. It had been suggested that the use of the disciplinary procedure as opposed to the capability procedure in some way constituted harassment. We do not accept that. Similarly, the comments made during the adjournment at the disciplinary hearing, the subject of covert recordings, cannot in our judgment amount to harassment as they were made in a private setting and there was no evidence to show any inappropriate or harassing comments or behaviour made in open parts of the hearing. In any event, if we are wrong, we accept the submission at paragraph 73 made by Mr Brittendon that the detriment, if it was, was in a claim presented outside of the period provided for under the Equality Act 2010 and there was no evidence as to why it would be just and equitable for the time to present this claim be extended. The only other issue in relation to harassment appears to involve the suspension of pay during periods of sickness. We find that there was correspondence prior to the cessation of sick pay by reference to a failure to attend the Occupational Health appointment as was arranged and the claimant's failure to submit "sick" certificates. The respondent had a contractual entitlement to take these actions and forewarned the claimant. Accordingly we dismiss this claim.

49. The remedy hearing is set down for 4 February 2019 when the tribunal will reassemble and hear arguments or submission in relation to remedy or, if appropriate, make case management orders for a further hearing.

_____
Employment Judge Cassel

Date: …27 January 2019…….

Sent to the parties on: .....

.....
For the Tribunal Office