mf

EMPLOYMENT TRIBUNALS

Claimant: **Mr T O Egiarhuoyi**

Respondent: **Barking Havering and Redbridge University Hospitals NHS Trust**

Heard at: **East London Hearing Centre**

On: **16-19 October & 12 November 2018 (in Chambers)**

Before: **Employment Judge Brown**
Members: **Ms M Long**
Mr M L Wood

Representation

Claimant: Mr D Lamina (Lay Representative)

Respondent: Mrs S Ramadan (Solicitor)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:

1. **The Respondent unfairly constructively dismissed the Claimant.**

2. **The Respondent did not subject the Claimant to direct race or direct disability discrimination.**

3. **The Claimant's claim for failure to make reasonable adjustments fails.**

4. **The Respondent did not subject the Claimant to discrimination arising from disability.**

5. **The Remedy Hearing will proceed on 1 February 2019. The parties shall exchange documents and witness statements relevant to remedy by 21 January 2019.**

REASONS

Preliminary

1 The Claimant brought complaints of direct race discrimination, direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments and constructive dismissal against the Respondent, his former employer. The parties had agreed a list of issues which was as follows:

Jurisdiction: Time Limits

1.1 In respect of any act or omission that is alleged to constitute unlawful discrimination that occurred before 17 August 2017:

1.1.1 Do such acts/commissions constitute part of conduct extending over a period for the purposes of Equality Act 2010, section 123(3)(a)?

1.1.2 If not, would it be just and equitable to extend time in respect of such acts/omissions pursuant to Equality Act, section 123(1)(b)?

Direct Race Discrimination

1.2 The Claimant claims the following constitutes instances of discriminatory treatment:

1.2.1 An alleged failure by Jonathan Faulkner to request a copy of the Occupational Health report dated 24 February 2016 in February/March 2016.

1.2.2 An alleged failure by Jonathan Faulkner to act on the recommendations of Occupational Health dated February 2016.

1.2.3 The alleged response by Nicola Dearson to the Claimant's request for support in June 2016. In particular, the Claimant alleges that Ms Dearson was reluctant to listen to him, was abrupt in her response and told him to speak to his line manager

1.2.4 The decision by Liselle Toney-Browne in November 2016 to refer the Claimant back to Occupational Health.

1.2.5 An alleged failure by Liselle Toney-Browne in November 2016 to request a copy of the Occupational Health report dated 24 February 2016.

1.2.6 An alleged failure by Jonathan Faulkner and/or Liselle Toney-Browne to redeploy the Claimant into a role that did not involve

heavy lifting/manual handling.

1.2.7 An alleged failure to remove requirement for the Claimant to perform manual handling/heavy lifting on the Stroke Unit.

1.2.8 An alleged failure to remove the requirement for the Claimant to sit a numeracy/literacy test during the redeployment interview process.

1.2.9 The reduction of the Claimant's sick pay to half pay in August 2017.

1.2.10 An alleged failure to offer the Claimant any of the re-deployment roles he had expressed an interest in.

1.3 If so, was this less favourable treatment on the grounds of the Claimant's race pursuant to section 13 Equality Act 2010?

1.4 Did the Respondent treat the Claimant less favourably than a real and/or a hypothetical comparator? The Claimant will rely on the following real comparators:

1.4.1 Joan [surname to be confirmed]
1.4.2 Jan Hill
1.4.3 Paul Bell

Disability

1.5 At the relevant times, did the Claimant have a disability within the meaning of section 6 Equality Act 2010? The Claimant relies on the following conditions by way of alleged disabilities:

1.5.1 An impaired lumbar disk.

1.6 It is admitted by the Respondent that the Claimant is disabled.

1.7 Did the Respondent know (or could reasonably have been expected to know) that the Claimant has/had at the material time the alleged disability?

Direct Disability Discrimination

1.8 The Claimant relies on the following as less favourable treatment:

1.8.1 Not being appointed to an alternative position as he was unable to perform manual handling duties and/or because he was disabled.

1.9 If so, was this less favourable treatment on the grounds of the Claimant's disability pursuant to section 13 Equality Act 2010?

1.10 Did the Respondent treat the Claimant less favourably than it would have treated real and/or hypothetical comparator/s? The Claimant will rely on the following real comparators:

1.10.1 Abigail Broderick

Failure to make reasonable adjustments

1.11 The Claimant relies on the following alleged provisions, criteria or practices ('PCPs'):

1.11.1 The requirement that the Claimant perform heavy lifting and/or manual handling.

1.11.2 The requirement that the Claimant sit a numeracy and literacy test during the interview process.

1.11.3 The practice of reducing the Claimant's sick pay to half pay pursuant to the Respondent's sick pay policy.

1.12 Are the PCPs capable of amounting to PCPs within the scope of section 20(3) Equality Act 2010?

1.13 If so, did the Respondent apply the PCPs to the Claimant and did they put the Claimant, as a disabled person, at a substantial disadvantage in comparison with a non-disabled person? The Claimant relies on the following by way of alleged disadvantages he says he suffered:

1.13.1 Not being able to work on the stroke unit without being in pain.

1.13.2 The Claimant's back condition being exacerbated by work.

1.13.3 The taking of the numeracy and literacy test.

1.13.4 Reduction in his sick pay in August 2017.

1.14 If so, did the Respondent take such steps as were reasonable to avoid the disadvantage? The Claimant says that the following would have been reasonable adjustments for the Respondent to make to avoid the substantial disadvantage:

1.14.1 Placing the Claimant into an alternative role without going through the redeployment process.

1.14.2 Placing the Claimant into an alternative role without requiring him to attend a formal interview.

1.14.3 Not requiring the Claimant to sit a numeracy and literacy test.

1.14.4 Payment of full sick pay.

1.15 If not, would those adjustments have been reasonable ones for the Respondent to make?

Discrimination arising from Disability

1.16 The Claimant relies on the following as alleged unfavourable treatment:

1.16.1 Not offering the Claimant any of the re-deployment roles he expressed an interest in.

1.17 The Claimant alleges that the things arising in consequence of his alleged disability were:

1.17.1 Being unable to continue working on the stroke unit.

1.18 Did the Respondent treat the Claimant unfavourably and, if so, was this because of something arising in consequence of the Claimant's alleged disability?

1.19 If so, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The Respondent relies on the following by way of legitimate aims:

1.19.1 The need to ensure reasonable and robust management of redeployment.

1.19.2 The need to ensure that employees are redeployed into roles which are suitable for their skill set, qualifications and level of experience.

Remedy

1.20 If the claim succeeds in full or in part, to what remedy is the Claimant entitled?

Constructive Dismissal

Liability

1.21 Did the Respondent commit a fundamental breach of the Claimant's contract of employment amounting to a repudiation of that contract? The Claimant alleges breach of the implied term of trust and confidence. The alleged acts upon which the Claimant relies as constituting such breach are:

1.21.1 An alleged failure to deal with the Claimant's grievance dated November 2016.

1.21.2 An alleged failure by the Respondent to simply place him in an alternative position during the redeployment process. It is denied by the Respondent that it is usual practice to simply place an employee into an alternative position during the redeployment process.

1.21.3 An alleged failure by the Respondent to make adjustments to the redeployment process. The Respondent will say that it made reasonable adjustments to the redeployment process to accommodate the Claimant, namely an extension of the redeployment period for a period of 8 months.

1.21.4 An allegation that the Claimant was advised that he was unsuitable for a position because of his disability and as he could not carry out manual handling. This is denied by the Respondent.

1.21.5 An allegation that the Claimant was required to sit a numeracy and literacy test in relation to each position applied for. The Respondent will say that the Claimant was not required to sit a numeracy and literacy test in relation to each position. The Claimant was asked to complete the test to access his suitability for one role during an informal interview.

1.21.6 An alleged reduction in the Claimant's sick pay to half pay from August 2017. The Respondent will say that the Claimant's sick pay is governed by section 14 Agenda for Change and that it was appropriate to reduce his sick pay due to the level of absence.

1.21.7 An allegation that the Claimant was incorrectly classified as sick during the redeployment process. The Respondent will say that it was entitled to treat the Claimant as sick as he was signed off as unfit to work, and in accordance with the Respondent's sickness policy.

1.22 If the Respondent did commit a fundamental breach of the Claimant's contract of employment amounting to a repudiation of that contract, did the Claimant resign in response to such breach?

1.23 If so, did the Claimant nevertheless delay in resigning and thereby affirm his contract of employment?

1.24 Did the Claimant resign in response to a series of breaches of contract and/or a course of conduct by the Respondent which, taken cumulatively, amounts to a breach of the implied term of trust and confidence the course? The Claimant relies on paragraph 21(f) above as the last straw act.

1.25 If the Claimant was constructively dismissed, what was the reason or principal reason for her dismissal and is it a potentially fair reason within section 98(1)(b) & (2) of the Employment Rights Act 1996?

1.26 Was any such dismissal fair within the meaning of Employment Rights Act 1996, section 98(4)? The Respondent will say that the Claimant's dismissal was for some other substantial reason, namely the breakdown in trust and confidence as acknowledged by the Claimant in his resignation letter.

Remedy

1.27 If the Claimant was unfairly dismissed:

1.27.1 To what basic award is he entitled under ERA, s119; and

1.27.2 What compensatory award would be just and equitable in all the circumstances having regard to the loss sustained by the Claimant under ERA, s123?

2 The Claimant is of Black African ethnic origin and compares himself with white / British employees.

3 The Respondent admitted that the Claimant was disabled by reason of an impaired lumbar disk at all relevant times.

4 It also admitted that it applied the PCPs set out in the list of issues and that they put the Claimant at the substantial disadvantages set out therein.

5 The Claimant was unrepresented at the hearing and at the time the list of issues had been agreed. The Employment Tribunal became concerned, during the Final Hearing, that the list of issues did not properly reflect the Claimant's pleading, in that the discrimination issues were not included as factual matters giving rise to the Claimant's resignation.

6 The Claimant's claim, however, did plead that the alleged discriminatory acts had been part of the reason for his constructive dismissal. The Claimant confirmed, at the Final Hearing, that he was relying on all the allegations in the list of issues - both the factual discrimination allegations and the factual constructive dismissal allegations - in bringing his constructive dismissal complaint.

7 Ms Ramadan, acting for the Respondent, cross-examined the Claimant about each of the issues in the discrimination claims and the constructive dismissal claims. She put to him the Respondent's non-discriminatory explanations for each of the acts of discrimination. The Tribunal considered that Ms Ramadan had put to the Claimant both the Respondent's non-discriminatory explanation and the Respondent's alleged proper and reasonable cause for each act, during cross-examination, and that the Respondent's case had been put in detail to the Claimant. The Tribunal therefore concluded that it was appropriate for the Claimant to be allowed to rely on the factual matters set out in his discrimination claims also in his constructive dismissal claim. That properly reflected his pleading and the Respondent was not at any disadvantage because the Respondent's case in relation to those factual matters had been put.

8 The Tribunal therefore made clear that, in considering the Claimant's constructive dismissal case, it would also consider the factual matters relied on in the discrimination complaints.

9 The Tribunal heard evidence from the Claimant, who had been employed as a Health Care Assistant by the Respondent. For the Respondent it heard evidence from: Jonathan Faulkner, Senior Charge Nurse on the Respondent's Acute Stroke Unit; Nicola Dearson, Matron with responsibility at the relevant times for Stroke, Neurology, Neurosurgery and Stroke Rehabilitation specialties; Liselle Toney-Browne, Employee Relations Adviser; and Catherine Wood, Matron for the Respondent's Outpatient Department.

10 There was a bundle of documents. Page numbers in these reasons refer to page numbers in the bundle. Both parties made written and oral submissions.

11 The Claimant was accompanied by Mr D Lamina, who was described as a McKenzie Friend. The Claimant however mainly represented himself by choice.

12 The Tribunal reserved its decision. A provisional remedy hearing was listed for 1 day on 1 February 2019.

Findings of Fact

13 The Claimant commenced employment with the Respondent as a Healthcare Assistant on 16 February 2009, working on the Respondent's Stroke Unit. His duties as a Healthcare Assistant included assisting dependent stroke patients with their physical, medical and personal needs.

14 The Claimant also had a temporary contract with the Respondent's in-house Bank, pursuant to which he undertook overtime work.

15 The Claimant told the Tribunal that he had a back condition which had deteriorated over a number of years. The Claimant alleged that his back condition had been caused by manual handling in the workplace. The Tribunal did not see any medical evidence which would allow it to make a finding either way and made no decision regarding this.

16 The Tribunal was told - and it did not appear to be in dispute - that the Claimant had received training on manual handling during his employment and that there were devices on the Stroke Unit for assisting staff to lift and manoeuvre patients.

17 The Claimant told the Tribunal that, one morning in July 2015, he woke up and tried to get out of bed, but discovered he could not move. He was off work for 7 weeks thereafter.

18 The Claimant was seen in Occupational Health on 7 January 2016. The resulting report said (p.186):

> "[the Claimant] was assessed on the 7 January 2016. Further Physiotherapy is to be arranged. No specific work place adjustments are currently required but it

> would be beneficial if Terry was able to reduce the amount of heavy lifting tasks he performs throughout the day."

19 The Claimant attended a formal sickness meeting on 11 February 2016, conducted by Jonathan Faulkner, Senior Charge Nurse. Mr Faulkner wrote to the Claimant after the meeting, stating that, because of the Claimant's sickness absence, he had decided to monitor the Claimant's absence formally, under the Respondent's sickness policy. Mr Faulkner said that the Claimant had told him that the Claimant had been and was continuing to attend the physiotherapy for his back condition, but that the Claimant felt that his back was worsening. Mr Faulkner and the Claimant agreed that the Claimant would be referred to Occupational Health to seek advice. Mr Faulkner explained to the Claimant that he would be monitoring the Claimant's sickness absence for the next 6 months and that Mr Faulkner expected that there would be a marked improvement in the Claimant's attendance levels (pgs.194 to 195).

20 Mr Faulkner did refer the Claimant to Occupational Health on 11 February 2016, asking, amongst other things: whether the Claimant was fit to continue in his current role; if adjustments were advised, would they be temporary or permanent; and what impact the Claimant's back condition might have on the Claimant's ability to carry out his role effectively (pgs.196 to 200).

21 The Claimant was seen by Jenny Otoo, Occupational Health Advisor, on 24 February 2016. Ms Otoo sent the report to Mr Faulkner and the Claimant. She sent a copy to Tracy Williams at the Respondent's Human Resources Department (p.55s). In the report, Ms Otoo said that the Claimant reported a history of lower back pain for 5 years and had now been diagnosed by his GP as having sciatic pain. Ms Otoo said that the Claimant reported struggling to manual handle, even with the use of aids such as a hoist (p.55r). She said that the Claimant reported that manual handling aspects of his role were impacting on him as his pain worsened. When he was off work, he had some relief and was able to minimise his intake of painkillers. Ms Otoo said:

> "Although I am unable to confirm that his back condition has been caused by work, it is clear his duties are impacting on his back condition."

Ms Otoo advised as follows:

> "I can advise based on the reported challenges he is facing that his back pain will continue to impact on his attendance and work and it will be beneficial to consider relocating him to a less demanding ward. He wants to be redeployed into another area. I do not feel he fully understands this process hence I have advised him to speak to his Manager and HR for further advice …
>
> Terry remains able to continue in his role without any manual handling duties at the moment. This might be the case for a longer term until he has further investigations and treatment …
>
> His current prognosis is guarded as it is not clear what the situation is with his back …"

22 In response to Mr Faulkner's questions as to whether adjustments ought to be

permanent or temporary, Ms Otoo responded:

> "Permanent adjustments until there is improvement in his condition and a review of the manual handling training is offered as he has a longstanding back problem."

23 Ms Otto said:

> "It will be advisable for Terry [the Claimant] to meet with his Management Team to discuss this decision to be redeployed as he feels he cannot continue to work in the current ward due to the demands. I will support this to an Out-patient setting if a role is available…
>
> The Equality Act 2010 is likely to be applicable in this case based on the history and on-going significant impact on his day to day activities." (p.55s)

24 The Claimant told the Tribunal that he met with Jonathan Faulkner to discuss the outcome of Jenny Otoo's assessment about 4 weeks after her report. He told the Tribunal that Mr Faulkner claimed not to have received any emails or recommendations from Occupational Health at this meeting and also at a later meeting on 6 May 2016.

25 Mr Faulkner told the Tribunal that he had received the Occupational Health report when it was sent to him in February 2016. He told the Tribunal that he did not meet with the Claimant again until May 2016 because sickness review meetings were scheduled every three months and therefore he met the Claimant on 6 May, according to the Respondent's formal sickness absence review process. He also said that the Claimant had not had any further absence during the time and was working well and not complaining of back problems.

26 The Claimant contended that Mr Faulkner did not request a copy of the Occupational Health report dated 24 February 2016, either in February or March 2016, and that he failed to act on the recommendations in it and that he did both these things because of the Claimant's race. He said that a colleague on the ward, Paul Bell, had been struggling with sickness issues and that Mr Faulkner had offered him a transfer to medical records. He said that Mr Faulkner had supported Paul Bell, but did not support the Claimant. He also said that another colleague, Jan Hill, who had been employed on the ward before Jonathan Faulkner became manager, had been having back problems. She was transferred, by Elaine Hill (the matron at the time), to a different ward with less manual handling. Both the comparators were white British.

27 The Respondent disclosed a record of staff change for JH from Harvest B (a Stroke ward) to HASU (Hyper Acute Stroke Unit), effective immediately on 8 June 2011 (p.180a).

28 Mr Faulkner gave evidence that a role came up for which Paul Bell met the basic requirements and that Mr Bell was given a 4-week trial and he was successful in that role.

29 Mr Faulkner said that regarding JH, the Transient Ischemic Attack (TIA) Clinic

had asked whether there was anyone who was available to work in the Clinic. JH remained on the Harvest B Ward budget, but was working in the TIA clinic within the Stroke Unit. Mr Faulkner said that the circumstances were different because JH was not redeployed; an alternative post was simply available within the service. Mr Faulkner said that, if a post had come up within the Stroke Unit, for example a ward clerk post, then the Claimant could likewise have been offered that post. When such a post did come up later in HASU (Hyper Acute Stroke Unit), the Claimant was contacted about it, but did not respond.

30 The Tribunal accepted Mr Faulkner's evidence that he did receive the relevant report. It appears that it was sent to him at the same time as the Claimant, according to the Occupational Health report itself. The Tribunal noted that Mr Faulkner did record the recommendations contained in the report, in the record of a later meeting. The Tribunal decided that it was highly unlikely that Mr Faulkner would simply have accepted the Claimant's word for what was in the Occupational Health report. It concluded that it was likely that Mr Faulkner did receive a copy of the Occupational Health report himself. Therefore, the Tribunal accepted Mr Faulkner's explanation that he did not ask for a copy of the report because he had already received it from Occupational Health.

31 The Tribunal accepted Mr Faulkner's description of the Respondent's sickness process that formal review meetings are scheduled at regular three-month intervals and that he met the Claimant in May, pursuant to the sickness process which he was following. As the Claimant had not had any more significant sickness absence, then there was no reason under the sickness policy to trigger an earlier review meeting. The Tribunal accepted that Mr Faulkner was acting in accordance with the sickness policy and that, therefore, he met the Claimant in May, rather than earlier, because May 2016 was the scheduled date for another meeting.

32 The Claimant attended a formal sickness review meeting on 6 May 2016 (p.208).

33 Mr Faulkner sent the Claimant an outcome letter on 6 May 2016. He copied the outcome letter to Liselle Toney-Browne, HR Advisor (pgs.208 to 209). Mr Faulkner recorded that the Claimant had been referred to Occupational Health and that the Claimant had attended on 24 February. He said:

> "… in summary the occupational health advisor concluded that your back problems were now chronic and exacerbated by the manual handling workload that were part of your duties on Harvest B and recommended redeployment to an outpatient setting if that were possible. We discussed a recent interview you had that if successful would mean a career change outside of healthcare and consequently negating the problems associated with your current work duties. We agreed that if that was unsuccessful you would liaise with human resources about any out-patient vacancies and I would facilitate that transition if required."

Mr Faulkner agreed to meet with the Claimant again for a further formal review meeting on 5 August 2016.

34 The Claimant had undertaken a law degree at this point and was looking for

work in the legal profession. In evidence to the Tribunal, the Claimant agreed that he discussed this with Mr Faulkner.

35 The Claimant told the Tribunal that Mr Faulkner advised the Claimant to look at the Trust vacancy website and to tell Mr Faulkner of any jobs that the Claimant was interested in. Mr Faulkner offered to support the Claimant with his applications; Mr Faulkner said that he would be aware of the requirements for vacancies and could help the Claimant in this regard. The Claimant told the Tribunal that he completed 4 applications with Mr Faulkner's support, but was not successful in securing any of the posts.

36 It appeared from the Claimant's evidence that he was not applying for other Healthcare Assistant roles, but was applying for roles in the Trust at a higher grade, with a view to utilising his legal qualifications.

37 The Claimant said that, on a number of occasions, he tried to escalate his concerns about needing to be redeployed to Nicola Dearson, Ward Matron. He told the Tribunal that Ms Dearson, who was Mr Faulkner's line manager, gave the Claimant the cold shoulder and told the Claimant to meet with his manager – who, the Claimant contended, was not resolving the issue.

38 Nicola Dearson, Ward Matron, gave evidence to the Tribunal. She said that she did not recall the Claimant approaching her to raise the matter. She said that her normal response to members of staff, who were raising issues with work, would be to advise them to take the matter up with their immediate line manager. She said that, if she had done this, she would have been treating the Claimant in the same way as she would have treated any member of staff.

39 The Claimant attended a further sickness review meeting on 5 August 2016. In Mr Faulkner's outcome letter recording discussions at the meeting, also dated 5 August 2016, Mr Faulkner reiterated that the Claimant had attended Occupational Health on 24 February that year and that Occupational Health had advised that the Claimant's back problems were chronic and exacerbated by the manual handling and had recommended redeployment to an out-patient setting if possible. Mr Faulkner said:

> "We discussed the fact that you were still having ongoing problems with your back and though you were currently able to manage that you were rightly concerned about further deterioration, as such you would continue to seek occupation outside healthcare that you have qualified for and in the interim pursue a new post within healthcare that had a vast reduction in activities that could be detrimental to your back, I reiterated that I would continue to support you in this pursuit in any way I could." (pgs.210 to 211)

Mr Faulkner again copied this letter to Liselle Toney-Browne, HR Advisor.

40 Liselle Toney-Browne, Employment Relations Advisor, gave evidence to the Tribunal. She said that she had not been copied into the Occupational Health report in February 2016. She had started work for the Respondent on 2 May 2016. She said that she did not take any action in relation to the outcome letters from the formal sickness review meetings, which were copied to her, because the letters were not

written in a way which required her input. She said that Mr Faulkner had not asked her for advice.

41 Ms Toney-Browne told the Tribunal that she did not have a copy of Jenny Otoo's report and that, had she had Jenny Otoo's report in conjunction with Mr Faulkner's letters, different actions would have been taken. Ms Toney-Browne said there would have been a further meeting with Mr Faulkner and the Claimant to discuss the way forward, including redeployment, reasonable adjustments on the ward and perhaps further meetings with Occupational Health.

42 On 15 August 2016, the Claimant who was applying for the role of HR Workforce System Support, emailed Sudha Pavanakumar in the Respondent's Human Resources department. He told her that he was working as an HCA on the Stroke Ward and had had a lot of back problems with manual handling. He said that he had been referred to Occupational Health some months ago. He said that it had been recommended that his line manager should make reasonable adjustments for him not to do manual handling on the ward. The Claimant said that, when he had discussed it with his manager Jonathan Faulkner, Mr Faulkner had advised that there was no position on the ward which did not require manual handling. He said that Mr Faulkner had advised him that he would be classified as redeployed and not fit to work on the Stroke Unit and that he should look for vacancies in the Trust. The Claimant said that he had consequently found a vacant role as HR Workforce System Support, for which the Claimant met all the criteria. He said, however, that his manager was on annual leave and he was worried that the vacant role would be filled by the time the manager returned. He asked Ms Pavanakumar for support (p.212).

43 Ms Pavanakumar replied on 16 August 2016, saying that Liselle Toney-Browne was the designated Employee Relations Advisor for the Claimant's Division. She copied Liselle Toney-Browne and Val Davis, Head of Employee Relations, into her reply and asked Val Davis to redirect the Claimant's email to the appropriate team member, as unfortunately Liselle Toney-Browne on annual leave (p.213).

44 On 6 September 2016, Liselle Toney-Browne emailed Jonathan Faulkner, saying that she had been told that the Claimant had been applying for jobs within the Trust and believed that he was under redeployment. She said:

> "I have reviewed the letters from your sickness meetings with Terry and there is no mention of redeployment. I also looked at the last OH report dated 7 January 2016 and this is not recommended. Do you know why Terry feels he is under the Trust Redeployment Procedure? Can I request for you and I meet formally with Terry with regard to this matter?
>
> … If Terry is struggling at work and feels no longer fit to work in his contracted role, then you will need to complete a new referral to OH to explore his medical complaint. You will need to ask OH to assess him on the criteria for redeployment to a suitable alternative role…" (p.214).

45 It was put to Liselle Toney-Browne, during her evidence, that she should have thought to obtain a copy of the 24 February 2016 report, which had been mentioned in both Mr Faulkner's letters of May and August 2016. Ms Liselle Toney-Browne said that

she did not think that she should seek to obtain a copy of that report.

46 Mr Faulkner did not respond to Ms Liselle Toney-Browne's 6 September 2016 email. Ms Toney-Browne did not follow it up. In evidence she said she could not give a reason why she failed to do so. Mr Faulkner was unable to explain to the Tribunal what he did in respect of the email and why no meeting had taken place arising from it.

47 On 15 November 2016, the Claimant sent an email to Liselle Toney-Browne headed: "Urgent Issues Regard Wellbeing to Work". He said that he had tried on several occasions to contact Ms Liselle Toney-Browne, to no avail. He said that his back problem had resulted from work and that no reasonable adjustments had been made to support him. He said he wanted to discuss the Respondent's duty in relation to the Claimant's wellbeing and fitness to do his work (p.215).

48 The Claimant emailed Ms Toney-Browne again on 18 November 2016 (p.216), chasing a reply to his email of 15 November 2016. He said:

> "I will appreciate if you could reply to my email to arrange to see you in your office when convenient… I am on the verge of a breakdown due to stress related to my role at work, having to work and carry out manual handling with a damaged back." (pgs.216 to 217)

Ms Toney-Browne replied on 23 November 2016, apologising for the delay and saying she had been busy in meetings and covering for another colleague who was on leave. She invited the Claimant to a meeting on 25 November 2016.

49 In the meeting, the Claimant and Ms Toney-Browne discussed redeployment. The Claimant told Ms Toney-Browne that Occupational Health had advised that he be redeployed. Ms Toney-Browne, who had only seen a report from 7 January 2016 and had not investigated Mr Faulkner's mention of a further report in February 2016, told the Claimant that there was no recommendation from Occupational Health that he be redeployed to an alternative role in the Trust. She told the Claimant that he could only be redeployed if Occupational Health recommended this.

50 In an email on 30 November 2016, giving the outcome of the meeting, copied to Mr Faulkner, Ms Toney-Browne said:

> "… the recommendation for redeployment has to come from Occupational Health… To date your manager has not received such a recommendation from Occupational Health…" (p.227)

51 Ms Toney-Browne said that the Claimant would have to be referred back to Occupational Health and that she would meet with the Claimant and Mr Faulkner to discuss the report from Occupational Health, once the Claimant had had an assessment (p.227).

52 Mr Faulkner, who was copied into this email, did not challenge Ms Liselle Toney-Browne's statement that he had not received a recommendation for redeployment from Occupational Health.

53 The Claimant was referred to Occupational Health again by Mr Faulkner on 28 November 2016 (p.218). Mr Faulkner again asked whether the Claimant was fit to continue in his current role and, if adjustments were advised, whether they be permanent or temporary (p.224).

54 The Claimant was seen in Occupational Health by physiotherapist on 19 December 2016. The report of that consultation dated 19 December 2016 said:

> "[The Claimant] is complaining of longstanding low back pain. In a previous report written by Jenny Otoo (Occupational Health Advisor), it was recommended [the Claimant] be redeployed to an outpatient role if possible. However [the Claimant] is still working in the Stroke Unit which is physically demanding. Currently I am unsure if [the Claimant] would be able to continue in this role. I need to do further assessment of [the Claimant]'s functional capacity…"

55 The report did not make any recommendations, but said that the situation might change after a functional capacity evaluation on the Claimant (p.234) It said that the Claimant was likely to be considered to be disabled, but also said that the Claimant was fit for work (p.234).

56 On 2 January 2017 the Claimant replied to Ms Toney-Browne's email of 30 November 2016 (p.241). He said that he had been told by the Occupational Health physiotherapist that he could benefit from having 3 to 4 physiotherapy sessions to improve his back. The Claimant did not agree with this, as he had undergone a number of physiotherapy sessions in the past, to no avail. He said that, to clarify the discussion he had had with Ms Toney-Browne in November 2016, the Claimant had seen Occupational Health in February 2016 and it was recommended that, due to the seriousness of his back condition, work in a stroke unit was not suitable for him, so that his manager should make reasonable adjustments for him to work in a different area without manual handling (p.214).

57 Ms Liselle Toney-Browne replied on 16 January 2017, saying that she had no record of the February 2016 recommendation from Occupational Health and needed the Claimant to provide evidence of it (p.240). In evidence to the Tribunal, Ms Toney-Browne was asked whether she could have tried to get a copy of the February 2016 report from Occupational Health herself. Ms Toney-Browne said that the person who had undertaken the assessment had not saved a copy of it to the HR system. She also said that, looking back, she should have asked about the further Occupational Health report when the Claimant met her in November 2016.

58 The Claimant forwarded a copy of the 24 February 2016 OH report to Ms Toney-Browne on 9 February 2017 (p.254).

59 The Claimant was given around 4 physiotherapy sessions in January 2017 by Occupational Health. On 2 February 2017, he was discharged from Occupational Health physiotherapy and was advised that, if there was no improvement in his back condition after 6 weeks, redeployment was recommended (p.247).

60 The Occupational Health physiotherapist sent a report to Mr Faulkner dated

2 February 2017. Again, he said that the Claimant was fit for work. In his recommendation section the physiotherapist said:

> "I recommend [the Claimant] continue in his role for the next six weeks as normal, as physiotherapy treatment may have a delayed positive effect. After this if [the Claimant] still reports he has low back pain and this really affects his quality of life negatively, then he would have to consider redeployment. [The Claimant] understands this is a drastic option if he were not able to continue in his current role." (p.55n)

61 The Claimant went off sick on 13 February to 26 February 2017 with back pain (p.518).

62 Mr Faulkner conducted a formal long-term review meeting with the Claimant on 27 March 2017. Ms Toney-Browne was present at the meeting. On 3 April 2017 Mr Faulkner wrote to the Claimant, recording what had been discussed in the meeting (p.292). He said:

> "Following the most recent outcome from your last physiotherapy appointment with the Occupational Health department and the on-going chronic issues with back pain, the recommendation was to utilise the redeployment policy as you are no longer fit to work in your current contracted role.
>
> Liselle provided you with the Trust Redeployment Guidelines and asked you to… outline your experience, skills and knowledge and… return it to her by 3rd April."

63 The Respondent has redeployment guidelines for managers (p.56). These state that, once an individual has been established as having redeployment status, a meeting should be held as soon as possible with the employee, their line manager and HR advisor. The purpose of the meeting is to, amongst other things, explain the redeployment procedure and the employee's status within it, inform the employee of the Trust website on which they can view vacancies, and to tell the employee that they must meet the essential criteria for any job into which they seek redeployment (p.57). The guidelines provide that, in the instance of ill-health redeployment, this should be done in line with Occupational Health recommendations as far as reasonably practicable (p.58).

64 The policy provides for a procedure when there is a preliminary match between the redeployee and a potential vacancy. It says:

> "1.5 A Preliminary Match
>
> The preliminary match is the initial point which identifies those vacancies in which aspects of the job description, person specification and advert are considered to match the employee's skills, experience, qualifications… and salary.
>
> If a preliminary match to a post is considered as a suitable alternative, or the

> employee has identified a post for which they wish to apply… the HR Advisor will contact the Recruiting Manager as early as possible. The HR Advisor will discuss the role, the potential of a suitable redeployee and advise that the redeployee's Redeployment Form… will be sent to the Recruiting Manager.
>
> Should the vacancy have been advertised, the HR Advisor will contact the Recruitment Advisor to request that any non-redeployee applications for the posts are placed on hold. A post can be put on hold if a suitable redeployee becomes available at any time before an offer of employment is made through the normal recruitment process…
>
> To establish whether the post is a suitable alternative employment, it is important that the Recruiting Manager consider the redeployee's qualifications, skills, abilities and experience against the essential criteria listed in the job description (person specification). These should be demonstrated on the (employee's redeployment form) as the Recruiting Manager will be assessing the application against these criteria." (p.59).

65 The guidelines further provide that, where the recruiting manager has reviewed the redeployment forms on a preliminary basis, the recruiting manager:

> "… will arrange for an informal structured interview to be held. The purpose of this is to ensure that the redeployee meets the minimum essential criteria for the role or is able to meet those criteria within a reasonable timespan if provided with suitable training."

66 The guidelines also make provision for trial periods. Where a suitable vacancy has been identified, a redeployee is entitled to a trial period lasting up to 4 weeks. At the outset of the trial period, the recruiting manager and employee will set out objectives which the employee will be expected to meet. Training required during the trial must be highlighted at the start of the period. The guidelines provide:

> "If the training is likely to take longer than four weeks, a longer trial period maybe required. In total this will not usually exceed three months." (p.60)

67 The guidelines provide that, throughout the work trial, an employee's substantive employing department will continue to pay the member of staff. They provide that the redeployment period will last for 3 months. However, it may be reasonable to extend the employee's redeployment period (to) a maximum of four weeks (p.61). The guidelines provide that if no suitable redeployment opportunities have been identified during the redeployment period, there may be no other alternative than to consider dismissal (p.61).

68 The guidelines state that, if several applications are submitted by different redeployees for the same position and there is not a clear match with one redeployee, then the redeployees should be informed that a competitive interview will be undertaken in order to confirm a suitable match (p.60).

69 The Claimant completed his redeployment forms on about 3 April 2017.

Ms Toney-Browne sent him a list of vacancies on 6 April 2017.

70 Ms Toney-Browne told the Tribunal that employees were only able to be considered under the redeployment rules for redeployment to jobs which were within their current or lower level pay band, but that employees were free to apply under a competitive process for jobs which were at higher bands. The Employment Tribunal accepted her evidence; such a rule accords with the usual rules for redeployment in organisations and is also fair to other employees.

71 The Claimant expressed an interest in an Anaesthetic Pre-Assessment HCA post on 5 May 2017 (p.314). Ms Toney-Browne emailed him on 11 May 2017 saying that she had received a response from the recruiting manager for the Pre-Assessment role and that she had agreed to review the Claimant's online application. Ms Toney-Browne said that the recruiting manager had advised that they were looking for: "... someone with out-patient, surgical experience". Ms Toney-Browne asked the Claimant whether he had this experience and told him that she was sure that it was something the Claimant could gain with training.

72 On 15 May 2017 the Claimant replied to Ms Toney-Browne regarding the Anaesthetic Pre-Assessment HCA position, saying that he had experience of working in a surgical department before his role on the Stroke Unit, which was gained through working with NHS professionals in a Pre-Surgical and Post-Surgical Observation Unit. He said that his responsibilities in the Surgical Unit were to carry out observation procedures on patients, pre- and post- surgical interventions. The Claimant also said that he had seen a different role in the Health Science Service which was of interest to him; a Band 2 Production Assistant Aseptics post in the Pharmacy Department (p.312).

73 The recruiting Matron for the HCA Pre-Assessment Anaesthetic job viewed the Claimant's application and arranged an interview with him on 22 May 2017 (p.334). This interview was informal, but the Claimant was told that he was unsuccessful. Ms Toney-Browne asked the Matron for feedback as to why the Claimant had been unsuccessful at the informal interview. The recruiting Matron told Ms Toney-Browne that this was for a variety of reasons:

> ".. he was unable to express how we would use his skills as HCA within a pre-assessment setting, and wasn't able to practically express ways of communication with patients that come to pre-assessment..." (p.334)

74 It appeared from email exchange that, while there had been a high volume of applicants for that HCA Pre-Assessment Anaesthetic post, the recruiting Matron had been happy to view the Claimant's application and, if he met the criteria, to invite him for an interview. She had seen the Claimant for an informal interview in accordance with the redeployment policy (p.336).

75 On 2 June 2017, Ms Toney-Browne wrote to the recruiting manager for the Band 2 Production Assistant Aseptics role, telling him that, when he interviewed the Claimant on 6 June 2017, the interview would have to be an informal structured interview. She said that the purpose of the interview would be to ensure that the redeployee met the minimum central criteria for the role, or was able to meet those criteria within a reasonable timespan if provided with suitable training. She said that

the manager should note that, at this stage, the offer would be made purely on the basis of the redeployee's performance at the interview and would be subject to successful completion of a trial period (p.339).

76 Ms Toney-Browne wrote again to the recruiting manager after the interview, asking why the Claimant had been unsuccessful at the informal interview. She enquired, if the recruiting manager had not been successful in recruiting to the position, whether it would be possible for the Claimant to be given a 4-week trial period (p.338).

77 Mr Fisher, the recruiting manager, replied on 20 June 2017 saying:

> "We interviewed Terry as part of an already arranged set of interviews as you are aware. We recruited someone from these interviews who had previous relevant experience and fully met the person specification and interviewed much better. A 4-week trial may not be useful in this role as the post takes a minimum of 3 months before the individual can start to perform any of the job that they will eventually perform, since the training for this role cannot be shortened…" (p.338).

78 Ms Toney-Browne was asked about this interview in her evidence. It was put to her that interview appeared to have been a competitive interview. Ms Toney-Browne said that she agreed, although she had emailed the manager telling the manager that the interview had to be informal and the Claimant given priority. She said that, unfortunately, the line manager had not followed her advice.

79 The Claimant also expressed an interest in a Health Care Assistant Band 2 Out Patient position and was invited to attend an interview on 23 June 2017 (p.350).

80 On 19 June 2017, Ms Liselle Toney-Browne held a review meeting with Mr Faulkner and the Claimant to discuss the redeployment process. The Claimant explained that he had been invited to attend an interview on 23 June 2017 for the Health Care Assistant position in Out Patients. He said, however, that he had been invited to complete an assessment for that position, which he believed was not in accordance with the redeployment process. Ms Toney-Browne agreed to look into this on his behalf and, on 22 June 2017, emailed Catherine Wood, the recruiting Matron at the Out-Patient department. Ms Toney-Browne told Ms Wood that the Claimant was undergoing redeployment and should only have an informal structured interview. She said that she believed that the Claimant had been invited to complete an assessment for the position and that that was not necessary under the principles of redeployment. Ms Toney-Browne reminded Ms Wood that the purpose of the informal structured interview was to ensure that the Claimant met the minimum essential criteria for the role, or would be able to meet those within a reasonable timespan if provided with suitable training.

81 The Claimant attended the interview on 23 June 2017 and was asked to complete a numeracy and literacy assessment. The Claimant objected to taking the assessment, saying that this was not appropriate under the redeployment policy. Ms Wood required him to take the assessment in any event. She told the Tribunal that it was her standard practice to ask all candidates to complete numeracy and literacy assessments for Health Care Assistant roles in Out Patients. She said that this was to

ensure that the basic standards were satisfied. She had had experience, in the past, when HCAs had misfiled patients records because they did not have basic literacy skills; for example, they could not put files in alphabetical order.

82 Ms Wood said that 85% of the Out-Patient staff were HCAs and that they worked independently. She had had performance issues with previous staff and had introduced these very basic tests to ensure that HCAs could, for example, accurately record times on a 24-hour clock, put records in date order and accurately identify patients.

83 The Claimant completed the assessments and attended the interview. He was not appointed to the post. Ms Wood told the Tribunal that she had not read Ms Toney-Browne's email of 22 June 2017 in detail.

84 Ms Wood told the Tribunal that she did not have the opportunity to arrange an informal meeting and that the Claimant had undergone the same process as the 10 to 15 other applicants.

85 Ms Wood wrote to Ms Toney-Browne, giving her the outcome of the interview process. She said that the Claimant had not reached the standard in the literacy test – he had scored 5 out of 8. Ms Wood said that she allowed a pass for 7 out 8, but not below. In her feedback to Ms Toney-Browne, Ms Wood said that the Claimant had been unable to demonstrate knowledge of Out Patients and what the work there entailed, did not have an awareness of the job description, and, in a scenario, he had given her concerns about his practice. She said that, for his interview questions, he had scored 3 out of 10.

86 In evidence to the Tribunal, Ms Wood told the Tribunal that, in interview, the Claimant had been asked about scenarios and patient safety. She said that the Claimant had not shown, at any point, that he had understood what Out Patient work entailed. She stated that the panel had significant worries and concerns on patient welfare in the Claimant's case. She said that the Claimant had not performed on the literacy test in relation to identification of patients.

87 In her witness statement, Ms Wood said that she was clear that the Claimant did not meet the minimum essential criteria for the role. She had considered whether he would be able to meet the essential criteria within a reasonable timespan if provided with suitable training, but she was not satisfied that the Claimant would be able to improve to the necessary standard, because he had fallen far below the minimum standard required. She said that that final decision was made collectively by the panel.

88 During the interview the Claimant had mentioned that he was seeking redeployment because of his back condition. Ms Wood told him that the Out Patients role involved manual handling patients' medical records. Ms Wood said that she already had staff who had back problems.

89 In evidence to the Tribunal, Ms Wood said that the Out Patients Department could make reasonable adjustments for people with back problems. However, she said that there was manual handling involved in the job; for example, assisting patients when taking their height and weight and assisting with procedures. She also said that

the Department saw thousands of members of the public, some of whom could be using wheelchairs, and some of whom would arrive on stretchers.

90 The Tribunal found Ms Wood's evidence regarding the Claimant's performance at interview to be credible. She explained why she considered that he did not meet the minimum standards and where he had failed to satisfy the panel that he could undertake basic requirements of the job.

91 The Claimant expressed an interest in a Clinical Coding Assistant position (p.375a). Ms Toney-Browne spoke to the recruiting manager about the Claimant. The recruiting manager advised that the position involved a lot of manual handling. Nevertheless, the manager said that they would be willing for the Claimant to come to the department to discuss the role (p.375a).

92 On 6 July 2017, the Claimant emailed Ms Toney-Browne saying that he had attended an informal meeting about the Clinical Coding role and had decided that the position was not right for him, considering his back problems. He said that the position involved a lot of manual handling, lifting heavy patient case notes onto trolleys; the Claimant would have been working on his own doing these manual handling tasks (p.375b).

93 On 10 August 2017 the Claimant emailed Mr Faulkner concerning reduction in his monthly pay. He had been told that he was going to be paid half pay from 17 August 2017 (p.375d). The Claimant complained that he had not been offered a different role, despite attending for interviews for Band 2 positions. He said:

> "The reason for not offering me the suitable vacant position applied for was as a result of the failure to follow the appropriate procedure of the redeployment process by my employer…
>
> As far as I am aware of the redeployment procedure, even if I do not meet all the requirements for the suitable vacant position, the trust has a duty to put the employee on trial for the position, making sure training is offered to the employee to meet all the criteria for the position…" (p.375i).

94 Mr Faulkner passed the Claimant's complaint on to, Val Davis Interim Head of Employee Relations. Mr Faulkner said that the redeployment policy was not being followed properly, the Claimant had not been offered a trail period in any of the roles that had been identified and that he had been interviewed in the same way as all applicants (p.375a).

95 The Claimant's pay was reduced to half pay on 17 August 2017.

96 The Respondent applies the Agenda for Change terms and conditions to its staff. The Agenda for Change terms and conditions provide that, after completing 5 years' service, staff are entitled to 6 months' full pay and 6 months' half pay when on sick leave.

97 The Claimant went off work sick on 10 February 2017 because of lower back pain. The Respondent provided the Tribunal with the Claimants' GP Statements of

Fitness for Work for the whole period from 13 February 2017 until May 2017. All the GP Statements of Fitness for Work stated that the Claimant was not fit for work during that period because of low back pain. There was no evidence that the Claimant's GP ever signed him back to work as fit.

98 The Claimant's contract also provided that, when he had worked for over 60 months, he would be entitled to 6 months' full pay and 6 months' half pay.

99 Ms Toney-Browne told the Tribunal that the Claimant went on to half pay in August because he had exhausted his 6 months' full pay entitlement. He had never been signed as fit to work by his GP after February 2017 and throughout the redeployment process.

100 On 1 September 2017, Ms Toney-Browne wrote to Nicola Dearson, asking for her support in redeploying the Claimant and specifically asking whether any Band 2 vacancies within her Division were going through recruitment (p.375l). The same day, Ms Dearson responded, saying that there was a Band 2 Ward Clerk position coming up on the Hyper Acute Stroke Unit.

101 On the same day, the Claimant emailed Ms Toney-Browne, saying that there was a Band 3 Clinical Coding vacancy which interested him. At the Tribunal, the Claimant confirmed that his claim to the Tribunal concerned only the Band 2 posts, and not this Band 3 post.

102 On 12 September 2017, Ms Toney-Browne contacted Mr Faulkner, asking him to make contact with the Claimant to arrange an informal chat with a Matron about a Ward Clerk position. She said that the Claimant would be able to start this role on a trial period immediately, if successful, and would benefit from a handover from the current Ward Clerk.

103 Mr Faulkner replied, saying that he telephoned the Claimant's mobile telephone number and had received no answer, but had left a message asking the Claimant to call. Ms Toney-Browne also wrote to the Claimant on 14 September 2017, notifying him of a full-time Ward Clerk Band 2 position on HASU and asking him to ring Kathy Mason, Senior Sister, to arrange an informal structured interview (p.403).

104 The Claimant did not respond to Mr Faulkner's telephone message or to the letter from Ms Toney-Browne.

105 The Claimant submitted a formal grievance on 11 September 2017 (p.387). In it, he complained that Ms Jenny Otoo, Occupational Health Advisor, had advised that he be redeployed to an Out Patient setting if a position was available, but that nothing had been done about it. He also said that he had eventually been put on the redeployment process by Liselle Toney-Browne. He said that the Respondent had failed to follow the correct procedure for the redeployment process and that the Respondent's decision to reduce his sick pay to half pay was unreasonable and in breach of the redeployment process. He said that the Respondent had breached its duty of trust and confidence and directly discriminated against him.

106 The Claimant was invited, by letter of 25 September 2017, to an informal

meeting about his grievance, to be held on 6 October 2017 (p.409).

107 On 26 September 2017, Ms Toney-Browne emailed the Claimant, attaching a list of vacancies and drawing his attention to two Band 2 vacancies: Ward Clerk on Harvest A Ward working 30 hours a week; and a post on the General Surgery Ward working 37.5 hours a week (p.402g).

108 On 28 September 2017, the Claimant wrote to Jonathan Faulkner and Human Resources, resigning. He said that the Respondent had failed to make reasonable adjustments to provide him with a suitable position within the Trust when positions were available on numerous occasions. He said that he had been classified as sick when in the redeployment process and that his salary had been reduced by half. He said that he had escalated his complaints to Human Resources in October 2016, which had been dealt with by Liselle Toney-Browne without a resolution (p.55ziii).

109 The Claimant contacted ACAS on 16 November 2017 and presented a complaint to the Tribunal on 10 January 2018.

110 In evidence to the Tribunal, the Claimant withdrew his allegation that Liselle Toney-Browne failed to deal with his grievance dated November 2016.

Relevant Law

Discrimination

111 By *s39(2)(b)(c)&(d) EqA 2010*, an employer must not discriminate against an employee in the way the employer affords the employee access to opportunities for transfer or training, or by not affording the employee access for receiving any benefit, facility or service, or by dismissing him, or subjecting him to any other detriment.

Direct Discrimination

112 Direct discrimination is defined in *s13(1) EqA 2010:* **"**(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

113 Disability and race are each a protected characteristic, *s4 EqA 2010*. By *s9 EqA 2010*, race includes colour; nationality; ethnic or national origins.

114 In case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," *s23 Eq A 2010.*

115 The test for causation in direct discrimination cases is a narrow one. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the ET must determine why the alleged discriminator acted as he did. What, consciously or unconsciously, was his reason? Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified. Para [77]. See also *Chief Constable of Greater Manchester Police v Bailey* [2017] EWCA Civ 425 paragraph [12].

116 If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it had a significant influence, per Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576. "Significant" means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

Burden of Proof

117 The shifting burden of proof applies to claims under the Equality Act 2010, s136 EqA 2010.

118 In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in Igen v Wong [2005] ICR 931 at para 76 and Annex to the judgement.

119 In *Madarassy v Nomura International plc.* Court of Appeal, 2007 EWCA Civ 33, [2007] ICR 867, Mummery LJ approved the approach of Elias J in Network Rail Infrastructure Ltd v Griffiths-Henry [2006] IRLR 865, and confirmed that the burden of proof does not simply shift where M proves a difference in sex and a difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient, para 56 – 58 Mummery LJ.

Discrimination Arising from Disability

120 *s 15 EqA 2010* provides: "Discrimination arising from disability (1) A person (A) discriminates against a disabled person (B) if— (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim. (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

121 In *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14, Langstaff P said that there were two issues regarding causation under s15:

121.1 What was the cause of the treatment complained of ("because of something" – what was the "something"?)

121.2 Did that something arise in consequence of the disability?

Reasonable Adjustments

122 By *s39(5) EqA 2010* a duty to make adjustments applies to an employer. By *s21 EqA* a person who fails to comply with a duty on him to make adjustments in respect of a disabled person discriminates against the disabled person.

123 *s20(3) EqA 2010* provides that there is a requirement on an employer, where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter, in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the

disadvantage.

124 *Para 20, Sch 8 EqA 2010* provides that an employer is not under a duty to make adjustments if the employer does not know and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the substantial disadvantage.

125 In Griffiths v Secretary of State for work and Pensions [2016] IRLR 216, the CA held that a requirement for an employee to maintain a certain level of attendance at work in order not to be subject to the risk of sanctions was a PCP. In so formulating the PCP, it was clear that a disabled employee whose disability increases the likelihood of absence from work is disadvantaged when compared to non-disabled employees as they are at greater risk of being absent on the grounds of ill health. It may then be reasonable to alter the trigger points at which disciplinary action will be considered.

126 The comparator for the purposes of s20 is identified by reference to the disadvantage caused by the relevant arrangements, *Smith v Churchills Stairlifts plc* [2005] EWCA Civ 1220, [2006] IRLR 41, per Maurice Kay LJ at para 41. In other words, the comparator is a person who was not placed at a substantial disadvantage by the arrangements.

Reasonableness of Adjustments

127 The test of 'reasonableness', imports an objective standard, *Smith v Churchills Stairlifts plc* [2005] EWCA 1220, [2006] ICR 524, *Collins v Royal National Theatre Board Ltd* 2004 EWCA Civ 144, 2004 IRLR 395 per Sedley LJ para 20.

128 The *Equality Act 2010* does not specify any particular factors which are to be taken into account in deciding whether an adjustment is reasonable. The Code of Practice on Employment 2011 provides examples of some of the factors which might be taken into account in determining whether a particular step is reasonable for an employer to have to take include;

- 128.1 Whether taking any particular steps would be effective in preventing the substantial disadvantage;
- 128.2 The practicability of the step;
- 128.3 The financial and other costs of the step and the extent of any disruption caused;
- 128.4 The extent of the employer's financial and other resources;
- 128.5 The availability to the employer of financial and other assistance;
- 128.6 The type and size of the employer.

Constructive Dismissal

129 *s 94 Employment Rights Act 1996* states that an employee has the right not to be unfairly dismissed by his employer. In order to bring a claim of unfair dismissal, the employee must have been dismissed.

130 By *s95(1)(c) ERA 1996,* an employee is dismissed by his employer if the employee terminates the contract under which he is employed, in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

This form of dismissal is known as constructive dismissal.

131 In order to be entitled to terminate his contract and claim constructive dismissal, the employee must show the following:

131.1 The employer has committed a repudiatory breach of contract.

131.2 The employee has left because of the breach, *Walker v Josiah Wedgewood & Sons Ltd* [1978] ICR 744;

131.3 The employee has not waived the breach- in other words; the employee must not delay his resignation too long, or indicate acceptance of the changed nature of the employment.

132 The evidential burden is on the Claimant. Guidance in the *Western Excavating (ECC Limited) v Sharp* [1978] ICR 221 case requires the Claimant to demonstrate that, first the Respondent has committed a repudiatory breach of his contract, second that he had left because of that breach and third, that he has not waived that breach.

133 Every breach of the implied term of trust and confidence is a repudiatory breach, *Morrow v Safeway Stores* [2002] IRLR 9.

134 In order to establish constructive dismissal based on a repudiatory breach of the implied term of trust and confidence, the employee must show that the employer has, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between them, *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606, *Baldwin v Brighton and Hove City Council* [2007] ICR 680 and *Bournemouth University Higher Education Corporation v Buckland* [2009] IRLR 606.

135 To reach a finding that the employer has breached the implied term of trust and confidence requires a significant breach of contract, demonstrating that the employer's intention is to abandon or refuse to perform the employment contract, Maurice Kay LJ in *Tullett Prebon v BGC* [2011] IRLR 420, CA, para 20.

136 The non-payment of wages by an employer to an employee can constitute a repudiatory breach of contract, *Cantor Fitzgerald International v Callaghan* [1999] IRLR 234.

137 Persistent failure to make reasonable adjustments may constitute a repudiatory breach of contract, *Meikle v Nottinghamshire CC* [2005] ICR 1, *Shaw v CCL Ltd* [2006] IRLR 98.

138 Once a repudiatory breach has occurred, it is not capable of being remedied so as to preclude acceptance. The wronged party has a choice of whether to treat the breach as terminal. However, the wronged party cannot ordinarily expect to continue with the contract for very long without being considered to have affirmed the breach, *Buckland* per Sedley LJ, at paragraph [44].

Resignation in Response to Breach

139 In *Nottinghamshire County Council v Meikle* [2004] EWCA Civ 859, [2004] IRLR 703, CA the Court of Appeal held that what was necessary was that the employee

resigned in response, at least in part, to the fundamental breach by the employer; as Keene LJ put it:

> "The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that, in the present case, it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by the employer."

140 In *Wright v North Ayrshire Council* [2014] IRLR 4, EAT, Langstaff P said that once a repudiatory breach of the employment contract by the employer has been established in relation to a constructive dismissal claim, the correct approach, where there was more than one reason why an employee left a job, was to examine whether any of them was a response to the breach. If the breach played a part in the resignation, then the employee has been constructively dismissed. However, Langstaff P also said that where, there is a variety of reasons for a resignation, but only one of them is a response to repudiatory conduct, a tribunal may wish to evaluate whether, in any event, the claimant would have left employment and adjust an award accordingly.

Reasonableness

141 If the Claimant establishes that he has been dismissed, the ET goes on to consider whether the Respondent has shown a potentially fair reason for the dismissal and, if so whether the dismissal was, in fact, fair under *s98(4) ERA*. In considering *s98(4),* the ET applies a neutral burden of proof.

Polkey and Contributory Fault

142 If the Tribunal determines that the dismissal is unfair the Tribunal may go on to consider the percentage chance that the employee would have been fairly dismissed, *Polkey v AE Dayton Services Limited* [1988] ICR 142, *Gover v Propertycare Limited* [2006] ICR 1073.

Discussion and Decision

143 The Tribunal took into account all its findings of fact in coming to its decision. For clarity, it has set out its decision in relation to each issue separately. Addressing the list of issues and applying the law to the facts, the Employment Tribunal found as follows:

Direct Race Discrimination

Issue 1.2.1

144 The Tribunal was satisfied, on the evidence, that Mr Faulkner did receive a copy of the Occupational Health report when it was sent to him on 24 February 2016 and that that was the reason he did not need to request a further copy. This was nothing to do with the Claimant's race.

Issue 1.2.2

145 The Tribunal accepted Mr Faulkner's evidence that he did not act on the recommendations of Occupational Health between February 2016 and May 2016 because he was meeting with the Claimant under the Respondent's Sickness Absence Procedure and his next meeting was scheduled for May 2016.

146 At the May 2016 meeting, it was agreed between Mr Faulkner and the Claimant that the Claimant would continue with his applications for roles outside the NHS. At that point, therefore, Mr Faulkner did not seek to redeploy him into a different role in the NHS. Mr Faulkner was going out of his way to assist the Claimant with his applications for better paid roles, to help the Claimant advance in his career as the Claimant wished. He was acting in a commendably supportive way regarding the Claimant's applications.

147 Mr Faulkner had copied his letters of May and August 2016 to Human Resources and had not received any advice from Human Resources that the procedure that he was adopting with regard to the Claimant's applications was wrong. The Tribunal was satisfied by Mr Faulkner's evidence that his failure to initiate the formal redeployment policy at this time had nothing to do with the Claimant's race.

Issue 1.2.3

148 The Tribunal was also satisfied, on Ms Dearson's evidence, that, if Ms Dearson directed the Claimant towards his line manager when he approached her with work issues, this was because Ms Dearson would always direct employees to their line managers in relation to issues with their work. She did not treat him differently to any other employee. Her treatment of him was in no way because of his race.

Issue 1.2.4

149 The Tribunal considered that Liselle Toney-Browne did not act in a proactive way in relation to the Claimant's medical condition. While she read Mr Faulkner's letters of May and August 2016 - in which Mr Faulkner recorded the 24 February 2016 Occupational Health advice - she did not seek a copy of that Occupational Health report. She did not provide any proactive advice to Mr Faulkner regarding the redeployment process when she read, in his letters, that Occupational Health had advised that the Claimant be moved to a role in Out Patients.

150 The Tribunal found, however, that there were not facts upon which it could conclude that Ms Toney-Browne would have treated a non-African, or white British, employee differently to the way in which she treated the Claimant. Ms Toney-Browne appeared to be passive in her approach to employee relations and to the assistance that she gave to managers; only if she was directly asked for advice or help would she intervene in any way. It appeared that Ms Toney-Browne was quite a junior member of staff and had been very recently employed when Mr Faulkner met with the Claimant in May 2016. A reasonable person, or a more experienced HR manager, might have appreciated that some advice needed to be given to Mr Faulkner and the Claimant about the redeployment process. Nevertheless, the Tribunal concluded that Ms Toney-Browne treated the Claimant in the same detached way as she would have treated other employees who needed redeployment, but whose managers had not directly asked Ms Toney-Browne for assistance in this regard.

151 After the Claimant contacted Human Resources again in August 2016, Ms Toney-Browne was prompted to email Mr Faulkner about redeployment, but failed to follow up the email. She was unable to offer any explanation for this. While this was not an allegation in the race discrimination claim, it further indicated Ms Toney-Browne's rather passive approach to questions of disability and redeployment.

152 Ms Toney-Browne told the Tribunal that she was not aware of the existence of 24 February 2016 report in November 2016 and only became aware of it when the Claimant sent it to her in February 2017. She said that, on the Human Resources intranet, the only report which she could find was one dated January 2016 and this did not recommend redeployment.

153 The Tribunal accepted her evidence in this regard, although, again it indicated Ms Toney-Brown's rather incurious attitude to the Claimant's condition and his redeployment. She told the Tribunal that she had read both of Mr Faulkner's letters which clearly mentioned the report of 24 February 2016. Ms Toney-Browne did not put two and two together and realise that there was such a report, even if it was not logged on the Human Resources system. Ms Toney-Browne's approach was very superficial and piecemeal - only if she was asked a direct question would she answer it; and only if a report was on the HR system did she consider that it was likely to exist.

154 Again, however, the Employment Tribunal did not find that there was evidence that Ms Toney-Browne would have acted more proactively in the case of a non-black African or white British employee in the same circumstances as the Claimant.

Issues 1.2.6 and 1.2.7

155 The Claimant contended that Mr Faulkner and Ms Toney-Browne failed to redeploy him into a role which did not involve heavy lifting or manual handling because of his race and failed to remove the requirement to perform manual handling on the Stroke Unit.

156 The Tribunal accepted Mr Faulkner's evidence that a suitable alternative role, within the Stroke Unit, which did not involve manual handling, only became available in September 2017. The Claimant was then contacted by both Mr Faulkner and Ms Toney-Browne, to invite him to attend a meeting with a view to undertaking a 4-week trial. The Claimant did not respond to that invitation.

157 In so far as the Claimant compared his treatment to that of Ms Hill and Mr Bell, the Tribunal accepted the Respondent's evidence that alternative positions had become available at the time that those comparators were looking for different roles. In any event, the Respondent had a redeployment policy which required employees who were being redeployed to meet the minimum essential criteria for the role into which they were being redeployed. The Trust's guidelines required that this be assessed by way of an informal interview. There was no automatic redeployment into alternative roles. The Tribunal accepted Mr Faulkner's evidence that Mr Bell, the Claimant's comparator, was given a 4-week trial after meeting the minimum requirements and was thereafter successful in being appointed to a redeployed role.

158 Ms Hill was not a redeployee but was simply placed in a vacant position within

the Stroke Unit's budget. This was not a redeployment situation.

159 The failure to redeploy the Claimant into a role which did not involve heavy lifting or manual handling was nothing to do with the Claimant's race, it was simply because: either, there were no such roles available on the Stroke Unit at the relevant time; or, he was not considered for roles under the redeployment process until he actually entered that process.

160 When the Claimant did enter the redeployment process, he was not appointed to the roles because:

160.1 In respect of the Production Assistant Aseptics role, the manager conducted a competitive interview and appointed someone who had previous relevant experience, fully met the person specification and interviewed much better than the Claimant.

160.2 In respect of the HCA Out Patient role, the Claimant failed the literacy test which Ms Wood administered to all applicants and performed very poorly in his interview, so that he did not meet the minimum requirements for the post, in any event.

160.3 In respect of the Anaesthetic Pre-Assessment role, the Claimant did not demonstrate that he met the minimum essential requirements for the post. He was completely unable to express how he could use his HCA skills in a Pre-Assessment setting, or how he could communicate with patients in that setting.

None of these outcomes had anything to do with race.

161 While it is correct that the assessment process for the HCA Out Patient post and the Production Assistant Aseptics post did not accord with the requirements of the redeployment policy - in that the Claimant was required to undergo a competitive interview process - the Tribunal concluded that there was no evidence that a non-African, or white British employee, would have been required to go through a different process by those managers at those times. The Claimant was treated in the same way as all the other applicants for those posts were treated. The redeployment policy was not followed. The Tribunal accepted that Ms Wood simply decided to proceed with the competitive interviews as had already been arranged, but that, in any event, the Claimant performed so badly that he would not have succeeded under the informal interview requirements.

162 With regard to the Productions Assistant Aseptics post, the process had also been set up, in advance, as a competitive process. It appeared that Mr Fisher, the recruiting manager, again proceeded with the competitive interviews which had been previously arranged, in the same way as Ms Wood decided to do.

Issue 1.2.8

163 Ms Wood did fail to remove the requirement for the Claimant to sit a numeracy and literacy test during the redeployment interview process. The Tribunal accepted her evidence that she considered that it was an essential part of an HCA role in Out Patients to have basic literacy and numeracy skills. This was necessary for patient safety. HCAs in an Out Patient setting worked very independently. Ms Wood had had

experience with previous HCAs who had misfiled records and misidentified patients. The Tribunal accepted that it was a matter of patient safety for HCA assistants to be able to file records correctly, in alphabetical order and date order. The Tribunal was satisfied that a white or British or non-African redeployee would have been required to sit this basic literacy and numeracy test.

Issue 1.2.9

164 The Tribunal was satisfied that the Claimant went off sick in February 2017 and remained signed off sick by his GP throughout the redeployment process.

165 By August 2017, the Claimant had exhausted his 6 months' full pay entitlement under Agenda for Change and under his contract. This was the reason that the Respondent reduced his pay to half pay at that point. It had nothing to do with the Claimant's race; it was simply following its Agenda for Change terms and conditions. The Agenda for Change terms were applicable to all staff, whatever their race.

Issue 1.2.10

166 The Respondent did fail to offer the Claimant any of the redeployment roles he had expressed an interest in. The Tribunal has set out the reasons for this already. It was satisfied that race had nothing to do with the failure to offer him these posts, albeit that, on at least one occasion, the relevant manager did not follow the redeployment process as he had been advised to do.

Direct Disability Discrimination

Issues 1.8 – 1.10

167 The Claimant contended that he was not appointed to the HCA out-patient role because he was disabled and/or because he was unable to perform manual handling duties.

168 The Tribunal was satisfied that the reason he was not appointed to that role was because he failed the literacy test and that he performed so poorly in interview that he was considered not to meet the minimum essential requirements for the role. While Ms Wood did tell the Claimant that there was manual handling involved in the role and that she had other people who were disabled and had reasonable adjustments, this was not the reason that the Claimant failed to attain the role. Ms Wood responded to the Claimant's assertion that he was moving because of manual handling duties. Ms Wood mentioned manual handling in her feedback on the Claimant, after she had explained the reasons that he had not been appointed to the role. Disability and/or the Claimant's inability to perform manual handling were not part of the decision-making process with regard to his appointment.

Failure to Make Reasonable Adjustments

169 The Respondent admitted that it applied the PCPs set out in the list of issues and that those PCPs put the Claimant at the substantial disadvantages set out therein – issues 1.11 – 1.13.

170 The Claimant contended that the Respondent failed to make adjustments, in

that it failed to place the Claimant into an alternative role without going through a redeployment process, failed to place the Claimant into an alternative role without requiring him to attend a formal interview, required the Claimant to sit a numeracy and literacy test and failed to pay him full sick pay.

171 The Claimant contended that these adjustments were reasonable and would have removed those substantial disadvantages. The Burden of Proof shifted to the Respondent to show that it had not failed to make reasonable adjustments.

Adjustment 1.14.1

172 Insofar as the Claimant contended that it would have been reasonable to appoint him to a role without going through the redeployment process, the Tribunal found that this would not have been a reasonable adjustment. The Tribunal found that it was important for patient safety and for the basic administration of the Respondent's organisation that employees did fulfil the minimum essential requirements for any post into which they were placed. The redeployment process was designed to ensure this, but also placed a much-reduced hurdle to redeployees in securing other employment. Redeployees were not required to go through a competitive formal interview and, therefore, they were more likely than normal applicants to attain other work. The redeployment process, the Tribunal concluded, struck an objectively reasonable balance between the needs of disabled employees to be redeployed into available roles and the Respondent's need to ensure that people could do the roles that they were paid for.

Adjustment 1.14.2

173 However, the Tribunal found that the Respondent failed to make a reasonable adjustment when it required the Claimant to go through a formal interview for the Production Assistant Aseptics role on 6 June 2017.

174 Mr Fisher, the Recruiting Manager, was advised by Liselle Toney-Browne of the requirements of the redeployment process, but nevertheless continued with the competitive interview process. This did not treat the Claimant in accordance with the redeployment process, which the Tribunal has found constituted a reasonable adjustment - the redeployment process struck an objectively appropriate balance between the needs of the employer and the needs of disabled employees to be retained in employment.

175 There was no evidence that the other candidates for the Production Assistant Aseptics role were also redeployees, which might have justified a competitive interview. Ms Toney-Browne conceded in evidence that Mr Fisher had not followed her advice to conduct an informal interview.

176 With regard to the HCA Out-Patient role, while the Claimant was required to attend a formal interview process, in fact the test applied to him was whether he fulfilled the minimum essential requirements for the role. He did not fulfil the requirements because his failures in answering questions relevant to the role were so significant. The Claimant failed the informal test, albeit that it was administered in a formal context. The Respondent did not fail to make a reasonable adjustment regarding the HCA Out Patient role.

Adjustment 1.14.3

177 The Tribunal found that it was not a reasonable adjustment for the Respondent to remove the requirement to sit a numeracy and literacy test for the Out-Patient HCA post. The Tribunal accepted Ms Wood's evidence that the numeracy and literacy test was a basic test and was a minimal essential requirement of the post, for the reasons given above.

Adjustment 1.14.4

178 The Tribunal also found that it was not a reasonable adjustment for the Respondent to continue to pay the Claimant full pay after 6 months. In reducing his pay to half pay for a further 6 months, the Respondent was following nationally agreed Agenda for Change terms and conditions, which were, in any event, generous. There was no reason for the Claimant to be treated differently, even if he was a disabled employee, to other people who had been long-term sick, whether disabled or not.

Time Limits - Reasonable Adjustment Claim

179 The Respondent failed to make a reasonable adjustment when it required the Claimant to go through a formal interview for the Production Assistant Aseptics role on 6 June 2017. This was a single occasion on which it failed to make a reasonable adjustment. There was not a continuing act.

180 The Claimant contacted ACAS on 16 November 2017, more than 5 months after the failure to make the reasonable adjustment. He presented a complaint to the Tribunal on 10 January 2018.

181 The Claimant presented his claim out of time. The Tribunal did not extend time for presentation of the Claimant's claim. He is legally qualified. He was aware of the Respondent's duty to make reasonable adjustments for him – he referred to the duty in his emails to HR in 2016. He submitted a formal grievance on 11 September 2017, alleging discrimination. The Tribunal concluded that the Claimant was aware of employment law his rights but failed to bring a claim to the Tribunal within the time limits. It was not just and equitable to extend time for presenting the claim.

Discrimination Arising from Disability

182 The Claimant contended that the Respondent subjected him to discrimination because of something arising in consequence of his alleged disability when it failed to offer him any of the redeployment roles in which he expressed an interest.

183 The Claimant contended that the "something arising in consequence of disability" was him being unable to continue to work in the Stroke Unit.

184 The Tribunal has set out above, under its findings in the Direct Discrimination claims, the reasons why the Claimant was not offered any of the redeployment roles. These reasons were not that the Claimant was unable to continue to work on the Stroke Unit. The Claimant's claim for discrimination arising from disability fails.

Constructive Dismissal

185 As indicated above, the Tribunal has considered the factual allegations in the

discrimination claim, even if it has decided that they did not constitute discrimination, in deciding the constructive dismissal claim. It has also considered all the individual allegations in the constructive dismissal claim.

Issue 1.21.1
186 In evidence, the Claimant withdrew his allegation that Liselle Toney-Browne failed to deal with his grievance dated November 2016.

Issue 1.21.2
187 The Respondent had reasonable and proper cause for failing simply to place the Claimant into an alternative position without going through the redeployment process, as explained above.

Reasonable Adjustment Factual Issue
188 However, the Tribunal has decided that the Respondent failed to act in accordance with its own redeployment process when considering him for the Production Assistant Aseptics post. The Tribunal concluded that the Respondent had no reasonable and proper cause for this failure. Mr Fisher could have interviewed the Claimant along with other applicants, as part of the recruitment process, but still conducted an informal interview and applied the test of whether he met the minimum essential criteria for the role.

189 The Tribunal concluded that the failure to follow the Respondent's own Redeployment Process did constitute a breach of the duty of trust and confidence. Employees are entitled to expect that employers will treat them according to published processes. The Tribunal has decided that the redeployment process struck an objectively fair and reasonable balance between the employer's needs and the needs of redeployees. Failing to follow it meant that the employer failed to adhere to a fair and reasonable process.

Issue 1.21.3
190 The Respondent had reasonable and proper cause for extending the redeployment process to eight months. The extension was generous to the Claimant and gave him a better opportunity, than other candidates for redeployment, to obtain alternative work. This was to his advantage. Extending the period did not breach the duty of trust and confidence.

Issue 1.21.4
191 The Claimant was <u>not</u> advised that he was unsuitable for the Out-Patient HCA position because of his disability as he could not carry out manual handling. Ms Wood was giving the Claimant information about the role for which he had applied - in the circumstances that the Claimant was saying he wished to avoid manual handling. There was reasonable and proper cause for Ms Wood's approach and, in any event, this was not the reason that the Claimant failed to secure the job.

Issue 1.21.5
192 The Tribunal reiterates that there was reasonable and proper cause for the Claimant to be required to sit a numeracy and literacy test.

Issue 1.21.6

193 The Respondent acted with reasonable and proper cause in applying its Agenda for Change sick pay terms and conditions to the Claimant. He was not incorrectly classified as sick during the redeployment process; he was signed off work sick at all times by his GP. There was no breach of any express or implied term of the Claimant's contract – he was treated in accordance with his contractual rights.

Discrimination – Factual Allegations – Issues 1.2.1 – 1.2.10

194 The Tribunal found that there was reasonable and proper cause for Mr Faulkner's failure to take action on the 24 February Occupational Health report, between February and May, because the Claimant was in work and not complaining about his back problems.

195 The Tribunal accepted that there was reasonable and proper cause for Mr Faulkner not taking steps in May 2016 to progress redeployment, because, specifically at that point, the Claimant had applied for external jobs.

196 Nevertheless, the Claimant continued to say, in August 2016, that he wanted to obtain another job without manual handling in the healthcare sector, if he was unable to obtain work elsewhere. Mr Faulkner's 5 August 2016 outcome letter was copied to Liselle Toney-Browne. She did nothing to advise Mr Faulkner about redeployment process, even when she emailed him in September 2016, following the Claimant chasing up redeployment with Human Resources. She failed to pursue that and failed to arrange a meeting until, once more, the Claimant chased her in November 2016.

197 Ms Toney-Browne was not assisted by more senior members of Human Resources, even when they were copied into relevant emails. She was a new employee and may have benefited from guidance from more experienced Human Resources professionals.

198 While the Tribunal has accepted that Ms Liselle Toney-Browne did not discriminate against the Claimant because of his race in failing to obtain the 24 February report, it found that there was no reasonable or proper cause for her failure to obtain the February report. She had been told, in two letters, that it existed and had made specific recommendations regarding redeployment. The Claimant was telling her that his back was painful and he wanted redeployment and she failed to take basic action to read and inform herself of the situation.

199 In November, when she was told by the Claimant that Occupational Health had recommended redeployment, Ms Liselle Toney-Browne failed to interrogate either the Claimant or his manager any further about previous Occupational Health reports.

200 The Tribunal found that Ms Toney-Browne breached the duty of trust and confidence between employer and employee when she failed to request a copy of the 24 February 2016 report and referred the Claimant back to Occupational Health. She had been told that OH had recommended redeployment and the briefest of enquiries would have confirmed this. There had already been a significant delay, since August 2016, in acting on the OH report. In the circumstances that the Claimant was complaining of ongoing pain, her November 2016 failure to obtain and act on the 24 February 2016 OH recommendations was likely to seriously damage the relationship of trust and confidence between employer and employee.

201 When another Occupational Health report advised that the Claimant might benefit from physiotherapy, it was reasonable for the Respondent not to put the Claimant in redeployment, at that point. In April 2016 the Respondent acted reasonably in placing the Claimant on redeployment.

202 The Tribunal therefore concluded that the Respondent, without proper cause, acted in such a way as was calculated or likely to destroy or seriously damage the relationship of trust and confidence when:

202.1 Liselle Toney-Brown failed to request of copy of the 24 February 2016 OH report and referred the Claimant back to Occupational Health instead;
202.2 The Claimant was required to go through a formal recruitment process on 6 June 2017 for the Band 2 Production Assistant Aseptics role.

Affirmation?

203 On 19 June 2017, at a redeployment process review meeting, the Claimant complained that he was not being treated in accordance with the redeployment process. On 10 August 2017 Claimant complained to Mr Faulkner that the redeployment process had not been followed. He complained that he had not been offered a different role and said, "As far as I am aware … even if I do not meet all the requirements for the suitable vacant position, the trust has a duty to put the employee on trial for the position, making sure training is offered to the employee..". Mr Faulkner passed the complaint on to Val Davis, Interim Head of Employee Relations (pp 375i and 375a).

204 There was no evidence that Employee Relations provided the Claimant with a response to his complaint.

205 The Claimant submitted a further formal grievance on 11 September 2017 (p387), which remained unresolved at the time of the Claimant's resignation.

206 The Tribunal concluded that the Claimant did not affirm the 6 June 2017 breach of his contract. He complained on several occasions about the failure to follow the redeployment process. He was not given a response. He then resigned on 28 September 2017.

Resignation in Response to Breach

207 The Tribunal concluded that the Claimant did resign, at least in part, in response to the Respondent's failure to follow its redeployment procedure. He said that the Respondent had failed to make reasonable adjustments and had failed to provide him with a suitable position when suitable positions were available on numerous occasions.

208 The Claimant was entitled to resign claiming constructive dismissal.

Unfair Constructive Dismissal

209 The Tribunal concluded that the Respondent had not shown that there was a potentially fair reason for the Claimant's constructive dismissal. Even if it had, the

Tribunal would have concluded that it did not act fairly in constructively dismissing the Claimant when it failed to follow its own redeployment procedures.

210 The Claimant's unfair constructive dismissal claim succeeds.

Remedy Hearing

211 The Claimant's other complaints fail.

212 A remedy hearing will take place on 1 February 2019. The parties shall exchange documents and witness statements relevant to remedy by 21 January 2019.

213 The Tribunal shall determine all matters of remedy at that hearing, including any decision with regard to *Polkey.*

Employment Judge Brown

10 January 2019