EMPLOYMENT TRIBUNALS

Claimant: Mr P Brittain

Respondent: Nottingham City Homes Limited

Heard at: Nottingham

On: Tuesday 2 May, Wednesday 3 May and Thursday 4 May 2017

Before: Employment Judge Moore

Members: Mrs J C Young
Mr C Tansley

Representatives

Claimant: Mr E Benson, Representative
Respondent: Ms N Owen of Counsel

JUDGMENT having been sent to the parties on 30 May 2017 and written reasons having been requested in accordance with Rule 62 (3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided.

REASONS

1. This is a claim of Section 15 and Section 20 and 21 under the Equality Act. The ET1 was presented on 7 October 2016.

Issues

2. Disability

The Respondent conceded the Claimant was disabled within the meaning of Section 6 EA 2010.

3. Failure to make reasonable adjustments (Section 20 and 21 EA 2010)

a) The detriment relied upon by the Claimant was his dismissal.

b) Does a PCP applied by the Respondent place the Claimant at a substantial disadvantage in comparison with non-disabled persons. The PCP was agreed as a requirement that the employee maintains a level of fitness so as to maintain satisfactory attendance at work so as not to lead to dismissal for reasons of capability.

c) Does the Respondent have the required knowledge about the Claimant as a disabled person?

d) Has the Respondent take such steps as it is reasonable to take in all the circumstances in order to prevent the PCPs having that disadvantageous effect? The Claimant relies upon the following adjustments;

i. Redeployment to a more sedentary role
ii. Assigning the more physical tasks to other colleagues and
iii. Allowing a phased return to work and
iv. Allowing him to use up his holiday entitlement before physically returning to work

4. Discrimination arising from disability (Section 15 EA 2010)

a) The detriment relied upon by the Claimant was his dismissal.

b) Has the Respondent treated the Claimant unfavourably because of something arising in consequences of his disability? The "something arising in consequence" was the Claimant's sickness absence since 7 April 2015.

c) If so can the Respondent show that its actions were a proportionate means of achieving a legitimate aim? The legitimate aims relied upon by the Respondent are

i. Needing certainty in its employee headcount and identity, finances and sickness figures, particularly at a time of restructure across the organisation and;
ii. Ensuring that employees with long term ill health are suitably provided for in a situation where they are unfit to work in the role for which they were employed.

The relevant law

5. Section 15 EA 2010 provides:

15 Discrimination arising from disability

1) **A person (A) discriminates against a disabled person (B) if—**

i. **A treats B unfavourably because of something arising in consequence of B's disability, and**

ii. **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.**

6. (Relevant) Sections 20 and 21 EA 2010 provide

20 Duty to make adjustments

1) **Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**

2) **The duty comprises the following three requirements.**

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

21 Failure to comply with duty

(1) **A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.**

(2) **A discriminates against a disabled person if A fails to comply with that duty in relation to that person.**

(3) **A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.**

Findings of Fact

7. We made the following findings of fact.

8. The Claimant commenced employment on 7 January 2010 as an Electrical Technical Officer. The Respondent is an arm's length management organisation responsible for maintenance of Nottingham City Council's housing stock.

9. The Claimant was responsible for supervision and management of electrical repairs and maintenance to the Respondent's housing stock involving managing external contractors. There was no actual repair work undertaken by the Claimant. The Claimant did undertake some physical work in his role, occasionally having to access awkward spaces such as roof spaces or manholes. There was a dispute of fact as to how often this would be. We prefer the Claimant's evidence in this regard in that the physical elements of the role relating to accessing awkward spaces was occasional, once a week at most.

10. Working with the Claimant was one other Electrical Technical Officer Mr Graydon Peacock and a team of 4 Assistant Technical Officers. The Line Manager of the Claimant was John Jackson until he left the employment of the Respondent in October 2015 and was replaced by Mr Paul Ruston who in turn reported to a Mr Evelyn.

11. The Respondent introduced a new absence management policy on 18 January 2016. The verifier of that policy was George Pashley, Company Secretary for the Respondent. The policy was not contractual. It provided for a process of managing short term and long term absence. The long term absence sections were referred to in the bundle at pages 63 - 64. It provided that if it seems unlikely the employee will be able to return to work in the foreseeable future the manager would move to stage 3 of the sickness absence management process and prepare a management report for consideration of dismissal, having fully explained the process and implications to the employee.

12. Stage 3 provided that the Director or Assistant Director will consider the management report and decide whether a hearing is appropriate to consider if dismissal is appropriate.

13. The policy further provided at 9.3 that the Manager in conjunction with HR and Occupational Health and in discussion with the employee will need to consider whether the employee has a disability within the definition of the Equality Act 2010 and consider any reasonable adjustments that may enable the employee to return to work.

14. The Claimant was a member of the Nottinghamshire Local Government Pension Scheme. This had arrangements for employees who had to retire early due to ill health. There were effectively 3 levels of different types of ill health retirement, all of which the Tribunal were referred to in detail. In summary tier 1 was permanent incapacity and tier 3 was incapacity with a prospect of returning to gainful employment within 3 years.

15. In March 2015 the Claimant was diagnosed with a rare form of cancer known as Merkel Cell cancer. This has a low survival rate after 5 years of only 25%. The Claimant was signed off sick and underwent surgery and a course of radiotherapy in June 2015 for 5 weeks. As a result of the surgery the Claimant developed a condition called lymphedema in his left leg which is an incurable but manageable condition that causes pain and swelling.

16. On 1 October 2015 the Claimant had a welfare meeting with John Jackson and Dawn Baker who was HR Representative. The Claimant advised he was keen to get back to work and some discussions took place regarding a phased return starting with a half day per week.

17. On 27 November 2015 a further welfare meeting took place this time with Paul Ruston as Mr Jackson had left the Respondent's employment. Ms Baker did not attend the meeting. Mr Ruston informed the Claimant that John Jackson's job might be suitable at his office base or that the Claimant could return to his role with adjustments so that the occasional physical elements of his role could be carried out by someone else in the team. The Claimant informed Mr Ruston he was suffering from depression but had arranged to start counselling sessions in December 2015.

18. On the following day the Claimant e-mailed Ms Baker to update her on the meeting and advised he hoped to return on 4 January 2016. Unfortunately this did not happen as the Claimant had planned. His health had not improved and his daughter had been unwell which exacerbated his depression.

19. A further meeting took place on 6 January 2016 with Paul Ruston, Dawn Baker again was not in attendance. The Claimant had 7 weeks' holiday owning to him as a result of his absence the previous year. He discussed with Mr Ruston taking holiday from February 2016 and returning in April 2016. The Claimant explained to Mr Ruston the various issues with his health but also advised him of the steps he was taking to manage these issues including attending counselling, management of various support garments, drainage massage, trying different compression garments, exercises and swimming. The Claimant at this time was able to drive, walk and climb the stairs.

20. Dawn Baker subsequently arranged for the Claimant to be seen by the Respondent's occupational health advisers, Medigold Health. The Claimant attended an appointment on 19 January 2016 with a Mr DisneySpiers who was an RGN nurse. The reports were seen by the Tribunal and referred to extensively by both parties during the proceedings. The main relevant points from the report we find are as follows. The report recorded that the Claimant could only stand or walk for 4-5 minutes. This was disputed by the Claimant.

The report then contradicted this and stated the Claimant could walk slowly and sit for 60 minutes maximum. The Claimant also needed to keep his leg elevated and was struggling physically and emotionally at the time of that appointment. The Claimant was recorded as saying he was unsure if he was fit to return but the outcome was that Mr Disney-Spiers recommended that he review the Claimant in 3 months and stated that his diagnosis was not curable but it was treatable. Mr Disney-Spiers stated that it was very difficult to predict future absences, that the Claimant was unlikely to make significant improvement and that progress would be slow. Mr Disney-Spiers was asked by Ms Baker, presumably in the referral as to the answer to the question whether there were any reasonable adjustments that could be made and his reply was that the Claimant was currently unfit for any type of work. This would likely to be the case for 3 months. Therefore no reasonable adjustments were required.

21. The Claimant subsequently challenged a number of findings in the report but did not challenge the note that he could only walk for 4-5 minutes. We find that whether it was 4-5 minutes or 45 minutes it was clear that the Claimant needed a sedentary job and nothing about this changed from the date of the report to the date of the hearing today.

22. Following that report there was an e-mail from Dawn Baker to Paul Ruston on 25 January 2016 in which she stated that in view of the unforeseen return to work that they needed to consider the sustainability of the Claimant's continued absence. The Tribunal did not hear oral evidence from Dawn Baker so the evidence that we had before us was documentary in regard to her involvement.

23. On 27 January 2016 Ms Baker sent a further e-mail to Paul Ruston and it was here that there was the first mention of the possibility of early ill health retirement. This was instigated by Dawn Baker. Later that day, Dawn Baker e-mailed the Claimant to provide feedback on the challenges he had made to Mr Disney-Spiers' report. She also advised that that Mr Disney-Spiers had also been asked additional questions by Dawn Baker with regards to early ill health retirement. This had not been previously discussed with the Claimant. Mr Disney-Spiers reported back to Dawn Baker his view was that there was no indication in the near future that the Claimant will become permanently unfit for his contractual role. Although progress would be slow he again recommended a referral back to him in 3 months.

24. Despite Mr Disney-Spiers advice Ms Baker advises the Claimant in that email that she has arranged for him to see an Occupational Health Physician as to whether he would qualify for ill health early retirement. It is not clear why she instigated this step or took this step but we find it was instigated by Ms Baker. It is also not clear why she took this step having regard to the fact that Mr Disney-Spiers had informed Ms Baker that there was no indication in the near future the Claimant would become permanently unfit for his contractual role. An appointment was arranged for 10 February 2016 for the Claimant to see an occupational health physician in relation to early ill health retirement.

25. There was what was described as a welfare meeting on 3 February 2016 attended by Dawn Baker, Paul Ruston and the Claimant. The Respondent had no notes of that meeting and we did not hear any evidence from Dawn Baker or Paul Ruston. The Claimant recorded what had happened at that meeting and although his wife was not in attendance at that meeting his account was corroborated insofar as Mrs Britton returned home after the meeting to find the Claimant was extremely distressed. We accept the Claimant's account of what happened at that meeting. It was the only record that we had of that meeting. We accept that Ms Baker raised the issue of terminating the Claimant's employment and that a payment of three month's pay in lieu of notice was suggested by Ms Baker. Ms Baker later accepted

at the appeal hearing when questioned by Jonathan Shaw that 3 months payment in lieu of notice payment had been discussed.

26. Dawn Baker subsequently sent the Claimant a letter on 8 February 2016 in response to the Claimant's request for minutes of the meeting on 3 February 2016. There then followed a medical report of Medigold of 11 February 2016 by Dr Gupta in which she said she advised that she needed to have information from the Claimant's General Practitioner. It is important to note that Dr Gupta records that the specific point of the referral was to consider the issue of ill health retirement. No enquiries were made of Dr Gupta as to whether or not the Claimant would benefit from reasonable adjustments or a phased return.

27. On 25 February 2016 the Claimant sent an e-mail letter to Mr Evelyn which expressed concerns about what had happened thus far. He complained that he had been told that he was going to be dismissed during the 3 February 2016 meeting and also specifically raises the issue that no reasonable adjustments were being made. He advised that he believed that the Respondent was breaching the Equality Act.

28. Mr Evelyn replied on 10 March 2016 giving reassurances to the Claimant. At that same time on 10 March the Claimant asked Dawn Baker if he could take his remaining holiday as half pay. In other words to re-designate his sick leave to holiday so that he would receive some income. He wanted to take the 7 weeks that he had at half days so that he would receive half income of 14 days. He also asked in the event he qualified for early health retirement, what this would mean and whether this could be discussed at the next meeting. Dawn Baker replied to say that he would not be permitted to take his holiday at half rate although no explanation was provided other than holidays had to be taken at one day at a time.

29. The next matter of note is the report of 11 March 2016 from Medigold, this time a Dr Coles had received a letter from the Claimant's General Practitioner Dr Tao and compiled a report on that basis. Dr Coles did not see the Claimant, nor was he asked any information or asked to comment on whether or not the Claimant would be fit for his substantive role with any reasonable adjustments. The relevant findings of Dr Coles are set out at page 119 in the bundle and in summary Dr Coles that Dr Tao had pointed out that the physical work was likely to exacerbate the situation and that he did not think the Claimant was fit to return to his work due to the physical demands of that role. Dr Coles stated he did not see it was likely the Claimant could cope with some of the physical aspects of the job and it would be much more reasonable for him to be employed in a predominantly sedentary capacity. Dr Coles supported early health retirement on a level tier 3 and a certificate for permanent capacity was signed and dated 11 March 2016.

30. On 17 March 2016 Ms Baker e-mailed the Claimant to say they had received the report and that it confirmed he qualified for early ill health retirement. She also stated that they wanted to meet to discuss the details and suggested a meeting on 23 March 2016. There was no mention in the e-mail from Ms Baker to the Claimant that the meeting on 23 March 2016 was going to result in the Claimant's dismissal. It was not clear whether he was sent any information including the report from Dr Coles prior to that meeting.

31 .At some point between 1 1 and 23 March 2016 Mr Edlin prepared a letter of dismissal. Mr Edlin could not remember when he wrote the letter except to say it was some point between these dates. The letter was dated 23 March 2016 but gave the date of dismissal of 1 1 March 2016. Mr Edlin accepted in evidence that the reason for dismissal in his mind was that the Claimant had qualified for early ill health retirement; it was not for reasons of capability.

32. The letter written by Mr Edlin was then delivered at a meeting with the Claimant on 23 March 2016 also in attendance was his wife, Dawn Baker and George Pashley. The only notes of the meeting were the notes prepared by Mrs Britton. There were no notes of the meeting prepared by the Respondent. We have accepted Ms Britton's notes as an accurate record of that meeting. In summary the main points of significance arising from that meeting was that Dawn Baker informed the Claimant that Medigold stated his condition would not allow return to his substantive role, though he may be able to undertake other work with a less strenuous role. The Claimant confirmed that he was making progress with the pressure garments and that he had found an antidepressant that suited him. He was offered and accepted counselling by Dawn Baker. There was a discussion around why tier 3 had been decided upon and not tier 1. The Claimant asked if he could return to work with adjustments to allow for his condition. Dawn Baker informed him that this would not be permitted and that he was retired on the grounds of ill health as at the date of his report. There was to be no job return as he had been retired on these grounds and a capability hearing had been dispensed with.

33. What happened at the meeting on 23 March 2016 was contrary to what was outlined in the letter from Mr Edlin on 10 March 2016. This stated that the Respondent would do everything they could to keep the Claimant employed. There was no pre-warning of dismissal, and we find the Respondent failed to follow their own absence management procedure. There was no management case prepared and no opportunity for the Claimant to comment or discuss on the decision that had been taken by the Respondent. We also find that the prospect or possibility of reasonable adjustments was rejected outright by Dawn Baker. The dismissal letter stated that Mr Edlin was advising not to proceed with the decision without convening a formal capability hearing and sought the Claimant's agreement on this. No such agreement was ever discussed with the Claimant either by Mr Pashley and Dawn Baker at the meeting on 23 March or by Mr Edlin after the meeting. Neither Mr Edlin nor Mr Pashley could explain first of all why they sought to obtain the Claimant's agreement to dispense with a capability hearing and then when that agreement was not forthcoming proceeded in any event to dismiss the Claimant.

34. The Claimant subsequently lodged an appeal and it was evident that the focus of the Claimant's appeal was initially why he had not received tier 1 retirement. This caused the Claimant considerable distress as he maintained that the doctors who had assessed him at tier 3 did not in the Claimant's view take into account that his type of cancer only had a 25% survival rate after 5 years.

35. On 29 March 2016 Dawn Baker wrote to Dr Coles to raise the issue of reasonable adjustments. In the email, Ms Baker asked for clarification from Dr Coles earlier comment that it would be more reasonable for the Claimant to be employed in a predominantly sedentary capacity. Ms Baker went onto ask if this were possible would the Claimant be fit to return to work now or can he give an indication if this would be in the foreseeable future. The next sentence stated:

"We are trying to ensure that the decision to terminate will not be challenged in relation to making reasonable adjustments."

36. We find that Ms Baker did not make any serious enquiries as to what adjustments might enable the Claimant to return to work, rather that the enquiry was to ensure that the decision to terminate could not be challenged. We do not go as far as to find that Ms Baker was deliberately trying to manipulate Dr Coles reply but there was no genuine attempt to obtain advice on what reasonable adjustments might have enabled the Claimant to return to work.

37. A reply was sent on behalf of Dr Coles in which he stated that although he did not think the Claimant likely to be capable of an immediate return to work, he may improve with further treatment and may be capable of a sedentary role within the next six months. The Claimant first discovered about these further enquiries in the course of these proceedings. The Claimant was asked in cross examination why his appeal had focussed on tier 1 and why he had not initially appealed the actual dismissal. The Claimant said he had sought advice from Macmillan Cancer support about the tiers and was advised that he should qualify for tier 1 because of his cancer prognosis. He accepted that he missed not raising an appeal against the actual dismissal. There was evidently a possible contradiction in the Claimant's position at this point. On one hand the Claimant was appealing on the grounds he should qualify for tier 1 which meant he was totally unfit. On the other hand he was saying he could return with reasonable adjustments. He accepts under cross examination he sounded confusing. However we accepted the explanation that he subsequently gave in re-examination about the level of confusion that he was experiencing at that time. Furthermore we took into account that the Claimant understandably thought that the early health retirement was the only option on the table. This can be explained by the advice that the Claimant had been given from Macmillan and also the outright rejection of the possibility of reasonable adjustments to enable the Claimant to return in any event. We find that no criticism should be made of the Claimant regarding the grounds for his appeal for these reasons.

38. There then set in motion various arrangements for a second opinion on the tier 3 early health retirement. By 18 April 2016 the Claimant informed the Respondent that in addition to the grounds to his appeal he wanted to appeal the decision to terminate his contract and clarified that on 4 May 2016 the grounds for discrimination/constructive dismissal and the way the whole situation was handled. An appeal hearing took place on 5 May 2016. In attendance was Jonathan Shaw, Dawn Baker, the Claimant and his companion Steve Walters. Mr Shaw helpfully accepted that the detailed notes that had been taken by the Claimant of that appeal hearing were accurate. The Claimant also found the appeal process very distressing and became very emotional.

39. There was an extensive discussion at the appeal. Mr Shaw is recording as asking the Claimant what duties he felt he could do and both in the Claimant and Respondent notes of that appeal meeting the Claimant informed Mr Shaw that he could sit at a desk and do computer work. The Claimant accepted that he would struggle with manhole, roof spaces and ladders but reiterated he could work from home, elevate his leg and made a suggestion that a more junior member of the team does the difficult physical access work. We find that the Claimant did agree at that appeal hearing that he was currently unfit for work but that should be considered in the context of the preceding conversation where the Claimant had gone through the elements of the role that he could not do. In other words the Claimant accepted he was not fit for his substantive role with no adjustments.

40. Mr Shaw followed up with the appeal with Dawn Baker and asked her if she had any copies of e-mails sent to the Claimant to inform him he was at risk of losing employment and any e-mails that informed the Claimant if ill health retirement qualified, his employment would terminate. Ms Baker did not answer Mr Shaw's question. She did inform him that it was normal practice to dispense with capability hearings due to the circumstances of his condition. Mr Shaw upheld the decision to dismiss the Claimant on 11 May 2016. Mr Shaw concluded in summary that as the Claimant had qualified for early ill health retirement there was a likely inability for him to return to work. This had the effect that there was no need for any reasonable adjustments

to be considered. This was a consistent theme across the Respondent's evidence and the position they took at the time.

41. There was a further referral by Dr Jackson who was an occupational health practitioner from Nottingham City Council this time to the Claimant's oncologist Dr Lawson and we have carefully considered Dr Lawson's reports at page 194 of the bundle which was dated 1 July 2016 after he had reviewed the Claimant on 15 June 2016. Dr Lawson reported that the Claimant was feeling well with no recurrent tumour. Lymphedema was recorded as very mild with a possibility it might improve and whilst he noted that in order to ask what type of employment the Claimant would be capable of he referred back to a Dr Keely, he said he was not aware of any side effects from the radiation that would have an impact on his ability to work. He also commented that his psychological effects with appropriate support treatment he would hope that would not prevent patients with cancer from working.

42. We find that between April and June 2016 the Claimant would have been fit to return on a phased return with adjustments sought. There was evidence of improvement by 23 March 2016 which the Respondent were on direct notice of and further evidence of further improvements as at the appeal hearing. These were that the Claimant was responding well to antidepressants, he was receiving counselling and was trialling different compression garments. There was only one medical report that sought to properly investigate whether there were any reasonable adjustments that could facilitate a return to work and that was two months earlier when the Claimant was referred to Mr Disney-Spiers. By the time of dismissal, given the improvements in the Claimant's health since that report in January 2016, there were some simple adjustments that could have been made to enable the Claimant to return such as a phased return to office based duties, provision of equipment to enable him to keep a leg raised, home working, temporary allocation of the physical work to other members of the team but none of these were even considered by the Respondent before deciding to dismiss the Claimant.

43. A list of vacancies that were available between March and June 2016 was provided to the Tribunal and we heard some evidence from the Claimant about which of these vacancies he possibly could have been redeployed toe We find it would be too speculative to have embarked in a process of saying which of those roles would have been suitable for the Claimant but we do find that the Claimant may have been suitable for the Technical Project Manager role that Graydon Peacock had been promoted to on or around March 2016. Mr Peacock had previously occupied the same role as the Claimant 3 grades lower and therefore we did not accept Mr Pashley's evidence that it was unlikely the Claimant would have been successful in applying for this role. The Respondent did not consider the possibility of redeployment to a sedentary post before dismissing the Claimant.

44. Mr Evelyn gave evidence that the team was under pressure from covering the Claimant's absence and Mr Pashley gave evidence that the absence figures for the Respondent were higher than the local authority average but not about how the Claimant's absence impacted on these figures. Mr Pashley gave further evidence which was not evidence in chief and therefore the Claimant had not had the opportunity to cross examine Mr Pashtey that the Respondent had lost contracts due to their absence levels. Whilst we did not disbelieve Mr Pashley on this there was simply no evidence to support this. The Claimant had exhausted his sick pay yet the Respondent had not explored the opportunity of engaging additional help for the team. Whilst the team may have been stretched due to the Claimant's absence the Respondent took no steps to address this other than dismiss the Claimant where there were other alternatives that could have been explored.

45. We find the Respondent held a genuine yet misguided belief that early ill health retirement would be in the best interests of the Claimant but they did so without taking into account the Claimant's wishes. The Respondent simply did not listen to the Claimant's wishes and proceeded down a route that had been instigated by Dawn Baker. No one at the Respondent including Mr Edlin, Mr Pashley or Mr Shaw properly considered the medical evidence that was available and applied their own minds to what the Claimant was saying about his improvements and his progress. There was a total acceptance of the medical reports even when the purpose of the report was not to give advice on whether adjustments could enable the Claimant to return to work but was simply in respect of the ill health retirement question which was a quite different question that should have been asked. There was a failure to obtain up to date medical evidence on whether there were any reasonable adjustments that could have enabled the Claimant to return to his role.

Conclusions

Discrimination arising from disability

46. The Respondent conceded that the dismissal of the Claimant amounted to a substantial disadvantage and accordingly the only matter the Tribunal had to determine in respect of the Section 15 claim was whether the Respondent could show that the decision to dismiss was a proportionate means of achieving a legitimate aim.

First legitimate aim

"Needing certainty in its employee headcount and identity, finances and sickness figures, particularly at a time of restructure across the organisation"

47. In relation to first of all whether or not the dismissal was a proportionate means of achieving a legitimate aim, we find that it was not so for the following reasons.

48. It was not proportionate to dismiss the Claimant as the Respondent failed to follow their own absence management procedure in reaching that decision. The Respondent failed to consult with the Claimant or hold a stage 3 meeting within their sickness absence management process. There was no management report for consideration of dismissal and no explanation of the process and implications to the Claimant.

49. There was also no compliance with the policy whereby the Director or Assistant Director will consider the management report and decide whether a hearing is appropriate to consider if dismissal is appropriate. No hearing was arranged, the Claimant was simply informed he would be dismissed on 23 March 2016.

50. The Respondent also failed to follow their policy at 9.3 that the Manager in conjunction with HR and Occupational Health and in discussion with the employee will need to consider whether the employee has a disability within the definition of the Equality Act 2010 and consider any reasonable adjustments that may enable the employee to return to work.

51. The failure to consult with the Claimant and listen to his concerns despite promising to do so as late as 10 March 2016 meant that the Respondent were not and could not have been fully in possession of sufficient medical evidence to be reasonably informed and draw reasonable conclusions. The Respondent followed the ill health retirement medical health advice but did not make any proper enquiries of that advice and whether or not in fact a number of simple reasonable adjustments could have enabled the Claimant to return to his substantive role and did not obtain up to date advice in relation to reasonable adjustments. The Respondent did not follow the advice in the report from Mr Disney Spiers which was dated 19 January 2016 and recommended a review

in 3 months. This was not a proportionate means of achieving the legitimate aim.

52. We also find that this is not a case where there was no reasonable prospect or likelihood or knowledge or information that the Claimant would be fit to return in the foreseeable future. There was information available to the Respondent that the Claimant was improving and accordingly there was a chance that return in a foreseeable future was likely. Had proper enquiries been made of the Claimant or that evidence had been considered or revisited in an up to date occupational health report, such a conclusion would have been reached.

Second legitimate aim

"Ensuring that employees with long term ill health are suitably provided for in a situation where they are unfit to work in the role for which they were employed"

53. We find that dismissal was not a proportionate means of achieving this aim for reasons set out above in terms of the failure to comply with the sickness policy and failure to consult and engage with the Claimant and properly asses the medical evidence. Further, the aim could have been achieved by other means rather than dismissal such as removing the physical elements to his role or redeployment but no such other means were explored.

54. Moving on to the legitimate aims we accepted the Claimant's representative's submissions in this regard that there was no evidence from the Respondent on the legitimate aims other than the evidence I have referred to above from Mr Edlin and Mr Pashley about absence figures and pressure on the team.

55. Counsel for the Respondent submitted that there does not need to be concrete evidence for justification (relying on Mr Justice Elias President, in Seldon v Clarkson Wright & Jakes [2009] IRLR 267 at para 73). We do not accept that this means where this is very little or no supporting evidence the Respondent need do no more. In particular there was no evidence on why there was a need for certainty in employee headcount or how this would have applied to people with disabilities. The legitimate aim relied upon was not in our view an explanation which it was immediately obvious or where common sense could be applied as Mr Justice Elias President referred to in Seldon.

56. Further, the second legitimate aim was not achieved by dismissing the Claimant. He has not ended up being suitably provided for as he was dismissed and ending up receiving a Tier 3 pension. The decision on the pension was a matter totally beyond control of the Respondent — it was a matter for the pension trustees. Therefore this particular legitimate aim was one that could not even be achieved by the Respondent.

Section 20 and 21 — Failure to make reasonable adjustments

57. The Respondent submitted that the duty to make reasonable adjustments was never triggered in this case as the Claimant was unable to give an indication of when he would be able to return to work (**Doran v Department of Work and Pensions** UKEATS/0017/14).

58. We conclude that the point at which the duty to make adjustments was triggered. Had the Respondent made the appropriate enquiries of both the medical evidence and the Claimant and consulted with the Claimant then they would have found that the trigger point was engaged. His health had improved between January 2016 and March 2016 and the Respondent was on notice this was the case. Prior to his dismissal the Claimant had suggested a number of adjustments that could have made a return to work possible with adjustments. There was evidence that the proposed adjustments of work from home, elevating his leg and a more junior member of the team doing the difficult

physical access work would have been reasonable and would have eliminated or reduced the disadvantage.

59. The Respondent should not benefit from their own neglect to consider these adjustments. If an employer fails to consider reasonable adjustments and as a result the employee is not fit to return to work it would render the duty pointless to permit the employer to say his duty was not triggered in the first place.

60. We went on to consider whether the adjustments would have prevented the disadvantages and we find that they would have done. In respect of both removing the physical elements of the role and moving the Claimant into a sedentary tasks or role, we found that given the occasional nature of the physical elements once a week at most and the fact that Mr Ruston and Mr Jackson had discussed this in detail with the Claimant and concluded this was indeed possible in October and November 2015, that this was sufficient for us to conclude that the adjustments would have prevented the disadvantage. This was also supported by all of the medical evidence where the various practitioners commented that it was the physical elements of the role that would give the Claimant the difficulty.

We did not accept the Respondent's Counsel's submission that what was discussed in October/November 2015 was irrelevant as the situation had changed. The Claimant's underlying condition of Merkel Cell cancer had not changed. His symptoms and effects from the cancer including the lymphedema had improved and it was this particular condition that was impacting on his ability to do the physical elements of his role.

Failure to make reasonable adjustment to the holiday policy

61. The Claimant had requested to return to work on a phased return and / or to use holidays to make up his salary. We did not hear any evidence from the Respondent about why this suggestion was rejected but it was, The only evidence we had was an e-mail from Dawn Baker saying that holidays had to be taken only as one whole working day and could not be taken as half days. We find this was not an adequate explanation and such an arrangement would have been a reasonable adjustment to ameliorate the financial disadvantage being experienced by the Claimant due to his absence from work. Further, had the Claimant been permitted to use his accrued holiday either being used half or full days, this could have facilitated a phased return to work for the Claimant.

62. For these reasons we find in favour of the Claimant in that the Respondent did not take such steps as was reasonable in the circumstances to prevent the PCPs having the disadvantageous effect.

Employment Judge Moore

Date 31 August 2017

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE