EMPLOYMENT TRIBUNALS

SITTING AT: **SOUTHAMPTON**

BEFORE: **EMPLOYMENT JUDGE M S EMERTON**
MEMBERS: **MS A SINCLAIR, MR R SPRY-SHUTE**

BETWEEN:

Mr M Moores

Claimant

AND

The Queen Elizabeth Hospital Kings Lynn NHS Foundation Trust

Respondent

ON: **2-4 and 8-9 October 2018**

APPEARANCES:

For the Claimant: **In person**
For the Respondent: **Mr M Islam-Choudhury (Counsel)**

JUDGMENT having been sent to the parties on 24 October 2018 and an in-time request for written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Summary

1. It should be noted that this claim relates solely to the alleged failure to make reasonable adjustments, and indirect disability discrimination, relating to the period of the claimant's appeal in March 2017 against being issued with a final written warning, up until his appeal was decided in October 2017.

2. The claim was presented on 2 January 2018 and does not relate to events (including the claimant's subsequent dismissal) after this latter date. The

claimant subsequently presented a second claim (3330846/2018) in the South East Region, which has not been combined with this case and about which this tribunal has been provided with little or no information.

3. It should also be noted that in March 2018 the claimant made an application to amend his claim to add a claim of protected disclosure detriment (relating to disclosures in 2016, and a list of alleged detriments from April 2016 onwards). The application to amend was dismissed, with reasons, on 31 July 2018, and not renewed.

4. In summary, the claim relates to the middle and latter part of 2017. The claimant, employed as Deputy Director of Estates and Capital Development by the respondent Trust, had been disciplined for financial irregularities and issued with a final written warning, against which he appealed. He also became unwell at his disciplinary hearing and went on long-term sick leave, from which he did not return. The claimant complains as to the way he was treated during the appeal process.

5. The respondent has conceded that the claimant was a disabled person by reason of stress and anxiety, over the relevant period.

6. The tribunal concluded that this was a very weak claim, and in some respects misconceived. The claimant failed to discharge the initial evidential burden upon him in respect of any of the claims of failure to make reasonable adjustments, or indirect discrimination.

7. Despite the claimant generating a very considerable quantity of paperwork at the time, and in presenting the tribunal with detailed evidence, that evidence does not disclose a well-founded case. Although the claimant was clearly genuinely upset by what he saw as unfairness in the processes followed by his employer, the specific statutory claims he has chosen to bring are not made out. To the extent that the claimant resents being issued with a final written warning in March 2017, this has plainly led to a sense of injustice which underlies the whole claim. It seems that the claimant believes, in his own mind, that he was a whistle-blower. This long-standing sense of grievance has not, however, assisted the claimant in presenting a coherent discrimination claim. The tribunal's function was to consider the evidence relating to the reasonable adjustments and indirect discrimination claims, and to determine those claims. These claims are not well-founded.

Adjustments and Assistance to the Claimant

8. Before the hearing, the tribunal had noted that the claim form had stated that the claimant needed assistance with concentration, memory recall and emotional control, and that he was assisted by minimising spoken exchanges and maximising written preparations. The tribunal also noted a list of requested adjustments set out in the claimant's email of 27 February 2018, as carefully summarised by Employment Judge Housego in his case management summary of 31 July 2018. The Tribunal noted that the claimant had written that he "*may become obsessive*" and had invited the Judge to "*speak freely to keep my contributions focussed*".

9. The list of matters the claimant suggested would assist him included introducing speakers and audience, and various suggestions as to how to

conduct proceedings, including an indicative timeline, and summing up next steps.

10. The tribunal endeavoured to ensure that the claimant was put at his ease and that adjustments were made in accordance with his suggestions. The tribunal recognised that attending a hearing and presenting his case without the assistance of a representative was bound to be something of a challenge for the claimant, and it made due allowance for that.

11. The tribunal was careful to timetable the case (which involved regular breaks and short days), and ensured that the structure was explained to the claimant in terms he would understand, and that he was regularly reminded of the timings, of what had happened so far and would be happening during the remainder of the hearing. The claimant was reminded regularly of the issues to be determined, so that he could focus his case on those matters. The claimant was regularly given time to pause and to collect his thoughts. It was made clear that if he needed additional breaks, these would be provided. If he wanted any matter explained to him, the tribunal would do their best to explain. The tribunal is satisfied that Mr Islam-Choudhury assisted the tribunal in applying the overriding objective to deal with the case fairly and justly, by playing his part in ensuring that the hearing was conducted in an appropriate way.

12. The claimant was given the opportunity to make oral closing submissions, but indicated to the tribunal that he would prefer to rely on written submissions. The timetable was adjusted so that the claimant would receive the respondent's written closing submissions on the Friday afternoon, and then have Friday evening and the weekend to finish his own written submissions, enabling him to respond in writing to the specific arguments set out by the respondent. He also chose to make a few oral submissions in reply to Mr Islam-Choudhury, but confirmed at the end of his closing submissions that he was happy that he had been able to set out his case in the way he wanted.

The Background to the Final Hearing

13. This is a case where there were three preliminary hearings (PHs).

14. The first PH was held on 6 March 2018 before Employment Judge M Ford QC. Judge Ford noted that the claimant had indicated he was considering a whistleblowing claim, although no such claim was raised in the claim form and no details had previously been provided. He gave directions, indicating that if the claimant did decide to bring such a claim, full particulars should be provided by 20 March 2018. Judge Ford set out the information which would need to be provided. Judge Ford identified that the claimant was bringing claims only of failure to make reasonable adjustments and indirect disability discrimination. and that the respondent did not dispute that at the relevant time the claimant was a disabled person. He plainly took considerable care to clarify the claim and to set out the details of the six provisions, criteria or practices ("PCPs") relied upon by the claimant both in respect of the adjustments and indirect discrimination claims. He also set out the disadvantage relied upon by the claimant and the reasonable adjustments proposed by the claimant. Noting that the claimant was claiming almost £1.5m, he listed the final hearing for liability only, over a

period of six days, with an indicative timetable. It should be noted that the parties in fact called less evidence than had originally been anticipated, and the case was comfortably completed in five sitting days, despite the tribunal rising early.

15. Judge Ford listed the hearing for October 2018. As well as providing for the possible subsequent application to add protected disclosure claim, he issued conventional case management orders to ensure that the parties were ready for the final hearing.

16. A second PH was listed before Employment Judge Housego on 31 July 2018. In a very detailed case management summary, Judge Housego set out details of adjustments made for the preliminary hearing in accordance with the claimant's requests. He set out detailed background, including the claimant's application of 20 March 2018, supplemented by further information on 12 April 2018, in relation to a protected disclosure claim. He noted that the amendment application was lengthy and unstructured and sought to add many other matters. After hearing what the parties had to say, he refused the amendment application and confirmed that the issues which had been carefully and patiently compiled by Judge Ford remained as set out in the order of 6 March 2018. He recorded that the claimant accepted this. He made the sensible suggestion that the claimant might like to have a copy of Judge Ford's order relating to the issues laminated and kept before him as he prepared for the case, "*as it was those issues that would be covered in the hearing and no others*". Judge Housego also noted the existence of a second claim, presented in a different region, which was apparently listed for preliminary hearing in Norwich on 12 December 2018. He decided it would not be in the interest of justice to combine the cases. Judge Housego also set out helpful further information in respect of the final hearing, and set out advice to the claimant as to how to approach the hearing. He set out varied orders in respect of the final hearing.

17. The third and final PH was conducted by telephone on 26 September 2018 before Employment Judge Harper. This had been directed to consider recent correspondence and consider whether the case was ready for hearing. There had evidently been some delays, but these were dealt with at the PH. Judge Harper also noted that the Tribunal would be unable to sit on one of the six designated days, but established that both parties would be able to deal with the case in the shorter period, and that the case was ready for the final liability hearing.

Conduct of the Hearing

18. The hearing commenced on Tuesday 2 October 2018, scheduled for three days that week (not sitting on the Friday), plus the Monday and Tuesday of the following week. The tribunal was provided by the respondent with an agreed bundle of 511 pages, and a chronology/cast list. The claimant did not agree the chronology and case list and provided his own to the Tribunal as well. The claimant also provided various additional documents which he wished to rely upon, which were subsequently paginated and inserted in the bundle with the agreement of the respondent. Both parties provided witness statements.

19. The Tribunal spent some time going through the issues, as set out in the initial case management summary, and confirmed that the claimant understood what it was, that he needed to establish. The Judge confirmed the scope of the claims and reminded the claimant that the tribunal would not be deciding other issues which were not relevant to determining the specific claims before it. The case was timetabled in detail, allowing the claimant ample time to prepare himself for each stage of the proceedings. The claimant expressed himself to be happy with the proposed timings.

20. Having confirmed the issues and discussed with the parties the key documents to read, the tribunal commenced its reading and the first witness was called after lunch on the first day. This was Mr Edward Libbey, Chair of the respondent NHS Trust, who had heard the claimant's appeal against disciplinary sanction. The claimant had thought his cross-examination would be some 30 minutes, and the hearing had been timetabled accordingly. Cross-examination turned out to be just over an hour, but the claimant was permitted to finish his questioning, and on that basis it was agreed that the Tribunal would finish early, and the claimant would commence cross-examination of the second witness the following morning. The claimant had estimated he would want an hour for the second witness. The Tribunal indicated that it would plan on the cross-examination taking something like two hours, but with the evidence completing by lunchtime in any event. It was agreed that the claimant would not be called to give his own evidence until the morning of the third day, so that he could plan accordingly.

21. On the second day, the tribunal heard evidence from Mr Roy Jackson, the respondent's Director of Finance and Resources, who was also the claimant's line manager and played a key role in proceedings. In the event, his evidence finished at around 12.40. The respondent then closed its case. The tribunal spent some time discussing timings for the remainder of the case with the parties, and the specific arrangement for closing submissions. Both parties agreed the way ahead. The tribunal agreed to adjourn at lunchtime and to resume the following morning.

22. On the third day of the hearing (Thursday 4 October 2018), the tribunal recapped timings and arrangements, and then heard the claimant's oral evidence. Mr Islam-Choudhury had indicated he would be concentrating on taking the claimant through the six PCPs relied upon, and that he was not proposing to cross-examine on matters not relevant to the issues to be determined. It was agreed that to the extent that the respondent might be taking a point on time jurisdiction, he would cross-examine the claimant on that point. The claimant's evidence finished at lunchtime. The tribunal again agreed with the parties as to the arrangements for the remainder of the hearing, and confirmed the timings. It was agreed that the claimant would be provided with the respondent's written submissions on the afternoon of the following day (Friday), when the Tribunal would not be sitting.

23. On the morning of the fourth day of the hearing (Monday 8 October 2018), the tribunal were provided with written submissions from both parties. Once the tribunal had read both sets of submissions, Mr Islam-Choudhury made oral submissions, as previously agreed. The claimant was given the opportunity to reply orally, if he wished to do so. The claimant did briefly reply. The Tribunal then adjourned to consider its Judgment.

24. On the fifth and final day of the hearing the judge delivered the tribunal's judgment orally, with full oral reasons. Mr Islam-Choudhury had previously indicated that, whether or not the claim succeeded, the respondent would ask for written reasons. This was because, in view of the second claim, the parties would need a written record of the tribunal's findings, particularly as there was a possibility of some duplication in the final claim, and estoppel issues might arguably arise.

25. The tribunal agreed that written reasons would be provided. The judge indicated that the judgment would be signed that day and would then be sent to the parties from the Regional Office in Bristol, in the near future. He confirmed that written reasons would be typed and sent to the parties in due course, without further request, but that the subsequent timings would depend upon availability of a typist, and the judge having time to fair the final version. The parties were reminded that there were currently very limited judicial resources at the Southampton Employment Tribunal.

The Issues

26. The main issues in the case are those set out in the case management summary of 6 March 2018, recorded by Employment Judge M Ford QC after extensive discussions with the claimant, and analysis of what the claimant had put in writing. Both parties agreed that these correctly set out the claims, albeit there were further matters to clarify in respect of the response. The tribunal also noted that Judge Ford had gone further, and had set out some background law, plainly to assist the claimant in formulating his arguments. There is no need to repeat these in full, and relevant issues will be referred to in the tribunal's conclusions. What appears below is a summary.

27. The respondent accepts that at the relevant time the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010, because of stress and anxiety. The respondent also admits that it knew of the claimant's disability for the purposes of paragraph 20 of Schedule 8 of the Equality Act, relevant to the duty to make reasonable adjustments.

28. The claimant brings claims of:

    a. Failure to make reasonable adjustments (section 20 of the Equality Act 2010); and

    b. Indirect discrimination (section 19 of the Equality Act 2010).

29. In respect of both claims the claimant relies upon the same provisions, criteria or practices (PCPs), and the same matters are said to amount to a substantial (or particular) disadvantage.

30. The PCPs relied upon are those set out below:

    (1) PCP1 Requiring correspondence about the appeal to be conducted through the line manager against whom the claimant had a grievance (in the claimant's case, Mr Roy Jackson).

(2) PCP2 Adopting a policy of not responding in writing, in the agreed timescale or at all, to questions raised by the claimant about the management statement of case in the context of the appeal.

(3) PCP3 Requiring attendance at an oral appeal hearing without prior written response to questions (in the claimant's case the oral hearing took place on about 16 October).

(4) PCP4 Requiring the appeal hearing to take place at 9.00am on a Monday morning in Kings Lynn, and so requiring the claimant to leave his home in Dorset the night before.

(5) PCP5 Only dealing with issues in the appeal which the respondent considers were of interest to it and/or not dealing with all the appeal points raised by the claimant.

(6) PCP6 Refusing to pay injury allowance as required by agenda for change or to provide a reasonable explanation for not paying injury allowance.

31. In respect of the reasonable adjustments claim, the claimant must establish that the PCP was applied to him and that it put him at a substantial disadvantage compared with non-disabled persons. The disadvantage must relate to the relevant disability: the purpose of the comparative exercise is to identify whether it is because of the disability that the PCP disadvantages the claimant.

32. If both the above are met, the respondent must take such steps as reasonable to avoid the disadvantage. Although the claimant is not required to state the proposed reasonable adjustments, it is always helpful to do so, and he has indeed done so. These are referred to in the Tribunal's conclusions.

33. In respect of the adjustment claims, the respondent's principal argument is that the PCPs described were simply not applied to the claimant, and/or they did not put him at substantial disadvantage.

34. In respect of the indirect discrimination claim, the claimant relies upon the same facts and the same PCPs. However, the application the PCP must put persons who have the same disabilities as the claimant at a particular disadvantage compared with other persons in general. It should be noted that the application of the PCP must put the claimant individually at that disadvantage. If the claimant is able to demonstrate that the PCP was applied and put him at that particular disadvantage, the respondent must show that the treatment was a proportionate means of achieving a legitimate aim.

35. Again, in the indirect discrimination claim the respondent relies principally upon the claimant not discharging the initial evidential burden upon him. In reality there is very considerable overlap between the claims, which are probably better brought as an adjustments claim. It is hard to see how bringing the claims in the alternative as indirect discrimination (where the respondent admits knowledge of the disability) can add anything of substance.

36. As indicated above, the hearing was for liability only. Although the tribunal canvassed with the parties as to whether it would be helpful to determine whether was any specific financial compensation payable as a result of any alleged failure to pay injury allowance, this eventuality did not arise.

The Parties' Closing Submissions

37. Mr Islam-Choudhury provided fourteen pages of written submissions on behalf of the respondent and attached a number of cases, as follows:

Rider v Leeds City Council UKEAT/0243/11;

O'Hanlon v Revenue and Customs Commissioners [2007] EWCA Civ 283;

Environment Agency v Rowan [2008] ICR 218;

Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265; and

Nottingham City Transport Ltd v Harvey UKEAT/0032/12/JOJ.

38. What appears below is intended to be a short overview of the salient points and is not intended to be a comprehensive summary of all arguments deployed by each party.

39. Mr Islam-Choudhury, in his written submissions on behalf of the respondent, set out the law relating to adjustments, including the overall framework set out by the EAT in *Environment Agency v Rowan*. He pointed out that "practice" is something which occurs more than a one-off occasion, which has an element of repetition about it (*Nottingham City Transport Ltd v Harvey*) and arguments in respect of there usually being no breach of the duty to make reasonable adjustments by not extending contractual sick pay (*O'Hanlon*). Submissions were made on the general point of the use of comparators (*Rider v Leeds City Counsel* and *Griffiths v Secretary of State for Work and Pensions*). The submissions went on to set out arguments in relation to each PCP. It is suggested that none of the PCPs were applied, and that the claimant did not suffer any disadvantage to the required degree, and that therefore the duty to make reasonable adjustments was not triggered. To the extent that a broad reading might indicate that the PCP was applied, the respondent relied upon the lack of substantial/particular disadvantage. In respect of PCP 6 (in relation to injury allowance), the argument was slightly different: firstly, the respondent relied on the time point, suggesting that the claim was out of time and that it was not just and equitable to extend time, but on the substantive point, the precise PCP alleged was not applied because the claimant was not entitled to this allowance, and an explanation had been given to him. However, in any event, there was no substantial disadvantage because the claimant was not entitled to the additional sick pay and the duty to implement a reasonable adjustment was not triggered. The respondent relied in particular upon the *O'Hanlon* case and argued that this was not capable of being a PCP. In relation to this latter PCP, if the Tribunal was not minded to agree with the respondent's analysis, it would rely upon this being a proportionate means

to achieve a legitimate aim and that the purpose and rules governing the application of injury allowance were such that it was not reasonable to pay the claimant injury allowance, because his absence stemmed from his own misconduct. It was plainly also related to a dispute between him and his employers - it was perfectly reasonable, and proportionate, that somebody in the claimant's position should not receive extra sums of money for an allowance plainly calculated to deal with matters such as nurses being assaulted by patients on the ward, not people who go off sick with stress upon being given a final written warning for misconduct.

40. In his oral submissions, Mr Islam-Choudhury commented upon the claimant's submissions, suggesting that aspects of them were incorrect or misconceived. He went on to develop some of the arguments set out in respect of the six PCPs, and to answer the Tribunal's questions. In respect of the time point relating to PCP 6, he reiterated that this was out of time and argued that the decision not to pay the injury allowance was made on 4 August 2017; the claimant had three months to go to ACAS which he should have done by 3 November 2017. In fact, he did not go to ACAS until some six weeks later on 21 December 2017, and therefore did not benefit from any time extension, not presenting his claim until 2 January 2018. He suggested that the claimant, in answer to questions in cross-examination, had not set out any coherent explanation for the delay, noting that the claimant confirmed he was fit enough to present a claim, there was no suggestion he was not aware of time limits, and he was assisted by a representative. His somewhat half-hearted explanation that he was waiting to see how his grievance on injury allowance would be dealt with, was undermined by the fact that the claimant was also complaining that he had not in fact received any reply to his grievance until after the time limit had expired, and his complaint of inordinate delay in dealing with this matter. That sat somewhat unhappily with the claimant's argument that the only reason he did not present the claim earlier was that he wanted it dealt with under the respondent's procedures. Mr Islam-Choudhury confirmed that he was not relying on any specific prejudice caused to the respondent by delay, other than the obvious prejudice of needing to respond to an out-of-time claim, but suggested that the claimant had not established any just and equitable reason to extend.

41. The claimant, who had had time to consider the respondent's written submissions, set out his own written submissions in a 10-page document emailed to the tribunal on the morning of Monday 8 October 2018. The Judge had suggested to the claimant that he might find it helpful to respond in the same structure as that set out by Mr Islam-Choudhury, and to specific points made by the respondent. The claimant's written submissions partially followed this suggestion, albeit the first five pages related to a succession of general points, which is difficult to summarise, but has been taken into account by the tribunal. This also contained various references to whistle-blowing, and invited the Tribunal to make findings of fact (such as a clear finding that the claimant was not disabled when he was appointed) which plainly went well beyond the scope of the issues in the case. The claimant then made written submissions in relation to each of the six PCPs. He argued that each one was indeed applied, and caused him substantial or particular disadvantage, and that there had been a failure to make reasonable adjustments. He reiterated, in relation to PCP 6, that he considered that he was contractually entitled to the allowance in question

and that it was just and equitable to extend time as there was no requirement for the claimant to ignore the internal grievance procedures. He suggested that it was relevance that in the middle of November, he had received a reply to his grievance advising that the matters should have been included in the appeal hearing, which had already been taken place. The claimant also stated that he had been informed by the Chief Executive that the grievance issues (including the refusal to pay injury allowance) should have been dealt with at the appeal hearing. [*The tribunal would note, however, that the documentation in the bundle referred to, gave no suggestion that every matter in the grievance would be dealt with at the appeal, but merely made the obvious point that appeal points should be raised in the appeal rather than as a separate grievance*. *The tribunal has seen no evidence suggesting that anybody gave an undertaking that grievance matters would be dealt with at the appeal, and Mr Libbey was indeed clear that this was not the case*].

42. In brief oral submissions, the claimant confirmed that he was relying on what he had set out in writing. He reiterated his opinion that the original disciplinary allegations against him were flawed, that there was a conspiracy against him, and that matters should have been resolved in his favour on appeal. In relation to injury allowance, he confirmed his view that he was entitled, pointing out that there was a typographical error in the guidance contained within the bundle, which was not disputed by the respondent and which the tribunal duly noted.

The Facts

43. This is a case which very much turns upon its own facts. Some initial comments on the facts would be appropriate.

44. It is also appropriate to note that there are repeated reference to the role of Mr David Coe, who acted as the claimants' representative during internal proceedings with the respondent. He did not give evidence (although it is surprising that the claimant did not seek to call him to support his own account). There was no suggestion from either party that references to him should be anonymised. The tribunal did consider this of its own motion, but decided not to, for two reasons. Firstly, his role is central to the case and would be artificial not to refer to him by name. Secondly, the tribunal would stress that it makes no personal criticism of Mr Coe. To the extent that that either party may implicitly criticise the material presented by Mr Coe during the appeal, the tribunal does not take that as suggesting that Mr Coe was not doing his best to help the claimant present his case as best he could. It would doubtless have been challenging for Mr Coe to persuade the claimant to focus on relevant matters, and to have kept him to deadlines in accordance with the agreed procedures.

45. The tribunal notes that the claimant has raised various factual issues (for example in relation to his alleged whistleblowing) which do not relate directly to any issue to be determined, and upon which the tribunal need not make findings. The claimant also, for example, invited the Tribunal to make a finding of fact that when he commenced work for the respondent, he was not disabled. Quite apart from the issue that the claimant has not called any reliable evidence sufficient to found such a finding of fact, the tribunal declines to make any such finding, which is not relevant to any liability issue

to be determined in relation to his claims. The tribunal notes that it has not heard evidence as to the claimant being disabled, because the respondent was able to concede that at the relevant time the claimant was disabled by reason of stress and anxiety (notwithstanding the fact that this concession goes beyond what one would normally expect, because it would be unusual to classify "stress" as a mental impairment in relation to Section 6 of the Equality Act 2010).

46. There are, however, certain underlying themes which merit early comment.

47. The tribunal considers that the credibility of the claimant's primary evidence is largely not in dispute. Rather, the respondent takes issue with the claimant's stated understanding of the facts, or with his understanding of the contents of contemporaneous documents. The tribunal found that much of the claimant's evidence was somewhat confused and repetitive, but it does accept that he had a genuine sense of grievance and appeared (at the hearing) to believe that he had been discriminated against in the way alleged, even if that belief was based more upon his own perceptions then any conclusions which could legitimately be drawn or inferred from the primary evidence.

48. For example, one matter of particular significance was the status of Mr David Coe. The respondent, throughout the relevant process, took him to be the claimant's union/staff representative, and treated him accordingly. There was nothing either unexpected, or inappropriate, in taking this approach, Mr Coe having been named as the claimant's representative, and Mr Coe having behaved as one would expect a union or staff representative to behave. The claimant's evidence to the tribunal, however, characterised Mr Coe as merely the "point of contact" or "post box" through whom his communication with management on his appeal should be channelled. The claimant was adamant that until the week before the appeal hearing, Mr Coe was ***never*** acting in the capacity of union/staff representative for him. Indeed, this stated belief seemed to underpin much of his tribunal case against the respondent. The respondent's case was that quite clearly Mr Coe was acting as the claimant's representative throughout. Indeed, the evidence before the tribunal makes it clear that Mr Coe was an experienced union representative for the Unite union, albeit he was apparently representing the claimant more in the capacity of a colleague than as an official union representative. It is clear to the tribunal that the only reasonable conclusion which would be drawn at the time by management, and by Occupation Health (OH) advisers, was that Mr Coe was indeed acting as the claimant's representative.

49. Despite the claimant's repeated assertions that Mr Coe was ***not*** his representative, the tribunal considers that the evidence shows that he unquestionably ***was*** carrying out that role. The tribunal finds it somewhat surprising that, at the hearing, the claimant is now asserting a set of facts which do not appear to be born out to any extent by the evidence called by the parties. Indeed, Employment Judge M Ford QC, at the first PH on 6 March 2018, expressly referred to Mr Coe as being the claimant's "union/staff side representative". The issues were case agreed with the claimant (see paragraph 3.1.2 of the case management summary). The claimant evidently agreed at the time that these correctly set out the issues in the case and did not suggest that Judge Ford had misunderstood his

case. It was only at the final hearing that the claimant asserted that Mr Coe was not in fact his union/staff side representative. As was pointed out by the respondent at the hearing, the tribunal notes that during the original disciplinary process, Mr Coe expressly acted as the claimant's representative. At the disciplinary hearing he acted as the claimant's representative. In an email of 13 April 2017 (shortly after the claimant had appealed) the claimant expressly referred to Mr Dave Coe as "*an independent and trusted colleague as well as my Unite Union representative*" (page 166 of the bundle). For example, when the claimant attended the OH assessment in Salisbury on 22 June 2017, the Consultant in OH evidently discussed Mr Coe's role as being his representative. This is referred to at paragraph 13 of his letter of 29 June 2017 (page 264 of the bundle), where the consultant refers to the claimant requesting that "*correspondence be sent via his union representative*", plainly a reference to Mr Coe. Mr Coe then went on expressly to represent the claimant at his appeal hearing in October 2017. Other documents around the relevant period also make it quite plain that Mr Coe was representing the claimant. Quite plainly the respondent was at all material times treating Mr Coe as the claimant's representative, as the claimant had himself represented Mr Coe at the time. The tribunal is entirely satisfied that throughout the process Mr Coe was plainly acting in the capacity as the claimant's representative.

50. To suggest that Mr Coe had some other role, or that he was in some ill-defined way a representative of management, or merely a mouthpiece, is somewhat fanciful. It is surprising that the claimant pursued these arguments with such vigour, and it does rather typify the claimant's sometimes unrealistic approach to his case, an approach he himself described as sometimes "obsessive". The tribunal; considers that refusal to entertain any possibility that he might be mistaken, despite the overwhelming evidence to the contrary, is, regrettably, another example of the air of unreality surrounding much of the claimant's case.

51. The claimant was plainly very upset by the final written warning which he had received in March 2017. During the Employment Tribunal hearing he sought to argue that in fact he had never received a final written warning. This was a somewhat surprising assertion, since quite plainly that was the sanction given to him by the disciplinary panel which heard his case, and it was the sanction against which he was appealing. The tribunal has read the letter of 7 March 2017 setting out the reasoned conclusions of the disciplinary panel, which expressly concludes that the sanction is a final written warning. There was nothing drawn to the tribunal's attention, in the respondent's procedures, suggesting that the final written warning needs to be given in any other document other than the letter setting out the disciplinary panel's findings. The tribunal does not in any event need to make any finding about the original disciplinary process and sanction, but notes that this is important background context to the appeal.

52. In summary, the claimant, as a senior manager with financial responsibilities (and on a salary of £72,000 per year, indicating a high degree of personal accountability and the expectation that he would conduct himself professionally), was accused of serious financial irregularities. The disciplinary outcome letter confirms that he had been found to be guilty of gross misconduct, in relation to financial irregularities for which the claimant was personally responsible. On the face of it, this

would appear to be sufficient to justify the claimant's summary dismissal. Nevertheless, rather than dismiss the claimant for gross misconduct, the respondent chose to impose the lesser sanction of a final written warning, to remain on the claimant's file for twelve months. The background position was therefore that there was a finding of gross misconduct which would normally have resulted in dismissal, albeit on this occasion mitigated to final written warning. This was the penalty about which the claimant was appealing, with Mr Coe's assistance. It was a surprising argument that there had never been a final written warning.

53. One other specific evidential point which also merits early comment, relevant to the consideration of PCP 5, is that the claimant was adamant that he had been told by the Chief Executive that his grievance should have been considered by Mr Libbey on appeal, and his complaint that Mr Libbey had failed to do so. Mr Libbey denied ever having been asked to deal with the claimant's grievance. The claimant referred, in passing, to correspondence, which has been considered by the tribunal. The tribunal considers that it is abundantly clear that what the claimant had been told was that if he wished to raise matters in relation to his appeal against a final written warning, those should (unsurprisingly) have been included within his appeal. To the extent that in his grievance he wished to raise unrelated matters (such as potential ill-health retirement or payment of injury allowance), those could be dealt with separately. The reality is plainly that, as one would expect (and as no doubt Mr Coe would have advised the claimant had it been discussed with him), if an employee wishes to appeal against disciplinary sanction they should raise relevant matters in the course of appeal. As Mr Libbey made clear, the Trust's procedures provided one appeal against disciplinary sanction, which he as Chair of the Trust was hearing, and that there was no procedure for a further appeal against the Chair's appeal decision. It is plainly right, that if the claimant failed to raise as a ground of appeal, a matter which he chose to rely upon in a grievance, it would be pointed out to him that the time to have raised this would have been at the disciplinary appeal. The claimant has characterised an entirely uncontentious and obvious management approach to the appeal, as some sort of conspiracy, or a failure by Mr Libbey to hear the claimant's grievance in addition to the appeal. The tribunal considers there can be no legitimate criticism of the respondent, and that the claimant has mischaracterised what evidently occurred by suggesting that there had been malpractice on behalf of the respondent to fail to deal with a matter on appeal which the claimant had expressed concern upon.

54. In relation to the two respondent witnesses, the tribunal found the evidence of both witnesses to be clear, credible and consistent with the contemporaneous documentary evidence. In respect of Mr Libbey, the tribunal considers that he approached his task as appeal panel chair in a reasonable and conscientious way. It accepts his evidence that he considered all the very detailed written representations from the claimant (even if these were in a somewhat repetitive and incoherent format), but that his approach was to concentrate on the four specific appeal points raised by Mr Coe at the appeal hearing. That was an entirely sensible and proportionate response, to an over-complex and rather muddled appeal against disciplinary sanction. The tribunal also accepts Mr Libbey's clear and uncontradicted oral evidence that at the appeal hearing Mr Coe made no complaint about the procedures followed in the appeal, and made no

request or suggestion that the appeal hearing might be postponed or rescheduled in order to give the claimant more time.

55. In respect of Mr Jackson, the Tribunal considers it of particular significance that the disciplinary proceedings were concluded with the final written warning in March 2017, and that the claimant appealed in early April 2017, some time before Mr Jackson had taken up his employment for the Trust as (initially) Acting Director of Finance on 2 May 2017 (before being confirmed as the substantive Director the following year). Mr Jackson had therefore no previous knowledge of the claimant, and had arrived after all the events complained of had occurred, and after the claimant had submitted his written appeal.

56. The Tribunal accepts Mr Jackson's evidence that he was, as the claimant's line manager (and noting that the claimant was a senior manager where the appeal would be heard by the Trust's Chair), attempting to manage the process in a proportionate and effective way. The tribunal considers that Mr Jackson gave a clear and logical explanation as to how and why he followed OH advice, and he came up with a process for the appeal by which all correspondence should be routed to him personally, so that he could ensure that appropriate action was taken. For example, the claimant had sent copious materials to the Chair of the appeal panel at a stage when he plainly should have had no personal contact with the Chair. The Chair would need to arrive at the appeal hearing ready to take an impartial view. It is unsurprising that Mr Jackson took the rational view, in the light of the OH report and what had been happening, that correspondence should come to him, to ensure that it was all coordinated centrally. The tribunal found Mr Jackson's explanation as to the procedures he followed, and why he followed them, to be a believable and reasonable one. The tribunal notes that the claimant's grievance of 21 September 2017 refers on the one hand to the handling of the appeal, where the claimant is plainly blaming Mr Jackson at least in part, and also relating to injury allowance. The tribunal would also observe that this states that "*Mr Coe is my staff side representative but is away from the Trust until 2 October*", relevant to the claimant's assertions at the tribunal hearing.

57. Various comments and conclusions on the evidence in support of the claimant's case are made in the findings below, and in the tribunal's conclusions. These reasons should be read as a whole.

58. What appears below is the tribunal's narrative findings of fact in relation to the key events, which will also be referred to as appropriate in the Tribunal's conclusions. The tribunal makes the following findings of fact upon a balance of probabilities:

    (1) The respondent is, as its name suggests, an NHS Trust in Kings Lynn, Norfolk, albeit providing medical services to an area including not only Norfolk but parts of Cambridgeshire and South Lincolnshire.

    (2) The claimant is an experienced manager who had previously worked for the NHS Trust in Bournemouth, where he continues to live. He was employed by the respondent as Deputy Director of Estates and Capital Development from 1 June 2015, until he was served with three months' notice of dismissal by reason of incapacity due to ill-health, on

1 February 2018. This was after the events considered in this Employment Tribunal claim.

(3) Concerns were raised about the claimant in August 2016 and, as indicated above, a disciplinary process was instigated. This eventually led to a disciplinary hearing on 2 March 2017. On that day, the claimant was taken ill and went on sick leave. He did not return to work prior to his dismissal. His initial fit note signed him off work with "stress at work" for four weeks.

(4) It should be noted that the respondent NHS Trust, as one might expect, has a number of written policies. For example, it has a conventional disciplinary policy, with conventional appeal arrangements. There was nothing in that policy to which the tribunal's attention was drawn that had any particular bearing on how matters were handled.

(5) The contract of employment provided for full pay to continue during the first five months of the claimant's sick leave. This was reduced to half pay for a specified period, after five months. There is no dispute as to this part of the contractual entitlement.

(6) It is also not in dispute that the claimant's contract of employment was subject to the contents of "Agenda for Change". The latter contains specific provisions for the payment of injury allowance, at section 22. Paragraph 22.3 provides that "*eligible employees who have injuries, diseases or other health conditions that are wholly or mainly attributable to their NHS employment, will be entitled to an injury allowance, subject to the conditions set out in this section*".

(7) There are a number of conditions set out in Agenda for Change. There is also, at 22.7, a list of circumstances which "*will not qualify for consideration of injury allowance*". These include:

- Sickness absence as a result of disputes relating to employment matters, conduct or job applications;

- Injury, disease or other health conditions due to or seriously aggravated by the employee's own negligence or misconduct.

(8) The claimant was informed by letter of 7 March 2017 that the outcome of his disciplinary hearing was a final written warning.

(9) On 24 March 2017 the claimant submitted his appeal against the finding and sanction, raising matters concerning procedural irregularities, the sanction being too severe in the circumstances, and other matters. He presented three disciplinary appeal notification forms on this date, each with various paragraphs attached. These raised a large number of issues in relation to the way the disciplinary investigation was conducted.

(10) The head of workforce responded on 31 March 2017, acknowledging the appeal and telling the claimant that an appeal hearing would be

arranged as soon as possible and that she would write again to confirm the details as soon as this had been arranged. It should be noted that the claimant had raised fifty-three separate points of appeal and it was therefore already a relatively complex matter to deal with.

(11) The Tribunal notes that on 11 April 2017 the claimant's GP signed him off for a further six weeks with "anxiety, stress at work".

(12) On 13 April 2017 the claimant commenced what turned out to be an extremely detailed further correspondence with various members of the Trust's staff. He set out various numerous comments and concerns. Although some of his correspondence appeared to be in the form of questions, he was not always clear as to what he wanted. His email of 13 April 2017 did, however, did confirm that Mr Coe continued to act as his Union representative, even if the claimant resiled from this position at the tribunal hearing.

(13) On 4 May 2017, the claimant was officially told that his appeal hearing would commence at 12.30pm on Friday 12 May 2017; the claimant would be allocated forty-five minutes to state the grounds of his appeal and management forty-five minutes to respond. The letter reminded the claimant he had a right to be represented at the appeal hearing and set out the understanding that his representative was Mr David Coe (Unite) "*who we have arranged to be present at the hearing*". The tribunal notes that, again, the claimant did not indicate that Mr Coe was not acting as his representative.

(14) On 5 May 2017 the claimant complained at being contacted when off sick, and advised that his GP did not think he should attend before his current sick note expired. The respondent looked to rearrange the appeal hearing, noting that Mr Coe was on leave for two weeks, and looked for a further date in early June 2017. The claimant was referred to OH in order to obtain a clear view of his condition. The tribunal notes, for example, that on 10 May 2017 the claimant asked for documentation to be sent to Mr Coe, plainly on the basis that Mr Coe was acting as his representative.

(15) The claimant also sent various other emails, some of them raising complex concerns.

(16) The claimant having been referred to OH, he carried out a telephone consultation with the Trust's consultant Occupational Health Physician, Dr Blankson. Dr Blankson wrote a report to Mr Jackson (who by now had joined as Acting Director of Finance), reporting on the claimant's health. The tribunal notes that the letter reported that the claimant attributed his emotional health symptoms to work-related stress, increasing conflict with management, excluded for being a whistle-blower, feeling isolated and his state of paranoia fuelled by lack of contact in communication with management. Dr Blankson made it clear that he/she was unable to comment on the veracity of the claimant's perspective, but the letter went on to give the following advice: "*The claimant is not fit to return in any capacity at present. It would be helpful to request further medical evidence from the GP with his consent*". The report advised that the claimant was not fit to attend

a disciplinary meeting at this time. Dr Blankson suggested a review assessment in six to eight weeks.

(17) On the same date, 19 May 2017, Mr Jackson wrote to the claimant to introduce himself and to say he had been appointed as Acting Director of Finance and would take over as line manager. He noted that the claimant had been corresponding with HR on matters relating to sickness absence and disciplinary appeal process, and made it clear in the letter that "*now that I have taken over your line management, it is important that I am fully appraised of events and that I have oversight of the two procedures [sickness absence and the disciplinary appeal process]. I would therefore be grateful if you would address all future correspondence to me at the Trust*".

(18) The Tribunal therefore notes that on receipt of this letter, the claimant was fully aware of Mr Jackson's role, and was also aware that he should be addressing all correspondence to Mr Jackson.

(19) Mr Jackson's letter of 19 May 2017 went on to note that the claimant was still unwell, and had been unable to attend the appeal hearing planned for 12 May. It made clear that he had made a referral to OH for advice on whether he was fit to attend a rearranged hearing, and gave the claimant further advice on the appeal procedures. He noted that it appeared that the claimant was likely to be signed off work for a further period, and asked for the updated fit note and he also sent the claimant a copy of the management attendance policy in view of the long-term sickness absence. He suggested having a meeting to discuss the absence, under the respondent's policy.

(20) The Tribunal notes that on 22 May 2017 the claimant's GP signed him off for a further eight weeks for "*anxiety, stress at work*".

(21) The claimant acknowledged Mr Jackson's letter and reiterated that he would rely on the code to guide him on key points relevant to his situation and also indicated he would prefer to correspond by email and that it was too early to have a meeting. Correspondence continued. The tribunal notes, for example, that on 23 May 2017 the claimant sent an extremely lengthy email to Mr Jackson raising all sorts of matters to do with events, and the facts leading to his final written warning, and his complaints in relation to matters he wished to have dealt with on appeal. At the end of this email he confirmed that he had been signed off for a further eight weeks by his GP, but asked that going forward Mr Jackson did not respond direct to him but instead communicated through David Coe.

(22) In accordance with the claimant's wishes as to correspondence, Mr Jackson then wrote to Mr Coe on 31 May 2017, confirming that he was happy to direct correspondence through Mr Coe for the time being and also confirming that all correspondence from Mr Coe or the claimant should be directed to himself as the claimant's line manager, as set out in his earlier letter. He noted that although the claimant was unwell and did not wish to be communicated with directly, it appeared that the claimant was himself communicating with other members in the Trust: that he had asked the individuals concerned not to respond direct. He

referred to the recommendations of OH and the appeal process, and also noted that the claimant had been considering the ill health retirement, and understood that Mr Coe had the relevant forms so that the claimant could make an application.

(23) In relation to ill-health retirement, the tribunal notes that, as expected in the circumstances, the procedure was that application would be made using specific paperwork, and that clearly no final decision could be made by the Trust. A decision on any application for ill-health retirement would be made nationally, having taken appropriate medical advice.

(24) The letter also made it clear that despite the claimant having raised a large number of points in his email of 23 May, Mr Jackson was not in a position to comment on the merits of that version of events, or on the appeal, and confirmed that the claimant would have the opportunity to raise any points he wishes with the appeal panel in due course. There was also correspondence about sickness absence and the management attendance policy.

(25) There was a follow-up telephone consultation between the claimant and OH on 1 June 2017. The claimant told OH that he was not happy with Dr Blankson's report. OH confirmed that the claimant remained unfit for work in any capacity or to take part in work processes.

(26) The claimant continued to correspond directly with Mr Jackson on a number of matters. He confirmed that, as arranged by Mr Jackson, he had met with Dr Jane Spenceley, an Occupational Health Consultant, at Salisbury hospital (rather closer to his home in Bournemouth) on 22 June 2017.

(27) The Tribunal notes that detailed correspondence continued over this period and, for example, on 12 June 2017 Mr Jackson wrote to Mr Coe dealing with various matters raised by the claimant including whistleblowing, grievance and disciplinary appeal, but confirming he was awaiting OH advice.

(28) The Tribunal was taken to the OH referral form which Mr Jackson completed, to be sent to Salisbury. Although the claimant took exception to its contents, the tribunal considered that it fairly set out the current situation and asked sensible questions, both in respect of the claimant's continuing sickness absence, and also in respect of the appeal process. Plainly, the purpose was to confirm details of the medical condition and prognosis, and the extent to which the claimant would be able to engage in the appeal process and attend an appeal hearing.

(29) Further correspondence between the claimant and Mr Jackson continued and on 20 June 2017 Mr Jackson sent a letter to Mr Coe updating on the various matters. Meanwhile, the claimant's sick leave was extended, but on 29 June 2017 Dr Spenceley, the Occupational Health Consultant in Salisbury, wrote a letter to Mr Jackson. This answered the various questions posed by Mr Jackson. It confirmed, amongst other things, that the claimant was not fit to attend a meeting

in respect of his absence. In respect of the appeal process, the report explicitly confirmed the claimant was unfit to attend a face-to-face disciplinary appeal process, and Dr Spenceley was unable to advise a timescale when this may change. However, she made it clear that the claimant's psychological health status required that the process was moved forwards. She supported the suggestion that the majority of the appeal be performed by correspondence, "*with the potential of a mutually agreeable final shorter meeting (dependent on Martin's wellbeing)*". She noted that the Trust policy was for the claimant to be sent the management statement of case, and other relevant documents, seven days before the appeal hearing. Given the claimant's condition, she would advise that if the documents contain less than ten full sides of writing, one week would be enough. If significantly greater amounts of information were contained within the documents, then an increased period of time would be needed, up to a maximum of three weeks.

(30) The tribunal notes that it is not in dispute that although much of the management statement of case related to evidence which had already been before the original disciplinary panel and had been seen by the claimant, it was nevertheless a very lengthy document.

(31) Dr Spenceley's letter of 27 June 2017 also noted that "*the claimant requested correspondence be sent via his union representative*". She had had "*a long discussion with respect of this, and I support his request as this appears to significantly reduce his anxiety and would enable more timely response to documents*". She agreed with the GP's diagnosis presented on his fit note (see above). Dr Spenceley also discussed ill-health retirement with the claimant, and had advised that the claimant could apply for ill-health retirement but there would be a request for additional medical information from his GP before his application form could be completed and "*sent to the independent Occupational Health Physician who assesses Martin's eligibility for ill-health retirement*". She made it clear that she could not guarantee that this would be a successful application, but she would be prepared to support such an application.

(32) Correspondence continued.

(33) Having received various other correspondence and having received the latest OH report, on 14 July 2017 Mr Jackson wrote to Mr Coe. This is a significant letter which set out the appeal process to be followed (the contents of which the claimant agreed, and the claimant confirmed at the tribunal hearing that this set out the agreed process).

(34) The letter of 14 July 2017 referred to the contents of the OH report and noted that the claimant was not fit to attend a disciplinary appeal hearing in person, and that no timescale had been identified as to when that might change. The report also confirmed that not progressing the appeal might be detrimental to the claimant's psychological health, and in those circumstances Mr Jackson was "*willing to agree that the majority of the appeal process can be concluded in correspondence and I note that this adjustment is supported by Occupational Health*". Although the appeal hearing

would normally be arranged within four weeks, that was plainly no longer appropriate. He set out a timetable incorporating the OH suggested adjustments.

(35) Step 1 would be the production of a management statement of case and supporting documents, in response to the appeal documents already submitted.

(36) Step 2 would be for the claimant to set out in writing any questions or comments he had in relation to the management statement of case "up to three weeks" from the date of receipt of the management statement of case". The claimant should at the same time set out any additional information which he would like the appeal panel to consider, and his representative (Mr Coe) would be permitted to submit documents in support.

(37) Step 3 would be the management response in writing, to the questions raised/comments raised by the claimant in accordance with step 2, up to three weeks from receipt of those questions and comments.

(38) Up to two weeks later would be step 4, when all documentation would be passed onto the appeal panel.

(39) Step 5 (the final step) would be a short appeal panel hearing, at which the claimant could appear at in person if he wished, to consider the information. It would deliberate and inform the claimant of the outcome appeal in writing. This would be arranged at a mutually convenient time.

(40) The claimant continued to be signed off by his GP from 17 July 2017 with "*work stress*".

(41) On 19 July 2017 the claimant agreed to the procedure. In an exchange of correspondence, various matters raised by the claimant were dealt with, and the claimant was reminded that his sick pay would be reduced to 50% from 12 August 2017.

(42) Not all correspondence needs to be summarised, but the tribunal notes that in a letter dated 4 August 2017 (directed to Mr Coe, as previously agreed), Mr Jackson made it expressly clear that he had considered injury allowance under Agenda for Change, but the claimant was not entitled to it. The tribunal would observe that it appears to be uncontroversial that, plainly, management would consider the claimant be ineligible for injury allowance, albeit this letter did not set out the reasoning in any great detail. However, what it did was to make it clear that the respondent relied on the second bullet point of Section 22.7, a copy of which was enclosed with the letter. The tribunal notes that this is the bullet point which refers to "*sickness absence as a result of disputes relating to employment matters, conduct or job applications*". The claimant was therefore aware from the letter, and its enclosure, as to the specific reason that the respondent had concluded that temporary injury allowance was not payable. The claimant replied, objecting to injury allowance not being paid.

(43) The letter of 4 August also indicated that the appeal paperwork would be sent in stages, in line with OH advice, commencing with the management statement of case on 11 August 2017.

(44) On 11 August 2017 the claimant was sent the management statement of case of 15 pages, with a table of contents, listing the detailed paperwork which the claimant had previously been supplied with. The tribunal notes that this is set out in a reasonably intelligible format, and this is the key document to which the claimant might wish to respond, and to which he had been given up to three weeks to respond. The position, therefore, was that the respondent had effectively complied with stage 2 of the agreed appeal process, and would be expecting the claimant's response in the form of questions/comments within three weeks, to be sent direct to Mr Jackson by 1 September 2018 at the latest. That would appear to be perfectly reasonable: the new information sent to the claimant was essentially the 15 pages of statement of case, and the other documentation was material he had had for some time already.

(45) Rather than responding in accordance with the agreed timetable, and routing appeal correspondence through Mr Jackson, the claimant went off on something of a "frolic of his own". On 15 August 2017, the claimant sent an email direct to the Chair of the Trust, Mr Libbey, in his capacity as Chair of the appeal panel. He said to Mr Libbey that "*before responding to the management statement of case for the appeal that I received by email on 11 August 2017 I am writing to request in the interest all allegations are wiped from my HR records*". He also raised a large number of other matters personally with Mr Libbey.

(46) The tribunal would make a number of observations: Firstly, it was plainly fanciful to consider that the Chair of the appeal panel would wipe all allegations from the claimant's appeal record before he had even heard the appeal. Secondly, it should have been apparent to the claimant (and certainly apparent to Mr Coe, his representative) that it was plainly highly inappropriate to seek to correspond by special pleading with the Chair of the appeal panel direct, prior to the appeal hearing. Thirdly, the claimant also sent to Mr Libbey what he described as "*the working draft of my response to the management statement of case*", even though the agreed steps were plainly that the papers would only be referred to the appeal panel after the exchanges of correspondence had been completed. The tribunal notes that this draft document was extremely lengthy, and was also copied to the manager presenting a management case as a copy addressee, but not copied to Mr Jackson.

(47) The tribunal would observe that this, as well as being inappropriately addressed personally to the Chair of the appeal panel for action, it was expressly stated to be an "early draft". This plainly departed from the agreed procedure. Any reasonable reading of the email would take it as not intending to comply with step 2 of the agreed procedure. There was no provision for discussions about "early draft", and certainly not to try to engage the appeal Chair before the appeal hearing. The

claimant had not yet complied with Step 2 of the procedure, but had until 1 September to do so.

(48) On 20 August 2017 the claimant also sent an email to HR (not Mr Jackson), raising a number of other matters, copying the Chair of the appeal panel and Mr Coe, and the manager presenting the management case. He raised a large number of matters for action by HR. He did not inform Mr Jackson of this. Various other matters were also raised by the claimant, with different people in the management chain, raising a large number of somewhat complex points.

(49) Mr Libbey told Mr Jackson that he had received this document from the claimant, and on 29 August 2017 Mr Jackson wrote to the claimant through Mr Coe, pointing out that the agreed timetable was to allow the claimant up to three weeks to provide his comments/questions and that to date he had not received any comments or questions from the claimant. He reiterated that any correspondence should come to him and that correspondence had been sent to Mr Libbey but he should have no involvement in the matter because he would be on the appeal panel. It was in contravention of his instructions, and he reiterated that Mr Libbey should not respond to the letter which the claimant sent to him. He drew attention to the fact that wiping the allegations from the claimant's HR file was of course one of the options open to the appeal panel, which could consider any matters raised. He ended the letter by explicitly confirming that he looked forward to receiving the claimant's comments and questions relating to the management statement of case by 1 September 2017, and that if he did not hear from the claimant by that date he would assume that the claimant did not wish to comment.

(50) The Tribunal notes that at this stage the claimant had raised *draft* matters with an inappropriate person, and sent off various emails (not to Mr Jackson) seeking to involve a number of members of staff in a rage of matters. But he had not made any formal response to the management statement of case. Had the claimant (or Mr Coe) been in any doubt as to the stage which had been reached, Mr Jackson's letter left no ambiguity: a formal response would be required on 1 September, if the claimant wished to respond to the management statement of case.

(51) As it turned out, Mr Coe was absent on leave. Although the tribunal has heard no evidence on the point, it would appear likely that Mr Jackson received an automatic out-of-office response to his emailed letter, because on 30 August 2017 he sent a slightly re-worded letter to the claimant direct, explaining that he was writing because Mr Coe was on leave, and ending by expressly stating that the claimant should send his comments or questions relating to the management statement of case by 5.00pm on 1 September 2017 and that if nothing was received he would assume the claimant did not wish to comment, and explaining that he (Mr Jackson) would then be on annual leave. The letter also confirmed that if any further correspondence was sent to other people in the Trust other than him he would instigate disciplinary proceedings on the basis of failure to follow a reasonable management instruction.

(52) On 1 September 2017 at 12.08pm (and therefore at some stage prior to the deadline for the claimant's response to management statement of case) the claimant emailed Mr Jackson, copy to various other people in the Trust including Mr Coe. He had plainly read the letter, and objected to its contents. He complained that Mr Jackson had no role in the process. He did not, however, respond to the substantive point that the 1 September was the deadline. The tribunal notes that this was in the context that he had been told that there would be no response to his email directed at Mr Libbey which was, itself of course, merely a draft list of matters he was intending to raise subsequently.

(53) The position was, therefore, that although an initial draft had been prepared, the claimant was entirely aware that if he wished to comply with step 2 of the process, he should submit anything upon which he sought to rely in writing, via Mr Jackson, by 5.00pm on 1 September. He had taken the time, earlier that same day, to compose a lengthy email complaining about various matters. He did not use the remaining time later that day to provide any substantive response to the management statement of case.

(54) In cross-examination, the claimant confirmed he had made a conscious decision ***not*** to send any material to Mr Jackson. The claimant appears to have chosen to leave matters, therefore, on the basis that he sent an early draft to the Chair of the appeal panel, and that even though he had been told that this would not elicit any response, he did not wish to raise any matter formally.

(55) It is not clear why the claimant did not assist his own appeal, by complying with the agreed procedure and expressly sending his response within the agreed three-week period.

(56) One matter which the claimant did, however, progress at this early stage, was to query the decision not to pay him injury allowance, by email of 6 September 2017. By this stage, of course, Mr Jackson was on leave (which the claimant knew would be the case).

(57) On 13 September 2017 the claimant emailed Mr Coe, and copied Mr Jackson, complaining further about injury allowance. Because Mr Jackson was still on leave, on 13 September 2017 the Director of HR wrote to Mr Coe to update him on the claimant's appeal process, noting that the claimant had not presented his questions/comments in response to the management statement of case, and pointing out that on the basis of the agreed chronology, an appeal meeting had been arranged for the 16 October 2017. The Trust was not willing to reschedule the meeting, but as an additional adjustment to the agreed process the Trust would agree to receive any comments received by the claimant by 9 October 2017 and those would be considered by the panel. The claimant having raised other matters, including in particular injury allowance, those would be dealt with by Mr Jackson on return from leave.

(58) Having returned from leave, on 20 September 2017 Mr Jackson wrote to Mr Coe, responding to various matters which had been raised by

the claimant in his absence. It was noted that when the claimant had emailed him on 6 September, he would have received an out of office response telling him when Mr Jackson would be returning to the Trust. This reiterated that the question/comments on management statement of case should have been submitted to Mr Jackson by 1 September 2017 but were not, it was noted that the claimant continued to remain signed off work until 1 November 2017 and that previous correspondence and the Occupational Health report suggested that the appeal should be progressed with, but it was unlikely that the claimant would be able to attend. He updated the claimant on various other matters and in respect of the injury allowance, and set out again, in some detail, his explanation as to why the claimant was not eligible for injury allowance, again cross-referring to the specific paragraphs of Agenda for Change relied upon.

(59) The tribunal would characterise Mr Jackson's letter as clear. In respect of the injury allowance, it provides a clear explanation as to why the allowance would not be paid. The claimant was also advised that if he remained dissatisfied, then he would need to raise a grievance on the point, which he should raise directly with the Chief Executive.

(60) Mr Jackson also confirmed on 20 September 2017 that correspondence should still be sent direct to him, in respect of the appeal, but he was not undertaking any formal role or active part in the appeal itself: it was important correspondence came to him. The claimant had asked for the appeal hearing to start at 2.00pm or later, but had not set out any medical reason as to why he wished for this. Mr Jackson confirmed that due to the diary commitments of the other individuals in the appeal process, it was not possible to start at 2.00pm on the appointed date, and it would need to start at 9.00am and last a maximum of two hours.

(61) On 21 September 2017, the claimant presented a grievance to the Chief Executive complaining about the way his appeal was handled and also specifically in respect of non-payment of injury allowance. He still provided no response on the substantive point of his intentions in respect of his questions/comments on/response to the management case.

(62) On 22 September 2017 the claimant emailed Mr Coe (still copying the Chair of the appeal panel and management representative, as well as Mr Jackson) sending Mr Coe draft questions to consider and inviting Mr Coe on his thoughts on "how to reduce a number of questions".

(63) The tribunal would note that the above email was not submitting to Mr Jackson questions that he wished answered. Rather, it was raising with his own representative a draft list for his representative's action when he returned on 2 October. This was plainly on the basis that he and his representative would discuss the questions with a view to presenting a revised list, in line with the updated timescale. The tribunal notes that this is a lengthy list of 52 questions.

(64) On 28 September 2017 the claimant emailed Mr Coe to confirm that he was unfit to attend the appeal, and that he had not yet been offered

an OH appointment which Mr Jackson had hoped might be arranged, but pointing out his GP had assessed him on 6 September and that his current sick note ran to 1 November. He explained that he had arranged to see his GP again on 11 October. He told Mr Coe that if he was unfit to attend the appeal, he would like it to go ahead in his absence, and that he believed his written submissions presented full details of his grounds of appeal, both on outcome and failure to follow the proper process. He hoped that Mr Coe would be willing and allowed to speak on his behalf. Mr Coe forwarded this to HR a few days later.

(65) On 9 October 2017 the claimant emailed Mr Coe with two sets of questions: 12 on outcome, and 52 on process, and raising various points with Mr Coe. It would appear that this email also contains the final draft (which may have been unamended) of all the comments he made on the management case.

(66) On 10 October 2017, a day later than the agreed timescale, Mr Coe forwarded these to management stating his understanding that the management would respond in writing to questions and comments, but this had not happened.

(67) The tribunal would note that in fact the claimant had never submitted through his line manager a proper series of comments and questions within the agreed timescale. In the circumstances, it should have come as no surprise whatsoever that there was no response in writing by management. The position now was that the claimant's material was presented, well over a month after the original deadline (that would have allowed time for a response), and a day after the amended deadline. The tribunal notes that this material was submitted on Tuesday 10 October 2017, in preparation for an appeal hearing at 9.00am the following Monday.

(68) The claimant saw his GP on Wednesday 11 October 2017, and the GP confirmed that he would not be fit to attend the appeal hearing, and advised him not to do so. The claimant followed that advice and informed Mr Coe that he would not be attending. He also confirmed that on the Monday he had received a bundle from the respondent, expressing his concern it was very lengthy.

(69) The tribunal would note that nearly all of the documents given to the claimant at that stage, if not all of them, were documents that he had for some considerable time already. The significance of the bundle is that it was also supplied to the appeal panel, so that Mr Coe and the claimant could see the same set of documents which were being considered at the appeal hearing. There was nothing additional of substance for the claimant to consider. The tribunal notes that despite the claimant expressing some concern directly to Mr Coe, he did not copy this to others, and Mr Coe did not (at the appeal hearing) raise any concerns in respect of this timescale or the material that he had been provided with.

(70) The tribunal notes that in giving his instructions to Mr Coe, the claimant also said, "*I hope next week negotiations on my exit package, including a clear/positive reference, will start*".

(71) The position was therefore that the appeal hearing was listed for 9:00am on Monday 16 October 2017, and no objection had been made to that date. OH had previously advised that the hearing should not be delayed, and neither the claimant nor Mr Coe had asked for more time, or asked for a delay to allow time to receive and consider any management response. Although the claimant had queried whether the hearing might be held in the afternoon, he had not provided any explanation as to why that would be necessary and certainly not suggested that the timings would be to accommodate any illness, and in any event Mr Coe did not object to the timings. The medical advice had been suggesting, all along, that the claimant remained signed-off sick and would be unlikely to be able to attend. In any event, the claimant himself had decided on 11 October that he would not attend any appeal hearing in the immediate future, regardless of time of day, and his GP evidently gave him advice that she should not attend any hearing.

(72) As the claimant accepted in cross-examination that, whatever the timing of the appeal hearing on Monday 16 October 2017 (morning *or* afternoon), he would not have attended.

(73) On Friday 13 October 2017, Mr Coe submitted further material on behalf of the claimant to be considered by the appeal panel. Although this was very late, all written materials were considered by the panel. The tribunal accepts Mr Libbey's evidence that all written material was read by the panel.

(74) The disciplinary appeal hearing went ahead, as scheduled, on the morning of Monday 16 October 2017. Mr Coe represented the claimant. It is not in dispute that Mr Coe summarised the claimant's case as four specific points namely (1) the reluctance of the panel to look into who else was involved [*in the events forming the substance of the disciplinary allegation against the claimant*], (2) the length of time for the process to conclude, (3) the "understanding of the importance of Joint Contracts Tribunal over Standing Financial Instructions" and (4) the relative risk to the Trust as the invoice could not have been paid.

(75) As indicated above, the tribunal accepts Mr Libbey's evidence that Mr Coe made no objection to the arrangements for the hearing and did not suggest that the claimant was unable in any way to present his case.

(76) On 20 October 2017, Mr Libbey signed the disciplinary appeal outcome letter on behalf of himself (as Chair) and the other panel members comprising Ms Ciara Moore (Chief Operating Officer) and Ms Sharon Charman (Director of HR). The letter confirmed that Mr David Coe had attended the appeal hearing to present the claimant's case, and summarised the material put before them including the arguments set out by Mr Coe. The panel upheld the disciplinary

findings of the original disciplinary panel, which comprised findings of "*unacceptable conduct to NHS Trust Guidelines, Policies or Standard as communicated from time to time*", "*any conduct or performance likely to bring the Trust into disrepute*" and "*any breach of the Trust standing orders and financial standing orders*". They noted that there was no personal gain and agreed that the sanction of a final written warning should be upheld. The letter confirmed that there are no further levels of appeal against the panel's decision and that the disciplinary panel has now been concluded.

(77) The outcome letter having been sent, Mr Jackson wrote to the claimant direct (as the claimant now requested should be the case) to deal with matters relating to the injury allowance and the ill-health application, suggesting in relation to the latter that the claimant should forward the completed application to the acting Occupation Health Manager.

(78) The tribunal notes that although the claimant was not assessed by OH again until after the disciplinary meeting, the report from the Salisbury OH Consultant dated 26 October 2017 confirmed that the claimant was still unable to work or attend meetings [*effectively confirming that he would not have been fit to attend any appeal hearing*] and made reference to the claimant's possible application for ill-health retirement.

(79) The tribunal notes that on 30 October 2017 the claimant wrote to Mr Libbey to complain about the appeal hearing outcome, despite being informed that this was the end of the disciplinary appeal process. He also wrote to the Chief Executive to complain about various matters. The tribunal notes that correspondence continued, to and from the claimant, on various matters which are not the subject of this Tribunal claim.

(80) On 2 January 2018 the claimant presented his ET1 claim.

(81) As referred to by both parties during the hearing, in fact the claimant's employment was subsequently terminated on the grounds of capability (ill-health), and he was dismissed with notice with an effective date of termination of 30 April 2018. There having been no successful application to amend, plainly events after 2 January 2018 would in any event be incapable of forming part of this tribunal claim.

Conclusions

59. These are claims of failure to make reasonable adjustments under Sections 20 and 21 of the Equality Act 2010 in the first place, and in the second place and in the alternative, arising from the same facts, claims of indirect discrimination under Section 19 of the Act.

60. In relation to both areas of claim, the Tribunal reminded itself of the precise statutory wording and has applied the statutory tests and in respect of the six PCPs or provisions, criteria and practices. The approach to the alleged PCPs is identical in respect of each. The claimant has relied on the same disadvantage for each, as being the "substantial disadvantage" in respect of Section 21 and the "particular disadvantage" in respect of Section 19.

61. The tribunal has considered the facts and the law in the round, but it would be appropriate to set the analysis out in writing in respect of each of the six PCPs, with conclusions as to each of the two heads of claim.

62. The tribunal took into account what the parties had to say in closing submissions, and has taken into account the approach set out in the case law to which it has been referred. The tribunal has also reminded itself of HHJ Eady's judgment in *Carreras v United First Partners Research [2016] UKEAT/0266/15/RN.* In approaching the statutory definition, the protective nature of the legislation meant a liberal, rather than an overly technical approach, should be adopted, as to the analysis of the PCP. As Mr Islam-Choudhury correctly pointed out, the general approach to be taken in reasonable adjustments claims is summarised by HHJ Serota QC in the case of *Environment Agency v Rowan*, which establishes that the tribunal must consider (a) the PCP that was applied, (b) the physical features [*not relevant here]*, (c) the identity of the non-disabled comparators (where relevant) and (d) the nature and extent of the substantial disadvantage suffered by the claimant. The tribunal would only then go on to consider the reasonableness of any adjustments, and issues of knowledge (of which the latter does not arise ibn this case). On the facts of this case, the tribunal does not consider that an exhaustive analysis of a comparator is strictly necessary, although some comment will be made, more in the context of the substantive (or particular disadvantage).

63. he tribunal has also considered the other case law, including as to the extent that sickness allowance can be covered as a PCP in a reasonable adjustments claim.

64. The structure set out by Employment Judge Ford QC, in the case management summary of 6 March 2018, will be followed. Judge Ford plainly took great care to set out the precise claims in relation to the six claims of reasonable adjustments, and the mirror-image claims of indirect discrimination.

65. **PCP 1**: "*Requiring correspondence about the appeal to be conducted through the line manager against whom the claimant had a grievance (in the claimant's case, Mr Roy Jackson)".*

66. The claimant relies upon the disadvantage of "suffering increased stress and anxiety when he had to engage with his line manager, who was one of the people against whom he had a grievance."

67. The respondent argues that this PCP was not applied, and that the claimant's own evidence does not support such a conclusion.

68. Some relevant facts are summarised above at paragraphs 48-50 and 55-56, and at paragraph 58 (17)-(22) and more generally at 58 (23)-(39) and 58 (44)-(73).

69. The tribunal took a broad view (see *Carrerras*), and in particular on the point as to when it should be said that the claimant had a grievance against Mr Jackson. The tribunal notes that although the grievance was not presented until 21 September 2017, the claimant had earlier raised some concerns as

to the way that Mr Jackson was handling matters. That said, as the claimant was generally unhappy with his employers, it would be unreasonable to treat Mr Jackson as being the subject of a grievance until such time as the claimant expressly confirmed that he was making a formal complaint about Mr Jackson's role and behaviour.

70. One of the points which the respondent raises is that there was no requirement to correspond through Mr Jackson, because in fact it was done via Mr Coe. That is broadly correct. The tribunal also accepts the persuasive argument that it is hard to see how there could be any arguable case relating to problems in routing correspondence through Mr Jackson, at a stage when the claimant had in fact made no objection to Mr Jackson (his line manager) fulfilling this role.

71. The tribunal considers that this not a particularly felicitously worded PCP. Taking a broader interpretation, however, the tribunal considers that the focus should be more on whether, if there was some sort of requirement for appeal documentation to go through Mr Jackson, there was there any substantial disadvantage (or "particular disadvantage"). Furthermore, the tribunal would need to consider how any such disadvantage might have related to disability. The background to the arrangement (or routing matters through Mr Jackson) was that it was plainly put in place largely to *support* the claimant, and that he consented to that arrangement. On the face of it, a comparator would be a person who was following appeal against disciplinary sanction, who had complained against is line manager, but was not suffering from stress and anxiety. However, this would make little or no sense, because in fact considerable special arrangements had been put in place specifically because of the claimant's medical condition. The PCP was not as stated by the claimant, because the actual PCP miss-states the evidential position and exaggerates any possible disadvantage through that misstatement.

72. On 23 May 2017 the claimant first requested that correspondence should go through his representative David Coe, which indeed is what happened save on very specific occasions such as when Mr Coe was away on 30 August (when therefore there was no choice but to correspond directly with the claimant). Mr Jackson agreed to do this, and that this was done throughout, with the support of OH, which specifically recommended that this should be done. OH never recommended that Mr Jackson should not be involved. The claimant himself regularly directed correspondence directly to Mr Jackson, even though Mr Jackson was careful to send correspondence through Mr Coe, as agreed – this rather undermines the premise behind the PCP relied upon by the claimant. There were some occasions, and indeed from the appeal hearing onwards, when in fact the claimant asked Mr Jackson to respond to him directly, suggesting that this was less of an issue.

73. Fundamental to this PCP (or something approximating to it) is the lack of evidence suggesting disadvantage to the claimant. Although the claimant has suggested that the reason that he was put at disadvantage was that "*he suffered increased stress and anxiety when he had to engage with his line manager*", the tribunal rejects this argument. The claimant, who was geographically absent (in Bournemouth) on sick leave, had agreed to this arrangement, and objectively speaking there is nothing at all objectionable

in it. In any event he had no need to contact Mr Jackson direct, rather than to direct correspondence through Mr Coe, his representative. Most of the period pre-dated the grievance, and even after the grievance there was no request to vary the arrangement, and no medical advice to that effect. The tribunal does not consider that there is any credible evidence that the claimant did in fact suffer increased stress and anxiety as a result of this arrangement. Indeed, it would have rather the opposite effect, as if the claimant had complied (and, of course, he did not), it would have made his life much less stressful, with far fewer causes of possible anxiety, as he would have been able to focus on one exchange of correspondence, rather than leave matters so vague and unclear, copying in various people and leaving matters entirely opaque as to who should be dealing with his queries and coordinating any response. Mr Jackson was someone who had had no previous contact with the claimant, was not implicated in any way in the disciplinary allegations against the claimant, and was plainly the obvious point of contact as his line manager and his Director. The tribunal notes, as referred to above, that after the appeal hearing the claimant asked Mr Jackson to correspond directly.

74. The tribunal considers that the evidence strongly suggests that the claimant suffered no disadvantage (whether "substantial" or "particular") from the arrangement, as would be the case with any other disabled person in the same position. Indeed, the claimant's own proposed adjustment rather gives the lie to his alleged PCP, as the only proposed adjustment was the very one which the respondent had immediately implemented, as soon as it was suggested, namely that correspondence should be conducted through Mr David Coe, the claimant's "union/staff side representative". This was well before there was any suggestion of a grievance against Mr Jackson (and others), and plainly had nothing to do with Mr Jackson as an individual, but to shield the claimant from having to deal dealing directly with difficult correspondence, whoever it came from. The problem was not Mr Jackson, but the claimant tending to indulge in muddled and copious correspondence, and doing so in an ill-directed way, and then not being mentally well-placed to deal with incoming correspondence. The use of Mr Jackson as a single point of contact was part of the solution, not part of the problem.

75. The tribunal considers that PCP1 is somewhat misconceived, but taking a broad approach, it does not disclose any actual disadvantage, whether "substantial" or "particular".

76. As indicated above, the only proposed adjustment was one which the respondent already had in place. Even if there had been any disadvantage, the respondent was already taking all reasonable steps to ensure that correspondence to and from the claimant was dealt with in the most effective way, so as to reduce the stress and anxiety suffered through pursuing a disciplinary appeal when the claimant was not well.

77. Insofar as indirect discrimination would need to be addressed (there being no particular disadvantage), the tribunal would in any event accept that there was plainly a legitimate aim, along the lines of ensuring that the claimant's appeal should be handled effectively, and any PCP adopted (taking the road approach) was plainly proportionate.

78. There is no merit in this first allegation, and neither the reasonable adjustments claim nor the indirect discrimination claim is well founded.

79. **PCP 2**: "*Adopting a policy of not responding in writing, in the agreed timescale or at all, to questions raised by the claimant about the management statement of case in the context of the appeal."*

80. The disadvantage is said to be that as a disabled person the claimant needed more time than a non-disabled person to digest and respond to management response before the final appeal hearing.

81. The respondent's case is, in essence, that there was plainly no policy (or practice) of not responding in writing, in the agreed timescale or at all, and that in fact Mr Jackson was fastidious in responding.

82. Some relevant facts are summarised above at referred to under PCP 1.

83. The tribunal has been through the chronology of events in some detail, and is minded to agree with the respondent that the parts of the claimant's evidence, upon which he relied, do not in fact show that any such PCP (or anything like it) was applied at all. The claimed PCP is somewhat fanciful, and misrepresents the true state of affairs. Indeed, the evidence before the tribunal suggested that quite plainly there was no such policy ("provision" or "practice", even taking a broader *Carreras* approach), and certainly no repeated failure. It is hard to construct a meaningful comparator, because, again, the claimant has misrepresented what actually happened. It is more logical to rely on the wording of the PCP and the evidence of disadvantage itself.

84. Breaking down the case to its basic building blocks, the claimant (firstly) did *not* properly ask specific questions, during (secondly) the agreed timescale, and so there could be no failure to provide a response. There was an agreed procedure, which the claimant should plainly have understood, and upon which he was receiving help from his union/staff representative, and the claimant unwisely failed to follow that procedure. The procedure had specifically been drawn up to make things easier for the claimant, with a timescale which (with OH advice) would give ample time for the claimant to digest the response. If the claimant did have any substantial or particular difficulty, it arose through his own failure to follow the agreed process, and his muddled and inappropriate way of conducting his appeal (despite having the assistance of an experienced union representative). Plainly the respondent's agreed approach, set out in writing, was precisely designed to ensure that a response in writing could be provided by management. It was the claimant's own unhelpful approach which ensured that the agreed process did not work, not any PCP applied by the respondent.

85. When Mr Coe eventually asked questions on the claimant's behalf, missing even the extended deadline, it was plainly much too late to enable a considered response to be provided, and for that to be considered by the claimant. There was no PCP, but this was the natural consequence of the claimant's own failure to adhere to the agreed process. That must have been apparent to the claimant and Mr Coe. Significantly, the claimant did not ask for any extra time to complete this, suggesting that he did not consider that he was at any disadvantage.

86. The claimant was over-complicating his own appeal, sending various emails to various people and copying in others. It is perhaps surprising that Mr Jackson was able to achieve as much coherence as he did, amidst an incoherent approach from the claimant. Whilst it is inevitable that Mr Jackson would doubtless have missed one or two points raised by the claimant during the process, that is very different from adopting a policy or practice of not responding in writing.

87. The chronology that was proposed by Mr Jackson on 14 July 2017, with his remaining as the point of contact for the claimant for all matters relating to his appeal, was a sensible framework which was agreed to by the claimant. The respondent was not in default of that agreed process. The claimant was himself in default.

88. The respondent's behaviour did not put the claimant at any disadvantage, and would not put another disabled person at any disadvantage. It was designed to be an adjusted procedure to remove the possible disadvantage of following the usual disciplinary appeal procedures, and complied with OH advice. If the claimant was put at any disadvantage, he was the author of his own misfortune. Not only was there no compliance by the claimant with the primary agreed timetable, but he even missed the extended deadline given to him by Mr Jackson to present new material, notwithstanding that the respondent was still ready to receive this late material and to consider it on appeal.

89. In essence, the claimant was sent the management case on 11 August 2017: 15 pages of management case, with reference to supporting materials with which the claimant should already have been familiar. The claimant (and his representative) knew that he needed to present a response, or questions, to Mr Jackson by 1 September 2017 if he wanted them taken into account. He did not do so, but complained about various other matters, which did not assist his case in the appeal at all. He was reminded of the deadline shortly before its expiry, but still did not provide the requested material. The alleged PCP was simply not applied to the claimant.

90. The tribunal does recognise that, Mr Coe having belatedly submitted material shortly before the appeal hearing, the claimant did not receive a response before the that hearing. However, the claimant cannot, at that very late stage, well after the agreed deadline, have expected more than that his submissions would be taken into account at the hearing.

91. The tribunal has considered what any disadvantage to the claimant might actually have been was, and whether there was any deliberate intention not to respond. The tribunal notes that although the claimant has identified a theoretical disadvantage, in fact he has not pointed to any ***actual*** disadvantage in not receiving short-notice answers, and the disadvantage the claimant suggests is on the basis that he needed time to digest any management response – in fact he had had from 11 August (some two months before the appeal hearing) to digest the management response. He was not disadvantaged compared to non-disabled persons – indeed, he had been given very considerably longer than a non-disabled person would have been given before the appeal hearing, as normally timescales would

have been much tighter. There is no evidence suggesting that Mr Coe was unable to present the claimant's case effectively at the appeal hearing. If the appeal was unsuccessful, it was because, at heart, the claimant's grounds of appeal had little in them. Mr Coe evidently did the best he could, and did not complain that he had been inhibited from presenting the claimant's case. He did not ask for more time, but told Mr Libbey that he was ready to proceed; wisely, he concentrated on the key points of the appeal.

92. In respect of the suggestion that the claimant needed more time to digest and respond, the tribunal considers that no substantial or particular disadvantage has been made out. In essence, the respondent (through Mr Jackson) had set out a clear extended timescale, following the advice of OH, and the claimant never asked for extra time. The second PCP was not made out, and in any event, there was no disadvantage caused to the claimant.

93. There is no merit in this second allegation, and neither the reasonable adjustments claim nor the indirect discrimination claim is well founded. There is no case for the respondent to answer.

94. **PCP 3**: "*Requiring attendance at an oral appeal hearing without prior written response to questions (in the claimant's case the oral hearing took place on about 16 October)".*

95. This to some extend overlaps with the previous PCP. The disadvantage relied upon by the claimant, recorded by Judge Ford at the PH, was that "*as a result of his stress and anxiety he was, or felt, unable to attend a hearing unless he had ample notice of the response of management to his questions*". A proposed reasonable adjustment was for management to have responded to his questions in writing at a sufficient time before the hearing, so that he felt able to attend the hearing.

96. The respondent denies that it applied such a PCP, and denies that it was under any obligation to respond to any questions.

97. Some relevant facts are summarised above at paragraph 58 (45)-(74).

98. The tribunal agrees with the respondent that in fact the PCP is somewhat misconceived, as the claimant was *not* required to attend the hearing, in the knowledge that his representative would in any event attend on his behalf and raise all matters which the claimant wanted raised. In the light of earlier OH advice, it was recognised that it was very likely the claimant would not be able to appeal the hearing, but that it was uncontroversial that it was in the claimant's interests to proceed with the appeal hearing. It is, again, hard to construct a meaningful comparator, because the claimant has misrepresented what actually happened. It is more logical, again, to rely on the wording of the PCP and the evidence of disadvantage itself.

99. There is no evidence suggesting a causal link between the claimant's illness and his not having time to respond to questions. In any event, the claimant made it clear in his oral evidence that the week before the appeal hearing, in confirmation with discussions with discussions with his GP he would not be attending anyway. This was not a concern raised by Mr Coe at

the appeal hearing. The position as at the appeal was that the OH reports had indicated it be unlikely the claimant would be fit enough to attend, but that it would not be in the claimant's medical interests to delay the hearing. There was no suggestion that his medical position would improve, and it did not. The claimant's GP found, the week before the appeal hearing, that he was not fit to attend. The claimant agreed. This was not because he had not had a response to his questions, but because he was not well. There is no evidence of a causal link between not having had replies to his very late questions, and his being unwell.

100. Mr Libbey made it clear that neither the claimant nor Mr Coe (on his behalf) raised any question of possible adjournment of the appeal hearing to allow for more time, or to see if the claimant might be able to attend. Rather, Mr Coe confirmed he was ready and evidently wanted the appeal hearing to go ahead on the material he had.

101. It is hard to see how it could be legitimately be concluded, on the available evidence, that such a PCP was applied, nor that the alleged disadvantage was actually suffered. The PCP is, in any event inconsistent with the case revealed through the claimant's own evidence,

102. The proposed adjustments (to have responded in writing to the claimant's questions earlier) was ruled out because the claimant had not complied with the agreed timetable. Arrangements were in place for the claimant to make written submissions and to be represented at the appeal hearing. This is what happened, and no complaint was made at the appeal hearing as to any disadvantage. The reality is that the claimant has still not demonstrated any substantial disadvantage, or particular disadvantage, and indeed was (again) given rather more opportunity than appellants would normally be given to prepare his case in advance and present it in writing, because of the adjustments already made to the procedure. The tribunal agrees with the respondent that the duty to make further reasonable adjustments was not triggered in relation to this PCP.

103. There was no need to make adjustments, and no need to consider any statutory defence to the indirect discrimination.

104. There is no merit in this third allegation, and neither the reasonable adjustments claim nor the indirect discrimination claim is well founded.

105. **PCP 4**: "*Requiring the appeal hearing to take place at 9.00am on a Monday morning in Kings Lynn, and so requiring the claimant to leave his home in Dorset the night before.*"

106. This is said to have put the claimant at a substantial/particular disadvantage because as a result of his disability he suffered anxiety when he left his home, especially overnight and/or was not able to leave his home overnight.

107. The respondent's case was that then hearing had to be arrange for 09:00am because of diary commitments of those attending, with the choice of starting then or postponing the hearing, leading to further delay (which would not have been in the claimant's interest), and that in any event the claimant did not wish to attend any hearing.

108. Some relevant facts are summarised above at paragraph 58 (64)-(74).

109. In reality, the tribunal notes that the clear evidence, as referred to above, was that the hearing had been arranged for 9.00am, not as any particular PCP, but because those who needed to attend on this particular day were simply not available in the afternoon. The only option, as the respondent points out, would have been not to proceed on that day, and to re-schedule the appeal hearing for another day, causing further delay. To do so would of course have gone against the OH recommendations. It is, again, hard to construct a meaningful comparator, because the claimant has misrepresented what actually happened. If there was one, it would not assist the claimant, as it would have to be a non-disabled person who was not planning to attend an appeal hearing and had earlier suggested, without giving reasons, that if he attended he would prefer a 2pm start-time, but in the event did not challenge the hearing time and date. In reality, this would add nothing to the claimant's case. It is more logical, again, to rely on the wording of the PCP and the evidence of disadvantage itself.

110. The claimant neither requested a postponement, not gave any medical explanation for his proposed timings. Indeed, there was still, at the tribunal hearing, no medical evidence supporting the claimant's late suggestion that it would cause less stress or anxiety to have an afternoon meeting. This was on the basis that it would be inherently less stressful to have to travel all the way from Bournemouth to Kings Lynn, and to return, in one day: the tribunal took judicial notice of the fact that this would be well over 200 miles each way, and perhaps four hours each way. It is hard to see why this would be less stressful than staying in a hotel the night before (Mr Jackson having made it clear that the respondent could arrange accommodation for the claimant) when the claimant could be rested before the commencement of the appeal hearing. It is possible that the claimant is correct, but he provided no coherent evidential basis for any disadvantage.

111. A key point, however, is that the claimant's evidence before the tribunal was (as the respondent points out) that he was not fit to travel and attend ***any*** sort of appeal hearing. It was never suggested that a hearing should be held at a location nearer the claimant's home, or by telephone conferencing.

112. In those circumstances, the tribunal accepts that it was entirely immaterial as to whether he was not going to attend at 9.00am, or was not going to attend at 2.00pm. Or, indeed, not going to attend on a subsequent day (the medical advice being that further would be disadvantageous to the claimant's health, and the claimant in any event having not asked for postponement to another day). The claimant was represented by an experienced union representative at the time. He never told anybody at the time that there was any problem with him leaving his home overnight. He never suggested a location nearer home. There was no supporting medical evidence. The tribunal does not consider that this assertion of fact is made out, and considers that if there had been any merit in it, it would have been raised at the time. As set out above, the tribunal considers that, properly construes, there was no such PCP, but even if there was, there was no disadvantage caused to the claimant, who would not have attended anyway.

113. The tribunal considers that there is no basis for arguing disadvantage, in relation to the PCP as set out, and that in any event it cannot be reasonable to make the proposed (or any) adjustment of having the hearing at 2pm, when there is no reason to believe that this would prevent the claimant from suffering any relevant disadvantage. The tribunal recognises, however, (although this was not argued by the claimant) that there could have been a point taken in respect of the nuances knowledge, in respect of the indirect discrimination claim, as a different legal test applies. That said, in reality the outcome must be the same: if the claimant had established that he had suffered a particular disadvantage, the general legitimate aim would be along the lines of completing the appeal hearing in a timely way, and avoiding the need to disadvantage the claimant by a postponement to another date some time later. This was in the context of the claimant volunteering no information suggesting any specific disadvantage relating to a 09:00am start, and nothing being suggested in any information from the claimant, by the GP or by OH suggesting any medical reason to start at 2:00pm rather than 09:00am, and nothing being raised by Mr Coe at the hearing, and no request for postponement to another day. Quite plainly, it would be proportionate to go ahead at the planned time, whilst the participants were available (the claimant having in any event elected not to attend, on medical advice).

114. There is no merit in this fourth allegation, and neither the reasonable adjustments claim nor the indirect discrimination claim is well founded.

115. **PCP 5**: "*Only dealing with issues in the appeal which the respondent considered were of interest to it and/or not dealing with all the appeal points raised by the claimant*".

116. This is said to amount to a particular or substantial disadvantage because as a result of his disability the claimant suffered particular anxiety and stress from a failure to resolve each of the issues he had raised on appeal (on which he needed closure).

117. The respondent's case is that the PCP was not applied, as it did not limit matters to those that "were of interest to it", and that in any event this is a one-off allegation not capable of being a PCP (see *Nottingham City Transport v Harvey*). All the matters raised were considered by Mr Libbey, and there was no disadvantage suffered.

118. Some relevant facts are summarised above at paragraphs 53-54 and 58 (74)-(76).

119. Quite apart from a lack of any coherent evidence supporting such an alleged disadvantage, the tribunal considers, again, that this is a somewhat misconceived PCP. All Employment Tribunals (and indeed the Employment Appeal Tribunal) will be familiar with the situation whereby a litigant in person has provided a lengthy, repetitive, somewhat incoherent and disproportionally long list of concerns, most of which miss the point and add nothing to the appeal. It is, again, hard to construct a meaningful comparator, because the claimant has misrepresented what actually happened. It is more logical, again, to rely on the wording of the PCP and the evidence of disadvantage itself.

120. This was plainly the situation which confronted Mr Libbey when he dealt with the claimant's internal appeal.

121. The tribunal accepts that Mr Libbey and the appeal panel took care to read everything which the claimant had written. However, as an experienced Chair, with a senior management background, Mr Libbey evidently took an entirely appropriate approach, which was, in the relatively short appeal hearing, and in the outcome letter, to deal with key themes. He took the entirely appropriate step of relying upon Mr Coe's summary of the four main points of the appeal, and Mr Coe was evidently entirely sensible and reasonable to concentrate on summarised themes, rather than to take the panel at inappropriate length through irrelevant (or repetitive) detail. This was not some arbitrary selection of only those matters that Mr Libbey was in some way "interested in", as implausibly suggested by the claimant's PCP, but a sensible reliance on the main themes in a lengthy and cover-complex appeal. Indeed, these were the key themes summarised on the claimant's behalf by his own representative.

122. Mr Coe did ***not*** ask Mr Libbey to deal expressly with every point made by the claimant in writing, no matter how weak or irrelevant. This was a sensible approach by Mr Coe, and set out the structure of the appeal to which the appeal panel would be expected to focus their response. There was no evidence suggesting to the appeal panel, and indeed no credible evidence before the Employment Tribunal, that the claimant's medical condition in some way required an irrationally lengthy and complex blow-by-blow comment on every single thing ever raised by the claimant in the appeal, expressly rejecting each individual point as without merit. That would be pointless, would hugely delay proceedings, and could hardly be said to benefit the claimant.

123. It is entirely clear from Mr Libbey's credible evidence that he did in fact receive all the material from the claimant. It was very lengthy and detailed material. It was inevitable that no reasonable appeal panel would refer expressly in the outcome letter to every single point raised. In any event, Mr Libbey's approach cannot be faulted.

124. The Tribunal considers again that, strictly speaking, the PCP is misconceived and, on the facts, was plainly not applied.

125. Even if the tribunal was to take a more liberal and broader approach, however, as indicating more generally that the appeal outcome letter dealt only with the main themes in the appeal (identified by the claimant's own representative), the tribunal in any event does not accept that, objectively, the claimant was disadvantaged in any way.

126. The Tribunal again considers that the duty to make reasonable adjustments does not arise and the respondent is not required to submit its defence indirect discrimination. Had, however, the tribunal been inclined to accept that there might be some disadvantage, the proposed adjustment of responding in writing to every point made in the appeal is wholly unreasonable and disproportionate, especially when this was neither suggested by the medical evidence, nor suggested by the claimant's own union representative. No further adjustment was required. Assuming a legitimate aim of explaining to an appellant (represented by an experienced

union representative) why the disciplinary warning was upheld, the carefully crafted outcome letter was entirely proportionate.

127. There is no merit in this fifth allegation, and neither the reasonable adjustments claim nor the indirect discrimination claim is well founded.

128. **PCP 6**, the final PCP, is "*refusing to pay injury allowance as required by Agenda for Change or to provide a reasonable explanation for not paying injury allowance."*

129. The PCP is said to have put the claimant at disadvantage compared to non-disabled people "*because, as a result of disability, the claimant suffered increased anxiety and stress from the financial worries and/or the uncertain financial position*".

130. The two suggested adjustments are (1) to have paid the allowance, and/or (2) to have provided a reasonable and timely explanation.

131. The respondent argues that this claim is well out of time, but the substantive argument is, in essence, that the PCP is neither valid, and nor was it applied.

132. Some relevant facts are summarised above at paragraph 58 (7), 58 (42) and 58 (58).

133. A non-disabled comparator, on the basis of the factual findings which the tribunal has made, would be someone who was not eligible for injury allowance, and was therefore refused it, and was given a reasonable explanation for that refusal. In the alternative, this would be another person who had become ill after being disciplined for what was seen as gross misconduct, and then asked for injury allowance. Either way, this does not take the claimant's case anywhere.

134. Insofar as the time point falls to be considered on this allegation, there has been no coherent argument from the claimant that this was part of a continuing act of which the last act was in time, nor why it would be just and equitable to extend time. The tribunal accepts the respondent's argument that the decision not to pay injury allowance was made on 4 August 2017. The claimant had three months, to 3 November 2017, to go to ACAS to commence early conciliation. He did not go to ACAS for another six weeks or so; because of this delay he cannot benefit from any extension of time for ACAS early conciliation. It was still another ten or eleven days or so before he presented the claim on 2 January 2018. This was not a particularly lengthy delay. However, the claimant does not rely upon his medical condition, and indeed, at the time he was able to put many things in writing, often at very considerable length, and had the assistance of an experienced representative. The claimant does not suggest that he was unaware of time limits. He did give evidence that he took advice from ACAS at an earlier stage, although he was unclear when that was. The argument which the claimant relies upon is to say that he had put in a grievance about injury allowance (21 September 2017) and that he was expecting that to be dealt with.

135. At the time that time expired, the claimant was complaining that he still had not received a reply to his grievance, and was complaining that it was not substantially dealt with. At the time that he went to ACAS for early conciliation, and presented his claim, there was still no substantive resolution. Yet he felt able to put in the claim anyway.

136. The respondent admits that other than the disadvantage of having to respond to an out of time claim, there was no specific prejudice suffered by the respondent by responding. This is particularly as the respondent's case is that Mr Jackson set out his explanation at the time for not paying injury allowance, and the respondent is clear that a decision was made, and communicated to the claimant. The respondent invites the Tribunal to take the view that the claimant has not established that there was sufficient just and equitable reason to extend time.

137. Taking into account the relevant statutory provisions and case law (which need not be rehearsed here), and its discretion to extend the three-month time limit, the tribunal would on balance be minded to agree with the respondent. The explanation given by the claimant in fact does not really hold water: The claimant is complaining that the respondent was not responding to his complaints, which seems a fairly fragile reason to delay his claim. Everything that the claimant needed to know and indeed all the other claims should have been clear to him well before the deadline for this case. However, the tribunal resolved that the more appropriate course of action would be to consider the merits of the claim first, in any event. As it turns out, the claim is of no merit and any extension of time is somewhat academic.

138. Taking into account the respondent's submissions, and the case of *O'Hanlon* (at least in respect of reasonable adjustments), the tribunal agrees with the respondent that the facts of this case are analogous to sick pay.

139. It is not the purpose of the equality legislation to attempt to use "reasonable adjustments" arguments to justify additional financial payments from the employer, whilst an employee is not fit to work. This would go entirely contrary to the legislation, which is trying to ensure that people can come back into work. It is also a rather unattractive argument that because a person with mental issues argues that financial worries exacerbate his symptoms, he should therefore be entitled (as a reasonable adjustment) to extra money which would not be payable to someone with similar levels of absence but who did not have mental health issues.

140. The tribunal agrees with the respondent, in any event, that the PCP contains two parts, both of which must be evidentially established first, if the claim is to be capable of succeeding. If, however, this was treated as two separate PCPs, the outcome would be the same.

141. The tribunal agrees with the respondent that the first part of the PCP (refusing to pay injury allowance) falls outside the ambit of reasonable adjustments provisions in the Equality Act 2010. However, regardless of the *O'Hanlon* point, the PCP is deeply flawed, on a logical and factual basis.

142. The wording of the PCP is very specific. It makes two very specific allegations. The tribunal considers that the allegations are unambiguous, and not susceptible to a liberal interpretation under the ***Carreras*** approach.

143. The first allegation contained in the PCP is based solely on the assumption that the claimant ***was*** entitled to injury allowance under Agenda for Change. If, however, the claimant is seeking to argue that as a disabled person he should nevertheless be paid additional allowances from the public purse to which he was not entitled, then the tribunal would wholly reject such an argument.

144. The tribunal has carefully looked at the wording of Agenda for Change, as presented to it in the bundle (taking into account an amendment to correct a typographical error in the respondent's original document). It considers that the claimant's case is misconceived. Put simply, the claimant was not entitled to injury allowance.

145. Agenda for Change does not require the injury allowance to be paid to those who fall outside the criteria, and it is not for the employee to decide for himself or herself what allowances they would like to be entitled to. It is an objective test, based on applying the basis of the wording of the documents to the facts. As rightly identified by Mr Jackson, the claimant was somebody who was plainly in an employment dispute with their employer: the claimant was seeking to argue that he had been made ill by his employer, because he had been disciplined for misconduct. This was plainly not the sort of work-related injury anticipated in Agenda for Change. The tribunal was given the example of a nurse assaulted by a patient, who consequently had to take a long time off work, when it would plainly be unfair to stop paying her wages, if the reason she was not at work was because a patient assaulted her. Indeed, published guidance (which was not provided to the tribunal, but was referred to by the claimant) appears to follow that same interpretation. It would be very difficult indeed to mount any arguable case that somebody who is disciplined for financial irregularities, and as a result of being disciplined falls ill, and then appeals and complains that the process was unfair, should therefore become entitled to extra money from the NHS budget, because he has chosen to raise a dispute with his employing NHS Trust.

146. The tribunal considers that the claimant falls squarely within one of the Agenda for Change exceptions, and was ineligible for injury allowance. The tribunal therefore considers that there was no entitlement to injury allowance, and that the respondent cannot be criticised for failing to pay it.

147. Similarly, the second allegation within the PCP is also misconceived.

148. The claimant asserts that the respondent failed "*to provide a reasonable explanation for not paying injury allowance".*

149. The claimant was told, before his pay was due to reduce, that injury allowance was not payable. In fact, the tribunal considers that in the 4 August 2017 letter from Mr Jackson, referring to the attached extract from Agenda for Change, a sufficient and reasonable explanation was given. The claimant was told that he was not eligible. He was expressly referred to the paragraphs of the Agenda for Change relied upon, namely that it would not

be paid for "sickness absence as a result of disputes relating to employment disputes relating to employment matters, conduct or job applications". The claimant therefore knew precisely why the allowance would not be paid to him.

150. Furthermore, when the claimant challenged this, Mr Jackson gave a further, more detailed, explanation in writing on 20 September 2017.

151. Not only was a clear explanation given by the respondent, but it was one which the tribunal considers to be entirely reasonable. Not only does the tribunal agree with Mr Jackson's interpretation of the rules and his application of them to the facts, but it would be highly surprising if any NHS manager would have come to a different conclusion.

152. All the claimant can really say is "*I believe that I should have been paid injury allowance*". But he would be wrong to come to any such conclusion. To characterise the claimant's mistaken view as somehow providing the basis for a PCP is wholly misconceived.

153. The tribunal considers that on any analysis, the sixth PCP was not applied to the claimant.

154. In any event it, it would be an illogical application of the law for the claimant to be permitted successfully to argue that "you cannot do this because it causes me stress", thereby effectively preventing the employer from taking any decision with which the claimant disagrees, to his own considerable financial advantage. Furthermore, the tribunal has not been provided with any coherent medical evidence, or indeed any coherent evidence from the claimant himself, that he did in fact suffer increased stress as a result of not being paid injury allowance.

155. The tribunal would also take issue, logically, that even if it could be shown that the PCP was applied (and in fact it cannot be so demonstrated) that the claimant was put at a greater disadvantage than a non-disabled person who was similarly refused the allowance for the same reason. Plainly there was no disadvantage flowing from a failure to give an explanation at the time, as such an explanation was provided.

156. It is unnecessary to go further, but plainly it would not be a reasonable adjustment to pay the claimant a financial allowance to which he was not entitled, and this would plainly be a proportionate means of achieving a legitimate aim along the lines of paying NHS employees (from public funds) only those allowances that they were entitled to receive.

157. There is no merit in this sixth allegation, and neither the reasonable adjustments claim nor the indirect discrimination claim is well founded.

<u>General conclusions on the claims</u>

158. In none of the claims of failure to make reasonable adjustments or of indirect discrimination, has the claimant been able and none of the claims of indirect discrimination, has the tribunal found that the claimant was put at a particular or substantial disadvantage, by such a PCP being applied to him.

159. None of the claims are well founded.

_____

Employment Judge M S Emerton

_____

Date 10 June 2019