# THE EMPLOYMENT TRIBUNALS

**Claimant** **Mr Engin Kul**

**Respondent** **Home House Limited**

**HELD AT:** **London Central**

**ON:** **16, 17, 21, 22, 23 January and 13-15 May 2019**

**EMPLOYMENT JUDGE: Mr J Tayler** **Members: Ms S Dengate**
**Mr D Clay**

***Appearances***

**For Claimant:** **Mr J Cook, Counsel**
**For Respondent:** **Mr M Duggan, Queen's Counsel**

## JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The harassment and unlawful deductions/breach of contract claims are dismissed on withdrawal.

2. The Respondent failed to make a reasonable adjustment by not appointing the Claimant to the role of Assistant Front of House Manager in July 2017 with a phased return to work.

3. The Claimant was dismissed. His contract of employment was not frustrated.

4. The dismissal constituted discrimination because of something arising in consequence of disability and was not a proportionate means of achieving a legitimate aim.

5. The dismissal was unfair.

# REASONS

## Introduction

1. By a Claim Form submitted to the Employment Tribunal on 16 November 2017 the Claimant brought complaints of:

   1.1 Unfair dismissal

   1.2 Discrimination because of something arising in consequence of disability

   1.3 Direct disability discrimination

   1.4 Failure to make reasonable adjustments

   1.5 Harassment related to disability

   1.6 Unlawful deductions from wages/breach of contract

2. The harassment and unlawful deductions/breach of contract claims were withdrawn.

## Issues

3. The parties produced a list of issues that was agreed in a finalised form at the hearing. We have decided those issues necessary to determine the case.

## Evidence

4. The Claimant gave evidence on his own behalf.

5. The Respondents called:

   5.1 Ana Binz, Operations Manager

   5.2 Natalie Tait, Human Resources Director

6. We were provided with an agreed bundle of documents and a supplementary bundle. References to page numbers in this Judgement are to the page number in the agreed bundle of documents.

## Findings of fact

7. The Respondent is a private members' club situated in Marylebone London. It has 5,000 members. It provides club facilities and hotel rooms. It operates seven days a week; and is open 24 hours a day. The Respondent employs a little under 200 employees.

8. In 1996 the Claimant obtained a qualification in Hotel Management from Istanbul University. In 2006 he obtained a Higher National Certificate in Business Management from Southgate College. In 2009 the Claimant took a BA Honours in Hospitality Management from Leeds Metropolitan University.

9. Before the Claimant commenced employment with the Respondent he had been employed since September 2005 as an Assistant Night Manager at Park Inn, Russell Square at a salary of £18,500 and prior to that had been a catering and beverage assistant at the London Hilton Hotel, Kensington, where his hourly rate was £5.50.

10. The Claimant applied to work for the Respondent on 4 December 2009 [p48]. He was offered employment as a Night Manager on 9 December 2009 [p55]. The Claimant's employment commenced on 11 January 2010. The annual salary was £20,000.

11. The Claimant was provided with a principal statement of terms of employment [p56] and a job description [p63]. The first three responsibilities set out in the job description were;

> "1. To take accountability for the total operation of Home House during night time.
>
> 2. To ensure all security measures are strictly enforced during the night. This to include cash handling and key security
>
> 3. Ensure all members & their guests receive efficient Reception services upon arrival and departure from the Club during night time hours. To deal with late room cancellations/ releasing rooms."

12. Despite the title Night Manager, the role did not have any specific line management responsibilities and was principally a reception/security role.

13. The Claimant completed a Night Workers Health Questionnaire on 15 February 2012 [p66]. He did not suggest that he was suffering ill health as a result of night working.

14. On 2 November 2012 the Claimant was promoted to Senior Night Manager [p67B]. This did not involve any significant change in job duties.

15. On 25 December 2013 the Claimant sent an email stating [p68];

> "I had to do less days to cover patrick in January 2014.
> I do not feel well and I need to rest enough. I will do my normal shift.

> You need to get someone to cover Patrick
> I need to have a least 2 days to rest although I check the night workers law which indicates it could cause many health issues I might suffer in future. It strongly advises I should have my 4 days rest otherwise in near future I might face with more serious health conditions. …
>
> After that I will do my 4 days on 4 days on, I would like to go back to my normal life and health. In future I can only cover 1 or maximum 2 days it depend how I feel."

16. The specific issue the Claimant raised was about working a number of nights in a row to cover staff absence. The Claimant did not raise a concern that he did not want to work nights at all, or that working nights was generally affecting his health.

17. On 4 January 2014 the Claimant sent an email stating:

> "Brian can do work on 05 Jan but he **cannot** do 12/13 January because he goes somewhere and I understand it, Instead he will work on 9/10 January. I will cover Patrick on 6/7 January and I have to work 9 days in a row again from 11 January. I am really tired. I will do it once more for the last time. **After 19 January I will not do any extra shits anymore unless I feel well,** at the moment my body has run out of energy. I can hardly motive myself to come to work. My life is upside down. If you have any issues about it I am ready to talk anytime you want."

18. Again, this was not a complaint about working nights generally, but about having to cover shifts.

19. Ian Sturrock, the then Front of House Manager, replied that day stating [p147.1];

> "Further to your email on 25th Dec, I had consulted Brian, who had kindly agreed to cover those shifts - I was not aware that there had been a change of plan.
>
> We are currently proactively recruiting for additional night coverage. I had a meeting with both Gregg and Joel yesterday which was focused on the necessity to amend this situation ASAP.
>
> Engin, there is nothing more important than your health. We all greatly appreciate the incredible commitment you have shown to the club and continue to do.
>
> Many, many thanks for generously agreeing to cover these shifts. We will get this situation rectified immediately, in order to restore some stability to your schedule.
>
> Again, thank you as always for your commitment and professionalism."

20. On 4 April 2014 the Claimant sent an email to Greg Cutter, the Human Resources Manager, stating [p75.1]

> "I have heard that Ian is leaving his position as FOH Manager.
>
> I would like to arrange an appointment with you to discuss if it is possible for me to take his position .."

21. The Claimant did not receive a response to this email; but did not take the matter any further when a new Front of House Manager was appointed. While on this occasion the Claimant asked to be moved to a day-time managerial role, he did not suggest that this was because of a general problem with working nights. We do not accept that the Claimant made repeated request to move to working in the day, or that he said he needed to because of difficulties in working at night.

22. On 24 September 2014 the Claimant signed an individual agreement to opt out of the 48 hour maximum average working week under the Working Time Regulations 1998.

23. Ana Binz commenced work as Front of House Manager in January 2015.

24. The evidence from Ana Binz, which was not disputed, and was accepted by the Claimant in cross examination, was that no overtime whatsoever was carried out by the night managers in 2015.

25. On 21 April 2015 the Claimant attended a Performance Appraisal Review with Ana Binz [p70]. The Claimant scored highly; receiving many outstanding gradings. The Claimant did not raise an issue about working nights or specifically ask to be moved to a management role; although he referred to a hope that someone would "discover an ability" which suggest some desire for progression. The Claimant may well have in mind a move to a management role, but his comment was not understood in that way by Ana Binz.

26. In December 2015 the Claimant worked one extra shift.

27. The Claimant obtained a postgraduate MA Diploma in Management from Westminster University in 2015.

28. In February 2016 the Claimant worked some extra shifts to provide cover after one of the night managers was dismissed. He worked 20 and 21 February 2016; and it would appear some shifts earlier in February 2016 [p77].

29. On 17 February 2016 the Claimant sent an email to Ana Binz stating;

> "I am ok to do first week, But I need to see how I feel if can do another 6 six days no-stop or not. I would like to you understand that doing 6 days already drains energy in the body. I do not want to be unwell again."

30. Again, the specific concern raised was about working too many nights in a row when covering absent colleagues, rather that working a night generally. The Claimant did work the two extra shift in the first week but the extra shifts in the second week were re-allocated. These two extra shifts in February 2017 were the last worked by the Claimant.

31. The Claimant took extended leave from 5 July to 1 August 2016. The Claimant visited family abroad. Natalie Tait stated that on his return the Claimant seemed very concerned about his family and was downcast. Natalie Tait states that the Claimant said that he was having difficulty in sleeping because of anxiety about his family.

32. The Claimant attended work to help with a party during his leave period on 29 July 2016. The Claimant was then absent from work due to ill health.

33. On 17 August 2016 the Claimant was provided with a Statement of Fitness for Work Certificate ("Med 3") stating he was unfit for work for 1 month because of "anxiety".

34. On 17 August 2016 the Claimant attended work to deliver the Med 3 and met with Ana Binz. Ana Binz states that the Claimant stated that he "could no longer do night time work". Ana Binz states that the Claimant agreed that he would take a day-time role as Senior Receptionist. Ana Binz stated that she told the Claimant that there would be a reduction in salary, and the Claimant said that he was content with this. The Claimant denied in cross examination that he had agreed. We consider that the contemporaneous correspondence supports Ana Binz's contention that the Claimant did agree to return to the Senior Receptionist role on a reduced salary.

35. On 1 September 2016 Ana Binz sent an email to Natalie Tait, Human Resources Director, stating [p81];

> "Engin will start with his new role on the 5th of September, next Monday. Could we change his package to £22k salary and perhaps keep him on the 3 points he has for service charge?"

36. On 2 September 2016 Ana Binz wrote to the Claimant offering him the role of Senior Receptionist, stating that his salary would decrease from £28,790.94 to £22,000 with effect from 5 September 2016 but that the other terms and conditions of his employment would remain the same.

37. The Claimant attend work on 5 September 2016. He arrived at 7am and left at 3pm although his shift was 10am to 6 pm. The Claimant was given a copy of the letter of 2 September 2016.

38. On 6 September 2016 the Claimant sent an email to Natalie Tait stating [p87];

> "I received an offer for a new position from Ana Yesterday. I am sorry but I am not fit enough to make any decisions about my employment and I have not been fit since the 03rd of August 2016.

> I will be seeing my GP on 8th September 2016 and I will keep you updated"

39. Natalie Tait replied;

> "Thank you for your email. Am I to assume that you will not be returning to the House until following your GP appointment?

40. The Claimant responded [p86];

> "I do not feel well and I feel even worse since yesterday. I am not fit to make any decisions at the moment I need to focus on getting better.
>
> I need to see my GP on 08th September 2016 and I will update you on 08th September 2016."

41. On 6 September 2016 the Claimant sent an email to Natalie Tait informing her that he had undertaken a first session of therapy [p91].

42. At about this time Joel Williams, the General Manager, raised the possibility of the Claimant undertaking the role of Purchasing Manager, which at that time was a largely administrative role. The salary was £25,000.

43. On 11 October 2016 the Claimant sent an email to Joel Williams [p94];

> "Hi Joel
>
> I am sending this email regarding to new position.
>
> I have thinking about it since yesterday afternoon, if I could fully be fit to do this job without letting you down with my conditions. This morning I woke up at 02:30 am and struggling to sleep.
>
> I think that on my return to HH I might need to reduce my hours of working (part-time) and then when I feel ready I can gradually build up my working hours. I think this is the most sensible option for me realistically.
>
> I really appreciate with the offer, but as you could see that I firstly need to sort myself out.
>
> Probably it is best for me to wait until the end of my sick note and be assessed by my GP. I have been really working hard to be back since it happened. I have been putting so much pressure on me, it is better to ease it and heal it.
>
> If I come back earlier I could jeopardise the progress and go back where I started again. As you could see I am already awake. I need to get better in order to do my job properly."

44. On 10 November 2016 the Claimant was signed off as not fit to work due to an anxiety disorder for 2 months, to 8 January 2017.

45. On 11 November 2016 the Claimant sent an email to Natalie Tait stating [p98];

> "I am sending this email to inform you that my health condition has been improving slowly. I have seen my GP yesterday. I still have sleeping issues, which is very vital for my recovery. It looks like it will take time to adjust my sleeping. I try to get better very hard and I am very tired. On the other hand I try to put less pressure on myself to lessen the stress on myself. My GP has given my another 2 months sick note to support my recovery. If you have time I would like to see you in coming days to set up a strategy for my return to work after this sick note finishes. At least I will have something to look forward and get me focussed better. After this period of sick note, Realistically I would like to work just 2 days until I feel better and gradually increase my working hours. Preferably weekends **I would like to help business and my colleagues, use my managerial skills and knowledge.** I would like to talk you about it in coming days if you have time available for me." [emphasis added]

46. On 15 November 2016 the Claimant met with Natalie Tait. The Claimant took an adversarial approach and stated he found the offer of the senior receptionist role insulting. Joel Williams was asked to join the meeting. Joel Williams stated that the role and salary had previously been discussed. The Claimant agreed. Natalie Tait produced a note of the meeting, that we accept is accurate [p101];

> "Met with Engin -15.11.2016
>
> Explained that his anxiety is getting better and would like to discuss his return to work options.
>
> EK said that our previous offer of a Senior Receptionist day role was insulting to him and he was able to make a clear decision.
>
> NT attempted to reassure EK that the offer was made on the understanding that this was EK's request. Apologies were offered if this wasn't the case and we all agreed that this was a misunderstanding with his line manager and HR / General Manager (JW)
>
> Both NT and JW expressed support in assisting Engin's return to work and agreed that a phased return to work may be better.
>
> **NT suggested an alternative role in the first instance that may be easier to step into. We would also notify Engin of any other opportunities that may arise in the meantime.**
>
> Agreed to meet again around Christmas time, to work on a plan.

The meeting concluded with the outcome that we would meet to discuss options closer to the time of his return to work. GP appointment was yet to be scheduled." [emphasis added]

47. The Claimant met again with Natalie Tait on 11 January 2017. Natalie Tait produced a record of the meeting which we accept is accurate [p104];

"Meeting with EK to discuss a phased return to work with amended duties.

EK suggested that he was keen to work 2 days per week, no night shifts however early evenings were fine.

We discussed his therapy and his support group every week.

Ek said he was making good progress and his sleeping had improved.

NT asked about EKs feelings about a position of authority. EK stated that his main focus was to get back to work, not position. EK stated that as he has extensive management and Home House specific experience then he would of course offer help if it was required on shift.

EK suggested a weekend role would be preferred and would consider a weekend management role.

I explained that I would speak to Joel and Ana in regards to what roles are currently available and said I would come back to him hopefully before his doctors appointment on 18.01.2017. **I also stated that we would try and get a role as close as possible but it may be a receptionist or security role. I also stated that we would try and get as close to his salary as possible. EK reiterated that his focus is getting back to work and not anything else.**

We spoke further about the arrangement being temporary until EK is back on his feet." [emphasis added]

48. On 18 January 2017 the Claimant sent an email to Natalie Tait [p107];

"I am sending this email to inform you that;

1. I have a sick note from my GP until the 23rd Of January 2017. Because he was supposed to give that to backdate and adjust my previous sick note, on the other hand, the system was not processing two notes at the same time. He will give an Amended Hours Note next week, I will pick it up from my GP.

2. Amended hours note will start from 24th January 2017 and I will be under health observation of my GP for 2 months until the end of my 8 weeks of group therapy starting on 15th February from 10am to Midday.

3. I can bring this Amended Hours Note next week as soon as I get it from him. Probably he can do it next Monday or Tuesday.

4. In this case I am willing to come back from the First week of February 2017 to allow you sometime to put me on the rota if it is fine or if you would like me to come back earlier, I can start next week, I leave it to you and Ana about my 2 days a week daytime shift (in total 16 hours) as we talked last Wednesday.

If you need anything, please do not hesitate to contact me."

49. On 20 January 2017 Natalie Tait responded;

"Apologies for the delay - I have been out of the office for a couple of days.

The below looks to be all fine. I have discussed your return to work with Joel and he is very happy to welcome you back to Home House.

As your return is phased and we have a current lack of resources in security, we would like to offer you the opportunity of working with Marco in Security for 2 days per week ( 2 x 8hours per day). Initially every Monday and Friday from 7am - 4pm.

How does this sound to you?"

50. The Claimant replied [p106];

"Thank you for the email.

It is fine for me at the moment to do the security until I get better and better opportunity comes up.

I hope that you will keep my hourly rate as same as it was before."

51. Natalie Tait responded [p105];

"I will work out your hourly rate. The security rate may be much lower however we will do our very best to bridge the gap where possible."

52. The Claimant replied [p105];

"I would like you to consider that I have been working there for 7 years when you evaluate my hourly pay and I deserved every penny more than enough while I was working there. I would like to be able to my bills and in the mean time to get better and being productive, this is all about coming back to work. I am not going to make any money to save or spare to myself for my leisure time etc.

When would you like me to start?"

53. Natalie Tait relied on 23 January 2017 stating [p105];

> We can either start you from Friday this week or Monday 30th January, which would you prefer?
>
> In regards to the hourly rate for the role. A day time security rate would be £8.50 per hour. We have however taken your experience with Home House into account and would like to increase this to £10 per hour for all hours worked by yourself whilst in this role.
>
> **I must note that the role of a Senior Night Manager carries a much higher salary due to the working hours and the level of responsibility. This role is still open to you however given our discussions I am assuming that your final decision is to resign from this post and accept the security role on a temporary basis? I must specify this as we will need to change your contract upon return**." [emphasis added]

54. On 26 January 2017 the Claimant was issued with a Med 3 to 23 March 2017 [p110]. The certificate referred to Low Mood, but the boxes for phased return, amended duties and workplace adaptations were ticked.

55. On 26 January 2017 the Claimant sent an email to Natalie Tait stating [p108];

> "I would like to inform you that I have been feeling very unwell since this Monday. I am trying to reach my GP"

56. On 27 January 2017 the Claimant sent a copy of the Med 3 dated 23 March 2017.

57. On 30 January 2017 Natalie Tait sent an email to the Claimant stating [p111]:

> "Thank you for sending this through. The note states that you are fit for work with amended hours/phased return/ adaptations to the work place and duties. I am assuming from your email that you do not wish to return to work at the present time. Can you please confirm if this is the case?"

58. The Claimant replied [p111]:

> "I would like to confirm that I do not feel well. I have had so much effort to lift myself since I got sick. It shows you that as well I may not be fit to work too."

59. On 6 February 2017 the Claimant sent an email to Natalie Tait [p112]

> I am sending this email about your email (23.01.2017).
>
> **I would like to tell you that your email degraded me enormously that I am still trying to recover from it.**

I had meetings with you two times and all those meetings were not prepared professionally to find a solution for my case. It looks like you do not want to acknowledge that fact that I am suffering from Anxiety Disorder'. I have been trying very hard to recover and having therapies, I will have more Therapies from 15th February 2017.

I have been really trying to recover and when I am feeling ready to work and I am always demotivated by HH and feel even worse than before. I always work hard for Home House, I worked many times 20 days non-stop to cover the sacked night managers, Once I worked 36 days with 2 days off to cover after Daniel Mertens was sacked suddenly. I have sacrificed my family life, my health and social life. I have not called sick for 6.5 years, I came to work although I was really really sick sometimes. Is it possible not be sick when you cover night shifts 20 days? Absolutely the answer is no, but I came to work and did my best.

There were lots of promotions happening without my knowledge, I always mentioned to FOH managers and Joel and each time I was really disappointed very deeply, my soul was broken and I just wanted to have a chance to prove myself. I applied to FOH manager position after Ian Sturrock left, I did not get even a single reply in April in 2014.m …

I just would like to have a concrete reply from you to this email below;;;; …

Sent: 11 November 2016 11:19 …

When I met you and joel, I did not have any strategy at all but instead you preferred to deliver the verdict by emailling rather than talking to me. You had months to prepare something for me. Why am I not allowed to use my managerial skills? I have Postgraduate Diploma in Management 2015 from Business School of Westminster University, I saved 6000 pounds for this course to benefit my career with Home House, I invested my hard earned cash on this course, I just a result; your promotion offer; Security at the back door with 10 pounds an hour to get my skills to be rotten. I am a devoted employee of Home House, please do not forget that."

60. The version of the email of 11 November 2016 is different to that received by the Respondent. It appears that it was a draft that was toned down before it was sent.

61. On 8 February 2017 Natalie Tait wrote to the Claimant [p115];

"I am extremely sorry that you are so unhappy in response to our attempts to phase you back to work on lighter duties.

On a personal level I am also very disappointed that this proposal is not to your liking since I have been working with the managers here to identify work that permits you to return on the basis you have advised us, namely on 2 days a week with no night work. We have taken a really purposive approach to looking for work that would enable you to ease

back into the workplace with a view to build Ing up again to full time work at the appropriate level of seniority. This is because you are a valued employee and we want to retain you.

Unfortunately, it ls not possible to allocate you work on the basis you wish to return, at first instance, of the same seniority as a night manager and therefore at the hourly rate you enjoy as a full-time Night Manager. Night management work is more highly paid than day time security. I had understood from our previous discussions that you understood this but you attached higher value to returning to work on light duties to assist you build up to your regular working pattern. This was not anticipated to be a permanent arrangement, but one that would be subject to regular review. …

From what I understand from you, you are willing and fit to return to work 2 days a week undertaking day work and not night work. We do have work to offer you on the basis of 2 days per week, day work at the rate of £10 per hour. If your phased return is successful, you will hopefully be able to build up your confidence and fitness to enable you to take on more days which should open up more role options for you which may well carry higher rates of pay than that available for security in day hours. It is completely up to you as to whether you wish to accept this alternative role on a temporary phased return basis. Please let me know in writing whether you do accept it or not no later than this Friday 10th February 2017.

If you do not want to accept it for any reason, then the business will need to secure an assessment from an independent occupational health advisor as so far, we have taken as read what you have said about your fitness backed up by your GP certificates."

62. The Claimant replied [p118];

"I would like to thank you for your e-mail. Unfortunately, I cannot find any answers on your letter to my question on the subject of this e-mail.

I would like tell you that when we met on 15th November 2016, When I proposed that I would like to work as a weekend duty manager, you said that you can not give me fixed days, I said that Is fine. Additionally you can not give, the job to me, because of my health condition I can not guarantee to finish the shift or not to be sick. You just told me that come and discuss with the options available two weeks before you feel like coming back to work. However, I came back on 11th January 2017 to meet you but there were no options available at all, you were still asking me what I would like to do. I thought that you would come up with concrete options and strategy. There was no preparation at all. It was like a counselling session, If you remember I thanked you that I had a nice counselling session at the end of our talk. Anyway I told you that I would like to work for FOH and if it is needed I can cover some areas too, but we did not discuss a particular position. I did not confirm that I was willing

> to get this security position during our meeting. Did you give a letter about phase of return strategy? I was expecting that from you."

63. Natalie Tait replied on 9 February 2017 suggesting a referral to Occupational Health [p120]. The Claimant responded alleging that he was being bombarded with correspondence.

64. On 15 February 2017 the Claimant commenced course of therapy at King's Cross Hospital.

65. On 23 February 2017 the Claimant wrote stating that he was not well enough to deal with matters and that he had asked his union to deal with the case [p125].

66. On 24 February 2017 the Claimant was provided with a Med 3 signing him off as unfit to work for 6 weeks due to depression without recommendation for steps that might permit him to return to work [p126].

67. On 27 February 2017 Natalie Tait wrote to the Claimant informing him that the Respondent wished to refer him to Occupational Health [p130].

68. On 16 March 2017 the Claimant wrote to Natalie Tait stating that he had "given my consent to my Union to take the case on behalf of me" [p131]

69. On 4 April 2017 the Claimant was provided with a Med 3 signing him off as unfit to work for 6 weeks due to anxiety and depression without recommendation for steps that might permit him to return to work [p126]

70. On 28 April 2017 the Claimant wrote complaining that he had not been paid his full salary [p136.1]. On 28 April 2017 Natalie Tait wrote stating that the Claimant's entitlement to SSP had expired [p136.1]

71. On 19 May 2017 the Claimant was provided with a Med3 stating that he had been assessed because of anxiety symptoms and sleep disorder, stating that he might be fit for work and might benefit from amended duties and workplace adaptions.

72. On 23 May 2017 the Claimant wrote to Natalie Tait [p137] stating;

> "I have a fit note from my GP that permits me to return to work but working only day times due to the long term effects of my illness
>
> On that basis I would like to organise a return to work meeting where I would ask if my union representative Steve Forrest to be present"

73. The Claimant met with Natalie Tait on 30 May 2017. During that meeting Natalie Tait said that if appropriate day time managerial roles were available the Claimant would be considered for them.

74. On 31 May 2017 the Claimant sent an email to Natalie Tait stating that all correspondence should from then on be with him.

75. The Claimant was seen by Dr Remington, Consultant Occupational Physician, on 28 June 2017. Dr Remington reported by letter dated 4 July 2017. He stated [p152];

> "Thank you for referring this gentleman to Occupational Health. I met with him on 28 June 2017 in our Candover Street clinic.
>
> Mr Kul is the Senior Night Manager for Home House and joined them in January 2010. He has been absent from August last year as a result of developing an acute anxiety and depressive condition at a time when he tells me he had been working an excessive number of night shifts in a row and had experienced interference with his sleep pattern and a range of physical and psychological symptoms consistent with an acute stress reaction."

76. The Claimant contends that the second paragraph supports his contention that his condition was caused by working nights. Dr Remington was repeating what the Claimant had said to him. It was incorrect as the condition did not develop after the Claimant "had been working an excessive number of night shifts in a row" but a number of months after that issue had last been raised by him, and after a lengthy holiday.

77. The report continued;

> "Since that time he has received talking therapies as well as being prescribed antidepressant medication and has experienced a steady Improvement in his mood. Mr Kul is however clear that he would not be able to cope with a return to nlghtwork and has communicated to his employers a desire to return to work on the basis of a daytime Management role.
>
> Mr Kul tells me he has been offered work as a Receptionist, which is a role of less seniority and importance, compared with his Night Manager responsibility, as well as being accompanied by a reduction in his salary. He feels that this would be an undermining of his self-respect and Image and would not be possible for him to cope with in the light of his present state of mind. …
>
> At the present time he has improved sufficiently to contemplate a phased return to work. However, he no longer feels able psychologically, to cope with night work. Unfortunately, at the present time, he does not feel able-to undertake a return to a lesser role and a loss of income that is associated with any daytime role thus far Management have felt they have available to offer him. It would be helpful if there were a role available, perhaps at an alternate location, which he could be offered and if there could be further discussion on the financial Issues with him. Mr Kul would be fit enough in my opinion to have further substantive discussions with Management with regard to these Issues.

> Were an appropriate role to be available; it would be acceptable in my view for him to attempt a phased return to the workplace, based on a three-day week initially for three weeks, increasing to four days a week and reviewed after six weeks to establish how well he was coping. It would be Important to have ongoing Management discussions to ensure that he was coping well with any return to work.
>
> If no suitable role is available, it will be a Management issue as to what the future relationship will be between Mr Kul and his employers.
>
> At the present time, the situation is one of an individual who has been suffering from anxiety and depression and who is now much improved and on continuing therapy, who has a strong sense of pride and self-image and therefore, is concerned over the issues of status and Income."

78. The Claimant accepted that the report accurately set out his condition and his contentions about the roles in which he might return to work.

79. On 6 July 2017[1] Natalie Tait sent a general email stating [p150];

> "It is my pleasure to announce the following promotions within the Front Hall end Reservations team:
>
> Maryam lbrahlml has been promoted to Front of Houser Manager, working closely with Ana and the team to enhance our member experience and continue in our mission to go from good to great!
>
> Further to this, Soffa Spadafora has been promoted to Assistant Front of House Manager to strengthen the team and further ensure our members and guests receive the best possible service and seamless Journey throughout their stay with us,
>
> Congratulations to you both on these well-deserved promotions"

80. On 13 July the Claimant was sent a letter by Natalie Tait in which she stated [p154];

> "I have now read Medigold's report following the recent review you attended with Dr Remington. I attach a copy of the report which I understand was sent to you by Medigold in advance of their sending it to me.
>
> I would now like us to meet, to review the report the report with you, so that we can assess next steps. …
>
> At our meeting, we will discuss what options are available to us now. I have to say that following our last meeting together with Steve Forrest and review of the Medigold report, **I think that we may have reached an impasse.** This view is based on the fact you have advised Medlgold that

[1] The parties agreed that the email was dated 6 July not 7 June

> you cannot cope with night work and you have rejected the day time roles offered to you not being of an acceptable status. Medigold has also advised that you would benefit from a change of work location which is not an option available to the company at this time. **At the moment, it seems the only viable thing to do is to accept that it is not possible for the contractual relationship to continue as the only work we have, you cannot perform.** I would like to hear your views about this. **If, however, there is no viable solution then it is likely that we will just have to accept that unfortunately there is nothing more that can be done and accept the termination of the relationship."** [emphasis added]

81. In July 2017 the Claimant applied for a revised Purchasing Manager role. This was a much more senior role that the previous role that had been offered to the Claimant, requiring a much greater level of skill (see job description at 173.8 c.f. 173.4) and at a salary of £40,000 per annum. The Claimant's application was acknowledged on 20 July 2018.

82. On 24 July 2017 the Claimant and his trade union rep, Steven Forrest, met with Natalie Tait. The Claimant was very upset having just discovered that the Front of House Manager and Assistant Front of House Manager Roles had been filled without him knowing about them. He was confrontational and Steven Forrest sought a number a breaks to calm him down. We were provided with a transcript of the meeting from a covert recording [p243] which included the following exchanges (C refers to the Claimant, N to Natalie Tait, S to Steven Forrest);

> "C: Yes that's correct. And as we discussed last time ... on 30 May 2017, you said you would give me a managerial position if anything is available ... [inaudible] was over here, so you said that
>
> N: OK, I think, when I say managerial position I just want to be really careful in case you know a managing director position could become available and you wouldn't be right for that so ...
>
> C: No, no, the thing is
>
> N: **I just want to make clear ... if a managerial became available I said you would be considered for that position**
>
> C: OK, very good" [emphasis added]

83. Natalie Tait accepted that she had told the Claimant on 30 May 2017 that if a day time managerial position became available he would be considered for it.

84. The transcript records;

> "C: And, on the 6 July
>
> N: Yes

C: You created two positions at Front of House

N: Yes

C: What positions were they?

N: OK

C: You created two positions from my department

N: There were two people promoted in your department

C: Yes

N: Yes

C: So you opened two positions

N: Yes

*C:* So you said you would, I would be considered

N: Yes you will be considered

C: So what happened there?

N: And we, I think you were involved in that as well

C: What do you mean? I wasn't aware of it. So you didn't really call me or inform me so what has happened?

N: OK, so what happened there were two people to my knowledge who were promoted within the FOH department and one was promoted to supervisor and one ... sorry assistant FOH manager, and the other to FOH manager

C: I have the email

N: Yes I see that. Erm, so, is that my congratulations to the promotions?

C: I have the email

N: Yes I see that. Erm, so, is that my congratulations to the promotions?

C: Yes

N: OK

N: That, those positions were made available and sent out to the whole of the FOH team

C: Hm

N: Did you receive that email?

C: No

N: You didn't receive that email?

C: No. I am not working actually, as you said ... you are not working so how can you check your work email. You need to contact me. You need to contact me from my personal email, not from my business email …

C: **OK, so I haven't really received the question to, actually answer to my question. You said I would be considered. So why was I not considered?**

N: **OK, you weren't**

*C:* Medical report [inaudible]. Yes

N: **You weren't considered, directly considered. OK you weren't directly considered for the role because you hadn't returned back to employment. We hadn't worked through ... something could have changed.** The reason I wanted to talk to you was to talk through your concerns you expressed to the doctor at the time of the report. OK. That's what we are here to talk about. We then make a decision to move forward and to see what roles are available

C: No because you said already that there is no role available for me

N: I didn't say that, Engin

S: Nobody said that Engin, nobody …

N: OK, erm, so I mean, for me personally, erm, it's, it's more of a point around your, your feeling that anything other than a management position coming back would be undermining to your self-respect and image and not be possible for you to cope with in the light of your present state of mind

C: Yes, exactly

N: Can you talk to me a little bit more about that in terms of the management position and where you, where you see yourself coming back. I mean, obviously we have many different management positions in many different departments, so ...

C: Actually, you promoted two people, OK, just a few weeks ago

N: Yes

C: Or 10 days ago, whatever

N: I want to talk about you

C: Let me just...I'm talking about myself.

…
So if any position came up from FOH, where is my department, I should have got at least one of those positions to help me get back to normal

N: Right, OK

C: OK, so that was the issue I have been trying to explain last 15 minutes ….

5: So where do we go from here?

**N: I'm going to send you a vacancy list today, I'm going to summarise our points.** I need to read through this. I'm concluding this meeting now and if there is anything I need to come back to Engin on immediately then I will. Appraisal from 2010, I'm sure it's in your file, so I'm sure it won't be a
difficult thing to send on

S: Yeah

N: And then really before the end of the week we will have a conclusion, yeah" [emphasis added]

85. On 27 July 2017 Natalie Tait wrote to the Claimant stating:

"We have repeatedly advised you we would welcome your return to work during day time hours but of course there is no Night Manager role during day time hours, there is no comparable role. The roles to which your skills and experience would most lend themselves are security and reception. You have been offered the opportunity of a role of this kind but you are not willing to consider this as an option given you require a management role and the salary and status attaching to the same.

You have insisted that you are only prepared to return to a managerial role. We do not have any day time managerial roles available that are suitable to your skills and experience. You have pointed to the fact we currently have vacancies for a Senior Engineer and a Product Manager. There require very specific skills and experience that you do not have.

You have been represented at our 2 most recent meetings by union representative, Steve Forrest who is Branch President of the London Central Branch of the GMB London Region. He was quite clear in his advice to you at Monday's meeting that you do not have the support of

the union in relation to your condition that you return to day work in a managerial role. You have since advised me that Mr Forrest is no longer representing you.

In view of your stipulation that you return only in a managerial role and that is the only type of role you believe you are deserving of and that you would find acceptable, it is simply not possible for us to identify a role that is acceptable to you given that the only managerial role suitable to your skills and experience is a night manager role and you are unable for health reasons to continue doing that.

Accordingly, it is evident that the contract of employment between you and the company is now frustrated and is not capable of operating. The company is treating the contract as frustrated with immediate effect and your employment Is to be construed as terminated by virtue of such frustration with immediate effect from today 27 July 2017."

**The Law**

*Disability Discrimination*

86. Disability is a protected characteristic for the purposes of the Equality Act 2010 ("EQA").

*Discrimination in Employment*

87. Certain forms of discrimination in employment are made unlawful by section 39 EQA;

> (2) An employer (A) must not discriminate against an employee of A's (B)—
>
> > (a) as to B's terms of employment;
> >
> > (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
> >
> > (c) by dismissing B;
> >
> > (d) by subjecting B to any other detriment. ...
>
> (5) A duty to make reasonable adjustments applies to an employer.

88. Detriment involves treatment of such a kind that a reasonable worker would or might see as being to their detriment, amounting to something more than an unjustified sense of grievance; there is no need for the disadvantage to have physical or economic consequences; **Shamoon v Chief Constable of Royal Ulster Constabulary** [2003] ICR 337.

89. Of all the protected characteristics disability is the one that may give rise to the largest number of types of claim. There are advantages in focusing on the form of discrimination that is most apt to the factual situation.

*Reasonable Adjustments*

90. Section 20(3) EQA provides in respect of the duty to make reasonable adjustments;

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

91. The approach to PCP cases was considered in **Royal Bank of Scotland v Ashton** 2011 ICR 362 and **Environment Agency v Rowan** 2008 IRLR 20. The tribunal should consider the PCP relied upon, the identity of the non-disabled comparators, the nature and extent of the substantial disadvantage asserted to be suffered by the Claimant in comparison with the comparators and the practical result of the reasonable steps the employer can take to ameliorate the disadvantage.

92. In identifying the PCP, the EHRC Employment Code states (paras 4.5 and 6.10) that a PCP should be construed widely to include any formal or informal policy, rules, practices, arrangements, conditions, prerequisites, qualifications or provisions. In **Carreras v United First Partners Research** UKEAT/0266/15 at para. 31 it was held that a “liberal rather than an overly technical approach” should be adopted to identifying the PCP in accordance with the “protective nature” of the legislation.

93. The Tribunal next makes a comparison with a non-disabled comparator, although this is not the same as the like for like comparison required in a case of direct discrimination: **Griffiths v Secretary of State for Work and Pensions** [2016] IRLR 216 CA.

94. In considering substantial disadvantage “substantial” means “more than minor or trivial”; s.212(1) EqA.

95. In considering the likelihood of the adjustment being successful, in **South Staffordshire and Shropshire NHS Foundation Trust v Billingsley** UKEAT/0341/15, Mitting J held:

> “17 Thus, the current state of the law, which seems to me to accord with the statutory language, is that it is not necessary for an employee to show that the reasonable adjustment which she proposes would be effective to avoid the disadvantage to which she was subjected. It is sufficient to raise the issue for there to be a chance that it would avoid that disadvantage or unfavourable treatment. If she does so it does not necessarily follow that the adjustment which she proposes is to be treated as reasonable under section 15(1) of the 2010 Act.

> 18 It is in the end a question of Judgement and evaluation for the Tribunal, taking in to account a range of factors, including but not limited to the chance. A simple example may suffice to illustrate the point. If a measure proposed by an employee as a reasonable adjustment stands a very small chance of avoiding the unfavourable treatment arising out of her disability to which she would otherwise be subjected, but it was beyond the financial capacity of her employers to provide it so a Tribunal would be entitled to conclude that it was not a reasonable adjustment. Indeed, on those facts it would be difficult to justify a conclusion that it was a reasonable adjustment. In the case of a large organisation by contrast, where a proposed adjustment would readily be implemented without imposing an unreasonable administrative or financial burden on the employer then the obligation to take it may arise notwithstanding that the chance of avoiding unfavourable treatment was very far from a certainty.

96. A possible adjustment may be suggested by the parties or the Tribunal during the hearing: see **Project Management Institute v Latif** [2007] IRLR 579. There is not a burden on the Claimant to identify the reasonable adjustment.

97. The duty to make reasonable adjustments may impose a requirement to treat a disabled employee more favourably than other employees and can involve transferring a disabled employee who could no longer perform his original job to an alternative role without competitive interview: **Archibald v Fife Council** [2004] ICR 954.

98. It can be a reasonable adjustment to create an entirely new role for a disabled Claimant in order to maintain their employment: **Southampton City College v Randall** [2006] IRLR 18.

99. An employee is not required to accept an adjustment such as a transfer to a role at a lower salary if that would involve a breach of the employee's contract of employment: **G4S (Cash Solutions) Ltd v Powell** [2016] IRLR 820. It may be a reasonable adjustment to provide for a (potentially lengthy) period of pay protection. However, HHJ Richardson stated;

> ""I do not expect that it will be an everyday event for an Employment Tribunal to conclude that an employer is required to make up an employee's pay long-term to any significant extent – but I can envisage cases where this may be a reasonable adjustment for an employer to have to make as part of a package of reasonable adjustments to get an employee back to work or keep an employee in work. They will be single claims turning on their own facts: see *O'Hanlon*. The financial considerations will always have to be weighed in the balance by the Employment Tribunal: see *Cordell*. I make it clear, also, that in changed circumstances what was a reasonable adjustment may at some time in the future cease to be an adjustment which it is reasonable for the employer to have to make; the need for a job may disappear or the economic circumstances of a business may alter."

100. The employer may not be under a duty to make reasonable adjustments by providing, for example, a phased return to work if the employee is at the time unfit for any work for the foreseeable future: **NCH Scotland v McHugh** EATS 0010/06. However, the employer will generally need to make sure proper adjustments are in place one a return to work is foreseeable. His Honour Judge McMullen QC referred to taking steps when there is “some sign on the horizon that the Claimant would be returning”.

*Discrimination because of something arising in consequence of disability*

101. Discrimination because of something arising in consequence of disability is defined by section 15 EQA;

> 15(1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

102. Langstaff P held in **Basildon & Thurrock NHS Foundation Trust v Weerasinghe** [2016] ICR 305, EAT):

> "The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" - and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages." per

103. We had regard to the approach to section 15 claims set out by Simler P in Pnaiser v NHS England [2016] IRLR 170 at §31.

104. Bean LJ held in ***Trustees of Swansea University Pension & Assurance Scheme v Williams*** [2017] EWCA Civ 1008, [2017] IRLR 882 that:

> "No authority was cited to us to support the view that a disabled person who is treated advantageously in consequence of his disability, but not as advantageously as a person with a different disability or different medical history would have been treated, has a valid claim for discrimination under s 15 subject only to the defence that the treatment was a proportionate means of achieving a legitimate aim. If such a claim were valid it would call into question the terms of pension schemes or insurance contracts which confer increased benefits in respect of disability caused by injuries sustained at work, or which make special provision for disability caused by one type of disease (for example cancer). The critical question can be put in this way: whether treatment which confers advantages on a disabled person, but would

> have conferred greater advantages had his disability arisen more suddenly, amounts to "unfavourable treatment" within s 15. In agreement with the President of the EAT I would hold that it does not."

105. The Claimant also must establish that he has been subject to a detriment.

*Direct discrimination*

106. Direct discrimination is defined by Section 13 EQA:

> **13 Direct discrimination**
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

107. In the case of direct discrimination the Claimant must be compared with a person who is also absent from work and has similar limitation on the type of work to which he can return to as the Claimant; **Lewisham London Borough Council v Malcolm** [2008] IRLR 700.

108. The Courts have long been aware of the difficulties that face Claimants in bringing discrimination claims and of the importance of drawing inferences: **King v The Great Britain-China Centre** [1992] ICR 516. Statutory provision for the reversal of the burden of proof is now made by Section 136 EQA:

109. Guidance on the reversal of the burden of proof was given in **Igen v Wong** [2005] IRLR 258. It has repeatedly been approved thereafter: see **Madarassy v Nomura International Plc** [2007] ICR 867.

110. To establish discrimination, the discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of a significant influence: see Lord Nicholls in **Nagarajan v London Regional Transport** [1999] IRLR 572 at 576.

111. There may be circumstances in which it is possible to make clear determinations as to the reason for treatment so that there is no need to rely on the section: see **Amnesty International v Ahmed** [2009] ICR 1450 and **Martin v Devonshires Solicitors** [2011] ICR 352 as approved in **Hewage v Grampian Health Board** [2012] ICR 1054. However, if this approach is adopted it is important that the Tribunal does not fall into the error of looking only for the principal reason for the treatment but properly analyses whether discrimination was to any extent an effective cause of the reason for the treatment.

*Discrimination time limits*

112. The time limit in which complaints of discrimination should be brought is set out in Section 123 of the EqA;

> "(1) … proceedings on a complaint … may not be brought after the end of—
> the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable.
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

113. The time limit is adjusted to take account of pre-claim conciliation. In this case it was accepted by the parties that having taken early conciliation into account the earliest that an act could have occurred and still fall within a three month time limit (without any just and equitable extension of that period) was 3 July 2017.

114. In **Matuszowicz v Kingston-upon-Hull City Council** [2009] ICR 1170 the Court of Appeal held that a failure to make a reasonable adjustment is an omission rather than an act. Lord Justice Sedley concluded that if there is a failure to make an adjustment there must come a time when the employee concludes that were the adjustment to be made it should have been made by that point, from which point the time limit will run. This prevents a situation of neglect from dragging on indefinitely.

115. Sedley LJ noted the difficulties that treating a failure to make reasonable adjustments as an omission could have but stated at paragraph 38;

> "…tribunals can be expected to have sympathetic regard to the problems that paragraph 3(4)(b) [now s.123(4)(b) EqA] will create for some Claimants. As Lloyd LJ points out, its forensic effect is to give the employer an interest in asserting that it could reasonably have been expected to act sooner, perhaps much sooner, than it did, and the employee in asserting the contrary. Both contentions will demand a measure of poker-faced insincerity which only a lawyer could understand or a casuist forgive."

116. This is a matter that the Employment Tribunal may take into account when considering whether to apply a time limit longer than 3 months on just and equitable grounds; **Watkins v HSBC Bank Plc** [2018] IRLR 1015.

117. The Court of Appeal held in **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] IRLR 1050 at paragraph 14;

> "Section 123(3) and (4) determine when time begins to run in relation to acts or omissions which extend over a period. In the case of omissions, the approach taken is to establish a default rule that time begins to run at the end of the period in which the Respondent might reasonably have been expected to comply with the relevant duty. Ascertaining when the Respondent might reasonably have been expected to comply with its duty is not the same as ascertaining when the failure to comply with the duty began."

118. If the employer does an act inconsistent with making the adjustment, time runs from that date.

119. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. The Tribunal has a broad discretion to extend time when there is a good reason for so doing: **Robertson v Bexley Community Centre (t/a Leisure Link)** [2003] IRLR 434 and **Morgan** at para. 18:

> "First, it is plain from the language used ('such other period as the Employment Tribunal thinks just and equitable') that Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike s 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in s 33(3) of the Limitation Act 1980 (see British Coal Corporation v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark London Borough Council v Afolabi [2003] EWCA Civ 15, [2003] IRLR 220, para [33]. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under s 7(5) of the Human Rights Act 1998: see Dunn v Parole Board [2008] EWCA Civ 374, [2009] 1 WLR 728, paras [30]–[32], [43], [48]; and Rabone v Pennine Care NHS Trust [2012] UKSC 2, [2012] 2 All ER 381, para [75].

120. In **Abertawe Bro Morgannwg Local Health Board v Morgan** [2018] ICR 1194, CA, Leggatt LJ held that the Tribunal has "the widest possible discretion" under the just and equitable test (para 18).

*Unfair Dismissal*

121. Pursuant to s.94 of the Employment Rights Act 1996 ("ERA") an employee has the right not to be unfairly dismissed.

122. For the right to arise the employee must have been dismissed. If the contract comes to an end by operation of the legal process of frustration there is no dismissal.

123. Although developed in the context of commercial contracts the doctrine of frustration can apply to employment contracts. However, there are stringent limitations on the operation of the doctrine. We accept that Claimant's Counsel's analysis of **J Lauritzen AS v Wijsmuller BV (The Super Servant Two)** [1990] 1 Lloyd's Rep 1, where CA Bingham LJ (as he then was) set out five propositions:

123.1 The doctrine of frustration has evolved "to mitigate the rigour of the common law's insistence on literal performance of absolute promises" and that its object was:

> "… to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances."

123.2 Frustration operates to "kill the contract and discharge the parties from further liability under it". Therefore it cannot be "lightly invoked" but must be kept within "very narrow limits and ought not to be extended".

123.3 Frustration brings a contract to an end "forthwith, without more and automatically".

123.4 "the essence of frustration is that it should not be due to the act or election of the party seeking to rely on it" and it must be some "outside event or extraneous change of situation".

123.5 A frustrating event must take place "without blame or fault on the side of the party seeking to rely on it".

124. In **Egg Stores (Stamford Hill) v Leibovici** [1977] ICR 260, EAT, Phillips J held that the following matters should be taken into account when determining whether an employment contract has been frustrated: the length of previous employment, how long the employment had been expected to continue, the job's nature, the nature, length and effect of the illness, the need for the work to be done and for a replacement to do it, the risk to the employer of acquiring obligations in respect of redundancy payments or unfair dismissal compensation to the replacement employee, whether wages have continued to be paid, the acts and statements of the employer and whether a reasonable employer could have been expected to wait longer.

125. The doctrine of frustration does not apply if there has been a failure to make reasonable adjustments: **Warner v Armfield Leisure Ltd** [2014] ICR 239, EAT at para. 46:

> "In the case of a disabled person, before the doctrine of frustration can apply there is an additional factor which the Tribunal must consider over and above the factors already identified in the authorities – namely whether the employer is in breach of a duty to make reasonable adjustments. While there is something which (applying the provisions of the Equality Act 2010) it is reasonable to expect the employer to have to do in order to keep the employee in employment the doctrine of frustration can have no application. This submission derives support from Thorold and we think it is correct."

126. If dismissal is established, it is for the Respondent to establish one of a limited number of potentially fair reasons for dismissal. These include, pursuant to s.98(2)(b) ERA, a reason which relates to the capability of the employee or pursuant to s. 98(1) ERA some other reason such as to justify the dismissal.

127. Where the employer establishes a potentially fair reason for dismissal the Tribunal will go on to consider, on a neutral burden of proof, whether the dismissal was fair or unfair having regard to the reason shown by the employer. This depends on whether in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. This is to be determined in accordance with equity and the substantial merits of the case.

128. When considering fairness of procedures, the Tribunal considers the overall process including any appeal: **Taylor v OCS Group Ltd** [2006] ICR 1602.

129. There are two stages at which the Tribunal has regard to justice and equity in considering the compensatory award. Pursuant to Section 123(1) ERA the Tribunal should award compensation of such an amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal, insofar as the loss is attributable to the action taken by the employer. Section 123(6) ERA provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion that it considers just and equitable having regard to that finding. The equivalent provision to Section 123(1) ERA founded what is referred to as a **Polkey** reduction where it is decided that there is a chance that had a fair procedure been operated the employee would have been dismissed in any event.

130. In considering **Polkey**, contribution and just and equitable compensation the Tribunal has to make its own factual findings about what would have happened had a fair procedure been applied and/or whether the misconduct did in fact take place. That is a very different approach to that in determining whether the dismissal was fair or unfair which turns on the question of whether the

Respondent's decision on the evidence that it considered was one that was open to a reasonable employer.

131. Where a **Polkey** reduction has been made on the basis that the Claimant would or might have been dismissed as a result of his misconduct this may be taken into account in deciding upon any reduction of the compensatory award for contributory conduct to avoid there being an excessive further reduction in the compensatory award for the same conduct: **Roa v Civil Aviation Authority** [1995] ICR 495. The same reasoning does not apply to the Basic Award as the **Polkey** reduction does not apply to it: **Grantchester Construction (Eastern) Limited v Attrill** EAT 0327/12.

**Analysis**

132. There was a risk in analysing this claim of failing to see the wood for the trees. There was also a risk of considering the more historical matters to an excessive extent, without focusing sufficiently on those nearer to the end of the Claimant's employment.

133. In his oral closing, Mr Cook focused on a primary contention that the Respondent had failed in its duty to make reasonable adjustments by not considering the Claimant for the role of Assistant Front of House Manager in June/July 2017 and/or not slotting him into that role. If there was such a failure to make a reasonable adjustment, Mr Cook contended the argument that the contract had been frustrated would fail and the dismissal was unfair. We consider that Mr Cook was wise to focus his submissions. It is where we will start our analysis.

134. At the meeting on 30 May 2017 the Claimant explained he wanted a daytime job with a management element on a phased return. Natalie Tait said that if such a role became available the Claimant would be considered for it.

135. We understand that dealing with the Claimant was at times difficult. The Claimant switched between seeming to agree to a return to work in any capacity and then argued that offering roles junior to that of Senior Night Manager was an insult. He reached a stage where he would only consider a managerial role. At times he was very upset and difficult to deal with.

136. The Claimant was in receipt of a Med 3 that stated he could return to work with adjusted duties. The Claimant had made it clear that he wished to have a phased return to a daytime managerial role. Natalie Tait had stated that he would be considered if such a role became available.

137. On 4 July 2017 a medical report was provided that supported the Claimant's contention that he would be able to return to work to an appropriate role on a phased basis. The report emphasised the fact that the Claimant placed great importance on having a role compatible with his level experience and set out his concerns about facing a reduction salary. We consider that, of those two matters, the most important to Claimant was maintaining some level management status. He found it very difficult to accept he might return in a role that was significantly junior to his Senior Night Manager role. Particularly, as

the Respondent expected him to accept a revised contract; making such a junior role permanent, pending any promotion.

138. In June/July 2017 three roles were available. There was a vacancy for the Front of House Manager; the role that had been vacated by Ana Binz on her appointment as House Manager. There was a vacancy for an Assistant Front of House Manager. There was a vacancy for a Purchasing Manager.

139. The Front of House Manager role involved a significantly greater managerial aspect than the Claimant had undertaken as Senior Night Manager; involving line management responsibilities the full front of house team. That was not an appropriate role for the Claimant. We do not consider it would have been a reasonable adjustment to offer him this role.

140. We consider the Purchasing Manager role was much expanded upon the role that was offered to the Claimant in October 2016, now requiring a much greater level of purchasing experience. The enhanced nature of the role is apparent from the new job description [p173.8] and increase in salary from £25,000 to £40,000. We do not consider it would have been a reasonable adjustment to offer the Claimant this role.

141. However, we consider that the Assistant Front of House Manager role was eminently suitable Claimant, even if it would require degree of training (or refresher training) in some of the Respondent's computer system. When one compares Assistant Front of House Manager job description [p17315] to the Night Manager job description the Claimant was provided with when he started the role [p 63] (which was not updated when he was made Senior Night Manager) we consider that there is a significant degree of similarity. There are no significant roles in the Assistant Front of House Manager that the Claimant would not been able to undertake. In particular, like the Senior Night Manager role, it did not involve the line management of other members of staff. This was precisely the type of role the Claimant was interested in and been told by Natalie Tait he would be considered for. However on 6 July 2017 an email was sent stating that Ms Spadafora had been promoted to the role. The Claimant had not been informed that the role was available and had not been considered for it. There was a suggestion at the meeting on 24 July 2017 that a circular email had been sent that informed the Claimant of the role. We accept the Claimant's evidence that he was not sent the email. Although there was some suggestion in live evidence that the Claimant was considered for the role, we do not accept that was the case. At the meeting on 24 July 2017 Natalie Tait accepted that he was not considered for the role because he was absent from work. That is clear from the transcript.

142. We consider, adopting an appropriately broad approach to the provisions, criterion or practice that are appropriate to a claim of failure to make reasonable adjustments; those identified at paragraph 21.2[2] and, to a lesser

[2] Requiring or expecting that employees in daytime managerial roles should work on a full time basis and/or a variable shift pattern and/or certain hours.

extent, 21.3[3] of the list of issues are apt for consideration of the Assistant Front of House Manager role. The Claimant was not considered for the role as he was absent and could not immediately slot into a full-time role. We consider the PCPs would put people who shared the Claimant's disability at a substantial advantage because by not being at work and not being able to be slotted immediately into a full-time role, they would not be considered or appointed to the role. The application of the PCPs placed the Claimant at that disadvantage. The Respondent knew the Claimant was disabled and would be disadvantaged by the application of the PCPs. We consider, in circumstances where there was a long-standing employee who the Respondent had rated as excellent in his role, it would have been reasonable for the Respondent to appoint the Claimant on a phased return to work into the Assistant Front of House Manager role with the provision of any necessary training/refresher training. While that does involve treating the Claimant more favourably that other members of staff that might have been considered for the role, that can be the consequence of the duty to make reasonable adjustments.

143. While we consider that it would be a reasonable adjustment to appoint the Claimant to the Assistant Front of House Manager role, we do not consider, in the circumstances of this case that maintaining the Claimant's salary at the full rate for Senior Night Manager would be a reasonable adjustment. While we accept that it can be a reasonable adjustment to apply salary protection, as part of a package of adjustment leading to a return to work, this will generally be in a situation in which an employee is being assisted in returning their substantive role. The Claimant's substantive role was Senior Night Manager. There was a salary premium because the work was to be conducted at night. There was no prospect of the Claimant returning to work nights. In the circumstances of this case we do not consider that it would be reasonable to require the employer to maintain a salary with a night working premium in the case of an employee who could no longer work nights. The prospect for the Claimant to achieve a higher level of salary in the future, above the rate of £24,000 plus service for the Assistant Front of House Manager role, would be through potential promotion.

144. The analysis of the time limit in a claim of failure to make reasonable adjustments is difficult. A failure to make a reasonable adjustment is an omission. However, attempts to make adjustments are likely to take place over a, potentially lengthy, period of time. During that time there may be periods during which there are adjustments that an employer could reasonably be expected to make, and other periods when there are not.

145. There cannot be a duty to make an adjustment by provision of an alternative role where such a role is not available and/or cannot be created. The cause of action is only complete once there is an application of a PCP and an adjustment that the employer could be reasonably expected to make. Once a role is available that the Claimant could be slotted into as a reasonable adjustment, time will start running once the employer has decided not to offer it to the employee, thereby doing an act inconsistent with making the adjustment;

[3] Requiring or expecting employees to attend more than two days a week in order to undertake a daytime managerial role.

or a time has been reached by which the employer would reasonably have been expected to make the adjustment. The following question arises; once a role has become available that could have been provided to the Claimant as a reasonable adjustment, does time start running in respect of that role alone, or in respect of the adjustment of providing an alternative role generally? If the latter, the Claimant could be out of time in making a claim in respect of a role that became available long after the first role that could have been provided as a reasonable adjustment; and in respect of which the claim would have been in time if it was treated as an individual adjustment. In our view the best analysis is that time run in respect of each distinct role once it is available as the cause of action in respect of that particular adjustment is not complete until the role becomes available. Accordingly, we consider the claim in respect of the Assistant Front of House Manager is in time as the Respondent only acted in a manner inconsistent with making that role available to the Claimant when he was informed on 6 July 2017 of the appointment of Ms Spadafora to it.

146. Alternatively, were the claim in respect of the Assistant Front of House Manager made more than three months after the omission is to be treated as having occurred (because time runs from when the Respondent acts incompatibly with appointing the Claimant to the first role that became available to which the Claimant could have been appointed to as a reasonable adjustment), we would have concluded that it is just and equitable to extend time to put the claim within time, as the Claimant was not aware of the availability of the Assistant Front of House Manager role, despite Natalie Tait having told him that he would be considered for such role, until he received the email appointing Ms Spadafora to the role. There would be no significant prejudice to the Respondent in extending time as it is a claim about events that would be in time they were treated as an act rather than the continuation of an omission. There is no issue of documents not being available or memories fading.

147. We conclude that the dismissal of the Claimant constituted discrimination because of something arising in consequence of his disability; namely the Claimant's absence from work caused by his inability to undertake night work and need for a phased return to work that had the consequence that Natalie Tait did not consider him for the role. We conclude that the dismissal of the Claimant was not a proportionate means of achieving a legitimate aim (such as assisting the Claimant to return to work in an appropriate role) in circumstances in which the Claimant could have been returned to work by the application of the reasonable adjustment.

148. As there was a failure to make reasonable adjustments, the doctrine of frustration of contract cannot apply. In any event, the doctrine only applies where because of an event outside of the control of the parties it is impossible for the contract to be performed in a manner that that is not fundamentally different to that contemplated by the parties. The Respondent had been engaged in a process of seeking to find a way in which the Claimant could return to work. They clearly accepted that there could be day-time roles for the Claimant that were not fundamentally different to the role of Senior Night Manager. Indeed, the meeting on 24 July 2017 ended with Ms Tait telling the Claimant that she would look at all potential vacancies. She did not consider

that there was no possibility of the Claimant returning to an alternative role. It appears that search was brought to an end because of her annoyance about the Claimant's repeated complaint that she had failed to consider him for roles in reception, despite having said that she would do so. In any event, one does not need to rely on that analysis as the failure to make a reasonable adjustment itself is fatal to the argument that there was a frustration of the contract.

149. The Claimant was dismissed from his employment. There was a potentially fair reason for dismissal; one that related the Claimant's capability. However, we considered that the dismissal was clearly unfair. Because the Respondent treated the contract as terminated by frustration, they did not give the Claimant the right to appeal. That necessarily rendered the dismissal unfair. This was particularly important as the Claimant main contention was that Natalie Tait had told him he would be considered for roles the Assistant Front of House Manager, yet she was the person who made the decision on the termination of his contract.

150. Furthermore, to dismiss the Claimant in circumstances where there was an alternative role available that he could be appointed to renders the decision to dismiss unfair. The Claimant did not contribute to his dismissal in a culpable or blameworthy manner. Although he was difficult to deal with at times that was because of his ill health and was not culpable or blameworthy. If a fair procedure had been operated the Claimant would not have been dismissed as a role was available that he could have been appointed to.

151. The Claimant succeeds in his claim of failure to make a reasonable adjustment, that his dismissal was because of something arising in consequence his dismissal and was unfair. The remaining claims add relatively little to these principal claims and we deal with them briefly to be proportionate. Many of them are slightly different ways of analysing historical matters.

*Direct Discrimination*

152. Dealing first with direct discrimination; we do not consider that offering the Claimant the day-time role of Senior Receptionist in September 2006 was detrimental treatment. While we can imagine there might be circumstances in which a role is offered that is so junior that it is an insult to the employee, this was not such a situation. There was an attempt to find a role that would allow the Claimant to return to work on a phased basis to a role that had similarities to his substantive role. That was not detrimental treatment. In any event, there is nothing to suggest that the Claimant would have been treated differently had he been absent for a non-disability related reason. The same reasoning applies to the role of Purchasing Manager in October 2016 and the offer of a Security position in January 2017.

153. The Claimant was not appointed to the position of Purchasing Manager in July 2017 because he did not have the relevant skills. The same applied to the Front of House Manager role. That was not because of his disability.

154. The decision not to offer the Claimant the Assistant Front of House Manager role was not because of his disability; but because of something arising in consequence of his disability; and is one that we have considered appropriate to be dealt with by way making a reasonable adjustment.

155. We do not consider that the Claimant was not paid between 16 May 2017 and 27 July 2017 because of his disability.

156. We do not consider there was anything detrimental in the manner in which the meeting was conducted on the 24 July 2017; or that there is anything to suggest that the way in which the meeting was conducted was because of the Claimant's disability.

157. We do not consider that the Claimant was dismissed, or his contract treated as frustrated, because of his disability, so as to constitute direct discrimination.

*Discrimination because of something arising in consequence of disability*

158. We do not consider that being offered the Purchasing Manager in October 2016 or a security position in January 2017 was detrimental, as set out above.

159. We do not consider that the Claimant was not appointed to be Front of House Manager or Purchasing Manager because of something arising in consequence of disability, but because he was not suitable for the role. We have dealt with the failure to offer the role of Assistant Front of House Manager as a reasonable adjustment.

160. The non-payment of Claimant's the salary between 16 May 2017 and 27 July 2017 was because of his absence. Strictly speaking that is not one of the things arising in consequence of his disability identified at paragraph 18 of the list of issues. For the period when the reasonable adjustment could be made by returning the Claimant to the role of Assistant Front of House Manager the Claimant will be entitled to recover the payment in his failure to make reasonable adjustments claim. In respect of the period before the adjustment was available there was no suitable role available for the Claimant. The Respondent had a legitimate aim of paying staff members once they returned to work in a suitable role, subject to the provision of sick pay. Again it might be said that is not quite how the legitimate aims are drafted at paragraph 20 of the list of issues. If one adopts a generous view of the List of Issues so that one treats being absent from work as the “something” arising in consequence of disability and paying staff members only once they returned to work in a suitable role as the legitimate aim we consider that while there was no work available that was suitable for the Claimant it was proportionate of the Respondent not to pay him while he was unable to work.

161. We considered there was nothing detrimental in the manner in which the meeting the 24 July 2017 was conducted.

162. We have held that the dismissal was because of something arising in consequence of disability.

*Reasonable Adjustments*

163. In respect of the reasonable adjustments claim arising out of the suggestion that the Claimant was subject to expectations of conduct in meetings and correspondence which he could not comply with because of his disability, which should have given rise to an adjustment of ensuring that meetings and correspondence were conducted in a conciliatory manner; we do not accept that the was any expectation to conduct meetings in a manner that the Claimant could not comply with, or that the Claimant was placed at any disadvantage in conducting meetings or correspondence in an appropriate manner by reason of his disability.

164. The other adjustment claims are all variations of the adjustment of finding a suitable role for the Claimant to return to. We have found that the reasonable adjustment would have been for the Claimant to be slotted into the role of Assistant Front of House Manager on a phased return.

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Employment Judge Tayler

5 June 2019

Judgment and Reasons sent to the parties on 12 June 2019