EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MR DAVID JAMES	AND	MID AND WEST WALES FIRE AND RESCUE SERVICE

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF ON: 27TH FEBRUARY / 28TH FEBRUARY / 1ST MARCH / 5TH MARCH / 6TH MARCH 2018

EMPLOYMENT JUDGE MR P CADNEY MEMBERS: MR R MEAD
MS C LOVELL

APPEARANCES:-

FOR THE CLAIMANT:- **MR O HYAMS (COUNSEL)**

FOR THE RESPONDENT:- **MR F CURRIE (COUNSEL)**

JUDGMENT

The unanimous judgment of the tribunal is that:-

1. The claimant's claim for unlawful deduction from wages is well founded and is upheld.

2. The claimant's claim for a failure to make reasonable adjustments contrary to s20(3) Equality Act 2010 is dismissed.

3. The claimant's claim for victimisation contrary to s27 Equality Act 2010 is dismissed.

Reasons

1. By this claim the claimant brings claims of unlawful deduction from wages, a failure to make reasonable adjustments pursuant to section 20 of the Equality Act 2010, and victimisation pursuant to section 27 of the Equality act 2010.

2. In the course of the hearing the tribunal has heard evidence from the claimant himself and on his behalf and from Barrie Davies, Neil Messam and Gary Williams; and for the respondent from Simon Jenkins, Kevin Jones, Roger Thomas and Ricky Woodhead. In addition the respondents intended to call Adrian Nicholas, who has provided a witness statement, but he was unable to attend the tribunal and we are invited to give his evidence such weight as we see fit in the light of the fact that he was not available for cross-examination by the claimant.

3. The background to the claims before us begin with events in 2014.The claimant was at that stage a Watch Manager A based at Swansea West fire station. The respondent operated at Swansea West what is known as a 2-2-4 watch system which required four Watch Managers. In 2014 there was a reorganisation of the Swansea and Neath Port Talbot areas which resulted in a decision to change the shift pattern at some stations, including Swansea West, from a 2-2-4 to a three watch system. As a consequence only three watch managers would be required going forward. Those Watch Managers would be promoted to Watch Manager B at a higher salary to recognise their increased responsibilities. As part of the process of moving to a three watch system the incumbents were invited to express preferences for their choice of station. In October 2014 the claimant's expressed three preferences were, first to remain at Swansea West, second Morriston, and thirdly Swansea Central. In support of his preferences he provided to the respondent at the time confidential information about stress he was suffering.

4. However, of the existing four watch managers the claimant was selected to transfer to another station. Initially the claimant was informed that he was to transfer to Swansea Central, at Watch Manager A grade as it was to retain the 2-2-4 shift system, but that offer was subsequently withdrawn. He was then offered a post as a Crew Manager, a level below Watch Manager, at Morriston which he declined. In December 2014 he was informed of, and accepted a transfer to Neath as a Watch Manager A. There are disputes as to some aspects those events but they are not relevant to any issue before us and so do not require our determination.

5. The claimant felt extremely aggrieved both by the transfer and the process leading to it, and describes himself as becoming "moody and irritable" at home, struggling to sleep, suffering with headaches and, unusually for him, becoming very emotional. During a medical in March 2015 it was found that his blood pressure was significantly raised, and he described feeling anxious and struggling to cope with stress and anxiety. As a result he saw Dr Thomas of the respondent's occupational health provider on 9 June 2015 and was advised to undergo counselling to assist him in

coping with work-related stress. These counselling sessions were provided over the coming months and the claimant describes them as being helpful.

6. The events which directly concern at the claims in this case began in the latter part of 2015. As part of his transfer to Neath the claimant was given what is described as "protection", which meant that if a Watch Manager position became available at Swansea West within 18 months of his transfer to Neath he would have a right to be offered that role before any other candidate. In December 2015 one of the Watch Managers at Swansea West notified the respondent of his intention to retire which would automatically create a vacancy at Swansea West. In summary what then occurred was that the claimant first received a telephone call from a member of the respondent's HR team Charlotte Holland offering him the role at Swansea West. That offer was confirmed in writing by letter dated 17 December 2015 which was received on the 21st of December. On 22nd December 2015 the claimant signed the paperwork and returned it by hand on 24th December 2015. It is not in dispute that the letter contained an offer of a "substantive" Watch Manager B post at Swansea West. This is the offer that the claimant accepted. The respondent's case is that the offer contained in the letter of a substantive post as Watch Manager B was an error. Accordingly by a letter dated 30th December 2015 which was received by the claimant on 4th January 2016 the offer was revoked and the claimant was informed that the transfer was not "substantive" but was "temporary". It is not in dispute that the word "substantive" in this context connotes, or at least includes, the sense that the transfer will be permanent, whereas a temporary transfer is by definition not permanent.

7. At the same time as these events the respondent was conducting a review into the three watch system that had been introduced into a number of stations approximately a year earlier. This had been ongoing since the summer of 2015. On 5 October 2015 a joint statement was issued on behalf of the service management and the Fire Brigade Union which stated "*Operational personnel will be aware there are discussions now ongoing surrounding the current shift system in NPT and Swansea commands. This review is being carried out in accordance with three watch duty system agreement. Service management and the FPU have conducted preliminary reviews on the three watch duty system covering a range of aspects in order to establish the efficiency and effectiveness of the current agreements that are in place. Further meetings will be scheduled over the coming weeks to discuss the pertinent issues surrounding reviews from both the Service and FBU's perspective which will take into account the future financial challenges the changing focus of the service, and keep future work streams of the fire and rescue service. Further updates will be communicated over the coming weeks*."

8. On 30 November 2015 Mr Davies, the Brigade Secretary, notified FBU officials that the management's preferred option moving forwards was a reversion to a 2-2-4 watch system, but with six personnel per watch rather than the previous seven. By an email dated 10 December 2015 the respondent notified managers that three meetings would be arranged to discuss the changes to the Swansea Bay stations including one at Neath on Friday, 18th December 2015. The union and management

subsequently reached an agreement to revert to the 2 -2- 4 watch system, the final agreement being reached in March 2016.

9. The claimant reacted extremely badly to the letter of 30th December 2015 retracting the substantive offer of employment and replacing it with a temporary offer. By 24th January 2016 he describes feeling completely overwhelmed and he broke down at work. From that point onward he went off sick and remained off sick and until he returned from 7 August 2017 (although technically he recommenced in July 2017 taking unused holiday). He is not yet working full-time work but has returned to three to four days per week.

10. On 10 February 2016 he submitted a grievance. The first part related to events prior to and including his transfer to Neath in January 2015. The second part related to the offer and subsequent withdrawal of the offer of a substantive post in Swansea West by the correspondence of December 2015 referred to above. The third part of the grievance related to events following his return to Swansea West complaining that he was feeling isolated, intimidated and bullied. On 11 February Mr Kevin Jones the Corporate Head of Operational Support Improvement wrote acknowledging the grievance and saying that he could deal with one element of it, which was the correspondence regarding the transfer to Swansea West fire station. He set out what effectively remains the respondent's case today which was that the Promotion and Transfer Panel which met in December 2016 had approved a temporary transfer because of the ongoing negotiations as to potential changes to the shift system which had not yet reached a final conclusion. It followed that the letter that was sent on 17th December 2015 offering a substantive post had been sent in error, as it was not known whether there would be a substantive post going forward. That error was corrected by the letter of 30 December 2015. He described it as a genuine error for which the respondent offered an apology, but stated that from the services perspective the question of the nature of the contract was closed. In relation to the other aspects of the grievance, in particular in relation to being isolated, marginalised bullied and intimidated on his return to Swansea West fire station he said that that would go ahead to be determined by group manager Adrian Nicholas.

11. On the 15th February 2016 claimant was notified by what appears to be a letter sent to all staff that the new agreed system of 2-2- 4 watches that would replace all the existing 2-2-4 and three watch systems at the Swansea and Neath Port Talbot fire stations. As with the earlier exercise staff were invited to set out their preferences for their place of work. A letter of the same date gave further information as to the proposed changes.

12. On 11 April 2016 Mr Nicholas provided the grievance outcome. It is not entirely clear from the document itself whether Mr Nicholas accepted or rejected the grievances but he made a number of recommendations for a development plan. In his witness statement he says that having investigated that he was satisfied that the claimant had misinterpreted a number of issues, and that whilst he could understand why he was disappointed he could not find any evidence that he been the victim of a conspiracy and concluded that he had been treated fairly by the service. The grievance outcome

was discussed with the claimant at a meeting on 13 May of 2016, after which the claimant appealed the outcome of the grievance.

13. In addition on 21 April 2016 before he received the outcome of the first grievance the claimant lodged a second grievance which set out three complaints. The first related to Mr Kevin Jones response to his initial grievance "unilaterally dismissing the grievance relating to my contract of employment" and failing to invite the claimant to a grievance meeting. The second was the failure of the respondent to reverse Mr Jones decision and the third was the fact that he did not accept that the decision to appoint him as a substantive Watch Manager B at Swansea West was in fact an administrative error. The second grievance therefore related entirely to the issues surrounding his appointment to the Watch Manager B post at Swansea West.

14. The second grievance was investigated by Mr Woodhead. In the course of that investigation he interviewed large number of people and produced a grievance report. A copy of the initial report was sent to the claimant and, following a meeting with him, was amended to include two new recommendations, but as a general proposition the grievance was not upheld. The claimant appealed the second grievance, the appeal being heard by Mr Hearn. It is not necessary to set out in greater detail the contents of and conclusions of the grievances and appeals as there are no claims in relation to them, save that in respect of the outcomes the claimant does not accept that the respondent was entitled to take the view as expressed initially by Mr Jones and subsequently upheld, that the respondent had a contractual right to treat the appointment as Watch Manager B at Swansea West as temporary rather than substantive.

15. In accordance with the position it had taken as to its contractual rights, on 15 March 2016 the respondent wrote to the claimant stating that it had been confirmed that he would remain at Swansea West fire station but in the role of Watch Manager A under the new 2-2-4 system he was informed that this would take effect from 13th May 2016 and that his contractual salary would be £34,160 which was the rate for a Watch Manager A. In in consequence from 13th May 2016 the claimant reverted to a Watch Manager A, and his salary was accordingly reduced.

16. As he was off sick he initially remained on full pay (at Watch Manager A rate). The respondent's contractual sick pay provided for six months at full pay followed by six months at half pay, thereafter reducing to zero. If that policy had been applied in full the claimant would have reduced half pay at some point at the end of June 2016, and from there to zero at a point towards the end of December 2016. In fact the respondent agreed to retain the claimant on full pay until the conclusion of his grievance. As a result he remained on full pay until mid-September 2016 reducing at that point to half pay on which he remained for six months before reducing to zero. As is set out above he technically returned to work in July 2017 although the initial period prior to 7 August was used as holiday and he returned on a phased return from that point.

17. It is convenient at this point to address the position of Gary Williams. He was appointed welfare officer for the claimant very shortly after he went sick at the end of

January 2016. He was extremely supportive of the claimant and remained the claimant's welfare officer until the conclusion of the grievance process. On 25 November 2016 the claimant was written to by Roger Thomas the Corporate Head of Response saying,

"*I write to you to in respect of the present situation regarding your ongoing sickness absence. I understand that your grievance is now closed and perhaps it would be helpful to simply provide some clarity around the current position. As your grievance is now closed you will appreciate the responsibility for the management of your current sickness absence and the associated well-being contact will now be transitioned from SM Gary Williams, who had been your welfare officer up until the grievance procedure closed on 16 September 2016 to your Command Management Team as per normal procedure. To expedite this transition I will ask head of response Swansea GM Gail Smith to arrange direct contact between yourself and line manager in order to support your ongoing sickness absence, and as and when is medically appropriate your return to work and subsequent rehabilitation plan*."

The claimant was extremely upset by this decision which had been made without consultation with him or Mr Williams.

18. On 19 January 2017 that the claimant submitted his first ET1 claiming unlawful deduction from wages based on the reduction from Watch Manager B to Watch Manager A in May 2016 and in addition alleged that he was a disabled person and that there have been a failure to make reasonable adjustments for his disability.

19. On 28th of February 2017 Mr Thomas wrote to the claimant following receipt of the medical report of 20 December 2016. It is this letter on which the victimisation claim is based and therefore we shall set it out in full.

"*Dear Mr James,*

Review Medical Assessment

Following your review medical assessment I am now in receipt of a report from Mid and West Wales Fire and Rescue Services…. Occupational Health Cnsultant Dr O Thomas stating that, in his opinion, you are unfit for operational duties. Ffor completeness I include a copy of this report which I understand that you have already seen.

I note from Dr Thomas's report that upon discussion you indicated that at the present time and given the ongoing symptoms you are experiencing you will not be able to contemplate a return to employment. Dr Thomas reports adds that although you have not completely discounted returning to work the circumstances are particularly complicated by what you have described as the complex situation and the legal process that you commenced.

In this regard Dr Thomas's report advises that in his medical opinion it would seem difficult to see how you will be able to return to work until the legal process has been

completed. Even upon the conclusion of this legal process Dr Thomas adds that due to what you perceive as a significant breakdown of trust between yourself and the organisation as a whole the likelihood of your return to work within the service seems highly uncertain. To this end taking into account the information from Dr Thomas and despite the conclusion of all grievance procedures relating to your case there remains no likelihood of you being able to return to work in the foreseeable future. The service remains committed to supporting you to facilitate your return to work and is therefore concerned by this prognosis.

From the services perspective I can confirm that the Employment Tribunal application (ET1) was received on the 13th February 2017 in respect of your claims for, amongst other things, a determination under section 11 of the Employment Rights Act 1996. The service will respond to your claims formally through the employment tribunal process.

Employees will from time to time be dissatisfied with the services decision on certain matters and she is to seek recourse through various internal or external avenues as you have chosen to do in this particular set of circumstances. Notwithstanding this it is also the case that in the majority of occasions employees remain in work while they seek a resolution of their concerns.

Clearly the situation is untenable on a long-term basis and you have already incurred sickness absence of almost 13 months. Dr Thomas report makes clear that there is no current prospect of your return to work. Your current absence has an impact on the service other personnel in the services delivery of services to the public.

You have not made any suggestions as to any areas that the service can consider to facilitate your return to work. The service is not satisfied that that all potential options have been explored in order to support your return to work, and require engagement from you to identify a solution to the situation to enable your return to work as soon as possible. Despite any legal proceedings you are pursuing there is also a requirement for you to engage with the service to discuss and agree a programme which provides you an opportunity to return to work.

Whilst the service has provided some one-to-one confidential counselling sessions for you in attempt to alleviate an exciting anxieties you are experiencing, any further workplace facilitation towards a return to work would appear to be in abeyance until you are able to engage with the service as previously stated. I would therefore welcome any suggestions that you or your line manager may have in this regard.

In the light of this I shall ask Group Manager Justin Lewis as one of my Heads of Service Response to contact you in order to arrange a meeting with you and your union representative in order to discuss new measures that the service can consider in terms of a potential managed re- integration into the workplace.

In the light of the duration of your absence and your current prognosis, should you fail to engage with the service around potential return to work I must advise you that

the service may have to consider meeting with your representative in order to discuss your continued employment with the service.

I therefore sincerely hope you will engage proactively with Group Manager Lewis with a view to agreeing a facilitated and supported programme to enable you to take up your Watch Manager role with the service."

Medical Evidence.

20. 4th March 2015 -The claimant visited occupational health on a number of occasions. The first with which is dated 4 March 2015 and is that referred to above at which it was discovered that the claimant had high blood pressure.

21. 9th June 2015 - Dr Thomas on 9 June 2015 in the section "Current Situation" states that "*Mr James has been with the fire service since 1990…. in 1996 due to a number of issues he received face-to-face counselling which was extremely helpful. He continued without significant different difficulty up to approximately 2011. Following this point in time he has had a number of difficult years with problems initially outside work causing a significant increase in stress. This has manifested with a number of symptoms including sleep disturbance. He has not coped as well as he would normally do with some incidents in work. Also he had a good support network in his previous station, and when he was moved and his watch was disbanded his symptoms have been significantly adversely affected…. Mr James clearly recognises that his mental health has deteriorated due to the problems of the last few years I do not believe there is any formal psychiatric disorder but clearly he is suffering with symptoms of stress and if this was progress that he could put potentially develop their illness with resultant sickness absence.*" He goes on to recommend that face-to-face counselling which, as is set out above, was provided and which claimant found useful.

22. 4th March 2016 - The next report resulted from a consultation on 4 March 2016 after the claimant had gone off sick. Once again report was prepared by Dr Thomas who summarises the events and the symptoms Mr James was suffering at the time and concludes that those symptoms are consistent with depression which was also the opinion of his GP. In the section Current Situation he expresses the view that "*Mr James is unfit for work even with the restricted duties being considered. This is predominantly due to the significant psychological symptoms and emotional lability*." He goes on to say, "*The symptoms at present suggest an episode of depression. I would hope that with early treatment including medication, possible psychotherapy and a resolution of the work-related situation there will be a good chance that Mr James would improve reasonably quickly and this will of course help a return to work.*" He goes on to say in answer to the question "Is there anything further the service can do to support WM James return to full operational duties?" "*It would be important that to engage as much as possible, and to keep open lines of communication which currently seem to be good. Having a supportive and sympathetic approach will tend to foster a sense of support and I think would be more*

likely to lead to a successful return to work over the medium-term" There were at that stage no specific adjustments which Dr Thomas could recommend that could facilitate a return to work.

23. 14 April 2016 - Dr Thomas states that the symptoms have not really improved and his GP has increased his antidepressant medication to a moderate dose. He expresses the view that given the significant symptoms Mr James was not fit for work and once again that he cannot recommend any amended duties that will allow his return.

24. 25th of May 2016 - At this stage Mr James who was once again seen by Dr Thomas was continuing to experience symptoms of significant depressive illness. He refers to the ongoing work-related situation and the fact that there is now legal involvement and expresses the view that proceedings will be long-term, and that there was unlikely to be a resolution of the claimant's psychological symptoms prior to the conclusion of the legal issues and the complex work-related situation. He remained unfit for work and once again there were no amended duties which could have allowed for his return.

25. 19th September 2016 - Dr Thomas at this stage expresses the opinion that as the internal process has now concluded that he would be cautiously optimistic that that there was a potential for the symptoms to improve however he states, "*I believe it seems highly unlikely at this point in time Mr James would be able to return to work within the fire service given his perception of a complete breakdown of trust with the organisation and he was in agreement with that opinion today although we could not conclude this with certainty until the legal process has been completed and there is the chance of his symptoms to improve*." Once again there were no amended duties which could have facilitated a return.

26. 14th November 2016 - Dr Thomas states that "*I would hope that as time elapses the perception of a breakdown between Mr James and the organisation will gradually lessen. I cannot state with confidence however at this point in time Mr James would be able to return. This would be aided by supportive contact and engagement between Mr James and the organisation…It would seem unlikely that Mr James would be able to return to work before January. I think on balance the likelihood of him returning to work in his normal occupation is less rather than more likely but is not out of the question.*" He adds, " *Following the consultation (I had already written the report as above) I was provided with an email suggesting that Mr James had been hoping to return to work and to discuss this with him. Unfortunately this information did not reach me in time to discuss with Mr James and this did not seem to be the case from the discussion we had in the consultation today. I would therefore suggest that we could review Mr James in around 4 to 6 weeks when we can of course raise this during the consultation*." Once again there were no amended duties and a phased return to work was not recommended at that point.

27. 20th December 2016 – Dr Thomas states, "*We discussed his fitness for work and whether he felt able to return in any capacity. He feels that at the present time given the ongoing symptoms there is no way that he could possibly contemplate a return to employment. This is particularly complicated by the complex situation and ongoing*

legal process surrounding his concerns surrounding his employment situation both now and in the past…..It seems difficult to see how Mr James would be able to return to work until the legal process has been completed….Due to the significant breakdown in trust between him and the organisation as a whole the prognosis in terms of him being able to return to employment within the Mid and West Wales Fire and Rescue service seems highly uncertain. It (a return to work in this organisation) certainly appears less rather than more likely but is dependent on the outcome. Mr James does not discount this and there is still a small possibility that he may be able to return following the conclusion of this." Once again there are no amended duties or a phased return recommended.

Disability

28. It is not in dispute that the claimant was a disabled person from 3rd March 2016 which is conceded by the respondent. At the start of the hearing there remained an issue of whether the claimant was disabled prior to that point. However the only claims of discrimination are ones for a failure to make reasonable adjustments and victimisation and both postdate 3rd March 2016. The parties are agreed that in the circumstances as there is no live issue before us which turns on whether the claimant was disabled from any earlier point it is not necessary for us to determine that issue.

Credibility

29. The primary thrust of the claimant's case is that some or all of the respondent's witnesses are lying in the evidence they have given to the tribunal. As will be set out in greater detail below in respect of the contractual dispute the respondents maintain that the offer of substantive employment was an error, and that in the circumstances described below they are not bound by the contractual agreement apparently entered into. The claimant does not accept that the original offer was made by mistake and has put to a number of the respondent's witnesses that they are simply lying about that, and that moreover documents which appear to support that suggestion have been either forged in their entirety or embellished by the addition of words to indicate that the position was to be offered a temporary post. In addition it is suggested that the removal of Mr Williams from the position of welfare officer was not for the reason given by the respondent that the grievance process had come to an end, and that the management of the claimant sickness should, as would ordinarily be the case, revert to his line manager but rather was a deliberate act of vindictiveness on the part of Mr Thomas which is a precursor to the act of victimisation in the sending of the letter of 28 February 2017.

30. It is not necessary for us to rehearse the reasons given by the claimant for those contentions, and for inviting us to draw the conclusions that the respondent's case is fundamentally based on a series of untruths and that we are being deliberately misled by the respondent's witnesses. Having heard from those witnesses having considered the points made by the claimant not least in his skeleton argument we have unhesitatingly concluded that all of the respondent's witnesses have given

honest evidence to the tribunal and that in particular the evidence they have given about decisions being made to appoint the claimant temporarily is both honest and accurate.

Unlawful deduction from wages

31. As set out above the unlawful deduction from wages claim is based on the demotion from Watch Manager B to Watch Manager A in May 2016. It is not in dispute that on the face of it the letter of 17 December 2015 made an offer of a substantive post at Swansea West at the rank of Watch Manager B, nor that the acceptance by the claimant of that offer would ordinarily form the basis of a binding agreement (See for example *Centrovincial Estates plc v Merchant Investors Assurance Co Ltd 1982* Supreme Court in which at page 10 letter D Lord Justice Slade stated "*it is an equally well-established principle that ordinarily an offer when unequivocally accepted according to its precise terms will give rise to a legally binding agreement as soon as acceptance is communicated to the offeror in the manner contemplated by the offer and cannot thereafter be revoked without the consent of the other party*")

32. On the face of it therefore the respondent is bound by the offer which it made and which the claimant accepted on 24 December 2015. However they rely on the doctrine of mistake as voiding that contract. The relevant doctrine is that of unilateral mistake which would not ordinarily avail them. However a unilateral mistake can be relied upon where the other party to the agreement either knows of the mistake, or reasonably ought to have known of the mistake. Both parties agree that that is the correct test. There is in the Centrovincial case the proposition that that is incorrect if there is offer, acceptance and consideration. That appears to derive from a concession made by counsel in that case, and despite the best researches of both counsel they cannot find any other reference to that doctrine. For the purposes of the tribunal therefore we will apply the test set out above that it will be sufficient for the respondent to establish the defence if either the claimant knew of the mistake, or ought reasonably to have known of the mistake.

33. The first factual dispute is whether there was a mistake at all. The claimant asserts that what happened was that it was agreed that there would be a substantive offer of the role, and it was only when it came to Mr Jenkins attention that that had been offered and that Mr Jenkins realised that it was potentially expensive in that it might involve an obligation to pay the claimant protected pay that it was decided to revoke the offer. There are a number of points in support of this proposition which are set out at paragraphs 4.1 to 4.19 of the claimant's closing submissions. Central to the claimant's case is that the minutes of the transfer and promotion panel meetings of the 9th and 16th of December 2015 are essentially forgeries. When Mr Jenkins gave evidence that he attended the meeting of 16th December he is quite simply lying and his lie is exposed by the fact that his name does not appear on the list of attendees. Given our conclusions as to mistake (set out below) we can deal with this relatively briefly. Mr Jenkins's explanation for that, which we accept, is that he had not been planning to attend as he was on a training course however the training course finished early and he attended after the meeting started. We have no doubt that Mr

Jenkins was an honest witness and as such we have no doubt that it was in fact agreed at the meeting that the appointment of the claimant to the post of Watch Manager B at Swansea West was intended to be temporary and that by an error the letter which was produced by the HR Department referred to a substantive post.

34. We are therefore satisfied that the offer contained in the letter was genuinely a mistake. The question for us is whether the claimant knew or ought reasonably to have known it was a mistake. The facts the respondent relies on in contending that claimant must have known that it mistake are as follows. From the summer of 2015, and in particular in the latter part of 2015, there were a number of communications set out above as to the question of whether the three watch system would be maintained. This must have been of very significant interest to the claimant as, if a four watch system were to be reinstated at Swansea West, given the "protection" agreement he would have first refusal and would in all likelihood return to Swansea West. If the claimant knew that there was a prospect of returning to a four watch system at Swansea West he would or should equally have known that that would be likely to be at Watch Manager A grade, as the Watch Manager B grade was only brought in to reflect the greater responsibilities and duties of a three watch system. Given that state of knowledge he must therefore have known, or at very least ought reasonably to have known, that the respondent cannot have intended in December 2015 to appoint him to a substantive rather than a temporary role as Watch Manager B at Swansea West.

35. The claimant contends that he neither knew nor ought reasonably to have known that the offer was a mistake. Firstly he relies on the fact that he was aware that if a vacancy became available in Swansea West he would have first refusal on it. When one of the Watch Managers indicated his intention to retire creating a vacancy it follows automatically that that would be offered to the claimant which is precisely what happened. In those circumstances the claimant could not have realised that the offer of a substantive post was a mistake, and would have had no reason to do so. Moreover at the stage at which the offer was made the question of whether the watch system would revert to a four watch was by no means clear. Consultations were to take place with the unions and it could not possibly have been known at that stage what the outcome of those consultations would have been, and whether what was then the management's intention would necessarily have been translated into a reversion to a four watch system. Moreover, even if the claimant can be reasonably held to have some knowledge of the likelihood that a four watch system would be brought into effect, he could have had no knowledge of the contractual arrangements that would be part of it, and therefore no knowledge of whether the respondent would have the contractual right to reduce him to Watch Manager A status and pay and/or whether he would receive any pay protection and if so how much. None of that was agreed until the final agreement between the respondent and the unions in March 2016. It follows, submits the claimant that he neither knew nor ought reasonably to have known that the offer was a mistake.

36. In our judgement the claimant is correct. We accept his evidence that he did not know that it was a mistake and for the reasons set out above in our judgement he could not reasonably be expected to have appreciated that it was a mistake. In those

circumstances a binding agreement was entered into by the acceptance of the offer made by the respondent.

37. The basis of the claim has altered slightly during the course of the hearing in that the original allegation was that there was no right to unilaterally reduce the claimant to Watch Manager A with the resulting loss of salary in May 2016. It is accepted now that in the light of the agreement with the trade unions that in fact the respondent did have the contractual right to do that but that that was subject to the agreement as to pay protection. There would be a period of pay protection for three years from 1 April 2016. The precise effect of that agreement is not entirely clear to us. It may mean that if there is a demotion at any stage after 1 April 2016 that there would thereafter be a three-year pay protection for the individual concerned commencing at the date of demotion; or alternatively it might mean that that there was a three-year period from 1 April 2016 of pay protection and if there were demotion during that period that pay would be protected until 31 March 2019. We have heard no evidence or argument as to this point. If the parties are in disagreement about this that can be dealt with at a remedy hearing if necessary. However for the avoidance of doubt in our judgement the claimant was contractually entitled to the benefit of the pay protection agreed by the respondents with the trade union and that the reduction in pay from May 2016 onwards was an unlawful deduction of wages given that it was in breach of that agreement

Reasonable Adjustments

38. As is set out above it is accepted that the claimant was disabled from March 2016. As all of the reasonable adjustments contended for occur after that date it is no longer necessary for us to determine whether in fact it became a disabled person at an earlier date. The adjustments contended for (para 22 of the claimant's first ET1) are (1) not to seek to resile from the contract which came into existence (the offer of a substantive Watch Manager B post) and/or (2) to continue to pay the claimant at the rate for Watch Manager B and/or (3) to continue to pay the claimant sick pay (at least half pay if not full pay) beyond 15th March 2017. The first two of those relate to pay at the Watch Manager B rate, and the third to the separate issue of sick pay.

39. We can deal with the first two together as they are very similar. He should either have been allocated to a grade above that to which the respondent believed he was contractually entitled, or alternatively paid at the rate for that grade. The first question is what is the PCP which places the claimant at a substantial disadvantage? In his written skeleton argument the claimant suggests that there are two PCPs: "(1) that the claimant was well enough to work, and (2) that the claimant was well enough mentally to be able to cope with (i.e. not have his clinical mental state affected negatively) by the loss of income through his pay being (a) reduced and (b) stopped. Neither in our view in truth captures the conduct complained of in respect of the first two adjustments. Firstly the reduction in status and pay did not relate at all to whether

the claimant was fit to work or able to cope mentally with reduction in income. There is no evidence at all that the respondents had a PCP of demoting employees or reducing their pay because of their fitness to work (save in relation to the sick pay scheme which we deal with below and which is the subject of the third adjustment contended for). In relation to the first two adjustments the factual context in which the claimant was reduced from Watch Manager B to Watch Manager A were, as set out above, ones in which the respondent believed it had a contractual entitlement to do so. If a PCP can be formulated, in our view, it is that the respondent had a practice of allocating employees to the correct grade and paying what it believed to be the appropriate contractual rate for that grade. As a matter of fact, as is set out above, they (in our judgment) were contractually entitled to demote given the agreement with the trade unions, but did not have the right to reduce the claimant's pay given the pay protection in place by virtue of the same agreement. Put like that the PCP would not place the claimant at any substantial disadvantage in comparison with a non disabled person, in that both would either be paid correctly or incorrectly depending upon whether the respondent was correct in its analysis of the contractual position. It follows that we are unable to identify PCP which places the claimant at a substantial disadvantage by reason of disability.

40. Even if we had been able to formulate a PCP the question whether an adjustment in the claimant's grade or position, or pay was reasonable would be governed by precisely the same considerations that relate to sick pay which are considered below.

41. The next adjustment contended for relates to sick pay. The respondent's sick pay provisions are that an employee is entitled to sick pay for six months at full pay and then six months at half pay. In common with many such schemes there is a discretion to continue to pay in particular where the cause of the sickness absence is an injury sustained in the course of a firefighter's duties. In this case there is no contractual claim that the respondent failed correctly to exercise its contractual discretion on the basis that the claimant's injuries were sustained in the course of his duties. The facts are that the claimant having gone off sick in January 2016 would ordinarily have had six months full pay. However as set out above, in fact full pay was continued until the conclusion of the grievance procedure in September 2016. At its conclusion he reduced to half pay for six months which (although we have no specific evidence about it) would take the claimant to a point in March 2017 at which he would have reduced to nil pay. The claimant returned to work in July 2017. We do not know what rate of pay he has returned.

42. As above the first question is whether there is a PCP which places the claimant at a substantial disadvantage. The answer to that is straightforward. The respondent has a policy of reducing to half and then nil pay those off work sick. A disabled person who is off work sick by reason of disability suffers those reductions in pay. He is placed at a substantial disadvantage in comparison with those not off work sick. In truth this is not in dispute between the parties and the real issue is whether the adjustment of not reducing pay is a reasonable one.

43. The respondent relies on the line of cases beginning with *O'Hanlon v The Commissioners for HM Revenue and Customs* and in particular the well-known

passage from the judgment of Elias P (in the EAT) at paragraphs 68 and 69. At paragraph 69 he states, "*Second, as the tribunal pointed out, the purpose of this legislation is to assist the disabled to obtain employment and to integrate into the workforce. All the examples given in s18B(3) are of this nature. True they are stated to be examples of reasonable adjustments only and are not be taken as exhaustive of what might be reasonable in any particular case, but none of them suggested it will ever be necessary simply to put more money into the wage packet of the disabled. The Act is designed to recognise the dignity of the disabled and require modifications which will enable them to play a full part in the world of work, important and laudable aims. It is not to treat them as objects of charity which is the tribunal pointed out may in fact sometimes and for some people tend to act as a positive disincentive to return to work."* In essence the respondent submits that that passage precisely encapsulates the claimant's contention in this case which is simply that it would be reasonable to pay him more.

44. The claimant relies upon *G4 S Cash solutions (UK) Ltd v Powell* which (as is set out in the head note) states "*There is no reason in principle why section 20(3) should be read as excluding any requirement upon an employer to protect an employee's pay in conjunction with other measures to counter the employees disadvantage through disability. The question will always be whether it's reasonable for the employer to have to take that step. Many forms of measure which it will be reasonable for the employer to have to take will involve cost to the employer. There is no reason in principle why pay protection, which is no more than another potential cost for an employer, should be excluded as a "step*". It goes on to say "*It is not expected that would be an everyday event for employment tribunal to conclude that an employer is required to make up an employee's pay long-term to any significant extent – but one 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 that to keep an employee in work.*"

45. The claimant contends that this is precisely one of those rare cases which fall outside the ordinary run as exemplified in O'Hanlon in which a stand-alone claim for the removal of the ordinary application of the sick pay scheme would be a reasonable adjustment. Whilst we do not understand the EAT in G4 S Cash Solutions to be asserting that pay enhancement can only be reasonable in the context of a package of other measures it is notable that that is the example given, and we have not been referred to any authority in which a stand-alone claim to avoid what would otherwise be the consequence of the application of the sick pay policy has been upheld.

46. The basis for the claim is that there had the claimant not suffered the loss of income he would be likely to have suffered less stress and therefore to return to work sooner. This proposition is amplified at paragraphs 12 to 15 of the claimant's closing skeleton argument. In particular at paragraphs 15.1 and 15.2 the claimant sets out extracts from Dr Thomas's report of 4 March 2016. However it is to be noted in our judgment, whilst they are general expressions of the importance of engaging and keeping open lines of communication and having a supportive and sympathetic approach; and of finding a resolution of the work-related situation there. Whilst that is undoubtedly true there is no specific recommendation in respect of pay.

47. In addition as the respondent in our judgement correctly points out there is in fact no evidential basis for the assertion that by increasing his pay the claimant would necessarily return to work sooner. In none of the Occupational Health Reports is it suggested that there were any adjustments which could have allowed the claimant to return to work, in particular none suggest that the simple increase in pay would have done so. Secondly the claimant's absence from work was multi-factorial. The onset of his mental health problems had begun with domestic issues and by the point which he went off sick in 2016 he complained, as is set out in his grievances, of the events of the latter part of 2014 into 2015; of the specific decision not to honour the offer of a substantive post at Swansea West, and of bullying and harassment on his return. The question of his status and pay was only one element of a number of matters affecting the claimant. In our view this analysis is correct and we can find no evidential basis to support the claimant's contention in this case.

48. It follows that in our judgement there is nothing in this case which provides an evidential basis for concluding that this is one of those rare cases in which the simple increase in pay would be a reasonable adjustment.

Victimisation

49. The victimisation claim is based upon the letter from Mr Thomas of 20 February of 2017. There are two elements of claim. The first is that sending the letter at all and starting a process which may have concluded with the dismissal of the claimant was a direct response to the claimant submitting his ET1 one and is therefore an act of victimisation. The second is that the tone of the letter in particular the implied suggestion that the claimant had in the past failed to engage with the respondent is untrue, and can only have been included in the letter by reason of the claimant having submitted his ET1 shortly before the letter was written.

50. Mr Thomas' evidence, which we accept, it is that the reason for the letter being written was that the most recent OH report of Dr Thomas (16th December 2016) indicated firstly that there will be no likely return to work prior to the conclusion of the legal proceedings, and secondly that even if there was return to work it would be unlikely to be a return to work with the respondent. By that stage that the respondent had an employee who been off work for over a year and in respect of whom the medical evidence was that he was unlikely to return to their employment at all in any event, and certainly not until the conclusion of the litigation. It followed that it was reasonable to attempt to begin the process to see whether in fact the claimant could return to work. Secondly the references to his engagement in the process was simply to impress upon him that he must cooperate with it. Mr Thomas' evidence was the letter was written with the assistance of the HR Department, and that this was the first time he had been involved in the drafting of such a letter.

51. In our experience there is nothing remarkable about the letter itself, and nothing remarkable about a letter being sent in respect of an employee who has been off sick for over a year and for whom there is no apparent prospect of return to work in the

foreseeable future on the basis of the medical evidence. In our judgement it is a perfectly standard letter of its type and the worst that can be said of it is that it was not worded with a degree of formality and not as sympathetically as it might have been. However, we accept Mr Thomas' evidence as to why and how the letter came to be written. In reality the only fact from which we could conclude that the burden had shifted to the respondent is the temporal coincidence between the ET1 and the letter. Even if that is in and of itself sufficient we are satisfied that the respondent has discharged the burden of demonstrating that there was no causal link between the either the sending of the letter or its contents and the earlier lodging of the ET1, and that therefore it did not constitute an act of victimisation.

Remedy

52. The claimant has succeeded in his claim for unlawful deduction from wages, but not in his claims for a failure to make reasonable adjustments and victimisation. The case will be listed for a telephone preliminary hearing to give directions for a remedy hearing if one is necessary.

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EMPLOYMENT JUDGE Cadney

Dated: 13 April 18

Judgment entered into Register
And copies sent to the parties on

.....23 April 2018.....

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for Secretary of the Tribunals