Case Number: 3328975/2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr M Edwards	and	Oxford University Hospitals NHS Foundation Trust

Held at Reading on Hearing – 3, 4, 5 June 2019
In Chambers – 6 June 2019

Representation **Claimant:** In person
Respondent: Mr S Brittenden, counsel

Employment Judge: Mr S G Vowles **Members:** Mrs C Baggs
Mrs J Smith

UNANIMOUS RESERVED JUDGMENT

Evidence

1. The Tribunal heard evidence on oath and read documents provided by the parties and determined as follows.

Discrimination Arising from Disability – section 15 Equality Act 2010

2. The Claimant was not subject to discrimination arising from disability. This complaint fails and is dismissed.

Unfair Dismissal - section 98 Employment Rights Act 1996

3. The Claimant was dismissed by reason of capability and the effective date of termination was 22 June 2017. The dismissal was not unfair. This complaint fails and is dismissed.

Public access to employment tribunal decisions

4. All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the Claimant and Respondent.

Reasons

5. This judgment was reserved and written reasons are attached.

REASONS

SUBMISSIONS

1. Claimant On 19 November 2017 the Claimant presented complaints of disability discrimination and unfair dismissal to the Employment Tribunal.

2. Respondent On 21 December 2017 the Respondent presented a response. All claims were resisted.

ISSUES

3. The claims were clarified in case management orders made at a preliminary hearing held on 4 May 2018.

4. The Respondent accepted that at all material times the Claimant was a disabled person for the purposes of section 6 Equality Act 2010 by reason of Diabetes Type 1 / Epilepsy / Visual Impairment / Cognitive Impairment.

EVIDENCE

5. The Tribunal heard evidence on oath from the Claimant, Mr Mathew Edwards (Senior Procurement Manager). It also read a statement on his behalf from Mr Stephen Moody (Procurement Manager) who did not attend the hearing and whose evidence was not challenged.

6. The Tribunal heard evidence on oath on behalf of the Respondent from Mr Gary Welch (Director of Procurement and Supply / Line Manager), Mr Jonathan Horbury (Foundation Trust Programme Director / Dismissing Officer) and Mr Jason Dorsett (Chief Finance Officer / Appeal Officer).

7. The Tribunal also read documents in a bundle provided by the parties, and considered written and oral closing submissions by both parties.

8. From the evidence heard and read the Tribunal made the following findings.

FINDINGS OF FACT

9. The Claimant was employed by the Respondent from 18 September 2000 to 22 June 2017. That was the effective date of dismissal. The Claimant was employed at that date as a Senior Procurement Manager. A summary of his role was set out in an employment assessment report dated 9 April 2014, with which the Claimant agreed, as follows:

> *"From the discussions and information provided Matthew was holding an extremely responsible post within the Trust as Procurement Manager. The job involves face-to-face discussions with internal and external stakeholders, work on the computer with spreadsheets and a proportion of time on the phone. Negotiation skills are particular important to broker effective contracts with suppliers. Accuracy and attention to detail are critical in terms of ensuring the contracts are correct and the money is spent wisely. Working on several contracts at any one time the post holder is required to quickly be able to access, recall and retrieve information from any one of a number of projects on the go. The post also requires supervision and management of staff. Both Matthew and his manager stated that the role at times can be exceptionally busy and demanding with considerable pressure and many 'urgent' matters to be attended to. Matthew's workspace is in a small open plan office of six people."*

10. The Claimant described his medical conditions as follows:

> *"I was known to have suffered from Type 1 Diabetes Mellitus since 1985 as well as a diagnosis of epilepsy since 1987 and having had seizures brought on by hypoglycaemia …*
>
> *I was taken ill towards the end of June 2013 …*
>
> *Over the weekend I was admitted to hospital and was diagnosed with a life-threatening streptococcus infection to the heart – endocarditis. During the course of the next few weeks had diagnoses of Diabetic Keto-Acidosis (DKA); septic arthritis in one wrist and my back, Proliferative Retinopathy, and Trans-Ischemic Attacks (TIAs) – also known as mini-strokes. I was discharged at the end of August 2013 and soon after had fractional retinal detachment to the left, and later, the right eye."*

11. From June 2013 the Claimant's sickness absence record was as follows:

- 28 June 2013 to 1 February 2015 – Absent on sick leave;

- 2 February 2015 to 5 July 2015 – At work on reduced duties on a phased return to work;
- 6 July 2015 to 22 June 2017 – Absent on sick leave.

12. The Respondent's contractual sick leave entitlements were full pay for the first 6 months and half pay for the second 6 months. However, throughout the period from June 2013 to June 2017, the Claimant remained on full pay except for the period August 2014 to April 2015 when he was on half pay.

13. On 28 November 2014 a case conference meeting was held attended by the Claimant, Mr Welch, Dr Evie Kemp (occupational health physician), Ms Dawn Andrew (HR Consultant) and Ms Susan Groves (Unison Trade Union representative). In a letter dated 3 December 2014 Mr Welch summarised the meeting. It included the following:

"The purpose of the meeting was to gain an update on your progress and to discuss future options. The following discussions took place:

1. *Evie provided a summary of medical challenges that you were facing and an overview of the assessments that had taken place since your absence began in June 2013.*

2. *At the meeting on 2 June 2014 two options were discussed which were confirmed in the Case Conference outcome letter dated 13 June 2014. The options were:*

   Option 1
   To apply to ill health retirement on medical grounds

   Option 2
   For you to remain absent from work for a further six months until 30 November 2014, during which time you could participate in further assessment and rehabilitation. During the six month period you would attend regular appointments with Evie and prior to the end of the 6 months we would meet again to consider the options available.

   The outcome letter stated that if option 2 was instigated then your pay would be at the six months' half pay entitlement and that you would use your outstanding annual leave during this period to enhance your pay.

During the meeting in June, it was explained that if option 2 was taken that at the end of the six month period all options would again be considered and this would include ill health retirement.

3. *Evie stated that she did have concerns that the combination of the medical problems you are dealing with would make return to work very challenging and this concern had also been raised in the neuropsychological report. However the Camborne Centre had stated that they were able to provide workplace support for a 3 month trial."*

14. On 15 December 2014 the Claimant wrote to Mr Welch to confirm that he wished to take up the option to return to work for a trial 3 month period. He also wished to retain the option to apply for ill health retirement at any time in the future.

15. During the course of 2014 medical opinions regarding the prospects of successful return to work were expressed in guarded terms, in particular by Ms Janet Widdows (DWP Workplace Psychologist), Dr Derek Wade (Consultant and Professor in Neurological Rehabilitation at the Camborne Centre) and Dr Evie Kemp (occupational health physician). All had concerns that the combination of the Claimant's medical problems would be difficult and challenging.

16. On 2 February 2015, the Claimant returned to work to reduced duties as part of the phased trial. It had been agreed that specialist equipment, appliances and training would be put in place for the Claimant's return. The Respondent failed to obtain such equipment and training in time for the return, but by 8 April 2015 most of the equipment had been delivered and installed.

17. The Tribunal accepted Mr Welch's evidence that on return to work the Claimant had been allocated a substantially reduced workload, equivalent to approximately 25% of his substantive role. He was allocated 15 projects, had no management responsibilities, and had no requirement to attend team meetings or to deal with freedom of information requests or other e-mail/telephone traffic.

18. Because of the delay in obtaining and installing specialist equipment between February and April 2015, Mr Welch decided to extend the phased return to work until the end of June 2015. On 13 May 2015 Mr Welch wrote to the Claimant as follows:

"As you know the start of the trial / phased return to work was delayed for a variety of reasons – not least that the equipment and associated training was not in place.

To ensure you have the maximum opportunity to settle back into the work environment, and to ensure that the trial / phased return to work is as successful as possible, it is important that the trial takes place over the full 12 weeks from the point that the equipment is available and you are able to use it fully (i.e. sufficient training is also complete)."

19. A final review meeting was held on 29 June 2015 attended by the Claimant, Mr Welch, Dr Kemp, Ms Chloe Allington-Dyckes (HR Business Partner) and Ms Groves (Unison Trade Union representative). This was an important and critical meeting for the Claimant. It was summarised in an e-mail dated 6 July 2015 from Ms Allington-Dyckes and therefore the Tribunal considered that it should be quoted extensively as follows:

"Gary explained that since your return to work you had been undertaking a defined workload that consisted of 15 projects of varying scale/complexity. This list of project[s] constituted no more than 25% of projects you would normally be carried out as part of your substantive role. Gary confirmed that during your return to work/work trial you had not been given any of the wider management duties which would usually form part of your role and you had not been subject to the emails/phone call traffic through the office.

Gary explained that he had been meeting with you regularly (almost weekly) to review the work and its progress. Gary reported that from these meetings he had been able to ascertain that you understood the steps that needed to be taken during a procurement process; that you had fitted back in well to the work routine; and that you appeared to be enjoying the social aspects of being at work.

On the less positive side, Gary felt that the software and aids which the Trust had purchased to support your return to work had not been as useful as all parties had anticipated; that you get very tired and that you fell behind on the restricted workload quite quickly. It has become clear that the extra steps in reading and understanding documents and information are proving difficult. The time and effort required to do the work has also increased significantly as your sight has deteriorated.

Dr Kemp provided Occupational Health input on your current state of health, as follows: Dr Kemp advised that your complex health problems were continuing. In particular your diabetes continued to be challenging to control

and that high and low blood sugars at work added to an additional cognitive challenge. Your eye sight was also deteriorating. You had a cataract operation booked for July 4th and although it was hoped that this might improve your vision to some extent, the outcome would also depend on complex problems affecting the rest of the eye. On a positive note you had found the chair very comfortable and were not experiencing any back problems.

Dr Kemp had also, with your consent, spoken with your Occupational Therapist and Workplace Coach. The main ongoing concerns were your memory, cognitive fatigue, tasks taking much longer than previously, difficulty initiating projects and becoming over focussed on ideas. There was unlikely to be any further natural cognitive improvement after this length of time, but there might be some further functional improvement dependant on applying appropriate strategies.

Dr Kemp felt it would be important to assess you after the cataract operation. She recommended one week sickness absence and then follow up on Wednesday 15 July at 2pm. Although it was hoped that the operation would be successful, improved vision was only one factor in a complex multifactorial situation and the difficulties you were experiencing at work were mainly due to challenges following brain injury. An improvement in vision was unlikely to significantly change the overall long term picture.

On the basis of the management and occupational health assessment of your progress it was felt that despite all adjustments which have been made, you are not currently able to undertake the role for which you were employed. Redeployment would be an option we would usually consider; however given the complexity of your health and he impact upon your physical and mental abilities, redeployment to a suitable alternative role is not perceived to be achievable.

Therefore the Trust has no further option than to consider your capability to undertake the role for which you are employed, which sadly may result in your dismissal from the Tribunal. Dr Kemp once again advised that she would support an[d] Ill Health Retirement application for you if you wished to now proceed with such an application."

20. The only contemporaneous note of the conference meeting available to the Tribunal was that produced by Dr Kemp and its content was consistent with the above e-mail summary produced by Ms Allington-Dyckes. Dr Kemp noted *"All agreed not fit for return to own job in long run"*.

21. The e-mail was copied to the Claimant and his Trade Union representative and neither challenged the accuracy of the account of the meeting or the summary of the conclusions.

22. On 10 July 2015 the Claimant commenced the process of applying for ill health retirement. Part of the application form AW33E was completed by Dr Kemp. She summarised the Claimant's medical conditions and the history of his ill health. Her summary was as follows:

"5. Please summarise information you consider to be relevant to this member's long term incapacity for any regular employment.

As above.
Unfortunately his 4 month workplace rehabilitation trial showed that even with specialised equipment, training and support he could not function at anywhere near the level required for an administrative role. I believe he is permanently incapacitated for any regular employment and would fully support this application."

23. On 1 October 2015 the Claimant was granted ill-health retirement benefits by the NHS Pensions Agency at Tier 2 which is defined as follows:

"There are two tiers for the determination of ill-health retirement benefits, which will still be administered by the Pensions Division of the NHS BSA:-

3.1 Tier 1 – Where an employee is assessed as being unable to do their own job. It assumes that the employee can undertake another job and so they will be awarded a lower level of benefits. They will receive early payment of actual benefits with no enhancement.

3.2 Tier 2 – Where an employee is assessed as being permanently unable to carry out "regular" employment – that is, undertake any job except to allow for the possibility of therapeutic or voluntary employment which could improve their condition.

24. On 4 December 2015 the Claimant wrote to Ms Allington-Dyckes saying:

"I came into the office yesterday to deliver fit notes to Gary and he was able to allocate time to have a brief discussion which I welcomed. An outcome was that he wanted me to write to you to say that I was sorry for the confusion, to confirm that I am not resigning, and that I would now like the trust to proceed with the capability hearing."

25. The Claimant went on to complain about the delay in arranging the capability hearing and about problems with his pay. Thereafter, up to 2 October 2016, there was extensive, but largely unexplained, delay by the Respondent in dealing with the Claimant's case. Mr Welch explained that from the end of December 2015 until June 2016, there was a period of no activity or progress. He said that was probably for various reasons, including the fact that he was very busy and there were lots of changes in the HR department and no HR lead on the case. During this period, the Claimant attended Occupational Health meetings but refused consent for Occupational Health reports to be provided to the Respondent.

26. It was clear that during this period, Mr Welch, and others in the Respondent's HR department, understood that the Claimant would resign having been successful in his ill health retirement application, despite his letter of 4 December 2015 referred to above.

27. On 20 October 2016 the Claimant attended a meeting with Mr Welch which was summarised in Mr Welch's letter dated 24 October 2016 as follows:

"Thank you for attending the above meeting with me which was held on Thursday 20 October 2016 in the Wernick Building at the Nuffield Orthopaedic Centre. Present at this meeting was myself, you and your chosen representative Caroline Lake from UNISON and Millie Spurin, HR Consultant.

I explained that the purpose of the meeting was to check in with you to see how you are as you are currently absent from work, and to discuss the next steps moving forwards.

The following was discussed during the meeting:

- *I apologised for the delay in holding this meeting*
- *You confirmed that you have an Occupational Health appointment on 01 November 2016 so that I am able to obtain the latest medical advice regarding your condition*
- *I explained that following this appointment and once I am in receipt of the latest Occupational Health report that there are two potential options:*
  - *If you are deemed as fit to return to work in your role of Senior Procurement Manager (with or without reasonable adjustments) by*

Occupational Health then I will be in contact with you to arrange a second trial phased return to work following your initial trial phased return in February 2015.

- *If you are deemed not fit to return to work in your current role then this will result in a capability hearing being called to consider your future employment here at the Trust where there is the potential you could be dismissed on the grounds of capability due to ill health.*

- *If you are deemed not fit to return to work then I would encourage you to proceed with your Ill Health Retirement paperwork, which you assured me is still valid from last year as you have been in contact with the Pensions team."*

28. There was then further delay while the Respondent was awaiting the next occupational health report but none was forthcoming. On 29 March 2017 Dr Anne-Marie O'Donnell (Consultant Occupational Health Physician) wrote to the HR department to advise that she had not been able to obtain consent from the Claimant to provide an Occupational Health report.

29. On 25 April 2017, on advice from HR, Mr Welch wrote to the Claimant to invite him to a formal meeting under the Respondent's absence management procedure to be held on 15 May 2017 and he enclosed his management case. The purpose of the meeting was to review the Claimant's current absence from work, the reasons for the absence, and to discuss what support had been offered during his absence. It was stated that a potential outcome of the hearing could be his dismissal from the Trust. The meeting was scheduled for 15 May 2017 but then rescheduled for 22 June 2017.

30. On 19 June 2017 the Claimant provided his response to the management case in which he set out questions and comments concerning the process, the time it had taken, and the possible outcome. He challenged the failed return to work saying that if it was unsuccessful, it was not down to him. He asked for a postponement of the meeting due to stress at work but that application was refused. The Claimant did not consent to Dr O'Donnell disclosing an Occupational Health report for the purposes of the meeting and also did not consent to her being present at the meeting.

31. On 22 June 2017 the meeting took place referred to as "Stage 4 meeting under long term sick procedure" chaired by Mr Horbury. The Claimant attended accompanied by Ms Lake (Unison Trade Union representative) and by Mr Welch and three HR personnel. Shortly before the meeting, the Claimant consented to a report by Dr O'Donnell being disclosed at the meeting. The report, dated 22 June 2017, read as follows:

"I have Mathew's consent to release this statement:

I have seen Mr Mathew Edwards to assess his fitness for work. I cannot identify any objective medical evidence that would contradict Dr Kemp's advice in 2015 that he is permanently incapable of undertaking the duties of his NHS employment and that redeployment to a role at a similar level would not be successful even with specialised equipment, training and support.

Please can you confirm that you have received it
Kind regards
Dr Anne-Marie O'Donnell
Occupational Physician"

32. The record of the meeting was set out in detail in the document bundle. Mr Horbury explained the purpose of the meeting as follows:

"This is the final stage of the Absence Management Procedure to consider, based on the evidence available, whether ME is capable of returning to work. As part of this I will be reviewing the absence history to understand what has brought us to the hearing today and to hear what options have been explored prior to today regarding a return to work."

33. Clearly, the medical opinion of Dr O'Donnell was highly relevant to the issue to be considered by Mr Horbury, namely whether the Claimant was capable of returning to work.

34. The Claimant was asked during the course of the meeting whether he accepted Dr O'Donnell's statement. Although in his evidence before the Tribunal he was equivocal as to whether he did accept the statement, the Tribunal found that he had accepted the content of the statement. At the meeting he said: *"I accept part of that statement, I accept my limitations"*. He did not challenge Dr O'Donnell's conclusion or the fact that there was no evidence to contradict the opinions of Dr Kemp and Dr O'Donnell.

35. Also, during the meeting the Claimant's Trade Union representative said: *"To some degree he cannot return to the role and what we would look for is retirement on the grounds of ill health"*.

36. Towards the end of the hearing, Mr Horbury said:

"From what I have taken from what CL [Trade Union representative] *said, ME* [Claimant] *is seeking dismissal on grounds of ill health, correct conclusion from that? Anything else from anyone? All parties said No."*

37. The Tribunal found that the Claimant did not challenge Dr O'Donnell's opinion, did not produce any medical evidence to contradict it, and that he was actively seeking termination of his employment on the grounds of ill health.

38. At the end of the hearing, Mr Horbury confirmed his conclusion that the evidence supported the Claimant's dismissal on the grounds of ill health. In his dismissal letter dated 26 June 2017 he said:

"The hearing saw evidence that you had been assessed by OUH's Occupational Health team and found to be permanently incapable of undertaking duties of [your] NHS employment [assumed to be your role as Senior Procurement Manager] and that redeployment to a role at a similar level would not be successful even with specialised equipment, training and support.

We also heard that while you did not agree with some of the wording of the statement received by the hearing from Occupational Health physician Dr Anne-Marie O'Donnell (dated 22 June 2017), you accepted its overall conclusion about your being incapable on the grounds of ill-health of resuming your current role or of redeployment.

We heard from your Union representative that your dismissal was sought on the grounds of ill-health.

It was my conclusion that the evidence, notably Occupational Health's assessment reported above, supported your dismissal on the grounds of ill-health. My decision was therefore that your dismissal on the grounds of ill health should take place with effect from 22 June 2017 and that 12 weeks' pay in lieu of notice should be given to you from that date in accordance with Trust policy.

A decision such as this one is never made without regret and I recorded the enormous sympathy I and colleagues have for the difficulties you have faced and continue to face in living with multiple and complex health conditions.

Some elements of the history of your phased return to work remained difficult to reach a definitive picture of, with disagreement remaining between your

recalled experience of events and your line manager's. Nonetheless, I did not believe these factors to affect the decision I needed to make."

39. On 9 July 2017, the Claimant presented an appeal against dismissal on 4 grounds:

- Procedural correctness
- Conclusion in light of the evidence
- Appropriateness of penalty
- Extenuating circumstances

40. An appeal meeting took place on 28 July 2017 chaired by Mr Dorsett. The Claimant attended unaccompanied, with his agreement. Mr Horbury (the dismissing officer) presented the management response to the appeal and HR representatives were also in attendance. The appeal was unsuccessful and the outcome letter dated 31 July 2017 included the following:

"During the meeting you presented your grounds of appeal, as outline in your letter of appeal. Having listened carefully to your grounds of appeal and comments made by you, and having reviewed the management response and all the medical facts available I can confirm my conclusions as follows –

- *That the procedure followed was appropriate and it was not demonstrated in the appeal that application of a different procedure would have led to a significantly different outcome.*
- *That the evidence from Occupational Health presented to the original hearing, and reviewed as part of this appeal, is clear that a [return to work is not possible on grounds of ill health]. The appeal noted that you did not agree in all points with the statements made by Occupational Health.*
- *That the remaining grounds for appeal that you submitted relate to comments and recommendations in the letter communicating the decision of the original hearing and not to the decision to dismiss. I am therefore not able to consider these grounds, but we discussed the timing and the nature of the recommendations to the Trust made by the original hearing.*
- *That the original decision of dismissal on the grounds of ill health with effect from 22 June 2017 should be upheld.*

I confirm that the above decision of the appeal hearing is final and there is no further right of internal appeal."

DECISION

Discrimination Arising from Disability – section 15 Equality Act 2010

41. *Section 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.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

42. *Section 136*

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

43. There is guidance from the Court of Appeal in Madarassy v Nomura International plc [2007] IRLR 246. The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination, they are not without more sufficient material from which a Tribunal could conclude that on the balance of probabilities the Respondent had committed an unlawful act of discrimination. The Claimant must show in support of the allegations of discrimination a difference in status, a difference in treatment and the reason for the differential treatment.

44. If the burden of proof does shift to the Respondent, in Igen v Wong [2005] IRLR 258 the Court of Appeal said that it is then for the Respondent to prove that he did not commit or is not to be treated as having committed the act of discrimination. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally

expect cogent evidence to discharge that burden of proof and to prove that the treatment was in no sense whatsoever on the prohibited ground.

45. The Tribunal took account of the relevant provisions of the Equality and Human Rights Commission Code of Practice on Employment 2011 Code of Practice.

46. The Discrimination Arising from Disability claim was set out in the case management order as follows.

- *The unfavourable treatment was the dismissal on 22 June 2017.*

- *The "something arising" in consequence of the disability was the perception of the Claimant's manager, Gary Welch, that the Claimant could not achieve the required standards of performance at work because of the effects of his disability. However, the standards were never set out for him and he disputes that he could not achieve satisfactory standards of performance.*

47. At the Tribunal hearing, the Respondent confirmed that it accepted that the Claimant's dismissal amounted to unfavourable treatment and that the dismissal was because of something arising in consequence of the Claimant's disability.

48. However, it was clear that the Respondent's acceptance of "something arising" was different to that alleged by the Claimant in the case management order quoted above.

49. In the Respondent's submissions, it was stated:

"As stated at the conclusion of day 2, the Trust accepts that C's dismissal amounted to unfavourable treatment, and that dismissal arose in consequence of C's disabilities."

50. It was not the dismissal which arose in consequence of the Claimant's disabilities, the dismissal was the unfavourable treatment. In the case management order, it was clear that the Claimant was alleging that it was the perception of the Claimant's manager, Gary Welch, that the Claimant could not achieve the required standards of performance at work because of the effects of his disability which was the "something arising" in consequence of his disability.

51. It was clear from the Respondent's case that it did not accept that the dismissal was because of the perception of Gary Welch, but because of the Claimant's actual inability to achieve the required standards of performance.

52. The Tribunal found that both Mr Welch's perception and the fact of the Claimant being unable to achieve the required standards of performance at work were "something arising" in consequence of his disability. In other words, it was not just a perception of Mr Welch that the Claimant could not achieve the required standards of performance that arose in consequence of his disability, but also the fact he could not do so, based upon the outcome of the phased return to work and the medical evidence to that effect. Mr Welch's perception was based upon that fact.

53. The Respondent relied solely upon the defence of justification and relied upon the following as legitimate aims:

The application of its absence management procedure as being necessary in order to:

1: Fulfil service needs;
2: Manage employees' sickness absence;
3: Provide a safe system of work;
4: Ensure that the standards and requirements which were essential to the role of senior procurement manager were performed; and to
5: Satisfy the aim of meeting its needs for the work to be done in a timely and effective manner in order to meet the needs of the service.

54. The Tribunal found that these were legitimate aims.

55. The Equality and Human Rights Commission (EHRC) Code of Practice on Employment states at paragraph 5.12:

"It is for the employer to justify the treatment. They must produce evidence to support their assertion that it is justified and not rely on mere generalisation.

The aim should be legal, should not be discriminatory in itself, and must represent a real objective consideration. The health, welfare and safety of individuals may qualify as legitimate aims providing the risks are clearly specified and supported by evidence." (para 4.28)

56. The Tribunal found that the aims set out above by the Respondent, which were set out in its defence in the ET3 response form and in Mr Horbury's

witness statement, complied with the requirements set out above in the EHRC Code of Practice. Mr Horbury said:

"During his sickness absence his workload had been shared across the team and agency staff, which added to the burden on colleagues and led to the additional costs of agency staff. I had in mind the needs and obligations on the Trust to meet service needs, the requirement for Mr Edwards to complete his work to an appropriate standard, to appropriately manage finances, manage employee sickness absence and the knock-on effect that had on other staff, finances and the service provided, and health and safety in terms of the Trust's obligations to Mr Edwards to provide a safe system and place of work for him."

57. Clearly, as the Respondent submitted, these aims are interconnected and there was no real challenge to the legitimacy of the aims. The Tribunal found that they were legitimate aims within the meaning of section 15 Equality Act 2010 and the EHRC Code of Practice.

58. The test of proportionality was considered in Hardy & Hansons PLC v Lax [2005] ICR 1565 and is summarised in the EHRC Code of Practice at paragraphs 4.30 and 4.31. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. A Tribunal should conduct a proper evaluation of the discriminatory effect of the unfavourable treatment as against the employer's reasons for applying it, taking into account all relevant factors. Treatment is proportionate if it is an appropriate and necessary means of achieving a legitimate aim. But "necessary" does not mean the treatment is the only possible way of achieving the legitimate aim. It is sufficient that the same aim could not be achieved by less discriminatory means.

59. The Tribunal found that the dismissal was a proportionate means of achieving the legitimate aims. The relevant factors taken into account were the medical evidence of Dr O'Donnell, the absence of any contradictory medical evidence or any challenge to the medical opinions, the Claimant's request for his employment to be terminated by means of retirement on health grounds (as stated by his Trade Union representative and not challenged by the Claimant) and the Claimant having never stated that he felt able to return to his role or requested a second phased return to work. The Tribunal found that dismissal was the only means of achieving the legitimate aims. The medical evidence was clear and unequivocal.

60. A second phased return to work or redeployment, both of which the Claimant now says the Respondent should have offered, were both unequivocally ruled out by the medical advice.

61. A standard was set for the Claimant. It was clear that the standard was the ability, with the reasonable adjustments in place, to undertake the duties of his role as a Senior Procurement Manager. Unfortunately, even with the adjustments in place, he was unable to achieve the standard.

62. In his closing statement, the Claimant said:

"I am aware that there are other options that were open to the Capability Hearing held on 22 June 2017 and these alternative measures available to the Respondent at the time would have included:

a. Re-instate me with appropriate support for a reasonable period
b. Undertaking a properly constructed Phased Return to Work Trial at its earliest opportunity to allow me to have the chance to show his capability after his cataract operation
c. Review the re-deployment opportunities
d. Agree a compensation package for the detriment caused to be as a consequence of a decision to dismiss."

63. Although the request for a *"compensation package"* was not a relevant consideration, the other three matters had been dealt with by the medical evidence. No other means of achieving the legitimate aim was suggested by the Claimant or apparent to the Respondent. Nor could the Tribunal discern any other means of doing so.

64. The Tribunal found that the dismissal was a proportionate means of achieving legitimate aims. On the basis of the clear medical evidence, it was the only means of doing so.

65. The claim of Discrimination Arising from Disability therefore fails.

Unfair Dismissal – section 98 Employment Rights Act 1996

66. *Section 94. The right.*
(1) An employee has the right not to be unfairly dismissed by his employer.

67. *Section 98. General.*

(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or if more than one the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do.

(b) relates to the conduct of the employee, …

(3) In subsection 2(a) -

(a) "capability" in relation to an employee means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality …

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) 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, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

68. The Unfair Dismissal claim was set out in the case management order as follows.

- *The Claimant claims that the dismissal on grounds of capability was unfair because the Occupational Health statement and the phased return to work were not adequately assessed by the Respondent.*

69. In cases of ill-health capability, in East Lindsey District Council v Daubney [1977] ICR 566 the EAT stressed the importance of consultation and discovering the true medical position. It was said that unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill-health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. If employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done.

70. In Spencer v Paragon Wallpapers Ltd [1977] ICR 301 it was said that every case depends on its own circumstances. The basic question is whether, in all the circumstances, the employer can be expected to wait any longer, and if so, how much longer. Relevant circumstances include the nature of the illness, the likely length of the continuing absence, the need of the employer to have done the work which the employee was engaged to do.

71. The Tribunal must not substitute its own view for that of the employer, but must assess the employer's conduct against the range or reasonable responses.

72. The Tribunal found that the genuine reason for dismissal was capability due to long term ill health. There was no dispute that this was the reason for dismissal nor was there any suggestion that there was an ulterior motive. It was a substantively fair dismissal.

73. Additionally, the Tribunal found that the Respondent had followed a fair procedure.

74. The Claimant had been consulted in meetings with Mr Welch and with HR during the period June 2013 to June 2017, in particular at the meetings held on 29 June 2015 and 22 June 2017. At these particular meetings, the Claimant had been present, accompanied by his Trade Union representative and presented with the matters to be considered for the purpose of the meetings well in advance. He had every opportunity to respond to the management case put forward by Mr Welch at the meeting on 22 June 2017.

75. There was a reasonable medical investigation conducted into the Claimant's condition. The medical opinions were expressed in the summary e-mail of 6 July 2015 and in the occupational health report of Dr O'Donnell of 22 June 2017.

76. Contrary to the Claimant's assertions, the Tribunal found that there was adequate assessment of the Occupational Health statements and the outcome of the phased return to work.

77. Redeployment to other roles was also considered in both meetings but ruled out by the clear medical evidence that the Claimant was permanently incapable of undertaking his role or any other role at a similar level on redeployment.

78. The Tribunal also found that the Respondent had followed its own sickness absence management policy. In his appeal, the Claimant had claimed that three versions of the absence management procedure were applied in June 2013 and two versions of the absence management procedure applied at the hearing in June 2017. That was considered by Mr Dorsett at the appeal stage, and rejected it on the basis that the procedure followed was appropriate and the application of a different procedure would not have led to any significantly different outcome. The Tribunal accepted that changes between the different versions were not so material as would have resulted in a different outcome.

79. The Tribunal considered that the extensive delays in dealing with the Claimant's case by the Respondent were unfortunate and at times unexplained. The Respondent accepted that. Indeed, Mr Horbury ordered an investigation into the delay although the Tribunal was not provided with details of the investigation, nor was Mr Horbury at the time.

80. The Tribunal found however that the delay was caused by incompetence and misunderstandings and was not deliberate. The Claimant, apart from a short period, received full pay up until the date of his dismissal. He did not therefore suffer financially due to the delay, nor did the delay make the dismissal unfair.

81. The Tribunal found that the Respondent could not be expected to wait any longer for the Claimant to return. The Claimant had been absent on sick leave since June 2013. Except for the unsuccessful phased return to work in the period February to July 2015, he had been absent for 4 years. In the circumstances, in particular the extent and unequivocal nature of the medical evidence that the Claimant was permanently incapable of undertaking his role or any other role, even with specialised equipment, training and support, the dismissal was within the range of reasonable responses.

82. The Tribunal found that the dismissal was not unfair and this claim fails.

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Employment Judge Vowles

Date: ……8 July 2019

Sent to the parties on:

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For the Tribunal Office