EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104486/2018

Held in Aberdeen on 18 and 19 March, 14, 15 and 16 May and 21 June 2019

Employment Judge N M Hosie
Members Mrs S Taylor
Ms V Lockhart

Mr J Horn	**Claimant Represented by: Mr R Holland - Solicitor**
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Grampian Health Board	**Respondent Represented by: Mr A Hardman - Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the tribunal is that:-

1. the claimant was unfairly dismissed by the respondent;

2. the respondent unlawfully discriminated against the claimant (the relevant protected characteristic being disability), in terms of s.15 of the Equality Act 2010; and

3. the respondent unlawfully discriminated against the claimant (the relevant protected characteristic being disability), in terms of s.20 of the Equality Act 2010.

REASONS

Introduction

1. The claimant claimed that he was unfairly dismissed and that he was unlawfully discriminated against because of the protected characteristic of disability, in terms of s.15 and s. 20 of the Equality Act 2010 ("the 2010 Act"). The respondent admitted the dismissal but claimed that the reason was capability (ill health) and that it was fair. So far as the discrimination claim was concerned, the respondent accepted that the claimant was disabled in terms of the 2010 Act, but otherwise the claim was denied in its entirety.

The evidence

2. We first heard evidence from the claimant, Jeff Horn, and then from his husband, Nicholas Norman.

3. We then heard evidence on behalf of the respondent from:-

- Jinette Mathieson, Macmillan Cancer Nurse Consultant
- Gwynne Cromar, HR Manager
- Fiona Francey, Deputy Director of Acute Services
- Dr Carol Close, Occupational Health Physician

4. The parties lodged a joint bundle of documentary productions ("P") and a "Chronology of Events".

The facts

5. Having heard the evidence and considered the documentary productions, the tribunal was able to make the following findings in fact.

6. After hearing evidence, the parties' representatives were invited to make written submissions. In his written submissions, the respondent's Counsel identified four stages in the development of this case, culminating in the claimant's dismissal and subsequent and unsuccessful appeal. We decided to adopt the same approach as a framework for our findings in fact.

"Stage 1 – the period up until the claimant's return to work on 11 September 2017"

7. The claimant began his employment with the respondent on 5 November 1995. His written terms and conditions of employment were included with the documentary productions (P111-114). He was dismissed from his employment on the grounds of capability due to ill health, effective from 23 December 2017. He was given 12 weeks' payment in lieu of notice.

8. The claimant was initially employed in 1995 as a Staff Nurse in Haematology and General Medicine. He then became a Chemotherapy Nurse. On 2 March 2003, he commenced work as a Macmillan Clinical Nurse Specialist ("CNS") in Haematology. Latterly, he worked as a Band 8B CNS. His work duties included bone marrow transport coordination, managing his own case load of patients with complex cancer care needs and prescribing specialist medications, including complex chemotherapy schedules. In addition, the claimant was prominent in Cancer Care Nursing in Scotland, being chair of the East Scotland Haematology Group and presenting at numerous international conferences. In 2015, he gained a further MSc qualification.

Line management

9. When the claimant's line manager died in 2011, Neil McLaughlin was appointed as his line manager, on a temporary basis, until 2013.

10. After 2013, the claimant was without a line manager. The respondent maintained that Yvonne Wright was his line manager, but this was disputed by the claimant. He maintained, in evidence, that Ms Wright had explained at a group meeting that she was very busy with her workload. He took from that that she was too busy to line manage him. The claimant gave his evidence in a measured, consistent and convincing manner and in the unanimous view of the tribunal, presented as credible and reliable.

11. From 2012 onwards, there was a catalogue of staff shortages and staff changes. In particular, the Haematology Day Unit Charge Nurse, who had previously been supportive of the claimant, retired in 2014 and was replaced

by an individual with minimal haematology experience. This resulted in additional pressure on the claimant, being the most experienced and qualified nurse in the department.

12. At the beginning of 2016, two specialist Band 6 nurses were recruited to job share in the claimant's department. This had the effect of increasing his workload as he had to train and support them.

Jinette Mathieson

13. On 27 January 2016, Ms Mathieson sent an e-mail to the claimant and others to advise, amongst other things, that she was unable to clarify the line management arrangements for the CNS Group (P115).

14. Ms Mathieson had a "1–2–1" meeting with the claimant on 9 March 2016 (P117–118). She recorded that the claimant, *"is working at an advanced level, is practising autonomously and is self-directed".*

Job evaluation review

15. On 20 May 2016, Ms Mathieson sent an e-mail to the claimant and others in the CNS Group to advise that a "Job Evaluation Review" would be carried out as part of the so called "Agenda for Change" (P119).

Claimant's ill health

16. From early 2016, the claimant developed a depressive illness. He was stressed at work and felt he had no one to turn to. He was also struggling to manage the two Band 6 specialist nurses who had been recruited, as he had never line managed before. He worried about his employment and began to dread attending his workplace.

17. On 16 July 2016, therefore, he asked to be referred to Occupational Health ("OH") list for counselling (P121).

Sick leave

18. On 11 August 2016, the claimant began a period of long-term sickness absence. He had been on holiday. He couldn't face returning to work. He was signed off first with "stress at work".

Psychiatric report

19. There was included with the documentary productions a Psychiatric Report from Dr Deepa Tilak, Consultant Psychiatrist and Psychotherapist, which is dated 20 August 2018, after the claimant's dismissal (P452–467). The report contains details of the claimant's medical history. It was obtained in relation to the claimant's application to the SPPA for an ill-health pension.

20. On 25 August and 13 September 2016 , the claimant repeated his request for counselling (P123 and P126). However, OH would not accept a self-referral from the claimant. He asked Jinette Mathieson to refer him, therefore, which she did, on 26 October (P137–159).

Occupational health ("OH")

21. The claimant's OH Attendance Record was produced (P162–173).

22. Under the respondent's Attendance Management Policy, "long-term absence" is defined as a period of absence from work which has a duration of 21 calendar days, or more (P68). All employees who have been off sick for 21 days should be referred to OH (P69). However, although he had been signed off on 11 August, it was not until 5 December 2016 that the claimant had his first consultation by telephone with a "Nurse Manager" (P162/163).

23. He then had "face to face" consultations with the same Nurse on 14 December 2016 (P163/164 and P175) and 18 January 2017 (P164 and P191). The claimant was disappointed with these consultations. He did not feel he was getting anything out of them. No form of treatment was offered, and he continued to suffer from anxiety and stress related to his employment.

24. The claimant personally arranged and financed private medical treatment, therefore, with a Cognitive Behavioural Psychotherapist in order to provide

him with better support. He had several sessions, beginning in December 2016. While these were helpful, they did not fully treat his condition.

Meeting with Jinette Mathieson on 30 January 2017

25. The claimant accepted that by the end of 2016, Jinette Mathieson was his line manager. They exchanged e-mails and on 18 January 2017 , the claimant suggested that they meet as this had been recommended by his Psychotherapist who he had been seeing privately (P188 –190).

26. They met for a coffee on 30 January 2017. It was the first contact that the claimant had with Ms Mathieson since he was signed off on 11 August 2016. The claimant explained that he was seeing a Psychotherapist privately, but his mood remained low and he was worried about returning to work. He also told her that he had difficulty working with the Director of Cancer Services, Dr Jane Tighe. Ms Mathieson appeared sympathetic but did not suggest any actions on the part of the respondent. They agreed that he should visit the haematology department the following day which he did, but he e-mailed Ms Mathieson to advise that he had found it very stressful (P201).

Meeting with Jinette Mathieson on 2 May 2017

27. The claimant met Ms Mathieson again on 2 May. He completed a "Stress Assessment Questionnaire" at the meeting (P236). Amongst other things, they discussed a possible phased return. The claimant expressed his concern about having to line manage the two Band 6 nurses who were recruited at the beginning of 2016 and job shared. Ms Mathieson reported by e-mail to Julie Murray, Assistant HR Manager, later that day, that the meeting had not been particularly productive (P234).

OH review on 1 March 2017 (P164-166)

28. The claimant met Dr Carol Close, Occupational Health Physician. This was the first appointment the claimant had with a Doctor since he was signed off

on 11 August 2016. The following is an excerpt is from the "OH Attendance Record" :-

"Face to face

Absent since: August 2016

Described increasing work related stresses in the year prior to this. A close knit team with 3 members, one left and another very part time. No longer in any team as such, there are some other clinical nurse specialists but he never sees them. Works in clinics and on the ward.

Accepts that the clinical work is emotionally challenging but has always done this and feels he had no issues with coping with this aspect.

Knows he could not cope with this challenge at present.

Mood was 3-4/10 when he went off. Now 8/10 in the last 2 months. Dipped a bit this week with OHS appt and after a weekend away which he found challenging….

No real anxiety but feels sick at the thought of returning to work and also bumping into patients…."

29. Dr Close reported as follows to the respondent (P165):-

"I met with Mr Horn for a medical assessment on 1.3.17. Thank you for your recent update.

Mr Horn has been absent from work since August with difficulties which appear to be linked to perceived workplace stress. He has accessed a specialist service and I am in the process of obtaining a report. He has some ongoing difficulties but there has been an improvement in the last 6 weeks.

In my opinion Mr Horn is unfit for his post. It is possible that he could be fit to consider a return to work in the next 2-3 months. A return to work would include a work adjustment programme in terms of a phased increase in hours and possible adjustments. I would also advise that a meeting is arranged to discuss the perceived workplace stresses in terms of a lack of support and professional isolation in a challenging role. He is not currently fit to arrange this.

I will arrange a review in around 6 weeks' time when I would hope to have the specialist report. Please don't hesitate to contact me if you have any queries prior to this."

OH review on 12 April 2017 (P166)

30. The claimant met Dr Close again. He remained unfit to return to work, but it was hoped that he would be fit to return in 1-2 months.

OH review on 24 May 2017 (P166/167)

31. The claimant met Dr Close again. She reported to the respondent as follows:-

"In my opinion Mr Horn remains unfit for work. If his progress is maintained, it is likely that he will be fit to return to work in the next 6-8 weeks. His return to work will include a phased increase in hours and initial adjustments. I understand that a meeting took place to discuss the perceived workplace stresses. I would recommend that Mr Horn does no clinical work for the first 3 weeks of his return and that he has a catchup in training and changes made during his absence.

I will arrange a review in 6 weeks…"

OH review on 6 July 2017 (P167/168)

32. The claimant met Dr Close again. She suggested a phased return to work from 31 July. The claimant was happy with that. She reported to the respondent as follows:-

"Mr Horn continues to make good progress and is no longer under regular review with his specialist.

In my opinion Mr Horn is fit to consider a return to work in the week beginning 31 July 2017. Due to the length of his absence, I would recommend a phased increase in hours and adjustments".

33. The claimant sent an e-mail later that day to Ms Mathieson to advise her that he had a return to work date of 31 July. However, she recommended that he take this annual leave which he had accrued before he returned (P259 - 258). Dr Close had advised the claimant that he should return to work as soon as possible and that he should not take any more time off than was necessary. However, he did not feel strong enough to challenge Ms Mathieson's decision.

34. On 19 July, he sent an e-mail to Dr Close to advise her that he would not be returning to work until 11 September. When she replied, Dr Close expressed her disappointment (P297).

35. The claimant became increasingly anxious about the lack of a plan for his return. His husband, Nicholas Norman, from whom we also heard evidence at the tribunal hearing, and who also presented as credible and reliable, said there was a *"vacuum of silence".* Accordingly, as the claimant put it, he *"formulated his own plan"*, which he set out in an e-mail to Jinette Mathieson on 17 August (P300).

36. He was also still waiting to hear about the new uniform which he required for his return, despite having raised this in an e-mail which he sent to Jinette Mathieson on 10 August (P298).

37. In response to his request for a return to work plan, Ms Mathieson sent the claimant an e-mail on 21 August (P304). The following is an excerpt:-

"We anticipate that there will be changes to the structure of your day to day job as the haematology nursing service has struggled with significant sickness of all team members over recent months, meaning that the previous way of working has been identified as not sustainable." This caused the claimant further concern as it seemed he would be returning to a situation which he considered to be *"worse"* than when he left.

38. The claimant's husband, Nicholas Norman, became increasingly concerned about what he perceived to be a lack of support from the respondent, the failure to put in place a return to work plan and the adverse effect this was having on the claimant's health. He expressed his concerns in an e-mail which he sent to Dr Close and Jinette Mathieson on 21 August (P303).

39. He was also concerned at the terms of Ms Mathieson's e-mail of 21 August (P304) which in his view, *"painted a picture of coming back to a department in chaos".*

40. Ms Mathieson replied later that day by e-mail in which she apologised for any upset caused and explained that was not her intention (P306).

41. Mr Norman sent an e-mail to Ms Mathieson later that day. He expressed concern about the claimant's ability to return to work on 13 September, as planned (P306).

OH review on 4 September 2017 (P168/169)

42. The claimant had a telephone review with Dr Close who advised that he would be fit to consider a return to work in the week commencing 11 September (p168/169).

43. Dr Close reported to the respondent as follows (P322):-

"I spoke with Mr Horn by telephone for a review on 4.9.17. Mr Horn remains absent from work, having been advised to use up annual leave within the last 4 weeks. This has led to a delay in his return which in my opinion has not been beneficial for his health.

Mr Horn describes an increase in his difficulties which appear to be mainly linked with the recent communication over his return to work. I have advised him to seek a GP review.

In my opinion, Mr Horn is fit to consider a return to work following his annual leave, as planned. Due to the length of his absence and exacerbation recently, I would recommend a slower phased increase in hours and adjustments. I would advise working 2x3 hour sessions on week 1, increasing by one 3 hour sessions each week, aiming to return to full time hours over a longer period. I would recommend that Mr Horn does no clinical work until his next review. He should have a catch up in training and changes made during his absence. I would recommend that a meeting is arranged following his return to work to discuss a plan for return to clinical work, bearing in mind the outcome of the discussion on perceived workplace stresses.

I will arrange a review in 3 weeks."

"Stage 2 – the period from 11 September 2017 until the claimant again went off sick on 13 November 2017"

44. The claimant returned to work on 13 September 2017. He had been off since 11 August 2016. He was at work for around 3 hours. Ms Mathieson was not at work that day and he did not hear from HR.

Return to work meeting on 15 September 2017.

45. Notes of that meeting were produced (P330/331). We were satisfied that they were reasonably accurate. Present at the meeting along with the claimant were Jinette Mathieson and Julie Murray, HR.

46. We did not hear evidence from Julie Murray at the tribunal hearing. We accepted the claimant's evidence that she was unhappy with the "lengthy" phased return which had been proposed by Dr Close which in her view was not normal. However, Ms Mathieson intervened, and it was agreed that there would be a phased return, in accordance with what Dr Close had proposed.

47. While we were satisfied that it was the claimant's intention to get back to work, he was concerned about whether he would be able to do so and that was why he *"enquired about the length of resignation"* if he felt he could no longer carry out the role. The Notes record the following exchange:-

> *"JH enquired about length of resignation if he felt that he could no longer carry out the role. JMu discussed whether resignation would be supported by OHS under medical grounds, but JH did not believe this would be the case. JMu suggested redeployment as an alternative but explained this would be at the job grade rather than as a protected salary agreement. JMu would check and let JH know whether he needed to give one month's notice, or, because of the seniority of his grade, 3 months' notice."*

Meeting with Jinette Mathieson on 18 September

48. A Note of that meeting was produced (P331). The main purpose of the meeting was to discuss *"work procedures".*

49. On 28 September, the claimant sent an e-mail to Ms Mathieson in which he suggested, amongst other things, that his phased return be, *"speeded up a little"* (P334). He explained at the tribunal hearing that Julie Murray's disapproval of the length of the phased return had played on his mind. Also, by then, he was feeling guilty that his colleagues were working so hard and he found it very difficult to leave patients he was seeing after 3 hours. He wanted to contribute more. He said this in evidence:-

"I began to feel more part of the team, certainly when I started seeing patients again. As a Macmillan nurse, I was seeing patients I was seeing before. Things were starting to look up. I felt very different. It required a lot of effort to maintain my composure and do the job properly. I felt nowhere near the way I had done before I was signed off but I was back at work and contributing."

OH review on 29 September 2017 (P169/170)

50. The claimant had a meeting with Dr Close. The following are excerpts from her notes:-

"Returned to work: 3 weeks

Working 2.5 days next week

Feeling much better than at the last review.

Return to work has gone well. Feeling very supported with a lot of good feedback.

Much happier with manager (Jinette Mathieson) and now feels she is supportive. Met with HR and manager to discuss return. HR felt too long phased hours, manager wished to go with OHS advice. Manager has assessed the level of work compared to specialist haematology nurses in other areas and sees NHSG as very high.

Cancer work will be divided up within the team and there will be a team leader.

Not in place at present due to staff absences. Funding for another nurse.

Feels very positive about this moving forward.

Still doesn't see himself staying there until he retires but much happier.

Mood has picked up.

Sleeping still poor but this is the norm for him – energy levels are fine.

Concentration good.

Motivation still picking up – not back to running yet.

Has GP appointment booked.

Med unchanged, not done anything for mood.

Partner is supportive, no personal stresses although grandfather died, elderly with dementia.

Keen to increase hours and start clinical work. Feels useless at work this week and wants to get going.

Wants to take two weeks annual leave at the end of the month – has lots to use and feels he didn't benefit from his last holiday as the return to work was hanging over him.

Looks very well, bright.

Imp – return to work has gone well, fit to increase hours in clinical work.

Ongoing potential stresses but feels supported now.

Plan – review 8 weeks, consents to report."

51. Dr Close reported as follows to the respondent following that review (P339):-

"I met with Mr Horn for a review on 29.9.17. He returned to work 3 weeks ago on a work adjustment programme.

Mr Horn describes a significant improvement in his difficulties since the last review. He has a GP review soon. He reports feeling supported at work.

In my opinion Mr Horn is fit to continue on his work adjustment programme. I would recommend that he works 3 days on the week beginning 9.10.17, increasing by 1 day weekly thereafter. He is fit for clinical work. I understand that there is a plan to divide up some areas of work which I would view as supportive.

I will arrange a review in six weeks."

Anonymous complaint

52. On or around 29 September 2017, Caroline Hiscox, Assistant Director of Nursing, received an anonymous complaint that, amongst other things, the claimant had been working when he was signed off due to ill health and that there was *"inappropriate behaviour outside of work".* Ms Hiscox referred the matter to Jinette Mathieson. She, in turn, took advice from HR and was advised that as this was an allegation of *"fraud",* it had to be investigated. Having taken advice from HR, Ms Mathieson reported to Ms Hiscox by e-mail on 29 September (P341).

53. Julie Murray, Assistant HR Manager, suggested an informal meeting with the claimant, *"to discuss the allegations and get his side of the story"* (P342). Accordingly, on 12 October, Ms Mathieson went into the claimant's room and

told him that there had been an anonymous complaint to the Assistant Director of Nursing that he had been working whilst on sick leave. She told him that she didn't believe it. The claimant denied the allegation. Ms Mathieson told the claimant that she didn't have any more information. She had spoken to HR who wanted to set up a meeting a week later.

54. By this time, the claimant was back working four full days each week and was making good progress. He was very upset, visibly so. He said in evidence that he was, *"devastated, completely in shock. After everything, it was the worst possible thing to bear. I had 22 years' unblemished service. I took pride in my professionalism. It still upsets me now."*

55. Later that day, the claimant sent an e-mail to Ms Mathieson (P343). The following are excerpts:-

"Thank you for seeing me today and for your support.

Clearly at any time this situation would be very upsetting but having only recently returned from a year long episode of sick-leave as a result of occupational burnout, I find this very distressing.

I intended to send an e-mail directly, but think it might be better if you can relate this up the management chain for me. I feel that to wait a week for an HR meeting is rather a long time given how challenging my return to work has been and how fragile recovery can feel.

As we discussed earlier, I can categorially confirm that there is no truth in the allegation that I had been undertaking work whilst on sick leave.

The only thing that I can think has caused confusion is that I attended an LGBT festival where myself and a small group of friends participated in a charitable fund-raising event. I contribute to the community in this way several times a year and have done so for many years. It is not work.

I can think of no other possible reason that someone would suggest that I have been undertaking any form of work.

For the most part of my sick-leave, I had been fairly socially isolated. I actually undertook this trip on the express advice of my (privately funded) psychotherapist who advised me that isolating oneself from normal social situations was mal-productive and damaging to one's mental health in general. I now find myself doubting the advice regarding trying to continue with aspects of one's life normally when working life is disintegrating.

This is clearly a very upsetting situation and I have to say that it feels rather malicious in nature. However, I fully understand that such allegations have to

be taken seriously and investigated, but I am sure that you understand the enormity of the situation at a very difficult time.

I realise that there is no way round the week long wait to speak with HR, but I would appreciate if you can relay my thoughts to senior management in the meantime. I have dedicated my career to NHS Grampian and have contributed greatly over many years, to my specialty. For this to be in doubt is deeply unpleasant.

Thank you for your continued support."

56. Ms Mathieson replied later that evening by e-mail as follows (P345):-

"I appreciate you must be in complete turmoil. I will forward your e-mail as requested. I believe the usual protocol is 7 days notice for any meeting, which is why Thursday, with the added complication of me being on leave, so that is as soon as it could be done.

Take care."

Meeting on 19 October 2017

57. The claimant met Julie Murray and Jinette Mathieson. Ms Murray asked the claimant if he had been working when on sick leave. He said, *"absolutely not".* Ms Murray then said, *"well that's the end of the matter*".

58. The claimant was due to go on holiday and, as he put it, he, *"pleaded with them to get a response".* Later that day, Julie Murray sent an e-mail to Jinette Mathieson to advise that, *"there is no evidence for us to take this allegation any further therefore the matter is closed".* She asked her to advise the claimant and to *"acknowledge that we are aware this has been a very distressing time for him."* Ms Mathieson forwarded Ms Murray's e-mail to the claimant and confirmed to him that, *"the matter is now closed"* (P351).

59. The claimant then went on holiday, but his mood was very low. The allegation of misconduct had greatly distressed him, particularly as he was not provided with details of the complaint or who had made it. He speculated whether it might have been a colleague. He felt that the respondent had been *"callous"* in the manner in which they had dealt with the matter. He said in evidence

at the tribunal hearing that, *"even though I was told it wouldn't be taken further, I was absolutely devastated by the complaint and felt deflated. I was back to rock bottom. I was struggling to cope. I was thinking about it constantly. The closer I got to going back to work, the more distressing it became."*

"Stage 3 – the period from 13 November to termination of employment on 13 December 2017"

60. The claimant was able to return to work in early November, but he found it very difficult to focus. On 13 November, after being back for only a week he sent the following e-mail to Jinette Mathieson (P352):-

"I am sorry but I can't face coming into work today. Despite your help, which I have appreciated, it isn't working out for me. I am seeing Occupational Health on Thursday but I think the outcome will be that I have to resign."

OH review on 16 November 2017 (P170/171)

61. The claimant had a meeting with Dr Close. The following are excerpts from her notes:-

"Absent from work this week

Struggling over the previous weeks – back at work around 9 weeks and has felt it was a struggle from the start but hoped he would feel better with it.

Not sleeping, crying all the time this week. Unable to focus on patients. Just feels he can no longer do the job – agrees he feels burnt out. Has focused all his career on patients and feels he can no longer do it. Very upset about it as he thought the patient contact would be what would make things better.

Thinking of just resigning.

Wants to let the dept know asap so they can look for someone to fill his post. Not sure how much sick pay he still has left.

NHS 22 years – feels he can no longer work in the NHS, can't contemplate staying.

Weepy++ throughout when discussing this.

Discussed options – needs to work for financial reasons.

Advised not to resign.

Does not feel he can even contemplate redeployment.

Discussed admin roles with no patient contact. Weepy++ at this. Pointed out that he will be looking for something else anyway which may not involve patient contact

Just feels he can't stay in the NHS.

Making appt with GP - has appt with psychologist next week. Not on anti-depressants, has used CBT/counselling instead.

Discussed options – I have encouraged him not to rule out redeployment.

Advised re termination of contract on medical grounds rather than resigning.

Advised to seek advice/figures on pension as application for early release may be an option. I have asked him to speak to her (his Psychotherapist) about a report – she wasn't happy to do this but advised that I would need this if we consider SPPA options. Consent obtained today for this and he will get back to me after his appt.

O/E weekly, anxious, flat, poor eye contact."

62. Dr Close then reported to the respondent as follows (P355):-

"I met with Mr Horn for a review on 16.11.17. He has been absent this week with an exacerbation of the difficulties he was experiencing during his last absence. He is seeking a review with his GP and specialist. In my opinion the exacerbation is due to his return to the workplace. He reports feeling supported in his return.

In my opinion Mr Horn is unfit for his substantive post. It is my opinion that he will not be fit to return to this post. We discussed possible ways forward including redeployment and termination of contract on medical grounds. In my opinion he is currently unfit for redeployment. It is not clear at present if he will be fit to consider this. We have also discussed seeking advice on an application for early release of pension.

I will arrange a review in around 4 weeks to reassess fitness for redeployment. Please don't hesitate to contact me if you have any queries."

63. The claimant went to see his GP on 17 November. He was signed off work for 42 days due to *"stress at work"* (P357).

64. On 12 December, Ms Mathieson sent an e-mail to the claimant to advise that HR had asked her to arrange a meeting, *"to discuss your options"*, following his next OH review which had been arranged for 20 December (P366).

65. On 14 December, Julie Murray sent an e-mail to the claimant to confirm that, as agreed, the meeting would be held on 21 December (P369).

66. At that stage, the claimant did not know what the *"options"* Ms Mathieson had referred to were. Nor did he anticipate that the meeting would be a formal one. He did not know that the termination of his employment was one of the options.

67. However, Ms Murray sent a letter to the claimant dated 14 December (P372) in which she advised that:-

"The purpose of this meeting is to discuss the advice from our Occupational Health Service that your health will not recover sufficiently to allow you to return to work in your substantive post in the future. As one of the potential outcomes of this meeting is the termination of your contract of employment, we are legally bound to invite you to meet with us to discuss your situation.

You have the right to be accompanied by an officer from your Trade Union/Staff Organisation or Professional Organisation, or by a colleague, friend or relative not acting in a professional capacity."

68. The claimant did not receive the letter until 18 December.

OH review on 20 December 2017 (P171-173)

69. The claimant attended this meeting with Dr Close along with his husband Nick Norman (P171 – 173).

70. Dr Close reported to the respondent as follows (P374):-

"I met with Mr Horn for a review on 20.12.17. He remains absent from work due to an exacerbation of the difficulties he was experiencing during his last absence. He is seeking a review with his GP and specialist. In my opinion, his exacerbation is due to his return to the workplace. He reports having felt supported in his return by his manager.

In my opinion Mr Horn remains unfit for his substantive post. It is my opinion that he will not be fit to return to this post. We discussed possible ways forward. In my opinion he remains unfit for redeployment and I do not have a timescale for this to change. I would support termination of contract on medical grounds. Mr Horn is considering an application for early release of pension.

I have not arranged any review. I will arrange for completion of paperwork once I have received the relevant reports."

71. The claimant described this meeting with Dr Close as, *"a bit of a blur".*

72. The respondent endeavoured to send the report to the claimant by e-mail on 20 December, but it was sent to his work e-mail address and he did not receive it prior to the meeting on 21 December.

Meeting on 21 December 2017

73. The claimant attended the meeting with Julie Murray, assistant HR Manager, and Jinette Mathieson. He was accompanied by his husband.

74. We did not hear evidence from Julie Murray at the tribunal hearing but, as we recorded, the claimant and his husband, Nick Norman, both presented as credible and reliable. Their evidence about what transpired at the meeting was consistent and corroborative to a degree. We made our findings in fact, therefore, as to what had transpired at the meeting, primarily on the basis of their evidence.

75. The meeting was conducted by Julie Murray. It lasted less than 10 minutes. No minutes were taken.

76. At the outset, Ms Murray asked if the claimant had seen a copy of the OH report. When he said that he had not, she handed him a copy and the claimant and his husband read it. It took them around a minute to do so.

77. Ms Murray then said that as the recommendation from Dr Close was to terminate the claimant's employment on health grounds, that's what she was going to do.

78. The claimant said in evidence at the tribunal hearing that he was, *"completely shocked, gobsmacked".* He had expected some discussion. Mr Norman said in evidence at the tribunal hearing that the decision to dismiss the claimant, *"was clearly premeditated".*

79. At one stage, the claimant asked about the early release of his pension and Ms Murray replied, *"that's nothing to do with us".* Ms Norman also said to her that they had not had sufficient time to consider the OH Report.

80. Mr Norman said that there were many employees at NHS Grampian on *"long term sick".* Ms Murray responded that was not relevant and told him that he was just there to *"support"* the claimant .

Dismissal

81. Ms Murray wrote to the claimant to confirm his dismissal *"on the grounds of ill health"* (P379/380). Her letter was dated 21 December, the same date as the meeting.

"Stage 4 – the appeal, the outcome of the application for early payment of pension and subsequent psychiatric assessment of the claimant"

Appeal

82. On 5 January, the claimant intimated an appeal against his dismissal (P385):-

"I refer to my meeting with Julie Murray on 21 December 2017, together with a follow up letter of the same date, in which I was dismissed on the grounds of ill health. Please accept this correspondence as notification of my intention to appeal this decision. I am appealing on the following grounds:

1. *I was not given fair notice of, nor time to prepare for, the meeting in the morning of 21 December 2017 following the Occupational Health review, in the afternoon of 20 December 2017.*

2. *The outcome of the meeting on 21 December 2017 was premeditated. No other possibilities were explored, particularly the possibility of me taking ill health retirement prior to dismissal. This is something referred to in the Occupational Health report.*

3. *The decision to dismiss me on the grounds of ill health was premature. I had a contractual entitlement to a further two months' sick pay.*

4. *Throughout my period of absence, I have received next to no support from HR or NHS Grampian in general."*

Appeal hearing on 7 March 2018

83. Prior to the appeal hearing, the claimant submitted "Expanded Grounds of Appeal" (P409-411) along with a "Chronology/Statement of Events" (P416-418).

84. The hearing was chaired by Fiona Francey, Deputy Director of Acute Services. The claimant was accompanied by Mr Norman.

85. Notes of the meeting were produced (P440-449). While not *verbatim*, we were satisfied that they were reasonably accurate.

86. There was an issue at the outset when Mr Norman advised Ms Francey and Ms Cromar that not only would he be representing the claimant, he would also be a witness. The Note records that, *"the panel have reluctantly agreed that NN as JH's husband can present the staff side case on his behalf."*

87. The claimant had been upset prior to the commencement of the hearing and Ms Francey and Ms Cromar expressed reservations about proceeding. However, the claimant and Mr Norman wished to proceed.

88. The Notes record that Mr Norman said this on behalf of the claimant by way of conclusion (P448):-

"In summary, NHSG have taken a keen, competent and highly qualified nurse and ruined him by failing in their duty of care. His career is terminated and he has been left destitute with no income and still suffering mental health issues that have arisen solely due to the workplace and through no fault of his own. The lack of any interest or care from NHSG after he went sick was a major factor in worsening JH's illness. The attitude of NHSG seems to be that this is a normal situation. They have thousands of workers on long-term sick, I know because I did a freedom of information request but have no idea how many are suffering from workplace stress, and nobody seems to care.

Finally, JH takes great exception to HR repeatedly sending him the employee conduct policy. The policy relates only to matters of employee conduct and discipline and does not cover ill health termination, with the exception of Appendix 8 that does not cover the appeals procedure. Two recent letters, made reference to Section 6 and Appendix 3 which relate to disciplinary hearings and allegations of misconduct and gross misconduct. This sends a message that HR consider JH's conduct and discipline to somehow be at fault. Each time this document was sent, he finds it upsetting, intimidating, offensive and damaging to his mental health. It is just another illustration of

how NHSG seem to have no idea how their conduct affects employees in difficulty. It seems extraordinary that NHSG does not have a separate policy regarding termination due to ill health, including the appeals procedure. JM has been supportive and it is nasty that she has been put in a position against us.

GC (Gwynne Cromar, HR manager) – she is the line manager.

NN – you can see that she is in a supportive relationship, it is difficult for JM and I feel sorry for JM."

89. Ms Mathieson concluded by summarising the "management case" as follows (P448/449):

"In conclusion I believe that the decision to terminate JH's contract on the grounds of ill health was a fair one and was based on the advice of the Occupational Health Service that he would not be fit to return to his substantive post nor was he fit for redeployment with no timescale for this to change. OHS were in support of termination of contract on medical grounds. OHS also advised that JH was considering an application for early release of pension.

To be eligible to apply for his ill health pension JH would require the support of either his OHS physician or other medical specialist. The decision on whether he is thereafter awarded his pension early is one for the Scottish Public Pension Agency (SPPA) on the advice of their medical advisor. There would still be a requirement for NHSG to terminate JH's employment contract as I do not believe there was any alternative option in this case".

90. The final paragraph in the Notes was as follows (P449):

"The panel would like it to be noted that due to JH's mental health, they did not feel comfortable in proceeding with the appeal hearing, however it was insisted by JH and NN that the hearing continued. Throughout proceedings, the panel became aware that JH was a member of the RCN and it also became clear that NN was not aware of the process of an appeal hearing."

Outcome of the appeal

91. On 8 March, Ms Francey wrote to the claimant to advise that his appeal had not been upheld (P450/451). The following are excerpts from her letter:-

"Decision making rationale of the appeal panel included the following, numbered in accordance with the numbering within your grounds for appeal document:

1. *The panel heard a letter was sent to you from Mrs Murray, Asst HR Manager, dated 14 December 2017, inviting you to a meeting on 21 December 2017. The purpose of this meeting was clearly stated in the letter. You did not request for this meeting to be rescheduled, nor did you or your representative approach Mrs Murray for clarity on the content of the letter, prior to the meeting.*

2. *The panel did not hear any evidence to support your view that the outcome of the meeting was premeditated. Any decision to grant you early release of pension on the grounds of ill health is made by the Scottish Public Pensions Agency; this would not impact on any decision relating to your employment.*

3. *Management responded to this point in their case, advising you to refer to Section 14.17 (Appendix 4) of Agenda for Change Terms and Conditions of Service which clearly shows this was not in breach of your terms and conditions.*

4. *You confirmed you had received good support from your line manager and, once into the OHS system, had been supported by OHS. The panel recognise that a referral to the OHS service was later than it should have been and wish to apologise to you for this; this will also be highlighted to the line manager for future cases.*

It was noted that the gap between the OHS outcome and the decision to terminate your contract on the grounds of ill health taking the advice from OHS was very short and that this had caused you further distress. This finding however did not alter the outcome in terms of process."

Claimant's submissions

92. The claimant's solicitor made written submissions. These are referred to for their terms.

The Claim

93. He confirmed that the claim comprised complaints of unfair dismissal in terms of s.94(1) of the Employment Rights Act 1996 ("the 1996 Act"); unlawful discrimination in terms of s.15 of the Equality Act 2010 ("the 2010 Act"); and ss.20 and 21 of the 2010 Act.

Unfair Dismissal

94. He did not accept that the respondent had established that capability, an admissible reason, was the reason for the claimant's dismissal. He maintained the respondent demonstrated *"a complete lack of knowledge of*

Mr Horn's condition". He suggested that the claimant's alleged misconduct when he was signed off sick may have been the reason.

95. In support of his submissions in respect of this complaint he referred to the following cases:-

Iceland Frozen Foods Ltd v Jones [1983] ICR 17

BS v Dundee City Council [2013] CSIH 91

DB Schenker Rail UK Ltd v Doolan [2010] UKEAT/0053/09

McAdie v Royal Bank of Scotland [2007] EWCA Civ 806

First West Yorkshire Ltd T/A First Leeds v Haigh [2008] IRLR 182

Spencer v Paragon Wallpapers Ltd [1976] IRLR 373

96. Having set out the relevant law, the claimant's solicitor then addressed, *"key aspects of fairness in this case"* and the issue of reasonableness in terms of s. 98(4) of the 1996 Act. He submitted that the dismissal was both substantively and procedurally unfair.

"The medical position"

97. The claimant's solicitor submitted that the onus was on the respondent, *"to take reasonable steps to ascertain the position rather than the onus being on the employee to volunteer medical information (beyond the duty to submit sick notes)".* He also submitted, with reference to **Schenker Rail**, that the decision to dismiss is a managerial one, not a medical one. He submitted that, *"in this case the respondent appeared to absolve themselves of any responsibility in decision making and relied solely on the OH Report. Dr Close's evidence was that she agreed the decision to ultimately dismiss was not one for her".*

"Consulting with the employee"

98. The claimant's solicitor stressed the importance of consultation, with reference, in particular, to ***East Lindsey District Council*** (para 572**)** and ***Spencer***. He submitted that the respondent had failed to properly consult with Mr Horn *"through the 16 month period".*

"Relevance of sick pay entitlement"

99. The claimant's solicitor submitted that this was a factor to take into account. It was not disputed that when he was dismissed the claimant still had 3 weeks' full pay and 5 weeks' half pay left.

"Length of service"

100. The claimant's solicitor reminded the Tribunal that the claimant had 22 years' unblemished service and submitted that this required to be weighed in the balance. He submitted that, *"Gwynne Cromar was wrong to state in evidence that record at work is not a factor".*

"Ill-health caused by employer"

101. The claimant's solicitor accepted, with reference to ***McAdie***, that an employer could fairly dismiss an employee for ill-health capability, despite the fact that the employee's stress related illness was due to the conduct of the employer. However, if the employer is responsible for the employee's ill-health, it requires to make more effort to find employment for the employee. In this regard the solicitor referred the Tribunal to:-

- *"Evidence of lack of line management after 2013*
- *Evidence of unfinished appraisal*
- *Evidence of Jeff Horn on the effect of workload - reasonable to attribute illness to employer's omissions"*

"Size of the employer"

102. The claimant's solicitor submitted with reference to, ***BS***, that the Tribunal was required to take into account the size and resources of the employer. The NHS is the largest employer in Scotland and Grampian Health Board is one of the largest employers in the North East.

"Availability of ill-health benefits/options"

103. The claimant's solicitor submitted, with reference to **First West Yorkshire Ltd**, *"that it is "unreasonable and thus unfair for an employer to dismiss an employee for long term ill-health BEFORE first considering whether he or she*

was entitled to ill-health retirement". He submitted that the case is relied upon *"in respect of the respondent's duties to explore other options".*

"Substantively unfair"

104. The claimant's solicitor then detailed a number of aspects of the evidence in support of his submission that the claimant's dismissal was substantively unfair: *"no substantial discussion on re-deployment; no request from line manager for OH to consider reasonable adjustments or consideration of the Equality Act; no discussion at all at the meeting on 21 December; no meeting by Jinette Mathieson or HR with claimant on re-deployment process; the appeal did not cure the unfairness; the respondent, never got to the bottom of his condition; most of all, no consultation or taking views of the employee as to what would be done; why no meeting after second absence?; respondent not interested in re-scheduling; no recognition of 22 years' service or previous good behaviour; no actual belief in incapacity as did not have facts to form that belief."*

"Procedurally unfair"

105. The claimant's solicitor then detailed a number of aspects of the evidence which he submitted demonstrated that the dismissal was not only substantively unfair but also procedurally unfair.

"Other unfairness – ill-health"

106. The claimant's solicitor contended that, *"the respondent's failure to assist or consider ill-health retirement as opposed to ill-health dismissal (they are two different things) was a material factor in the unfairness of the decision".* He relied on ***First West Yorkshire*** in support of his submission.

"Other unfairness – need to fill the job – succession/cannot wait any longer"

107. There was no urgent need to fill the claimant's post; no one was recruited until the summer of 2018, some 7 months later; further, "two Grade 6's had already been appointed. It was submitted that it was "*unfair not to wait longer".*

"Band of reasonable responses"

108. It was submitted that, *"the respondent failed the **Iceland** test. It was not reasonable to dismiss an employee of 22 years' service, 5 weeks after he was back at work."*

"Summary of case of unfair dismissal"

109. *"The claimant would contest that on the facts as noted above and applied to the law the claimant has been both substantively and procedurally unfairly dismissed. The employer has shown no evidence of intention to comply with their duties or policies. The procedures that they had in place at the time were insufficient to ensure that the claimant was aware of both (a) the procedure that he faced in the process, and (b) the consequences and outcome. It appeared that the respondents relied solely on the occupational health conclusion of 20 December without any thought as to whether there were alternatives or whether the claimant may have a different perspective. Even the occupational health report itself was flawed, on the basis that Dr Close submitted that no specific instructions or information had been given to her on re-deployment factors and/or opportunities. It was clear from the claimant's evidence that he had no clear idea of what re-deployment entailed and what the process was. Simply to say that re-deployment was not an option is fundamentally unfair and closed the door on Mr Horn's career.*

In all the circumstances, we would submit that the claimant has been unfairly dismissed under section 98 of ERA and a finding should be made in his favour".

Disability discrimination

110. At an early stage in the claim, the respondent conceded that the claimant was disabled in terms of the 2010 Act.

"Knowledge"

111. Having regard to the medical evidence the respondent had, the respondent's Attendance Management Policy; the exchange of correspondence between the claimant and Jinette Mathieson on 12 December 2016 when the claimant referred to "Occupational Burn-out" (P177); and the respondent's size and administrative resources, it was submitted that the respondent should have been aware that the claimant was disabled by, *"no later than September 2016 and at the very latest by December 2016".* The claimant's solicitor submitted

that, *"the EHRC Code states that employers must do 'all they can be reasonably expected to do'. In the claimant's view they did next to nothing."*

Reasonable adjustments in terms of ss. 20/21

"Relationship with discrimination arising from disability"

112. The claimant's solicitor submitted that the complaints of a failure to make reasonable adjustments in terms of s.20 and 21 of the 2010 Act and discrimination arising from disability in terms of s.15, are *"inextricably linked and both continued up to an including the dismissal meeting on 21/12 and the appeal".*

113. The claimant's solicitor referred to the EHRC Code, *"which states that if an employer has failed to make a reasonable adjustment which may have prevented or minimised the unfavourable treatment, it will be very difficult to show later that the treatment was "objectively justified" for the purposes of defending discrimination arising from a disability claim".*

"When does the reasonable adjustment duty arise?"

114. In support of his submission in this regard, the claimant's solicitor referred to ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] EWCA Civ 640.

115. He submitted that the duty arose as soon as the respondent, "***was able*** *to take steps to avoid the relevant disadvantage to the employee".* In the present case, if the respondent had followed their Policies, they, *"should have been able to do that in September 2016, all the way to March 2018."*

116. *He also submitted that:-*

"….there is clear evidence from Jinette Mathieson and Gwynne Cromar that at no point did the respondents even contemplate asking whether or not Mr Horn was disabled or even asking occupational health about possible adjustments and duties under the Equality Act. As Mr Horn said, "at no point in these proceedings was I asked if I was disabled." They cannot rely on ignorance that the duty had been triggered as they were the ones who did not

ask. In our view, the adjustments that Mr Horn relied upon and the PCP that caused the adjustment to arise were not ones that were to take place in the future but adjustments that could have been dealt with there and then."

Comparators

117. The claimant's solicitor submitted, with reference to ***Fareham College Corporation v Walters*** [2009] IRLR 991, that a reasonable adjustment claim requires only a general comparative exercise, rather than an individual like for like comparison. It was submitted that, *"it would be reasonable to compare Mr Horn's treatment with that of a group of non-disabled employees, which should be clearly discernible from the PCP applied to the employer."*

118. He submitted, for a number of evidential reasons, that the respondent should have known about the "substantial disadvantage" suffered by the claimant.

"What incidents are relied upon by the claimant in respect of the respondent's failure to make reasonable adjustments?"

119. The claimant's solicitor relied upon four (and possibly five) *"specific incidents"* where a PCP of the respondent had put the claimant, *"at a substantial disadvantage compared to his colleagues who were in the same circumstances but not disabled".*

The first PCP was "the respondent's application of their attendance management policy & OH referral policy at 5a and 5b"

120. The claimant's solicitor referred to Appendix 5 (b) of the respondent's Attendance Management Policy (P69) which states that all employees should be referred within 21 days of the commencement of their absence to OH. However, this was not done in the present case. It was further submitted that due to the nature of the claimant's illness this affected him more than most. As a consequence, the *"substantial disadvantage"* was a deterioration in his health.

121. It was submitted that, *"the respondents should have had knowledge by mid-September 2016 that Mr Horn had a depressive order condition. That should*

have alerted them to the requirement for an earlier OH referral, not a later one, and the failure to make timeous referral or an earlier referral than November was a PCP that substantially disadvantaged Mr Horn in respect of his health. A reasonable adjustment should be for earlier referral in cases where stress is cited by the employer."

"The second PCP which placed Mr Horn at a substantial disadvantage was the practice or policy of NHS Grampian HR Department to require employees coming back from long term sickness to take their accrued annual leave prior to starting their return to work"

122. There was evidence from both the claimant and his husband of his "suffering" during August 2017. There was evidence from Dr Close that, *"the delay would not benefit him medically and would lead to decline…"*

123. In the claimant's submission, this was a PCP that caused substantial disadvantage to Mr Horn. A non-disabled employee would not have suffered the same deterioration in health. Sitting at home waiting caused increased anxiety. *"A reasonable adjustment would have been to allow Jeff Horn to carry leave."*

"The third PCP relied upon was the practice or policy by Grampian HR Department to pursue anonymous complaints despite not having any detail of what happened and to make it a 2 step formal process"

124. There was evidence of the distress this caused the claimant. It was submitted that a reasonable adjustment would have been not to hold a formal meeting after putting the allegation on 12 October. The second meeting, *"added nothing*".

"The fourth PCP relied upon was the practice or policy by NHS Grampian to hold an ill health capability dismissal meeting either at the same time or shortly in proximity to an occupational health report recommending the claimant is no longer fit to return to work (20 & 21 December 2017)"

125. There was evidence from the claimant and Nick Norman that the meeting only lasted "2 or 3 minutes"; Ms Mathieson could not remember if the termination was prior to any discussion; no other witness for the respondent was available; the substantial disadvantage was the claimant's dismissal. It was submitted that a reasonable adjustment would have been to, *"extend the meeting or adjourn to a later date".*

"The fifth PCP is the practice and procedure applied to ill health dismissal appeals by NHS Grampian, in this case 7/3/18"

126. It was agreed that Fiona Francey who chaired the meeting could be *"intimidating"* ; it was agreed that there was no adjustment; such a formal procedure would affect the claimant more in his condition and there was evidence from Ms Francey of his distressed state. It was submitted that a reasonable adjustment would be to, *"change procedure".*

"Summary of failure to make reasonable adjustments"

127. *In the claimant's submission, the respondents are in breach of Section 20/21 on all of the stated occasions. In addition, all of the above are set against the background where NHS Grampian have fundamentally failed to grasp the concept of applying the Equality Act or making any enquiries whatsoever as to disability status of Mr Horn. If this had been done, then the adjustments could have been recognised and put in place. JM's evidence that there was "nothing she could do while the claimant was on sick" is startling but not surprising not having the experience in this area. HR appeared to have a policy not to intervene at all in disputes until the final termination meeting. The reliance on OH to suggest reports and adjustments is flawed when no request is given by the line manager. Gwynne Cromar admitted that no adjustment had been made or sought and no recognition of disability status throughout the case with a complete absence of enquiry. The claimant would submit that the failures are well founded and the tribunal should find unlawful discrimination on each occasion."*

Discrimination arising from disability in terms of s.15

128. The claimant's solicitor submitted, with reference to s.15, that the *"something arising"* in consequence of the claimant's disability was the inability to be able to attend work due to symptoms explained by the claimant and Dr Tilak.

Knowledge

129. So far as the respondent's knowledge of the claimant's disability was concerned, the claimant's solicitor relied on the submissions which he made in relation to the complaint of a failure to make reasonable adjustments.

130. He referred again to the EHRC Code and in particular paragraph 5.15 which requires an employer to do all it can reasonably be expected to do to find out the worker's disability.

131. The claimant's solicitor also drew to the tribunal's attention that knowledge of the consequences or *"substantial disadvantage"* of disability is not required under s.15, which is different from a s.20 claim.

"Meaning of unfavourable treatment"

132. In support of his submission in this regard, the claimant's solicitor referred to the guidance in ***Williams v Trustees of Swansea University Pension Insurance Scheme and another*** [2018] UKSC65.

133. It was submitted that, *"the unfavourable treatment was the dismissal because of being on sick leave and a disadvantage of not being able to process the OH report and understand the procedure for dismissal at the meeting on 21 December".*

"No comparator required"

134. It was submitted that no comparator is required for a s.15 complaint.

"Objective justification"

135. In support of his submission that the respondent in the present case did not have a defence of "objective justification", the claimant's solicitor said this:-

"In this case on the evidence we have heard, there was no requirement at December 2017 to dismiss the employee. While it is accepted employees cannot remain on long term sick indefinitely, Mr Horn had shown that he was able to return to work in September 2017. He had only been absent on the second absence for a period of six weeks. There was evidence from Gwynne Cromar that the post was indeed not filled for another 7 months. We heard evidence from Jinette Mathieson that two band 6 CNS nurses had joined by May 2017 to help workload. There did not appear to be any evidence that a replacement was desperately required and there does not appear to be a legitimate aim of replacement within the workforce or needs of the business of that size. Balancing both sides, dismissal at this stage was not proportionate and the procedure could have been extended to properly consult with Mr Horn, get his views and see if he could return to work."

"Relationship with unfair dismissal claim"

136. It was submitted, with reference to ***O'Brien v Bolton St Catherine's Academy*** [2017] EWCA Civ 145, that whilst considerations are likely to be similar, both claims can be considered separately. Even if the tribunal were to find that there was a fair reason under s.98 (1) in the unfair dismissal claim, the tribunal could still find unlawful discrimination under s.15.

"Relationship with reasonable adjustments"

137. It was submitted that the EHRC Code is relevant in that it, *"states that if the employer has failed to make a reasonable adjustment which would have presented or minimised unfavourable treatment, then it would be very difficult for them to show that the treatment was objectively justified for the purpose of discrimination arising from a disability claim".*

"Summary of s.15 claim"

138. The claimant's solicitor relied on ***City of York Council v Grosset*** [2019] EWCA Civ 105 in support of his s.15 claim.

139. The respondent dismissed the claimant in the present case for the reason that in their view, he was no longer able to do his job; there was a link between the claimant's medical condition and not being able to attend work.

140. It was submitted, therefore, that it was clear that s.15 was engaged in the present case. However, there was not, *"any proportionate aim or need to dismiss at this stage"* and the defence of *"objective justification"* was not engaged.

"Time limits – reasonable adjustments"

141. The claimant's solicitor submitted in respect of acts occurring more than three months before the claim was brought that there was, *"conduct extending over a period"* and that accordingly, the claim was in time.

142. However, if the tribunal was not so persuaded, he submitted that it would be *"just and equitable*" to allow the claim to proceed.

143. In support of his submission, he referred to ***Bahous v Pizza Express Restaurant Ltd*** [2012] All ER D191.

"Summary of claimant's case"

144. The claimant's solicitor said this in his written submission by way of summary:-

"The evidence which we have seen in this case over five days shows a systemic failure in Grampian Health Board to monitor and deal with long term sickness absence. The interface between occupational health, line management and human resources on the evidence just does not appear to be working. Jinette Mathieson admitted that she had never dealt with a long term sickness absence case such as this nor had any HR experience. However, she is under their system deemed to be the first point of contact.

In many ways, it appears to be a lack of training and system backup rather than the manager herself.

Human Resources do not appear to get involved until the matter is referred under Appendix 8 i.e. a dismissal meeting without procedure. According to Gwynne Cromar, there are no meetings between HR and the employee, before the formal stage. Referral to occupational health does not seem to red flag any failures by the line manager. There is a lack of checks and balances. Occupational health have not been asked the correct questions by an experienced line manager, therefore failing to suggest adjustments back. In all the evidence given, there was a number of examples where both Jinette

Mathieson and Gwynne Cromar stated that there was "nothing else they could do". The great tragedy in this case is that despite the respondent's lack of care, Mr Horn had managed to get himself back to work on 13/09/2017 only to go off again in November. It is submitted that the only logical conclusion is the impact of the complaint being raised.

After November and the second absence, HR and Jinette Mathieson had no time to think of reaching out and asking what is wrong.

This is clearly not acceptable and had led to Mr Horn having to leave his "dream job" after 22 years of exemplary service to be in our view unfairly dismissed and discriminated against because of the stress disorder which he developed during his final year at Grampian.

We would ask the tribunal to find that his claims in front of the tribunal are well founded."

Respondent's submissions

145. The respondent's Counsel also made written submissions. These are referred to for their terms. He submitted that:-

"*The claimant's employment ended by reason of capability due to ill-health after a thirteen-month absence from work between 11 August 2016 and 12 September 2017, followed by an attempted phased return to work between 13 September 2017 and 13 November 2017 and then a further absence from work until his final date of employment on 23 December 2017.*"

"Comments on the evidence"

146. Counsel invited the Tribunal to prefer the evidence of the respondent's witnesses. There were inconsistencies in the evidence of the claimant and his husband, for a number of reasons which he detailed.

"Proposed Facts"

147. Counsel then detailed "proposed facts", in relation to the "four stages" which we have set out above.

Relevant case law

148. Counsel referred to the following cases:-

Spencer v. Paragon Wallpapers Ltd [1976] IRLR 373
East Lindsey District Council v. Daubney [1977] IRLR 181
BS v. Dundee City Council [2013] CSIH91
Paisner v. NHS England [2016] IRLR 170
O'Brien v. Bolton St. Catherine's Academy [2017] IRLR 547
City of York Council v. Grosset [2018] IRLR 746*.*

Unfair dismissal

149. Counsel submitted that, *"all cases concerning termination of employment on grounds of ill-health are highly fact-sensitive".* He referred in particular to the guidance in ***Spencer*** and referred to the following comments of Phillips LJ:-

"*Every case depends on its own circumstances. The basic question which has to be determined in every case, is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer? Every case will be different, depending on the circumstances.*"

"Did the respondent act reasonably or unreasonably in dismissing the claimant by reason of capability?"

150. Counsel referred to the following circumstances in support of his submission that the respondent could not have been expected to wait any longer before terminating the claimant's employment when they did:-

"

- *By 20 December 2017, it was clear beyond peradventure that the claimant was unfit for his post, and that there was no prospect of his becoming fit for that post. That had been a consistent theme in the claimant's discussions with Dr. Close, as reflected in her reports to Ms Mathieson.*
- *Equally, by 20 December, it was clear beyond peradventure that the claimant was entirely unwilling and unable to contemplate redeployment to another role within the respondent's organisation. Again, that had been a persistent theme in his discussions with Dr.*

Close, reported to Ms Mathieson, and also in the claimant's own comments to Ms Mathieson.

- *The claimant had, by 20 December, made it clear to Dr. Close, and to Ms Mathieson, that he wished only to consider the early release of his pension, and not to consider any other option.*
- *In the particular and unusual circumstances of this case, therefore, by 20 December 2017, the stage had been reached when the respondent could not be expected to wait any longer before reaching a decision on whether to terminate the claimant's employment or not.*
- *Ms Mathieson and Ms Murray were fully aware, and appreciative, of the claimant's long service and his considerable contribution to his role as a CNS. That did not, however, mean that there was any prospect that the claimant would return to his post, or consider any other post within the respondent's organisation.*
- *It is to be borne in mind that although the claimant's employment was terminated on 20 December 2017, he received the equivalent of full pay for a further three months thereafter, rather than moving to half pay in January as would have happened had he remained employed.*
- *Even at the point of the Appeal Hearing some three months later, the claimant was unable to offer any suggestion of willingness or ability to return to his post, or to consider redeployment. This surprised Mrs Cromar as she stated in evidence."*

151. Counsel also submitted, with reference to ***Daubney***, that *"further consultation or discussion with the claimant prior to termination of his employment was inappropriate and of no value in the exceptional circumstances of this case."* In support of this submission he made a number of points:-

"

- *This was not a case where the claimant was, apparently, unwilling to end his employment. Here, the claimant had expressed on several occasions, to Dr Close and to Ms Mathieson, his refusal to contemplate any role within the respondent organisation.*
- *The claimant had already made his position clear. He had not sought to postpone the meeting of 21 December. As it turns out, the decision was apparently taken with the benefit of legal advice, and advice from the RCN.*
- *The claimant was unable and unwilling to contribute to any discussion about termination of his employment. He was unwell. He became easily distressed.*
- *It was by now apparent to Ms Mathieson and Ms Murray that delay in dealing with the situation exacerbated his distress.*
- *It was apparent that to have delayed a decision until the claimant was able to contribute more fully, over the lengthy Christmas break (particularly when he did not seek a postponement or any discussion) would simply have added to the claimant's distress.*

- *The decision to dismiss was subject to appeal. The claimant could have discussed alternatives to his dismissal at appeal had he chosen to do so. He did not."*

152. It was submitted that in these, *"wholly exceptional circumstances, it was reasonable for the respondent to forego fuller consultation with the claimant before terminating his employment, subject to appeal, on 21 December 2017."*

"Did the claimant's dismissal amount to discrimination arising from disability?"

153. Counsel explained that his submission in this regard focused on justification, for primarily the same reasons outlined in his submission on the fairness of the claimant's dismissal.

154. He adopted the bullet points above and made the following points in support of this part of his submission:

"

- *To have a skilled CSN fit and able to perform the role of the claimant in his substantive post was a legitimate aim for the respondent's manager.*
- *In the circumstances which prevailed (the claimant's inability to perform that role, and advice that he would not be fit to return to that role, or to consider redeployment) termination of his employment and recruitment to allow that role to be filled was a proportionate means of achieving that legitimate aim."*

"Is any part of the claimant's case for failure to make reasonable adjustments time-barred?"

155. *"This complaint was presented on 3 May 2018. The Early Conciliation Application was notified on 13 March 2018. The Early Conciliation Certificate was issued on 5 April 2018, some 23 days later. The ET1 was presented on 3 May 2018. It accordingly seems clear that any claim for compensation in respect of detriment by reason of the respondent's failure to make reasonable*

adjustments would ex facie be out of time if not presented by 10 January 2018."

156. Counsel further submitted that the claimant's complaints of detriment, by way of distress and possible exacerbation of his stress related condition, appeared to relate to a failure on the part of the respondent to make reasonable adjustments: -

"1. Its practice for communicating with staff off sick, as applied to communicating with the claimant during his initial period of sick leave and up till 12 September 2017; and

2. Its practice for handling complaints of misconduct as applied to its handling of the anonymous complaint made in November 2017 alleging the claimant had been working while on sick leave (P.1/347)."

157. Counsel repeated his submission that there was no medical evidence to suggest that either of these matters complained of either caused or exacerbated the claimant's stress related condition. He submitted that the medical evidence was to the contrary (evidence of Dr. Close and Dr. Tilak's report) (P.451-467).

Time-bar

158. He submitted that both aspects of the failure to make reasonable adjustments claim were, *"clearly and substantially out of time. Neither could properly be described as an act extending over a period (or at any rate such an act is extended until 10 January 2018)".*

159. Counsel also submitted that it would not be just and equitable to extend the time limit in the circumstances of the case for the following reasons:-

"

(a) Neither of these matters formed any part of the claimant's internal appeal and neither was foreshadowed before presentation of this complaint.

(b) By late November/early December 2017, the claimant, although ill, was fully supported by his husband Mr Norman.

(c) By that point, he was also in receipt of legal advice and advice from the RCN".

Reasonable adjustments

160. Finally, Counsel conceded that although it was now accepted that the claimant was disabled by August 2016, it was clear that neither the respondent's managers nor Dr. Close considered that to be so until November 2017, the point at which ill-health termination of employment was considered.

161. Counsel went on thereafter to make the following submissions:-

"

- *Even if it had been reasonable for Ms Mathieson to question whether or not the claimant was disabled during the period prior to his return to work in September 2017, there was no reasonable adjustment which she could have made while he remained under medical advice to remain off work.*
- *Once the claimant did return to work, on a phased basis, there was no indication that he had not made a full recovery and was fit to recommence work subject to the adjustments made by way of phased return and gradual reintroduction to patients.*
- *In these circumstances, it is my submission that in the circumstances which prevailed at the time, and the state of knowledge of the respondent, it would not have been a reasonable adjustment for the respondent to approach the issue of the complaint against the claimant in any manner differently than they did.*
- *With hindsight, it now appears that the claimant contends he was distressed (a) by the fact of the complaint, and (b) by the delay in meeting him to discuss it.*
- *In my submission, the first of these concerns was addressed by the respondent by having Ms Mathieson speak to the claimant personally to alert him to the complaint, rather than advise him of the matter by formal letter. That was a reasonable adjustment to the respondent's normal practice.*
- *In my submission, there was no reasonable adjustment the respondent could make to address the second of these concerns, given their state of knowledge about the claimant's condition at the time. This was a serious matter. It was appropriate to address it with the claimant, and to allow him an appropriate period to obtain advice or assistance in doing so.*
- *Further, I suggest the balance of evidence, in particular such medical evidence as is available, does not support the contention that delay in dealing with the complaint (as opposed to the simple fact of the complaint itself) caused any substantial detriment to the claimant."*

162. Finally, Counsel said this by way of "summary":-

"The respondent resists the claim for unfair dismissal on the ground that its conduct of the matter was within the range of reasonable responses in the circumstances of this case. Each case of this nature depends on its own circumstances. The circumstances of this case were such that the respondent was entitled to terminate the claimant's employment when they did. Further consultation with him was, in the circumstances of this case, inappropriate.

The respondent resists the claim of discrimination arising from disability on similar grounds. Termination of the claimant's employment was a proportionate means of achieving the legitimate aim of a skilled CSN fit and able to perform the role of the claimant in his substantive post.

The respondent resists the claim of failure to make reasonable adjustments on two grounds. Firstly, the claims in respect of matters prior to 10 January 2018 are time-barred and it is not just or equitable to consider them. Secondly, the respondent made such adjustments to their PCPs as was reasonable in all the circumstances of this case."

Claimant's response

163. The claimant's solicitor responded, in writing, to the respondent's written submissions.

164. He commented further on the evidence. He submitted that, *"appropriate support"* was not given to the claimant in the period from August 2016 to 11 September 2017.

165. So far as the anonymous complaint was concerned, the claimant's solicitor reminded the Tribunal that this was the claimant's first ever complaint in 22 years and he found it *"extremely embarrassing".*

166. Further, the claimant's solicitor drew to our attention Dr. Close's evidence that no specific or particular jobs were discussed in respect of redeployment on 20 December 2017.

Unfair dismissal

167. The claimant's solicitor confirmed that it was not accepted that capability was the reason for the claimant's dismissal. No concession had been made in that regard.

168. The claimant's solicitor also challenged the assertion by the respondent's Counsel that the ***First West Yorkshire*** case was irrelevant. He submitted that: *"the issue of whether an employee could benefit from the SPPA Scheme was "very much one for an employer's human resources department."*

Time-bar

169. The claimant's solicitor maintained that there were *"acts of continuing conduct"* ending in December 2017 and that the discrimination complaints were in time.

Reasonable adjustments

170. The claimant's solicitor made the following submissions:-

"The respondent's position appears to be that if the Tribunal finds that the respondent had knowledge or ought to have had knowledge of the claimant's disability, there is no requirement for any reasonable adjustment to have been made while he remained off work.

That view is not accepted. The point is not that the claimant was not considering a phased return to work. That was the issue in the case referred to. The case of ***Mid Staffordshire General Hospital NHS Trust v. Cambridge [2003] IRLR 566*** *is good authority for the proposition that the employer must consider even at that point what adjustments could assist the employee. The reasonable adjustment was making an earlier referral to Occupational Health or any referral at all or such as the claimant's position may have been actually understood and acted upon. None was made, but more importantly no adjustment was thought about, as was exemplified in Ms Mathieson's admission that while the claimant was off sick "there was nothing else she could do".*

Respondent's response

171. The respondent's Counsel also responded in writing to the claimant's submissions.

Unfair dismissal

172. He submitted that the ***First West Yorkshire*** case was, *"not appropriate authority in support of the claim for unfair dismissal in the circumstances of the case. In that case, the employer provided its own enhanced Company Pension Scheme for employees who became permanently unfit for work and this was, therefore, a matter for the employer to consider before terminating the claimant's employment. That was not the position in the present case".*

173. Counsel adhered to his submissions on the basis of ***Spencer***.

Reasonable adjustments

174. Counsel disputed the contention by the claimant's solicitor that the duty first arose in September 2016. He referred to his submission that:

> *"Even if it had been reasonable for Ms Mathieson to question whether or not the claimant was disabled during the period prior to his return to work in September 2017, there was no reasonable adjustment which she could have made while he remained under medical advice to remain off work."*

175. In support of his submission he referred to ***Doran v. DWP*** UKEATS/00/17/14/SM. He submitted that:

> *"On the facts of the present case, the duty to make reasonable adjustments was not triggered until the claimant became fit to contemplate, and contribute to arrangements for his return to work."*

Discussion and decision

Unfair dismissal

176. In every unfair dismissal case where dismissal is admitted s.98(1) of the Employment Rights Act 1996 ("the 1996 Act") requires the employer to show the reason for the dismissal and that it is an admissible reason in terms of s.98(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. An admissible reason is a reason for which an employee may be fairly dismissed and among them is capability. That was the reason which the respondent claimed was the reason for the claimant's dismissal. While this was disputed by the claimant's solicitor, we were satisfied that capability was the reason. That is not to say that the claimant's dismissal was fair or that the respondent acted reasonably, only that the respondent *believed* that due to his ill-health the claimant was not capable of continuing to carry out the duties not only of his substantive post but also of any other post within its organisation and that was the reason for his dismissal.

177. The remaining question which we had to determine, therefore, under s.98(4) of the 1996 Act, was whether the respondent had acted reasonably in treating that reason for dismissing the claimant as a sufficient reason and that question had to be determined in accordance with equity and the substantial merits of the case.

178. When considering this issue, we were assisted by the guidance in ***Spencer*** that we should consider whether, in all the circumstances, the respondent could have been expected to wait longer and, if so, how much longer. Matters to be taken into account are the nature of the illness, the likely length of the continuing absence, the need for the respondent to have done the work which the claimant was engaged to do and the circumstances of the case. Consultation with the employee, expert medical advice and consideration of

other options, in particular alternative employment/redeployment, are also crucial to the question of the reasonableness of an ill-health dismissal.

179. We also remained mindful that the, "*range of reasonable responses*" test of fairness applies both to the decision to dismiss and to the procedure which was followed in reaching that decision (***Sainsburys Supermarkets Ltd v. Hitt*** [2003] IRLR 23).

180. In terms of the respondent's Attendance Management Policy, the claimant should have been referred to OH within 21 days of the commencement of his absence (P.69). That was not done. The claimant was signed off on 11 August 2016, but it was not until 5 December 2016 that he had his first OH consultation, by telephone, with a Nurse Manager (P.162/163).

181. Nevertheless, we were satisfied that thereafter until September 2017 the manner in which the respondent dealt with the claimant's ill-health absence was within the band of reasonable responses. Despite having no experience of managing long-term absences, Ms Mathieson endeavoured to be as supportive as possible, something the claimant acknowledged.

Anonymous complaint

182. The claimant was making good progress towards a full return to work until October 2017 when he was advised of the anonymous complaint. Ms Mathieson informed him informally at first that there had been a complaint. We accepted that she did so with the best of intentions. However, she only told him that there had been a complaint that he had been working when signed off, nothing more.

183. We accepted that potentially the complaint could have been serious and had to be addressed, in some way. However, the respondent did not deal with it as a reasonable employer would have done. No detail was ever given to the

claimant and, not surprisingly, this distressed him greatly as he was left to speculate who had made the complaint and what it was about.

184. The respondent was aware of the claimant's fragility at the time. He had only recently returned to work after a lengthy period of absence due to stress. While respecting the complainer's anonymity, a reasonable employer would have insisted on obtaining details of the complaint so that these could be put to the claimant in a meaningful way. As it transpired, the claimant was only told in the most general terms that there had been an allegation that he had been working when signed off work due to ill health. It was not possible to get the claimant's *"side of the story"*, as Ms Murray asked Ms Mathieson to do, as there was no *"story".* The claimant then had to wait 7 days, worrying about the outcome and speculating what it was all about before he met Ms Murray and Ms Mathieson. That meeting was brief. It was entirely unsatisfactory. He was asked if he had been working when on leave. He replied, *"absolutely not".* Ms Murray then said, *"well that's the end of the matter".* The claimant then had to wait for written confirmation that the matter was closed.

185. In the particular circumstances at the time, in particular the claimant's previous ill-health, and having regard to the fact that he had 22 years' unblemished service, had become an expert in his own field over the years, and was committed to and took great pride in his work, the manner in which the respondent dealt with this matter was insensitive and unreasonable. It caused the claimant unnecessary distress. These were not the actions of a reasonable employer.

186. Prior to this matter being raised with the claimant, he had been progressing well. Dr. Close recorded a *"significant improvement…..looking very well, bright"* at her meeting with him on 29 September 2017 (P.169/170). She was positive and optimistic about the claimant's return to work on a phased basis.

187. However, that was in marked contrast to his condition at her meeting with him on 16 November 2017 (P.170/171), after he had been advised of the

complaint and the respondent had dealt with it in the way they did. Dr Close recorded that there had been an *"exacerbation of his difficulties"* and that in her opinion he was, *"unfit for his substantive post".*

188. It was clear to the Tribunal that the anonymous complaint and the unreasonable manner in which the respondent had dealt with it had been the catalyst for, or at least a significant factor in, the deterioration in the claimant's health. A reasonable employer acting reasonably would have had regard to this and the adverse effect on the claimant when before that he had been made good progress towards a full return to work, when deciding whether or not it would be reasonable to dismiss the claimant or wait.

Dismissal

189. We considered the circumstances prevailing at the time the claimant was dismissed by Ms Murray at the meeting on 21 December 2017. Ms Murray was a crucial witness. She took the decision to dismiss. We did not hear evidence from her. In any event, it was clear that her decision to dismiss the claimant at the meeting was premeditated. While in her e-mail of 12 December Ms Mathieson had advised the claimant that the purpose of the meeting was *"to discuss your options"* (P.370) none were. Nor did Ms Mathieson advise him in her e-mail that dismissal was a possible option. We also noted that Ms Murray's e-mail of 14 December to the claimant was headed *"Ill-health termination invite"* (P371). The claimant received the attached letter on 18 December (P372) only three days before the meeting. That was the first time he was advised that his dismissal was one of the options which would be considered. The letter was sent before the claimant met Dr Close on 20 December.

190. For whatever reason, as there was clearly not a conduct issue, in advance of the meeting the claimant also received from the respondent's HR Department a number of copies of the respondent's conduct policy. Not surprisingly, this also caused him unnecessary stress.

191. The meeting on 21 December was brief. It lasted less than ten minutes. No Minutes were taken. There was no meaningful discussion. The claimant's dismissal was presented by Ms Murray as a "*fait accompli*". Ms Murray's letter confirming her decision was dated the same day as the meeting (P.379/380). The letter gives no information about any discussions at the meeting.

192. Further, the claimant was only given a copy of Dr. Close's report (P.374) at the meeting. Dr Close had only seen the claimant the previous day. The claimant and his husband were only able to spend a very short time reading the report. While they did not seek an adjournment, they anticipated that there would be some discussion about "options" but there was not. The reference to *"options"* in Ms Mathieson's e-mail of 12 December (P370) created a reasonable expectation of a particular kind of meeting which was neither negated by the subsequent letter from Ms Murray (P372) nor fulfilled. This, along with the timing of Ms Murray's letter and the late presentation of the OH report denied the claimant and his husband the opportunity of preparing properly for the dismissal meeting.

193. We then considered, with reference to the guidance in ***Spencer***, the "*basic question*" namely whether, in all the circumstances, the respondent could have been expected to wait any longer.

194. The claimant had considerable expertise and experience in his particular discipline and was highly regarded. He had worked for the respondent for 22 years. His service was unblemished. There was no evidence to suggest that the respondent needed to replace him immediately. There was no pressure on the respondent to deal with the matter quickly. Two "Band 6's" had been recruited in the claimant's department in 2016. It appeared that the respondent was able to cover the claimant's lengthy absence without any material disruption. An existing "Band 7" in the department had taken over as team leader in the claimant's absence. It was several months after the claimant's dismissal before a replacement was engaged.

195. A reasonable employer would also have taken into account that the manner in which they had dealt with the complaint had been a set-back for the claimant in terms of making a full recovery and getting back to work full-time.

196. At the time of his dismissal the claimant still had 3 weeks full pay, 5 weeks half pay left.

197. A reasonable employer in these circumstances would have waited longer.

198. The case law also makes it clear that a fair procedure is essential. This requires not only a thorough medical investigation, but also consultation with the employee and consideration of other options. While there was some medical investigation there was no consultation with the claimant at the meeting on 21 December 2017 and no consideration of other options such as alternative employment/redeployment. It was never made clear to the claimant what redeployment might mean for him, but he said that he anticipated that his *"options"* would be discussed at the meeting, as did Ms Mathieson, but her involvement was minimal.

199. The decision to dismiss is a managerial, not a medical one (***Schenker Rail***), but Ms Murray appeared to simply accept Dr Close's Report at face value and decided that there was no need for any further discussion. That was clear from her letter confirming the dismissal (P379/380). Clearly she had closed her mind to any other option but dismissal. All she had received from Dr Close was a summary, running to three short paragraphs, of her review meeting with the claimant, the day before, on 20 December 2017. In that summary Dr Close advised that the claimant was, *"seeking a review with his GP and specialist"* (P374).

200. Although Dr Close *"encouraged"* the claimant at her meeting with him on 16 November, only a few weeks prior to his dismissal, *"not to rule out redeployment"* (P170), she was never asked for her opinion on the possibility of the claimant being able to do specific alternative employment opportunities which the respondent had or might have available. A reasonable employer

would have done so. The respondent is one of the largest employers in the region. At the claimant's return to work meeting on 15 September Ms Murray had raised the possibility of redeployment (P330) but this was never explored.

"Other unfairness – ill-health"

201. We also found favour with the submissions by the claimant's solicitor that the respondent's failure to consider ill health retirement was another material factor in the unfairness of the dismissal. It was indicative of the respondent's failure to consider all reasonable "options". Although the respondent's Counsel submitted that ***First West Yorkshire*** was irrelevant, we were satisfied that it was in point. In that case, the EAT held that it was unreasonable, and thus unfair, for an employer to dismiss an employee without first considering whether he or she was contractually entitled to be medically "retired" and granted an ill-health pension. In the present case, the SPPA provided an ill-health retirement pension Scheme (P105-110). It was a contractual benefit of working for the respondent. Dr Close had written to the claimant's Psychotherapist and GP in this connection in November 2017 (P360/361), prior to the claimant's dismissal. A reasonable employer would have considered the option of whether the claimant could benefit from the Scheme and awaited a response from SPPA. Ms Murray failed, indeed refused, to do so.

202. Even if we are in error and the respondent' s Counsel is correct that ***First West Yorkshire*** is irrelevant, we were satisfied that the claimant's dismissal, in the particular circumstances prevailing at the time, and having regard to the respondent's size and administrative resources, was both substantively and procedurally unfair.

203. With reference to ***Iceland***, the decision to dismiss was not within the range of reasonable responses open to a reasonable employer.

204. Nor were we persuaded that the Appeal cured the defects. There appeared to be some resentment on the part of the Appeal panel over the claimant's husband representing him and also being a witness, for whatever reason. His involvement and questioning was restricted. The Appeal panel thought it necessary to record in the Notes that he was, *"not aware of the process of an appeal hearing"* (P449). In any event, no alternatives to dismissal were discussed in any meaningful way at the Appeal. Nor did there appear to be any recognition of the claimant's expertise and lengthy unblemished service or of why it was necessary to dismiss him at that time rather than wait. Ms Francey who chaired the Appeal Hearing said it was not a re-hearing.

205. It also seemed strange that, although she was the claimant's Line Manager, Ms Mathieson who had no experience of ill-health dismissals and little HR experience, presented the management case at the Appeal hearing, rather than Ms Murray who took the decision to dismiss and was in a senior position in the respondent's HR department. It was also very surprising, for an organisation the size of the respondent with all its resources, that the issue of the claimant's disability, or even the possibility that he might be disabled, was never considered.

Disability Discrimination

206. It was accepted by the respondent that the claimant was disabled, in terms of the 2010 Act, from August 2016. However, this concession was only made after the claimant had commenced Employment Tribunal proceedings. It was not a factor Ms Murray had regard to when she took the decision to dismiss. The claimant's disability status was not considered at the Appeal hearing either.

207. The respondent should have been aware that the claimant was disabled, or at least could reasonably have been expected to know that he was. This could have readily been established by reasonable enquiry. As the claimant's solicitor drew to our attention, in terms of the EHRC Code of Practice on

Employment (2011) at para. 5.15, "*an employer must do all they can reasonably be expected to do to find out if a worker has a disability*". Although the respondent obtained a number of OH reports, we heard no evidence to suggest that the respondent did anything to ascertain if the claimant was disabled and if so its extent and consequences. We found that very surprising indeed given the respondent's resources, the duties which an employer has towards a disabled employee and the respondent's regular involvement with OH and Dr Close.

Discrimination arising from disability

208. S.15 of the 2010 Act is in the following terms:-

"***15. Discrimination arising from disability***

(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) Sub-section (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."

209. The first element of the section is that the disabled employee must have been treated "*unfavourably*", not "*less favourably*", which means there is no need for a comparator.

210. The claimant's dismissal was unfavourable treatment.

211. We were also satisfied, as we recorded above, that the respondent could reasonably have been expected to know that the claimant had the disability.

"Objective justification"

212. However, for a s.15 claim to succeed the discriminatory treatment must be as a result of something arising in consequence of the claimant's disability, not

the disability itself. In the present case, the dismissal was allegedly due, as Ms Mathieson put it, to the fact that the claimant "*could not do the job he was employed for*" which was in consequence of his disability. This complaint, therefore, turned on the issue of so-called *"objective justification".*

213. S.15 is silent on what may amount to a "*legitimate aim*" but the EHRC Code states that for the aim to be legitimate it, *"should be legal, should not be discriminatory in itself, and must represent a real, objective consideration*" (para. 4.28).

214. In his submissions, in this regard, the respondent's Counsel focused on the issue of justification. He relied primarily on the same submissions he had made in support of his contention that the claimant's dismissal was fair, and that the respondent was justified in terminating the claimant's employment when they did. However, we rejected those submissions and found that the respondent had not acted reasonably, and that the claimant's dismissal was unfair.

215. While we accepted that, *"to have a skilled CSN fit and able to perform the role of the claimant in his substantive post"*, was a legitimate aim for the respondent's managers, we were of the view that the respondent should have waited longer and that there was no pressing need to replace the claimant. Indeed, he was not replaced for several months.

216. We were not satisfied, therefore, that the unfavourable treatment was "*proportionate*". In this regard we were assisted by the guidance of the Supreme Court in ***Chief Constable of West Yorkshire Police & Another v. Homer*** [2012] UKSC 2015 where Baroness Hale stressed that: "*To be proportionate, a measure must be both an appropriate means of achieving a legitimate aim (and reasonably) necessary to do so.*" We were also mindful of the guidance in the EHRC Code as to "*What is a proportionate?*" (para. 4.30-4.32) and the "*balancing exercise*" which has to be carried out.

217. There was no apparent reason why it was *"reasonably necessary"* for the respondent to dismiss the claimant in December 2017. Nor were any non-discriminatory options explored by the respondent.

218. We arrived at the view, therefore, that the claimant was unlawfully discriminated against because of something arising from his disability in terms of s.15 of the 2010 Act.

219. In arriving at this decision, we were also mindful of the Court of Appeal decision in ***O'Brien***, to which we were referred and, in particular, the Judgment of Lord Justice Underhill at Para.53, that while the language of the two relevant statutes is different, a finding that a dismissal for the purpose of s.15 of the 2010 Act meant also that it was not reasonable for the purpose of s.98(4) of the 1996 Act, was "*entirely legitimate*". He said that: -

"*It would be a pity if there was any real distinction in the context of dismissal from long-term sickness where the employee is disabled within the meaning of the 2010 Act.*"

Reasonable adjustments

220. The general scope of the duty to make reasonable adjustments is to be found in s.20 of the 2010 Act. This is supplemented by Schedules 8 and 21. Schedule 8 sets out specific provisions regarding the duty in the context of employment; Schedule 21 contains a number of supplementary provisions. S.39 (5) states that the duty applies to employment.

221. S.20 of the 2010 Act states that the duty to make adjustments comprises three requirements. We were concerned with the first requirement, in terms of s.20(3):- "*A requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*"

222. One of the issues with which we were concerned was whether the duty was triggered when the claimant had not been certified as fit to return to work. In ***The Home Office v. Collins*** [2005] EWCA Civ 598 the Court of Appeal decided that the duty would not be triggered until the claimant was certified as fit to commence a phased return. However, in ***London Underground v. Vuoto*** EAT0123/09, the EAT concluded that ***Collins*** does not establish a general proposition of law that the duty does not arise until the employee indicates that they will be able to return. What is required is an objective assessment of the reasonableness of a particular adjustment and the Employment Tribunal in ***Vuoto*** was entitled to find that the adjustments would have enabled the employee to return to the workplace. Both decisions have since been considered in ***Doran***, to which we were referred by the respondent's Counsel, with the EAT concluding that both are correct. The Employment Tribunal is obliged to consider whether a duty has been triggered but should do so based upon the particular facts of the case.

223. A difficulty for the respondent in the present case, of course, was that at no time prior to the claimant's dismissal did they ever consider whether the claimant might be disabled and their obligations if he was.

The PCPs

224. The first situation in which the duty to make reasonable adjustments, in terms of s.20(3), is where a, "*provision, criterion or practice*" ("a PCP") of the employers puts a disabled person at a substantial disadvantage in relation to a relevant matter, compared with persons who are not disabled. Although there is no definition of a PCP in the 2010 Act, the EHRC Employment Code states that Para. 4.5 that: "*It should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions……*"

225. We were satisfied that the duty was triggered in the present case as the PCPs relied on by the claimant related to assisting the claimant back to work.

Comparators

226. We found favour with the submission by the claimant's solicitor in this regard which we understood was not disputed by the respondent's Counsel. We accepted "*that it would be reasonable to compare the claimant's treatment with that of a group of non-disabled employees which should be clearly discernible from the PCP being applied by the employer. For example, when discussing the PCP in respect of the anonymous complaint, the comparator would be a non-disabled employee of NHS Grampian subject to the same complaint process. In fact, in* ***Griffiths*** *the Court of Appeal held that the correct comparator under s.20 is merely someone who is not disabled but shares the same circumstances as a disabled employee.*"

227. The claimant's solicitor relied upon five PCPs which he maintained put the claimant at a substantial disadvantage compared to his colleagues who were in the same circumstances but not disabled.

228. We deal with each of the PCPs relied upon by the claimant's solicitor in his submissions, in turn. The discrimination alleged by the claimant's solicitor did not, in our view, constitute continuing conduct extending over a period of time, but rather a series of distinct acts.

"(1) The respondent's application of their attendance management policy & OH referral policy at 5(a) and 5(b) (P.68/69)"

229. It was not disputed that although the claimant had been signed off on 11 August 2016, it was not until 5 December 2016 well outwith the 21 days for referral, that he had his first consultation with OHS with a "Nurse Manager" (P.162/163).

230. It was submitted that: -

"*the failure to make timeous referral or an earlier referral than November was a PCP that substantially disadvantaged Mr Horn in respect of his health.*

A reasonable adjustment should be for earlier referral in cases where stress is cited by the employer."

Time-bar

231. However, the general rule is that a claim concerning work-related discrimination under part 5 of the 2010 Act (other than an equal pay claim,) must be presented to the Employment Tribunal within the period of three months beginning with the date of the act complained (s.123(1)(a).

232. The claimant's application for early conciliation was made on 13 March 2018. This complaint, therefore, was well out of time.

Just and equitable extension

233. The three-month time limit for bringing a discrimination claim is not absolute: Employment Tribunals have a discretion to extend the time limit for presenting a complaint where they think it "*just and equitable*" to do so (s.123(1)(b). Tribunals thus have a broader discretion under discrimination law than they do in unfair dismissal cases, as the 1996 Act provides that the time limit for presenting an unfair dismissal claim can only be extended if the claimant shows that it was *"not reasonably practicable"* to present the claim in time.

234. We decided, in all the circumstances, that it would not be just and equitable to extend the time limit in respect of this complaint. The claimant is an intelligent, articulate person and it would have been relatively straightforward for him to consider the implications of the failure on the part of his employer to make a timeous referral, to establish if and how he could bring a claim to an Employment Tribunal and that he was required to do so within a period of

three months. While he was unwell he had support from his husband. He could also have sought advice from the RCM. There was no impediment to him submitting a claim in time. We were satisfied that the submissions by the respondent's Counsel in this regard were well-founded.

235. We were also mindful that in ***Robertson v. Bexley Community Centre t/a Leisure Link*** [2003] IRLR 434 the Court of Appeal stated that when Employment Tribunals consider exercising this discretion "*there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So the exercise of discretion is the exception rather than the rule.*"

"(2) The second PCP which placed Mr Horn at a substantial disadvantage was the practice or policy of NHS Grampian HR Department to require employees coming back from long-term sickness to take their accrued annual leave prior to starting their return to work"

236. Dr. Close's opinion that it would have been preferable for the claimant to have returned to work on a phased basis was not communicated to the respondent either by Dr Close or the claimant himself.

237. In any event, this occurred in August 2017. It is also well out of time, therefore, and for the same reasons detailed above we were of the view that it would not be just and equitable to extend the time limit.

"(3) The third PCP relied upon was the practice or policy by Grampian HR Department to pursue anonymous complaints despite not having any detail of what happened and to make it a two-step formal process"

238. We have already recorded our concerns about the manner in which the anonymous complaint was dealt with by the respondent and we were satisfied

that the submissions by the claimant's solicitor in this regard were well-founded.

239. However, this claim was also out of time, and for the reasons already detailed we were not persuaded that it would be "just and equitable to exercise our discretion and extend the time limit.

"(4) The fourth PCP relied upon the practice or policy of NHS Grampian to hold an ill-health capability dismissal meeting either at the same time or shortly in proximity to an occupational health report recommending the claimant is no longer fit to return to work (20 & 21 December 2017)"

240. We were satisfied that the submissions by the claimant's solicitor in this regard were well-founded:

"

- *Evidence of Nick Norman and Jeff Horn regarding the length of the meeting. Evidence of Jeff Horn and Nick Norman regarding time to consider the report and discuss or give two options – two or three minutes";*
- *Evidence of Jeannette Mathieson "cannot remember" if termination prior to discussion;*
- *No other respondent witness available;*
- *Substantial disadvantage is of course dismissal;*
- *Reasonable adjustment would be to extend the meeting or adjourn to a later date."*

241. This claim was timeous.

242. We were satisfied, therefore, that the respondent unlawfully discriminated against the claimant in this regard by failing to make a reasonable adjustment, in terms of s.20 of the 2010 Act.

"(5) The fifth PCP is the practice and procedure applied to ill-health dismissal appeals by NHS Grampian, in this case 7/3/18"

243. We had concerns about the respondent's appeal procedures, which seemed over-formal, presumed that an employee would have experienced representation, and the restrictions placed on Nick Norman who had no experience. The panel was concerned about the claimant's distressed state and would have been prepared to allow an adjournment, but the claimant and Mr Norman wished to proceed. However, facing an NHS Appeal panel is bound to be stressful for anyone, let alone an individual who is mentally ill and being supported personally, rather than quasi-legally. There was also a power imbalance with the number of people attending and the formality of the process. The procedures should have been made more accessible to vulnerable appellants with flexibility for changes depending on the circumstances, for example, to the location, number of management staff attending and the room layout. An outline in advance of what to expect regarding the process and "rules of play" and a check for understanding and potential disadvantage would also have been reasonable adjustments. The respondent also persistently sent the claimant information on conduct dismissals which was irrelevant in the circumstances and stressful.

244. We were satisfied, therefore, that there was a failure to make reasonable adjustments and that the respondent unlawfully discriminated against the claimant in terms of s. 20 of the 2010 Act.

Summary

245. We decided, therefore, unanimously, that the claimant was unfairly dismissed, that there was unlawful discrimination in terms of s.15 of the 2010 Act and also unlawful discrimination in terms of s.20.

Remedy

246. The parties' representatives are invited to endeavour to reach agreement extra-judicially concerning the appropriate level of compensation, failing which it will be necessary to fix a Remedy Hearing. We shall allow the parties a period of four weeks to endeavour to reach agreement, failing which the case will proceed to a Remedy Hearing.

Employment Judge:	Mr NM Hosie
Date of Judgment:	18 October 2019
Date sent to parties:	21 October 2019