EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		***Respondent***
Mr Richard Wilson	**AND**	**Commissioners for Her Majesty's Revenue and Customs**

JUDGMENT OF THE TRIBUNAL

Heard at: North Shields **On: 15-17 and 20-22 May 2019**
Deliberations: 1 August 2019

Before: Employment Judge A M Buchanan
Non-Legal Members: Mr S Hunter and Ms P Wright

Appearances

For the Claimant: In person
For the Respondent: Mr D Bayne of Counsel

JUDGMENT

It is the unanimous Judgment of the Tribunal that:
1. The claim of disability discrimination by failure to make reasonable adjustments advanced pursuant to sections 20/21 and Schedule 8 of the Equality Act 2010 is not well-founded and is dismissed.
2. The claim of discrimination arising from disability advanced pursuant to section 15 of the Equality Act 2010 is not well-founded and is dismissed.
3. The claim of unfair dismissal advanced pursuant to sections 94/98 of the Employment Rights Act 1996 is not well-founded and is dismissed.

REASONS

Preliminary matters

1.1 The claimant instituted proceedings on 24 September 2018 supported by an early conciliation certificate on which Day A was shown as 28 August 2018 and Day B as 12 September 2018. A response was filed on 13 November 2018 in which the respondent denied all liability to the claimant.

1.2 At a private preliminary hearing before Employment Judge Martin on 11 December 2018, the various claims advanced and the issues arising for determination were defined and case management orders were made. A Judgment was issued on 21 December 2018 whereby the claims of direct and indirect disability discrimination advanced pursuant to sections 13 and 19 of the Equality Act 2010 ("the 2010 Act) were dismissed on withdrawal by the claimant.

1.3 The matter came before this Tribunal as set out above. Reasonable adjustments were made to the conduct of the hearing to accommodate the disability of the claimant taking account of the guidance from the Equal Treatment Handbook of February 2018. Regular breaks were taken throughout the hearing in particular during the time the claimant was giving evidence. The claimant was allowed to enter the Tribunal room first and make himself comfortable before the respondent and its witnesses entered. Changes to the seating arrangements in the Tribunal room were made and arrangements were made for the claimant to urgently notify the Tribunal if he felt the need for a break. The lighting in the Tribunal room was adjusted so far as it was possible to do so, a timetable for the hearing and an order of witnesses was agreed at the outset and adhered to, the claimant was allowed to give evidence from his normal seat in the Tribunal and it was agreed that the witnesses for the respondent should give evidence first. In the event the claimant represented himself competently and without any apparent difficulty. The claimant expressed himself entirely satisfied with the adjustments made by the Tribunal. Certain of the witnesses for the respondent were vulnerable and arrangements were made for them to have access to a designated waiting room whilst attending the Tribunal. Similar provision was made for the claimant and his partner.

1.4 There was insufficient time for the Tribunal to deliberate at the end of the hearing on 22 May 2019 and the Tribunal set a date to deliberate in Chambers. Unfortunately, the earliest date for those deliberations was 1 August 2019.

1.5 The Tribunal met in Chambers on 1 August 2019 to complete its deliberations and this Judgment is issued with full reasons in order to comply with Rule 62 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

The claims

2 The claimant advanced the following claims to the Tribunal:-

2.1 A claim of disability discrimination by an alleged failure to make reasonable adjustments relying on the provisions of sections 6, 20/21, 39 and Schedule 8 of the 2010 Act.

2.2 A claim of discrimination arising from disability relying on the provisions of sections 6, 15 and 39(2)(c) and (d) of 2010 Act.

2.3 A claim of ordinary unfair dismissal relying on the provisions of sections 94/98 of the Employment Rights Act 1996 ("the 1996 Act").

3 The Issues

The issues in the various claims advanced to the Tribunal were refined at the outset of the hearing and were as follows:

The claim of failure to make reasonable adjustments

3.1 Did the respondent apply a provision criterion or practice (PCP) on employees:
3.1.1 to attend work and/or
3.1.2 to achieve a certain level of attendance at work to avoid disciplinary sanction and/or
3.1.3 to work flexibly and have many different skill sets in different roles.

3.2 if so, did any of those PCPs put the claimant at a substantial disadvantage in comparison with a nondisabled person?

3.3 If so would any of the following have been reasonable adjustments
3.3.1 to adjust the attendance policy to exempt disciplinary sanction for disability related sickness including the sanction of dismissal
3.3.2 to adjust the duties and requirements of the claimant so as to avoid repeated changes of duties and office and managers

3.4 Would those steps have been reasonable to take and would those steps have avoided the alleged disadvantage?

3.5 Are there any time issues in relation to any of the claims advanced? If so, should time be extended pursuant to section 123 of the 2010 Act?

The claim of discrimination arising from disability

3.6 Did the respondent treat the claimant unfavourably:
3.6.1 by repeatedly moving the claimant to other offices and roles and by changing managers?
3.6.2 by suspending him from work on two occasions?
3.6.3 by dismissing him?

3.7 What was the something arising from the disability? Was it
3.7.1 the respondent's belief that the claimant posed a risk to himself and others
3.7.2 the exacerbation of his condition in the event of being uprooted and moved and subjected to changes in his routine
3.7.3 his disability related sickness absence?

3.8 Was the claimant treated in that way by the respondent because of something arising from his disability?

3.9 If so, did the respondent follow a legitimate aim in treating the claimant in that way? Did the respondent act proportionately in pursuance of such aim in treating the claimant in that way?

3.10 Are there any time issues in relation to any of the claims advanced? If so, should time be extended pursuant to section 123 of the 2010 Act?

The claim of ordinary unfair dismissal

3.11 Does the respondent prove on the balance of probabilities that the dismissal of the claimant was related to his capability or was for some other substantial reason within section 98 of the 1996 Act?

3.12 If so:
3.12.1 did the respondent carry out a reasonable investigation?
3.12.2 did the respondent reasonably consider the medical position?
3.12.3 did the respondent reasonably consult with the claimant?
3.12.4 did the respondent reasonably consider alternative duties for the claimant?

3.13 If so, did the penalty of dismissal on notice fall within the band of a reasonable response open to a reasonable employer?

3.14 If the dismissal of the claimant was unfair, would or might a fair dismissal have taken place in any event? If so, when?

4. **Witnesses**

In the course of the hearing, the Tribunal heard from the following witnesses:

Claimant

4.1 The claimant gave evidence and called no other witnesses.

Respondent

4.2 For the respondent evidence was heard from:

4.2.1 Julie Morgan ("JM") who was the line manager of the claimant from 11 January 2016 when he worked in the section known as "Large Business".

4.2.2 Sam Hill ("SH") who was the line manager of the witness JM.

4.2.3 Paula Elliott ("PE") who was a manager in Large Business and was the line manager of JM and was herself line managed by SH.

4.2.4 Beverley Brewis ("BB") who was the line manager of the claimant from 2017 onwards in the Risk and Intelligence Service ("RIS") of the respondent.

4.2.5 Sharon Sheldon ("SS") who worked in RIS in Manchester and was the officer who dismissed the claimant. She was the officer who decided to dismiss the claimant.

4.2.6 Kirsty Telford ("KT") who is the assistant director of RIS based in Manchester and the officer who dealt with the claimant's appeal from dismissal.

4.2.7 Jim Cairney ("JC") who was the officer who dealt with a grievance raised by the claimant.

4.2.8 David Tomlinson ("DT") who was the Security Manager for RIS on the site where the claimant worked. He is a grade 7 manager and provided assistance to BB in carrying out her duties in respect of the claimant. This witness did not attend the hearing and the Tribunal read his statement. Where his statement conflicted with the evidence from the claimant, the Tribunal preferred the evidence of the claimant.

5. Documents

We had an agreed bundle comprising three lever arch files before us running to some 1222 pages. Some pages were added during the hearing. Any reference to a page number in this Judgment is a reference to the corresponding page in the agreed trial bundle.

Findings of Fact

6. Having considered all the evidence both oral and documentary placed before us and in particular the way the oral evidence was given, we make the following findings of fact on the balance of probabilities:

6.1 The claimant was born on 25 February 1974. He began work for the respondent on 17 April 2001 and was dismissed effective from 31 May 2018. At the time of his dismissal the claimant worked for the respondent as a data analyst. With effect from 1 January 2015 the claimant worked eight hours per day on three days each week usually Wednesday Thursday and Friday. The claimant suffers from autism and received a formal diagnosis of that condition in April 2017. However, as long ago as 2013 the claimant advised the respondent that he thought he suffered from Asperger's syndrome and the respondent accepts that it had constructive knowledge of autism since early 2013. By June 2016 the respondent treated the claimant as a disabled person for the purposes of section 6 of the 2010 Act. For all purposes connected with litigation, the respondent accepts that the claimant was a disabled person by reason of autism and that it had knowledge of that disability.

6.2 The respondent is a public body with vast administrative resources and over 28,000 employees. The respondent has a large site at Benton Park Newcastle upon Tyne where over 4000 employees work and this is where the claimant and all relevant employees of the respondent worked at all material times for the purposes of this litigation. The respondent has different buildings on the site which are, in the main, mirror images of each other. The respondent divides its workforce between different directorates and departments. In 2013 the claimant was working in the section known as "Large Business" and subsequently moved to work in the section known as "RIS".

6.3 The claimant made a request to reduce from full time hours to part-time hours on 12 December 2014 (page 52) and gave the reason to enable him to provide care for his children and to enable both himself and his partner to remain in employment. The request was approved and was to be effective from 1 January 2015.

6.4 The performance of the claimant caused him to receive a "*must improve"* rating in the assessment year 2015/2016 and on 9 September 2015 (page 63) the claimant was given a first written warning for poor attendance. At the end of the review period arising from the warning namely on 15 December 2015, the claimant's attendance had returned to a satisfactory level (page 66). At this time the claimant was managed by Jennifer Swanson but on 11 January 2016 JM became his line manager.

6.5 A workplace adjustment passport (page 68) was put in place for the claimant which detailed steps which managers needed to put in place when dealing with the claimant. It was noted that he had a sensitivity to lighting and required process and detailed written work. Amongst other things, managers were told the claimant needed time to digest issues and to be allowed to sit quietly to absorb information being discussed. Written information needed to be given to the claimant in advance of any training workshop in order that he could fully absorb the information and therefore take most benefit from a workshop. It was noted that if the claimant felt unable to deal with situations he had a "*white mist"* which descended which might cause him to "*shut down".* There might be a necessity to allow the claimant 20 minutes or so away from a situation.

6.6 The claimant had a short absence from work in January 2016 and as a result he was invited to a formal stage II meeting for his poor attendance (page 75). A formal meeting took place on 3 February 2016 (page 82) at which the claimant terminated the meeting and declined a referral to OH Assist (the occupational health provider used by the respondent). The claimant had a stress reduction plan in place which was reviewed at that time. The claimant was placed on a final written warning for poor attendance on 11 February 2016 (page 96). On 10 February 2016 (page 92) the claimant wrote to JM indicating that the formal procedures were causing him ever increasing stress at work and a constant worry for him was trying to pursue his duties effectively. On 11 February 2016 (page 92) the claimant wrote to JM setting out the effects of his condition on his behaviour specifically his behaviour at work. There were ongoing issues with the claimant's completion of timesheets and flexi working sheets. An issue had arisen with the claimant's use of the flexi time system and he had accrued a large deficit which he owed to the respondent in salary paid to him which he had not effectively earned. That matter was not addressed in a timely way with the claimant but disciplinary proceedings were commenced but paused pending Occupational Health ("OH") advice on the situation generally. Subsequently the outstanding balance was offered to be written off.

6.7 The behaviour of the claimant caused JM concern. The claimant told JM that certain pressure points caused him to "*lose it"* and become *"devoid of emotion"* and he had talked about experiencing various coloured mists and that he had "*blown it a couple of times"* when he worked a bouncer. This information caused concern and upset to JM.

6.8 At a meeting with JM on 9 March 2016 (page 112) the claimant had agreed to a referral to OH and a referral was made on 16 March 2016 (page 114). The resulting report on 30 March 2016 noted that a report had been requested from the claimant's GP (page 116).

6.9 On 21 April 2016 the claimant produced a knife in the office and used it to clean his nails: the knife was part of a larger so called multi-tool which the claimant used to repair the motor cycle on which he travelled to work. JM felt the claimant was testing her authority and she required him to put the knife away. She did not immediately report the matter to her line manager SH but did so in May 2016 when SH returned from holiday, JM made a note of the incident – page 118: she was unsure what to do. JM was generally out of her depth in having the responsibility to manage the claimant. To put no finer point on it, JM was fearful of the claimant.

6.10 When SH returned from holiday in May 2016 and heard about the incident on 21 April 2016 she put in place a risk assessment for JM which, amongst other things, ensured that, if JM was having a meeting with the claimant, other managers were always in the vicinity. Security staff were made aware of codewords which might be used if there was an incident involving the claimant and that would alert them immediately to call emergency services to the site. On advice from HR, SH met with the claimant to discuss various matters including the incident on 21 April 2016 during which meeting she asked to see the multi-tool in question. She offered to source a locker for the claimant in which to leave the multi-tool but instead the claimant suggested he would remove the blades from the multi-tool and so it would not pose a threat.

6.11 Both JM and SH in their own time read up about the disability of autism in order to seek to understand and better manage the claimant. There were difficulties with the report from 0H which had been requested (paragraph 6.8 above) and there was a suspicion that the claimant was not cooperating fully with OH. The claimant indicated he was still waiting for a diagnosis on his mental health and commented in a meeting with JM on 15 June 2016 (page 170) that if he went berserk in the street with a knife he would probably be seen quicker but that he would not do so. Both JM and SH were concerned about this remark and sought advice from Human Resources ("HR") because they were concerned about the safety of staff working with the claimant and wondered whether it was safe for the claimant to be in the office at that time. There was a factual dispute between the claimant and the witnesses for the respondent as to what was said by the claimant on 15 June 2016. We prefer the evidence of the witnesses for the respondent. We conclude that they were highly unlikely to make up a statement that the claimant had referred to going berserk in the street with a knife. The evidence from the claimant as to what he had said was vague and lacking in conviction. We prefer the evidence from the respondent.

6.12 On 16 June 2016 (page 173) a telephone conference took place between SH, JM and HR advisors the result of which was that medical suspension of the claimant on full pay was the appropriate step to take until full information was available from OH. It was intended that the period of suspension would be for a short time only.

6.13 On Friday, 17 June 2016 SH met with the claimant in a meeting which lasted some three hours. SH attended alone but she had made arrangements for security officers and senior managers to be in the vicinity of the meeting room at all times. A lengthy note of the meeting was produced (pages 260-265). When told that he was being suspended, the claimant became emotional and wept and sought to explain that he was not a risk to any of his colleagues and that his comments had been

taken out of context. He was concerned that any suspension would jeopardise his relationship with his partner and damage his family generally. The claimant went into a trance like state for some 10 minutes in the meeting during which he was silent and gripped the table in front of him. The result of the meeting was that the claimant was suspended for medical reasons on full pay. The matter was confirmed to the claimant in writing (pages 194-195). The letter began in these terms: *"I am writing to confirm that recent statements by you has led me to conclude that until we have further detail from the Occupational Health referral, we cannot make reasonable adjustments that meet our duty of care to you and your colleagues. Therefore, a medical suspension is appropriate. You are suspended from duty with pay with immediate effect".*

6.14 On Monday, 20 June 2016 the claimant telephoned SH to say that his GP had not heard anything from 0H. On investigating the matter, it was discovered that the required consent forms from the claimant had not been returned by him to 0H. That matter was addressed and OH were required to produce a report as a matter of priority.

6.15 A report was produced by Dr Noel McElearney of OH Assist on 12 July 2016 following a 45-minute face-to-face assessment undertaken with the claimant on that same day. The report (pages 255-256) indicated the claimant had had an initial assessment in March 2016 which confirmed he was on the autistic spectrum and that he had been referred for a fuller assessment for which there was a long waiting list because his case was not deemed to be urgent. The claimant was at pains to point out that the diagnosis made no difference but simply may serve to explain his behaviour but not alter it. The surprise of both the claimant and his partner at the medical suspension was recorded and it was noted the claimant had two other separate medical problems, one in respect of his knee and the other in respect of urinary matters which were not related. The report indicated the claimant was fit for work and the opinion was expressed "*I cannot see a medical reason why he should not be there"* and that he was fit for his role and no adjustments were required. It was noted that the autism diagnosis may serve to explain why the claimant would want to point out any deficiency in what he was being asked to do.

6.16 Having received the report, JM arranged a telephone call on 21 July 2016 with Dr McElearney to ask some supplementary questions and made a note of her call (page 271). The purpose of the call was to seek to understand the type of work to which the claimant was best suited. The OH referral had been made before the incident on 21 April 2016 but, when those matters had been referred to OH, a requirement for a chaperone for the doctor at the meeting on 12 July 2016 had been made.

6.17 The health and safety issues were raised in a further call with Dr McElearney on 3 August 2016 (page 291) and it became clear he had not been made aware of the health and safety issues and the doctor expressed the view it was never appropriate to bring a knife into the workplace and concluded that it would be right to keep the claimant on medical suspension until there had been a full NHS assessment of his place on the autistic spectrum. SH was concerned that that advice was very different to the initial advice and so organised a third discussion with Dr McElearney on 17 August 2016 (page 324) the result of which was felt by SH to be unsatisfactory. The quality of the advice being received was so poor that

the respondent registered a complaint in respect of the quality of the service from OH Assist and ultimately the respondent changed 0H providers.

6.18 The managers dealing with the case felt that further advice was required and ultimately a report was commissioned from Psychiatrist Kevin Friery of Workplace Wellness on the claimant. In September 2016 PE became the line manager of JM on the promotion of SH.

6.19 Kevin Friery met with the claimant at home on 28 October 2016 and spent 2 ½ hours with the claimant. A report was produced (page 400) in detail which made it plain that the claimant was not a threat in the workplace and had never been a threat in the workplace. It was noted that the specifics of the claimant's diagnosis would only come to light after a full assessment but that it was clear the claimant had a "*bundle of pervasive behavioural elements which create disability for him…. Occupational health have, quite rightly, said that no more workplace adjustments are needed because in terms of what might be seen as normal reasonable adjustments, there is nothing specific from a health perspective. There are, however, some behavioural adjustments that would lead to better outcomes and these should become part of his reasonable adjustment passport…… Richard is not change averse but he needs time to process it…… Some of the reasons behind the referral appear to reflect on other people's fears around Richard. In creating a positive way forward, I am very aware that I have talked extensively to Richard but haven't talked to his manager. A sustainable solution would involve understanding how he presses managers' buttons (he accepts that they press his) so that solutions recognise the strengths and vulnerabilities of all parties……. Finally, it has been several months since Richard was at work. Nothing will improve at work unless he is there, and there appears to be no bar to him being there. I think that by mid-November he should be looking to engage in a phased return to work with a view to being there full time (three days a week) within a month of that".*

6.20 Having considered the report, SH concluded, in conjunction with other managers, that the type of work best suited to the claimant was not available at the appropriate grade in Large Business and therefore work in other areas was sought. PE took the lead in seeking out other work. In the meantime, it was agreed with the claimant that he would return to a temporary role working with Jennifer Swanson his previous line manager with whom he had a good relationship. It was agreed the claimant would return to work on a phased basis from 23 November 2016. In the meanwhile, PE had found a vacant role in RIS which seemed a very good match to the type of work referred to in the Friery report.

6.21 A meeting took place between the claimant and PE on 17 November 2016 (page 475) which lasted over three hours. The claimant agreed to move to the new role in RIS and the arrangements for that move were effectively taken over by PE. As part of the efforts to return the claimant to work, the balance owed by him in respect of previous flexitime deficit was offered to be written off.

6.22 The Friery report had indicated that the claimant needed a role which was process and detail driven and which would challenge him. He needed a role with structure and the role in which he had been working at the time of his medical suspension in March 2016 had required agility and flexibility of tasks which by then it was understood posed difficulties for him. The claimant stated in his meeting with

PE on 17 November 2016 that he would like a role training the respondent's staff on autism but if that was not possible, he wished to have an analytical role of some kind. The claimant explained at that meeting that the difficulties he had experienced previously with the time recording system for flexi time and annual leave and the like was because he did not agree that the data he was asked to input was required at all and so he left engaging with the tasks to the last minute.

6.23 The claimant returned to work on 23 November 2016 as planned and a succession of lengthy and detailed meetings took place in the following working days between the claimant and PE in particular. The claimant had indicated he did not wish to accept the offer to write off the balance owed in respect of flexitime and a plan was put in place for him to work back the time. The final written warning in respect of his attendance which had been current at the time of the suspension was not to be re-imposed and there was to be a fresh start in terms of attendance. A meeting on 7 December 2016 (page 522) discussed the claimant's request for an apology in respect of the suspension. PE explained that the respondent did not apologise and did not accept any liability. The claimant had made PE aware that by this point he had been in touch with ACAS and had taken advice from a solicitor in respect of his employment position generally. During this meeting the claimant took the conversation off at various irrelevant tangents including his passion for guns which he explained to PE length. The claimant talked about raising a grievance and wishing to ensure that no other employees of the respondent went through similar experiences to those he had endured in the last nine months.

6.24 In her search for an alternative role for the claimant, PE discovered the role in RIS (pages 466-467) to which the claimant was ultimately appointed. She discussed the job description in detail with Kevin Friery who made positive comments about the claimant's suitability. On 8 December 2016, PE discussed the role in RIS with the claimant who was enthusiastic about the role. During the various meetings with PE, the claimant had referred to having an autistic meltdown (as he described it) at home and he had made reference to his love of guns and he had started a detailed discussion about the then recent murder of the Member of Parliament Jo Cox. This caused concern to PE and she raised the matter in one of her conversations with Kevin Friery who offered general reassurance on the matter.

6.25 On 4 January 2017 the claimant began his new permanent role in RIS. His new line manager was to be Marie Negus but to ensure a smooth transition, PE remained involved. Shortly after the claimant had moved to RIS, Marie Negus was promoted and her duties were taken over by BB. The move to the new role required the claimant to work in a different building but PE made it plain to him that if he wished to speak to her at any time, she would go across to the nearby building to speak with him. Both PE and the claimant's new managers in RIS were concerned that in meetings the claimant would often raise topics of conversation in respect of his interest in guns and bombs and knives and his motorbike and failed to pick up that these topics were both uncomfortable and unnecessary in the workplace. The claimant made his managers aware that he and his father in particular had always used guns and would hunt for rabbits. At one of the meetings, PE understood that the claimant had allowed his own gun licence to lapse and this caused PE some concern given that the claimant had also spoken about fact that he was depressed. PE, who was a robust manager, found some of the matters referred to by the

claimant in her meetings with him intimidating and very uncomfortable and they caused her considerable concern for her own health and safety and that of others.

6.26 A handover meeting took place involving the claimant and PE and his new line manager in RIS namely BB on 17 February 2017. This was a long meeting and it was at this meeting that the managers both became concerned about the topics of conversation raised by the claimant in particular his request to bring back into the office the multi-tool which had given cause for concern in April 2016. The claimant did not help himself in this regard.

6.27 When the claimant moved to RIS in January 2017, he continued his practice of speaking with colleagues in the workplace about guns, knives and bombs. No colleague formally complained about this matter but managers were aware informally that members of staff were not comfortable with these topics being repeatedly discussed. Like the claimant, the members of staff with whom he worked were all new to the role and were all involved in online training.

6.28 The first formal meeting between the claimant and BB took place on 8 February 2017. The claimant made complaints about the e-learning he was required to undertake and had formed the view that the job was not what he had expected it to be when he had applied for it. BB asked him not to prejudge and to persevere with the training. In this and other meetings, the claimant introduced irrelevant topics about his family and his challenging home life. Another meeting took place on 9 February 2017 at which a buddy system for the claimant was discussed but rejected by him and he raised concerns that the colleagues with whom he worked did not like him. BB monitored that situation and concluded that the team with whom the claimant worked were understanding of him and supportive of him. BB met PE for the first time at this time and she was made aware the claimant had spoken about the possibility of bringing a tribunal claim against the respondent. BB met the claimant again on 16 February 2017 when the claimant expressed himself "*ready to blow his top"* and a stress reduction plan was discussed.

6.29 A formal handover meeting took place involving the claimant on 17 February 2017 and PE and BB. The claimant complained he was finding his work repetitive and wanted to embark on more analytical work. The claimant mentioned he had been offered, but had refused, antidepressant medication on seven occasions in the previous 12 months. The conversation in respect of the gun licence (paragraph 6.25 above) and its non-renewal took place and both managers had concerns about the claimant's apparent access to guns whilst depressed. There was to be a removal of the RIS department from building 7 to building 3 in March/April 2017 and this matter was discussed with the claimant. At the end of the meeting the claimant raised the question of bringing the multi-tool into the workplace and this request was refused by BB. The claimant stated he wished to raise the matter with higher management and BB agreed to refer the matter to David Tomlinson who was in charge of security for RIS and was the senior manager in RIS.

6.30 BB raised the matter with DT after the meeting and DT undertook a firearms' check on the claimant which was returned as a clear check. The team in which the claimant worked was placed on an open balcony and the claimant sat close to the edge of the balcony and on 22 February 2017 became so frustrated with his work

that he threatened to throw his computer monitor off the balcony. The claimant's desk was moved.

6.31 On 22 February 2017 the claimant and PE and BB met with Claire Richardson of the charity Remploy. The meeting began with a visit to building 3 to find a suitable desk for the claimant and Claire Richardson gave advice as to how best to assist the claimant in the move and in the selection of an appropriate place for his desk. The meeting reconvened in building 7 during which the behaviour of the claimant gave both managers cause for very serious concern. The claimant raised the question of guns and the fact that he did not like being told not to talk about that subject in the workplace. He was critical of PE and her reference in the previous meetings to his gun licence situation and depression. He spoke in a threatening and angry way and became very irate and left the two managers feeling scared for their safety and that of others. The claimant was critical of the role he was undertaking in RIS. The claimant returned to his desk and BB heard him immediately start a conversation about guns. BB concluded that this was an intentional act of disobedience on the part of the claimant.

6.32 Both managers decided to seek advice from Kevin Friery on the situation and a telephone conversation with him (pages 601-603) took place. Kevin Friery was concerned about the mention of depression and of the information in respect of guns.

6.33 By this time BB was spending almost as much time managing the claimant as he was present in the workplace and she formed the view that there was a necessity for the claimant to spend some time away from work. BB contacted DT and a telephone conference was arranged to discuss the situation. The result of that telephone conference, which included several managers, was that the claimant was to be suspended on medical grounds for a second time. It was agreed that the suspension would be actioned by DT and that BB would not be involved in the meeting. The proposal that the claimant be suspended came from DT but it was agreed that all others attending that telephone conference which included BB, PE, SH, HR business partner James Bushnell and representatives from internal governance and civil service HR.

6.34 A letter was prepared to give to the claimant which appears at page 606 and this is the letter which was given to the claimant and not a copy of that which was used at the time of the first suspension: the two letters were very similar in content. A meeting took place between the claimant and DT at which another member of the security team Paul Younger was present. The meeting was brisk and ended after 15 minutes. The claimant stated he was neither shocked nor surprised by the news and he remained calm. It was agreed that an update from Kevin Friery was required but, unknown to the claimant, the managers had by then concluded that the appropriate line of action might be to move to dismiss the claimant.

6.35 Having been suspended, the claimant telephoned BB. The claimant stated he did not wish his suspension to be a long one. BB explained the inappropriate conversations which had caused such concern and reiterated that the suspension was for health and safety reasons. BB made a note of her conversation with the claimant at pages 609-611.

6.36 A telephone conference call about the claimant, but not involving him, took place on 14 March 2017 and the notes of BB appear at pages 621-623. It was agreed that Kevin Friery would produce a further report after reassessing the claimant on 22 March 2017. A further conversation between BB and the claimant took place on 24 March 2017 and the suspension was extended pending receipt of the updated report from Kevin Friery. A further conversation took place on 31 March 2017 at which a further referral of the claimant to OH was agreed. The resulting report from OH (page 644) indicated that the claimant was fit for work on normal hours and duties and seven recommendations were made which included that the claimant should be shown what to do rather than required to do e-learning, that he should be given a daily diary of what to do, that short-term realistic goals should be set, that changes should be discussed to ensure full understanding and that he should be given instructions each time in a clear, concise and direct way.

6.37 The updated report (pages 627-632) from Kevin Friery indicated that the claimant was frustrated with the role in RIS. The problems in respect of the multi-tool had taken on a significance greater than they merited and for the claimant the multi-tool had become "*totemic - a symbol of the struggle with which he was engaged with management".* The claimant had accepted that he could be a nuisance of work in his challenging behaviour which stemmed both from his autism and from what was described as *"an element of passive aggression in which resistance is his way of exercising control and dealing with his underlying unacknowledged anger. Richard says he believes strongly HMRC is not sympathetic to ASD and he thinks that the department's goal is to rid itself of such job holders. I assured him I have seen many examples where HMRC has bent over backwards to help autistic job holders, but he says his experience is different".* In looking at a way forward Kevin Friery commented that the changes in building, managers and colleagues experienced by the claimant were *"probably excessive. The pace of change – especially in the physical environment – needs to be carefully managed for him and for anyone else with a related personality. I feel to some extent that Richard has painted himself into a corner. He is in a job that does not energise or enthuse him, at a grade that doesn't allow him to use some of the undoubted skills he has and is bored. To mask the boredom, he becomes, in an almost undefinable way, subversive and creates unrest. I don't think this is deliberate but is rather a subconscious reaction. In similar situations I have recommended an honest career development review to help the jobholder identify and apply for roles that are a close match. Being realistic, given the job opportunities in the area, Richard may have few choices".* It was recommended that the claimant be given frequent brief feedback and counselling for the claimant was to be arranged to help address his more personal issues.

6.38 On 6 April 2017 an incident occurred at the claimant's home which resulted in the police being called and the claimant receiving a police caution for assault. This was a domestic incident but was reported by the claimant to the respondent on 7 April 2007. It had been agreed the claimant would return to work on 12 April 2017 and that remained the plan.

6.39 The claimant was ill on 12 April 2017 and did not return to work. He received a final formal diagnosis of autistic spectrum disorder on 13 April 2017. OH confirmed the claimant was not fit for work of any kind in a report on 27 April 2017 (page 668).

On 10 May 2017 the claimant reported he was still not in the right frame of mind to return to work. His absence was supported by adjustments to the absence policy first by 25% and then by 50% to take account of his disability.

6.40 The claimant eventually returned on a phased return on 20 July 2017. The claimant was upset at having to use public transport and on arrival at work, banged his desk and hit his head on the desk in the presence of BB expressing his frustration. The claimant's return to work was short lived and he became ill on 27 July 2017 with an upset stomach and further with anxiety and psoriasis.

6.41 By 21 September 2017 the claimant had had four periods of sickness covering 48 days in a rolling year and he was given a first written improvement warning but further absences followed. In October 2017 the department in which the claimant worked in RIS moved floors but remained in the same building.

6.42 The claimant went into work on 2 November 2017 and said he wished to be made redundant but BB told him that was not an option. The claimant was signed off for a month starting on 8 November 2017 and did not thereafter return to work. In the final absence the claimant did not fully cooperate with OH or in keeping in touch with his manager. On 20 November 2017 the claimant was given a final written improvement warning in respect of his attendance.

6.43 On 5 January 2018 a letter (page 851) was sent to the claimant to advise that he had been referred to SS to decide whether he should be dismissed or downgraded or whether his absence could be supported further. By 19 February 2018 the claimant had had 10 periods of sickness absence and had taken a total of 216 days off work in the preceding two years. The reasons given on fit notes for those absences included stress and depression, anxiety, stomach upset, psoriasis and autism spectrum disorder.

6.44 On 30 January 2018 SS wrote to the claimant (page 868) suggesting a meeting at his home on 6 February 2018. The claimant stated he did not receive the letter and it was sent to him again. The meeting duly took place on 6 February 2018. The claimant chose not to be accompanied. The claimant explained his autism disorder syndrome. SS asked the claimant what the respondent could do to support his absence and achieve a successful return to work. The claimant stated that there was nothing that could be done on which point he was particularly firm. The claimant made it abundantly clear he was not going to return to work for the respondent. The claimant was adamant that reasonable adjustments to enable him to return were not appropriate and would not achieve a return to work for him. He stated he wished to be made voluntarily redundant but it was explained by SS that that was not an option. SS raised the possibility of ill health retirement but the claimant indicated he was not interested and would rather bring tribunal proceedings because he felt he had been discriminated against particularly because there was no autism awareness training given to any of the managers with whom he had had dealings over recent years. The claimant was not open to a return to work. SS went over the matter on two further occasions within the meeting and received the same response. The claimant referred to wanting to raise a grievance. The meeting lasted one hour.

6.45 SS wrote up deliberations on 16 February 2018 (page 883). She concluded that she had no option but to dismiss the claimant and did so on 13 weeks' notice. SS had to consider whether the claimant should receive compensation under the civil service compensation scheme. BB in her recommendation had assessed compensation at 0% but SS determined the appropriate level of compensation was 25%. The decision was confirmed to the claimant by letter of 27 February 2018 and the claimant was advised of his right of appeal.

6.46 By letter dated 24 March 2018 claimant duly appealed. The appeal was referred to and dealt with by KT. The letter of appeal also served as a formal grievance which was referred to JC to deal with.

6.47 KT sent a letter to the claimant (page 937) inviting him to an appeal meeting on 3 May 2018. The meeting went ahead as scheduled. The claimant chose not to be accompanied. The claimant was asked to clarify the grounds of his appeal which were that SS had not been given all the relevant information when she made the decision. The claimant referred to the failure to refer to matters which had occurred when he was working in Large Business and in particular the length of time it had taken to obtain a medical report after the first medical suspension in April 2016. The claimant complained of the changes he had been subjected to and that he had been expected to learn new procedures on his own. The claimant referred to three dozen European decisions in which dismissals had been overturned when a disabled employee had been dismissed due to attendance reasons. The claimant indicated he did not wish to return to work unless there was a skills assessment which would find a suitable role for him where he could make a difference. He ruled out any return to RIS.

6.48 On 29 May KT issued the decision which was to the effect that all appropriate procedures had been followed and the appeal was dismissed. On 6 June 2018 KT sent a letter (page 983) to the claimant advising that the appeal had been reviewed by an independent HR director who had confirmed the decision that the appeal should not be upheld.

6.49 The claimant met with Keith Henry and a note taker on 30 May 2018 to enable Keith Henry to investigate the grievance which the claimant had raised. Copies of the notes of that meeting appear at page 959. A report resulted on 14 June 2018 which begins at page 986.

6.50 Having reviewed the report, JC invited the claimant to a grievance meeting on 3 July 2018. The claimant was unable to attend and at his request the meeting was rescheduled to 31 July 2018 and the resulting minutes are at pages 1007-1014. The claimant indicated he was seeking compensation for the effect his treatment had had on himself and his family and he wanted an admission of liability and an apology from the respondent. After the meeting JC asked Keith Henry why he had not contacted managers in Large Business when carrying out his investigation. Keith Henry confirmed that he had not done so but offered to do so and a supplement to his report was provided. Having reviewed all the evidence, JC sent a letter to the claimant on 15 August 2018 (page 1032) which did not uphold the complaint of bullying or of unfair treatment. The claimant raised no appeal against that outcome.

Submissions

7. We received detailed written submissions from the representative of the respondent which were supplemented by oral submissions and these are summarised. The claimant made oral submissions and these are summarised. As an adjustment to the proceedings, Mr Bain for the respondent made submissions first and the claimant spoke last.

Respondent

7.1 The law in respect unfair dismissal was set out and it was submitted that the Tribunal should examine the reasoning of the person deputed to decide whether or not the claimant should be dismissed in order to determine the reason for the dismissal. Reference was made to section 98(4) of the 1996 Act and to the question referred to in **Spencer-v- Paragon Wallpapers Limited 1976 IRLR 373** namely whether the respondent could be expected to wait any longer when it decided to move to dismiss the claimant. If the respondent has caused the sickness absence (which is not accepted in this case) there is a requirement for the respondent to "go the extra mile" **McAdie -v- RBS 2008 ICR 1087**. An employer should take steps to discover the medical condition of an employee but only need take such steps as are sensible according to the circumstances.

7.2 The law in respect of the discrimination claims advanced was set out. Unfavourable treatment because of something arising in consequence of disability is prohibited conduct unless the treatment is a proportionate means of achieving a legitimate aim. There are two separate steps – the Tribunal must identify the "something" and secondly another causative link because the "something" must arise in consequence of the claimant's disability. Reference was made to various authorities in respect of objective justification namely **Islam -v- Abertawe Bro Morgannwg Local Health Board EAT 0200/2013**, **R(Elias) -v- Secretary of State for Defence 2006 EWCA Civ 1293**, **Buchanan -v- Commissioner of Police of the Metropolis 2016 IRLR 918** and **O'Brien -v- Bolton St Catherine's Academy 2017 ICR 737** where Underhill LJ made it clear that where a capability dismissal is fair, it will usually be objectively justified.

7.3 In respect of the reasonable adjustment claims, it was submitted that the PCP must be identified and then the identity of the non-disabled comparators (where appropriate) and then the nature and extent of any substantial disadvantage. Only then is it possible to determine whether there are any practical steps that can be taken to ameliorate the disadvantage. The focus on adjustments should be on the practical result of the measures to be taken – as the function of the 2010 Act is to get employees back to work.

7.4 In respect of the time limit for claims, it was submitted by reference to **Hendricks -v- Metropolitan Police Commissioner 2002 EWCA Civ 1686** that to find "an act extending over a period" it was for the claimant to show that the incidents complained of were linked to each other and evidence of a continuing discriminatory state of affairs. Reference was made to the decision in **Abertawe Bro Morannwg University -v- Morgan 2018 EWCA Civ 640.**

7.5 It was submitted that the majority of the factual background was uncontentious. It was pertinent first to note the amount of time and effort which the respondent devoted to the claimant through its various officers. Secondly, the respondent put a large number of adjustments in place to assist the claimant. By contrast, the claimant was not performing adequately at Large Business and did no live work throughout his entire time at RIS. It was submitted that the factual issue as to what the claimant said to Julie Morgan on 15 June 2016 should be resolved in favour of the respondent.

7.6 The decision to dismiss the claimant by SS was because of his poor attendance and inability to return to work at the time of the dismissal or in the future. It was clearly within the band of a reasonable responses to dismiss. The claimant's challenges to the procedural fairness do not affect the reasonableness of the decision to dismiss. It was plainly within the band of reasonableness for SS to consider only the claimant's employment history whilst at RIS. In any event any error was corrected on appeal. The claimant was clear with SS that he would not be returning to work. The decision to dismiss the claimant was clearly proportionate. It would not have been a reasonable adjustment to ignore all disability related absence not least because it would not have assisted the claimant back to work.

7.7 Any alleged act of discrimination which took place before 28 May 2018 is prima facie out of time. The suspension decisions were taken by different managers in different departments on the basis of different evidence and are not sufficiently linked to establish a discriminatory state of affairs. The claimant's last move complained of was in October 2017 and is therefore 7 months out of time. The last job move was on 4 January 2017 and is 16 months out of time. The last suspension was on 23 February 2017 and is 15 months out of time. The delay has affected the ability of the witnesses for the respondent to remember events clearly. The claimant did not raise a grievance until 24 March 2018. The claimant has advanced no reason for the delay: in fact, he contacted ACAS as early as 2016 and decided not to bring a claim to the Tribunal at that time. It would not be just and equitable to extend time.

7.8 It is accepted both suspensions arose in consequence of the claimant's autism because they were put in place because of his increasingly volatile and intimidating behaviour at work. The medical suspensions were not unfavourable treatment as they were put in place to protect the claimant's health and well-being. It was clearly proportionate to suspend in June 2016. It is difficult to see what other action was open to the respondent given the claimant's failure to perform at work and the time that his management was taking. Having suspended, it was necessary for the suspension to continue until appropriate medical evidence had been obtained – the fact that it took as long as it did cannot lie at the door of the respondent.

7.9 The decision to suspend on the second occasion, given the background of the events which led up to it, was proportionate and it is difficult to see what else DT could have done. The fact that the concerns of the respondent's witnesses were well-founded is evidenced by the fact that the claimant had a meltdown during the period of suspension.

7.10 The change of management to include PE was not in fact complained of by the claimant. In any event the change did not arise in consequence of the claimant's disability because it arose because PE was appointed to the role which became

vacant following the promotion of SH. The move on 23 November 2016 to temporary work managed by JS was positively welcomed by the claimant and was not unfavourable and was in any event justified. The move to RIS was not unfavourable when it occurred and the fact the job did not live up to expectations does not render the move unfavourable: even if it was, it was justified. The change of line manager from MN to BB was not part of the pleaded case. The office move did not arise because of the claimant's disability but rather because the entire department moved buildings and the same is true of the change of floors in October 2017.

7.11 In respect of the reasonable adjustment claim, there was no evidence that the respondent operated the PCP contended for but, in any event, the changes in the claimant's roles were reasonable adjustments made to assist the claimant and in any event the adjustment contended for could not be achieved without isolating the claimant from his colleagues.

7.12 All the witnesses for the respondent went the extra mile and all were supportive of the claimant. They are entitled to be believed and their respective judgments should be accepted unless there is cause to doubt those judgments which there is not. All the evidence of the actions of the respondent sits ill with the claimant's case that the respondent wanted to be rid of him as an employee and all others suffering from autism. All the witnesses for the respondent were independently concerned with the behaviour of the claimant at work and that is no coincidence. It is not probable that all the witnesses were being intentionally over cautious in their dealings with the claimant. Their motivation was all about the well-being of the claimant and his colleagues. The claimant handled the presentation of his case much better than many litigants in person and his performance chimes well with the psychological evidence. Not all the conditions from which the claimant suffers are attributable to autism.

Claimant

7.13 The claimant submitted that he was an expert in his own condition of autism spectrum disorder and in particular how the condition affects adults on a daily basis.

7.14 The respondent breached its duty of care towards him by the way it treated him and by its lack of awareness of the condition of autism spectrum disorder.

7.15 When the claimant was suspended, he was allowed to return home unaccompanied to his family. If there was such a risk, as the respondent asserts there was, the question was posed why was the claimant allowed to do this and why did they not consider their duty of care to his family?

7.16 Both suspensions were unfair and unjust. OH were at fault in relation to the length of time it took to provide advice but so were the respondent. The managers reacted like headless chickens. The claimant submitted he was not wanted back at Large Business because they did not understand his condition. The moves to different departments and to different managers did matter because they all affected his disability. The claimant had been ready to return to work after the first suspension but was then told of other changes and this affected his level of trust in the respondent. Nonetheless he did attempt to return to work into a workplace where the

managers simply did not know enough about autism and in particular the autism as it affected the claimant.

7.17 It was submitted that the conclusion reached by the respondent to inform the suspension that the claimant was a danger was not logical. In Large Business the claimant was a fire warden and a fire safety officer. He was trained to evacuate others and trained to use a fire extinguisher. If he was a danger why was he given these responsibilities? The reality is that the respondent did not understand his disability and the respondent should provide autism spectrum training. The respondent has 28,000 employees and all of them should be provided with training because there will be many people in that workforce on the autistic spectrum and other employees need to know how to interact with them.

7.18 The claimant submitted that he agreed to the change on his first return to work in order to co-operate with the respondent and to be positive but he found it very difficult to absorb the information in respect of his new role. When he returned to work, his colleagues were already many days training ahead of him and this made integration into the team very difficult.

7.19 The claimant submitted he was unable to get through the work in RIS because he could not maintain his concentration long enough to make progress. It was accepted that the respondent bent over backwards to try and assist him but they did so in the wrong way. The respondent left its managers to do their own research in respect of autism spectrum disorder and they should not have been expected to do so. The meltdown which is referred to by the respondent was an episode which he suffered in his own home after eight months of relentless pressure. Despite the pressure, the claimant tried to fulfil the duties given to him by the respondent and tried to do the job to which he was assigned. He was too proud and stubborn to resign and therefore faced dismissal. If the claimant had been put in the right job, he would have produced good results, would have been able to get on with his colleagues and would have been able to produce consistent and high-quality work. As it was, he was placed in a role where there was no awareness of his disability and no understanding of it from those managing him and those with whom he was working.

7.20 The problems he faced would have been resolved by assessing him properly, finding him the right job and providing training to those managing him and those with whom he worked. The claimant asserted he was unfairly dismissed and his dismissal was an act of disability discrimination.

8. **The Law**

The meaning of Disability within section 6 of the 2010 Act

8.1 The Tribunal reminded itself of the meaning of disability and in particular Section 6 of the 2010 Act which provides:

(1) A person (P) has a disability if--
(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability--
(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section) --
(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

8.2 We noted that in this case the respondent conceded the claimant was a disabled person for the purposes of section 6 of the 2010 Act at the material time by reason of autism spectrum disorder and that it had the required knowledge of that disability and its effects at all material times.

Failure to make Reasonable Adjustment Claim: sections 20/21 of the 2010 Act

8.3 The Tribunal has reminded itself of the relevant provisions of section 20 and 21 and Schedule 8 of the 2010 Act which read:

Section 20:

"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this Section, Sections 21 and 22 and the applicable schedule apply; and for those purposes a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements,

(3) The first requirement is a requirement, where a provision, criterion or practice of A 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 take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where the disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid".

Section 21

(1) A failure to comply with the first second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person
(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purposes of establishing whether A has contravened this Act by virtue of subsection (2): a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

8.4 The Tribunal has had regard to the relevant provisions of Schedule 8 of the 2010 Act and in particular paragraph 20 which reads:
" (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know...
(b)….that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement".

8.5 The Tribunal reminded itself of the authority of **The Environment Agency v Rowan [2008] IRLR20** and the words of Judge Serota QC, namely:

"*An Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to section 3A(2) of the 1995 Act by failure to comply with section 4A duty must identify –*

(a) the provision, criterion or practice applied by or on behalf of an employer;

(b) the physical feature of premises occupied by the employer;

(c) the identity of non-disabled comparators (where appropriate);

(d) the nature and extent of the substantial disadvantage suffered by the claimant.
It should be borne in mind that identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the "provision, criterion or practice applied by and on behalf of an employer" and the 'physical feature of the premises', so it would be necessary to look at the overall picture.

In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under sections 3A(2) and 4A(1) without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice or feature placing the disabled person concerned at a substantial disadvantage".

The Tribunal notes this guidance was delivered in the context of the 1995 Act but considers it equally applicable to the provisions of the 2010 Act.

8.6 The Tribunal has reminded itself of the guidance in respect of the burden of proof in claims relating to an alleged breach of the duty to make reasonable adjustments in the decision in **Project Management Institute -v- Latif 2007 IRLR 579** where Elias P states:

"It seems to us that by the time the case is heard before a Tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative……that is why the burden is reversed once a potentially

reasonable adjustment has been identified…..the key point…is that the claimant must not only establish that the duty has arisen but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made……we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not."

8.7 We have reminded ourselves of the guidance from Elias LJ in the Court of Appeal in the decision in **Griffiths –v- Secretary of State for Work and Pensions 2015 EWCA Civ 1265.**

In this context I would observe that it is unfortunate that absence policies often use the language of warnings and sanctions which makes them sound disciplinary in nature. This suggests that the employee has in some sense been culpable. That is manifestly not the situation here, and will generally not be the case, at least where the absence is genuine, as no doubt it usually will be. But an employer is entitled to say, after a pattern of illness absence, that he should not be expected to have to accommodate the employee's absences any longer. There is nothing unreasonable, it seems to me, in the employer being entitled to have regard to the whole of the employee's absence record when making that decision. As I mention below, the fact that some of the absence is disability-related is still highly relevant to the question whether disciplinary action is appropriate.

As to the second proposed adjustment, the reasoning of the majority is in my opinion more opaque. But I think implicit in its analysis is the belief that there is no obvious period by which the consideration point should be extended. If the worry and stress of being at risk of dismissal is to be eliminated altogether, then all disability-related illness must be excluded. But if that step is not taken - and no-one was suggesting that it should be - then in a case like this when lengthy further periods of absence are anticipated, the period by which the consideration point should be extended becomes arbitrary. As the majority point out in paragraph 49 when drawing an analogy with the O'Hanlon case, in so far as the alleged disadvantage is with the stress and anxiety caused to a particular disabled employee, it would be invidious to assess the appropriate extension period by such subjective criteria.

Also, where the future absences are likely to be long, a relatively short extension of the consideration point is of limited, if any, value. It will not in practice remove the disadvantage if the absences remain over 20 days. No doubt there will be cases where it will be clear that a disabled employee is likely to be subject to limited and only occasional absences. In such a situation, it may be possible to extend the consideration point, as the Policy envisages, in a principled and rational way and it may be unreasonable not to do so. But in my view the majority has taken the view that this is not appropriate in a case of this nature. In my judgment, the majority was entitled to reach that conclusion.

8.8 We note that where a position is reached when there is nothing an employer can reasonably do to alleviate a disadvantage then the duty to make adjustments falls away: this will be the case where the position is irretrievable and this may be the position reached during a period of extended ill health. This may be the case also where the employer has caused the employee's predicament where, even in that situation, there is no unlimited obligation to accommodate the employee's needs. If an adjustment proposed will not in fact procure a return to work then it will not be a reasonable adjustment. We note also that the EAT in **Lincolnshire Police –v-**

Weaver 2008 AER 291 made it clear that a Tribunal must take account of the wider implications of any proposed adjustment and this may include operational objectives such as the impact on other workers, safety and operational efficiency. The purpose of an adjustment in the employment context is to return the employee to work.

Discrimination arising from disability – section 15 of the 2010 Act.

8.9 The Tribunal has reminded itself of the provisions of **section 15 of the 2010 Act** which read:

"(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arises in consequences 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.

8.10 We remind ourselves that in considering a claim pursuant to section 15 of the 2010 Act, we need to consider what breach of section 39 of the 2010 Act is established, whether there was unfavourable treatment of the claimant, whether there is something arising in consequence of the disability and finally whether the unfavourable treatment was because of the something arising from the disability.

8.11 We have reminded ourselves of the guidance of Simler J in **Pnaiser –v- NHS England 2016 IRLR 170** in respect of the proper approach to adopt in cases involving section 15 of the 2010 Act:

"From these authorities, the proper approach can be summarised as follows:

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

8.12 We have reminded ourselves that in considering so called justification, that we must consider an objective balance between the discriminatory effect of the PCP engaged and the reasonable needs of the party who applies it. We have noted the words of Pill LJ in **Hardys and Hanson -v- Lax 2005.** This was a decision of the

Court of Appeal taken in the context of a claim of indirect discrimination but this test was applied to claims advanced under section 15 of the 2010 Act by the EAT in **Hensman –v- Ministry of Defence UKEAT/0067/14/DM**.

Section 1(2)(b)(ii) requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (Barry) and I accept that the word "necessary" used in Bilka is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.

8.13 We have referred to the decision of HH Judge Clark in **H M Land Registry –v- Houghton and others UKEAT/0149/14/BA** to which we were referred by the claimant. We have noted the guidance given in that decision on the question of Justification:

As to justification, it is common ground between Counsel that at paragraph 26 this Employment Tribunal correctly directed themselves as to the classic test propounded by Balcombe LJ in Hampson v DES [1989] ICR 179 at 191E: "justifiable" requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition. .....Ultimately, the balancing exercise, once properly identified, is a matter for the Employment Tribunal absent any irrelevant factors being taken into account or relevant factors disregarded.

Burden of Proof and other relevant provisions of the 2010 Act.

8.14 The Tribunal has reminded itself of the relevant provisions of **section 136 of the 2010** Act which read:

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

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

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

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) An employment tribunal……."

8.15 The Tribunal has reminded itself of the relevant provisions of **section 39 of the 2010 Act** and in particular:

(2) An employer (A) must not discriminate against an employee of A's (B)-
…
(c) by dismissing B
(d) by subjecting B to any other detriment……
(5) A duty to make reasonable adjustments applies to an employer…
(7) In subsections (2)(c)… the reference to dismissing B includes a reference to the termination of B's employment-…
(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice".

8.16 We have reminded ourselves of the provisions of section 123 of the 2010 Act in respect of the time limit for the advancement of a claim. We have noted the decision in **Abertawe** (above) and that section 123(4) of the 2010 Act indicates that the period in which the employer might reasonably have been expected to comply with the duty should in principle be assessed from the claimant's point of view having regard to the facts known or which ought reasonably to have been known by the claimant at the relevant time. In addition, we note that section 123 gives Tribunal the widest possible discretion to consider an extension of time but factors which are almost always relevant include the length and reason for the delay and whether the delay has prejudiced the respondent.

Ordinary Unfair Dismissal Claim – Section 98 Employment Rights Act 1996 (the 1996 Act)

8.17 The Tribunal has reminded itself of the provisions of section 98 of the 1996 Act which read:

"*98(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair it is for the employer to show –*

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

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

(2) The reason falls within this subsection if it –

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

(b) relates to the conduct of the employee …

(4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

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

8.18 The Tribunal has reminded itself of the decision of **British Home Stores Limited v Burchell [1978] IRLR379** and notes that it is for the respondent to establish that it had a genuine belief in the lack of capability of the claimant at the time of the dismissal and that that belief was based upon reasonable grounds and that dismissal followed a reasonable investigation and a reasonable procedure.

8.19 We have reminded ourselves of the authority of **Spencer-v-Paragon Wallpapers Limited 1976 IRLR 373** and the words of Phillips J:

"What is required will vary very much indeed according to the circumstances of the case. Usually what is needed is a discussion of the position between the employer and the employee. Obviously what must be avoided is dismissal out of hand. There should be a discussion so that the situation can be weighed up, bearing in mind the employer's need for the work to be done and the employee's need for time in which to recover his health…..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?..".

8.20 We have reminded ourselves of the authority of **McAdie –v- Royal Bank of Scotland 2007 EWCA Civ 806** and the words of Wall LJ who expressly approved the decision of the EAT in that case which came before him on appeal. The Court of Appeal expressly approved the words of Underhill J in the EAT:

*"In **Betty** Morison P appeared to say that the fact that the employer had been responsible for the incapacity which was the reason for a dismissal should as a matter of principle be ignored in deciding whether it was reasonable to dismiss for that reason. But Bell J in **Edwards** and Judge Reid QC in **Frewin** expressed the view that, if that was what Morison P meant, it over-stated the position. We agree. It seems to us that there must be cases where the fact that the employer is in one sense or another responsible for an employee's incapacity is, as a matter of common sense and common fairness, relevant to whether, and if so when, it is reasonable to dismiss him for that incapacity. It may, for example, be necessary in such a case to "go the extra mile" in finding alternative employment for such an employee, or to put up with a longer period of sickness absence than would otherwise be reasonable. (We need not consider the further example, suggested by Bell J in **Edwards**, of a case where the employer, or someone for whose acts he is responsible, has maliciously injured the claimant, since there is no suggestion that those are the facts*

here. But we should say that we find some difficulty with the implication that in such a case there could never be a fair dismissal.) However, we accept, as did Bell J and Judge Reid, that much of what Morison P said in ***Betty*** *was important and plainly correct. Thus it must be right that the fact that an employer has caused the incapacity in question, however culpably, cannot preclude him for ever from effecting a fair dismissal. If it were otherwise, employers would in such cases be obliged to retain on their books indefinitely employees who were incapable of any useful work. Employees who have been injured as a result of a breach of duty by their employers are entitled to compensation in the ordinary courts, which in an appropriate case will include compensation for lost earnings and lost earning capacity: tribunals must resist the temptation of being led by sympathy for the employee into including granting by way of compensation for unfair dismissal what is in truth an award of compensation for injury. We also agree with Morison P in sounding a note of caution about how often it will be necessary or appropriate for a tribunal to undertake an enquiry into the employer's responsibility for the original illness or accident, at least where that is genuinely in issue: its concern will be with the reasonableness of the employer's conduct on the basis of what he reasonably knew or believed at the time of dismissal, and for that purpose a definitive decision on culpability or causation may be unnecessary".*

8.21 We note that a dismissal which cannot be justified does not automatically fail the reasonableness test in section 98(4) of the 1996 Act. There may be a dismissal which is unfair, usually for procedural reasons, but which is nonetheless justified under section 15 of the 2010 Act. We note that the decision to dismiss under the 1996 Act on the ground of mental ill-health should be taken in the light of medical advice and is a particularly delicate and sensitive matter and should perhaps be handled with greater tolerance and support. Consideration should be given to the true medical position and considerations of speaking to the employee and alternative employment are equally as important as when there is a dismissal for a physical illness.

Discussion and Conclusions

9. We approach our conclusions by dealing with the various claims advanced and issues arising in the following order:

9.1 The claim in respect of alleged failures to make reasonable adjustments.

9.2 The claim in respect of discrimination arising from disability.

9.3 The claim in respect of ordinary unfair dismissal.

The claim of failure to make reasonable adjustments

10. We deal with the various claims of failure to make reasonable adjustments in turn. We note that there are time issues in respect of several of these claims.

11. We turn to deal with the matters set out at items 3.1-3.5 in the list of issues above.

11.1 We are satisfied that a PCP was in play that the claimant attend work both in Large Business and subsequently in RIS to carry out the duties required of his role. Secondly, we are satisfied that a PCP was in play in the respondent's workplace for the claimant to achieve a certain level of attendance at work in order to avoid disciplinary sanction.

11.2 We are not satisfied that a PCP was in play in the respondent's workplace that the claimant was required to work flexibly and have many different skill sets in different roles. We received only little evidence as to the details of the claimant's role in Large Business and we can reach no conclusion that the third PCP contended for was in play in Large Business. In respect of the role in RIS, this was a new role and the evidence we heard and accept is that the claimant and his colleagues were undertaking training in that new area. We had no evidence placed before us that once basic training was complete, there would be a requirement to work flexibly and have many different skill sets in different roles. We had some evidence that once basic training was complete, an opportunity would have been presented to work specifically in one area of the role but what was being undertaken by the claimant in the short time that he spent in RIS was basic training in the role generally. We do not accept that the third PCP contended for was in play in RIS at any time during which the claimant worked in that area.

11.3 We have considered whether either of the two PCPs which we accept were in play placed the claimant at substantial disadvantage in comparison with a non-disabled person. We deal first with the PCP to attend work and carry out the duties of the role.

11.4 In terms of the role in Large Business, we were given insufficient information from the claimant to enable us to reach any conclusion as to whether or not that role placed him at a substantial disadvantage compared with a non-disabled employee in Large Business. The evidence given in respect of his duties latterly in Large Business was that he was involved in booking travel, hotels and training for others and was also responsible for taking minutes of certain meetings. That evidence was insufficiently detailed to permit us to reach any conclusion on the issue of substantial disadvantage in respect of the role in Large Business. In any event the only adjustment contended for by the claimant which could relate to this PCP was that the duties of the role and the requirements on the claimant should be adjusted to avoid repeated changes of duties and office and managers. We are not satisfied that, whilst the claimant worked in Large Business, there were such repeated changes but if there were, then the change of duty to RIS was in itself a reasonable adjustment which sought to give the claimant exactly the stability he wished for and was an adjustment with which he expressed his full agreement. We conclude that there was no failure to make reasonable adjustments in respect of the role in Large Business.

11.5 If our conclusion in respect of the role in Large Business is incorrect in any way, then we have given consideration to the time issues in respect of this particular claim. The claimant was suspended from his role in Large Business on 17 June 2016 and never returned to it. The claimant formally moved to RIS on 4 January 2017. The claimant entered into early conciliation in relation to these proceedings on 28 August 2018 and so any matter which occurred before 28 May 2018 is out of time in respect of the time limit set out in section 123 of the 2010 Act. The time limit for a claim of

failure to make reasonable adjustments, such as this is, runs from the time when the respondent should reasonably have made the adjustment and this could well have been a considerable time before 17 June 2016 when the claimant effectively ceased to work in that role: even if the time limit was as late as 17 June 2016 the claim is over 12 months out of time and, absent a discriminatory regime in the form of conduct extending over a period of time, it would need us to be satisfied that it was just and equitable to extend time to allow the claim to be considered for remedy. For the same reasons as we set out at paragraph 12.18 below, we would not be satisfied that time should be extended in this case.

11.6 In terms of the claimant's role in RIS, we have considered whether that role placed the claimant at a substantial disadvantage compared to a non-disabled person. The only evidence the Tribunal received was that, in the very short time which in reality he spent in RIS, the claimant was involved in on-line training and in basic training for that role. Clearly basic training for any role is required and we are unable to reach any conclusion that the requirements of that basic training or of that role (once basic training was complete) did or would have placed the claimant at a substantial disadvantage when compared to a non-disabled employee of the respondent. We are not satisfied that substantial disadvantage is established in respect of the role in RIS.

11.7 In any event, the one relevant adjustment contended for in respect of this PCP was to adjust the duties of the role to avoid repeated changes of duties and office and managers. We conclude that any such adjustment was not a reasonable one to make at a time when the claimant had barely embarked on the basic training for that role and was not at a stage where he had mastered even the basic requirements of the role.

11.8 We have given consideration to the time limit issue in respect of this claim should our above conclusions be wrong. The claimant did not work in the role in RIS after 8 November 2017 which was over six months before he entered into early conciliation in respect of these proceedings. Even if the time limit for this claim was as late as 8 November 2017, the proceedings are at least six months out of time and for the same reasons as we set out at paragraph 12.18 below, we do not consider it appropriate for time to be extended for the purposes of allowing this claim to be considered for remedy.

11.9 Accordingly any claim in respect of the first PCP fails and is dismissed.

11.10 We have considered the second PCP which we find in play namely that of being required to achieve a certain level of attendance in order to avoid a disciplinary sanction and have considered the question of substantial disadvantage. We have considered whether the claimant, as a disabled person by reason of autism spectrum disorder, was more prone to be absent from work than a non-disabled employee. This is a difficult question but one on which we find some assistance in the OH report of 5 April 2017 (page 645) from Ms Claire Stone Occupational Health Advisor in which she says "I*n my opinion all conditions are likely to be life-long and require continuing treatment to control the effects of the illness. In my opinion Mr Wilson may suffer relapse of his medical conditions from time to time, in spite of treatment but these are unpredictable in timing and length. Mr Wilson may require further*

absences from work during severe flare-ups". On balance we are persuaded that the disability of autism spectrum disorder could result in the claimant having more absences than a non-disabled employee although that is a conclusion which we reach with some misgiving. Accordingly, we are satisfied that the second PCP did place the claimant at substantial disadvantage in comparison to a non-disabled employee.

11.11 We have considered the adjustment contended for namely that all disability related sickness should be discounted. We are satisfied (paragraph 6.39 above) that the respondent had made adjustments to its attendance management procedure for the claimant by twenty-five percent and then fifty percent and we are not satisfied that the adjustment contended for by the claimant would be a reasonable adjustment. Clearly any policy can be adjusted in the way the claimant contends for but we have to consider whether the contended adjustment is reasonable and in our judgment to make such a broad and unrestricted adjustment to the policy would not be reasonable. The respondent had made reasonable adjustments to the policy in this matter. Accordingly, even if substantial disadvantage is present the claim fails for the adjustment contended for would not be a reasonable adjustment. We accept the submission of Mr Bayne in this regard and accept that any such adjustment would not have assisted the claimant back to work in the circumstances of this case.

11.12 Finally we have considered the question of time limits in relation to this particular claim should any of our previsions conclusions be wrong. The claimant went away from work for the last time in November 2017 and was not dismissed until he received the letter dated 27 February 2018 from SS giving him notice of dismissal effective on 31 May 2018. Any claim for this adjustment should have been made not later than a reasonable period after the end of February 2018 when the claimant was told of his dismissal. In fact, the claimant began early conciliation on 28 August 2018 and thus any matter arising before 28 May 2018 is out of time. For the same reasons as we set out at paragraph 12.18 below, we do not consider it appropriate for time to be extended for the purposes of allowing this claim to be considered for remedy.

The claim of discrimination arising from disability: section 15 of the 2010 Act.

12. We turn to deal with the claims advanced under section 15 of the 2010 Act which are in fact the principal claims advanced by the claimant in this matter. We deal with the issues set out at paragraphs 3.6 -3.10 above.

12.1 We have first considered whether the respondent treated the claimant unfavourably in any of the three ways asserted by the claimant. We have considered each in turn.

Moving the claimant to other offices and roles and by changing managers

12.2 Whilst moving the claimant to other offices and roles was pleaded as part of the allegations of unfavourable treatment, changes in line managers were not pleaded. At the outset of the hearing the claimant indicated that he wished to add the change of managers as an issue for consideration and the Tribunal considered it appropriate to do so given that the respondent was able to deal with the allegation through the witnesses who were to give evidence to deal with other pleaded issues.

12.3 The allegation as pleaded was that the respondent repeatedly (our emphasis) moved the claimant to other offices and roles and changed managers. We have considered whether the claimant has established a prima facie case that he had repeated changes of office and roles. We conclude that he has not established repeated changes of office or role but he has established repeated changes of managers. However, we note the concession of the respondent that a change of office and/or role and/or manager could amount to unfavourable treatment of the claimant and so we have considered each allegation of change separately and we have done so following the order adopted by Mr Bayne in his written submissions.

12.4 We conclude that PE was brought into the management of the claimant in September 2016 when she became the line manager of JM on the promotion of SH who had previously acted as line manager to JM (paragraph 6.18 above). This change of manager was not because of something arising from the disability of the claimant but rather arose entirely because SH was promoted and someone else was needed to fill the role she vacated. In any event, we accept the submission that this change was not unfavourable treatment of the claimant because it is clear the claimant enjoyed a better relationship with PE than he did either with JM, who found the claimant very difficult to manage, or with SH whose robust approach was not in the main to the claimant's liking. Even if that is wrong, then we are satisfied that this change was a proportionate means of achieving a legitimate aim namely to ensure that there was a functional relationship between the claimant and his line manager. Given that SH was promoted, a change needed to be made and in appointing PE to that role, the respondent acted proportionately to the aim being followed.

12.5 In November 2016 the claimant returned to work in a temporary role managed by Jennifer Swanson (paragraph 6.20 above). We accept the respondent's concession that this treatment arose in consequence of the claimant's disability but we do not accept that it amounted to unfavourable treatment. The claimant positively welcomed the fact that he would be returning to be line managed by Jennifer Swanson with whom he enjoyed a good relationship and indeed Kevin Friery had supported that step as a "*really positive step"* (page 551). Even if the move to the line management of Jennifer Swanson was unfavourable treatment of the claimant, we conclude that it was a proportionate means of achieving the legitimate aim of returning the claimant to the work-place as soon as possible with a functional relationship in place between the claimant and his line manager. We take account in reaching this conclusion that the claimant had been suspended on medical grounds for a very long time and we consider the question of that suspension separately below. Given that it was clearly necessary for the claimant to return to work in November 2016, the actions of the respondent in this regard were proportionate.

12.6 The claimant was moved to a role in RIS in January 2017 (paragraph 6.25 above). We accept the respondent's concession that this move arose in consequence of the claimant's disability. We do not accept the claimant's contention that this was unfavourable treatment. The claimant positively welcomed the change of role and it was endorsed by both Doctor McElearney and Kevin Friery. When the move was offered and accepted it was done with the full agreement and co-operation of the claimant. The fact that in the event the claimant did not like the role is not germane to the question of whether the move itself in January 2017 was

unfavourable – it was not. Everything pointed to the new role matching the skill set of the claimant and being a new start for him after the difficulties of 2016.

12.7 When the claimant moved to RIS in January 2017 his line manager became for a short time Marie Negus (paragraph 6.25 above) but she was shortly afterwards replaced by BB as Marie Negus was promoted. That change of manager did not occur because of something arising as a consequence of the claimant's disability but simply because Marie Negus was promoted and BB took over her duties. In an organisation the size of the respondent, change of line managers is a common and necessary occurrence and it had nothing whatever to do with the claimant's disability. The necessary causal link between the claimant's disability and the treatment is not established – it is however possible to see how that change may have affected the claimant given his disability.

12.8 The office in which the claimant worked in March 2017 in RIS was moved lock stock and barrel to another building (paragraph 6.29 above). Given his disability, we conclude that any change of that nature was unfavourable to the claimant. Accordingly, we must consider whether that unfavourable treatment arose because of something arising in consequence of the claimant's disability. Clearly it did not. It arose because the respondent had taken a decision (entirely unconnected to the claimant's disability) to move the RIS department from building 7 to building 3. The necessary causal connection to establish a claim under section 15 is simply not made out. In any event, the respondent did all it could to minimise any adverse effect on the claimant as set out at paragraph 6.31 above. We reach the same conclusion in respect of the floor move in October 2017. In respect of that move, there was no causal connection between the move and something arising as a consequence of the claimant's disability.

12.9 In respect of all these matters, the claims are substantially out of time and we conclude for the same reasons as set out at paragraph 12.18 below that it is not just and equitable to extend time.

The suspensions of the claimant in June 2016 and in February 2017

12.10 We conclude that the two medical suspensions of the claimant were unfavourable treatment of him. We do not accept that contention of Mr Bayne that the suspensions were not unfavourable treatment of the claimant as they were put in place to protect the health and well-being of the claimant. The suspensions on medical grounds in the circumstances of this case were unfavourable treatment of the claimant.

12.11 We note and accept the concession from the respondent that the suspensions arose because of the disability of the claimant. Accordingly, we must consider whether either of these two suspensions were a proportionate means of achieving a legitimate aim.

12.12 We have considered in respect of the suspensions whether what the respondent did was a proportionate means of achieving a legitimate aim which was set out to be the protection of the health and safety of the claimant and others. We accept that that is a legitimate aim and therefore have considered whether each

suspension was a proportionate means of achieving that legitimate aim. We deal with each suspension in turn.

The suspension of June 2017 – proportionality

12.13 The Tribunal had concerns in respect of the decision to suspend and in particular whether or not stereotypical assumptions were in play by the managers of the respondent in relation to the claimant's disability and his holding of a knife. The Tribunal had concerns as to whether there had been an assumption made that a person suffering from the disability of autism spectrum disorder ought not by reason of that disability to hold a knife at all and that therefore the decision had been taken to suspend with that assumption in play. Had the suspension occurred in April 2016 immediately after the so-called knife incident (paragraph 6.9 above) then that would have given us more cause for concern. However, we have noted the time span between that incident and the suspension and the events which took place within the intervening period. There was a meeting by SH with the claimant in late April 2016 (paragraph 6.10 above) when the incident was discussed and no suspension was mooted. It became clear however in June 2016 that further incidents of concern had occurred particularly the claimant referring to going berserk with a knife in the street and thereby advancing his autistic assessment (paragraph 6.11 above). We further note and accept that the managers of the respondent were concerned about the claimant's behaviour generally, that he was requiring weekly days off to deal with domestic emergencies, that he was becoming more vocal and agitated in the workplace to the extent that JM was fearful of approaching the claimant and that he had been seen storming off after normal discussions and kicking furniture in the workplace. Furthermore, a knife had been produced in the workplace albeit that the claimant had not repeated that action after he had been told by JM not to do so. We are satisfied, after very careful deliberation, that when the respondent moved to suspend what it did was proportionate to the aim in question. The respondent had a duty to consider the health and safety both of the claimant and its other employees and its managers. SH was particularly concerned about the mental health of JH in her management of the claimant. Consideration was given also to the fact that suspension was a neutral act and it did not impose any financial burden on the claimant given that it was suspension on full pay. It was intended that the suspension would be short-lived and the fact that it turned out not to be so was neither the fault of the respondent nor could the unfortunate delays with the obtaining of an OH report have been foreseen when the suspension was implemented. The decision to suspend in our judgement was a proportionate one to the aim in question but that is a decision reached only after having given that crucial question lengthy consideration.

The suspension of February 2017 - proportionality

12.14 We turn to the question of the second suspension in February 2017 and whether that suspension was proportionate to the same legitimate aim. Unlike the first suspension, we see differences in the way the decision was taken. First the decision was taken by an officer of the respondent who did not come to this Tribunal to give evidence and in the event of any difference between his evidence and the evidence of the claimant, we accept the evidence of the claimant. The suspension arose out of concerns both in respect of the claimant's health and the stress from which he was said to be suffering at that time and also by reason of the fact that the

claimant had referred to his use of a gun as a hobby and his obsession with guns on several occasions during the days and weeks prior to the second suspension. The respondent was concerned that the reference to guns in some way could impact on the workplace to the extent that DT had carried out a fire-arms check on the claimant which in the event was a clear check. We have concerns as to how a check could be made by DT in these circumstances but, not having had the benefit of oral evidence from him, we were not able to raise questions on that matter with him. It is clear, however, that at no time did the claimant bring into the workplace a gun which is, of course, different to the situation in respect of the first suspension and the concerns over the knife. We have considered again whether stereotypical assumptions were in play in respect of the decision to suspend. We infer from the statement of DT and from the evidence we heard from BB and others that an assumption was made that a person suffering from autism who was also stressed and refusing medication for depression was in some way, by virtue of that disability, necessarily a threat if he was in possession of a gun. An assumption was made that a person with autism should not have access to guns. We consider that assumption to be a stereotypical assumption and, in the absence of any direct evidence as to why DT took the decision to suspend in this case, we conclude that that stereotypical assumption was in play in the decision to suspend in February 2017. That does not necessarily mean that the decision was not proportionate but it is a very serious factor for us to consider. We have noted differences in the way this matter arose compared to the first suspension. The concerns giving rise to this second suspension arose over a much shorter period of time. At the time this decision was made, the respondent did have the benefit of the first report from Kevin Friery which had given them considerable comfort about whether or not the claimant posed any risk in the workplace and it was plain from that report that he did not pose any such threat and had never posed any such threat. The decision to suspend was taken quickly by DT in circumstances which we conclude were not proportionate to the aim being pursued. A measured approach dictated asking for further advice from Kevin Friery before, and not after, a second suspension and in the interim less draconian measures could have been considered to monitor the behaviour of the claimant if that was felt to be necessary. We conclude that the decision to suspend on the second occasion was a knee-jerk reaction borne out of ignorance of the effects of the disability of the claimant and out of ill-founded and ungrounded fears of any threat posed by the claimant in the workplace. Had we had any opportunity to hear from DT and hear him justify his decision, our conclusion may have been different but, given that he was the prime decision maker, we reach the conclusion that we do. Accordingly, in respect of the second suspension the claimant's claim of discrimination arising from disability is well-founded.

Time Limit Issues

12.15 We have therefore given consideration to the question of time-limits. We do so at this stage because there are no time limit issues in relation to the one remaining alleged act of discrimination arising from the disability of the claimant namely the dismissal of the claimant effective from 31 May 2018.

12.16 In this case we have noted that the delay from the date of the beginning of the first suspension in June 2016 and of the second suspension in February 2017 up to 28 May 2018 being the earliest date for a timely claim within these proceedings is a

very long delay namely 23 months and 15 months respectively. Even the period of delay from the end of each suspension is considerable. The claimant gave us no explanation for that delay. We have noted that as early as the end of 2016 the claimant had access to ACAS and had taken advice from a solicitor and should have been well aware of his rights in respect of actions for discrimination and indeed the time limit for so doing (paragraph 6.23 above). The claimant had raised with the respondent on more than one occasion the possibility of him taking legal action for disability discrimination but he had not done so. Had he had serious concerns about his suspension on either occasion then it was open to the claimant to bring those concerns to the Tribunal in a timely fashion. He did not do so and waited many months before instituting proceedings.

12.17 We have considered if it could be said that there was a discriminatory regime in place in the claimant's workplace. We reject any such contention. The managers involved in the first suspension were different to those involved in the second suspension - even if we had found (which we do not) that the first suspension was an act of disability discrimination. We have found no acts of discrimination in failures to make reasonable adjustments but, even if we had, the managers involved in those matters were not all the same as those involved in the suspensions. We conclude without difficulty that there was no discriminatory regime in play and we see no act of discrimination extending over a period of time as referred to in section 123 of the 2010 Act.

12.18 Accordingly we have considered if it is just and equitable to allow time to be extended to permit the suspension in February 2017 to be considered for remedy. In considering this question we have reminded ourselves of the decision of the Court of Appeal in **Robertson -v- Bexley Community Centre 2003 IRLR 4434** when the Court made it clear that it is for the claimant to convince the Tribunal that it is just and equitable for the time limit to be extended and there is no presumption that time limits should be extended: time limits are there for a purpose and should be observed. We have reminded ourselves also of the provisions of section 33 of the Limitation Act 1980 and the decision of the Employment Appeal Tribunal in **British Coal Corporation -v- Keeble 1976 IRLR 336.** We have considered the prejudice which each party would suffer if time was or was not extended, the length of and the reason for the delay, the extent to which the cogency of any evidence is affected by the delay, the reason why there was a delay and the promptness with which the claimant acted once he knew of the possibility of action. We have considered whether the delay affected the respondent and we are satisfied and accept the submission of Mr Bayne that the respondent's witnesses were to some extent disadvantaged in cross examination by the passage of time in not being able to deal with fully the questions which were put to them by the claimant. The delay is a long one and the claimant did not seek to offer any explanation for that delay. We note that the claimant was a disabled person throughout the period of the delay but that does not provide an automatic excuse for delay. Indeed, we were able to observe the claimant present his claim to us over several days. He did so competently and in a manner which did not suggest in any way that he would have been prevented in some way in taking appropriate legal action in a timely fashion had he chosen so to so. Time limits are meant to be observed and are only to be extended in exceptional circumstances taking account of the factors that we set out above. Having considered those factors, we conclude that it is not just and equitable for time to be extended to enable the

claimant to bring a claim in respect of the second suspension (and indeed the first suspension should our conclusion in respect of the proportionality of the first suspension be in error) and therefore the claim in respect of the second suspension fails and is dismissed as having been advanced out of time.

The dismissal of the claimant

12.19 We have considered the question of the dismissal of the claimant which occurred on 27 February 2018 and was effective from 31 May 2018. There is no argument from the respondent that the dismissal was other than an act of unfavourable treatment and that it arose because of the claimant's disability. There are no time issues. The question therefore is whether the dismissal was a proportionate means of achieving the aim of the respondent which was to have and maintain an efficient and effective workforce. We conclude that that is a legitimate aim and so we have considered whether the dismissal was a proportionate means of achieving that aim.

12.20 At the time of the dismissal the claimant had effectively not been at work since June 2017 - a period of almost eight months. The claimant could not offer any return to work date and indeed, in his meetings with SS, he made it plain that he had no interest in returning to work and was not prepared to engage with the process of achieving a return to work. The claimant raised no issues in respect of procedural matters relating to the dismissal and the steps leading up to it. In such circumstances to dismiss an employee when the aim is to achieve an efficient and effective workforce bearing in mind that the claimant's absence was bound to be having an effect on productivity and the workload of other employees, it would be a very exceptional case to say that dismissal was not justified considering the reasonable needs of the respondent's business and giving all due respect to the decision which as an independent manager SS made. This is not such an exceptional case. It seems to us that the only factor which might be used to say the decision was not proportionate would be the claimant's contention that he took the attitude he did in the capability proceedings because of what had happened to him and because there had been in his genuinely held view discrimination shown to him because of his disability. However, we are not satisfied that the reason the claimant took the approach he did was only by reason of the act of discrimination in respect of the second suspension. Everything points to the fact that the claimant had, by the time of the dismissal, become used to being at home, he had other family and caring responsibilities and we are not satisfied that the claimant acted as he did simply because of the second suspension. In those circumstances and particularly bearing in mind that the claimant sought to be paid off by the respondent by way of voluntary redundancy, it is clear that he had no interest in returning to work and the decision taken by SS to dismiss was one which was entirely understandable and one which we conclude was proportionate to the legitimate aim being pursued by the respondent. Therefore, in those circumstances, the decision to dismiss was proportionate and the claim for discrimination arising from disability in respect of the dismissal fails and is dismissed.

The claim of ordinary unfair dismissal under the 1996 Act

13. We turn to deal with the claim of ordinary unfair dismissal.

13.1 We conclude without difficulty on the balance of probabilities that the respondent has proved that the reason SS moved to dismiss the claimant was related to his capability. He had been absent from work for almost twelve months and evinced no intention ever to return. He could offer no reason for continuing his employment to the dismissing officer. The medical evidence before the respondent indicated that there was no medical reason why the claimant should not return to work. The claimant could offer no return to work date and made it plain he had no interest in doing so. For those reasons, SS moved to dismiss the claimant. The reason is established as being related to the capability of the claimant and thus falling within section 94(2)(a) of the 1996 Act and a potentially fair reason for dismissal.

13.2 We have therefore moved to consider the questions which we are required to consider pursuant to section 98(4) of the 1996 Act and in particular the matters set out at issues 3.12 and 3.13 above. We remind ourselves that there is no burden of proof resting on the respondent when we consider the questions posed by section 98(4) of the 1996 Act and that we must not consider what we would have done but rather consider the actions of the respondent from the viewpoint of the reasonable employer: only if what the respondent did fell outside the band of a reasonable response will the decision to dismiss be unfair.

13.3 By the time the respondent moved to dismiss the claimant, it had several medical reports available to it, not least the reports from Kevin Friery, which made it plain that there was no medical reason preventing the claimant's return to work. Further detailed consultations with Kevin Friery had taken place and had been carefully documented and the claimant did not disagree with the contents of those reports and discussions. By the time of the decision to dismiss, the claimant had been absent from work for a long period of time and could offer no prospect of being able or willing to return to work. Everything which the claimant did pointed to a wish no longer to work for the respondent and he had sought to investigate being paid off by way of voluntary redundancy – which was not on offer and which the respondent had given not the slightest indication was on offer. Questions of alternative employment in such circumstances did not reasonably arise. The respondent had consulted with the claimant and had informed itself of the medical situation. We note that the dismissing officer only took account of the claimant's history whilst working in RIS and did not look back into his employment history in Large Business. Given that the respondent had wiped the slate clean in respect of previous absences when the claimant moved from Large Business to RIS that was an entirely reasonable attitude to adopt and we conclude that factor is not sufficient to render the actions of the respondent unreasonable.

13.4 We have considered the appeal and note that at the appeal stage the appeal officer KT did look back at the various reports and history of the claimant in Large Business and confirmed the decision to dismiss having done so. Accordingly, even if we had been concerned about that failure on the part of SS (which we are not) then that failure would have corrected at the appeal stage. This was the only criticism which the claimant made of the process adopted by the respondent to dismiss him. The claimant asked very few questions of the officers of the respondent involved in his dismissal and accepted that they had all "*followed process".*

13.5 We have considered all aspects of the decision to dismiss the claimant both procedurally and substantively. We are satisfied that the decision to dismiss fell within the band of a reasonable response open to a reasonable employer. Therefore, we conclude that the decision to dismiss the claimant was fair in all respects and that the application for unfair dismissal advanced pursuant to the 1996 Act fails and is dismissed.

Final Comments

14.1 It seems to the Tribunal in this case that the respondent's managers had in the claimant a person with a difficult disability to understand and a difficult and complex disability to manage. The managers of the claimant had received little, if any, training on understanding disabilities such as that of the claimant and were left to their own devices to plug the gaps in their knowledge. In the event they did so and spent many hours of management time trying to find a way to return the claimant to a productive and suitable role. Given the size and administrative resources of the respondent, that absence of training is a surprising failure and one which, it seems to the Tribunal, the respondent would be well advised to address if it is to avoid similar difficulties to those presented in this case in the future. In this case the respondent has been found not to be liable to the claimant but it may not be so fortunate in a similar future case.

14.2 The disability of the claimant was complex and challenging. It also allowed the claimant to play on the ignorance of his managers to some extent and to *"press the buttons"* of his managers (to adopt the terminology in the Friery report) as they had inadvertently pressed his. The amount of time spent by the claimant's managers on the claimant's situation was disproportionate and that would not have been the case had the managers been trained to deal competently, and thus confidently, with disabilities such as that with which the claimant lives. Even though the claimant has not succeeded in his claims, the matters raised were of substance and were rightly brought to the Tribunal for independent scrutiny.

EMPLOYMENT JUDGE A M BUCHANAN
JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 7 September 2019