EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr I Gorrie	AND	South East Coast Ambulance NHS Foundation Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Southampton **ON** 5th to 13th November 2019

EMPLOYMENT JUDGE GRAY **MEMBERS** **Dr N Thornback**
Mr J C Sanger

Representation

For the Claimant: **Ms K Annand (Counsel)**
For the Respondent: **Mr A Allen (Counsel)**

RESERVED JUDGMENT ON LIABILITY

The unanimous judgment of the Tribunal is that:

- **The complaint of victimisation is dismissed on withdrawal.**
- **The complaint of failure to make reasonable adjustments succeeds.**
- **The complaint of discrimination arising from disability succeeds.**
- **The complaint of unfair dismissal succeeds.**

Matters for how remedy will be determined are to be addressed at a Case Management Preliminary Hearing by telephone at 10 AM on the 24 January 2020.

REASONS

Introduction

1. In this case the Claimant Mr Gorrie, who, as asserted by the Respondent, was dismissed by reason of capability, claims that he has been unfairly dismissed, and that he was discriminated against because of a protected characteristic, namely disability. The discrimination claims are now for discrimination arising from disability and because of the Respondent's failure to make reasonable adjustments. The complaint of victimisation, having been withdrawn by the Claimant by correspondence on the 31 October 2019, is dismissed following such withdrawal.

2. The Respondent concedes that the Claimant is disabled, but contends that the reason for the dismissal was capability, that the dismissal was fair, and that there was no discrimination.

This hearing

3. For our reference at this hearing we were provided with:

    a. An agreed bundle of documents running to 415 pages, although it was considerably greater in length than that owing to the use of letters and Roman numeral pagination in addition to numerical page numbering.

    b. A jointly agreed proposed timetable and reading list.

    c. An agreed chronology.

    d. A revised agreed list of issues.

    e. The Respondent's position statement.

4. At the outset of the hearing the timetable was discussed and it was agreed the question of liability would be addressed first.

5. The Respondent's witness, Mrs Jane Mitchell (Safeguarding Lead for the Respondent), was heard from first by agreement before the Claimant and his supporting witness gave their evidence, as she was unable to attend the hearing on any other day.

6. Closing submissions on the question of liability were concluded early afternoon on 11 November 2019. Thank you to both Counsel for their very helpful submissions (both written and oral) on behalf of the parties.

7. After submissions concluded we then heard representations from both Counsel on how the question of remedy should be addressed, if appropriate. With consideration of those representations and the listed time remaining for this hearing it was agreed that the Tribunal would reserve its decision on the question of liability. A telephone case management hearing was then listed with the parties' agreement for 10 AM on 24 January 2020 to case manage matters for a remedy hearing if required.

8. The Tribunal deliberated on the question of liability and reached a unanimous decision on 13 November 2019 which is reflected in these written reasons.

The issues

9. The Parties agreed that the relevant issues which fall to be determined by the Tribunal (as to liability only) are as follows:

10. Unfair Dismissal

a. Was the reason or the principle reason for the Claimant's dismissal one within subsection 98 (2) of the Employment Rights Act 1996 ("ERA"), "a potentially fair reason"?

b. The Respondent asserts that the reason for dismissal was capability.

c. If the Respondent dismissed the Claimant for a potentially fair reason did the Respondent fulfil their obligations under subsection 98(4) of the ERA in acting reasonably in all the circumstances?

d. In particular did the Respondent:

i. Adopt a fair procedure or follow their own policies when dismissing the Claimant;

ii. Undertake a practical assessment of the Claimant's capabilities, as recommended by Occupational Health;

iii. Carry out a reasonable investigation into the Claimant's abilities, experience, knowledge and skills;

iv. Hold a genuine belief that the Claimant's capabilities were below the necessary standard;

v. Properly and meaningfully consider alternatives to dismissal, such as adjustments to the Claimant's substantive role to SRV duties only or other appropriate redeployment; and/or

vi. Arrange non-competitive interviews for roles that the Claimant applied for.

e. Was the decision to dismiss the Claimant within the range of reasonable responses?

11. Disability

a. The Claimant contends that at all material times he was a disabled person within the meaning of section 6 of the Equality Act 2010 ("EqA") by reason of:

i. Osteoarthritis, predominantly in his left knee (since July 2014);

ii. Reduced Flexion/Osteoarthritis in his hands, predominantly his left hand (since July 2015).

b. The Respondent accepts that the Claimant was disabled by reason of all of the above conditions at the material time.

12. Jurisdiction

a. Has the Claimant brought his complaints under the EqA within the three-month time limit (s.123(a) EqA 2010)?

b. If not, would it be just and equitable for the Tribunal to extend time (s.123(1)(b) EqA 2010)?

13. Discrimination Arising from Disability

a. Did the Respondent treat the Claimant unfavourably by:

i. Removing him from his substantive Ambulance Technician duties on 26 July 2016?

ii. Subjecting him to an unsuccessful redeployment process between mid-August 2016 and his dismissal on 31 May 2017?

iii. Dismissing him with effect from 31 May 2017?

b. If so, was it because of something arising in consequence of the Claimant's disability, namely:

i. His inability to substantially grip; and/or

ii. His inability to carry heavy weights, particularly up and down stairs

iii. His difficulty getting in and out of the ambulance/high vehicles

c. Has the Respondent shown that the treatment was a proportionate means of achieving a legitimate aim, namely:

i. Management of their workforce and ensure that it has employees who are able to perform the job role that they are employed to complete, to ensure appropriate staffing levels are met to meet its business requirements and patient needs. Further that the actions were reasonable, necessary and proportionate in the circumstances following a total 10-month redeployment period in which the Claimant found no suitable vacancies.

14. Failure to Make Reasonable Adjustments

a. Did a provision, criterion or practice ("PCP") of the Respondent's put the Claimant at a substantial disadvantage in comparison with people who do not suffer from the Claimant's disability? The Claimant relies on the following PCP:

i. The requirement for Ambulance Technicians to be able to work on Dual Crew Ambulances (DCAs) [***the Respondent accepts this PCP applies***];

b. The Claimant claims he was placed at a substantial disadvantage as he was unable to work shifts on Dual Crew Ambulances due to his disability without exacerbating his pain levels. He was therefore not permitted to work as an Ambulance Technician, which put him at risk of dismissal. He was placed on the redeployment register and dismissed when he was not offered a different role with the Respondent.

c. Did the PCP place the Claimant at the substantial disadvantage above?

d. If so, did the Respondent fail to make reasonable adjustments to avoid the disadvantage?

e. The Claimant avers that the following would have been reasonable adjustments:

i. Rostering the Claimant to undertake SRV duties only;

ii. Practical assessment of the Claimant's capabilities;

iii. Maintaining the seconded role in Vehicle Preparation [***this reasonable adjustment was withdrawn by the Claimant orally on the 11th November 2019 during submissions***];

iv. Slotting in or non-competitive interviews for vacant roles;

v. On the job training for alternative roles;

f. Would these adjustments have avoided the disadvantage?

g. Would these adjustments have been reasonable?

The Witnesses

15. We heard from the Claimant and from Mr Nigel Sweet (his union representative) on his behalf.

16. For the Respondent we have heard from:

a. Mr Robert Ivey (HR Business Partner at the relevant time);

b. Mr Clive Burvill (Clinical Operations Manager at the relevant time and who conducted the Welfare Review Meeting with the Claimant on the 26 July 2016);

c. Ms Lorna Stuart (Operating Unit Manager and Quality and Improvement Hub lead at the relevant time and who conducted the Welfare Review Meetings with the Claimant on the 14 November 2016 and 21 December 2016 and who made the decision to dismiss the Claimant with notice);

d. Mr Richard Webber (Acting Paramedic Director at the relevant time and who chaired the appeal panel that heard the Claimant's appeal on the 28 February 2017 against his dismissal);

e. Ms Elizabeth Spiers (Communications Manager at the relevant time and who interviewed the Claimant for the role of Band 5 Communications Officer on 19 September 2016);

f. Mr David Wells (Contingency Planning and Resilience Manager at the relevant time and who interviewed the Claimant for the role of Band 4 Events Coordinator on 6 January 2017);

g. Mrs Jane Mitchell (Safeguarding Lead at the relevant time who interviewed the Claimant for the role of Band 4 Safeguarding Coordinator on 24 January 2017);

h. Mr Andrew Hartley (Clinical Education Lead at the relevant time and who interviewed the Claimant for the role of Band 4 Simulation Technician on 9 March 2017).

17. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence and have observed their demeanour in the witness box. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

The Facts

18. The Claimant suffers from diabetes, osteoarthritis predominantly in his left knee and reduced flexion in his left hand. His relevant disabilities for the purposes of this claim are his osteoarthritis and reduced flexion in his left hand. As has already been recorded in the agreed list of issues the Respondent accepts that the Claimant was disabled by reason of these conditions at the material time.

19. The Respondent is a publicly funded NHS organisation which provides emergency response to 999 calls from the public, urgent calls from healthcare professionals, and NHS 111 services across the region. The Respondent employs over 3,600 staff across 110 sites.

20. The Claimant's employment with the Respondent commenced on 10 January 2005 as an Ambulance Assistant (Band 3). His employment contract is at pages 73 to 77 of the bundle.

21. It was in July 2006 that the Claimant then became an ambulance technician (Band 4) for the Respondent.

22. The Claimant initially worked from Horsham Ambulance Station from 2006 until 2015 when he transferred to Pulborough Ambulance Station. During his time at Pulborough the conditions of the Claimant's osteoarthritis deteriorated. The Claimant told his then line manager (Mr A) that he was experiencing difficulties getting in and out of the Dual Crew Ambulances (DCA) as well as carrying heavy weights up and down stairs. Carrying heavy weights also adversely affected his left-hand condition. The Claimant was worried about the risks to his colleagues and patients if he was unable to undertake his full DCA duties. The Claimant says that his line manager

suggested that he could transfer to the Worthing Ambulance Station to work on a Single Response Vehicle (SRV) as there was no SRV at Pulborough.

23. On 4 April 2016 the Claimant moved to the Worthing Ambulance Station. This was not a formal adjustment to the Claimant's role and there is no record of it being such, as can be seen from the Request to Transfer form at page 118 of the bundle. With it not being formal the Claimant was rostered to work on a DCA on the 10 June 2016.

24. The day before the DCA work (on the 9 June 2016) the Claimant emailed his managers (Mr B and Mr G) to raise his concern about being rostered to work on a DCA due to his arthritis (page 120). The Claimant explains that he was "finding it physically difficult to work on a DCA – particularly using carry chairs and transferring (sliding) patients at hospital."

25. Within that email the Claimant does acknowledge "I am aware that this could be detrimental to me in that Occ Health may decide I am permanently unfit for work". "Working on the car was an informal arrangement but I was made aware that I may need an Occ Health referral if it became a problem. I reiterate that I have no problems working on a car. I have mentioned this to Scheduling, but they insist I have to work on DCAs = despite my shift line being an SRV one… I fully intend turning up for work on Friday 10th, but if I am forced to work on a DCA I will have no option but to go off sick."

26. There is a reply to the Claimant's email on 9 June 2016 at page 119 from Mr B. He says "As you know with working front line, there is a requirement that all staff at AP/Tech level and above are fit to work a full range of duties including DCAs and SRVs. I know [AT] has explained this to you as well over the last few days and set out the reasons for this."

27. "When hours are given to the Trust, they are for use how the Trust best deems it acceptable (be that crewing up 2 SRVs to form a DCA, splitting a DCA to 2 SRVs, moving a PP/CCP to EOC to cover the clinical desk) to maximise resourcing to meet the demand that is being faced at that point in time. It may, for instance, be that more urgent admissions are coming in than we predicted and so on-day the EOCs would look to amend resourcing to match this."

28. This is what the Respondent asserts is the need for what we understood to be "dynamic resourcing" and why they say that their Ambulance Technicians need to be fit to work a full range of duties including DCAs and SRVs.

29. An urgent Occupational Health (OH) referral is then arranged for the Claimant.

30. There was then a telephone call with an OH Physiotherapist (JS) on the 15 June 2016 which resulted in an OH report which is at pages 122 to 126 of the bundle. It notes (page 123) "There is an obvious cumulative effect of the symptom aggravation pattern here. He feels that it is the climbing in and out of the cab, in and out of the actual ambulance and carrying heavy weights up and down stars which are the aggravating activities. He feels that he may put his patients and other crew members at risk when carrying a patient up and down stairs, and has concerns that he may cause further deterioration to his knee condition. When working on SRV, his knee symptoms are not aggravated. Driving, carrying equipment bags and kneeling for CPR all seem tolerable activities for his knees."

31. As to his left hand it is stated carrying a chair aggravates pain, but activities such as "gear changing in the car, CPR, carrying equipment bags to do not aggravate the pain".

32. The OH Physiotherapist's recommendation is the Claimant is scheduled to work on SRV where he can carry out his full-time role without aggravation of his symptoms. If "such recommendations are deemed unreasonable I would advise a face to face appointment with one of our OHAs." (page 124).

33. The Claimant's manager Mr G then comments on this OH report in an email to Lorna Stuart (and copied amongst others to Robert Ivey) dated 17 June 2016 (page 128) – "Although Ian works on the SRV rota, there will always be times when he is required to work on a DCA, not only on relief, but as on a day change."

34. The Respondent's position is then communicated to the Claimant by an email dated 24 June 2016 from Mr G (page 130) – "We require you to be fit for a full range of duties, and the report suggests that you are not"… "The OH report gives advice and the SECAmb [the Respondent] do not have to accept it, but course we endeavour to work with advice, where possible." … "We could never guarantee that you would not be required to assist in patient handling at any point during a shift." … " If you are unable to meet the standard scope of practice required of your employment, we will require you to remain of[f] sick".

35. There is a GP fit note for the Claimant at page 131A of the bundle dated 5 July 2016 which notes that the Claimant is fit for work taking account of the following advice… "Says Can work on first response car but cant lift patients in + out of ambulance." This fit note was to apply from the 11 July 2016 for 2 months.

36. The face to face OH meeting for the Claimant takes place on the 6 July 2016 with Dr M. The OH report is then produced on the 14 July 2016 (and is at pages 136 to 138).

37. The report concludes (page 138) that the Claimant's reported level of capability is compatible with working an SRV and that the Claimant maintains that he would be able to cope with the infrequent moving and handling that would be required of him when working in that capacity. It goes on to state "If there is any remaining doubt to his ability to perform moving and handling tasks - even on an infrequent basis - then the best means of assessing that would be a practical assessment of his capability. Likewise, whilst I doubt that the problems with his hands would prevent him from working as an Ambulance Technician, the best means of confirming that will again be through a practical assessment of capability."

38. It is noted within the report (second to last paragraph as shown on page 137) that management has said it is not reasonable to accommodate the Claimant working away from DCAs. Dr M then confirms that it is a matter for the Respondent's management, balancing a desire to support the Claimant as an employee (who Dr M says is likely to be considered disabled for statutory purposes) on the one hand against their broader operational needs on the other. In the last paragraph of the letter it notes that there are really three options for the Claimant, that he is accommodated on SRVs only, if that is not considered possible then to sustain the Claimant's employment by identifying an alternative role that could accommodate his level of capability and failing that termination of employment.

39. The Claimant then attends a welfare review meeting with Clive Burvill and Robert Ivey of the Respondent on 26 July 2016. He is accompanied by Nigel Sweet his Unison representative. The Claimant deals with this meeting at paragraph 14 of his witness statement and notes that he was shocked to be told that his frontline career was over, and that he would have to think about being redeployed. In the interim he was told that he would be placed on light duties.

40. It is this welfare review meeting that forms the basis of the Claimant's first complaint of discrimination arising from disability in that he says he was removed from his substantive ambulance technician duties on that date.

41. All the witnesses before us who were at the Welfare meeting refer to the letter recording what happened at pages 143 to 145. It is a letter dated 3 August 2016 which the Claimant says was posted to him on the 5 August 2016 (it was also emailed to him on the same day it was posted as shown at page 147). The content of this letter is not disputed by the Claimant or Nigel Sweet. It does therefore appear that the contents of this welfare review meeting are broadly agreed save for a reference in the witness statements of Robert Ivey and Clive Burvill to the Claimant's ability to undertake CPR.

42. Robert Ivey and Clive Burvill say within their witness statements that it was confirmed at the Welfare meeting that it would not be possible for the Claimant to only be assigned to SRV's. They also state that in any event even if he could be so assigned, due to his arthritic knee, they say the Claimant accepted that he would not be able to administer CPR.

43. Robert Ivey confirmed in answer to questions during cross examination that he had notes from the Welfare meeting and had used those to produce the letter which was then approved by Clive Burvill. Robert Ivey confirmed that he no longer had access to his notes, so his witness statement was written with reference to his memory and the outcome letter.

44. The Claimant and Nigel Sweet deny the comments around the CPR were said or that position was accepted. It is not dealt with in their witness statements as they assert they did not know this was an issue until they received the witness statements of Robert Ivey and Clive Burvill, which those witnesses confirmed were produced some two years after the meeting. This is understandable as there is no mention of the Claimant being unable to administer CPR in the letter recording what happened at the Welfare meeting, which is the most contemporaneous document we have been presented to the meeting from the Respondent. It is also a position that is inconsistent with the OH reports and the Claimant's fit note.

45. In supplemental oral evidence the Claimant confirmed that he had administered CPR to someone who had collapsed near his home a couple of months before his dismissal. He confirmed that he did not have a problem administering CPR. Nigel Sweet acknowledged that if the position as to CPR had been as the Respondent's witnesses recall then it would have been the end of any arguments to keep the Claimant in the front line. This would have been a significant concession if made.

46. What the Welfare meeting outcome letter does record is the Claimant said at that meeting that he felt a reasonable adjustment for him under the Equality Act would be for him to remain on car-only (SRV) shifts. The letter records the Respondent's position (page 144) as "I explained to you that I did have sympathy for your situation but that I had to look at the full range of duties and the operational implications and that I could not put patients, the public, other crews and yourself at risk by having you continue to work solely on SRVs. I said that there was a risk you could be on a job where you couldn't perform some action required because of your health condition, such as lifting a heavy patient, which could compromise you if you decided to do the lift and caused yourself further damage or injury, and colleagues if it meant us having to call another crew to the scene. I said that I could not protect you from that situation and that this was a major risk and safety issue. We said that a reasonable adjustment has to be reasonable and we

did not feel that this was reasonable in the operational circumstances and for business needs."

47. There is no reference to CPR within the paragraph quoted from the letter above but we note that what it does say is consistent with the Respondent's position as set out to the Claimant in June 2016 for what we understand to be its need for "dynamic resourcing", and the Claimant's position as set out in his original email (page 120) and the OH reports.

48. On balance we therefore prefer the Claimant and Nigel Sweet's recollections of what was said at the meeting in relation to the CPR position, that it was not discussed as being a problem for him at the Welfare meeting.

49. As to the Claimant's front-line career being over, the letter (at page 144) notes that "You said that you had recognised this was a career-threatening condition and had actually self-referred and said you were aware of staff being given exclusive duties on DCAs. We pointed out that there may be some staff in that position but we look on each case and its particular merits separately and we could not tell you the specific circumstances why that might have been allowed but there would be specific reasons peculiar to that individual. We said we had to look at your case as it was at this time and we simply cannot accommodate car-only duties as it does not work as a reasonable adjustment for the operational reasons already described. You said that you recognised that you were therefore unlikely to be able to finish your career in a frontline role."

50. Redeployment options are then noted as being discussed and how the Claimant said EOC roles were not suitable due to his hand problem and a recent eye operation as he felt he could not do long shifts at a computer screen with those issues. The Clamant confirmed that he was not interested in ill-health retirement. The Claimant highlighted that an imminent move by the Respondent to Crawley may open up other opportunities as well as being close to the Claimant geographically (with him living in Horsham).

51. Following an adjournment in the meeting a temporary role is arranged for the Claimant in Vehicle Preparation (VPP).

52. The Claimant was to start the VPP role on the 15 August 2016 allowing for his annual leave and it would be for an initial 3 months. As per the Welfare meeting outcome letter …"This would be kept under review and we would expect you meanwhile to be looking at any relevant permanent job vacancies arising in the Trust. We said that we will also alert Employee Resourcing of your availability for permanent redeployment and that as you were Equality Act covered, this would guarantee you an interview so long as you met the minimum selection criteria. We should point out though that

you would still need to pass the interview and demonstrate that you were competent for the role." (page 144).

53. After the meeting on the 26 July 2016 the Claimant emails Robert Ivey on the 27 July 2016 (page 141). He thanks Mr Ivey for his help and advice yesterday. "Being told my frontline career was effectively over has come as a bit of a shock and took a while to sink in fully……. As I have mentioned above, the decision to remove me from front line duties came as a bit of a shock and I did not take in all the implications fully at the time".

54. We further note from the letter recording the meeting (page 145) the Respondent says, "I think we therefore have to acknowledge in this letter that you are unlikely to be able to return to your full time A&E role on the road as per the options available under the Trust's sickness absence management policy, we are now seeking permanent redeployment for you".

55. It does appear to be a shock to the Claimant and it does appear to be a decision by the Respondent.

56. In his witness statement (paragraph 33) the Claimant states that it was made clear to him in a Welfare meeting on 14 November 2016 that working solely on SRVs was not an option that would be considered in his case. Therefore, he felt the pushing for reinstatement to SRV duties would be a futile exercise, so he did, reluctantly, accept that it would not be a suitable avenue to pursue.

57. However, from the facts we have found in relation to the Welfare meeting on the 26 July 2016 and the Claimant's immediate response to that, it does appear that he accepted the position earlier in that he does not challenge it in his email of the 27 July 2016. Neither is the summary of what was discussed about the operational circumstances and business needs of the Respondent challenged in the witness statements of the Claimant or Nigel Sweet.

58. Nigel Sweet's handwritten notes of the welfare meeting, that were referenced for the first time in cross examination of the Respondent's witnesses (at page140A), note that SRV cannot be seen as "light duties". Nigel Sweet appears to accept the Respondent's explanation as he does not challenge it when he refers to it in his witness statement at paragraph 5.

59. The issue is raised though that there was no assessment of the Claimant's capabilities as suggested by OH (paragraph 6 - Nigel Sweet).

60. The Claimant then takes up the temporary post in vehicle preparation (on the 15 August 2016) while redeployment is pursued.

61. From the evidence presented to us it appears that the next event is the Claimant then visiting HR on the 31 August 2016 and speaking with AG to explain that he felt upset and unsupported in relation to redeployment opportunities, as the Trust did not appear to be arranging for any vacancies or options to be discussed with him (paragraph 19 of his witness statement). This visit by the Claimant then prompts an email from AG to Robert Ivey on the 31 August 2016 which raises this concern (page 149). We note that the Claimant's focus here in on redeployment and not adjusting his front-line role to SRV only duties.

62. Robert Ivey's email response to AG (on the 31 August 2016) (at pages 148 and 149) is consistent with his position as articulated by him in cross examination that the Claimant had only been on the interim secondment for about two weeks (since 15 August 2016) and that the emphasis is for him (the Claimant) to look for redeployment options as HR and / or Resourcing do not know what he can and cannot do and what his skills are that might be outside of his former role.

63. The email response to that from AG (on the 31 August 2016) is that this is what she told the Claimant and that she thinks his frustration is that there are not any posts he feels he can apply for and he is worried as to what that will mean for him at the end of the three months temporary placement (page 148).

64. Later on the same day, 31 August 2016, Robert Ivey emails the recruitment department to inform them of the Claimant's circumstances and that he should be guaranteed an interview if he meets minimum selection criteria for a post (page 150).

65. It is also on the 31 August 2019 (page 151) that the Claimant identifies the role of Communications Officer. The Claimant acknowledges that he has missed the application deadline but asks if he can be interviewed as he believes he has relevant experience. Robert Ivey acknowledges and says that it may still be possible for the Claimant to be offered an interview under the Trust's Two Ticks commitment if he meets the minimum selection criteria.

66. The Two Ticks commitment is set out in the Respondent's Recruitment and Selection Policy (pages 77a to 77az) at page 77 m of the bundle.

67. It says that – "5.17.2 **Disabled Applicants and the 'Two Ticks' Symbol**… 5.17.2.1….. Those candidates who declare that they have a disability and who meet the essential criteria for a post will be guaranteed an interview…. 5.17.2.3 ……decisions around suitability based on a disability must be

made following the interview and assessment process in accordance with the Equality Act".

68. There is then a further section of this policy that we were taken to on numerous occasions in evidence headed "5.18 **Prior Consideration of Displaced Staff**" (page 77 n).

    a. "5.18.1 Where existing staff are "at risk" of their contract of employment being terminated, either because they are unfit to perform their existing duties or for reasons of organisational change, they should be given prior consideration for any vacancy within the Trust for which they may be potentially suitable."

    b. "5.18.2 It is the HR Department's responsibility to keep a mailing list of all staff in this position and ensure that they receive copies of all vacancies advertised in the Trust. Where they apply for a vacancy and meet the essential selection criteria, they must be guaranteed an interview preferably in advance of other candidates to be interviewed."

    c. "5.18.3 Where there are doubts about the suitability of the displaced member of staff for the post, he/she may be offered the post on a trial period, allowing both a member of staff and the manager the opportunity to assess the person's suitability for the post without their employment rights being affected. This would typically be for one to three months."

69. We were also taken to Appendix F within this policy (page 77ak) which is an interview scoring form template and which shows that a score of 0 is unacceptable, 1 is poor, 2 is acceptable/average, 3 is good and 4 is excellent.

70. We were also taken to page 77am of the template which notes that the total score is:

    a. "Scoring: Candidates must have achieved a score of over ????? to qualify for employment. Score = add acceptable score (2) x amount of questions, (each panel member needs to jointly agreed a score for each question)."

71. It is noted within the Respondent's submissions (paragraph 9) that "The Interview Score Form in the Respondent's Recruitment and Selection Policy [77a] at [77am] can certainly be read as suggesting a formula for arriving at an appointable score of 2 times the number of questions. It is acknowledged that the lack of clear evidence on this and the lack of complete paperwork for all of the interviews is not impressive.".

72. The Communications Officer role (Band 5)

73. The Claimant is permitted to attend an interview for this role despite his application being after the application deadline.

74. The Claimant's interview for the Communications Officer role is on 19 September 2016. The interview was conducted by Elizabeth Spiers who attended this hearing to give evidence on behalf of the Respondent.

75. Elizabeth Spiers describes the interview with the Claimant in her witness statement at paragraphs 8 and 9. Mrs Spiers found that (paragraphs 8.1 to 8.5) that the Claimant's experience was limited, he failed to provide enough detail of running a successful communications project and his examples were not specific to the questions. Further, his written work for the task set was not of the level required.

76. In short, she found that neither the Claimant, nor any of the other applicants at that time, had the level of skills, experience and qualifications to "hit the ground running in the role". They were looking for someone with 18 months experience in a similar role or a degree. It was also a fixed term role (for 12 months) where they needed someone to deliver in that time. As a result, they did not appoint from that recruitment process and re-advertised the role as a higher band (band 6) and then successfully recruited someone in January 2017.

77. We have not heard evidence from the Claimant to say that the assessment of his levels of skills and experience by Mrs Spiers was wrong. It is also clear from Mrs Spiers' evidence that neither the Claimant nor the other applicants were able to meet the specifications of what they needed for the role at that time, that is someone who could hit the ground running with a suitable level of experience or a degree to deliver a fixed term project.

78. The Claimant was informed on 29 September 2016 that his application for the Communication Officer's role was unsuccessful.

79. The Claimant's union representative Nigel Sweet then sent an email to the Respondent on 9 November 2016 (page 188) asserting that the Respondent failed to comply with the Equality Act and in particular as interpreted by the case of Archibald and Fife Council. He asserted that the Claimant's rejection for the role of Communications Officer may have contravened the Equality Act.

80. This is responded to on 10 November 2016 (page 187) by Robert Ivey and he says that Archibald and Fife actually produced a judgement which said that reasonable adjustments can include the possibility that a disabled

person be placed at the same or higher grade without any competitive interview if that is reasonable under the circumstances. He says that is a subtle but important difference to how Mr Sweet had described it. He also explained that there are particular circumstances in that case that do not necessarily mean that the judgment fits every other case. He did not accept that the Respondent had contravened employment law.

81. As was highlighted by the Respondent's Counsel with his questions of the Claimant and Mr Sweet these two differing interpretations of Archibald and Fife from the Claimant's side and the Respondent's side were static for the rest of the relevant period of this claim.

82. Welfare meeting on the 14 November 2016

83. On 14 November 2016 a further occupational health report is produced about the Claimant following a telephone consultation with him on the 11 November 2016 (pages 192 to 194). At page 193 the report states… "Mr Gorrie has been working from SRV which he feels has successfully addressed the major exasperation of his knee problem climbing in and out of the cab, in and out of the ambulance and carry heavy weights up and down stairs. He continues to feel due to his knee problem that he may put his patients and other crew members at risk should he be called upon to carry a patient up and down stairs. When working on SRV, his knee symptoms are not aggravated. Driving, carrying equipment bags and kneeling for CPR all seem tolerable activities for his knees."

84. As acknowledged by the Claimant in cross examination this OH report remains in line with the previous OH reports.

85. There is then a welfare and redeployment review meeting with the Claimant on 14 November 2016 where he attends with Nigel Sweet and the Respondent is represented by Lorna Stewart and Robert Ivey.

86. At that meeting the Claimant is told his temporary post will be extended by a month and he is invited to a further meeting on 21 December 2016.

87. The letter confirming the outcome of the welfare meeting is at pages 208a to 208c.

88. The letter notes that the Claimant acknowledges that he could no longer work on the front line and this accords with what the Claimant says about this in paragraph 33 of his witness statement, save that the Claimant says that it is the Respondent's wording where it says the Trust would not be given the flexibility it needs if the Claimant was on the SRV only. The Claimant accepted in cross examination that he accepted this position although he did not agree with it. As noted already we have not had clear

evidence from the Claimant or Nigel Sweet to assert how the Respondent could operate differently to reasonably accommodate the Claimant working on SRV only. Neither the Claimant nor Mr Sweet could provide evidence of particular incidences of SRV only work.

89. The consensual focus from this meeting appears to be on trying to redeploy the Claimant.

90. The letter also notes the Claimant confirming that the Communications Officer role was the only job suitable for him to apply for during the last 3 months (page 208a).

91. After a short adjournment the Respondent agreed to undertake the following:

    a. "We will ask communication manager Liz Spiers to call you that week with feedback on your interview for the communications officer role… [this was done after the meeting and recorded in the letter as having been done]."

    b. "We will continue your current temporary redeployment to vehicle preparation on the present terms and conditions for a further month to give you that additional time to review alternative jobs within the Trust and also the wider NHS."

    c. "To further assist you, Robert will ensure that you are given an NHS Jobs Restricted account to enable you to review and apply for opportunities at other NHS organisations that are not widely advertised… [this was also done after the meeting and recorded in the letter]."

    d. "We will arrange to meet with you again at the end of that further month, i.e. around mid December 2016, to review progress. If it has not been possible at that point to confirm that you are being redeployed, at that further meeting we will give you 12 weeks notice of termination from your front light Technician role on the grounds of ill-health capability - although that would still mean that you would have 12 weeks to continue to seek alternative employment through redeployment to another post."

    e. "… In addition, Robert will email Clinical Education and HR training colleagues, plus Fleet and Logistics, and any other areas that might be a fit for your skills and experience in order to assess their needs for staff and whether they have any upcoming suitable alternative roles for which you might apply. As you are likely to be Equality Act covered, under the Two Ticks scheme to which the trust ascribes,

you would be guaranteed an interview so long as you met the minimum selection criteria. We should again point out though that you would still need to pass the interview and demonstrate that you were competent for the role. This is not to say that we will not consider slotting in if that is an appropriate course for a specific available job role but there does need to be a reasonable fit that works both for you and the Trust."

92. On 15 November 2016 Robert Ivey asks for the Claimant to have access to an NHS Jobs Restricted account so that he can see more of the vacancies available (page 197).

93. On 16 November 2016 Robert Ivey emails a number of people seeking opportunities for the Claimant (pages 200 to 211). At paragraph 29 of his statement he lists the seven individuals he wrote to and the follow up actions he undertook. This was not challenged by the Claimant. The Claimant has not raised criticism at the way Robert Ivey acted towards him personally and looking at the email Robert Ivey sent to the individuals (page 200 for example) it does appear that Robert Ivey is presenting the Claimant in a positive light for redeployment opportunities. Unfortunately, no opportunities did arise for the Claimant from Robert Ivey's efforts.

94. There is an email dated 7 December 2016 (page 216) from AR of the Respondent to Robert Ivey which notes the Claimant trying to raise an issue at the Diversity Champions meeting that day. In cross examination the Claimant confirmed that the issue he was trying to raise was that he should not be being managed under the sickness absence policy but one for disability.

95. Welfare meeting on the 21 December 2016 and the decision to dismiss

96. On 21 December 2016 the Claimant attended a further welfare and redeployment review meeting with Lorna Stewart and Robert Ivey of the Respondent. He is accompanied by PS from Unison.

97. A letter dated 28 December 2016 from Lorna Stuart confirming what happened at the meeting and its outcome is at pages 252 to 254. Its content does not seem to be in dispute.

98. It updates on the actions that the Respondent agreed to undertake from the last meeting and then goes on to state (page 252/253):

    a. "I asked you whether you had been applying for jobs and you told us that apart from the internal communications officer post, you had also put in speculative applications for two similar communication jobs through NHS jobs, both based in London. You explained that London

was not a difficult commute for you from Horsham. You added that Liz Spier's feedback for the internal comms roles that your recent writing/journalistic experience was not strong enough for you to hit the ground running on those aspects so there was a capability gap, although you had scored highly on the safeguarding and diversity questions. You said you understood this but felt you could argue some of those points. You said that you hoped one of the London based comms roles might give you the opportunity to bring that experience up-to-date."

b. "You noted that the internal publications officer post was being advertised again and Robert said that he understood they had not yet found anyone suitable. You made the point that you could have filled the gap at that time."

c. "You told us that there were not that many internal jobs in the trust for which you felt you could apply and be a reasonable fit for as they were very specific roles. You said that you had not applied for jobs in other NHS Trusts on NHS Jobs as they were restricted to internal candidates. Robert explained that the restricted account access you now have specifically allows you to apply for these as an internal candidate and that is the advantage of having the special access."

d. "We then discussed two new potential redeployment roles that were coming up, one being an events coordinator role in the contingency planning and resilience department which we think is at band 3 but could be band 4. We noticed that none of us had been able to access the job details that day as they seemed to have been taken down after one week. [P] speculated that it might be because the job had been for evaluation a couple of times he thought the banding may not have been fully concluded. Robert said he would check this."

e. "The other post was a safeguarding coordinator role at band four, for which Robert gave you the job description and person specification. Robert said that he expected this role to be advertised shortly and said he believed you met the essential criteria for that post. You agreed and also said that you had a personal interest in that area of work. We also noted again that you had achieved high marks on safeguarding at the Comms officer interview. ….."

f. "I told you that I would not give you notice today but said that I did still need to confirm that we would be giving you 12 weeks notice of termination from your frontline Technician role on the grounds of ill-health capability. I said that to give you a little more time we would instead look into your contractual notice period of 12 weeks to start

from 2 January 2017, with an end date of 31 March 2017, which is a few days beyond the end of the 12 week period…."

g. "Robert explained that if you are successful in obtaining one of the alternative roles then the notice period would stop from the day you took up a new appointment. If not, you would remain on notice but would still be free to continue to apply for any suitable alternative redeployment roles…"

99. The letter goes on to confirm the Claimant's right of appeal and that the 14-day limit to submit his appeal would not start until after the outcome is known for the two jobs he will now apply for, as if he were successful the notice of dismissal would be withdrawn.

100. **Events Co-Ordinator role (Band 4)**.

101. The Claimant's interview for the Events Co-Ordinator role is then set up (pages 226 to 227). It is of note to us that Robert Ivey states in his email to the Claimant about the role (page 227) that "I think this might be a good role for you to explore, as we discussed at today's meeting with you?".

102. On 6 January 2017 the Claimant attends an interview for the Events Co-Ordinator role. This interview was conducted by David Wells who attended this hearing to give evidence on behalf the Respondent. The Claimant is advised that day that he is unsuccessful.

103. In short, Mr Wells says at paragraph 9 of his witness statement that he decided not to offer the Claimant the job because he did not meet the criteria for the role through the interview. He says that while the Claimant interviewed well and was articulate he did not answer the questions fully and did not have much enthusiasm for the role. He goes on to explain at paragraph 11 of his witness statement that of the seven candidates they interviewed only two were appointable in their view.

104. The successful candidate scored 29/40 (page 254t) in comparison to the Claimant who scored 18/40 (page 254f). The other candidates' scores ranged from 26/40 to 14/40. The Claimant's score was the second to last.

105. It was accepted by David Wells during cross examination that he had already interviewed the candidate that turned out to be the successful candidate for this role before the Claimant (her interview was on the 5 January 2017 (page 254o) and the Claimant's on the 6 January 2017 (page 254a)). The successful candidate had not worked for the Trust before, did not have knowledge of the internal policies and didn't have a certificate in health and emergency planning (page 221). They had also not worked in emergency services or as a category one responder (page 224). It was

accepted that the successful candidate needed to be trained up and that the Claimant could also have been trained. During cross examination David Wells acknowledged that the essential criteria could be flexible.

106. David Wells was also challenged on the score threshold the Claimant had to score above, as there were 8 questions which based on the example formula in the Respondent's policy (page 77am) with 8 questions with 4 marks each that is out of 32, with the 4 Communications Skill marks would then be out of 36, not 40. However, we note that a score of 18 out of 36 would only put the Claimant at 50%, versus what the Respondent asserts to be its recruitment point of 28/40 which is 70%.

107. Mr Wells was also not challenged on his evidence in paragraphs 8,9 and 10 of his witness statement about the Claimant's lack of enthusiasm and inability to demonstrate the required competencies.

108. The Claimant was unsuccessful in securing this role.

109. We then see at page 255 an email exchange between the Claimant and Robert Ivey on the 6 January 2017, where Robert Ivey notes about the Safeguarding Co-Ordinator role that he would expect the Claimant to be shortlisted for interview for that one. The Claimant confirms that he will be submitting his application for that role.

110. The Appeal

111. By letter dated 13 January 2017 (pages 258 to 259) the Claimant appeals against his dismissal. Within the appeal letter the Claimant sets out his grounds as being "I do not believe that the Trust is complying with the [Equality] Act with regards to a 'reasonable adjustment'. I was told that the reasonable adjustment for me was to allow a set period for me to find alternative employment and if I was unsuccessful, my employment would be terminated. According to the Equality Act, if a reasonable adjustment put forward by the employer fails to achieve the desired result, the employer must consider other options. It cannot assume that it has discharged its responsibilities. In particular, failure of an adjustment cannot be grounds for dismissal." ….. "My appeal is based on the Trust failing to provide a reasonable adjustment as laid out in the Act and, therefore, failing to comply with the Equality Act." Further that it should not be managed under the Trust's sickness absence policy.

112. The Claimant does not expressly challenge in his letter of appeal that Archibald and Fife should have applied to the Events Co-ordinator role.

113. Robert Ivey in his witness statement (paragraph 44) states that he was involved in some email correspondence in arranging acknowledgement

of the Claimant's appeal letter and arranging the appeal hearing. We are referred to pages 260 to 265. At page 260 we can see an email from Robert Ivey to HR and copying in Lorna Stuart dated 18 January 2017 where he states "Ian has said he wishes to appeal regardless of the result of any applications, [H]. This is because, as mentioned below, he feels that he should be slotted into any vacancy and not be expected to go through a selection process. With setting up the appeal and obtaining manager availability etc., the likelihood is that the appeal will be heard after that application process anyway. The appeal panel may decide on any possible slotting-in if they wish."

114. There is a reply to this email from BM, Senior HR & Policy Manager, on the 18 January 2017 (page 263):

a. "Agree with what you say – we should organise the appeal without waiting for the outcome of the job application."

b. "The appeal panel need to consider the grounds of appeal put forward:"

115. The email goes on to note the concerns being raised by the Claimant about the redeployment process:

a. "1(a) Is he disabled under the equality act and if so (b) has the Trust failed to comply with reasonable adjustment requirements? Is allowing a period for redeployment a reasonable adjustment in itself? Is failure to find alternative employment grounds for dismissal? (Yes it can be if exhausted) Wrt the Archibald case, employers are not required to treat disabled persons more favourably, but transferring an employee to another role can be seen as an adjustment that removes the disadvantage. Also within the job application process, making adjustments so that a disabled person is not disadvantaged – and assuming he met the criteria in order to be shortlisted."

116. **Safeguarding Co-ordinator role (Band 4)**

117. On 24 January 2017 the Claimant attended an interview for the Safeguarding Co-ordinator. This interview was conducted by Jane Mitchell who also attended this hearing to give evidence on behalf of the Respondent.

118. Jane Mitchell confirmed in evidence that the criteria for employability meant a score of 28/40 or more. She confirmed that this was set by HR. She said that the Claimant was not successful as he scored 24/40 (page 268f). The successful candidate scored 29.5/40 (268 z(a)).

119. The Respondent notes within its submissions that this witness was not challenged in relation to paragraphs 7, 8 and 10 in relation to the Claimant's lack of passion and lack of clarity in his answers.

120. We have noted though that this witness' assertion as to the Claimant's lack of passion does appear to be contrary to the mark the Claimant was given for his personal motivation at the interview itself where he scored 3/4 (page 268b) (i.e. a "good"). His lack of passion doesn't appear to be an issue at interview, and Jane Mitchell was challenged about this in cross examination.

121. As to lack of clarity in his answers we have noted that the Claimant's score for knowledge framework was 1/4 (page 268b). The successful candidate scored 2/4 for that question (page 268w) and needed prompting to provide the answer (as noted on page 268w). Jane Mitchell confirmed under cross examination that the successful candidate was able to have some training around safeguarding and this could have been offered to the Claimant as well, where he lacked relevant knowledge. It had already been noted by Robert Ivey and Lorna Stuart prior to this interview that the Claimant scored well in safeguarding for the Communications Role.

122. We have also noted that the scores for the Claimant and the successful candidate in relation to their communication skills were the same, 3/4 (pages 268f and 268z(a)), which is "good". This does not seem to suggest that the Claimant was unclear.

123. Jane Mitchell in her witness statement (paragraph 6) says that she decided not to offer the Claimant the job because there was a better candidate. It is not therefore the position of Jane Mitchell that the Claimant did not meet the essential criteria of the job role.

124. Jane Mitchell was challenged during cross examination that, based upon the policy of the Respondent (page 77 am), a score of 18 (2 times the number of questions (in this interview that was 9)) plus 4 for communications skills gives a total of 22 as the threshold. It was put to this witness that as the Claimant had scored 24 his score would therefore have sufficed (with 22 as the threshold). This witness accepted that the Claimant could have been appointed if that had been the scoring and she also accepted that he could have potentially been offered a trial in the role.

125. The Claimant was unsuccessful in securing this role.

126. The Appeal hearing

127. On 28 February 2017 the Claimant attended an appeal hearing chaired by Richard Webber (who gave evidence at this hearing on behalf of the Respondent) in relation to his dismissal.

128. The appeal was conducted by Richard Webber as the Chair with AR, Non- Executive Director and IA, Assistant Company Secretary. There are full non- verbatim notes from this hearing at pages 299 to 315. The Claimant was represented by Nigel Sweet of Unison.

129. It was highlighted on behalf of the Claimant during the cross examination of Mr Webber that based on the Sickness Absence Management Policy (pages 72a to 72 aj) and in particular page 72ag, which states that appeals against termination of employment on the grounds of capability will be heard by a panel of three board members of the Trust, including one Non-Executive Director and the Director of Workforce (or if the Director of Workforce is unavailable a senior member of the HR Department) that the panel did not fulfil this required line up. Mr Webber thought it did as he counted the Assistant Company Secretary as being part of the board. We note though that there has not been any evidence presented to us to say why the appeal panel line up, as it was structured, was of detriment to the Claimant.

130. The appeal outcome letter dated 28 February 2017 from Richard Webber is at pages 317 to 319.

131. In short, the appeal is not upheld but the Respondent extends the Claimant's notice period to 31 May 2017 so that following the move by the Respondent to Crawley the Claimant could take advantage of what might potentially be new job opportunities.

132. The letter also states (page 318/319) "The Panel considered the points raised and internal HR advice regarding all of the steps taken to support you in finding suitable redeployment opportunities. We agreed, in your individual case, to speak to HR to ensure continued support in identifying alternative roles and look to allowing a non-competitive interview should a job occur for which this would be appropriate."

133. Although the Claimant challenged the use of the sickness absence policy in his situation, from a dismissal perspective, we have not been presented with evidence to say why that was of detriment to the Claimant. Nigel Sweet did accept during cross examination that the policy did give the Claimant a right of protection and he agreed that the policy did afford safeguards in the way it was run. We have also noted that the Claimant himself said in his original email (page 120) that he would need to go off sick and he does produce a GP fit note (131A).

134. Simulation Technician role (Band 4).

135. In an email from the Claimant to Robert Ivey on the 17 February 2017 (page 275) the Claimant sets out why he considers he is suitable for the Simulation Technician vacancy. This was not challenged by the Respondent.

136. On 6 March 2017 Robert Ivey asks for a non-competitive interview to be arranged for the Claimant for the role of Simulation Technician (page 328).

137. On the 9 March 2017 the Claimant interviews for the role of simulation technician with Andrew Hartley. Mr Hartley attended this hearing to give evidence on behalf of the Respondent. He explains at paragraph 9 of his witness statement that he was informed subsequently by HR that it had been agreed that if the Claimant met the score for appointment, which was 28/40 or over, then he would have been slotted into the role. He believes that he was told this information after the interviews had been concluded but before the final decision to appoint had been made. However, we note that it would be the case that at that point the interview scores awarded to each candidate would have already been set.

138. Under cross examination Mr Hartley confirmed that the Claimant was offered the usual competitive interview with the other candidates (albeit the first interview of the day) and that the Claimant was not considered the best candidate. The Claimant did not therefore benefit from a non-competitive interview for this role.

139. Mr Hartley says the Claimant did not score high enough to be slotted in, i.e. 28/40 (paragraph 7). There is no documentation to support that this was the threshold mark but it has been asserted to us by the Respondent that it would be that figure in order to be in line with the other interviews. Again though, we have reminded ourselves of the Claimant's assertion about the scoring and as is noted in the Respondent's submissions … "The Interview Score Form in the Respondent's Recruitment and Selection Policy [77a] at [77am] can certainly be read as suggesting a formula for arriving at an appointable score of 2 times the number of questions.". The threshold score may therefore not have been 28 out of 40.

140. As to what the Claimant scored at his interview this is stated by Robert Ivey in his witness statement (paragraph 50). He says that the Claimant's score was 24, however we have not been presented with any interview documentation to support this.

141. Mr Hartley in questioning accepted that the Claimant may have scored 24 out of 40 or 24 out of 36. He was not able to confirm the position as he did not have the interview scoring sheets.

142. Mr Hartley in his witness statement says that the Claimant's scores were very low (paragraph 7) and as he did not meet the 28/40 score threshold he was not eligible to be appointed against the highest score (i.e. slotted in) (paragraph 9). When asked what the Claimant's low scores were compared with Mr Hartley confirmed the two top scores. However, he was unable recall what those two top scores were. It was also confirmed by Mr Hartley that the person with the highest score had been shortlisted before he was told the Claimant would be shortlisted as well, and it was someone who he knew prior to the interviews.

143. Mr Hartley also confirmed that this is a role that is usually 9am to 5pm unless travel to a distant location is required. Mr Hartley accepted that assumptions should not be made about what the Claimant could or could not do and that to determine this would require a referral to OH. Mr Hartley accepted that reasonable adjustments could have been made to accommodate the Claimant in the role and he could have been offered a trial period.

144. The Respondent notes within its submissions that this witness was not challenged on his evidence at paragraph 7 about the Claimant's lack of research and lack of enthusiasm. Even if what Mr Hartley says is correct about this (and as said we have not seen any of the interview score sheets to demonstrate this assertion in comparison to the other candidates), these have not been stated as being essential skills for the role.

145. The Claimant was unsuccessful for this role.

146. By email dated 20 April 2017 the Claimant's union rep challenged HR about the interview for Simulation Technician and that Mr Hartley was unaware that the interview was supposed to be non-competitive (pages 341 to 342).

147. On 2 May 2017 Robert Ivey highlights a vacancy for the role of Freedom of Information coordinator (page 351). The Claimant says (paragraph 68 of his witness statement) that he had no previous experience of Freedom of Information and could not see how he would be successful if he had applied for that role.

148. By email dated 11 May 2017 the Claimant's union rep confirmed that the Claimant will not be applying for the role of Freedom of Information coordinator (page 353).

149. By email dated 22 May 2017 the Claimant's union rep is informed of the three-month placement as a patient advice liaison officer (page 359). The Claimant says he did not think such a role was appropriate as it was an interim possibility.

150. By email dated 22 May 2017 the Claimant's union rep indicates that the patient advice liaison officer role did not sound suitable for the Claimant (page 369).

151. The Claimant's employment ends with the Respondent on 31 May 2017 at the expiry of his notice period.

The Law

152. Having established the above facts, we now apply the law.

153. If the reason for the dismissal was capability it is a potentially fair reason for dismissal under section 98(2)(a) of the Employment Rights Act 1996 ("the Act").

154. We have considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".

155. The starting point should always be the words of section 98(4) themselves. In applying the section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to a set of factual circumstances within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

156. This is also a claim alleging discrimination because of the Claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The Claimant complains that the Respondent has contravened a provision of

part 5 (work) of the EqA. The Claimant alleges discrimination arising from a disability and failure by the Respondent to comply with its duty to make adjustments.

157. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. It is accepted in this claim that the Claimant is a disabled person at the relevant time, and the Respondent had knowledge of the disability.

158. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

159. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

160. Our attention was also drawn to the Code of Practice on Employment (2011) and in particular paragraph 6.33 of the Code of Practice: "**Transferring the disabled worker to fill an existing vacancy** - **Example:** An employer should consider whether a suitable alternative post is available for a worker who becomes disabled (or whose disability worsens), where no reasonable adjustment would enable the worker to continue doing the current job. Such a post might also involve retraining or other reasonable adjustments such as equipment for the new post or transfer to a position on a higher grade."

161. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that 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. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

162. As to time limits which relate to the complaints of discrimination Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

163. We were referred to the following case authorities by the parties Counsel within their submissions:

a. Merseyside and North Wales Electricity Board v Taylor [1975] ICR 185;

b. Garricks (Caterers) Ltd v Nolan [1980] IRLR 259 EAT;

c. Thanet District Council v Websper EAT 1090/01;

d. Environment Agency v Rowan [2008] ICR 218;

e. Smith v Churchills Stairlifts plc [2006] ICR 524;

f. Hay v Surrey County Council [2007] EWCA Civ 93;

g. Royal Bank of Scotland v Ashton [2011] ICR 632;

h. Cumbria Probation Board v Collingwood UKEAT/0079/08/JOJ, 7 August 2008;

i. Leeds Teaching Hospital NHS Trust v Foster [2011] Eq. L.R. 1075;

j. Archibald v Fife Council [2004] ICR 954;

k. Project Management Institute (“PMI”) v Latif [2007] IRLR 579;

l. Jewell v Stoke Mandeville Hospital NHS Trust ET Case No.2700986/98;

m. Southampton City College v Randall [2006] IRLR 18;

n. James v the Chief Constable of Norfolk, 18 January 2008;

o. Chief Constable of South Yorkshire v Jelic [2010] I.R.L.R. 744;

p. Horler v the Chief Constable of South Wales Police, 5 August 2013;

q. Wade v Sheffield Hallam University UKEAT/0194/12/LA;

r. Wolfe v North Middlesex University Hospital NHS Trust UKEAT/0065/14/MC;

s. Linsley v Revenue and Customs Commissioners [2019] IRLR 604, EAT;

t. Barclays Bank plc v Kapur and ors [1991] ICR 208, HL;

u. Owusu v London Fire and Civil Defence Authority [1995] IRLR 574, EAT;

v. Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530;

w. Hale v Brighton and Sussex University Hospitals NHS Trust EAT 0342/16;

x. Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640;

y. Middleton v Highways Agency, Case No. 2401568/2016;

z. Pnaiser v NHS England (1) and Coventry City Council (2) UKEAT/037/15/LA;

aa. Shah v Capita PLC UK EAT/0080/18/DM;

bb. O'Brien v Bolton St Catherines Academy [2017] ICR 737;

cc. Grosset v City of York Council 2018] ICR 1492;

dd. Secretary of State for Justice v Prospere UKEAT/0412/14/DA;

ee. Tarbuck v Sainsbury's [2006] IRLR 664;

ff. Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15;

gg. Iceland Frozen Foods v Jones [1983] ICR 17;

hh. J Sainsbury PLC v Hitt [2003] ICR 111;

ii. Polkey v A E Dayton Services Ltd [[1987] IRLR 503.

164. We take these cases as guidance, and not in substitution for the provisions of the relevant statutes.

165. We have noted the following legal principals from those case authorities:

166. **Reasonable Adjustments** - When considering the question of reasonable adjustments, we have referred to the case law summary provided by the Claimant's Counsel as to the steps involved in considering a reasonable adjustment claim, which the Respondent's Counsel accepted as a fair summary:

a. When addressing the question of reasonable adjustments in Environment Agency v Rowan [2008] ICR 218, the EAT set out how an employment tribunal should consider a reasonable adjustment claim (p24 Authorities Bundle (AB), para 27). The tribunal must identify:

i. (a) the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer;

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

iii. (d) the nature and extent of the substantial disadvantage suffered by the claimant.

b. In Smith v Churchills Stairlifts plc [2006] ICR 524, the Court of Appeal confirmed that the test of reasonableness is an objective one, and it is ultimately the employment tribunal's view of what is reasonable that matters (p37-45 AB).

c. In Hay v Surrey County Council [2007] EWCA Civ 93 (cited in the case of Ashton as referred to below), the Court of Appeal held the reasonable adjustments legislation is concerned with outcomes, not with assessing whether those outcomes have been reached by any particular process, or whether that process is reasonable or unreasonable (p53 AB).

d. In Royal Bank of Scotland v Ashton [2011] ICR 632, Mr Justice Langstaff commented: "… it is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment." (p54 AB, para 24). The EAT emphasised that, since the reasonable adjustment provisions are concerned with practical outcomes rather than procedures, a

tribunal's focus must be on whether the adjustment itself can be considered reasonable.

e. In Cumbria Probation Board v Collingwood UKEAT/0079/08/JOJ, 7 August 2008, HHJ McMullen said: "it is not a requirement in a reasonable adjustment case that the Claimant prove that the suggestion made will remove the substantial disadvantage" (p84 AB, para 50). The EAT then went on to uphold a finding of a failure to make a reasonable adjustment which effectively gave the claimant a chance of getting better through a return to work.

f. In Leeds Teaching Hospital NHS Trust v Foster [2011] Eq. L.R. 1075, the EAT held (p100-101 AB, para 17):

    i. "In fact, there was no need for the Tribunal to go as far as to find that there would have been a good or real prospect of Mr Foster being redeployed if he had been on the redeployment register between January and June 2008. It would have been sufficient for the Tribunal to find that there would have been just a prospect of that. That is the effect of what the Employment Appeal Tribunal (Judge McMullen QC presiding) held in Cumbria Probation Board v Collingwood (UKEAT/0079/08/JOJ) at [50]."

g. As to the comparator the Court of Appeal in Smith v Churchills Stairlifts plc [2006] IRLR 41 supported the idea of a fairly limited comparison group in a reasonable adjustments claim. Maurice Kay LJ held that, in the light of the analysis handed down by the House of Lords in Archibald v Fife Council, the proper comparator can be identified only by reference to the disadvantage caused by the arrangements that are questioned. Thus, on the facts of the Churchills Stairlifts case, where the arrangement (or provision, criterion or practice) that the disabled person could not meet was a requirement that potential employees should be capable of carrying a particular heavy article, the proper comparators would be the potential employees who could meet that requirement and were not disadvantaged as a result.

h. In Archibald v Fife Council [2004] ICR 954, Mrs Archibald had been employed as a road sweeper and had been physically fit to do that job until she became disabled following minor surgery.

i. Lord Hope commented at paragraph 12 (p110 AB):

    i. "Her disability placed her at a substantial disadvantage in comparison with others in the same employment who were

not at risk of being dismissed on the ground that, because of disability, they were unable to do the job they were employed to do. These persons, a limited class, were her "comparators"."

j. Lord Roger commented at paragraph 42 (p118 AB):

i. "What actually happens if an employee becomes so disabled that she cannot perform the essential functions of her job is that, under her contract of employment, she is liable to be dismissed. That is the substantial disadvantage she suffers...."

ii. "The appropriate comparators are therefore other employees of the employer who are not disabled, can therefore carry out the essential functions of their jobs and are, accordingly, not liable to be dismissed on the ground of disability."

k. As to the burden of proof this was set out by the EAT in Project Management Institute ("PMI") v Latif [2007] IRLR 579 at paragraphs 55 – 57 (p138 AB):

i. The Claimant must prove that the duty to make reasonable adjustments arose – i.e. there was a PCP and that caused him or her a substantial disadvantage;

ii. the Claimant must identify the "broad nature" of adjustments which should have been made (at any stage during the hearing will be sufficient - paragraph 57).

iii. the Respondent must show that the suggested adjustments were not reasonable given its particular circumstances.

167. We were referred by both Counsel to the case authority of Wade v Sheffield Hallam University UKEAT/0194/12/LA. In that case (as summarised within the Claimant's submissions):

a. "the claimant suffered from an allergy and was disabled within the meaning of the DDA. She had not been at work since 2004 and was placed on gardening leave from 2005 until 2012 when she was dismissed. In 2006 the respondent started a restructuring exercise which involved slotting in staff. The claimant applied for a vacancy but failed to meet two essential criteria: she lacked the ability to lead teams and to work within the newly restructured faculty of organisation and management. She was not offered the job. In 2008 the job came up again and again she applied. The claimant

contended that the job was the same as the one she had been doing since 1986. She attended a competitive interview but was not offered the job, the respondent saying that they had 'some concern that [she] saw this post as an extension of [her] previous role. The strong assumption that nothing much had changed didn't give confidence of forward thinking, adaptability or using [her] skills in the future."

b. "The claimant put forward that a reasonable adjustment was that there should have been a much softer assessment process prior to and instead of a competitive interview process, that softer process being an accommodation of the claimant's failures to reach the essential criteria that the interview panel identified. The Tribunal considered that the reasonable adjustment for which the claimant contended was tantamount to requiring the employer to automatically appoint her when it did not believe that she was appointable. The ET did not accept that that would be a reasonable adjustment. The claimant appealed. The EAT held (p235 AB):"

c. "18. In our judgment, Ms Woodward is correct in her support of this Employment Tribunal. The first thing to note is that the Tribunal recognised that the Respondent had been through this twice. In 2006 the Claimant failed to meet two essential requirements. The Claimant failed to recognise that the job had evolved and changed, and when considering whether she was to be redeployed into it the Tribunal held it was reasonable for the panel to consider the essential requirements. The simple proposition is that a reasonable adjustment comes to be made to disapply an essential requirement but not where the person fails to meet the essential requirements entirely."

168. We have also considered Wolfe v North Middlesex University Hospital NHS Trust UKEAT/0065/14/MC. In that case (as summarised within the Claimant's submissions):

a. "the claimant was a band five staff nurse originally employed to work on a ward. She was unable at the relevant time to undertake ward work by reason of an acute stress reaction, the result of a disability within the meaning of the Equality Act 2010. For a period, she was found suitable work in the Outpatients Department that was not ward-based. This amounted to the provision of reasonable adjustments."

b. "A time came when the Respondent considered that there was no longer an available post in the Outpatients Department and the Claimant was instructed that unless she found another post suitable for her or returned to her ward-based post or to a similar post she would be subject to the stage 3 sickness management procedure

which might result in the loss of her employment. The Claimant maintained that this instruction amounted to a PCP (provision, criterion or practice) requiring her to return to a ward-based post which she was unable to do by reason of her disability. The Employment Tribunal held that there was no such PCP and that she was never instructed to return to her ward-based post."

c. "The Employment Appeal Tribunal held that this finding could not be supported because the Claimant had not been offered a real choice and had been instructed to return to her post or face losing her employment. The Employment Tribunal had concentrated upon the reasonableness of the instruction rather than the question of whether it was applied as a PCP."

d. "The Employment Appeal Tribunal also considered that the Respondent had failed in its approach to the question of making reasonable adjustments by failing to take a proactive approach in finding an alternative post that would accommodate the Claimant's disability and largely leaving it to the Claimant to find one herself. The Respondent had failed to follow its own sickness absence policy by failing to prioritise the Claimant when making appointments to posts for which she was qualified and offering her a trial period. The Employment Tribunal should have considered in the light of the authorities, such as Archibald v Fife Council [2004] ICR 954, whether it was right to subject the Claimant to a competitive interview rather than prioritising her application if she met the minimum criteria for a post. "

e. "Judge Serota QC held at paragraphs 40 – 45 (p258-259 AB):

    i. "[40] It also appears that the Employment Tribunal failed to adequately take account of the proactive obligation on an employer in relation to making reasonable adjustments, prioritising the Claimant and if necessary giving her preferential treatment as compared to others doing similar jobs."

    ii. "[42] I also accept the submission that it is not a compliance with the duty to make reasonable adjustments to leave it to the Claimant to search for vacancies. The Employment Tribunal has recorded how she was advised in October 2011 that she would be contacted by the Respondent if there were any positions meeting her requirements but that she was responsible for looking for alternative employment, to continue to search the NHS jobs website and to contact the recruitment office if she became aware of any vacancies.

Similar advice was given to her at a sickness review meeting in January 2012."

iii. "[43] It is unimpressive that within weeks of the Claimant's dismissal taking effect a band five post became available in Outpatients which would have suited Ms Wolfe, the original band six post having been frozen in February 2012 and a band five nurse being appointed to the post. The vacancy had never been advertised; the Respondent gave no explanation as to when it was known that the post was unfrozen, why it was unknown to Ms Yang or Human Resources and why no consideration was given as to whether it might have been a suitable role for the Claimant. I consider the Employment Tribunal did not have sufficient regard to the Respondent's duty to make reasonable adjustments, because, as Miss Smeaton submitted, it focused on the Claimant's failure to find alternative employment rather than on the Respondent's duty to facilitate redeployment. The obligation was on the Respondent, which appears not to have appreciated that its duty might require it to treat the Claimant more favourably than those not disabled, and it significantly failed to comply with the sickness management policy."

iv. "[45] The next matter to consider is the position relating to the two positions in the Eye Clinic. It is certainly arguable that the policy of giving priority to staff from another ward that was being closed down was discriminatory so far as disabled persons were concerned, as in Mingo. Again, the reasonableness of the decision will need to be investigated..."

v. "I am not satisfied that the Employment Tribunal gave adequate weight to the duty of the Respondent to be proactive in finding alternative employment and in prioritising the Claimant and treating her more favourably than employees who were not disabled. The Employment Tribunal will need to consider whether the Respondent acted reasonably, notwithstanding its duties to be proactive and if necessary treat the Claimant more favourably, when it failed to comply with its sickness absence policy, failed to permit the Claimant to have a two-month trial period, failed to offer her one of the posts in the Eye Clinic and failed to preserve Ms Sealy's post."

169. We have noted from the Claimant's submissions, with reference to the case authority of Linsley v Revenue and Customs Commissioners [2019] IRLR 604, EAT, the assertion that "if the employer has a policy that is relevant to the employee's claim, that will be a good place to start in

deciding on reasonable steps; if the employer has not complied with it, that will be prima facie evidence of failure to make reasonable adjustments; the employer need not so comply in every case, but if it does not, the burden will be on it to show why it departed from the policy". In Linsley:

a. "the employee suffered from ulcerative colitis which it was accepted was a disability under the Equality Act 2010. Her condition manifested itself in an unpredictable and urgent need for a bowel movement and could be exacerbated by stress. An occupational health report in 2012 noted that the stress of having to look for a car park space at work aggravated her symptoms and that she would benefit from a dedicated space to avoid that stress. A car parking space was provided, but when she moved to a different site her request for a dedicated parking space was refused, despite it being the employer's policy to provide one. Instead, the employer allowed her to park in a car park for essential users or to park in a lay-by near the offices in an emergency, as long as the vehicle was moved once she was able to. The tribunal found that although the employer had failed to comply with its own policy on parking space allocation, it had made a reasonable adjustment in the arrangements made for the employee. Those arrangements might not have been what the employee wanted, but they were sufficient for the employer to discharge its obligations to the employee under the Act."

b. "The EAT held the tribunal had been required to consider whether the provision of a dedicated parking space was a step which it was reasonable for the employer to take. One of the facts to be considered was the existence of any policy relevant to the adjustment sought. The effect of the employer's policy in the instant case was that if occupational health recommended a parking space for an employee, one should be provided. The employer had departed from that policy and ignorance of it by the relevant managers was not a good reason for its lack of application. The tribunal had incorrectly diminished the significance of the policy by referring to it as non-contractual and discretionary. It did not need to be contractual for it to have been relevant in determining whether an adjustment it had recommended was reasonable or not. Had the tribunal given the policy the weight that it would normally attract, its conclusions on the reasonableness of the adjustments might have been different. Although the tribunal had had regard to the Code of Practice on Employment, it would have recognised the significance of the policy if it had considered para.6.28 of the code, which referred to the practicability of the step as being one of the factors to be taken into account when deciding whether taking that step was reasonable."

170. Respondent's Counsel asserted that Linsley is not authority for the proposition that a failure to follow policy must lead to a failure to make reasonable adjustments, it is something to take into account when applying the objective test.

171. Respondent's Counsel has also drawn our attention to the authority of Tarbuck v Sainsbury's Supermarkets Ltd 2006 IRLR 664, and in particular paragraphs 71 and 72, to assert with regard to the reasonable adjustment of carrying out a practical assessment of the Claimant's capabilities, that an assessment in itself is not a reasonable adjustment in the same way that consultation is not a reasonable adjustment in itself.

172. **Discrimination Arising from Disability** - The proper approach to section 15 claims was considered by Simler P in the case of Pnaiser v NHS England at paragraph 31: (a) Having identified the unfavourable treatment by A, the ET must determine what caused it, i.e. what the "something" was. The focus is on the reason in the mind of A; it involves an examination of the conscious or unconscious thought processes of A. It does not have to be the sole or main cause of the unfavourable treatment but it must have a significant influence on it. (b) The ET must then consider whether it was something "arising in consequence of B's disability". The question is one of objective fact to be robustly assessed by the ET in each case. Furthermore: (c) It does not matter in precisely what order the two questions are addressed but, it is clear, each of the two questions must be addressed, (d) the expression "arising in consequence of" could describe a range of causal links … the causal link between the something that causes unfavourable treatment and the disability may include more than one link, and (e) 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.

173. In assessing the legitimate aim defence, the tribunal must consider fully whether (i) there is a legitimate aim which the respondent is acting in pursuance of, and (ii) whether the treatment in question amounts to a proportionate means of achieving that aim.

174. The test of proportionality is an objective one. A leading authority on issues of justification and proportionality is Homer v Chief Constable of West Yorkshire Police in which Lady Hale quoted extensively from the decision of Mummery LJ in R (Elias) v Secretary of State for Defence [2006] 1WLR 3213. At paragraph 20 Lady Hale cited a passage in his judgment when Mummery LJ said: "…. the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So, it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."

175. "Mummery LJ went on to commend the three-stage test for determining proportionality derived from De Freitas v Permanent Secretary of Ministry of Agriculture [1999] 1 AC 69, 80 "First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly are the means chosen no more than is necessary to accomplish the objective?""

176. Lady Hale cited a further passage from the judgment of Mummery LJ which he had cited from the decision of the Court of Appeal in Hardys & Hansons Plc v Lax: it is not enough that a reasonable employer might think the criterion justified. The tribunal has to weigh the real needs of the undertaking against the discriminatory effects of the requirement."

177. **Time limit / Jurisdiction** - In Hale v Brighton and Sussex University Hospitals NHS Trust EAT 0342/16 (as summarised within the Claimant's submissions) an employment tribunal found that the decision to commence a disciplinary investigation against the claimant was an act of discrimination, but it was a 'one-off' act and was therefore out of time. The claimant appealed, arguing that the tribunal had been wrong to treat the decision to instigate the disciplinary procedure as a one-off act of discrimination rather than as part of an act extending over a period ultimately leading to his dismissal. Referring to Hendricks, the EAT observed that the tribunal had lost sight of the substance of the claimant's complaint. This was that he had been subjected to disciplinary procedures and was ultimately dismissed – suggesting that the complaint was of a continuing act commencing with a decision to instigate the process and ending with a dismissal.

178. In the EAT's view, by taking the decision to instigate disciplinary procedures, the Trust had created a state of affairs that would continue until the conclusion of the disciplinary process. This was not merely a one-off act with continuing consequences. Once the process was initiated, the Trust would subject the claimant to further steps under it from time to time. The EAT said that if an employee is not permitted to rely on an ongoing state of affairs in situations such as this, then time would begin to run as soon as each step is taken under the procedure. In order to avoid losing the right to claim in respect of an act of discrimination at an earlier stage of a lengthy procedure, an employee would have to lodge a claim after each stage unless he or she could be confident that time would be extended on just and equitable grounds. However, this would impose an unnecessary burden on claimants when they could rely upon the provision covering an act extending over a period. The EAT therefore concluded that this part of the claimant's claim was in time.

179. Respondent's Counsel within his submissions said in respect of the case of Hale that he did not agree with the way the Claimant's Counsel was

seeking to draw authority from Hale that any process becomes a continuing act at the start of the process. He submits that there is a distinction and a continuing act is not open-ended by the starting of the process. Respondent's Counsel submits that there is a difference between the complaint about SRV duties in July 2016 and the subsequent redeployment. He asserts that only the first of those matters (i.e. the move to SRV only) is covered by the pleaded PCP.

180. We were also referred to an ET case Middleton v Highways Agency, Case No. 2401568/2016, by Claimant's Counsel which decided that the omission to make a reasonable adjustment to appoint the claimant to a particular role "was part of the same state of affairs as the alleged discrimination arising from disability. By dismissing the claimant without choosing the alternative of redeployment, the respondent perpetuated the same omission to redeploy the claimant. We are not deciding that the failure to appoint the claimant to the EO Role was in itself an act extending over a period. Matuszowicz prohibits us from doing so. Rather, our view is that the failure to make this adjustment and the later dismissal were part of the same state of affairs. Together they constituted an act extending over a period ending with the date of termination…."

Our Decision

181. We have addressed the issue of reasonable adjustments first as this does appear to be the most logical place to start and is consistent with the comments of Lord Roger in paragraph 32 of Archibald (page 115 AB).

182. If there were reasonable adjustments that needed to be made, and they were not, this will impact on the Claimant's alleged detriments. i.e. being taken off the front line and ultimately dismissed.

183. So, we now address the agreed issues with our findings in that order:

184. Failure to Make Reasonable Adjustments:

a. Did a provision, criterion or practice ("PCP") of the Respondent's put the Claimant at a substantial disadvantage in comparison with people who do not suffer from the Claimant's disability? The Claimant relies on the following PCP (which the Respondent agrees applied):

    i. The requirement for Ambulance Technicians to be able to work on Dual Crew Ambulances (DCAs).

b. The Claimant claims he was placed at a substantial disadvantage as he was unable to work shifts on Dual Crew Ambulances due to his

disability without exacerbating his pain levels. He was therefore not permitted to work as an Ambulance Technician, which put him at risk of dismissal. He was placed on the redeployment register and dismissed when he was not offered a different role with the Respondent.

c. Did the PCP place the Claimant at the substantial disadvantage above?

d. If so, did the Respondent fail to make reasonable adjustments to avoid the disadvantage?

185. **The PCP, the non-disabled comparators and the substantial disadvantage** - (as per Rowan) - There was an issue raised by Respondent's Counsel in relation to the pleaded PCP. In short, the Respondent says that such a PCP can only be relevant for the first of the pleaded reasonable adjustments (that is rostering the Claimant to undertake SRV duties only).

186. Further, that the substantial disadvantage (which is in the agreed list of issues) does not apply to the fourth and fifth reasonable adjustments (that is slotting in or non-competitive interviews for vacant roles and on the job training for alternative roles) because the Claimant would need to be disadvantaged compared to other displaced workers (e.g. those displaced due to redundancy).

187. The Claimant was employed as an Ambulance Technician. The Claimant could not work on DCAs so it put him to a substantial disadvantage. We do not see why the substantial disadvantage as articulated in the agreed list of issues should not be considered by us, this is what the parties have agreed we are to consider.

188. As that agreed substantial disadvantage asserts, the Claimant was at risk of dismissal and was then subject to the Respondent's redeployment process because he was unfit to perform his existing duties as an Ambulance Technician which required them to be able to work on Dual Crew Ambulances (DCAs). This is clearly in the same way as he was subjected to the Respondent's Sickness Absence Management policy because he was unfit to perform his existing duties. For these reasons we accept that the Claimant is to be compared to someone who is not unfit to perform his existing duties as an Ambulance Technician (as per the case authorities Archibald and Smith).

189. **The reasonable adjustments** - The Claimant continues to aver that the following would have been reasonable adjustments:

a. Rostering the Claimant to undertake SRV duties only;

b. Practical assessment of the Claimant's capabilities;

c. Slotting in or non-competitive interviews for vacant roles;

d. On the job training for alternative roles.

190. We remind ourselves when considering these proposed adjustments that the test of reasonableness is an objective one, and it is ultimately the employment tribunal's view of what is reasonable that matters (Smith). Further, a tribunal's focus must be on whether the adjustment itself can be considered reasonable (Ashton). Also, "it is not a requirement in a reasonable adjustment case that the Claimant prove that the suggestion made will remove the substantial disadvantage" (Collingwood).

191. As the Claimant has proven there was a PCP that caused him substantial disadvantage and identified the "broad nature" of adjustments which should have been made, it is then for the Respondent to show that the suggested adjustments were not reasonable given its particular circumstances (Latif). We now go on to consider that for each proposed adjustment:

192. **Rostering the Claimant to undertake SRV duties only** – the decision to remove the Claimant from front line duties on the 26 July 2016 does appear to be a shock to the Claimant and it does appear to be a decision by the Respondent. As said this is as a result of a PCP that caused him a substantial disadvantage (as detailed above). We therefore have to consider whether the Respondent has shown that this suggested adjustment was not reasonable given its particular circumstances.

193. The Respondent has consistently asserted what we understand to be its need for "dynamic scheduling". As stated in the outcome letter from the Welfare meeting on the 26 July 2016 (page 144) the Respondent's position is articulated as "I explained to you that I did have sympathy for your situation but that I had to look at the full range of duties and the operational implications and that I could not put patients, the public, other crews and yourself at risk by having you continue to work solely on SRVs. I said that there was a risk you could be on a job where you couldn't perform some action required because of your health condition, such as lifting a heavy patient, which could compromise you if you decided to do the lift and caused yourself further damage or injury, and colleagues if it meant us having to call another crew to the scene. I said that I could not protect you from that situation and that this was a major risk and safety issue. We said that a reasonable adjustment has to be reasonable and we did not feel that this was reasonable in the operational circumstances and for business

needs." …." "You said that you had recognised this was a career-threatening condition and had actually self-referred and said you were aware of staff being given exclusive duties on DCAs. We pointed out that there may be some staff in that position but we look on each case and its particular merits separately and we could not tell you the specific circumstances why that might have been allowed but there would be specific reasons peculiar to that individual. We said we had to look at your case as it was at this time and we simply cannot accommodate car-only duties as it does not work as a reasonable adjustment for the operational reasons already described. You said that you recognised that you were therefore unlikely to be able to finish your career in a frontline role.".

194. As we have found this does appear to be a position that is accepted by the Claimant and Mr Sweet at that point, despite the Claimant expressly acknowledging this in his witness statement as being from the meeting on the 14 November 2016. The Claimant's immediate response on the 27 July 2016 does not challenge the position. Further, the summary of what was discussed about the operational circumstances and business needs of the Respondent is not challenged in the witness statements of the Claimant or Nigel Sweet.

195. For these reasons we accept what the Respondent says that this suggested adjustment was not reasonable given its particular circumstances.

196. **Practical assessment of the Claimant's capabilities** - On reminding ourselves of the wording about this in the OH report (page 137) to our reading it does seem to suggest that if there is any doubt in the Claimant being able to perform the SRV role then an assessment of capability could be carried out. Further, it expressly then links a general assessment to his hand problem "Likewise, whilst I doubt that the problems with his hands would prevent him from working as an Ambulance Technician, the best means of confirming that will again be through a practical assessment of capability". This does seem to support the Respondent's understanding of this wording in that an assessment is required if SRV duties only are possible. As already found the Respondent has set out a consistent evidential position as to why SRV duties only were not possible. We accept what they say about that as the Claimant and Nigel Sweet also appear to have done.

197. Even if this were therefore a potential reasonable adjustment, noting the arguments of Respondent's Counsel that an assessment in itself is not a reasonable adjustment in the same way that consultation is not a reasonable adjustment in itself (Tarbuck), it would be one that it is only reasonable to make if the adjustment to roster the Claimant to undertake

SRV duties only was reasonable, which for the reasons already given we have not found to be so.

198. **Slotting in or non-competitive interviews for vacant roles** – reminding ourselves of Wade – "The simple proposition is that a reasonable adjustment comes to be made to disapply an essential requirement but not where the person fails to meet the essential requirements entirely." and Wolfe – where "The Employment Tribunal should have considered in the light of the authorities, such as Archibald v Fife Council [2004] ICR 954, whether it was right to subject the Claimant to a competitive interview rather than prioritising her application if she met the minimum criteria for a post."

199. Further, when considering the objective test of what is reasonable, the reason why the Respondent departed from its Recruitment and Selection Policy should be considered (Linsley).

200. We have noted the apparent failure of the Respondent to fully apply its own redeployment policy (in particular page 77n) and its argument being that any such failures (i.e. not allowing the Claimant to be given prior consideration for any vacancy for which he is potentially suitable) were not of consequence because the Claimant did not score "above the line". The Respondent asserts there is a difference with meeting essential criteria to be interviewed and then meeting essential criteria to be appointed.

201. However, the Claimant was acknowledged by the Respondent as meeting the essential criteria in particular for the roles of Safeguarding Co-ordinator and Simulation Technician, but despite that he was not given prior consideration. Further, the reasons for the Claimant scoring what he did and the setting of the appointment "line" is not clear in relation to all of the potential alternative roles. We have noted the acknowledgment by the Respondent in relation to the interview scores that – "the lack of clear evidence on this and the lack of complete paperwork for all of the interviews is not impressive." We agree, particularly in relation to the Simulation Technician role which followed the appeal outcome where it was noted that – "The Panel considered the points raised and internal HR advice regarding all of the steps taken to support you in finding suitable redeployment opportunities. We agreed, in your individual case, to speak to HR to ensure continued support in identifying alternative roles and look to allowing a non-competitive interview should a job occur for which this would be appropriate." Despite this the Claimant was not given prior consideration for the role (and despite it being expressly requested by Robert Ivey that the Claimant had a non-competitive interview (page 328)) and no papers were kept evidencing the scores now being asserted by the Respondent in its evidence.

202. **The Communications Officer role (Band 5) -** What happened with this role may not comply fully with the Respondent's Recruitment and Selection Policy but the Claimant was permitted to submit an out of time application. With reference to page 77 n, prior consideration is not the same as slotting the Claimant into the role and the Claimant was added to the short list out of time. He was not offered a trial period, but in respect of this role it does not appear there are doubts about suitability. The evidence of Mrs Spiers was the Claimant (and the other candidates at that time) were not suitable. None of the candidates appear to have met the "essential criteria" as required for that role.

203. We accept the reasons given by the Respondent as to why this was not a suitable role for the Claimant and also have noted that the role in the end was re-advertised at a higher Band 6.

204. **Events Co-Ordinator role (Band 4)** – Again, what happened with this role may not have complied fully with the Respondent's Recruitment and Selection Policy.

205. The reasons for the Claimant being unsuccessful in this role are he did not meet the criteria for the role through the interview. Mr Wells says that while the Claimant interviewed well and was articulate he did not answer the questions fully and did not have much enthusiasm for the role. Mr Wells goes on to explain at paragraph 11 of his witness statement that of the seven candidates they interviewed only two were appointable in their view and the Claimant scored 18/40 (the second lowest score). We have also noted that when Robert Ivey proposes this role he states in his email to the Claimant about the role (page 227) that "I think this might be a good role for you to explore, as we discussed at today's meeting with you?". It is not put forward on the basis that the Claimant meets the essential criteria for the role.

206. We accept the reasons given by the Respondent as to why this role was not suitable for the Claimant.

207. We have noted though that during cross examination David Wells acknowledged that the essential criteria could be flexible.

208. **Safeguarding Co-ordinator role (Band 4)** – the Respondent did not comply fully here with its Recruitment and Selection Policy. This is significant for this role as it is recognised at the Welfare meeting on the 21 December that:

209. "The other post was a safeguarding coordinator role at band four, for which Robert gave you the job description and person specification. Robert said that he expected this role to be advertised shortly and said he

believed you met the essential criteria for that post. You agreed and also said that you had a personal interest in that area of work. We also noted again that you had achieved high marks on safeguarding at the Comms officer interview. ….." (page 253)

210. We then see at page 255 an email exchange between the Claimant and Robert Ivey on the 6 January 2017, where Robert Ivey notes about the Safeguarding Co-Ordinator role that he would expect the Claimant to be shortlisted for interview for that one.

211. The Respondent was also at this point well aware of the concerns being raised by the Claimant about the redeployment process (as can be seen by the email from BM, Senior HR & Policy Manager, on the 18 January 2017 (page 263)).

212. In relation to the scores given to the Claimant at his interview we have noted he was given a score of 3/4 for his personal motivation at the interview (page 268b) (i.e. a "good").

213. Further, although the Claimant's score for knowledge framework was 1/4 (page 268b), the successful candidate scored 2/4 for that question (page 268w) but needed prompting to provide the answer. Jane Mitchell confirmed under cross examination that the successful candidate was able to have some training around safeguarding and this could have been offered to the Claimant as well, where he lacked relevant knowledge. It had already been noted by Robert Ivey and Lorna Stuart prior to this interview that the Claimant scored well in safeguarding for the Communications Role.

214. We have also noted that the scores for the Claimant and the successful candidate in relation to their communication skills were the same, 3/4 (pages 268f and 268z(a)), which is "good". This does not seem to suggest that the Claimant was unclear.

215. Jane Mitchell in her witness statement (paragraph 6) says that she decided not to offer the Claimant the job because there was a better candidate. It is not therefore the position of Jane Mitchell that the Claimant did not meet the essential criteria of the job role. Jane Mitchell also accepted that the Claimant could have potentially been offered a trial in the role.

216. We therefore find that allowing the Claimant to take up this role at that time by non-competitive interview would have been a reasonable adjustment. The Claimant does not need to be the best candidate. A reasonable adjustment comes to be made to disapply an essential requirement and this is not a situation where the Claimant fails to meet the essential requirements entirely. Further, it does not appear right to subject the Claimant to a competitive interview rather than prioritising his application

as he did meet the minimum and appears to have met the essential criteria for the role. The lack of any safeguarding knowledge could have been rectified with training. This was also a Band 4 role the same as the Claimant was already in.

217. **Simulation Technician role (Band 4)** - the Respondent did not comply fully here with its Recruitment and Selection Policy. This is significant for this role as by this point the appeal panel had recognised the need to allow for non-competitive interviews should a job occur for which this would be appropriate. Robert Ivey expressly requests for the Claimant to have a non-competitive interview for this role (page 328).

218. Despite that the Claimant was offered the usual competitive interview with the other candidates (albeit the first interview of the day) and as a result he was not considered the best candidate. It was confirmed by Mr Hartley that the person with the highest score (who was appointed) had been shortlisted before he was told the Claimant would be shortlisted as well, and it was someone who he knew prior to the interviews. The Claimant did not therefore benefit from a non-competitive interview for this role.

219. Add to that there is a lack of clarity as to the actual scores awarded to the Claimant and the other candidates and what the appointable threshold was. We have noted though, that Mr Hartley accepted that assumptions should not be made about what the Claimant could or could not do and that to determine this would require a referral to OH. Mr Hartley accepted that reasonable adjustments could have been made to accommodate the Claimant in the role and he could have been offered a trial period.

220. We therefore find that allowing the Claimant to take up this role at that time by non-competitive interview would have been a reasonable adjustment. The Claimant does not need to be the best candidate. A reasonable adjustment comes to be made to disapply an essential requirement and this is not a situation where the Claimant fails to meet the essential requirements entirely. Further, it does not appear right to subject the Claimant to a competitive interview rather than prioritising his application as he did meet the minimum and essential criteria for the role. This was also a Band 4 role the same as the Claimant was already in.

221. **On the job training for alternative roles** – based on the findings we have made in respect of the Claimant's apparent suitability for the other roles we do not think that on the job training would be a reasonable adjustment for the Communications Officer or the Events Co-ordinator role.

222. We do though consider that it would have been reasonable to provide this for the Claimant, as was accepted by Jane Mitchell, in respect

of the Safeguarding Co-ordinator role and as could have been accommodated as part of a trial period that could have applied to the Safeguarding Co-ordinator and Simulation Technician roles.

223. Based on our findings as to the proposed adjustments we find that allowing the Claimant to have non-competitive interviews for the Safeguarding Co-ordinator and Simulation Technician roles and appointing him to those roles with on job training and/or a trial period as needed, would have avoided the disadvantage of the Claimant's employment being terminated.

224. We also find that those adjustments would have been reasonable for the Safeguarding Co-ordinator and Simulation Technician roles as although the Claimant was not the best candidate he was suitable for those roles, meeting the minimum and essential criteria. It is with that thinking in mind the Respondent's Recruitment and Selection Policy, if followed, would have assisted him. The Claimant was not seeking redeployment through choice but out of necessity and the "Prior Consideration of Displaced Staff" (paragraph 5.18 – page 77n) provision of the Recruitment and Selection Policy was there to assist such employees.

225. **Discrimination Arising from Disability** - Did the Respondent treat the Claimant unfavourably and if so was it because of something arising in consequence of the Claimant's disability?

226. **Removing him from his substantive Ambulance Technician duties on 26 July 2016?** – The Respondent accepts that this is unfavourable treatment and we concur and it arose because of the Claimant's inability to substantially grip; and/or to carry heavy weights, particularly up and down stairs; and/or get in and out of the ambulance/high vehicles.

227. **Subjecting him to an unsuccessful redeployment process between mid-August 2016 and his dismissal on 31 May 2017?** – based on the finding of facts we have made we have not found that the Claimant was unsuccessful in the redeployment process because of his inability to substantially grip; and/or to carry heavy weights, particularly up and down stairs; and/or get in and out of the ambulance/high vehicles. It may well be the situation, as put by Claimant's Counsel, that the Claimant being subjected to a redeployment process may be because of something arising in consequence of disability i.e. being unfit to perform his existing duties, but that is different to the success of otherwise of that redeployment process arising in consequence of his disability, as is pleaded in the agreed list of issues. We therefore do not find that this is unfavourable treatment because of something arising in consequence of the Claimant's disability.

228. **Dismissing him with effect from 31 May 2017?** – The Respondent accepts that this is unfavourable treatment and we concur and it arose because of the Claimant's inability to substantially grip; and/or to carry heavy weights, particularly up and down stairs; and/or get in and out of the ambulance/high vehicles.

229. We now consider whether the Respondent has shown that the treatment of removing him from his substantive Ambulance Technician duties and the dismissal were a proportionate means of achieving a legitimate aim, namely:

    a. Management of their workforce and ensure that it has employees who are able to perform the job role that they are employed to complete, to ensure appropriate staffing levels are met to meet its business requirements and patient needs. Further that the actions were reasonable, necessary and proportionate in the circumstances following a total 10 month redeployment period in which the Claimant found no suitable vacancies.

230. The test of proportionality is an objective one. We have considered whether the objective is sufficiently important to justify limiting a fundamental right; whether the measure was rationally connected to the objective; and whether the means chosen are no more than is necessary to accomplish the objective.

231. We find that removing the Claimant from his substantive Ambulance Technician duties is a proportionate means of achieving the aim, for the reasons we have set out as to why the adjustment to SRV only duties would not be reasonable.

232. As to the dismissal we do not find this to be a proportionate means of achieving a legitimate aim as the Claimant could have been redeployed if the reasonable adjustments we have found that should have been made, were made.

233. As to the question of **time limits / jurisdiction** relevant to what we have found we rely on the case authority of Hale and have noted the case of Middleton. The Respondent itself notes in its dismissal letter (page 253) … "Robert explained that if you are successful in obtaining one of the alternative roles then the notice period would stop from the day you took up a new appointment. If not, you would remain on notice but would still be free to continue to apply for any suitable alternative redeployment roles…". This clearly recognises that the Claimant is under notice of dismissal, but that dismissal would be negated if the Claimant were successful in finding redeployment. Three of the potential contested alternative roles arose while the Claimant was under notice of dismissal.

234. In the case of Hale the EAT held by taking the decision to instigate disciplinary procedures the Trust had created a state of affairs that would continue until the conclusion of the disciplinary process. In this case the Respondent had created a state of affairs that would continue until the Claimant's dismissal (on the 31 May 2017), so conduct extending over a period, as the Claimant was put under notice of dismissal subject to an active redeployment process. If this is not right for these same reasons, and in light of the actively conducted appeal process during the notice period, we would find that it would be just and equitable to extend time in respect these claims.

235. **Unfair Dismissal** – based on the findings we have made in respect of the failure to make reasonable adjustments we find that the decision to dismiss the Claimant was outside the band of reasonable responses as there were reasonable adjustments that could have been made that would have negated the dismissal.

236. As to the consideration of Polkey, as relevant to what we have found, we have not found facts to suggest that the Claimant would have been dismissed at a future point for a lack of enthusiasm as submitted to us by the Respondent.

237. **Conclusion** - accordingly, therefore the Tribunal upholds the Claimant's complaint that the Respondent has contravened a provision of part 5 of the EqA in that it failed to make reasonable adjustments (in relation to the Safeguarding Co-ordinator and Simulation Technician roles) and it subjected the Claimant to less favourable treatment because of something arising in consequence of the Claimant's disability by dismissing him with effect from 31 May 2017; and the Tribunal upholds the Claimant's complaint that the Respondent unfairly dismissed him pursuant to the Act.

238. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraphs 9 to 14; the findings of fact made in relation to those issues are at paragraphs 18 to 151; a concise identification of the relevant law is at paragraphs 152 to 180; how that law has been applied to those findings in order to decide the issues is at paragraphs 181 to 237.

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Employment Judge Gray

Dated: 21 November 2019
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