EMPLOYMENT TRIBUNALS

Claimant Mr D Hackleton

Respondent: Royal Mail Group Limited

HELD AT: Sheffield

ON: 10 to 14 February 2020 inclusive 22 June 2020 (by video) 23 June 2020 in chambers

BEFORE: Employment Judge Little
Mr P R Kent
Ms A S Brown

REPRESENTATION:

Claimant: Ms R Kight of Counsel (instructed by Banner Jones)
Respondent: Mr M Foster, Solicitor (Weightmans LLP)

RESERVED JUDGMENT

1. The Claim was presented in time.
2. The complaint of failure to make reasonable adjustments succeeds.
3. The complaint of discrimination arising from disability succeeds in part.
4. The complaints of harassment related to disability and victimisation fail.

REASONS

1. **The complaints and procedural history**

1.1 Mr Hackleton presented his claim to the Tribunal on 9 January 2019. He brought complaints of disability discrimination which at that stage appeared to be limited to a complaint that there had been a failure to make reasonable adjustments and that there had been victimisation.

1.2 At a preliminary hearing for case management conducted on 7 March 2019, the claimant's solicitor presented a document described as a claims schedule and following discussion at that hearing it was clarified that in addition to the two complaints mentioned above Mr Hackleton was also complaining of discrimination arising from disability and harassment.

1.3 Having initially defended the claim as presented the respondent was given permission to amend it's grounds of resistance to deal with the claim as clarified. Those amended grounds were presented on 4 April 2019.

1.4 On 16 August 2019 the claimant, who remained an employee of the respondent, sought through his solicitors to amend his claim to include what was described as "the ongoing failure to make reasonable adjustments". An amended claims schedule was at the same time filed and served. On 27 August 2019 the respondent's solicitors indicated that they did not object to the application to amend but pointed out that it had been made shortly before what would have then been a five day hearing listed for September 2019. The issue was referred to Employment Judge Wade who on 30 August 2019 granted the claimant's application to amend and postponed the hearing.

The respondent did not present or seek to present amended grounds of resistance to the now amended claim.

1.5 On 17 October 2019 the claimant sought a further amendment to his claim. That was in circumstances where his employment had been terminated on 3 September 2019. Following a request by the Regional Employment Judge for the claimant to provide further particulars of the proposed amendment, the claimant's solicitors filed draft amended particulars of claim with an amended claims schedule on 17 November 2019. The claimant's dismissal, it was contended was discrimination arising from disability and was said to be a further failure to make reasonable adjustments.

1.6 On 29 November 2019 the Employment Tribunal wrote to the parties indicating that Employment Judge Rostant had ordered that the amendments to the claim were permitted. The respondent had in the meantime made no objection to the application. As this Tribunal would learn, the respondent did not present any amended grounds of resistance to deal with the dismissal complaints until the first day of our hearing.

1.7 For the reasons set out in the Order which this Tribunal made on 10 February 2020, refusing the respondent's application to amend, this hearing has proceeded on the basis that the respondent has not presented any defence to the dismissal complaints and, because the 4 April 2019 grounds

of resistance did not deal with the matter, nor has it put forward any justification defence for the section 15 complaints.

1.8 We should add that it had been the intention of the Employment Judge who conducted the case management hearing on 7 March 2019 that the file would have been referred back to him to make such further case management orders as appeared to be required for the final hearing. That was in the context of the possibility of a preliminary hearing also being required to deal with a jurisdictional point. In the event it appears that the parties chose not to deal with any jurisdictional point in that way and so the hearing which had been listed for June 2019 to deal with that matter was vacated. In the event the file was not referred back to the Judge and other than dealing with the amendments referred to above, there was no further case management.

1.9 One might have thought that the parties would have sought further directions from the Tribunal but, as both parties were represented by solicitors, it appears that they used their initiative in terms of disclosing documents, agreeing a bundle and, on some date unknown to the Tribunal, exchanging witness statements.

1.10 The absence of a further case management hearing meant that there was no opportunity to consider the time allocation of five days in the context of such reasonable adjustments as the claimant might need during the course of the hearing. In the event the claimant has explained to us that after sitting for an hour or less he needs to stand up, stretch and walk about a bit. Whilst the Tribunal were perfectly happy to take such breaks, this has delayed the progress of the hearing. Had there been the opportunity to further case manage, a longer hearing that could have been allocated to address this. The parties when exchanging witness statements would have been aware that both the claimant and his wife had prepared particularly lengthy witness statements as had one of the respondent's three witnesses. That did not cause either parties' solicitors to question whether the case could be completed within five days. In the event, a significant part of the first day was taken up with dealing with the question of whether or not the respondent should be permitted to amend its grounds of resistance and there was then a significant amount of reading for the Tribunal to undertake before the live hearing could commence at noon on the second day. It is for these reasons that unfortunately the February 2020 hearing went part-heard. The resumed hearing had been arranged for May 2020, in person, but by reason of the intervening Covid-19 pandemic, the resumed hearing did not take place until 22 June 2020 which was a video hearing.

2. **The complaints – in summary**

These are:-

- Disability discrimination – alleged failure to make reasonable adjustments.
- Discrimination arising from disability (Equality Act 2010 section 15) – including the claimant's dismissal.
- Harassment related to disability.
- Victimisation.

3. **The issues**

Whilst the Tribunal were undertaking their reading Ms Kight prepared a revised list of issues and that took into account our ruling in respect of the respondent's application to amend. We were given this four page document on resuming the live hearing on day two and Mr Foster indicated that the respondent agreed that list.

The Tribunal were satisfied with that list, although we pointed out that whilst a jurisdictional issue had been included in respect of time limits, no-one had ever explained precisely what time point was being taken. It seemed that the representatives themselves were not entirely sure. We indicated that as this was a matter going to the Tribunal's jurisdiction and as it had been raised, initially we believe by the respondent in its first grounds of resistance, it was a matter that we would have to deal with.

Our other comment regarding the list was that the description of the reasonable adjustments complaint might suggest that the basis of the complaint was the substantial disadvantage to which the claimant may have been put, whereas we considered that that was simply a constituent part of the test as to whether or not a duty arose and the thrust of a reasonable adjustments complaint was that there had been a breach of the duty, rather than an approach which suggested that the substantial disadvantages came within a quasi-less favourable or unfavourable treatment category.

The final point was in relation to the victimisation complaint. Whilst it appeared that the respondent disputed that the claimant's grievance of 9 August 2018 amounted to a protected act it was not clear why the respondent took that position. It has subsequently conceded that the grievance was a protected act.

4. **Evidence**

The claimant has given evidence, having prepared a 23 page witness statement. The claimant's wife, Ruth Hackleton has also given evidence and she had prepared a witness statement running to 26 pages. The respondent's evidence was given by Mrs T Wood, senior business partner and the claimant's line manager (until circa May 2019), her witness statement ran to 21 pages; Mrs K Jones, head of business partnering, who heard the claimant's grievance and was also the dismissing officer; and Mr C Wilkinson, head of knowledge management.

In relation to Mrs Jones' statement, when undertaking our initial reading we omitted those parts of her statement which appeared to deal with the dismissal. However when subsequently discussing this with the parties it was agreed that we should read most if not all of the statement on the basis that if we considered it included matters which had not been pleaded we should disregard those matters. In any event and with the parties' agreement, we excluded from our reading those parts of Mrs Wood and Mr Wilkinson's statements which purported to deal with justification for any section 15 discrimination. Those were paragraphs 136 of Mrs Wood's statement and paragraph 95 of Mr Wilkinson's statement.

5. **Documents**

The Tribunal have had an agreed two volume trial bundle running to 752 pages.

6. **The claimant's essential case**

The respondent accepts that the claimant is a person with a disability by reason of cerebral palsy, which was known about at the time when the employment began and also by reason of Scheunemann's Disease. The latter impairment was unknown when the employment commenced in October 2017 because it was only provisionally diagnosed in February 2018. In total the claimant actually attended work for 11 weeks. After approximately 14 months absence he was dismissed. The claimant's essential case is that the respondent should have made the reasonable adjustment of permitting him to work from home four days a week with only one day in the office or travelling. The respondent's case is that on occupational health advice they considered that it would be unsafe to permit the claimant to work from home at all and ultimately that the claimant was unfit to work for the respondent at all.

7. **The Tribunal's findings of fact**

7.1. On 22 August 2017 the claimant attended a job interview at the respondent. He was interviewed by Tracey Wood who, in due course would become his line manager. The position applied for was as a business partner analyst (BPA).

7.2. Aware of the claimant's medical condition, cerebral palsy, Mrs Wood, having decided that the claimant should be employed, sought a pre-employment assessment by the respondent's occupational health provider, OH Assist Limited. A report was issued by OH Assist on 10 October 2017. It noted that the claimant's condition affected his mobility requiring him to walk with a stick. He had some loss of function in his hands and got back pain. The report included the following:

"*In my clinical opinion Mr Daniel Hackleton is fit for work with adjustments. I understand that he has been advised that there is an option of flexible working where he is able to work from home on some occasions, he is aware that the frequency and number of days is dependent on business need*."

That report is at pages 159 to 160.

7.3. The claimant's employment commenced on 30 October 2017, in the role of business partner analyst. The job specification to which we have been referred in respect of this role appears at page 650 in the bundle. We understand that it was possibly issued to the claimant as part of a "profiling" exercise undertaken in the latter part of the claimant's employment. The specification describes the purpose of the role as:

"(To) be the single point of contact for colleagues from other teams in RMG to request data, insight and analytics from GBI and knowledge management".

A further aspect of the role was to ensure that the business unit was getting the most from data and the available tools and that the right capabilities were being lined up for the future. Among what are described as the key accountabilities is "maintain a good understanding of the domain and future strategy for their RMG domains and partner with and build strong relationships with business stakeholders from their domain,

working with stakeholders to understand business issues and how information can be best used to support hypotheses and root cause".

The claimant's job description described the job location as "London/Chesterfield preferred". In contrast to other job descriptions, such as 'Analyst' (p 651), it did not refer to 'some travel may be required'.

7.4. On 15 January 2018 the claimant went on sick leave. Initially he was suffering symptoms of nausea. However his ill-health continued and on 15 February 2018, after the claimant had begun suffering collapses, a consultant neurologist, Dr Gibson, indicated to the claimant that he believed that he had a spinal disorder called Scheunemann's Disease. That diagnosis was subsequently confirmed by another consultant who was a specialist in that condition – a Mr Breakwell – on 6 March 2018.

7.5. In the meantime the respondent had obtained the first of what would be many occupational reports on the claimant during the employment. We should add that we have not seen copies of any of the actual referrals which led to these reports.. The first report was by Jennifer Barnes, an occupational health advisor and there is a copy at pages 215 to 217. She noted that the claimant had initially been absent from work with a digestive problem but also noted the recent diagnosis with Scheunemann's Disease. She considered that the claimant was unfit for work due to his ongoing symptoms of vomiting, nausea and back pain. One of the questions posed by the claimant's manager was whether any adjustments could be made in order to support the claimant's return to the office or working from home. The answer which Ms Barnes gave to this question was that once his symptoms had settled he should be able to resume his duties. He would require frequent posture breaks and flexible working as an adjustment. However at present he was unfit for work in any capacity.

7.6. On 9 March 2018 Mr Wilkinson, head of knowledge management and a self-described advocate of disability rights (see paragraph 3 of his witness statement) sent an email to Mrs Wood. A copy appears at page 574 in the bundle. Those parts of that email which have not been redacted read as follows:

"I agree that his job requires him to be in the office to interact with colleagues and stakeholders and to continue to build his knowledge.

Whilst we can accommodate a small amount of working from home, this is absolutely not something that can be on a permanent basis. I also don't understand how working from home will be better than working in the office?".

7.7. That email was written in reply to an email which apparently had been sent by Mrs Wood to Mr Wilkinson earlier that day (see page 572). Having spoken to the claimant that day, Mrs Wood had reported that the claimant believed that he would be able to return to work but had to take it slowly. He had told Mrs Wood that ensuring that he was comfortable was the priority which meant working from home as much as he could if that was more comfortable, because an orthopaedic chair was unlikely to be the answer. Mrs Wood had explained to Mr Wilkinson that the claimant's role required picking up a wide range of tasks, none of which were routine, talking to numerous people and being proactive. The claimant's lack of background knowledge meant that it was essential for him to ask

questions, talk to others and seek out answers. Mrs wood had not seen enough evidence of that during the claimant's short time in the office so as to be confident that working from home would suit him in that role.

7.8. The claimant has during the course of this litigation made a subject access request and there are various documents within the bundle which have come into his possession through that route. The two emails to which we have just referred are in that category. The SAR documents have unfortunately been redacted, perhaps unnecessarily and so in the case of various emails we have looked at it is not always easy to work out who the sender or recipient were.

7.9. On 29 March 2018 there was a meeting between the claimant and Tracey Wood. Mrs Wood wrote to the claimant on the same date (pages 222 to 223). It was noted that the claimant would shortly be seeing his GP to discuss an anticipated letter from an orthopaedic surgeon and to develop a plan for return to work. The letter records the claimant indicating that he was feeling well enough to come into work but was keen to take advice on managing his back problem. Mrs Wood had offered the claimant access to a bed within the first aid room on site should he need to lie down for short periods. The claimant's trial period was to be extended for a period of three months.

7.10. In a further email that comes out of the SAR, at page 575 to 576 in the bundle is what is probably Mrs Wood's email dated 18 May 2018 although it is unclear who she is writing to. In this email she says that she understands that the claimant had been advised that there was an option of flexible working where he would be able to work from home on some occasions but that the claimant was aware that the frequency and number of days was dependent on business need. Mrs Wood recommended that there was a DSE assessment "if you can support in working from home on some day (sic) this should be undertaken for his desk at the office and at home". It was also noted that during the 11 weeks the claimant had worked he had worked from home on five occasions. We were told that had been because of adverse weather conditions and in particular the claimant's concern that he might fall, having regard to his mobility problem, when walking from the car park into the office.

7.11. A further occupational health assessment was carried out on 30 May 2018 by Dr Joseph MacCarthy of OH Assist. A copy appears on pages 232 to 233. The doctor noted the claimant's conditions and that adjustments had been made at work including an emergency evacuation plan and the provision of a parking space. The doctor went on to write:

"*Despite this he has concerns about whether a return to work in the workplace might aggravate his condition and tells me he has medical advice to work from home for the most part. He is keen that advice from his GP is taken into account."*

Dr MacCarthy goes on to indicate that before providing advice he intends to seek a report from the claimant's GP and further advice would follow.

7.12. Whilst we understand that the claimant's GP was in correspondence with OH Assist on probably more than one occasion, the respondent did not at any time see any letter or report from the claimant's GP other than the fit notes which the claimant submitted from time to time. Instead, in the usual

way, any relevant information from the GP was conveyed to the respondent via occupational health reports. In the numerous fit notes within the bundle, an example of which is at page 242, the GP consistently advised that the claimant was not fit for work and never completed that part of the fit note which could have indicated that the claimant might have been fit if the employer agreed to, for instance a phased return to work, amended duties or workplace adaptations.

7.13. On 19 June 2018 a meeting took place between the claimant, Mrs Wood and Mr Wilkinson. The meeting took place at the respondent's Chesterfield office. After the meeting Mr Wilkinson wrote to the claimant seeking to summarise the key discussion points and the follow up actions agreed. That letter, dated 26 June 2018, is at pages 267 to 269. However, unbeknown to Mrs Wood and Mr Wilkinson, the claimant illicitly recorded that meeting. A transcript of that recording appears at pages 626 to 647.

In Mr Wilkinson's letter the following appears:

"*You advised us that your GP has recommended that you should be working from home for a minimum of four days per week. We discussed your current role of business partner analyst and I explained that due to the need to meet with stakeholders both in London and Chesterfield, that working from home for at least four days per week would not allow you to build the necessary working relationships with key stakeholders across the business which is the core part of this role."*

Mr Wilkinson's letter goes on to state:

"Having explained this in the meeting, you agreed and understood that your current role was not compatible with the medical advice you have been given. Whilst we will always look at and consider any reasonable adjustments, there is a need to be in the office in Chesterfield at least three days per week and this would also include travel to London and other Royal Mail locations across the country to attend meetings and workshops.

You were very clear in that you wanted to continue your career with Royal Mail and indicated that you felt that more analytical roles could be more suited to working from home at least four days per week. I am equally keen to explore how you can continue your career at Royal Mail and we therefore discussed conducting a redeployment exercise to look for other suitable roles within the business."

The letter informs the claimant that in the event that the respondent was not able to find a suitable role for him as part of a redeployment exercise then it would need to consider other viable options, one of which could be the claimant leaving the business on ill-health grounds. The claimant signed the letter to confirm that he believed that it was an accurate reflection of the meeting (see page 269).

7.14. Within the claimant's transcript of the 19 June meeting – which the respondent we understand accepts as being accurate – the following exchange appears (page 641 – 642). Mr Wilkinson is recorded as saying:

"*And, you know, I am more than happy to look at what reasonable adjustments we can make to support you but I think, having given it some thought in advance of today, I don't think that that role …. and that role*

needs to work for a minimum of four days. I just don't see how it can work … and so one of the options open to us … is you have the option to go through what is called a scoping exercise. This is where we look at roles across Royal Mail. We do an assessment of you".

To these comments the claimant's recorded replies are monosyllabic – 'right', 'yep', 'yeah'. Mr Wilkinson continues:

"*That is one option … the other option, which I just want to make you aware of, it feels like you are not ready for it but I want to make you aware of it … there is an ill-health option and you know that is a route we could potentially go down".*

The claimant's response to that is:

"No my head's not there yet".

7.15. Towards the end of the 19 June meeting the claimant gave Mrs Wood and Mr Wilkinson a two page document addressed to "To whom it may concern" and this is at pages 255 to 256 in the bundle. It begins:

"I wish to lodge a grievance regarding my working conditions. I feel I have been discriminated against due to my disability and Royal Mail has not made adequate reasonable adjustments".

The claimant went on to write that the specialists and GPs that he had seen had said that it was perfectly possible for the claimant to return to work full-time but there should be a focus on lowering the claimant's pain levels wherever possible. The claimant then wrote:

"In view of the fact that my cerebral palsy worsens with the normal ageing process and since my second disability was diagnosed, my consultant and my GP have both advised me not to work full-time in an office environment, and specifically my GP has recommended that I work from home at least four days out of five".

The claimant went on to note that Tracey Wood had repeatedly told him that his job was an office based role but the claimant contended that he had originally been given the opportunity to work from home as and when needed. He felt that the addition of a second disability should not mean that that opportunity was removed. He believed that with the use of video and telephone conferencing and spending one day in the office per week working from home would otherwise be a reasonable adjustment. The claimant suggested that one of the reasonable adjustments would be allowing him to work from home for at least four out of five days, or 80% of his working hours. Alternatively he should be offered suitable alternative employment on a permanent home working basis.

7.16. In response to this grievance Mr Wilkinson wrote a letter dated 29 June 2018 to the claimant and a copy appears at pages 272 to 274. In this letter he requested further details of how the claimant believed he had been discriminated against. On the issue of working from home, Mr Wilkinson pointed out that it had been made clear to the claimant that engaging with stakeholders and building strong working relationships was a critical part of the role and as part of the learning curve the claimant needed to spend time with people in the office in Chesterfield to understand the systems and processes. Mr Wilkinson reiterated that at the 19 June meeting he had explained that the business partner role was

not compatible with working from home for at least four days per week. Mr Wilkinson then wrote:

"At this meeting (19 June) you understood and accepted why this was the case. As a result we agreed to progress with a scoping exercise to look at redeployment options for roles which would be compatible with working from home at least four days per week."

Having regard to what is set out in the transcript, we find that Mr Wilkinson in his letter is somewhat overstating the state of affairs by referring to the claimant agreeing to those matters. Instead the claimant is simply told of those matters by Mr Wilkinson and we do not think that such comments as 'yeah' and 'right' could, without more, indicate agreement to such fundamental matters.

On 2 July 2018 the claimant sent an email to Mr Wilkinson (page 280) thanking him for his response and indicating that the claimant did not wish to raise a formal grievance. His main objective had been to state the difficulties in fulfilling some of the tasks of the role due to his disability and the fact that the reasonable adjustments he needed were not all in place. He had wanted to suggest some ways in which he could use technology to accommodate his doctor's recommendations of working at home for four days per week. He concluded the email by saying that he appreciated Mr Wilkinson's understanding in the matter as well as addressing his concerns regarding his future at Royal Mail.

7.17. A further occupational health report was prepared on 21 June 2018. That report is by Dr Athanasiou, a consultant occupational physician and, as were the majority of these consultations in the claimant's case, it was conducted by telephone. A copy appears at pages 260 to 262. Whilst the claimant had reported pain, fatigue and tiredness together with balance issues and back pain, it was noted that he was receiving physio treatment and that he was helped by doing a lot of swimming. The doctor went on to write "Based on the assessment today, Mr Hackleton is fit for work with adjustments."

His current capacity for work was described as – "flexible working – combination of working from home and on site and so has to attend doctor's appointments." Some time has been spent in our hearing analysing this rather opaque statement. It remains unclear whether the doctor was limiting the benefit of home working to the ability to attend doctor's appointments or more broadly. In fact the claimant lives approximately two miles away from Royal Mail's Chesterfield office and his GP, based in Dronfield is probably something like equidistant from home or work. As before various manager questions are recorded in the report. One of those is:

"*Would a benefit (sic) to returning to his workplace and using specialist equipment, be more beneficial to his long-term prognosis compared to working from home where there is no specialist equipment?"*.

The answer to this question is:

"*Based on the history DSE assessment took place and ergonomic equipment was provided but did not prove to alleviate the symptoms. It seems that a combination of working from home and on site is helping him more"*.

Of course in so far as that answer might suggest that the claimant was currently working from home and on site then that is incorrect.

7.18. The claimant was not happy with aspects of this report and sought a revision. The revised report dated 29 June 2018 is at pages 275 to 277. In this report, the answer to the question "Is there anything that the business should consider to support Mr Hackleton's return to the workplace" was answered differently. In the earlier report the answer was "The already implemented adjustments seemed to have helped him and in addition please see above". However, in the revised report the answer was:

"In my medical opinion return to work can take place with reasonable adjustments in place, which based on the nature of his condition may deem to be permanent. Direct feedback from Mr Hackleton would be useful guidance as he has full awareness of his condition and given that he wants to be at work (safely) and remain productive."

7.19. On 2 July 2018 Mrs Wood wrote to the claimant (a copy is at page 279). She informed him that as of 17 July 2018 his entitlement to occupational sick pay would reduce to half pay.

7.20. There was to have been a further occupational health assessment of the claimant on 12 July 2018. However, the person conducting that assessment, Andrea Smith, was concerned that the claimant was unaware that the issue of him travelling to Florida on his honeymoon would be discussed during the course of that assessment. That came about because the respondent was aware of the claimant's plans for his honeymoon, which he has not kept a secret. His manager, Mrs Wood was unsure how the claimant would be able to travel to America in circumstances where he was raising concerns about the need to travel to London as part of his job. Mrs Wood has told us that although this was mentioned in the referral to OH Assist, she did not expect that it would be raised as a direct question during the course of the assessment. In any event Andrea Smith decided that it would not be appropriate to proceed and accordingly there was no report. We find that the respondent has erroneously sought to portray this as the claimant refusing to allow the release of a report. The fact was that, in the circumstances we have described, there was no report.

7.21. On 9 August 2018 the claimant raised a further grievance which on this occasion was described as a formal grievance. This appears at pages 306 to 308. Referring to the 19 June meeting, the claimant said that he felt that the decision to focus on redeployment opportunities had been made prematurely and without exploring alternative options for him to continue in his current role. He was also concerned about the reference to ill health retirement because that had given him the impression that the decision had already been made not to allow him to return to his current role. The claimant reminded the recipient of this grievance, Mr Wilkinson, that the claimant had suggested several reasonable adjustments. He went on to refer to the telephone assessment on 12 July and he said that Ms Smith had told him that the raising of the honeymoon issue implied that the respondent doubted the severity of the claimant's condition. The claimant found that extremely insensitive. He felt that the number of conversations he had been required to have with

occupational health was excessive. He also complained about delays in various consents he had been required to give for occupational health to speak to his GP being actioned. He felt occupational health had delayed or lost those consents He felt that the delays had not only hindered his return to work but also caused him to suffer financial loss because his sick pay had been reduced. He said that once in possession of all the medical information he believed that Royal Mail should thoroughly investigate the feasibility of him remaining in his current role with appropriate adjustments including co-ordinating meetings in Chesterfield on the one day a week he proposed to be not working from home.

7.22. On 24 August 2018 Mrs Wood wrote to the claimant (321 to 322). She said that at the 19 June meeting "we all agreed to look at a redeployment scoping exercise". However having contacted all the relevant heads of department Mrs Wood was confirming that there were not any vacancies which matched the criteria which the claimant had declared on a redeployment form.

Mrs Wood's recollection of the 19 June meeting as recorded in this letter was that the claimant had understood and agreed "how it (the business partner analyst role) would not be compatible with the medical advice that you received in terms of working from home at least four days per week". The letter went on to refer to the option of the claimant leaving the business on ill-health grounds. Mrs Wood was aware that the claimant had now raised a formal grievance which was being handled by Mrs Wood's line manager, Kate Jones. Mrs Wood said that in those circumstances she was not planning any further action on the issue of the claimant continuing in the BPA role until the formal grievance had been resolved.

7.23. On 29 August 2018 a grievance investigation meeting was conducted by Mrs Jones with the claimant. Notes were taken by Tracey Thornton and those notes are at pages 324 to 326. The claimant is minuted as saying that he felt that the process was going down one road, of him leaving the business.

7.24. The Tribunal have not seen the notes of any other interviews which Mrs Jones may have conducted whilst investigating the claimant's grievance.

7.25. On 25 September 2018 Mrs Jones appears to have prepared the letter and decision outcome report which is at pages 334 to 340 in the bundle. However it seems that it was the letter dated 3 October 2018 and report (at pages 342 to 348) that was actually sent to the claimant. Mrs Jones was not really able to explain why there were two letters/reports but it was agreed that the content of each was the same. We refer therefore to the 25 September 2018 letter/report. This indicates that Mrs Jones had interviewed both Mrs Wood and Mr Wilkinson.

7.26. In respect of the grievance that the decision to look for redeployment "has been made without due consideration." Mrs Jones referred to that matter first being raised at the 19 June meeting. She referred to the adjustments which had been made at work including the sum of £10,000 being invested in doors which opened automatically and the offer of the first aid room if the claimant needed to lie down flat. On the 'four days at home' issue,

Mrs Jones reiterated that that would not be compatible with the role but suggested that two days at home per week could be accommodated. In any event she felt that due consideration had been given before progressing down the redeployment route.

On the issue of occupational health being told about the claimant's honeymoon arrangements Mrs Jones concluded that that was a valid question because it related to the claimant's ability to perform his current role which required working at a computer. Mrs Jones did not feel that the requirement that the claimant had numerous occupational health assessments meant that the respondent was questioning his condition it was because of the length of the absence, the complex nature of the conditions, the need for Royal Mail to understand those issues and the claimant's current capacity for work.

On the issue of delays with consents for the occupational health practitioners to contact the claimant's GP, Mrs Jones took the view that irrespective of any delays on the part of occupational health, the claimant's sick pay entitlement was governed by the fact that he continued to be signed off work as unfit by his GP.

7.27. On 4 October 2018 the claimant appealed against this grievance outcome (page 350).

7.28. On 11 October 2018 the claimant and his wife went on their honeymoon to Florida.

7.29. On 31 October 2018 there was a further telephone consultation with OH Assist, on this occasion with a Dr Mohammed Baig an occupational physician. A copy of his report is at pages 370 to 372. Dr Baig had before him a report from the claimant's GP, Dr Barr and a report from the specialist Mr Brakewell. Dr Baig noted that both the GP and the surgeon were of the opinion that the claimant should limit the time that he sat so as to decrease muscular spasm. In terms of current capacity for work Dr Baig wrote as follows:

"Based on the assessment today and advice from his GP, Mr Hackleton is fit for work with adjustments. It is recommended by his GP that he should work from home for 04 days and one day from office after proper OT assessment and DSE assessment. It was discussed with Mr Hackleton the possibility of doing more than one day at work, but he wants to follow his GP advice and is reluctant to do more than one day as he feels previously (sic) *he tried to work more days at work his condition deteriorated*".

Presumably that is reference to the 11 weeks that the claimant actually did attend work.

7.30. On 8 November 2018 there was a meeting at the claimant's home. This was attended by Mrs Wood and Mr Wilkinson. The claimant and his wife were in attendance. Notes of that meeting, which the claimant has signed as being an accurate reflection of the conversation, are at pages 384 to 385. Reference is made to Dr Baig's report and the GP's recommendation of working from home four days a week. Mr Wilkinson is recorded as explaining that HR had advised that Royal Mail had a duty of care for an employee working from home and so a home visit had been recommended to carry out an initial assessment of the claimant's home

working environment. This meeting of course was not that assessment. Mr Wilkinson also suggested that in the light of Dr Baig's report the claimant might want to come into the office for one day a week as suggested in that report. The claimant is recorded as saying that given his current condition that could only be for an hour or two and that he would prefer to wait until an occupational assessment had been done with any resulting recommendations in place.

7.31. The respondent chose to make arrangements for an occupational health assessment of the claimant in the office environment. The assessment was conducted in November 2018 by Karen Phillpotts, a registered occupational therapist with OH Assist. The report produced following that assessment is at pages 394 to 397. However the claimant also covertly recorded this assessment and the transcript is at pages 656 to 693. In paragraph 48 of the claimant's witness statement he describes this assessment as being lengthy, two hours, and extremely physically and mentally distressing so much so that at the end of the assessment he was crying. The claimant goes on to say that he was in so much pain that he just wanted the assessment to end and that it was in those circumstances that he agreed that he could not return to work in the office. He says that he felt bullied and degraded during the assessment because he was asked to perform what he considered to be pointless tasks which caused him pain. In the transcript (page 692) the claimant explains to Miss Phillpotts that he could not afford to take the option of ill-health retirement. Miss Phillpotts asks the claimant whether realistically he can still work, to which he replies that he does not know. Miss Phillpotts goes on to point out that during the course of the two hour assessment the claimant's pain levels were now at the point where he wanted to lay down and go to sleep and the claimant agrees that that is exactly how he feels. Miss Phillpotts suggests that the pain levels were a barrier and the claimant agrees, "unless someone came up with a magic drug".

7.32. In Miss Phillpotts' written report she noted that when the claimant had been asked to complete a functional task that would be consistent with sedentary working, he had reported a significant increase in pain. Miss Phillpotts indicated that the claimant had reported that the only posture that he would be capable of sitting in for any length of time would be with his legs straight out in front of him and his back rest very reclined. Miss Phillpotts had explained to the claimant that sitting in that preferred posture was not a favourable posture and that it would also not enable functioning working without potentially having further musculoskeletal risks to other areas of his spine and body. Miss Phillpotts' analysis of the claimant's job demands indicated that the characteristics were of sedentary physical demand but she considered that the claimant's current capabilities were that he did not have the capabilities to complete a sedentary duty.

7.33. Although it appears that it was outside her terms of reference, Miss Phillpotts went on to write "It is my opinion that if Mr Hackleton were to work at home then he would need an appropriate desk and chair as per equipment at work and therefore this would be the same limitations as working within the office environment" (page 397).

7.34. Miss Phillpotts' conclusion was expressed in these terms:

"In my opinion Mr Hackleton's capabilities are not related to work equipment, this is a capability issue and in my opinion I cannot see Mr Hackleton maintaining a return to work programme due to his increase in pain when sitting in a functional posture. During the assessment a potential rehabilitation plan and adjustments were shared with Mr Hackleton and he agreed that he would not be able to manage or maintain a return to work. It is my opinion that Mr Hackleton does not have the capability to complete work duties due to his pain levels and reduced functional sitting posture."

The report goes on to mention that the claimant had spoken to "management" – we understand Mrs Wood – during the assessment and requested that ill-health retirement be considered. As we have noted the claimant says that he said that under duress in order to bring the assessment to an end.

We should add that the claimant criticises the respondent's decision to assess him working in the office prior to an assessment of him working at home.

On 20 November 2018 Ms Amanda Branson, an occupational health advisor with OH Assist, wrote to the respondent. Her letter in fact begins 'Dear Ms advice centre'. She refers to receipt of "your business referral on 19/11/18". The Tribunal have not seen a copy of that referral. The report notes that the outcome of the 19 November assessment "was that Mr Hackleton would not be able to sustain a return to work for three days per week due to severe pain. In this assessment it was discussed that due to this ill-health retirement would be the most likely outcome in this case." The letter goes on to say that Ms Branson was referring the case on for an OHP assessment to allow that possibility to be discussed further.

7.35. On 21 November 2018 the claimant wrote to Mrs Wood (page 419). He complained that he had been getting very conflicting information from OH Assist and then from Royal Mail. Referring to his OH phone call on the previous day (presumably with Ms Branson) the claimant said that he was told that ill-health retirement was not a foregone conclusion and that a return to work was still being considered. He went on to say that he had been told by Ms Branson that the assessment he had gone through (presumably on 19 November) had reached that conclusion (ill-health retirement) because Royal Mail did not have the capability to meet the adjustments my doctor had recommended". The claimant added that he had no faith in any of the process and that he had now instructed solicitors.

7.36. The claimant's appeal against the grievance outcome had been heard by Mr John Spong. He was a team manager in the programme and project management office. The outcome letter (page 429) is undated but it is understood that it was either sent or received by the claimant on or about 5 December 2018. Enclosed with that letter was Mr Spong's report. His decision was that some points of the grievance appeal were upheld whereas others were not. The report – pages 431 to 438 - shows that the majority of the appeal was not upheld. However Mr Spong agreed with the claimant that it had been inappropriate for Mrs Jones to deal with the claimant's grievance in circumstances where, in part, the grievance was

against her manager, Mr Wilkinson. However Mr Spong did not think that if a wholly independent manager had been appointed to hear the grievance that there would have been any material difference to the outcome (page 432). The only other matter that was upheld was the claimant's complaint that the focus on redeployment opportunities had been made prematurely without exploring alternative options for the claimant to continue in the business partner analyst role. Mr Spong concluded (page 435) that the evidence did imply that that conclusion on 19 June – that the claimant could not fulfil the role working from home four days a week – "was reached rather quickly without thorough investigation of what additional adjustments could be put in place to help DH fulfil the role." Noting that a number of reasonable adjustments had already been put in place to accommodate the claimant, Mr Spong conceded that "on the specific issue of working from home for four days a week I would agree that this particular aspect could have been investigated further". Mr Spong's recommendation was that further options should now be explored with regard to what additional reasonable adjustments could be made and reference was made by Mr Spong to "a home visit on 8 Nov to check DH's working conditions at home with a view to further explore what reasonable adjustments could be considered to allow DH to fulfil his role going forward."

7.37. It seems that Mr Spong may have misunderstood the nature of the home meeting on 8 November 2018 which we have referred to above. In the event there would not be a home assessment by an occupational therapist until early March 2019.

7.38. The claimant was due to have a further telephone consultation with OH Assist on the question of ill-health retirement on 11 December 2018. However on 10 December 2018 the claimant sent an email to Mrs Wood (pages 463 to 464). The claimant said that having spoken to his solicitor he would be available for the call the next day but he wanted to make it clear that he was doing that under protest. Having read Mr Spong's appeal outcome, the claimant and his solicitor felt that all possible reasonable adjustments had not been pursued or explored. The email went on:

"*We feel I have no other option but to follow this process to avoid Royal Mail using another excuse such as the redundancy process to get me to leave the business. We believe there should be a full independent review regarding making reasonable adjustments for me. However it appears this is unlikely as the outcome is biased and Royal Mail will not change its position."*

The claimant went on to mention that he would be telling the OH Assist doctor of his protest and would be informing them that he felt that he was still able to fulfil the role.

7.39. The reference to a redundancy process in the claimant's email was in turn a reference to something which he had been told by Mr Wilkinson at the 8 November 2018 home meeting. Mr Wilkinson had taken that opportunity to inform the claimant that the respondent was undergoing a restructure of its management and to deliver what Mr Wilkinson describes as the brief which he had given to all other employees in his team. Mr Wilkinson

denies that either he or Mrs Wood told the claimant during that meeting that his role was not safe.

In the event, the claimant's evidence is that Dr Archer, who was to have conducted the 11 December telephone consultation, did not feel it was appropriate to continue in circumstances where the claimant was not freely giving his consent to the consultation.

7.40. As we have mentioned, on 9 January 2019 the claimant presented his claim form to the Employment Tribunal.

7.41. On 4 March 2019 an occupational therapy assessment was conducted in the claimant's home by Mandy Kelly, a registered occupational therapist. The report which Ms Kelly subsequently prepared was issued on Optima Health headed paper although as the notepaper refers to a registered office address which is the same as OH Assist's registered office, we assume they are related companies.

7.42. For unexplained reasons, there is a report by Ms Kelly dated 4 March 2019 (pages 520 to 526) and then what appears to be an identical report other than it is dated 6 April 2019, which is at pages 543 to 550. It was suggested to us that the March report had been sent to HR whereas Mrs Jones told us that she believes that it was the report dated 6 April which she had before her at the material time. The claimant illicitly recorded the 4 March home assessment and the transcript is at pages 694 to 752.

7.43. In her report Ms Kelly records that the purpose of the assessment is a request by management to assess the claimant's capabilities and for advice on what adjustments are required to enable him to return to the workplace, although of course the assessment that she was actually conducting was in relation to the claimant's ability to work at home. The report does not comprehensively describe the accommodation within the bungalow that is the claimant's home. Ms Kelly records that the claimant was observed mainly sitting in a reclining armchair in his lounge room (which is not described) but the latter part of the assessment was conducted in the kitchen where the claimant sat on what is described as a padded low back kitchen stool at the kitchen island. Other than this the size and facilities of the kitchen are not recorded.

7.44. Under the heading 'Recommendations' (page 547 onwards) Ms Kelly recorded:

"From the observations and Mr Hackleton's reports during the assessment, it would not be suitable for Mr Hackleton to work from home on an ongoing basis. The current reclining armchair does not support Mr Hackleton in a good working posture and if he was to work consistently in this posture, it is anticipated that he would be at high risk of developing further musculoskeletal issues.

No suitable workstation options were found that would accommodate the current armchair and provide the correct postural support. At this point, there does not appear to be readily available space within Mr Hackleton's living area or kitchen to support a home based workstation with office chair.

The office environment would be the most suitable for Mr Hackleton at this time. The commute is 10 minutes and would be manageable with his current reported and observed tolerances."

The remaining recommendations in respect of equipment and work practices are, despite the context of the report, directed at what Ms Kelly believes would need to be done within the office environment of the respondent's premises. Ms Kelly's report thereafter is also premised on the basis that the claimant can return to work – that is in the office. One of her recommendations (page 550) reads:

"Once a return to work date is agreed and the recommendations above are on track, a workplace assessment is recommended so that Mr Hackleton's workstation set up correctly (sic). This will increase the likelihood of a successful and sustainable return to work."

It is to be noted that although Ms Kelly was supposed to be assessing the claimant's home, her opinion was that the claimant could return to work in the office, whereas in November of the preceding year Karen Phillpotts had been of the opinion that she could not see the claimant maintaining a return to work programme and that he would not be able to manage or maintain a return to work, hence consideration of ill-health retirement.

7.45. The claimant's evidence was that during the assessment he and his wife were given to believe that Ms Kelly was in favour of the claimant working from home and he says that the written report bore no resemblance to the report that he and his wife were anticipating. In paragraph 70 of the claimant's witness statement he goes so far as to say that this led him to believe that Royal Mail had pressured OH Assist and Ms Kelly to write a report "more in keeping with Royal Mail's management preference". The claimant's wife then carried out some research and discovered that Ms Kelly had been "a senior occupational therapist" working for Royal Mail from 2001 to 2006. Subsequently, in an email to Ms Jones of 30 May 2019 (to which we will return) the claimant described Ms Kelly as a former Royal Mail employee. We have a copy of Ms Kelly's CV in the bundle (pages 623 to 624) and under employment history she indicates that between January 2001 and January 2006 she was a senior occupational therapist for ATOS Origin Occupational Health/Royal Mail. We doubt that that makes her a former employee of Royal Mail, but obviously there had been a historical connection.

7.46. On 11 April 2019 Mrs Wood conducted a further meeting with the claimant. In addition his wife was present and again Tracey Thornton took notes. Those notes are at pages 551 to 553. The purpose of this meeting was to discuss Ms Kelly's report. The claimant is recorded as saying that his GP would not "sign off the plan" and he, the claimant, would not follow it either. The typewritten notes have some handwritten annotations and we understand these are either by the claimant or his wife.

7.47. The next part of the note has been amended in that way to read that Mrs Hackleton says that her husband had been advised to work from home four days a week. However Mrs Wood says in response to that that the report had found that that wasn't safe and the office environment was the most suitable place to work. The claimant said that he would not be following the plan because it was not a workable solution and could lead

to him collapsing. The claimant and his wife had the concern that the office was open plan whereas at home, which was quite compact, there were walls to lean on for support and it was only 10 steps from the workstation to the bathroom. The claimant is recorded saying that he thought that it was management's preference for him to come back to the office or retire and there had been report after report until that outcome was reached. The claimant raised the issue of the independence of OH Assist and that one of them was a former Royal Mail employee. The meeting concluded with a reference to Mrs Hackleton saying that they would get further reports and forward them to occupational health to pass on to Mrs Wood.

7.48. In or about May 2019 responsibility for managing the claimant's situation passed from Mrs Wood to her line manager Mrs Jones.

7.49. On 30 May 2019 the claimant wrote a lengthy email to Mrs Jones and a copy is at page 561.1 to 561.4. It seems that that email was in response to an invitation from Mrs Jones for the claimant to attend an interview with her on 6 June 2019. The claimant said that he agreed that the current situation was untenable but he believed that that was because Royal Mail had consistently and repeatedly refused to make the necessary reasonable adjustments to allow him to return to work. Attached to the claimant's email was Mr Reddington's report, which the claimant said he had only received that day. He said that the report was based upon a consultation he had with Mr Reddington on 7 May 2019. The claimant went on to write that Mr Reddington had confirmed the recommendations made by the claimant's orthopaedic specialist and GP that for the sake of his health it was imperative that he worked from home for a minimum of four days a week. He said that that was the same advice that Royal Mail had had for over a year, but had so far refused to follow it. He went on to say that the report explained how the ergonomics mentioned in Ms Kelly's report were not appropriate in the claimant's case due to the complexity of his two separate disabilities. As we have noted, this is a somewhat clearer explanation than Mr Reddington himself gives in his report which makes no specific reference to Ms Kelly's report at all. The claimant goes on to again question the independence and integrity of both Ms Kelly and Ms Phillpotts. Describing Ms Kelly as a former Royal Mail employee, the claimant said that he very much doubted her impartiality and objectivity when considering what was in his best interests, as against what the claimant described as a clear management preference stated by Royal Mail. Ms Kelly had in his view raised unfounded concerns about the health and safety aspects of home working. He went on to refer to Royal Mail waging "a systematic campaign against me" and that he found the scare tactics (a reference to the restructuring process which Mr Wilkinson had mentioned) as being absolutely abhorrent and designed to bully and intimidate him into resigning from a role he was capable of doing.

7.50. On an unknown date, but believed to be in May 2019, Mr Michael Reddington, a spinal physiotherapist with City Physio Limited prepared a report on the claimant. That report was at the behest of the claimant. Mr Reddington had been treating the claimant and he gave the dates of April 2018 and 7 May 2019 for two of those occasions. The report is at page 614 in the bundle (and also at 561.5). It is undated and brief. The report includes the following:

"Mr Hackleton's unique "set" of medical problems precludes him from most usual "off the peg" treatments, including ergonomic principles."

Mr Reddington does not go on to explain precisely what he means by this rather Delphic reference. The claimant's understanding is that Mr Reddington knew more about the claimant's conditions than did the occupational therapists employed by OH Assist. Further the claimant understood that the description of a unique set of medical problems meant the combination of cerebral palsy and Scheunemann's Disease. Although we do not have the details, we have the impression that what would be the normal treatment of Scheunemann's Disease was likely to aggravate the claimant's pre-existing cerebral palsy. The reference to 'off the peg' treatments including ergonomic principles meant, according to the claimant's understanding, that whilst for instance Ms Phillpotts might consider that the claimant's preferred posture when working at home would be potentially harmful, that would only apply to a person who did not have the claimant's specific disabilities. In the same way, the claimant told us that he believed Mr Reddington was saying that ergonomic principles that would apply to a person without the claimant's disability would not necessarily apply to the claimant. The concluding paragraph of this very brief report reads as follows:

"*It is my opinion that Mr Hackleton is able to work, given accommodation to his specific travel, exercise and ergonomic needs. I believe he manages best and would continue to be able to carry out seated work, in terms of these pre-requisites by working at home. This would allow him to perform his exercises in a timely manner before work, it would also allow him to avoid the physical stress and difficulties in travelling to work, thus aiding his productivity in his ensuing work. Working at home would also allow him to manage his spinal and bowel conditions with regular movement and access to facilities he requires at home".*

As the claimant puts it in paragraph 78 of his witness statement, occupational therapy recommendations which may be appropriate for the general population would not be valid in the claimant's case and could actually cause additional pain. There were a lot of different factors regarding how the claimant's body moved and functioned because of his disabilities.

7.51. The interview which had been proposed for 6 June 2019 in fact took place on 4 July 2019 and the respondent describes this as a first formal meeting. The meeting was attended by the claimant and his wife and in addition to Mrs Jones there was a representative from HR and also Ms Thornton who again took the notes. These are at pages 567 to 570. Mrs Jones read out the part from Ms Kelly's report which said that it would not be suitable for the claimant to work from home on an ongoing basis. The claimant said that he rejected the findings of that report and that his GP had advised him to work from home four days a week. The claimant would not follow that (Kelly's) report. Mrs Jones repeated that that was the health professional's report and that was the advice which the respondent would follow.

7.52. There was then a discussion of Mr Reddington's report. Mrs Jones noted that whilst that gave clear guidance that the claimant could work from home, it did not give any indication that an assessment had been made of

the home by Mr Reddington to ensure that it was a safe working environment. It is common ground that Mr Reddington had not and in the event never did inspect the claimant's home. The claimant said that he would approach Mr Reddington for a further report. It would transpire however that unbeknown to the claimant, Mr Reddington had gone away for three months and so no further report was put forward from Mr Reddington, or for that matter from any other health professional on behalf of the claimant. Under the impression that he would be able to contact Mr Reddington the claimant went on to ask Mrs Jones whether there were any specific questions which he should put to Mr Reddington. We understand that eventually Mrs Jones sent a proforma occupational health referral form to guide the claimant. However we find that it would have been fairly obvious to both the claimant and particularly Mr Reddington, if he had been approached, what his report needed to cover. Whether Mr Reddington, as a spinal physiotherapist, would have felt qualified to prepare such a report and to inspect the claimant's property and make an assessment of how he would work at home is, in the circumstances, an academic question. Towards the end of the note of the meeting, Mrs Jones said that she would await the claimant's decision on a further redeployment exercise but that the next step in the process, if no suitable role was found, would be dismissal. The claimant responded that the next thing that Mrs Jones would hear would be from his solicitor.

7.53. On 11 July 2019 Mrs Jones wrote to the claimant (pages 563 to 564). She enclosed copies of the notes taken at the 4 July meeting. The claimant was asked to confirm whether he would like Mrs Jones to undertake a further redeployment exercise. Reference was also made to the possibility of further guidance being given by Mr Reddington. Mrs Jones wrote that it was for the claimant to provide Royal Mail with any evidence that he wanted to be taken into account. As Mrs Jones was not a medical expert she was unable to provide the claimant with any recommendations or advice in that regard. The claimant was informed that if it was not possible to identify a suitable role via redeployment, or if it was impossible to facilitate a return to work otherwise, the next step would be consideration of dismissal.

7.54. A second formal meeting, as it was described, took place on 30 July 2019. A brief note of that is at 570J. In addition to the claimant, his wife and Mrs Jones, there was again someone from HR and Ms Thornton took the note. Mrs Jones is recorded as saying that it was the claimant's opportunity now to put forward any further evidence or raise anything else with her. The claimant's response was that he had made every point in writing. The claimant and his wife had no idea what more was required and so there was nothing more from Michael (Reddington). The claimant does not explain that for the reasons set out above he had not been able to speak to Mr Reddington. He went on to suggest that there was nothing in the previous occupational health reports "to give Michael (Reddington) any idea of what more detail to give us". For the reasons previously expressed, we find that implausible as it was obvious that the claimant needed to produce medical evidence in sufficient detail to support the contention that it would be safe to work most of the time at home and to point out any perceived errors in the opinions which had been offered by Ms Phillpotts and Ms Kelly. The notes conclude by referring to Mrs Jones

saying that she would take into account all the OT reports and correspondence when making her decision.

7.55. When sending the claimant the notes of that meeting under cover of her letter of 1 August 2019, Mrs Jones explained that she would be on leave for two weeks from 5 August and that she would contact him on her return. However, in fact it was not until 3 September 2019 that Mrs Jones wrote to the claimant informing him that her decision was that the claimant would be dismissed from his employment with Royal Mail "due to your refusal to follow the detailed guidance provided in the OH Assist report dated 6 April undertaken by occupational therapist Mandy Kelly at your home and your refusal to engage with the adjustments we have made for you in the office in order to facilitate a return to work."

8. **The parties' submissions**

Both representatives had prepared written submissions which we have carefully considered but do not propose to summarise here. At the resumed hearing by the video on 22 June 2020 the representatives made oral submissions.

9. **Our conclusions**

9.1 Jurisdiction

The grounds of resistance made no reference to any potential time bar. However in the agreed list of issues the matter is referred to in general terms. We have never been clear precisely what the time issue was, although we had asked the respondent to provide clarity about this during the hearing. All that is said in Mr Fosters outline submissions is –

"*It might be said that in certain respects the events of which the claimant complains cannot be considered to amount to conduct extending of* (sic) *a period of time*."

When we asked Mr Foster to explain this further he said that the respondent struggled to pursue the point and that it was difficult for the respondent to argue that there had not been 'a succession of events'.

As this is a matter which goes to a jurisdiction we consider that we need to go a little further than simply accepting this concession, although nothing appears to be obviously out of time.

The claim was presented on 9 January 2019 and so at a time when enquiries and investigation of the practicality of reasonable adjustments was being actively considered rather than at a time when a decision had already been made. The claimant's case in relation to part of the section 15 complaint is that there was conduct extending over a period. The claimant's dismissal occurred on 3 September 2019 and the claimant had sought an amendment to add this to the section 15 complaint on 17 October 2019. Had the claimant chosen to present a new claim then it would have been in time. In the event the amendment was permitted without objection on 29 November 2019. The matters of complaint in respect of alleged harassment and victimisation can again properly considered as a case based upon conduct extending over a period.

Accordingly we are satisfied that we have jurisdiction to hear and determine the whole of this claim.

9.2 The reasonable adjustments complaint

9.2.1 Provisions, criteria and practices (PCPs)

The respondent accepts that it had each of the three PCPs on which the claimant relies - that business partner analysts (BPAs) are predominantly office-based; are required to travel to meetings and the sick pay policy.

9.2.2 Substantial disadvantage

The respondent also accepts that the office based practice could put the claimant at a substantial disadvantage when compared to persons who are not disabled. We find that it did put him at a substantial disadvantage because his disabilities meant that he could not comfortably work in a conventional office setting.

With regard to the travel practice, we note that the claimant's contract of employment (p75) states that the needs of Royal Mail require mobility. We accept that there is no reference to travel in the job specification (p650) . However it is clear from the evidence given by the respondent's witnesses that travel was a requirement. In paragraph 13 of Mrs Woods statement she says, with reference to BPAs – "*they are also required to travel to meetings with key stakeholders throughout the business."* In paragraph 26 of Mr Wilkinson's statement he refers to travelling to meetings as a crucial part of the role. Moreover, the respondent alerting occupational health to the claimant's honeymoon travel plans suggests that the ability to travel was part of the role.

We find that in reality there was a practice which required travel. We also find that that practice put the claimant at a substantial disadvantage because his disabilities meant that travel was difficult and uncomfortable.

We deal with the issue about sick pay separately.

9.2.3 The duty to make reasonable adjustments

Having regard to the first two PCPs only at present, we find that the duty to make reasonable adjustments arises.

9.2.4 Did the respondent discharge that duty?

Mr Wilkinson describes himself as an advocate of disability rights. That he may well be in general terms, but we need to consider Mr Wilkinson's approach and that of the respondent to it's duty towards the claimant. We note that in his email of 9 March 2018 to Mrs Wood (p574) he writes that working from home "*is absolutely not something that can be on a permanent basis. I also don't understand how working from home will be better than working in the office?"*

We find that this sets the tone for the respondent's subsequent treatment of the claimant. It is also at odds with the occupational health advice which the respondent was receiving. Dr Athanasiou's report of 21 June 2018 (p260-262) describes the claimant's then current capacity for work as being flexible working from home and on site. The doctor says that the claimant was fit for work with adjustments.

There is also the report of Dr Baig, occupational health physician, dated 31 October 2018 (p370-372). Dr Baig had the benefit of a report from the claimant's GP, Dr Barr, and a report from the spinal specialist who was treating the claimant, Mr Breakwell. Dr Baig writes that the claimant was fit for work with adjustments and he noted that the GP recommended that the claimant should work from home four days per week and one day in the office after proper OT and DSE assessment.

Subsequently the respondent commissioned the report by Karen Philpotts, a registered occupational therapist (p394). The purpose of her assessment was of the claimant's capabilities and for advice on what adjustments were required in the workplace. She was pessimistic as to the prospects of the claimant working in the office and her opinion was that the claimant's proposal that he be permitted to work in a reclined or lying posture would not be functional. She felt that that could put other areas of his body at high risk of musculoskeletal damage. Although she was not conducting an assessment about the claimant working from home, she expressed the view that for this the claimant would need an appropriate chair and desk of the type that would be available in the office and so there would be the same limitations.

Mandy Kelly, also a registered occupational therapist, prepared the report on home working (520-526). She concluded it would not be suitable for the claimant to work from home on an ongoing basis. She too was concerned that if the claimant continued to work seated on a reclining armchair he would be at high risk of developing further musculoskeletal problems. Although she was not reporting on the office environment she nevertheless expressed the view that that would be the most suitable for the claimant.

In contrast to these opinions there is the report by Michael Reddington, spinal physiotherapist (p614). This was obtained by the claimant and provided to the respondent in May 2019. This report included the insight that – *"Mr Hackleton's unique 'set' of medical problems preclude him from most usual 'off-the-peg'treatments, including ergonomic principles*." He believed that the claimant managed best working at home carrying out that work seated.

We find that essentially Mr Reddington was saying that, because of the claimant's particular conditions, it was necessary to 'think outside the box'. We also find that it would have been reasonable for the respondent to have accepted that what might have been an unsafe working practice for the majority would nevertheless have been workable in the claimant's case. That should have led the respondent to commission a more detailed report either from Mr Reddington or from some other medical professional with knowledge and experience of the claimant's conditions and their impact on the ability to work.

That the respondent failed to do this suggests a closed mind on the issue of homeworking, as prefigured by the views expressed by Mr Wilkinson in his 9 March 2018 email. It is also significant that the respondent sought to place undue importance on what it perceived to be the claimant's own acceptance that he could work neither at home nor in the office and that redeployment or ill-health retirement was the answer. During his evidence Mr Wilkinson frequently returned to the point that the claimant had agreed with what Mr Wilkinson had said at the 19 June 2018 meeting. He believed that because the claimant had signed the minutes of that meeting he had agreed that working from home was not compatible with job. However the transcript of the

claimant's illicit recording shows in our view that the respondent has sought to read too much into the claimant's monosyllabic responses. We should also add that although when being cross-examined Mr Wilkinson sought to challenge the accuracy of the transcripts the respondent's solicitor had previously indicated that the respondent did not object to the transcript. That occurred on day three of the hearing during the course of the claimant's cross-examination.

We are also mindful that the respondent does permit BPAs at locations other than Chesterfield and London to work from home, subject to satisfactory risk assessments on their home environment (see Mrs Jones witness statement paragraph 17).

For all these reasons we find that it would have been a reasonable adjustment to have permitted the claimant to work from home four days a week once it had further specialist advice. On the basis of Mr Reddington's report and the evidence which the claimant has given about his disabilities and their effect we are satisfied that the claimant's particular requirements as practised at home would have been found to be safe, albeit somewhat counterintuitive from a conventional ergonomic standpoint. If the claimant had been allowed to work from home on that basis for the majority of the working week, we consider that he would have been able to work one day per week in the office with minimal adjustments. Whilst our conclusion on the latter point involves a degree of conjecture we remind ourselves that the respondent would have been under ongoing duty to make reasonable adjustments in the light of the prevailing circumstances on the claimant return to work.

It follows that it would also have been a reasonable adjustment not to have considered and then actioned the claimant's dismissal prior to the other reasonable adjustments being put in place.

9.2.5 Sick Pay as a reasonable adjustment

It is agreed that the respondent had the provision of a sick pay policy which allowed six months full pay and a further six months half pay, but without any discretion to discount disability related absence or extend the entitlement where the absence was disability related. The respondents Sick Pay and Sick Pay Conditions policy is at pages 103 to 108 in the bundle. Whilst there are provisions for discounting absences due to being assaulted on duty or because of industrial injury or disease, the policy says nothing about absence due to disability.

The respondent contends that on the authority of the Court of Appeal in **O'Hanlon** v. **HMRC [2007] IRLR 404** extension of sick pay will rarely be a reasonable adjustment and not in cases which would not assist the employee to return to work (see page 6 of Mr Foster's Outline Submissions).

Ms Kight submitted that the claimant's case should be considered under the principles set out in **Meikle** v **Nottinghamshire County Council [2005] ICR 1** . That was because the length of the claimant's absence was attributable to the respondent's prevarication in relation to homeworking and its insistence on frequently referring the claimant to occupational health "*because of its desire not to enable homeworking*" (paragraph 46 of her written submissions.)

In **O'Hanlon** Hooper LJ giving the judgement of the Court of Appeal said-

"*We do not believe that the legislation has perceived this (enhanced sick pay) as an appropriate adjustment, although we do not rule out the possibility that it could be in exceptional circumstances."*

That was because the purpose of the legislation was to assist people with disabilities to obtain employment and be integrated into the workplace. It was not to treat them as objects of charity.

However in the earlier Court of Appeal decision in **Meikle** it was accepted that in circumstances where Mrs Meikle had been absent on sick leave for a prolonged period owing to her employers failure to make reasonable adjustments, there was no reason to exclude the payment of sick pay from the scope of the duty to make reasonable adjustments.

We also note that this principle is included in the Equality and Human Rights Commission Code of Practice on Employment at paragraph 17.22.

The claimant's sick pay was reduced to half pay in July 2018 and ceased in January 2019.

Whilst we do not accept that the respondent sought numerous occupational health reports until it got the answer that it wanted, we conclude that it should have focused its enquiries on the claimant's unique problems at an early stage rather than pursuing a more conventional approach. We accept that the respondent was not shown Mr Reddington's report until May 2019 and so after the sick pay entitlement that expired. However we do not consider that that means that the respondent was excused from giving more comprehensive consideration to the claimant's employment difficulties at an earlier stage.

Accordingly we find that there was a breach of the duty in respect of sick pay. We reserve to the remedy hearing consideration of quantum for this breach.

9.2.6 <u>The section 15 complaint</u>

With due respect to the claimant and those who advise him, prolixity has been a characteristic of his case and this is particularly evident in the way that the alleged unfavourable treatment for this part of his claim has been set before us.

The essential and obvious unfavourable treatment is the claimant's dismissal.

With regard to the other eight treatments as set out in paragraph 8 of the list of issues, we consider that there is much duplication of material which is really only relevant to the reasonable adjustments complaint. We do not accept that a request during a lengthy period of absence for the claimant to complete some 10 consent forms for occupational health reports can properly be regarded as unfavourable treatment. Although motive is not a relevant consideration, we do not accept the claimant's contention that this was intentional oppressive behaviour by his employer.

<u>The dismissal</u>

Although the letter of dismissal (pp 571A – 571D) suggests that the claimant was dismissed for conduct – "*due to your refusal to follow the detailed guidance in the OH*

assist report dated 6th April …… and your refusal to engage with the adjustments we have made for you in the office …." (p571D) we find that the real reason for dismissal was the claimant's long term sickness absence which arose because of his disabilities and so was the 'something' in the context of section 15.

Because there is no justification or other defence put forward in respect of the dismissal we find that this aspect of the section 15 complaint succeeds. We might add that as we have found the respondent to be in breach of it's duty to make reasonable adjustments it would have been difficult for the respondent to justify a dismissal which flowed from that breach, which is our finding.

9.2.7 Harassment

The claimant was clearly upset that the respondent informed occupational health of the claimant's plans to travel to America for his honeymoon. However we consider that this was a legitimate enquiry and had some relevance even though travelling first-class and business class to the USA for private purposes is a different proposition to commuting to London or elsewhere in the UK for business purposes. As it was in the claimant's interests that occupational health assessments were made and as he was in a position to explain the context to the occupational health advisor, we doubt that this can be classified as unwanted conduct. If it can we accept that it was conduct related to the claimant's disability but we do not accept that it had the purpose of harassing him. It seems to have had that effect, but we do not consider it reasonable for it to have had that effect. We remind ourselves that the claimant had not kept his honeymoon travel plans a secret.

With regard to undertaking the office based assessment prior to the home based assessment, which is the other unwanted conduct complained of, we again doubt that this can properly be regarded as unwanted conduct. Again, it was in the claimant's interests that all options were considered and we do not consider that there is much significance to the order in which they were done. In any event we do not consider that there was the purpose of harassing and if it had that effect, again we do not consider that that was reasonable.

For these reasons we do not find the harassment complaint to be made out.

9.2.8 Victimisation

Ultimately the respondent has accepted that the claimant's grievance of 9 August 2018 was a protected act.

As we have found the respondents view from an early stage to have been that homeworking was not compatible with the claimant's role, we do not accept that this position being confirmed after the receipt of the claimant's grievance is likely to have been caused by that grievance. The respondent was simply reiterating its initial view.

We find that the only reason that Mr Wilkinson told the claimant about the proposed managerial restructure at the 8 November 2018 meeting was because he was including the claimant in a notification which had already been given to the rest of the team. This risk applied equally to the claimant and we do not find that Mr Wilkinson raised the issue because of the claimant's grievance. Instead it was part of the initial consultation process.

The alleged detriment of Karen Philpotts making the' lack of capacity' comment could not in any event be a detriment done by the respondent as Ms Philpotts was not an employee of the respondent or otherwise part of it.

Accordingly we find that the victimisation complaint is not made out.

Employment Judge Little

_____

Date 13th July 2020

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EMPLOYMENT TRIBUNALS

Claimant Mr D Hackleton

Respondent: Royal Mail Group Limited

HELD AT: Sheffield

ON: 10 to 14 February 2020 inclusive 22 June 2020 (by video) 23 June 2020 in chambers

BEFORE: Employment Judge Little
Mr P R Kent
Ms A S Brown

REPRESENTATION:

Claimant: Ms R Kight of Counsel (instructed by Banner Jones)
Respondent: Mr M Foster, Solicitor (Weightmans LLP)

RESERVED JUDGMENT

1. The Claim was presented in time.
2. The complaint of failure to make reasonable adjustments succeeds.
3. The complaint of discrimination arising from disability succeeds in part.
4. The complaints of harassment related to disability and victimisation fail.

REASONS

1. **The complaints and procedural history**

1.1 Mr Hackleton presented his claim to the Tribunal on 9 January 2019. He brought complaints of disability discrimination which at that stage appeared to be limited to a complaint that there had been a failure to make reasonable adjustments and that there had been victimisation.

1.2 At a preliminary hearing for case management conducted on 7 March 2019, the claimant's solicitor presented a document described as a claims schedule and following discussion at that hearing it was clarified that in addition to the two complaints mentioned above Mr Hackleton was also complaining of discrimination arising from disability and harassment.

1.3 Having initially defended the claim as presented the respondent was given permission to amend it's grounds of resistance to deal with the claim as clarified. Those amended grounds were presented on 4 April 2019.

1.4 On 16 August 2019 the claimant, who remained an employee of the respondent, sought through his solicitors to amend his claim to include what was described as "the ongoing failure to make reasonable adjustments". An amended claims schedule was at the same time filed and served. On 27 August 2019 the respondent's solicitors indicated that they did not object to the application to amend but pointed out that it had been made shortly before what would have then been a five day hearing listed for September 2019. The issue was referred to Employment Judge Wade who on 30 August 2019 granted the claimant's application to amend and postponed the hearing.

The respondent did not present or seek to present amended grounds of resistance to the now amended claim.

1.5 On 17 October 2019 the claimant sought a further amendment to his claim. That was in circumstances where his employment had been terminated on 3 September 2019. Following a request by the Regional Employment Judge for the claimant to provide further particulars of the proposed amendment, the claimant's solicitors filed draft amended particulars of claim with an amended claims schedule on 17 November 2019. The claimant's dismissal, it was contended was discrimination arising from disability and was said to be a further failure to make reasonable adjustments.

1.6 On 29 November 2019 the Employment Tribunal wrote to the parties indicating that Employment Judge Rostant had ordered that the amendments to the claim were permitted. The respondent had in the meantime made no objection to the application. As this Tribunal would learn, the respondent did not present any amended grounds of resistance to deal with the dismissal complaints until the first day of our hearing.

1.7 For the reasons set out in the Order which this Tribunal made on 10 February 2020, refusing the respondent's application to amend, this hearing has proceeded on the basis that the respondent has not presented any defence to the dismissal complaints and, because the 4 April 2019 grounds

of resistance did not deal with the matter, nor has it put forward any justification defence for the section 15 complaints.

1.8 We should add that it had been the intention of the Employment Judge who conducted the case management hearing on 7 March 2019 that the file would have been referred back to him to make such further case management orders as appeared to be required for the final hearing. That was in the context of the possibility of a preliminary hearing also being required to deal with a jurisdictional point. In the event it appears that the parties chose not to deal with any jurisdictional point in that way and so the hearing which had been listed for June 2019 to deal with that matter was vacated. In the event the file was not referred back to the Judge and other than dealing with the amendments referred to above, there was no further case management.

1.9 One might have thought that the parties would have sought further directions from the Tribunal but, as both parties were represented by solicitors, it appears that they used their initiative in terms of disclosing documents, agreeing a bundle and, on some date unknown to the Tribunal, exchanging witness statements.

1.10 The absence of a further case management hearing meant that there was no opportunity to consider the time allocation of five days in the context of such reasonable adjustments as the claimant might need during the course of the hearing. In the event the claimant has explained to us that after sitting for an hour or less he needs to stand up, stretch and walk about a bit. Whilst the Tribunal were perfectly happy to take such breaks, this has delayed the progress of the hearing. Had there been the opportunity to further case manage, a longer hearing that could have been allocated to address this. The parties when exchanging witness statements would have been aware that both the claimant and his wife had prepared particularly lengthy witness statements as had one of the respondent's three witnesses. That did not cause either parties' solicitors to question whether the case could be completed within five days. In the event, a significant part of the first day was taken up with dealing with the question of whether or not the respondent should be permitted to amend its grounds of resistance and there was then a significant amount of reading for the Tribunal to undertake before the live hearing could commence at noon on the second day. It is for these reasons that unfortunately the February 2020 hearing went part-heard. The resumed hearing had been arranged for May 2020, in person, but by reason of the intervening Covid-19 pandemic, the resumed hearing did not take place until 22 June 2020 which was a video hearing.

2. **The complaints – in summary**

These are:-

- Disability discrimination – alleged failure to make reasonable adjustments.
- Discrimination arising from disability (Equality Act 2010 section 15) – including the claimant's dismissal.
- Harassment related to disability.
- Victimisation.

3. **The issues**

Whilst the Tribunal were undertaking their reading Ms Kight prepared a revised list of issues and that took into account our ruling in respect of the respondent's application to amend. We were given this four page document on resuming the live hearing on day two and Mr Foster indicated that the respondent agreed that list.

The Tribunal were satisfied with that list, although we pointed out that whilst a jurisdictional issue had been included in respect of time limits, no-one had ever explained precisely what time point was being taken. It seemed that the representatives themselves were not entirely sure. We indicated that as this was a matter going to the Tribunal's jurisdiction and as it had been raised, initially we believe by the respondent in its first grounds of resistance, it was a matter that we would have to deal with.

Our other comment regarding the list was that the description of the reasonable adjustments complaint might suggest that the basis of the complaint was the substantial disadvantage to which the claimant may have been put, whereas we considered that that was simply a constituent part of the test as to whether or not a duty arose and the thrust of a reasonable adjustments complaint was that there had been a breach of the duty, rather than an approach which suggested that the substantial disadvantages came within a quasi-less favourable or unfavourable treatment category.

The final point was in relation to the victimisation complaint. Whilst it appeared that the respondent disputed that the claimant's grievance of 9 August 2018 amounted to a protected act it was not clear why the respondent took that position. It has subsequently conceded that the grievance was a protected act.

4. **Evidence**

The claimant has given evidence, having prepared a 23 page witness statement. The claimant's wife, Ruth Hackleton has also given evidence and she had prepared a witness statement running to 26 pages. The respondent's evidence was given by Mrs T Wood, senior business partner and the claimant's line manager (until circa May 2019), her witness statement ran to 21 pages; Mrs K Jones, head of business partnering, who heard the claimant's grievance and was also the dismissing officer; and Mr C Wilkinson, head of knowledge management.

In relation to Mrs Jones' statement, when undertaking our initial reading we omitted those parts of her statement which appeared to deal with the dismissal. However when subsequently discussing this with the parties it was agreed that we should read most if not all of the statement on the basis that if we considered it included matters which had not been pleaded we should disregard those matters. In any event and with the parties' agreement, we excluded from our reading those parts of Mrs Wood and Mr Wilkinson's statements which purported to deal with justification for any section 15 discrimination. Those were paragraphs 136 of Mrs Wood's statement and paragraph 95 of Mr Wilkinson's statement.

5. **Documents**

The Tribunal have had an agreed two volume trial bundle running to 752 pages.

6. **The claimant's essential case**

The respondent accepts that the claimant is a person with a disability by reason of cerebral palsy, which was known about at the time when the employment began and also by reason of Scheunemann's Disease. The latter impairment was unknown when the employment commenced in October 2017 because it was only provisionally diagnosed in February 2018. In total the claimant actually attended work for 11 weeks. After approximately 14 months absence he was dismissed. The claimant's essential case is that the respondent should have made the reasonable adjustment of permitting him to work from home four days a week with only one day in the office or travelling. The respondent's case is that on occupational health advice they considered that it would be unsafe to permit the claimant to work from home at all and ultimately that the claimant was unfit to work for the respondent at all.

7. **The Tribunal's findings of fact**

7.1. On 22 August 2017 the claimant attended a job interview at the respondent. He was interviewed by Tracey Wood who, in due course would become his line manager. The position applied for was as a business partner analyst (BPA).

7.2. Aware of the claimant's medical condition, cerebral palsy, Mrs Wood, having decided that the claimant should be employed, sought a pre-employment assessment by the respondent's occupational health provider, OH Assist Limited. A report was issued by OH Assist on 10 October 2017. It noted that the claimant's condition affected his mobility requiring him to walk with a stick. He had some loss of function in his hands and got back pain. The report included the following:

"*In my clinical opinion Mr Daniel Hackleton is fit for work with adjustments. I understand that he has been advised that there is an option of flexible working where he is able to work from home on some occasions, he is aware that the frequency and number of days is dependent on business need*."

That report is at pages 159 to 160.

7.3. The claimant's employment commenced on 30 October 2017, in the role of business partner analyst. The job specification to which we have been referred in respect of this role appears at page 650 in the bundle. We understand that it was possibly issued to the claimant as part of a "profiling" exercise undertaken in the latter part of the claimant's employment. The specification describes the purpose of the role as:

"(To) be the single point of contact for colleagues from other teams in RMG to request data, insight and analytics from GBI and knowledge management".

A further aspect of the role was to ensure that the business unit was getting the most from data and the available tools and that the right capabilities were being lined up for the future. Among what are described as the key accountabilities is "maintain a good understanding of the domain and future strategy for their RMG domains and partner with and build strong relationships with business stakeholders from their domain,

working with stakeholders to understand business issues and how information can be best used to support hypotheses and root cause".

The claimant's job description described the job location as "London/Chesterfield preferred". In contrast to other job descriptions, such as 'Analyst' (p 651), it did not refer to 'some travel may be required'.

7.4. On 15 January 2018 the claimant went on sick leave. Initially he was suffering symptoms of nausea. However his ill-health continued and on 15 February 2018, after the claimant had begun suffering collapses, a consultant neurologist, Dr Gibson, indicated to the claimant that he believed that he had a spinal disorder called Scheunemann's Disease. That diagnosis was subsequently confirmed by another consultant who was a specialist in that condition – a Mr Breakwell – on 6 March 2018.

7.5. In the meantime the respondent had obtained the first of what would be many occupational reports on the claimant during the employment. We should add that we have not seen copies of any of the actual referrals which led to these reports.. The first report was by Jennifer Barnes, an occupational health advisor and there is a copy at pages 215 to 217. She noted that the claimant had initially been absent from work with a digestive problem but also noted the recent diagnosis with Scheunemann's Disease. She considered that the claimant was unfit for work due to his ongoing symptoms of vomiting, nausea and back pain. One of the questions posed by the claimant's manager was whether any adjustments could be made in order to support the claimant's return to the office or working from home. The answer which Ms Barnes gave to this question was that once his symptoms had settled he should be able to resume his duties. He would require frequent posture breaks and flexible working as an adjustment. However at present he was unfit for work in any capacity.

7.6. On 9 March 2018 Mr Wilkinson, head of knowledge management and a self-described advocate of disability rights (see paragraph 3 of his witness statement) sent an email to Mrs Wood. A copy appears at page 574 in the bundle. Those parts of that email which have not been redacted read as follows:

"I agree that his job requires him to be in the office to interact with colleagues and stakeholders and to continue to build his knowledge.

Whilst we can accommodate a small amount of working from home, this is absolutely not something that can be on a permanent basis. I also don't understand how working from home will be better than working in the office?".

7.7. That email was written in reply to an email which apparently had been sent by Mrs Wood to Mr Wilkinson earlier that day (see page 572). Having spoken to the claimant that day, Mrs Wood had reported that the claimant believed that he would be able to return to work but had to take it slowly. He had told Mrs Wood that ensuring that he was comfortable was the priority which meant working from home as much as he could if that was more comfortable, because an orthopaedic chair was unlikely to be the answer. Mrs Wood had explained to Mr Wilkinson that the claimant's role required picking up a wide range of tasks, none of which were routine, talking to numerous people and being proactive. The claimant's lack of background knowledge meant that it was essential for him to ask

questions, talk to others and seek out answers. Mrs wood had not seen enough evidence of that during the claimant's short time in the office so as to be confident that working from home would suit him in that role.

7.8. The claimant has during the course of this litigation made a subject access request and there are various documents within the bundle which have come into his possession through that route. The two emails to which we have just referred are in that category. The SAR documents have unfortunately been redacted, perhaps unnecessarily and so in the case of various emails we have looked at it is not always easy to work out who the sender or recipient were.

7.9. On 29 March 2018 there was a meeting between the claimant and Tracey Wood. Mrs Wood wrote to the claimant on the same date (pages 222 to 223). It was noted that the claimant would shortly be seeing his GP to discuss an anticipated letter from an orthopaedic surgeon and to develop a plan for return to work. The letter records the claimant indicating that he was feeling well enough to come into work but was keen to take advice on managing his back problem. Mrs Wood had offered the claimant access to a bed within the first aid room on site should he need to lie down for short periods. The claimant's trial period was to be extended for a period of three months.

7.10. In a further email that comes out of the SAR, at page 575 to 576 in the bundle is what is probably Mrs Wood's email dated 18 May 2018 although it is unclear who she is writing to. In this email she says that she understands that the claimant had been advised that there was an option of flexible working where he would be able to work from home on some occasions but that the claimant was aware that the frequency and number of days was dependent on business need. Mrs Wood recommended that there was a DSE assessment "if you can support in working from home on some day (sic) this should be undertaken for his desk at the office and at home". It was also noted that during the 11 weeks the claimant had worked he had worked from home on five occasions. We were told that had been because of adverse weather conditions and in particular the claimant's concern that he might fall, having regard to his mobility problem, when walking from the car park into the office.

7.11. A further occupational health assessment was carried out on 30 May 2018 by Dr Joseph MacCarthy of OH Assist. A copy appears on pages 232 to 233. The doctor noted the claimant's conditions and that adjustments had been made at work including an emergency evacuation plan and the provision of a parking space. The doctor went on to write:

"*Despite this he has concerns about whether a return to work in the workplace might aggravate his condition and tells me he has medical advice to work from home for the most part. He is keen that advice from his GP is taken into account."*

Dr MacCarthy goes on to indicate that before providing advice he intends to seek a report from the claimant's GP and further advice would follow.

7.12. Whilst we understand that the claimant's GP was in correspondence with OH Assist on probably more than one occasion, the respondent did not at any time see any letter or report from the claimant's GP other than the fit notes which the claimant submitted from time to time. Instead, in the usual

way, any relevant information from the GP was conveyed to the respondent via occupational health reports. In the numerous fit notes within the bundle, an example of which is at page 242, the GP consistently advised that the claimant was not fit for work and never completed that part of the fit note which could have indicated that the claimant might have been fit if the employer agreed to, for instance a phased return to work, amended duties or workplace adaptations.

7.13. On 19 June 2018 a meeting took place between the claimant, Mrs Wood and Mr Wilkinson. The meeting took place at the respondent's Chesterfield office. After the meeting Mr Wilkinson wrote to the claimant seeking to summarise the key discussion points and the follow up actions agreed. That letter, dated 26 June 2018, is at pages 267 to 269. However, unbeknown to Mrs Wood and Mr Wilkinson, the claimant illicitly recorded that meeting. A transcript of that recording appears at pages 626 to 647.

In Mr Wilkinson's letter the following appears:

"*You advised us that your GP has recommended that you should be working from home for a minimum of four days per week. We discussed your current role of business partner analyst and I explained that due to the need to meet with stakeholders both in London and Chesterfield, that working from home for at least four days per week would not allow you to build the necessary working relationships with key stakeholders across the business which is the core part of this role."*

Mr Wilkinson's letter goes on to state:

"Having explained this in the meeting, you agreed and understood that your current role was not compatible with the medical advice you have been given. Whilst we will always look at and consider any reasonable adjustments, there is a need to be in the office in Chesterfield at least three days per week and this would also include travel to London and other Royal Mail locations across the country to attend meetings and workshops.

You were very clear in that you wanted to continue your career with Royal Mail and indicated that you felt that more analytical roles could be more suited to working from home at least four days per week. I am equally keen to explore how you can continue your career at Royal Mail and we therefore discussed conducting a redeployment exercise to look for other suitable roles within the business."

The letter informs the claimant that in the event that the respondent was not able to find a suitable role for him as part of a redeployment exercise then it would need to consider other viable options, one of which could be the claimant leaving the business on ill-health grounds. The claimant signed the letter to confirm that he believed that it was an accurate reflection of the meeting (see page 269).

7.14. Within the claimant's transcript of the 19 June meeting – which the respondent we understand accepts as being accurate – the following exchange appears (page 641 – 642). Mr Wilkinson is recorded as saying:

"*And, you know, I am more than happy to look at what reasonable adjustments we can make to support you but I think, having given it some thought in advance of today, I don't think that that role …. and that role*

needs to work for a minimum of four days. I just don't see how it can work … and so one of the options open to us … is you have the option to go through what is called a scoping exercise. This is where we look at roles across Royal Mail. We do an assessment of you".

To these comments the claimant's recorded replies are monosyllabic – 'right', 'yep', 'yeah'. Mr Wilkinson continues:

"*That is one option … the other option, which I just want to make you aware of, it feels like you are not ready for it but I want to make you aware of it … there is an ill-health option and you know that is a route we could potentially go down".*

The claimant's response to that is:

"No my head's not there yet".

7.15. Towards the end of the 19 June meeting the claimant gave Mrs Wood and Mr Wilkinson a two page document addressed to "To whom it may concern" and this is at pages 255 to 256 in the bundle. It begins:

"I wish to lodge a grievance regarding my working conditions. I feel I have been discriminated against due to my disability and Royal Mail has not made adequate reasonable adjustments".

The claimant went on to write that the specialists and GPs that he had seen had said that it was perfectly possible for the claimant to return to work full-time but there should be a focus on lowering the claimant's pain levels wherever possible. The claimant then wrote:

"In view of the fact that my cerebral palsy worsens with the normal ageing process and since my second disability was diagnosed, my consultant and my GP have both advised me not to work full-time in an office environment, and specifically my GP has recommended that I work from home at least four days out of five".

The claimant went on to note that Tracey Wood had repeatedly told him that his job was an office based role but the claimant contended that he had originally been given the opportunity to work from home as and when needed. He felt that the addition of a second disability should not mean that that opportunity was removed. He believed that with the use of video and telephone conferencing and spending one day in the office per week working from home would otherwise be a reasonable adjustment. The claimant suggested that one of the reasonable adjustments would be allowing him to work from home for at least four out of five days, or 80% of his working hours. Alternatively he should be offered suitable alternative employment on a permanent home working basis.

7.16. In response to this grievance Mr Wilkinson wrote a letter dated 29 June 2018 to the claimant and a copy appears at pages 272 to 274. In this letter he requested further details of how the claimant believed he had been discriminated against. On the issue of working from home, Mr Wilkinson pointed out that it had been made clear to the claimant that engaging with stakeholders and building strong working relationships was a critical part of the role and as part of the learning curve the claimant needed to spend time with people in the office in Chesterfield to understand the systems and processes. Mr Wilkinson reiterated that at the 19 June meeting he had explained that the business partner role was

not compatible with working from home for at least four days per week. Mr Wilkinson then wrote:

"At this meeting (19 June) you understood and accepted why this was the case. As a result we agreed to progress with a scoping exercise to look at redeployment options for roles which would be compatible with working from home at least four days per week."

Having regard to what is set out in the transcript, we find that Mr Wilkinson in his letter is somewhat overstating the state of affairs by referring to the claimant agreeing to those matters. Instead the claimant is simply told of those matters by Mr Wilkinson and we do not think that such comments as 'yeah' and 'right' could, without more, indicate agreement to such fundamental matters.

On 2 July 2018 the claimant sent an email to Mr Wilkinson (page 280) thanking him for his response and indicating that the claimant did not wish to raise a formal grievance. His main objective had been to state the difficulties in fulfilling some of the tasks of the role due to his disability and the fact that the reasonable adjustments he needed were not all in place. He had wanted to suggest some ways in which he could use technology to accommodate his doctor's recommendations of working at home for four days per week. He concluded the email by saying that he appreciated Mr Wilkinson's understanding in the matter as well as addressing his concerns regarding his future at Royal Mail.

7.17. A further occupational health report was prepared on 21 June 2018. That report is by Dr Athanasiou, a consultant occupational physician and, as were the majority of these consultations in the claimant's case, it was conducted by telephone. A copy appears at pages 260 to 262. Whilst the claimant had reported pain, fatigue and tiredness together with balance issues and back pain, it was noted that he was receiving physio treatment and that he was helped by doing a lot of swimming. The doctor went on to write "Based on the assessment today, Mr Hackleton is fit for work with adjustments."

His current capacity for work was described as – "flexible working – combination of working from home and on site and so has to attend doctor's appointments." Some time has been spent in our hearing analysing this rather opaque statement. It remains unclear whether the doctor was limiting the benefit of home working to the ability to attend doctor's appointments or more broadly. In fact the claimant lives approximately two miles away from Royal Mail's Chesterfield office and his GP, based in Dronfield is probably something like equidistant from home or work. As before various manager questions are recorded in the report. One of those is:

"*Would a benefit (sic) to returning to his workplace and using specialist equipment, be more beneficial to his long-term prognosis compared to working from home where there is no specialist equipment?"*.

The answer to this question is:

"*Based on the history DSE assessment took place and ergonomic equipment was provided but did not prove to alleviate the symptoms. It seems that a combination of working from home and on site is helping him more"*.

Of course in so far as that answer might suggest that the claimant was currently working from home and on site then that is incorrect.

7.18. The claimant was not happy with aspects of this report and sought a revision. The revised report dated 29 June 2018 is at pages 275 to 277. In this report, the answer to the question "Is there anything that the business should consider to support Mr Hackleton's return to the workplace" was answered differently. In the earlier report the answer was "The already implemented adjustments seemed to have helped him and in addition please see above". However, in the revised report the answer was:

"In my medical opinion return to work can take place with reasonable adjustments in place, which based on the nature of his condition may deem to be permanent. Direct feedback from Mr Hackleton would be useful guidance as he has full awareness of his condition and given that he wants to be at work (safely) and remain productive."

7.19. On 2 July 2018 Mrs Wood wrote to the claimant (a copy is at page 279). She informed him that as of 17 July 2018 his entitlement to occupational sick pay would reduce to half pay.

7.20. There was to have been a further occupational health assessment of the claimant on 12 July 2018. However, the person conducting that assessment, Andrea Smith, was concerned that the claimant was unaware that the issue of him travelling to Florida on his honeymoon would be discussed during the course of that assessment. That came about because the respondent was aware of the claimant's plans for his honeymoon, which he has not kept a secret. His manager, Mrs Wood was unsure how the claimant would be able to travel to America in circumstances where he was raising concerns about the need to travel to London as part of his job. Mrs Wood has told us that although this was mentioned in the referral to OH Assist, she did not expect that it would be raised as a direct question during the course of the assessment. In any event Andrea Smith decided that it would not be appropriate to proceed and accordingly there was no report. We find that the respondent has erroneously sought to portray this as the claimant refusing to allow the release of a report. The fact was that, in the circumstances we have described, there was no report.

7.21. On 9 August 2018 the claimant raised a further grievance which on this occasion was described as a formal grievance. This appears at pages 306 to 308. Referring to the 19 June meeting, the claimant said that he felt that the decision to focus on redeployment opportunities had been made prematurely and without exploring alternative options for him to continue in his current role. He was also concerned about the reference to ill health retirement because that had given him the impression that the decision had already been made not to allow him to return to his current role. The claimant reminded the recipient of this grievance, Mr Wilkinson, that the claimant had suggested several reasonable adjustments. He went on to refer to the telephone assessment on 12 July and he said that Ms Smith had told him that the raising of the honeymoon issue implied that the respondent doubted the severity of the claimant's condition. The claimant found that extremely insensitive. He felt that the number of conversations he had been required to have with

occupational health was excessive. He also complained about delays in various consents he had been required to give for occupational health to speak to his GP being actioned. He felt occupational health had delayed or lost those consents He felt that the delays had not only hindered his return to work but also caused him to suffer financial loss because his sick pay had been reduced. He said that once in possession of all the medical information he believed that Royal Mail should thoroughly investigate the feasibility of him remaining in his current role with appropriate adjustments including co-ordinating meetings in Chesterfield on the one day a week he proposed to be not working from home.

7.22. On 24 August 2018 Mrs Wood wrote to the claimant (321 to 322). She said that at the 19 June meeting "we all agreed to look at a redeployment scoping exercise". However having contacted all the relevant heads of department Mrs Wood was confirming that there were not any vacancies which matched the criteria which the claimant had declared on a redeployment form.

Mrs Wood's recollection of the 19 June meeting as recorded in this letter was that the claimant had understood and agreed "how it (the business partner analyst role) would not be compatible with the medical advice that you received in terms of working from home at least four days per week". The letter went on to refer to the option of the claimant leaving the business on ill-health grounds. Mrs Wood was aware that the claimant had now raised a formal grievance which was being handled by Mrs Wood's line manager, Kate Jones. Mrs Wood said that in those circumstances she was not planning any further action on the issue of the claimant continuing in the BPA role until the formal grievance had been resolved.

7.23. On 29 August 2018 a grievance investigation meeting was conducted by Mrs Jones with the claimant. Notes were taken by Tracey Thornton and those notes are at pages 324 to 326. The claimant is minuted as saying that he felt that the process was going down one road, of him leaving the business.

7.24. The Tribunal have not seen the notes of any other interviews which Mrs Jones may have conducted whilst investigating the claimant's grievance.

7.25. On 25 September 2018 Mrs Jones appears to have prepared the letter and decision outcome report which is at pages 334 to 340 in the bundle. However it seems that it was the letter dated 3 October 2018 and report (at pages 342 to 348) that was actually sent to the claimant. Mrs Jones was not really able to explain why there were two letters/reports but it was agreed that the content of each was the same. We refer therefore to the 25 September 2018 letter/report. This indicates that Mrs Jones had interviewed both Mrs Wood and Mr Wilkinson.

7.26. In respect of the grievance that the decision to look for redeployment "has been made without due consideration." Mrs Jones referred to that matter first being raised at the 19 June meeting. She referred to the adjustments which had been made at work including the sum of £10,000 being invested in doors which opened automatically and the offer of the first aid room if the claimant needed to lie down flat. On the 'four days at home' issue,

Mrs Jones reiterated that that would not be compatible with the role but suggested that two days at home per week could be accommodated. In any event she felt that due consideration had been given before progressing down the redeployment route.

On the issue of occupational health being told about the claimant's honeymoon arrangements Mrs Jones concluded that that was a valid question because it related to the claimant's ability to perform his current role which required working at a computer. Mrs Jones did not feel that the requirement that the claimant had numerous occupational health assessments meant that the respondent was questioning his condition it was because of the length of the absence, the complex nature of the conditions, the need for Royal Mail to understand those issues and the claimant's current capacity for work.

On the issue of delays with consents for the occupational health practitioners to contact the claimant's GP, Mrs Jones took the view that irrespective of any delays on the part of occupational health, the claimant's sick pay entitlement was governed by the fact that he continued to be signed off work as unfit by his GP.

7.27. On 4 October 2018 the claimant appealed against this grievance outcome (page 350).

7.28. On 11 October 2018 the claimant and his wife went on their honeymoon to Florida.

7.29. On 31 October 2018 there was a further telephone consultation with OH Assist, on this occasion with a Dr Mohammed Baig an occupational physician. A copy of his report is at pages 370 to 372. Dr Baig had before him a report from the claimant's GP, Dr Barr and a report from the specialist Mr Brakewell. Dr Baig noted that both the GP and the surgeon were of the opinion that the claimant should limit the time that he sat so as to decrease muscular spasm. In terms of current capacity for work Dr Baig wrote as follows:

"Based on the assessment today and advice from his GP, Mr Hackleton is fit for work with adjustments. It is recommended by his GP that he should work from home for 04 days and one day from office after proper OT assessment and DSE assessment. It was discussed with Mr Hackleton the possibility of doing more than one day at work, but he wants to follow his GP advice and is reluctant to do more than one day as he feels previously (sic) *he tried to work more days at work his condition deteriorated*".

Presumably that is reference to the 11 weeks that the claimant actually did attend work.

7.30. On 8 November 2018 there was a meeting at the claimant's home. This was attended by Mrs Wood and Mr Wilkinson. The claimant and his wife were in attendance. Notes of that meeting, which the claimant has signed as being an accurate reflection of the conversation, are at pages 384 to 385. Reference is made to Dr Baig's report and the GP's recommendation of working from home four days a week. Mr Wilkinson is recorded as explaining that HR had advised that Royal Mail had a duty of care for an employee working from home and so a home visit had been recommended to carry out an initial assessment of the claimant's home

working environment. This meeting of course was not that assessment. Mr Wilkinson also suggested that in the light of Dr Baig's report the claimant might want to come into the office for one day a week as suggested in that report. The claimant is recorded as saying that given his current condition that could only be for an hour or two and that he would prefer to wait until an occupational assessment had been done with any resulting recommendations in place.

7.31. The respondent chose to make arrangements for an occupational health assessment of the claimant in the office environment. The assessment was conducted in November 2018 by Karen Phillpotts, a registered occupational therapist with OH Assist. The report produced following that assessment is at pages 394 to 397. However the claimant also covertly recorded this assessment and the transcript is at pages 656 to 693. In paragraph 48 of the claimant's witness statement he describes this assessment as being lengthy, two hours, and extremely physically and mentally distressing so much so that at the end of the assessment he was crying. The claimant goes on to say that he was in so much pain that he just wanted the assessment to end and that it was in those circumstances that he agreed that he could not return to work in the office. He says that he felt bullied and degraded during the assessment because he was asked to perform what he considered to be pointless tasks which caused him pain. In the transcript (page 692) the claimant explains to Miss Phillpotts that he could not afford to take the option of ill-health retirement. Miss Phillpotts asks the claimant whether realistically he can still work, to which he replies that he does not know. Miss Phillpotts goes on to point out that during the course of the two hour assessment the claimant's pain levels were now at the point where he wanted to lay down and go to sleep and the claimant agrees that that is exactly how he feels. Miss Phillpotts suggests that the pain levels were a barrier and the claimant agrees, "unless someone came up with a magic drug".

7.32. In Miss Phillpotts' written report she noted that when the claimant had been asked to complete a functional task that would be consistent with sedentary working, he had reported a significant increase in pain. Miss Phillpotts indicated that the claimant had reported that the only posture that he would be capable of sitting in for any length of time would be with his legs straight out in front of him and his back rest very reclined. Miss Phillpotts had explained to the claimant that sitting in that preferred posture was not a favourable posture and that it would also not enable functioning working without potentially having further musculoskeletal risks to other areas of his spine and body. Miss Phillpotts' analysis of the claimant's job demands indicated that the characteristics were of sedentary physical demand but she considered that the claimant's current capabilities were that he did not have the capabilities to complete a sedentary duty.

7.33. Although it appears that it was outside her terms of reference, Miss Phillpotts went on to write "It is my opinion that if Mr Hackleton were to work at home then he would need an appropriate desk and chair as per equipment at work and therefore this would be the same limitations as working within the office environment" (page 397).

7.34. Miss Phillpotts' conclusion was expressed in these terms:

"In my opinion Mr Hackleton's capabilities are not related to work equipment, this is a capability issue and in my opinion I cannot see Mr Hackleton maintaining a return to work programme due to his increase in pain when sitting in a functional posture. During the assessment a potential rehabilitation plan and adjustments were shared with Mr Hackleton and he agreed that he would not be able to manage or maintain a return to work. It is my opinion that Mr Hackleton does not have the capability to complete work duties due to his pain levels and reduced functional sitting posture."

The report goes on to mention that the claimant had spoken to "management" – we understand Mrs Wood – during the assessment and requested that ill-health retirement be considered. As we have noted the claimant says that he said that under duress in order to bring the assessment to an end.

We should add that the claimant criticises the respondent's decision to assess him working in the office prior to an assessment of him working at home.

On 20 November 2018 Ms Amanda Branson, an occupational health advisor with OH Assist, wrote to the respondent. Her letter in fact begins 'Dear Ms advice centre'. She refers to receipt of "your business referral on 19/11/18". The Tribunal have not seen a copy of that referral. The report notes that the outcome of the 19 November assessment "was that Mr Hackleton would not be able to sustain a return to work for three days per week due to severe pain. In this assessment it was discussed that due to this ill-health retirement would be the most likely outcome in this case." The letter goes on to say that Ms Branson was referring the case on for an OHP assessment to allow that possibility to be discussed further.

7.35. On 21 November 2018 the claimant wrote to Mrs Wood (page 419). He complained that he had been getting very conflicting information from OH Assist and then from Royal Mail. Referring to his OH phone call on the previous day (presumably with Ms Branson) the claimant said that he was told that ill-health retirement was not a foregone conclusion and that a return to work was still being considered. He went on to say that he had been told by Ms Branson that the assessment he had gone through (presumably on 19 November) had reached that conclusion (ill-health retirement) because Royal Mail did not have the capability to meet the adjustments my doctor had recommended". The claimant added that he had no faith in any of the process and that he had now instructed solicitors.

7.36. The claimant's appeal against the grievance outcome had been heard by Mr John Spong. He was a team manager in the programme and project management office. The outcome letter (page 429) is undated but it is understood that it was either sent or received by the claimant on or about 5 December 2018. Enclosed with that letter was Mr Spong's report. His decision was that some points of the grievance appeal were upheld whereas others were not. The report – pages 431 to 438 - shows that the majority of the appeal was not upheld. However Mr Spong agreed with the claimant that it had been inappropriate for Mrs Jones to deal with the claimant's grievance in circumstances where, in part, the grievance was

against her manager, Mr Wilkinson. However Mr Spong did not think that if a wholly independent manager had been appointed to hear the grievance that there would have been any material difference to the outcome (page 432). The only other matter that was upheld was the claimant's complaint that the focus on redeployment opportunities had been made prematurely without exploring alternative options for the claimant to continue in the business partner analyst role. Mr Spong concluded (page 435) that the evidence did imply that that conclusion on 19 June – that the claimant could not fulfil the role working from home four days a week – "was reached rather quickly without thorough investigation of what additional adjustments could be put in place to help DH fulfil the role." Noting that a number of reasonable adjustments had already been put in place to accommodate the claimant, Mr Spong conceded that "on the specific issue of working from home for four days a week I would agree that this particular aspect could have been investigated further". Mr Spong's recommendation was that further options should now be explored with regard to what additional reasonable adjustments could be made and reference was made by Mr Spong to "a home visit on 8 Nov to check DH's working conditions at home with a view to further explore what reasonable adjustments could be considered to allow DH to fulfil his role going forward."

7.37. It seems that Mr Spong may have misunderstood the nature of the home meeting on 8 November 2018 which we have referred to above. In the event there would not be a home assessment by an occupational therapist until early March 2019.

7.38. The claimant was due to have a further telephone consultation with OH Assist on the question of ill-health retirement on 11 December 2018. However on 10 December 2018 the claimant sent an email to Mrs Wood (pages 463 to 464). The claimant said that having spoken to his solicitor he would be available for the call the next day but he wanted to make it clear that he was doing that under protest. Having read Mr Spong's appeal outcome, the claimant and his solicitor felt that all possible reasonable adjustments had not been pursued or explored. The email went on:

"*We feel I have no other option but to follow this process to avoid Royal Mail using another excuse such as the redundancy process to get me to leave the business. We believe there should be a full independent review regarding making reasonable adjustments for me. However it appears this is unlikely as the outcome is biased and Royal Mail will not change its position."*

The claimant went on to mention that he would be telling the OH Assist doctor of his protest and would be informing them that he felt that he was still able to fulfil the role.

7.39. The reference to a redundancy process in the claimant's email was in turn a reference to something which he had been told by Mr Wilkinson at the 8 November 2018 home meeting. Mr Wilkinson had taken that opportunity to inform the claimant that the respondent was undergoing a restructure of its management and to deliver what Mr Wilkinson describes as the brief which he had given to all other employees in his team. Mr Wilkinson

denies that either he or Mrs Wood told the claimant during that meeting that his role was not safe.

In the event, the claimant's evidence is that Dr Archer, who was to have conducted the 11 December telephone consultation, did not feel it was appropriate to continue in circumstances where the claimant was not freely giving his consent to the consultation.

7.40. As we have mentioned, on 9 January 2019 the claimant presented his claim form to the Employment Tribunal.

7.41. On 4 March 2019 an occupational therapy assessment was conducted in the claimant's home by Mandy Kelly, a registered occupational therapist. The report which Ms Kelly subsequently prepared was issued on Optima Health headed paper although as the notepaper refers to a registered office address which is the same as OH Assist's registered office, we assume they are related companies.

7.42. For unexplained reasons, there is a report by Ms Kelly dated 4 March 2019 (pages 520 to 526) and then what appears to be an identical report other than it is dated 6 April 2019, which is at pages 543 to 550. It was suggested to us that the March report had been sent to HR whereas Mrs Jones told us that she believes that it was the report dated 6 April which she had before her at the material time. The claimant illicitly recorded the 4 March home assessment and the transcript is at pages 694 to 752.

7.43. In her report Ms Kelly records that the purpose of the assessment is a request by management to assess the claimant's capabilities and for advice on what adjustments are required to enable him to return to the workplace, although of course the assessment that she was actually conducting was in relation to the claimant's ability to work at home. The report does not comprehensively describe the accommodation within the bungalow that is the claimant's home. Ms Kelly records that the claimant was observed mainly sitting in a reclining armchair in his lounge room (which is not described) but the latter part of the assessment was conducted in the kitchen where the claimant sat on what is described as a padded low back kitchen stool at the kitchen island. Other than this the size and facilities of the kitchen are not recorded.

7.44. Under the heading 'Recommendations' (page 547 onwards) Ms Kelly recorded:

"From the observations and Mr Hackleton's reports during the assessment, it would not be suitable for Mr Hackleton to work from home on an ongoing basis. The current reclining armchair does not support Mr Hackleton in a good working posture and if he was to work consistently in this posture, it is anticipated that he would be at high risk of developing further musculoskeletal issues.

No suitable workstation options were found that would accommodate the current armchair and provide the correct postural support. At this point, there does not appear to be readily available space within Mr Hackleton's living area or kitchen to support a home based workstation with office chair.

The office environment would be the most suitable for Mr Hackleton at this time. The commute is 10 minutes and would be manageable with his current reported and observed tolerances."

The remaining recommendations in respect of equipment and work practices are, despite the context of the report, directed at what Ms Kelly believes would need to be done within the office environment of the respondent's premises. Ms Kelly's report thereafter is also premised on the basis that the claimant can return to work – that is in the office. One of her recommendations (page 550) reads:

"Once a return to work date is agreed and the recommendations above are on track, a workplace assessment is recommended so that Mr Hackleton's workstation set up correctly (sic). This will increase the likelihood of a successful and sustainable return to work."

It is to be noted that although Ms Kelly was supposed to be assessing the claimant's home, her opinion was that the claimant could return to work in the office, whereas in November of the preceding year Karen Phillpotts had been of the opinion that she could not see the claimant maintaining a return to work programme and that he would not be able to manage or maintain a return to work, hence consideration of ill-health retirement.

7.45. The claimant's evidence was that during the assessment he and his wife were given to believe that Ms Kelly was in favour of the claimant working from home and he says that the written report bore no resemblance to the report that he and his wife were anticipating. In paragraph 70 of the claimant's witness statement he goes so far as to say that this led him to believe that Royal Mail had pressured OH Assist and Ms Kelly to write a report "more in keeping with Royal Mail's management preference". The claimant's wife then carried out some research and discovered that Ms Kelly had been "a senior occupational therapist" working for Royal Mail from 2001 to 2006. Subsequently, in an email to Ms Jones of 30 May 2019 (to which we will return) the claimant described Ms Kelly as a former Royal Mail employee. We have a copy of Ms Kelly's CV in the bundle (pages 623 to 624) and under employment history she indicates that between January 2001 and January 2006 she was a senior occupational therapist for ATOS Origin Occupational Health/Royal Mail. We doubt that that makes her a former employee of Royal Mail, but obviously there had been a historical connection.

7.46. On 11 April 2019 Mrs Wood conducted a further meeting with the claimant. In addition his wife was present and again Tracey Thornton took notes. Those notes are at pages 551 to 553. The purpose of this meeting was to discuss Ms Kelly's report. The claimant is recorded as saying that his GP would not "sign off the plan" and he, the claimant, would not follow it either. The typewritten notes have some handwritten annotations and we understand these are either by the claimant or his wife.

7.47. The next part of the note has been amended in that way to read that Mrs Hackleton says that her husband had been advised to work from home four days a week. However Mrs Wood says in response to that that the report had found that that wasn't safe and the office environment was the most suitable place to work. The claimant said that he would not be following the plan because it was not a workable solution and could lead

to him collapsing. The claimant and his wife had the concern that the office was open plan whereas at home, which was quite compact, there were walls to lean on for support and it was only 10 steps from the workstation to the bathroom. The claimant is recorded saying that he thought that it was management's preference for him to come back to the office or retire and there had been report after report until that outcome was reached. The claimant raised the issue of the independence of OH Assist and that one of them was a former Royal Mail employee. The meeting concluded with a reference to Mrs Hackleton saying that they would get further reports and forward them to occupational health to pass on to Mrs Wood.

7.48. In or about May 2019 responsibility for managing the claimant's situation passed from Mrs Wood to her line manager Mrs Jones.

7.49. On 30 May 2019 the claimant wrote a lengthy email to Mrs Jones and a copy is at page 561.1 to 561.4. It seems that that email was in response to an invitation from Mrs Jones for the claimant to attend an interview with her on 6 June 2019. The claimant said that he agreed that the current situation was untenable but he believed that that was because Royal Mail had consistently and repeatedly refused to make the necessary reasonable adjustments to allow him to return to work. Attached to the claimant's email was Mr Reddington's report, which the claimant said he had only received that day. He said that the report was based upon a consultation he had with Mr Reddington on 7 May 2019. The claimant went on to write that Mr Reddington had confirmed the recommendations made by the claimant's orthopaedic specialist and GP that for the sake of his health it was imperative that he worked from home for a minimum of four days a week. He said that that was the same advice that Royal Mail had had for over a year, but had so far refused to follow it. He went on to say that the report explained how the ergonomics mentioned in Ms Kelly's report were not appropriate in the claimant's case due to the complexity of his two separate disabilities. As we have noted, this is a somewhat clearer explanation than Mr Reddington himself gives in his report which makes no specific reference to Ms Kelly's report at all. The claimant goes on to again question the independence and integrity of both Ms Kelly and Ms Phillpotts. Describing Ms Kelly as a former Royal Mail employee, the claimant said that he very much doubted her impartiality and objectivity when considering what was in his best interests, as against what the claimant described as a clear management preference stated by Royal Mail. Ms Kelly had in his view raised unfounded concerns about the health and safety aspects of home working. He went on to refer to Royal Mail waging "a systematic campaign against me" and that he found the scare tactics (a reference to the restructuring process which Mr Wilkinson had mentioned) as being absolutely abhorrent and designed to bully and intimidate him into resigning from a role he was capable of doing.

7.50. On an unknown date, but believed to be in May 2019, Mr Michael Reddington, a spinal physiotherapist with City Physio Limited prepared a report on the claimant. That report was at the behest of the claimant. Mr Reddington had been treating the claimant and he gave the dates of April 2018 and 7 May 2019 for two of those occasions. The report is at page 614 in the bundle (and also at 561.5). It is undated and brief. The report includes the following:

"Mr Hackleton's unique "set" of medical problems precludes him from most usual "off the peg" treatments, including ergonomic principles."

Mr Reddington does not go on to explain precisely what he means by this rather Delphic reference. The claimant's understanding is that Mr Reddington knew more about the claimant's conditions than did the occupational therapists employed by OH Assist. Further the claimant understood that the description of a unique set of medical problems meant the combination of cerebral palsy and Scheunemann's Disease. Although we do not have the details, we have the impression that what would be the normal treatment of Scheunemann's Disease was likely to aggravate the claimant's pre-existing cerebral palsy. The reference to 'off the peg' treatments including ergonomic principles meant, according to the claimant's understanding, that whilst for instance Ms Phillpotts might consider that the claimant's preferred posture when working at home would be potentially harmful, that would only apply to a person who did not have the claimant's specific disabilities. In the same way, the claimant told us that he believed Mr Reddington was saying that ergonomic principles that would apply to a person without the claimant's disability would not necessarily apply to the claimant. The concluding paragraph of this very brief report reads as follows:

"*It is my opinion that Mr Hackleton is able to work, given accommodation to his specific travel, exercise and ergonomic needs. I believe he manages best and would continue to be able to carry out seated work, in terms of these pre-requisites by working at home. This would allow him to perform his exercises in a timely manner before work, it would also allow him to avoid the physical stress and difficulties in travelling to work, thus aiding his productivity in his ensuing work. Working at home would also allow him to manage his spinal and bowel conditions with regular movement and access to facilities he requires at home".*

As the claimant puts it in paragraph 78 of his witness statement, occupational therapy recommendations which may be appropriate for the general population would not be valid in the claimant's case and could actually cause additional pain. There were a lot of different factors regarding how the claimant's body moved and functioned because of his disabilities.

7.51. The interview which had been proposed for 6 June 2019 in fact took place on 4 July 2019 and the respondent describes this as a first formal meeting. The meeting was attended by the claimant and his wife and in addition to Mrs Jones there was a representative from HR and also Ms Thornton who again took the notes. These are at pages 567 to 570. Mrs Jones read out the part from Ms Kelly's report which said that it would not be suitable for the claimant to work from home on an ongoing basis. The claimant said that he rejected the findings of that report and that his GP had advised him to work from home four days a week. The claimant would not follow that (Kelly's) report. Mrs Jones repeated that that was the health professional's report and that was the advice which the respondent would follow.

7.52. There was then a discussion of Mr Reddington's report. Mrs Jones noted that whilst that gave clear guidance that the claimant could work from home, it did not give any indication that an assessment had been made of

the home by Mr Reddington to ensure that it was a safe working environment. It is common ground that Mr Reddington had not and in the event never did inspect the claimant's home. The claimant said that he would approach Mr Reddington for a further report. It would transpire however that unbeknown to the claimant, Mr Reddington had gone away for three months and so no further report was put forward from Mr Reddington, or for that matter from any other health professional on behalf of the claimant. Under the impression that he would be able to contact Mr Reddington the claimant went on to ask Mrs Jones whether there were any specific questions which he should put to Mr Reddington. We understand that eventually Mrs Jones sent a proforma occupational health referral form to guide the claimant. However we find that it would have been fairly obvious to both the claimant and particularly Mr Reddington, if he had been approached, what his report needed to cover. Whether Mr Reddington, as a spinal physiotherapist, would have felt qualified to prepare such a report and to inspect the claimant's property and make an assessment of how he would work at home is, in the circumstances, an academic question. Towards the end of the note of the meeting, Mrs Jones said that she would await the claimant's decision on a further redeployment exercise but that the next step in the process, if no suitable role was found, would be dismissal. The claimant responded that the next thing that Mrs Jones would hear would be from his solicitor.

7.53. On 11 July 2019 Mrs Jones wrote to the claimant (pages 563 to 564). She enclosed copies of the notes taken at the 4 July meeting. The claimant was asked to confirm whether he would like Mrs Jones to undertake a further redeployment exercise. Reference was also made to the possibility of further guidance being given by Mr Reddington. Mrs Jones wrote that it was for the claimant to provide Royal Mail with any evidence that he wanted to be taken into account. As Mrs Jones was not a medical expert she was unable to provide the claimant with any recommendations or advice in that regard. The claimant was informed that if it was not possible to identify a suitable role via redeployment, or if it was impossible to facilitate a return to work otherwise, the next step would be consideration of dismissal.

7.54. A second formal meeting, as it was described, took place on 30 July 2019. A brief note of that is at 570J. In addition to the claimant, his wife and Mrs Jones, there was again someone from HR and Ms Thornton took the note. Mrs Jones is recorded as saying that it was the claimant's opportunity now to put forward any further evidence or raise anything else with her. The claimant's response was that he had made every point in writing. The claimant and his wife had no idea what more was required and so there was nothing more from Michael (Reddington). The claimant does not explain that for the reasons set out above he had not been able to speak to Mr Reddington. He went on to suggest that there was nothing in the previous occupational health reports "to give Michael (Reddington) any idea of what more detail to give us". For the reasons previously expressed, we find that implausible as it was obvious that the claimant needed to produce medical evidence in sufficient detail to support the contention that it would be safe to work most of the time at home and to point out any perceived errors in the opinions which had been offered by Ms Phillpotts and Ms Kelly. The notes conclude by referring to Mrs Jones

saying that she would take into account all the OT reports and correspondence when making her decision.

7.55. When sending the claimant the notes of that meeting under cover of her letter of 1 August 2019, Mrs Jones explained that she would be on leave for two weeks from 5 August and that she would contact him on her return. However, in fact it was not until 3 September 2019 that Mrs Jones wrote to the claimant informing him that her decision was that the claimant would be dismissed from his employment with Royal Mail "due to your refusal to follow the detailed guidance provided in the OH Assist report dated 6 April undertaken by occupational therapist Mandy Kelly at your home and your refusal to engage with the adjustments we have made for you in the office in order to facilitate a return to work."

8. **The parties' submissions**

Both representatives had prepared written submissions which we have carefully considered but do not propose to summarise here. At the resumed hearing by the video on 22 June 2020 the representatives made oral submissions.

9. **Our conclusions**

9.1 Jurisdiction

The grounds of resistance made no reference to any potential time bar. However in the agreed list of issues the matter is referred to in general terms. We have never been clear precisely what the time issue was, although we had asked the respondent to provide clarity about this during the hearing. All that is said in Mr Fosters outline submissions is –

"*It might be said that in certain respects the events of which the claimant complains cannot be considered to amount to conduct extending of* (sic) *a period of time*."

When we asked Mr Foster to explain this further he said that the respondent struggled to pursue the point and that it was difficult for the respondent to argue that there had not been 'a succession of events'.

As this is a matter which goes to a jurisdiction we consider that we need to go a little further than simply accepting this concession, although nothing appears to be obviously out of time.

The claim was presented on 9 January 2019 and so at a time when enquiries and investigation of the practicality of reasonable adjustments was being actively considered rather than at a time when a decision had already been made. The claimant's case in relation to part of the section 15 complaint is that there was conduct extending over a period. The claimant's dismissal occurred on 3 September 2019 and the claimant had sought an amendment to add this to the section 15 complaint on 17 October 2019. Had the claimant chosen to present a new claim then it would have been in time. In the event the amendment was permitted without objection on 29 November 2019. The matters of complaint in respect of alleged harassment and victimisation can again properly considered as a case based upon conduct extending over a period.

Accordingly we are satisfied that we have jurisdiction to hear and determine the whole of this claim.

9.2 The reasonable adjustments complaint

9.2.1 Provisions, criteria and practices (PCPs)

The respondent accepts that it had each of the three PCPs on which the claimant relies - that business partner analysts (BPAs) are predominantly office-based; are required to travel to meetings and the sick pay policy.

9.2.2 Substantial disadvantage

The respondent also accepts that the office based practice could put the claimant at a substantial disadvantage when compared to persons who are not disabled. We find that it did put him at a substantial disadvantage because his disabilities meant that he could not comfortably work in a conventional office setting.

With regard to the travel practice, we note that the claimant's contract of employment (p75) states that the needs of Royal Mail require mobility. We accept that there is no reference to travel in the job specification (p650) . However it is clear from the evidence given by the respondent's witnesses that travel was a requirement. In paragraph 13 of Mrs Woods statement she says, with reference to BPAs – "*they are also required to travel to meetings with key stakeholders throughout the business."* In paragraph 26 of Mr Wilkinson's statement he refers to travelling to meetings as a crucial part of the role. Moreover, the respondent alerting occupational health to the claimant's honeymoon travel plans suggests that the ability to travel was part of the role.

We find that in reality there was a practice which required travel. We also find that that practice put the claimant at a substantial disadvantage because his disabilities meant that travel was difficult and uncomfortable.

We deal with the issue about sick pay separately.

9.2.3 The duty to make reasonable adjustments

Having regard to the first two PCPs only at present, we find that the duty to make reasonable adjustments arises.

9.2.4 Did the respondent discharge that duty?

Mr Wilkinson describes himself as an advocate of disability rights. That he may well be in general terms, but we need to consider Mr Wilkinson's approach and that of the respondent to it's duty towards the claimant. We note that in his email of 9 March 2018 to Mrs Wood (p574) he writes that working from home "*is absolutely not something that can be on a permanent basis. I also don't understand how working from home will be better than working in the office?"*

We find that this sets the tone for the respondent's subsequent treatment of the claimant. It is also at odds with the occupational health advice which the respondent was receiving. Dr Athanasiou's report of 21 June 2018 (p260-262) describes the claimant's then current capacity for work as being flexible working from home and on site. The doctor says that the claimant was fit for work with adjustments.

There is also the report of Dr Baig, occupational health physician, dated 31 October 2018 (p370-372). Dr Baig had the benefit of a report from the claimant's GP, Dr Barr, and a report from the spinal specialist who was treating the claimant, Mr Breakwell. Dr Baig writes that the claimant was fit for work with adjustments and he noted that the GP recommended that the claimant should work from home four days per week and one day in the office after proper OT and DSE assessment.

Subsequently the respondent commissioned the report by Karen Philpotts, a registered occupational therapist (p394). The purpose of her assessment was of the claimant's capabilities and for advice on what adjustments were required in the workplace. She was pessimistic as to the prospects of the claimant working in the office and her opinion was that the claimant's proposal that he be permitted to work in a reclined or lying posture would not be functional. She felt that that could put other areas of his body at high risk of musculoskeletal damage. Although she was not conducting an assessment about the claimant working from home, she expressed the view that for this the claimant would need an appropriate chair and desk of the type that would be available in the office and so there would be the same limitations.

Mandy Kelly, also a registered occupational therapist, prepared the report on home working (520-526). She concluded it would not be suitable for the claimant to work from home on an ongoing basis. She too was concerned that if the claimant continued to work seated on a reclining armchair he would be at high risk of developing further musculoskeletal problems. Although she was not reporting on the office environment she nevertheless expressed the view that that would be the most suitable for the claimant.

In contrast to these opinions there is the report by Michael Reddington, spinal physiotherapist (p614). This was obtained by the claimant and provided to the respondent in May 2019. This report included the insight that – *"Mr Hackleton's unique 'set' of medical problems preclude him from most usual 'off-the-peg'treatments, including ergonomic principles*." He believed that the claimant managed best working at home carrying out that work seated.

We find that essentially Mr Reddington was saying that, because of the claimant's particular conditions, it was necessary to 'think outside the box'. We also find that it would have been reasonable for the respondent to have accepted that what might have been an unsafe working practice for the majority would nevertheless have been workable in the claimant's case. That should have led the respondent to commission a more detailed report either from Mr Reddington or from some other medical professional with knowledge and experience of the claimant's conditions and their impact on the ability to work.

That the respondent failed to do this suggests a closed mind on the issue of homeworking, as prefigured by the views expressed by Mr Wilkinson in his 9 March 2018 email. It is also significant that the respondent sought to place undue importance on what it perceived to be the claimant's own acceptance that he could work neither at home nor in the office and that redeployment or ill-health retirement was the answer. During his evidence Mr Wilkinson frequently returned to the point that the claimant had agreed with what Mr Wilkinson had said at the 19 June 2018 meeting. He believed that because the claimant had signed the minutes of that meeting he had agreed that working from home was not compatible with job. However the transcript of the

claimant's illicit recording shows in our view that the respondent has sought to read too much into the claimant's monosyllabic responses. We should also add that although when being cross-examined Mr Wilkinson sought to challenge the accuracy of the transcripts the respondent's solicitor had previously indicated that the respondent did not object to the transcript. That occurred on day three of the hearing during the course of the claimant's cross-examination.

We are also mindful that the respondent does permit BPAs at locations other than Chesterfield and London to work from home, subject to satisfactory risk assessments on their home environment (see Mrs Jones witness statement paragraph 17).

For all these reasons we find that it would have been a reasonable adjustment to have permitted the claimant to work from home four days a week once it had further specialist advice. On the basis of Mr Reddington's report and the evidence which the claimant has given about his disabilities and their effect we are satisfied that the claimant's particular requirements as practised at home would have been found to be safe, albeit somewhat counterintuitive from a conventional ergonomic standpoint. If the claimant had been allowed to work from home on that basis for the majority of the working week, we consider that he would have been able to work one day per week in the office with minimal adjustments. Whilst our conclusion on the latter point involves a degree of conjecture we remind ourselves that the respondent would have been under ongoing duty to make reasonable adjustments in the light of the prevailing circumstances on the claimant return to work.

It follows that it would also have been a reasonable adjustment not to have considered and then actioned the claimant's dismissal prior to the other reasonable adjustments being put in place.

9.2.5 Sick Pay as a reasonable adjustment

It is agreed that the respondent had the provision of a sick pay policy which allowed six months full pay and a further six months half pay, but without any discretion to discount disability related absence or extend the entitlement where the absence was disability related. The respondents Sick Pay and Sick Pay Conditions policy is at pages 103 to 108 in the bundle. Whilst there are provisions for discounting absences due to being assaulted on duty or because of industrial injury or disease, the policy says nothing about absence due to disability.

The respondent contends that on the authority of the Court of Appeal in **O'Hanlon** v. **HMRC [2007] IRLR 404** extension of sick pay will rarely be a reasonable adjustment and not in cases which would not assist the employee to return to work (see page 6 of Mr Foster's Outline Submissions).

Ms Kight submitted that the claimant's case should be considered under the principles set out in **Meikle** v **Nottinghamshire County Council [2005] ICR 1** . That was because the length of the claimant's absence was attributable to the respondent's prevarication in relation to homeworking and its insistence on frequently referring the claimant to occupational health "*because of its desire not to enable homeworking*" (paragraph 46 of her written submissions.)

In **O'Hanlon** Hooper LJ giving the judgement of the Court of Appeal said-

"*We do not believe that the legislation has perceived this (enhanced sick pay) as an appropriate adjustment, although we do not rule out the possibility that it could be in exceptional circumstances."*

That was because the purpose of the legislation was to assist people with disabilities to obtain employment and be integrated into the workplace. It was not to treat them as objects of charity.

However in the earlier Court of Appeal decision in **Meikle** it was accepted that in circumstances where Mrs Meikle had been absent on sick leave for a prolonged period owing to her employers failure to make reasonable adjustments, there was no reason to exclude the payment of sick pay from the scope of the duty to make reasonable adjustments.

We also note that this principle is included in the Equality and Human Rights Commission Code of Practice on Employment at paragraph 17.22.

The claimant's sick pay was reduced to half pay in July 2018 and ceased in January 2019.

Whilst we do not accept that the respondent sought numerous occupational health reports until it got the answer that it wanted, we conclude that it should have focused its enquiries on the claimant's unique problems at an early stage rather than pursuing a more conventional approach. We accept that the respondent was not shown Mr Reddington's report until May 2019 and so after the sick pay entitlement that expired. However we do not consider that that means that the respondent was excused from giving more comprehensive consideration to the claimant's employment difficulties at an earlier stage.

Accordingly we find that there was a breach of the duty in respect of sick pay. We reserve to the remedy hearing consideration of quantum for this breach.

9.2.6 <u>The section 15 complaint</u>

With due respect to the claimant and those who advise him, prolixity has been a characteristic of his case and this is particularly evident in the way that the alleged unfavourable treatment for this part of his claim has been set before us.

The essential and obvious unfavourable treatment is the claimant's dismissal.

With regard to the other eight treatments as set out in paragraph 8 of the list of issues, we consider that there is much duplication of material which is really only relevant to the reasonable adjustments complaint. We do not accept that a request during a lengthy period of absence for the claimant to complete some 10 consent forms for occupational health reports can properly be regarded as unfavourable treatment. Although motive is not a relevant consideration, we do not accept the claimant's contention that this was intentional oppressive behaviour by his employer.

<u>The dismissal</u>

Although the letter of dismissal (pp 571A – 571D) suggests that the claimant was dismissed for conduct – "*due to your refusal to follow the detailed guidance in the OH*

assist report dated 6th April …… and your refusal to engage with the adjustments we have made for you in the office …." (p571D) we find that the real reason for dismissal was the claimant's long term sickness absence which arose because of his disabilities and so was the 'something' in the context of section 15.

Because there is no justification or other defence put forward in respect of the dismissal we find that this aspect of the section 15 complaint succeeds. We might add that as we have found the respondent to be in breach of it's duty to make reasonable adjustments it would have been difficult for the respondent to justify a dismissal which flowed from that breach, which is our finding.

9.2.7 Harassment

The claimant was clearly upset that the respondent informed occupational health of the claimant's plans to travel to America for his honeymoon. However we consider that this was a legitimate enquiry and had some relevance even though travelling first-class and business class to the USA for private purposes is a different proposition to commuting to London or elsewhere in the UK for business purposes. As it was in the claimant's interests that occupational health assessments were made and as he was in a position to explain the context to the occupational health advisor, we doubt that this can be classified as unwanted conduct. If it can we accept that it was conduct related to the claimant's disability but we do not accept that it had the purpose of harassing him. It seems to have had that effect, but we do not consider it reasonable for it to have had that effect. We remind ourselves that the claimant had not kept his honeymoon travel plans a secret.

With regard to undertaking the office based assessment prior to the home based assessment, which is the other unwanted conduct complained of, we again doubt that this can properly be regarded as unwanted conduct. Again, it was in the claimant's interests that all options were considered and we do not consider that there is much significance to the order in which they were done. In any event we do not consider that there was the purpose of harassing and if it had that effect, again we do not consider that that was reasonable.

For these reasons we do not find the harassment complaint to be made out.

9.2.8 Victimisation

Ultimately the respondent has accepted that the claimant's grievance of 9 August 2018 was a protected act.

As we have found the respondents view from an early stage to have been that homeworking was not compatible with the claimant's role, we do not accept that this position being confirmed after the receipt of the claimant's grievance is likely to have been caused by that grievance. The respondent was simply reiterating its initial view.

We find that the only reason that Mr Wilkinson told the claimant about the proposed managerial restructure at the 8 November 2018 meeting was because he was including the claimant in a notification which had already been given to the rest of the team. This risk applied equally to the claimant and we do not find that Mr Wilkinson raised the issue because of the claimant's grievance. Instead it was part of the initial consultation process.

The alleged detriment of Karen Philpotts making the' lack of capacity' comment could not in any event be a detriment done by the respondent as Ms Philpotts was not an employee of the respondent or otherwise part of it.

Accordingly we find that the victimisation complaint is not made out.

Employment Judge Little

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Date 13th July 2020

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