Case No: 2201848/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr H Pintovega

Respondent: The London Borough of Camden

Heard at: **London Central** **On:** **17, 18 & 19 October 2018; 19 December 2018; 9 & 10 April 2019 (in chambers)**

Before: **Employment Judge Professor A C Neal**

Members: Mr D Carter
Mr J G Walsh

Representation

Claimant: Mr N Toms (of Counsel)

First Respondent: Mr S B Sudra (of Counsel)

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

(1) the Claimant was unfairly dismissed by the Respondent. A remedy hearing will be listed in due course;

(2) the Claimant's claim alleging that he has been unlawfully discriminated against (indirect discrimination) by reference to Section 19 of the Equality Act 2010 is dismissed;

(3) the Claimant's claim alleging that he has been discriminated against by reason of "something arising in consequence of his disability" by reference to Section 15 of the Equality Act 2010 is dismissed; and

(4) the Claimant's claim alleging that the Respondent has failed to discharge a duty arising under Section 20 of the Equality Act 2010 to make reasonable adjustments in relation to circumstances touching his disability is dismissed.

REASONS

1 In this case the Claimant brings four claims. First, he claims that he has been unfairly dismissed by the Respondent. Second, he claims that he has been unlawfully discriminated against (indirect discrimination) by reference to **Section 19 of the Equality Act 2010**, in respect of the protected characteristic of disability. Third, he claims that he has been discriminated against by reason of "something arising in consequence of his disability" by reference to **Section 15 of the Equality Act 2010**. Finally, he claims that the Respondent has failed to discharge a duty arising under **Section 20 of the Equality Act 2010** to make reasonable adjustments in relation to circumstances touching his disability.

2 The development of the proceedings in this case has been subject to a number of problems which manifested themselves at the beginning of Day 1.

3 First, the original pleadings had been set out in broad outline, and, despite a thoroughgoing case management hearing before Regional Employment Judge Potter on 24 July 2018, the precise issues between the parties remained in many respects unclarified right up until the commencement of the full merits hearing.

4 It was also the case that, at the outset of the hearing, the Respondent was not prepared to concede that the Claimant was a "disabled person" within the meaning of **Section 6 of the Equality Act 2010**. This had the consequence that witness statements and the structure for presentation of the case had been set up with that position in mind.

5 However, after intense discussion and some detailed case management by the Employment Judge on the morning of Day 1 of the hearing the Respondent eventually conceded that the Claimant was a disabled person for the purposes of the **Equality Act** claims.

6 The parties also reached detailed agreement as to the issues to be dealt with in this case, and the Tribunal is grateful for both representatives having devoted time to produce an "Agreed List of Issues" reflecting discussions on the morning of Day 1. That list was presented to the Tribunal at the commencement of Day 2. As a matter of formality, therefore, the Tribunal adopted that "Agreed List of Issues", which superseded earlier versions of issues considered in previous case management discussions.

7 The agreed issues were set out as follows:

> Disability discrimination
>
> 1. It is accepted that the Claimant is a disabled person within the meaning of Section 6 Equality Act 2010.
>
> Reasonable adjustments (Sections 20/21 Equality Act 2010)
>
> 2. The provisions, criterion or practices relied on by the Claimant are as follows:
>
> (a) the requirements of the role as a Caretaker including manual handling, heavy lifting, driving tugs, walking distances, climbing stairs and being active for more than an hour or two a day;

(b) the requirement to undertake a 4 week trial period to assess his suitability (beyond his medical condition) for the post of Business Support Officer prior to being confirmed in the role.

3. Did either or both these provisions, criterion or practices put the Claimant at a substantial disadvantage in comparison to non-disabled employees? The Claimant will contend,

   (a) his disability prevented him from carrying out the above requirements of his role as a Caretaker. A non-disabled employee without his back and related conditions would not have been so disadvantaged;

   (b) the requirement to undertake a 4 week trial period to assess his suitability (beyond his medical condition) put him at a substantial disadvantage compared to a non-disabled new starter in the role as he had just 4 weeks to demonstrate his suitability and access any training whereas a non-disabled new starter would have had their probationary period of 6 months.

4. Should the Respondent have taken the following steps as reasonable adjustments to accommodate the Claimant's disability and enable him to continue in their employment:

   (a) appointing him to the role of Business Support Officer subject only to his medical suitability with adjustments; and/or

   (b) appointing the Claimant to the role of Business Support Officer at the conclusion of his 4 week trial period given he had performed well so far in the role.

5. Was the Claimant treated unfavourably by the Respondent in that they:

   (a) did not confirm his appointment to the role of Business Support Officer; and/or

   (b) dismissed him.

6. Was any of the alleged unfavourable treatment because of something arising in consequence of the Claimant's disability? The Claimant will say the unfavourable treatment was because of the following matters which arose as a consequence of his disability:

   (a) his inability to carry out his substantive role as a caretaker;

   (b) his sickness absence record;

   (c) the fact that he would need reasonable adjustments to the role of Business Support Officer relating to lifting and moving furniture.

7. Was any unfavourable treatment justified as a proportionate means of achieving a legitimate aim?

[NB. No paragraph 8]

Indirect discrimination (Section 19 Equality Act 2010)

9. The provision, criterion or practice relied on by the Claimant is the practice of the Respondent of requiring employees who are medically redeployed to undergo a 4 week trial period before confirming them in a new post.

10. Does this provision, criterion or practice place disabled employees at a particular disadvantage compared with non-disabled employees engaged in a new post?

11. Did the provision, criterion or practice disadvantage the Claimant?

12. Can the Respondent show the provision, criterion or practice was a proportionate means of achieving a legitimate aim?

Unfair dismissal (Part X Employment Rights Act 1996)

13. Was the reason for the Claimant's dismissal his capability as alleged by the Respondent or his disability.

14. If the Claimant was dismissed for capability, was his dismissal fair taking into account:

    (a) the failure of the Respondent to act on the recommendation of Occupational Health in February 2016 by redeploying the Claimant at this time when he had not reached Stage 3 of the sickness absence procedure;

    (b) the failure of the Respondent to follow their own guidance on redeployment by appointing the Claimant permanently to the role of Business Support Officer subject only to a trial period in relation to his medical suitability for the role;

    (c) the failure of the Respondent to provide feedback on his work performance as Business Support Officer to enable him to address any deficiencies in his work performance;

    (d) the failure of the Respondent to provide any or any adequate training for his duties as a Business Support Officer to enable him to fully undertake the role;

    (e) the Respondent terminating his appointment as Business Support Officer without good reason and/or based on assumptions as to how he might perform parts of his job description in the future when he had not had any training on these duties and/or been asked to undertake them prior to his appointment being terminated;

    (f) the failure of the Respondent to allow him a 6 month probationary period as would have been granted to any other new starter;

    (g) that he had performed well in the role of Business Support Officer during the 4 week trial period;

    (h) the failure of the Respondent during his redeployment or afterwards to send him a list of vacancies and/or to find him alternative employment;

    (i) the failure of Ms Sharon Calvey to carry out any or any adequate investigation into how the Claimant had performed in the role of Business Support Officer particularly given the concerns raised by the Claimant and his trade union;

    (j) the delays in the procedure including the appeal.

8 In relation to specific elements which remained to be identified by the Tribunal for the purpose of dealing with the Claimant's claims made under the **Equality Act 2010** the following was agreed and the Tribunal makes initial findings of fact accordingly.

(1) **Comparator**

(a) The comparator for the purposes of the Claimant's allegations was identified by the Claimant as "a non-disabled new starter or a redeployed non-disabled member of staff".

(b) By contrast, the Respondent adopted the position that the correct comparator should be as stated by the Claimant but subject to the limitation of that person "being redeployed under the ill-health procedure".

(c) While those respective positions provided a starting point for the Tribunal to address the question of who was the correct comparator, for reasons set out below, the evidence did not present itself in the same frame of reference as the propositions initially put forward by the parties on Day 1 of the hearing.

(d) In consequence, the Tribunal took it upon itself to reach a decision, on the basis of the evidence and submissions made by the respective parties, as to what should be the correct comparator for the purposes of these claims.

(2) **Jurisdiction – Time Limits for Presenting Claims**

(a) A number of issues were raised in relation to the jurisdiction of the Tribunal to consider the claims made by the Claimant.

(b) For the avoidance of doubt, there was no dispute that the Tribunal has jurisdiction in relation to the claim of unfair dismissal. That matter was agreed and placed on record during the course of the case management preliminary hearing heard by Regional Employment Judge Potter on 24 July 2018.

(c) However, the Respondent took the time point in relation to the Claimant's claims brought by reference to the protected characteristic of disability under various provisions of the **Equality Act 2010**.

(d) As regards that issue, the Claimant's case was that the disability-related matters all centred upon a specific date of 27 July 2017.

(e) The Claimant maintained that those claims were presented in time because they formed a "continuing process" leading up to the eventual termination of the Claimant's employment, for which the "effective date of termination" was 30 October 2017.

(f) In the alternative, the Claimant submitted that should any (or all) of those matters be held to have been presented out of time, it would nevertheless be just and equitable for the Tribunal to extend the time for presentation, given, in particular, the tardiness of the Respondent in its handling of the whole procedures relating to the Claimant.

(g) In this context, a number of matters were not in dispute between the parties as regards the relevant time-line for events related to these proceedings. Given that consensus, the Tribunal makes the following further findings of fact:

(1) The Claimant commenced employment with the Respondent on 12 December 2004.

(2) There was no written contract of employment. However, there was a statement of terms furnished by reference to **Section 1 of the Employment Rights Act 1996** (Bundle page 57b).

(3) The Claimant was informed on 27 July 2017 that he would not be confirmed in a trial position as a "Business Support Officer".

(4) The Claimant was eventually dismissed by the Respondent. It is agreed that the effective date of termination was 30 October 2017.

(5) An internal appeal was launched by the Claimant on 18 December 2017. That appeal was eventually heard on 6 September 2018, and the outcome of the appeal hearing was delivered on 17 September 2018.

(6) The Claimant went through ACAS pre-claim conciliation. The relevant dates on the ACAS certificate are: (1) *Start*: 14 January 2018 and (2) *Certificate issued*: 28 February 2018.

(7) The Claimant presented his claims to the Tribunal and his Claim Form ET1 was stamped in on 28 March 2018.

(8) The trial hearing of the case before this Tribunal commenced on 17 October 2018.

(3) **Indirect Discrimination and Reasonable Adjustment – PCP Relied Upon**

(a) It was agreed on Day 1 of the hearing that, in relation to the Claimant's allegation of indirect discrimination by reference to the protected characteristic of disability, the provision, criterion or practice (PCP) relied upon is "the subjection of the Claimant to a 4-week trial period".

(b) The Tribunal notes that the "Agreed List of Issues" makes reference to two PCPs in the context of the claim relating to alleged failure to make reasonable adjustments. Thus, it was also agreed that in relation to the allegation of the failure by the Respondent to make reasonable adjustments this related to "the redeployment of the Claimant to the position of Business Support Officer".

(c) For reasons which are set out below the Tribunal has had regard to whether these accurately reflected the matters in the "Agreed List of Issues".

CONDUCT OF THE HEARING

9 The hearing of this case took place over four days, during the first three of which live evidence was received, and during the fourth of which submissions were made orally by the representatives of the parties.

10 The representatives of the parties produced written skeleton arguments by way of closing submissions in accordance with orders given by the Tribunal on 19 October 2018. Leave was also granted for the parties to exchange supplementary written arguments in relation to matters raised by the respective counterparty in

their closing submissions. The Tribunal places on record their appreciation of the care and detail reflected in the documents produced for their benefit.

11 The Tribunal then took two days to consider the matter in Chambers on 9 and 10 April 2019. A unanimous decision with reasons was developed during those Chambers hearings and those reasons are set out below.

12 The Tribunal heard live witness evidence from the Claimant, Mr Hector Pintovega, as well as from Ms. Cynthia Waters (HR Strategic Lead within Camden Human Resources), Ms Anthea Henry (Business Support Service Manager within the Corporate Services Directorate of the Respondent), Ms. Sharon Calvey (Head of Estate Services for the Respondent), Ms. Namita Bhardwaj (HR Business Support Advisor for the Respondent) and Ms. Hayley Agbandje (HR Business Adviser for the housing management division of the Respondent).

13 All of the witnesses gave evidence on the basis of prepared written witness statements. Each was subjected to cross-examination, and, from time to time, to questioning from members of the Tribunal.

BACKGROUND FINDINGS OF FACT AND TIME-LINE

14 A number of preliminary findings of fact have been set out above at paragraph 8 of this Judgment. In addition to those, the Tribunal makes the following further background findings of fact, which are broadly uncontroversial as between the parties:

(1) On 12 December 2004 the Claimant commenced employment as a caretaker with the Respondent.

(2) He suffered from various problems related to his back and eventually began to have substantial periods of sickness absence.

(3) On 29 April 2015 a “Stage I” Absence Review Meeting was held to consider the Claimant’s circumstances.

(4) On 3 November 2015 the Claimant was certified off work sick with back and kidney problems.

(5) In the light of these continuing problems the Claimant was referred to the Respondent’s occupational health service (OH). The OH service made a recommendation on 9 February 2016 that the Claimant was not fit to work in his post as a caretaker but would be fit to be redeployed to office-based work.

(6) In April 2016 the Claimant returned to work having been certified as fit to work by his GP on 7 April 2016.

(7) However, almost as soon as he had recommenced work on that date, he was sent home by Miss Susan O'Hara.

(8) On 11 October 2016 a “Stage 3” Sickness Absence Meeting took place.

(9) At that meeting it was decided to place the Claimant in a "redeployment pool" for 12 weeks. This was intended to run until 4 January 2017.

(10) In the event, that period of placement in the redeployment pool was extended to the end of May 2017.

(11) Between November 2016 and May 2017 the Claimant obtained an opportunity to perform work with Camden Estates, to whom he was seconded for a limited duration project.

(12) On 5 June 2017 the Claimant commenced a 4-week trial period in the position of "Business Support Officer" which was intended to continue until 7 July 2017 (see Bundle Page 137).

(13) On 13 July 2017 the Claimant attended a meeting with Miss Anthea Henry.

(14) On 27 July 2017 a formal “Stage 3” Sickness Absence Procedure Meeting took place.

(15) At that meeting a decision was reached to terminate the employment of the Claimant.

(16) The Claimant’s employment was duly terminated with notice, following a brief period of deferral during which some attempt was made to deal with a request on behalf of the Claimant to be granted a full pension entitlement.

(17) The effective date of the Claimant’s termination was 30 October 2017.

(18) The Claimant appealed against that decision on 18 December 2017 (see Bundle page 165-166).

(19) That appeal was eventually heard by the Respondent on 6 September 2018.

(20) The unsuccessful outcome of the appeal was communicated to the Claimant by letter dated 18 September 2018 (see Bundle page 167-169).

THE CLAIMS

15 In the light of the background findings of fact the Tribunal turns now to deal with the various claims presented by the Claimant in the following order: (1) Unfair Dismissal; (2) Alleged unlawful indirect discrimination by reference to the protected characteristic of disability (**Section 19 of the Equality Act 2010**); (3) Alleged unlawful discrimination by reason of something arising in consequence of his disability (**Section 15 of the Equality Act 2010**); and (4) An alleged failure by the Respondent to make reasonable adjustments in relation to circumstances touching the Claimant’s disability (**Section 20 of the Equality Act 2010**).

(1) Unfair Dismissal

16 **Section 94(1) of the Employment Rights Act 1996** states that, subject to any other provision in Part X of the Act:

An employee has the right not to be unfairly dismissed by his employer.

17 **Section 98 of the Employment Rights Act 1996** provides that:

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

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

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

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

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

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a) —

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

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

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

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

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

18 **Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992** provides that:

(1) A failure on the part of any person to observe any provision of a Code of Practice issued under this Chapter shall not of itself render him liable to any proceedings.

(2) In any proceedings before an employment tribunal or the Central Arbitration Committee any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

> **(3) In any proceedings before a court or employment tribunal or the Central Arbitration Committee any Code of Practice issued under this Chapter by the Secretary of State shall be admissible in evidence, and any provision of the Code which appears to the court, tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question.**

19 In the context of that provision the Tribunal has had regard to the **ACAS Code of Practice No.1 on Disciplinary and Grievance Procedures** (latest version 11 March 2015).

20 In relation to the Claimant's claim of unfair dismissal there is no dispute and the Tribunal finds that he was dismissed within the meaning of **Section 95(1)(a) of the Employment Rights Act 1996**.

21 As already indicated the effective date of termination was agreed as having been 30 October 2017.

22 The reason given by the Respondent for the termination of the Claimant's employment, as set out in the letter of termination dated 30 October 2017 (see Bundle page 158), is "capability".

23 The Tribunal has also noted that this reason was elaborated further in the "Case Summary of Employment Review Meeting held on 26 July 2017", in terms of "ill health capability" (Bundle page 154).

24 The Tribunal is satisfied that the "capability" reason for dismissal, by particular reference to "ill health", if established, would fall within the statutory list of reasons set out in **Section 98(2) of the Employment Rights Act 1996**.

25 However, the Claimant challenges the proposition that "ill health capability" truly was the reason (or, if more than one, the principal reason) for his dismissal. His case is that the dismissal formed part of a process which stemmed from the circumstance of his being a disabled person. As well as regarding that as the basis for his alleged unfair dismissal, the underlying motivation imputed to the Respondent, the handling of the process itself, and the outcome of his dismissal are taken as the basis for his parallel allegations of unlawful discrimination by reference to the protected characteristic of disability.

26 In order to deal with the question of what was the reason (or, if more than one, the principal reason) for the Claimant's dismissal, the Tribunal turns to consider the history of events between late 2015 and the end of October 2017. There is little or no dispute over much of the underlying situation during that time – although there are important disputes between the parties in relation to the procedural handling of the Claimant's circumstances by the Respondent.

27 The background to all of these events relates to the health of the Claimant. Although there were disputes between the parties in relation to whether the medical condition of the Claimant was such as to render him a "disabled person" for the purposes of **Section 6 of the Equality Act 2010**, once that status of disability had been conceded by the Respondent on Day 1 of the hearing there remained little of controversy in relation to the medical situation itself. In particular,

there was agreement as to the relevant material to be derived from the medically-related documents included in the Bundle prepared for the hearing.

28 Having commenced employment with the Respondent in 2004, the Claimant, who was employed in a Caretaker position, suffered from what was described in his "Further and Better Particulars of the Grounds of Claim" as an "underlying back condition". Eventually, the Claimant suffered a worsening of his condition, which he maintained had been brought about by driving tasks undertaken during the course of his employment.

29 By January 2015 this had developed to a point where the Claimant was taking a substantial period of time off work. Consequently, after shortly over a month's sickness absence, the Claimant was assessed by an external organization (Health Management) which the Respondent retained to deal with occupational health matters concerning their staff.

30 The OH report of 9 March 2015 set out the medical problems from which the Claimant was reportedly suffering, but was not able to confirm the cause of the Claimant's worsened condition.

31 In the light of the OH report, the Respondent decided to hold what was described as a "Stage I Absence Review Meeting" on 29 April 2015. This appears to have been undertaken under the so-called "Sickness Absence Management Procedure" of the Respondent (Bundle page 422 ff).

32 A decision was then made by way of follow up to the Stage I meeting to monitor the Claimant's health over a 12-month period, at the same time as various adjustments were made to the Claimant's working arrangements.

33 On 3 November 2015 the Claimant commenced another period of sickness absence, in relation to which relevant medical certificates and information were furnished. In the light of that absence, the Claimant was again referred to OH for an assessment on 4 February 2016.

34 A further OH report was provided on 9 February 2016, in which it was recommended that the Claimant's condition was not such as to give rise to an entitlement to retirement on the grounds of ill health, and that he was fit to be redeployed to another role (provided that this was an office-based role) within the Respondent organisation.

35 Particular mention is made of the recommendation relating to retirement on ill health grounds, since the Tribunal was made aware that in certain circumstances an arrangement might be activated which could lead to such a retirement with pension provision under the Local Government Pension Scheme (described as "release of unreduced pension on ill health grounds"). It appears – although the Tribunal was not presented with detailed evidence on the point – that all parties had seen this pensionable route as a possible way forward given the Claimant's continuing ill health, and, indeed, even after completion of the various procedures outlined below the Claimant's representatives were endeavouring to achieve some sort of outcome of this kind. The Claimant told the Tribunal during the course of cross-examination that his manager had been pushing for a solution through this "unreduced pension" route.

36 Following receipt of the February 2016 recommendation from OH, the Claimant was assessed by his GP in April 2016, at which point the GP issued a further medical certificate stating that the Claimant may be fit for work, and pointing out the need for an office-based role which might avoid aggravating his back condition.

37 The Claimant thereupon returned to work, only to be sent home almost immediately by Ms Susan O'Hara. According to his witness statement (paragraph 6), which was not challenged, Ms O'Hara told the Claimant that he could not come back until the Respondent could find him a new position. The Claimant also told the Tribunal that:

> **… every time I contacted Susan O'Hara she said they did not have anything suitable available for me, I was to continue on sickness leave and wait for them to contact me.**

In the course of giving evidence on the basis of her prepared witness statement (paragraph 11) Ms Sharon Calvey told the Tribunal that, by July 2016, Ms O'Hara was herself on long-term sickness absence.

38 This situation continued over the Summer of 2016, during the course of which it is also noted that a further OH assessment was undertaken on 4 July 2016 – this time at the instigation of the Respondent's HR department – in the context of which specific questions were being raised about the possibility of bringing the Claimant within the qualification framework for the Local Government Pension Scheme.

39 Eventually, the Claimant was called to attend what was described as an "Employment Review Meeting" which took place on 12 October 2016. This meeting had initially been scheduled for 22 July 2016, and had then been rescheduled for 16 August 2016. The meeting, which had been convened at the instigation of Ms Sharon Calvey, was described to the Tribunal by Ms Hayley Agbandje in her witness statement (paragraph 8) as a "Stage 3 Employment Review Meeting".

40 The upshot of the meeting on 12 October 2016 was that a decision was made by Ms Calvey to place the Claimant in what was described as "the Redeployment Team" for a period of 12 weeks (that period of 12 weeks having been computed on the basis of completed years of continuous service with the Respondent). As matters turned out, that initial period of 12 weeks was extended until the end of May 2017.

41 In consequence, between November 2016 and May 2017 the Claimant was "seconded" (in his words) to work in an audit of lock-ups and garages within the Parking and Letting Department of Camden Estates. That was an office-based role.

42 The Claimant's case is that the role in the Parking and Letting Department was never intended to be a permanent role. He maintains that the experience went well, and that he was praised for his work in that capacity (including being rewarded in tangible terms for his performance).

43 Throughout the period in the Parking and Letting Department it is common ground that the Claimant received information about vacancies on a weekly basis. The Claimant says that this was in line with "the Redeployment process", but that "the vast majority of the jobs sent to me were not suitable due to the Grade".

44 In any event, following an extended period with the Parking and Letting Department, the Claimant was then placed in Business Support. Thus, with effect from 5 June 2017 he obtained a position of "Business Support Officer" – on a comparable grade to the position that he had been occupying in the Parking and Letting Department. The Claimant told the Tribunal that this role had not been sent to him by the Respondent, but was a role which he found himself on the internal vacancies intranet.

45 The position of "Business Support Officer" was intended to be for a 4-week trial period, and was to continue until 7 July 2017. However, in order to take account of previously booked annual leave arranged for the Claimant, that period was extended until 13 July 2017.

46 Deployment into that position was handled by Ms Henry, who dealt with the Claimant's "expression of interest" in the role, and confirmed the trial appointment in a letter dated 1 June 2017. The tasks to which the Claimant was to be assigned were organized in the light of discussions between Ms Henry and Ms Diana Small (who took on the task of line-managing the Claimant during the trial period). Ms Henry has provided hearsay evidence of what was allegedly discussed between the Claimant and Ms Small (who reported directly to Ms Henry), although the Tribunal has not heard directly from Ms Small.

47 Ms Henry has reported to the Tribunal what she says she was told by Ms Small about the Claimant and his performance during the trial period. That reported feedback is set out extensively in the witness statement of Ms Henry. Unfortunately, however, there is no documentary evidence before the Tribunal of the supervision said to have been undertaken by Ms Small and purportedly fed back to Ms Henry. There are no notes or records of any of the "talks" which Ms Henry said she had held with Ms Small about the Claimant. Nor is there any record of the allegedly "regular ad hoc 121's (one on one informal supervisory meetings) sitting together on the 2nd floor" said to have taken place between Ms Small and the Claimant. Furthermore, the evidence in relation to these purported activities was given by Ms Henry in conditional terms – "As line manager to Ms Small, we would meet regularly.."; "Ms Small would tell me…"; "Based on Ms Small's feedback, I would encourage her to raise the issues with him…" {paragraphs 12, 13 and 14).

48 Eventually, Ms Henry told the Tribunal that:

> **In a meeting I had with Ms Small around the 12th July 2017, she advised me that Mr Pinto Vega's performance and behaviour, still had not improved …**

Ms Henry then confirmed that:

> **Accordingly, based on Ms Small's feedback, we agreed that Mr Pinto Vega had not passed his trial period.**

49 In paragraphs 19-21 of her witness statement Ms Henry commented upon what she maintained Ms Small had reported to her in the context of areas in which the Business Support department was authorized to recruit at the time of the Claimant's trial period. Having set out those matters, she then told the Tribunal that:

> **Accordingly, I was satisfied that Ms Small, who had direct line management responsibility of Mr Pinto Vega, was correct in her assessment of him and that the performance which he exhibited was not one that could pass a trial period. I therefore authorized the termination of the trial period as not "passed".**

50 Thereafter, Ms Henry instructed a member of the Respondent's HR department (Ms Akiunmboni) to inform the Claimant of this outcome on 13 July 2017. Subsequently on that same day Ms Henry held a meeting with the Claimant and confirmed her decision. Ms Henry states that:

> **I did notice that Mr Pinto Vega was taken aback at my decision communicated in our meeting.**

although she comments in her witness statement that:

> **I was satisfied that Ms Small had provided Mr Pinto Vega with on-going feedback throughout the trial, and allowed him the opportunity to improve, whilst gaining training throughout.**

51 Subsequent to the delivery of the outcome from the trial period, the Claimant emailed Ms Henry to ask for feedback in writing, which was responded to by return. The Claimant's trade union representative was also seeking further clarification in relation to the decision.

52 This version of events stands in marked contrast to the account given by the Claimant, whose case it is that Ms Small had not provided him with feedback during the trial period – either as claimed by Ms Henry or at all.

53 Ms Henry claims in her witness statement (paragraph 28) that she "…knew this was not the case", although she did not explain to the Tribunal on what basis she claimed to know that.

54 In any event, Ms Henry told the Tribunal that the stance adopted by the Claimant led her to ask Ms Small to "keep any notes related to Mr Pinto Vega electronically in case of further queries". Yet, even this failed to generate any documentary evidence for the Tribunal in relation to what was going on, since:

> **Due to an unfortunate IT issue in December 2017, all of Ms Small's OneNote and Shared Drive notes disappeared from the system and IT (the Council's dedicated team) could not retrieve them.**

Nevertheless, Ms Henry continued to maintain in her witness statement that:

> **… I had no doubt in my mind that Ms Small had given Mr Pinto Vega adequate feedback as it would have been unusual not to. Also, Ms Small is experienced and I was confident in her ability to effectively manage the trial period.**

55 Upon being deemed not to have passed the trial period, the Claimant was then, as Ms Henry described it, in a situation where:

> **… he would return to the redeployment pool if another role could not be identified for him.**

56 Indeed, on notification of the unsuccessful outcome of the trial period with Business Support, the Claimant, in the words of Ms Calvey:

> **… reverted back to me and the ill-health procedure.**

Ms Calvey thereupon indicated that she intended "…to re-convene an Employment Review Meeting", and placed the Claimant on "gardening leave" from the time of his leaving the position in Business Support. Arrangements were made by Mr Paul Jarvis (standing in for Ms Henry during a period of annual leave) that the Claimant's last work day should be 21 July 2017.

57 On 27 July 2017 the re-convened Employment Review Meeting took place, under the chairmanship of Ms Calvey, who conducted the meeting together with Ms Agbandje. The Claimant attended with his trade union representative. At that meeting Ms Calvey came to the conclusion that:

> **… the decision to terminate his employment due to ill health capacity was the appropriate outcome.**

Ms Calvey elaborated on the reasoning which she said led her to that conclusion, and confirmed to the Tribunal that:

> **… the Claimant was dismissed for incapability under the Sickness Absence Procedure.**

58 The decision of Ms Calvey to terminate the Claimant's employment was conveyed to him at the meeting on 27 July 2017 and was followed up in written form in a letter dated 30 October 2017. It is common ground, and the Tribunal has found, that the effective date of dismissal was 30 October 2017.

59 After receiving confirmation of his dismissal, the Claimant then submitted an appeal on 18 December 2017 against the decision of Ms Calvey. That appeal was eventually heard on 6 September 2018, and the decision to dismiss was upheld by the Audit and Corporate Governance Appeals (Staff Appeals) Sub-Committee. The decision of that Sub-Committee was conveyed in writing to the Claimant in a letter dated 18 September 2018.

60 The Tribunal witnessed significant confusion on the parts of those giving evidence on behalf of the Respondent in relation to the appropriate procedures for dealing with the Claimant's circumstances and as regards which procedure (or procedures) individual members of the management team were, in fact, applying. This issue first arose towards the end of Day 2 of the hearing, during the course of cross-examination of Ms Namita Bhardjat.

61 By the time Ms Bhardjat was called, the Tribunal had already heard evidence, subjected to cross-examination and questioning by the panel, from Ms Cynthia Walters (on the afternoon of Day 1), Ms Anthea Henry (on the morning of Day 2),

and Ms Sharon Calvey (in the middle of Day 2). All three of those witnesses had given evidence on the basis of prepared witness statements.

62 Mention was made at various points in the witness statements prepared for the first three witnesses to procedures operated by the Respondent. In particular, reference was made to "the Council's Absence Management Policy and Procedure" (Ms Walters, paragraph 11); an "ill-health redeployment guidance", which Ms Walters said had been submitted by the Claimant's trade union representative (Ms Walters, paragraphs 15, 18b); "the Council's Sickness Absence Management Procedure" (Ms Calvey, paragraphs 7, 11); "the Sickness Absence Procedure" (Ms Calvey, paragraph 37); and "the Council's Absence Management Policy" (Ms Calvey, paragraph 38);

63 Specific mention was also made in the witness statements of what were variously described as "redeployment processes" (Ms Henry, paragraph 31); "the Council's Employment Terms and Conditions" (Ms Calvey, paragraph 13); and "the redeployment process" (Ms Calvey, paragraph 17). More generally, descriptions were given by both Ms Henry and Ms Calvey of various steps taken in relation to the Claimant, which clearly implied the operation of one or more procedures, although it was not clarified what particular procedure (if any) was being engaged at any particular point.

64 Three documents had been included in the Bundle prepared for the hearing: namely, (1) "Ill-Health Redeployment Guidance" (Bundle pages 419-421); (2) "Sickness Absence Management Procedure" (Bundle pages 422-444); and (3) "Sickness Absence Management Policy" (Bundle pages 445-451).

65 During the course of her cross-examination mention was made by Ms Walters of the "Sickness Absence Management Procedure" (by reference to Bundle page 436); and of the "Guidance" (by reference to Bundle pages 419 and 421). She also responded to questions from the panel by reference to "cases on ill-health redeployment", and by mentioning "Guidance" and "procedure".

66 Ms Henry, whose witness statement did not contain any express reference to any of the procedures included in the Bundle or drawn to the attention of the Tribunal, commented on the "Ill-Health Redeployment Guidance" (by reference to Bundle page 421), and dissented from the proposition at paragraph 8 of the witness statement of Ms Bhardjat in relation to the need for a "formal application" at the point where the Claimant was being taken into the role of Business Support Officer.

67 Ms Calvey was taken, during the course of her cross-examination, to the "Ill-Health Redeployment Guidance" (by reference to Bundle pages 419 and 421) as well as to the witness statement of Ms Bhardjat. She stated that these were procedures for "redeployment". When asked directly, she told the Tribunal that she could not recall that anybody had raised any other procedure for the purpose of dealing with the Claimant's case.

68 The panel asked Ms Calvey a number of questions about what procedure (or procedures) might have been in play during her involvement with the Claimant's case. In addition, as regards the issue of what the witness said was the reason for the eventual termination of the employment of the Claimant, the Employment

Judge drew Ms Calvey's attention to the "Ill-Health Redeployment Guidance" (by reference to Bundle page 421), in the context of what she was saying at Paragraph 37 of her witness statement. When asked directly which of (1) "ill-health capability", (2) "incapability under the sickness absence procedure, or (3) "incapability" (as set out in Ms Calvey's outcome letter to the Claimant, at Bundle page 158) was the reason for the Claimant's dismissal, the witness replied that the reason had been "incapability, substantially".

69 However, when Ms Namita Bhardjat gave her evidence and was taken to the "Ill-Health Redeployment Guidance" and the "Sickness Absence Management Procedure", she made mention of something new – what she described as an "Organizational Change Policy".

70 When pressed on this, and after questions from the Tribunal to the representative of the Respondent, it became clear that members of the Respondent's team present in the hearing room were aware of what Ms Bhardjat was referring to, and it was confirmed that no copy of that "policy" had been included in the Bundle prepared for the hearing. On further questioning, the witness told the Tribunal that the "Organizational Change Policy" was the policy which she utilized for the Claimant's case, and that it was the policy to which she was referring in her witness statement. She also explained that the procedure for "appointment" to a "suitable alternative" post by reference to the "Ill-Health Redeployment Guidance" was not applicable in the Claimant's case, as there had been no "appointment" – and she made clear that, had there been such an "appointment", she would have prepared an appointment letter, which did not happen.

71 When Counsel for the Claimant put to Ms Bhardjat that she was using "the redeployment policy" (referring to the "Ill-Health Redeployment Guidance" document at page 419-421 of the Bundle), she stated that she was using "the redeployment process".

72 Ms Bhardjat then used the expression "the redeployment procedure" in answer to a question from the panel (by reference to Bundle page 421), and told the Tribunal that this procedure "kicked in when the Claimant was given the post out of the pool". In response to a follow-up question from the Employment Judge, Ms Bhardjat then explained that "the reference to 'redeployment' in my witness statement is a generic presentation of the 'Organizational Change Policy'."

73 Given that evidence, which was complemented by further observations, in response to questions from the panel, that "I was clear on the policy I was running"; "Other senior managers knew of this procedure"; and "They were all aware of this", the Employment Judge directed that the Respondent was to serve a copy of the "Organizational Change Policy" on the Claimant as soon as reasonably practicable, and that copies should be provided for the Tribunal at the commencement of Day 3 of the hearing.

74 At the beginning of Day 3, a document entitled "Organizational Change Policy" was handed up to the Tribunal, and inserted into the hearing Bundle as one entry designated "Bundle page 453a". After discussion between Counsel for the respective parties and the Tribunal, it was then agreed that Ms Henry and Ms Calvey should be recalled for supplementary cross-examination under oath. Both

witnesses had been placed on stand-by notice as to their availability, and were present in the hearing room.

75 When recalled, Ms Henry told the Tribunal that:

> **I was not aware at the time of which specific policy was being applied to this case.**

She said that she had sent an email asking "What do we usually do?", and received a phone call back telling her that the Claimant was "an ill-health case". Ms Henry also stated that she "checked to see that we were treating it in the appropriate way".

76 Ms Calvey stated that she was using the "Sickness Management Procedure" throughout, and that her involvement was with "the ill-health redeployment".

77 Following the recall evidence of Ms Henry and Ms Calvey, the Tribunal heard from the final witness for the Respondent, Ms Hayley Agbandje, who also gave evidence on the basis of a prepared witness statement.

78 In her witness statement Ms Agbandje made reference to "the Council's Sickness Absence Management procedure" (paragraph 4), and during the course of cross-examination, she told the Tribunal that she had been following "the Ill-Health policy".

79 Ms Agbandje described in some detail the steps which she said had been followed in relation to the Claimant during his period in the post of Business Support Officer. Much of that description was by way of hearsay evidence about matters taken from the documentary evidence or in respect of which Ms Agbandje claimed she had been informed by Ms Calvey, Ms Akimnboni, or Ms Henry. However, she did offer direct evidence in relation to the "Employment Review meeting" held on 27 July 2017, which she said she had attended. Ms Agbandje also offered hearsay evidence concerning the appeal meeting held on 18 December 2017, which she told the Tribunal she was unable to attend. That hearsay account was said to have come from information given by Ms Debra L'Esteve, who stood in for Ms Agbandje at the appeal hearing.

80 During the course of her cross-examination Ms Agbandje was taken to the "Organizational Change Policy" document which had, shortly prior to the commencement of her evidence, been presented to the Tribunal and entered into the Bundle (page 453a). Counsel for the Claimant also took her to sections of the "Ill-Health Redeployment Guidance" (by reference to Bundle page 421). In addition, the Employment Judge reminded the witness of the notes of evidence given by Ms Bhardjat on the previous afternoon.

81 At this stage, Ms Agbandje's evidence became somewhat confused, and the cross-examination questioning by Counsel for the Claimant became increasingly insistent in consequence. In particular, at one point it was put to her that "HR follows the wrong policies, and then tries to cover it up afterwards" – a proposition which she vehemently denied. However, Ms Agbandje then told the Tribunal that:

> **… this procedure was adjusted and applied more loosely … The Sickness Absence Management Procedure was adjusted … the Guidance was adjusted … the length**

> **of time in the pool was extended … adjusted … We allowed more time for training and shadowing …**

When pressed further on this, she then stated that:

> **We did not "amend" the procedure, but we adjusted how we applied the policy …**

Finally, when presented with a direct proposition by Counsel for the Claimant, she maintained that:

> **It is not right that HR seems to make it up as they go along and then cover each other's backs …**

Discussion – Unfair Dismissal

82 Having heard the witnesses and observed them responding to questioning under cross-examination the Tribunal has formed the following view on the basis of that witness evidence and the relevant supporting documentary evidence contained in the Bundle prepared for the hearing.

83 Given that it is agreed that the Claimant was "dismissed" by the Respondent within the meaning of **Part X of the Employment Rights Act 1996**, the first question for the Tribunal is what was the reason for the dismissal of the Claimant.

84 The Tribunal is unanimously of the view that the reason for the Claimant's dismissal related to the capability of the Claimant for performing work of the kind which he was employed by the Respondent to do. On the basis of the evidence before them, the Tribunal is satisfied that the assessment of the Claimant's capability was made by reference to his perceived skill, aptitude, health and physical qualities.

85 The Tribunal finds that this was the "true" reason for dismissing the Claimant, and was the only reason. It is a reason which therefore falls within **Section 98(2)(a) of the Employment Rights Act 1996**, as amplified by **Section 98(3)(a)** of the same Act.

86 That finding having been made, the issue for the Tribunal is therefore the so-called "test of reasonableness" contained in **Section 98(4) of the Employment Rights Act 1996**:

> **the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case.**

87 As already indicated above at paragraph 19 of this Judgment, in addressing that statutory "test" of fairness, the Tribunal – as is required by virtue of **Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992** – has

had regard to the **ACAS Code of Practice No.1 on Disciplinary and Grievance Procedures** (latest version 11 March 2015).

88 The Tribunal is unanimously of the view that in this case the Respondent acted unreasonably in treating the perceived incapability of the Claimant as a sufficient reason for dismissing him. The Claimant was therefore unfairly dismissed by the Respondent.

89 That conclusion stems from two matters which have given rise to serious concern on the part of the Tribunal: (1) the first relates to the question of what procedure (or procedures) should have been applicable, which was (or were) actually applied, and what view is taken of the Respondent's arrangements for supervision of the proper procedural approach to the handling of the Claimant's circumstances; while (2) the second concerns the oversight and management of the period during which the Claimant was undertaking the role of Business Support Officer. In addition, the Tribunal has a number of comments to place on record in relation to (3) the handling and oversight of the appeal process which was triggered in the wake of the initial decision to terminate the employment of the Claimant.

(1) The Procedural Treatment of the Claimant Leading to Dismissal

90 Little needs to be said in relation to the choice of procedures and their purported application. The confusion arising out of the realization that witness statements appeared to have been prepared, and sworn evidence given, on the basis of completely erroneous stories about the procedural aspects of the Claimant's case, has been set out earlier in this Judgment.

91 The Tribunal is grateful to Ms Namita Bhardjat for her robust evidence given on the afternoon of Day 2. It cannot have been comfortable for her to find herself giving evidence which appeared to go contrary to the whole thrust of the Respondent's case on procedural fairness, and to appreciate the extent to which that undermined previous evidence given by witnesses on behalf of the Respondent.

92 Nor can it have been easy for Counsel on behalf of the Respondent to explain the failure to include the "Organizational Change Policy" eventually inserted into the Bundle prepared for the hearing (page 453a) on the morning of Day 3.

93 Neither Ms Calvey nor Ms Henry sought, when recalled for supplementary cross-examination, to disguise the embarrassment arising out of the content of their prepared witness statements. The incident served, however, to raise significant questions concerning the reliability of parts of the evidence given by those witnesses – in particular, as regards the procedural aspects of the Claimant's dismissal.

94 Ms Agbandje's evidence on Day 3 was far from satisfactory. For whatever reason – whether in an attempt to minimize the damage done on the previous day, or because she felt a need to furnish responses which might fit what she understood to be the Respondent's case – her evidence under cross-examination became increasingly confused and, at the same time, stubbornly assertive. Several of her propositions as to the application of parts of the procedures set out

at pages 419, 422, 445 and 453a of the Bundle appeared implausible, and the Tribunal finds that her testimony was unhelpful and unreliable on key points.

95 The Tribunal was particularly concerned when it compared what actually happened in this case with the claim by Ms Calvey that:

> **I took advice from Hayley Agbandje, who confirmed that Anthea Henry's decision and reasoning was within the Council's policies. Therefore, I considered our policies and found no breach.**

and that:

> **After reaching my decision I secured HR advice concerning its suitability. I was advised that my decision was reasonable, in line with other similar decisions across the council and that there were no diversity issues nor issues of procedure present.**

96 Similar concern was felt by the Tribunal in relation to Ms Agbandje's assertion that:

> **Ms Calvey's decision to dismiss was therefore appropriate and in keeping with similar decisions across the Council. There were no diversity issues nor issues with procedure.**

97 These concerns on the part of the Tribunal have been further heightened by the evidence given by Ms Cynthia Walters, who, as the Respondent's "HR Strategic Lead", took on the task of Advisor to the appeal panel which eventually disposed of the Claimant's case on 18 September 2017. According to Ms Walters (who was not recalled for supplementary cross-examination on Day 3):

> **11. After deliberations, which immediately followed the staff appeal hearing, the panel reached a unanimous decision. The panel decided not to up-hold Mr Pinto Vega's appeal. In so doing, the Sub-Committee decided to uphold the decision made by management to dismiss Mr Pinto Vega based on ill-health related incapability. This, they believed, was in accordance with the Council's Absence Management Policy and Procedure [page 422-451].**
>
> **12. On arriving at their decision, they asked me for advice in relation to issues of procedure, diversity and whether their decision was acceptable and in keeping with other decisions made elsewhere in the Council concerning similar scenarios. To this, I advised that there were no diversity issues nor issues of procedure – I felt that the Council's policies were followed. I also advised that their decision was reasonable and acceptable, compared to other similar cases across the Council. After delivering my advice, the panel agreed to communicate their decision to Mr Pinto Vega and other involved parties.**

98 The Tribunal has not been satisfied that these assertions as to the procedural propriety of what was being done by the Respondent in relation to the Claimant amount to anything more than a formulaic recital on the parts of the witnesses concerned. Since each of the witnesses claimed under oath that the prepared written witness statement reflected her own evidence, that criticism must be levelled at each of them individually.

99 Against that background, and given the confusion which eventually came to light in the wake of Ms Bhardwaj's evidence on the afternoon of Day 2, together with the view formed by the Tribunal that much of the evidence given by witnesses for the Respondent in relation to procedural aspects of the Claimant's dismissal

lacks reliability, the Tribunal is unanimously of the view that the Respondent acted unreasonably in its procedural treatment of the Claimant's case.

(2) <u>Management and Supervision of the Business Support Officer Role</u>

100 In relation to the steps immediately leading up to the termination of the Claimant's employment, two decision-making points proved to be of particular significance. The ultimate decision to dismiss the Claimant was taken by Ms Calvey in the wake of what transpired at the Employment Review Meeting held on 27 July 2017. Prior to that, the key event which led to Ms Calvey considering the Claimant in an Employment Review Meeting was the decision not to place the Claimant into a role with the Respondent's Business Support Service, which was taken by Ms Henry and communicated to the Claimant on 13 July 2017. Furthermore, the role and actions of Ms Diana Small have to be considered in conjunction with these two events, since it was she who was tasked with line managing the Claimant during his trial period in the role of Business Support Officer.

101 The Tribunal has heard in great detail about the period prior to the Claimant's commencement of a trial period in the role of Business Support Officer. It is clear from that history that there had been an extended period of ill-health absence. There had been some discussions about the potential for a cessation of employment (described by Ms Calvey as "ill-health retirement") by reference to the Local Government Pension Scheme – but those had come to nothing in the light of the OH assessment of the Claimant as being capable of office-based work. Thereafter, the Claimant found himself in the redeployment pool, and was placed in a position with the Respondent's Estate Parking and Access Team, before he eventually took the initiative to submit what Ms Henry described as his "expression of interest" for the Business Support Officer position.

102 Whatever may have been the appropriate formal procedure for dealing with that trial period, it was clear to all parties that the Claimant could be facing difficulties in relation to his continued employment with the Respondent if he was not successful in achieving a permanent role at the end of the trial or otherwise as a result of his time in the redeployment pool. It was therefore particularly important that the organization, supervision, and evaluation of that trial period was attended to with the greatest of care.

103 Unfortunately, however, it is clear from the evidence given to the Tribunal that the supervision of the Claimant and evaluation of his performance during the trial period left a great deal to be desired. The Tribunal finds, in particular, that the line management which should have been provided by Ms Small in these circumstances was nowhere near as careful and complete as was reported by Ms Henry.

104 Counsel for the Claimant has observed on a number of occasions that it is "strange" that Ms Small should not have been called to give evidence, and the Tribunal recognizes the force of Counsel's submissions in that regard. However, that is a matter for the Respondent, and it is not for the Tribunal to draw any inference one way or the other from that.

105 Nevertheless, given the extent to which Ms Henry was obliged to give hearsay evidence as to what was purportedly done by Ms Small, the Tribunal faced significant difficulties, in the absence of direct evidence from Ms Small, in weighing that account of events against the direct evidence to the contrary given by the Claimant under cross-examination.

106 It is also most unfortunate for the evidential underpinning of the Respondent's case that, apparently, every single tangible record of any kind generated by Ms Small in relation to her line management of the Claimant should have gone missing. Ms Henry told the Tribunal that only the notes of Ms Small were lost, and she was not aware of anybody else being affected in a similar way.

107 However, despite all of this, the Tribunal does not, on the evidence available, go so far – as it was invited to do by Counsel for the Claimant – as to find that there is necessarily anything untoward or sinister in what is said to have happened.

108 What is clear from the evidence given by Ms Henry and her subsequent cross-examination is that she had little or no direct contact with or information about the Claimant. It is evident, and the Tribunal finds, that Ms Henry relied almost entirely upon what she gleaned from Ms Small when it came to making the decision as to whether the Claimant had passed or failed with his trial period. Indeed, there is every indication that it was, in reality, Ms Small who decided that the trial was a failure, and that Ms Henry simply adopted that evaluation when she decided to "authorize the termination of the trial period as not 'passed'".

109 The Tribunal further finds, contrary to what Ms Henry claims in her witness statement (paragraph 23), that Ms Small had not "… provided Mr Pinto Vega with on-going feedback throughout the trial, and allowed him the opportunity to improve, whilst gaining training throughout." In short, the Tribunal is of the view that Ms Henry's reliance upon a view that "… Ms Small is experienced and I was confident in her ability to effectively manage the trial period" was entirely misplaced.

110 This misplaced reliance by Ms Henry upon the adequacy and quality of feedback from Ms Small then fed through into the (entirely separate) decision-making process which Ms Calvey was called upon to undertake. At this stage – which turned into what effectively became the point at which it was to be decided whether the Claimant was to be dismissed – Ms Calvey made clear to the Tribunal that she was acting on the basis that:

> **… Anthea Henry is a very experienced manager and her input as regards her decision that the trial was unsuccessful was acceptable.**

111 The Tribunal notes that Ms Calvey gave short shrift to what was described as a "vehement challenge" to the trial period feedback on the part of the Claimant's trade union representative. That disquiet on the part of the trade union representative went primarily to the role of Ms Small, about which the Tribunal has already had cause to comment. It also went to a misconception on the part of the Claimant as to whether he had somehow been "confirmed" in the role of Business Support Officer – a matter in relation to which the Tribunal is unable to say, on the basis of the evidence before them, whether this was a "genuine misunderstanding" (as maintained by the Respondent) or anything more sinister (as implied by the Claimant).

112 During the course of her cross-examination Ms Calvey told the Tribunal that she had been "supported" by Ms Hayley Agbandje at the meeting where the decision to terminate the employment of the Claimant was made. When questioned about the absence of any recorded feedback from Ms Small to Ms Henry during the process of determining that the Claimant's trial period had been unsuccessful, Ms Calvey commented that:

> **I take advice from my HR advisor [Ms Agbandje] … she was comfortable with how the decision had been reached.**

113 However, when pressed further about what Counsel for the Claimant put to her as an absence of any evidence to back up the bases upon which Ms Henry claimed to have reached her decision about the trial period (specified by reference to a set of descriptors set out in an email from Ms Henry to the Claimant dated 14 July 2017), Ms Calvey eventually accepted that:

> **… I agree that there is no evidence for any of the highlighted aspects at [Bundle page 135] … I accept that there is no supporting evidence …**

but nevertheless went on to assert that:

> **… these are experienced managers and I have to take account of their views.**

114 After further cross-examination in relation to specific points of criticism levelled at the Claimant, Ms Calvey conceded that:

> **I accept that there is not a single document to support that the Claimant was missing deadlines or the like**

but continued to insist that:

> **I was satisfied on what I had before me that he [the Claimant] was not satisfactory within our guidelines.**

115 Eventually, when taken to what she had said in her witness statement at paragraph 35, to the effect that:

> **Despite the decision to terminate the trial being Anthea Henry's on reviewing whether they had operated within the Council policies, I concluded that they had supported their belief that the Claimant was not suitable for the role and such belief was not limited to physical capability alone, as provided by the offer terms/letter dated the 1st June 2017. I took advice from Hayley Agbandje, who confirmed that Anthea Henry's decision and reasoning was within the Council's policies. Therefore, I considered our policies and found no breach.**

Ms Calvey confirmed, in relation to the proposition that "I concluded that they had supported their belief that the Claimant was not suitable for the role", that:

> **I accept that there was no evidence … I took the position "on trust" … I only discovered afterwards that there was no evidence.**

116 In addressing the statutory test in **Section 98(4) of the Employment Rights Act 1996**, the Tribunal finds that there were serious shortcomings in the oversight of the Claimant's trial period which should have been undertaken by Ms Small. The consequences of those shortcomings directly impacted upon the decision-making of Ms Henry, and resulted in a severely flawed decision being made by her to determine the trial period not "passed". These deficiencies also had lingering consequences which eventually manifested themselves in the context of the

decision taken by Ms Calvey to terminate the employment of the Claimant. Misplaced faith in the adequacy and quality of what should have been done by Ms Small and Ms Henry drove Ms Calvey – supported by Ms Agbandje – to a decision which lacked proper enquiry and evidence, as well as to a rejection of the legitimate concerns raised by the Claimant's trade union representative without further investigation or evaluation.

117 In the unanimous view of the Tribunal the Respondent clearly acted unreasonably in their substantive decision to dismiss the Claimant on the basis of the information before Ms Calvey at the meeting of 27 July 2017. The quality of human resource management in this particular case fell well below the standards which should be expected of a Respondent such as this London Borough.

(3) <u>Handling and Oversight of the Appeal Process</u>

118 The Tribunal comments, finally, on the appeal process which was triggered in the wake of the Claimant's dismissal. Notice of the Claimant's appeal was given on 18 December 2017. The outcome of the appeal, a hearing of which took place on 6 September 2018, was eventually communicated to the Claimant by letter dated 18 September 2018.

119 Evidence in relation to this area was received from Ms Cynthia Walters, who told the Tribunal that she had been asked to stand in for the Director of HR and OD to support the appeal panel, and from Ms Sharon Calvey, who described to the Tribunal how she had attended the appeal hearing on 6 September 2018 "to present management's case".

120 Ms Walters was present throughout the meeting of the appeal panel on 6 September 2018 when the appeal of the Claimant was considered. She was also present during the deliberations of the panel, in the course of which the decision was taken not to uphold the Claimant's appeal. Ms Walters furthermore drew up the letter dated 18 September 2018 in which the appeal panel's decision and reasons were set out in summary form.

121 According to Ms Walters, the appeal panel reached their decision in the belief that this "… was in accordance with the Council's Absence Management Policy and Procedure".

122 Ms Walters was at pains during the course of her cross-examination to stress that she was "not the decision-maker" in the appeal process. Counsel for the Claimant sought to discover why none of the "decision-makers" in relation to that appeal was present to give evidence to the Tribunal, but Ms Walters confirmed that she was "not in a position to say why they are not here". When Counsel asked whether there was any record of the appeal meeting (such as notes taken during the hearing), Ms Walters informed the Tribunal that "We do not generally take notes of such meetings".

123 In response to questions from the Tribunal, Ms Walters explained that she:

> **… would be interacting with the members on the panel while they are deliberating ... for example, referring to previous cases of relevance.**

When asked specifically about her witness statement claim (paragraph 12) that the appeal panel, on arriving at their decision:

> **… asked me for advice in relation to issues of procedure, diversity and whether their decision was acceptable and in keeping with other decisions made elsewhere in the Council concerning similar scenarios. To this, I advised that there were no diversity issues nor issues of procedure – I felt that the Council's policies were followed. I also advised that their decision was reasonable and acceptable, compared to other similar cases across the Council.**

Ms Walters replied that:

> **I don't know if there had been any similar cases before. We have had very few cases on ill-health redeployment.**

When pressed further on the point, she eventually conceded that:

> **… I did not look to see what had happened elsewhere … I just did not do that.**

124 Ms Sharon Calvey reiterated that the "decision made by management", against which the Claimant had raised his appeal, was:

> **… on the basis of ill-health related incapability. This was based in accordance with the Council's Absence Management Policy.**

She explained to the Tribunal that, having put the management case in relation to the Claimant's appeal, she "took no part in the decision making process".

125 Finally, Ms Hayley Agbandje, who was originally expecting to "support" Ms Calvey for the appeal, told the Tribunal that she was unable to attend the appeal hearing on 6 September 2018, and that Ms Debra L'Esteve stood in for her on that occasion.

126 The Tribunal therefore heard no direct evidence from any of the decision-makers charged with determining the Claimant's appeal. Nor was Ms Walters recalled after the confusion identified on the afternoon of Day 2, so that her earlier evidence to the effect that "I felt that the Council's policies were followed" could not be further investigated or elaborated. In consequence, the issue of what procedure (or procedures) had been applied in relation to the Claimant was never really clarified by the Respondent.

127 Having heard the evidence of Ms Walters, and observed her responding to questions put by way of cross-examination, the Tribunal was given a strong sense that the whole appeal phase was driven from the Respondent's HR function, and that the elected members ostensibly making the final decision were treated as little more than a "rubber stamp" for the process. Indeed, the tenor of the answers given by Ms Walters to questions put by the Tribunal as to why none of the decision-makers was appearing to give evidence, included the observation that:

> **… the Respondent's policy is that the HR Advisor comes to a case like this ... not Members …**

128 However, without direct evidence from anybody involved in that decision-making process, that sense of "HR direction" and "rubber stamping" remains no more than an impression. Certainly, there was no clarification, other than the assertions in the original witness statement of Ms Walters, of what procedure was, in fact, applied. Furthermore, the Tribunal makes reference to what has already

been said above in this Judgment, in relation to its findings as to the adequacy of the process leading to Ms Calvey's decision to dismiss the Claimant – shortcomings which were not, even on the evidence of Ms Walters and Ms Calvey, brought to the attention of the appeal panel on 6 September 2018. Nevertheless, the Tribunal is not able, on the direct evidence before it, to attribute to elected members of the appeal panel those glaring shortcomings of procedure and substance which have been outlined above. Nor would it be right and proper in these circumstances to direct criticism to the elected members of the panel.

129 The Tribunal therefore confines itself to placing on record its concerns about the appeal process and the approach of the Respondent's HR function to it. That having been said, the matters set out in respect of that appeal process do not form part of the Tribunal's reasoning in the context of applying the "test of reasonableness" in **Section 98(4) of the Employment Rights Act 1996**, any more than do the circumstances giving rise to the delay in dealing with the Claimant's appeal – the reasons for which are noted and accepted by the Tribunal.

THE CLAIMS BROUGHT BY REFERENCE TO THE EQUALITY ACT 2010

130 The Tribunal now turns to the claims brought under provisions in the **Equality Act 2010**. All of these are brought by reference to the protected characteristic of disability. They are threefold: (1) an allegation of unlawful indirect discrimination (**Section 19**); (2) an allegation of discrimination by reason of something arising in consequence of the Claimant's disability (**Section 15**); and (3) an allegation of failure to make reasonable adjustments (**Section 20**).

131 **Section 4 of the Equality Act 2010** provides that:

The following characteristics are protected characteristics –

- **age;**
- **disability;**
- **gender reassignment;**
- **marriage and civil partnership;**
- **pregnancy and maternity;**
- **race;**
- **religion or belief;**
- **sex;**
- **sexual orientation.**

132 **Section 6 of the Equality Act 2010** then provides that:

(1) A person (P) has a disability if –

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

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

(3) In relation to the protected characteristic of disability –

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section) –

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

(6) Schedule 1 (disability: supplementary provision) has effect.

133 For the purposes of all of the disability claims the Respondent initially resisted the proposition that the Claimant is a "disabled person" within the meaning of **Section 6 of the Equality Act 2010**. However, on the morning of Day 1 of the hearing, the Respondent conceded that the Claimant was a disabled person for the purposes of the **Equality Act** claims.

134 Nevertheless, there remains an issue before the Tribunal as to whether the Claimant's claims brought by reference to the protected characteristic of disability under various provisions of the **Equality Act 2010** were presented in time.

135 **Section 123 of the Equality Act 2010** provides that:

(1) Subject to sections 140A and 140B, proceedings on a complaint within section 120 may not be brought after the end of –

(a) The period of 3 months starting with the date of the acct to which the complaint relates, or

(b) Such other period as the employment tribunal thinks just and equitable.

136 **Section 140B of the Equality Act 2010** provides that:

(1) This section applies where a time limit is set by section 123(1)(a) or 129(3) or (4).

(2) In this section —

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day

A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section.

137 It is common ground that the Claimant's Claim Form ET1 was presented to the Tribunal and stamped in on 28 March 2018. It is also agreed that, as he was required to do, the Claimant went through ACAS pre-claim conciliation with the relevant dates on the ACAS certificate being: (1) *Start*: 14 January 2018 and (2) *Certificate issued*: 28 February 2018.

138 Paragraph 25 of the "Respondent's Response to Claimant's Closing Submissions" addresses this point, and submits that, if the date of the alleged unlawfully discriminatory acts was 27 July 2017 – which was the date of the reconvened Employment Review Meeting – then, even after taking into account the ACAS conciliation period, the Claim Form ET1 was presented "considerably outside of the 3-month time limit to file a claim".

139 The Claimant, in answer to the time point, relies upon the proposition that 27 July 2017 is not the correct date from which to calculate the time limit for presentation, but that the events involving redeployment, the trial period, and the decision not to confirm the Claimant into the post of Business Support Officer formed part of a continuous act extending over a period of time leading up to the Claimant's dismissal. It is common ground that the effective date of termination of the Claimant's employment was 30 October 2017. The Claimant maintains that the time period for presentation of his claims by reference to the **Equality Act 2010** commenced on that date – *i.e*. on the same date as the (equivalent 3-month) time limit for presenting the claim alleging unfair dismissal, which it is conceded was presented in time.

140 The Respondent's answer to that argument is a submission that the Claimant has failed to establish a "continuous act" as alleged.

141 In the alternative, the Claimant submits that, should any (or all) of those **Equality Act 2010** matters be held to have been presented out of time, it would nevertheless be just and equitable for the Tribunal to extend the time for presentation, given, in particular, the tardiness of the Respondent in its handling of the whole procedures relating to the Claimant.

142 The Respondent answers that alternative submission with the further submission that "… the Claimant has not put forward reasons why it would be just and equitable to extend time".

143 By way of completeness as regards the factual matrix, the Tribunal reminds itself that, following his dismissal with effect from 30 October 2017, an internal appeal was launched by the Claimant on 18 December 2017. That appeal was eventually heard on 6 September 2018, and the outcome of the appeal hearing was delivered on 17 September 2018.

144 The Tribunal has had regard to the established case-law concerning what may be considered to be "a continuing act" in the context of determining from when

the period for presentation of a claim should be calculated. In particular, the Tribunal has reminded itself of the basic principles in this area laid down by the Court of Appeal in **Hendricks v. Commissioner of Police for the Metropolis, [2003] IRLR 96**, where Mummery LJ (dealing with the wording of the time limit rule prior to the enactment of the **Equality Act 2010**) observed that:

> **51. In my judgment, the approach of both the employment tribunal and the Appeal Tribunal to the language of the authorities on 'continuing acts' was too literal. They concentrated on whether the concepts of a policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken, fitted the facts of this case: see *Owusu v London Fire & Civil Defence Authority* [1995] IRLR 574 at paragraphs 21-23; *Rovenska v General Medical Council* [1997] IRLR 367 at p.371; *Cast v Croydon College* [1998] IRLR 318 at p.322 (cf of the approach of the Appeal Tribunal in *Derby Specialist Fabrications Ltd v Burton* [2001] IRLR 69 at p.72 where there was an 'accumulation of events over a period of time' and a finding of a 'climate of racial abuse' of which the employers were aware, but had done nothing. That was treated as 'continuing conduct' and a 'continuing failure' on the part of the employers to prevent racial abuse and discrimination, and as amounting to 'other detriment' within s.4(2)(c) of the 1976 Act).**
>
> **52. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends of a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'. I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be sidetracked by focusing on whether a 'policy' could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.**

145 The Tribunal has also noted that, certainly since its decision in **Pugh v. The National Assembly for Wales, [2006] UKEAT 0251** (another case decided on the pre-2010 Act provisions), the Employment Appeal Tribunal has expressed a preference for an approach on the parts of Tribunals that considers factual circumstances "in the round" (see at paragraph 45 of the Judgment of HHJ Serota), and that this approach appears to have been reiterated by reference to the current statutory formulation of the time limit in the **Equality Act 2010** by the President, Choudhury J. in his more recent comments set out in **Hale v. Brighton and Sussex University Hospitals NHS Trust, [2017] UKEAT 0342**.

146 The Tribunal has endeavoured to take an overview of the Claimant's circumstances "in the round", and has had regard to the evidence presented in relation to the Claimant's employment history with the Respondent as a whole (including that given by the Claimant himself, as well as relevant supporting documentation produced to the Tribunal); the evidence given by Ms Henry specifically in relation to the "trial period" in the post of Business Support Officer"; and the account given by Ms Calvey of what she did in relation to the various stages within the Respondent's "Sickness Absence Management Procedure" (both as regards the Employment Review undertaken prior to the trial period and in relation to the reconvened Employment Review Meeting).

147 While seeking to avoid a "too literal" approach to the matter, as warned by Mummery LJ in **Hendricks**, the Tribunal has nevertheless sought to ascertain

whether, as this case has been presented, there can be said to be "… 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts …", as suggested in the same case. This has necessitated careful consideration of the findings of fact set out above in this Judgment in relation to the Tribunal's finding that the Claimant was unfairly dismissed by the Respondent.

148 In that exercise, the Tribunal has formed the view that it is not acceptable in this case to suggest that the entirety of the Claimant's employment history can be taken as a "continuing act". Nor does the long history of this Claimant's medical problems serve to give rise to such a continuing act in the sense envisaged here. Similarly, the mere fact that various steps were taken over time under the umbrella of a particular procedure – such as the Respondent's "Sickness Absence Management Procedure" – does not necessarily serve to constitute a "continuing act".

149 Further, it seems to the Tribunal that the evidence clearly indicates that a distinction must be drawn in relation to the actions of Ms Calvey, in her role at the reconvened Employment Review Meeting, as compared to those of Ms Henry – which the Tribunal finds in this case to have been clearly separate from the operation of the "Sickness Absence Management Procedure", as contended for on behalf of the Claimant.

150 The Tribunal accepts the submission made on behalf of the Respondent that the complaints raised by the Claimant in respect of alleged disability-related matters focus upon the decision not to confirm him in the role of Business Support Officer, and that this outcome was communicated to the Claimant on 13 July 2017. At that stage the involvement of Ms Henry (apart from in response to a request for reasons to be provided in writing, and in her "representative of management" capacity during various procedural stages under the Respondent's "Sickness Absence Management Procedure") came to an end, and she "… took no further part in any decisions about Mr Pinto Vega …".

151 The Tribunal has already expressed its views in relation to the procedural and line-management shortcomings which led to the finding that the Claimant was unfairly dismissed by the Respondent. It is the view of the Tribunal that none of the matters addressed in that context shows any indication of being "tainted" in any sense whatsoever by unlawful discrimination having regard to the protected characteristic of disability. In particular, the Tribunal has recorded its finding that the "true" reason for dismissing the Claimant was the capability of the Claimant for performing work of the kind which he was employed by the Respondent to do, and that was the only reason for his termination of employment.

152 On the evidence before them, the Tribunal does not find the "bridge" between the various phases of the Claimant's employment and his treatment from the time of his suffering long-term ill-health until the termination of his employment in the context of his reconvened Employment Review Meeting to support the proposition of "continuing act" which Counsel for the Claimant submits there to be.

153 Given that, the Tribunal is unanimously of the view that the events which it is claimed by the Claimant should be regarded as one continuing process prior to 30 October 2017 do not constitute a "continuing act". These cannot, in the view of the

Tribunal, be regarded as "an act extending over a period" as distinct from "a succession of unconnected or isolated specific acts" within the sense of those expressions as drawn from the guidance in **Hendricks**.

154 Having found that the disability-related matters complained of did not constitute a "continuing act" for the purposes of identifying the appropriate date from which time ran for presentation of the Claimant's Claim Form ET1, the Tribunal finds that the latest date from which time could commence for the purposes of **Section 123 of the Equality Act 2010** was 27 July 2017. It follows that the three claims brought by reference to the **Equality Act 2010** were presented well out of time.

155 The question therefore arises as to whether the discretion to extend time should be exercised in this case. In the light of observations contained in the already-mentioned case of **Hale v. Brighton and Sussex University Hospitals NHS Trust**, the Tribunal has considered whether there ought to be an extension of those grounds, notwithstanding that there has been no express submission to that end. In the **Hale** case, the President of the Employment Appeal Tribunal gave consideration to a situation in which "… there were no express submissions below seeking an extension on just and equitable grounds, …", where that lack of express submissions came about "… because of the operative assumption on the Claimant's part that there was a continuing act".

156 The regime set out by **Section 123 of the Equality Act 2010** (which has to be read in conjunction with **Section 140B** of the same Act) concerns what is often described as the "just and equitable discretion". Thus, given the finding of the Tribunal that the Claimant's Claim Form ET1 containing his allegations of unlawful discrimination was presented outside the period of 3 months starting with the date of the acts complained of (as extended by **Section 140B**), the question for the Tribunal is whether it was presented thereafter within such other period as the Tribunal considers just and equitable.

157 The case-law in this area is complex, and has been developed through a large number of cases over many years. It also has to be noted that the modern version of the statutory provision which is now to be found in **Section 123 of the Equality Act 2010** contains some linguistic differences from its predecessors, although it appears to be common ground that the principles and approach that have been developed are consistent and remain valid even in the wake of those linguistic adjustments. The Tribunal therefore regards the established case-law in relation to the so-called "just and equitable" power as being valid and of relevance in applying the statutory test to this case.

158 Our journey takes us all the way back to the case of **Hutchinson v. Westwood Television, [1977] ICR 279**. Thereafter, the Tribunal has reminded itself of the approach adopted by Smith J. in **British Coal Corporation v. Keeble, [1997] IRLR 336**; the comments in **Robinson v. The Post Office, [2000] IRLR 804**; the detailed consideration of the Employment Appeal Tribunal in **Virdi v. Commissioner of Police of the Metropolis et al, [2007] IRLR 24**, and in particular the observations of Elias J. in that case; as well as the decision of the same body in **Chikwe v. Mouchel Group plc., [2012] All ER (D) 1**. As a matter of completeness, mention is also made of the guidance offered by the Court of Appeal in the cases of **Apelogun-Gabriels v. London Borough of Lambeth & another,**

[2002] IRLR 116, **Robertson v. Bexley Community Centre (t/a Leisure Link), [2003] All ER (D) 151** (in particular by reference to the comments made by Auld LJ), and observations made by Mummery LJ in the case of **Ma v. Merck sharp and Dohme, [2008] All ER (D) 158**.

159 In addition to the case-law guidance on what approach should be taken to the wording of the statutory provision itself, the Tribunal has also had regard – drawing upon the guidance given in **British Coal Corporation v. Keeble** – to factors derived from **Section 33 of the Limitation Act 1980**. Subsection (3) of that statute refers to the court having regard to "… all the circumstances of the case and in particular…" to:

> **(a) the length of, and the reasons for, the delay on the part of the plaintiff;**
>
> **(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed …;**
>
> **(c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;**
>
> **(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;**
>
> **(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;**
>
> **(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.**

160 The starting point to be derived from the decided cases is that time limits in employment matters, and especially those concerning discrimination, are matters that normally are exercised strictly. The basic authority for that proposition is to be found in the **Robertson v. Bexley Community Centre** case, where Auld LJ spells this out in terms. That case was decided shortly after Lindsey J., the then President of the Employment Appeal Tribunal, had observed in the case of **Robinson v. The Post Office** (at paragraph 32), that:

> **It is to be borne in mind that time limits in employment cases are in general strictly enforced.**

In other words, the time limit provisions are there for a purpose, so that it is the exceptional case, rather than the normal case, that they will be departed from.

161 It is also a generally received starting proposition that it is for the Claimant who has presented his claims out of time to establish to the satisfaction of the Tribunal that the "just and equitable" discretion should be exercised in the particular case. That obligation is not just a matter of the burden of proof. It also raises the question of what is the standard of proof to be established in order to persuade the Tribunal that a period other than the normal three months should be applicable. It is therefore a matter which requires evidence – which may be oral and subjected to cross-examination – or documentary.

162 In the circumstances of the current case, the Tribunal is broadly in agreement with the submission of the Respondent that "… the Claimant has not put forward reasons why it would be just and equitable to extend time". The Tribunal notes that the Claimant was being represented at all relevant times by his trade union – and, indeed, his trade union representative made effective challenges to management at various stages as events unfolded. Yet, there is no explanation as to when the Claimant realized that he might have a potential cause of action on the basis of his disability, there is no suggestion of any contemporaneous complaint being raised in terms of the alleged disability-related discrimination, and there is no account of the steps taken by the Claimant in the aftermath of his dismissal in preparation for presentation of his Claim Form ET1.

163 In short, there is absolutely no evidence to support any unexpressed submission to the effect that it is "just and equitable" that the Tribunal should extend time in this case. That being the case, and taking full account of the criticisms voiced by the Employment Appeal Tribunal about Tribunals sometimes being "too restrictive" in their approach to time limits in discrimination cases, this Tribunal is of the unanimous view that it is not just and equitable in the particular circumstances of this case to exercise the discretion and extend the time for presentation of the Claimant's Claim Form ET1.

164 The Tribunal therefore unanimously finds that the Claimant's three claims alleging unlawful discrimination by reference to the protected characteristic of disability were presented out of time and it is not just and equitable that the time for presentation should be extended.

165 The Tribunal now sets out its findings in relation to all of the issues agreed at the commencement of Day 1 of the hearing. This is done in order that the reasoning of the Tribunal as to the potential merits of the Claimant's disability-related claims is made clear – a factor (what the President of the Employment Appeal Tribunal describes in **Hale** as "the balance of prejudice" factor) which the Tribunal has taken carefully into account in reaching its decision not to exercise the "just and equitable discretion" in the context of the provisions of **Section 123 of the Equality Act 2010**.

(1) INDIRECT DISCRIMINATION (Section 19 Equality Act 2010)

166 **Section 19 of the Equality Act 2010** provides that:

> **(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**
>
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –**
>
> **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
>
> **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
>
> **(c) it puts, or would put, B at that disadvantage, and**

> **(d) A cannot show it to be a proportionate means of achieving a legitimate aim.**

167 As has already been set out earlier in this Judgment, the "provision, criterion or practice" (PCP) relied on by the Claimant is the practice of the Respondent of requiring employees who are medically redeployed to undergo a 4-week trial period before confirming them in a new post.

168 The issues for the Tribunal in relation to this claim are agreed as follows:

(1) Does this provision, criterion or practice place disabled employees at a particular disadvantage compared with non-disabled employees engaged in a new post?

(2) Did the provision, criterion or practice disadvantage the Claimant?

(3) Can the Respondent show the provision, criterion or practice was a proportionate means of achieving a legitimate aim?

169 The Tribunal bears in mind that there is a special rule in relation to the burden of proof, in consequence of the provisions of **Section 136 of the Equality Act 2010**. That section, which is headed "Burden of Proof", derives from European Union Law and provides *inter alia* that:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**
>
> **…**
>
> **(6) A reference to the court includes a reference to —**
>
> **(a) an employment tribunal; …**

170 The first consideration for the Tribunal has therefore been to ask whether the alleged PCP was, in fact, adopted and applied to the Claimant by the Respondent.

171 The context for this allegation arises out of the period during which the Claimant was placed in the role of Business Support Officer. That period commenced on 5 June 2017 and was intended to be for a 4-week trial period, until 7 July 2017. In the event, that period was extended until 13 July 2017. It is common ground that the trial was not considered by the Respondent to have been successful and that the Claimant was not confirmed in the post of Business Support Officer.

172 As has been described earlier in this Judgment, the formal procedures applied in relation to the Claimant were presented to the Tribunal – on the cases of both the Claimant and the Respondent – as being the Respondent's "Ill-Health Redeployment Guidance", their "Sickness Absence Management Procedure" and their "Sickness Absence Management Policy". Those policies were included in the Agreed Bundle prepared for the hearing (at pages 419-451). That presentation of the policy framework continued until the afternoon of Day 2, when the witness evidence of Ms Namita Bhardwaj made clear that another (different) policy – the

"Organizational Change Policy" (inserted into the Bundle as a composite document at page 453a) – had been applied during her involvement with the Claimant's circumstances.

173 The confusion over the applicable procedures, and who was referring to what procedure at various stages of dealing with the Claimant, has served to make the presentation of the Claimant's case in relation to alleged indirect discrimination under **Section 19 of the Equality Act 2010** less than entirely clear.

174 The Tribunal notes that the submissions contained in the "Claimant's Closing Submissions" – see, in particular, at paragraph 37(a) – include not just the PCP set out in the list of issues, but are also founded upon a second alleged PCP – namely:

> **… the requirements of [the] role as a Caretaker including manual handling, heavy lifting, driving tugs, walking distances, climbing stairs and [being] active for more than an hour or two a day.**

175 In relation to that second alleged PCP, it is submitted on behalf of the Claimant (at paragraph 54) that:

> **This provision, criterion or practice placed disabled employees at a particular disadvantage compared with non-disabled employees engaged in a new post**

for reasons which are adopted from the Claimant's submissions in relation to the alleged duty on the Respondent to make reasonable adjustments. These are said (at paragraph 39 of the "Claimant's Closing Submissions") to be that:

> **(a) the Claimant's disability prevented him from carrying out the above requirements of his role as a Caretaker. A non-disabled employee without his back and related conditions would not have been so disadvantaged; …**

176 The Tribunal further notes that, in his final submissions on this point, Counsel for the Claimant (at paragraphs 53-56 of the "Claimant's Closing Submissions") seeks to broaden the formulation of the PCP as agreed in the list of issues, to cover:

> **… a 4-week trial period not just based on their medical suitability before confirming them in a new post.**

The words "not just based on their medical suitability" have been added by Counsel.

177 By reference to that enlarged PCP, it is again submitted that:

> **This provision, criterion or practice placed disabled employees at a particular disadvantage compared with non-disabled employees engaged in a new post**

for reasons which are also adopted from paragraph 39 of the Claimant's submissions in relation to the alleged duty on the Respondent to make reasonable adjustments, namely:

> **(b) the requirement to undertake a 4 week trial period to assess his suitability (beyond his medical condition) put him at a substantial disadvantage compared to:**
>
> – **non-disabled new starters in a role as the Claimant had just weeks to demonstrate his suitability and access any training whereas a new starter would have their probationary period of 6 months;**

178 In relation to that enlarged PCP, it is also submitted (drawing upon paragraph 39(b) of the "Claimant's Closing Submissions"), that:

> **… non-disabled staff members who are being redeployed due to organizational change are not the appropriate comparators. There may be many of them. In most cases, they will not come to a wholly new role with a history of ill health absence and the impact this may have had on them. It may take a disabled employee longer to adjust to the new role.**

and:

> **… further non-disabled redeployees more generally will be far less likely to face the risk of unfounded assumptions being made about their capabilities based on their status as a redeployed disabled worker.**

179 The Claimant's case is then put in terms (at paragraph 55) that:

> **The provision, criterion or practice disadvantages the Claimant in that it [led] to his non-appointment to the post and subsequent dismissal.**

180 On the basis of that proposition, it is finally submitted that:

> **The Respondent cannot show the provision, criterion or practice was a proportionate means of achieving a legitimate aim given it was a breach of their own procedure…**

and for further reasons drawn from paragraph 51 of the "Claimant's Closing Submissions", namely:

> **(a) that there were no real concerns about his work as a Business Support Officer but, instead, unfair assumptions about his future work capabilities based on his status as a disabled employee;**
>
> **(b) there was a suitable alternative role for him, namely, Business Support officer;**
>
> **(c) that under the Respondent's Ill Health Redeployment – Process Guidance he should have been appointed to the role of Business Support Officer subject only to a four week trial period to assess his medical suitability;**
>
> **(d) if there were any issues with his work performance it would have been more proportionate to manage him first using the capability process instead of simply terminating his placement and then dismissing him almost immediately.**

181 The Tribunal is satisfied that the case management prior to this hearing and the Claimant's case set out on Day 1 relies, for the allegation of indirect discrimination, upon the PCP that the Claimant be subjected to "a 4-week trial period before confirming them in a new post". This is not the enlarged scope deftly sought to be achieved by Counsel for the Claimant in the "Claimant's Closing Submissions", and it is not "the requirements of [the] role as a Caretaker" relied upon in relation to the entirely separate claim brought by reference to **Section 20 of the Equality Act 2010**.

182 Having regard to all of the evidence given by the witnesses, the Tribunal finds that the procedure applied by the Respondent to the Claimant's circumstances was the "Sickness Absence Management Procedure". The (albeit confused) application of that procedure (alone or in conjunction with other procedures) involved a 4-week trial period in the role of Business Support Officer. During that trial period, the

performance of the Claimant was to be evaluated and a decision taken as to whether he should be confirmed into the trial post.

183 Evidence has been given as to what took place during the trial period. In particular, it has been set out above in this Judgment that deployment into the trial position of Business Support Officer was handled by Ms Henry, who dealt with the Claimant's "expression of interest" in the role, and confirmed the trial appointment. The Tribunal has also heard evidence that the tasks to which the Claimant was assigned were organized by way of discussions between Ms Henry and Ms Diana Small, who reported directly to Ms Henry. In relation to those tasks, and the evaluation of the Claimant's performance, Ms Small was given the task of line-managing the Claimant for the duration of the trial period. Ms Henry has provided hearsay evidence of what was allegedly discussed between the Claimant and Ms Small, although the Tribunal has not heard directly from Ms Small on that matter. The Claimant's evidence on those matters is direct, and, where there has been a divergence, the Tribunal accepts that direct version of events in preference to indirect hearsay propositions.

184 The Tribunal has heard evidence of how the procedure was supposed to operate in relation to the trial period – with specific reference being made (both in cross-examination and in final submissions) to the documentation contained in the Bundle prepared for the hearing, together with the additional document produced by the Respondent on the morning of Day 3. It has considered "what actually happened" in the light of "what should have happened" under the relevant procedure. For reasons which have been outlined already, the Tribunal has not been greatly assisted by much of the evidence given by witnesses appearing on behalf of the Respondent in relation to a number of these matters. In particular, the Tribunal has had cause to call into question the reliability of specific evidence given by Ms Walters and Ms Agbandje.

185 Taking all of the evidence together, however, the Tribunal finds that the alleged PCP for a "4-week trial" was applied to the Claimant – although it is noted that the 4-week period was, in the event, extended to cover a longer period.

186 There was dispute at the outset of the hearing as to what should be the appropriate comparator for the Claimant. As already set out at paragraph 8 of this Judgment, the Tribunal was presented with differing views as to the appropriate comparator from the Claimant and on behalf of the Respondent. It is the Claimant's case that the correct comparator for the purposes of the group of claims brought by reference to the **Equality Act 2010** is "a non-disabled new starter or a redeployed non-disabled member of staff".

187 He then says that the requirement to undertake a 4-week trial period to assess his suitability put him at a substantial disadvantage compared to non-disabled new starters in a comparable role. It is argued that this is because the Claimant had just weeks to demonstrate his suitability and access any training, whereas a new starter would have had a probationary period of 6 months.

188 While this may arguably be the case in relation to a "non-disabled new starter", the Tribunal is of the view that it is not so in relation to a "redeployed non-disabled member of staff". The distinction is important, because the Tribunal is of the view that the comparison with a "non-disabled new starter" for the purposes of

the trial period, as the PCP for the claim brought under **Section 19 of the Equality Act 2010**, is not a comparison of like with like. By contrast – and particularly taking into account the long history of what had taken place in relation to the Claimant prior to, as well as during, the trial period – an appropriate comparison can only be made with a "redeployed non-disabled member of staff".

189 Having considered all of the evidence throughout the hearing, the Tribunal therefore finds that the appropriate comparator for the purposes of the Claimant's claims by reference to the protected characteristic of disability is "a redeployed non-disabled member of staff".

190 In relation to the issue of whether this PCP places disabled employees at a particular disadvantage compared with non-disabled employees, the Tribunal, first, has regard to what a proper application of the PCP would give rise to.

191 The Claimant's submissions in relation to a comparison between a "4-week period" and a "6 months" period are, in the view of the Tribunal, disingenuous. These follow from submissions made by reference to the confused (and, arguably incorrect) application of the "Sickness Absence Management Procedure" in this case, and arguments raised on behalf of the Claimant by his trade union representative as to "what ought to have been" the applicable procedure in the Claimant's case.

192 If the procedure provided for in the "Sickness Absence Management Procedure" were to be properly applied, both disabled and non-disabled employees subject to the trial period would, in the normal course of events, have four weeks in which to (1) demonstrate their suitability and (2) access any training. In the view of the Tribunal it therefore does not follow that a proper application of the PCP places disabled employees at a particular disadvantage compared with non-disabled employees. Nor has evidence been presented to indicate how an alleged potential disadvantage can be said to arise, as submitted by the Claimant.

193 What is being submitted on behalf of the Claimant here is, essentially, an argument that there should be some modification or adjustment of the arrangements under the PCP – in other words, a submission going to **Section 20 of the Equality Act 2010** and not to "indirect discrimination" under **Section 19**.

194 Having found that this "4-week trial period" PCP has not been shown to place disabled employees at a "particular disadvantage" compared with non-disabled employees, it follows that the Claimant has failed to make out the first crucial limb of his case, and the allegation of indirect discrimination on this basis must fail.

195 For completeness, the Tribunal nevertheless addresses the issue of whether (had the "particular disadvantage" point been determined otherwise) that PCP disadvantaged the Claimant. In relation to this, the Tribunal has been greeted with submissions which go to the outcome of the trial period in the Claimant's case. It appears to be argued, in essence, that the Claimant must have been disadvantaged because he was judged not to have "passed" the trial period.

196 The Tribunal has already set out in detail its views in relation to the finding that the Claimant was unfairly dismissed. This concerns, in particular, significant shortcomings in the oversight and management of the trial period for which Ms

Henry was responsible, and in relation to which she eventually made the formal decision not to confirm the Claimant in the post of Business Support Officer. In that sense, therefore, the Claimant was "disadvantaged", in that he was then put back into the redeployment pool and Ms Calvey thereupon proceeded to a reactivation of the Employment Review Meeting, in the context of which an eventual decision to terminate his employment was taken.

197 However, the disadvantage which the Claimant suffered in that sense was not a consequence of the PCP, as alleged, but was a direct consequence of the already-described fundamental failures on the part of Ms Small, combined with the misplaced trust in Ms Small's line-management of the Claimant and the integrity of the feedback allegedly being given by her to Ms Henry. The Tribunal finds no evidential indication at all of disadvantage to disabled persons, and, taking the available evidence in the round, finds that the PCP did not disadvantage the Claimant as alleged.

198 Even had the Claimant been able evidentially to make out a general "disabled versus non-disabled" disadvantage flowing from the PCP, and then been able to show that he was himself disadvantaged by that PCP, this still leaves the Tribunal to consider the final requirement for the Claimant to succeed – namely, that the Respondent is unable to show that the PCP was "a proportionate means of achieving a legitimate aim".

199 In this context, the Tribunal has heard from Ms Walters and Ms Agbandje in relation to the operation (or intended operation) of the various procedures within the Respondent organization – in areas where the Tribunal has been able to place faith in the reliability of their testimony. An account of how matters were handled in practice has also been given by Ms Henry.

199 For the purposes of addressing this stage of the analysis, the observations of the Claimant on the basis of his prepared witness statement carry less significance. The burden is on the Respondent to establish a "legitimate aim" for the PCP to the satisfaction of the Tribunal, and to show that the PCP represented "a proportionate means" of achieving that aim.

200 This issue is addressed at paragraphs 42 and 43 of the "Respondent's Closing Submissions". Particular emphasis is placed upon the proposition that such a trial period as that constituting the PCP for these purposes is not "a one-way street" (thus enabling both sides to assess the situation), and that the "whole purpose of an initial trial period is to assess suitability early on …". The Tribunal also heard evidence from Ms Henry as to the purpose of the trial period, as well as in relation to the operation and outcomes of that arrangement in other cases. Further information, largely derived from relevant associated documents, was also provided in the witness statement of Ms Agbandje.

201 Having taken into account the evidence of the Respondent's witnesses, along with the Tribunal's own close scrutiny of the various documents setting out the procedures, and having regard to the submissions made on behalf of the Respondent (including observations made at the time of the production of the supplementary documentation at page 453a of the Bundle), the Tribunal is of the unanimous view that the Respondent has established a "legitimate aim" for its PCP

in assessing suitability for any given trial role, and that it is satisfied that the PCP applied to the Claimant was a proportionate means of achieving that aim.

202 For the reasons set out above, therefore, the Claimant's claim alleging unlawful indirect discrimination by reference to the protected characteristic of disability as provided for in **Section 19 of the Equality Act 2010** is dismissed.

(2) DISCRIMINATION BY REASON OF SOMETHING ARISING IN CONSEQUENCE OF THE CLAIMANT'S DISABILITY (Section 15 of the Equality Act 2010)

203 Turning now to the second claim brought by reference to the **Equality Act 2010**, the allegation is of unlawful discrimination by reason of something arising in consequence of the Claimant's disability.

204 **Section 15 of the Equality Act 2010** provides that:

> **(1) A person (A) discriminates against a disabled person (B) if –**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**

205 The Claimant's case is that he was "treated unfavourably" by the Respondent in that they (1) did not confirm his appointment to the role of Business Support Officer; and/or (2) dismissed him.

206 From paragraph 45 onwards of their "Respondent's Closing Submissions" the answer of the Respondent is set out, and that case is returned to in the "Respondent's Response to Claimant's Closing Submissions".

207 Much of the detail underpinning the respective submissions has been set out already in this Judgment. The Tribunal thus turns, in the light of the findings of fact already recorded, to the issues agreed in relation to this claim.

208 In relation to the first issue, the Tribunal accepts and finds that both the non-confirmation of the Claimant in the post of Business Support Office and his eventual dismissal were "treatments" which were "unfavourable" for the Claimant.

209 However, in relation to the question of whether either or both of those unfavourable treatments took place "because of something arising in consequence of B's disability" the Tribunal is of the unanimous view that this has not been made out by the Claimant.

210 The Claimant puts his case on the basis that the reason for his unfavourable treatment was (1) his inability to carry out his substantive role as a caretaker; (2) his sickness absence record; and (c) the fact that he would need reasonable adjustments to the role of Business Support Officer relating to lifting and moving furniture.

211 Taking the first "unfavourable treatment" – namely, the non-confirmation of the Claimant in the role of Business Support Officer – the Tribunal has had regard to the witness and documentary evidence in relation to the Claimant's historical employment record, the establishment of the trial period (through the Claimant's "expression of interest" to Ms Henry), the management and oversight of that trial period (primarily through the conduct of Ms Small in her role of line-management for the Claimant), and the eventual decision-making of Ms Henry which resulted in the evaluation that the Claimant had not "passed" the trial period.

212 The Tribunal has already expressed its view as to what it has described above as the "misplaced reliance by Ms Henry upon the adequacy and quality of feedback from Ms Small". That view has led the Tribunal to find that the Claimant was unfairly dismissed.

213 However, it is not the view of the Tribunal that the evidence establishes that the reason for the Claimant's non-confirmation was confined to "his ability to carry out his substantive role as a caretaker" – it was clearly a much more broadly considered decision as to the "capability" of the Claimant to rise to the demands of the position of Business Support Officer in the future, of the kind envisaged by **Section 98(3)(a) of the Employment Rights Act 1996**. When detailed consideration is given to the matters contemplated by Ms Henry at this stage, it is clear that – while she may have relied upon feedback from Ms Small which is open to challenge on the part of the Claimant (and which was challenged by his trade union representative) – the view reached by Ms Henry as to the Claimant's capability was not reached in consequence of the Claimant's disability. Likewise, in so far as the Claimant's sickness absence record was concerned, the same can be said. The Tribunal does not find that the evidence points to the Claimant's disability, giving rise to a sickness absence record of which Ms Henry was aware even before she arranged for the Claimant to undertake the trial period, being the reason (or even a reason) for the non-confirmation decision taken by Ms Henry. Finally, in relation to the proposition that Ms Henry's decision not to confirm the Claimant in the post was because of the need for reasonable adjustments to be made in the context of the Claimant's disability (in relation to lifting and moving furniture), the Tribunal is unanimously of the view that this is simply not made out on the evidence.

214 In consequence, the Tribunal finds that the first "unfavourable treatment" (the non-confirmation) did not occur "because of something arising in consequence of the Claimant's disability".

215 So far as the second "unfavourable treatment" (the termination of the Claimant's employment) is concerned, the Tribunal has considered closely the events and context leading to the decision by Ms Calvey to dismiss the Claimant. It is the unanimous view of the Tribunal that the evidence does not support the proposition that the decision to dismiss was "because of something arising in consequence of the Claimant's disability". Once again, it may arguably be the case that challenge can be made (and, indeed, was made by way of an appeal against the dismissal decision) to the accuracy of the underlying reasoning for Ms Calvey's decision. The Tribunal has already commented that the misplaced reliance by Ms Henry upon the adequacy and quality of feedback from Ms Small "fed through into the decision-making process which Ms Calvey was called upon to undertake". It is

that fundamental problem which underlay Ms Calvey's approach to the Claimant's case and which has led the Tribunal to find that the Claimant was unfairly dismissed by the Respondent.

216 The Tribunal reminds itself that the Claimant's redeployment experiences, including his trial period in the role of Business Support Officer, were over a long period, and were achieved within the framework of the Respondent's "Sickness Absence Management Procedure", about which much has been commented earlier in this Judgment. There is clear evidence that the various actors involved on the Respondent side were attempting, over a considerable period of time, to effect some form of realistic redeployment for the Claimant in the light of the medical and other information which had emerged in relation to his capability for discharging the caretaker role in which he had been employed for some time. What does not emerge from the evidence is any support for the proposition that either the decision not to confirm the Claimant in the post of Business Support Officer or the decision eventually to dismiss the Claimant had been made "because of something arising in consequence of the Claimant's disability".

217 It follows that the Claimant has failed to show evidentially that **Section 15 of the Equality Act 2010** is engaged, and there is no need for the Tribunal to consider the final issue of whether (if it had been engaged) the Respondent could show that the treatment of the Claimant was a proportionate means of achieving a legitimate aim.

218 The unanimous decision of the Tribunal is that the claim alleging discrimination by reference to **Section 15 of the Equality Act 2010** is not made out and is dismissed.

(3) FAILURE TO MAKE REASONABLE ADJUSTMENTS (Section 20 of the Equality Act 2010)

219 The issues before the Tribunal in relation to this aspect of the Claimant's case are set out in the "List of Agreed Issues" to which reference has already been made.

220 As already indicated, it was agreed between the parties at the outset of the hearing that in relation to the allegation of the failure by the Respondent to make reasonable adjustments this related to "the redeployment of the Claimant to the position of Business Support Officer".

221 The Tribunal reminds itself that, until the end of the morning of Day 1 of the hearing, it was not agreed by the Respondent that the Claimant was a "disabled person" for the purposes of his claims brought by reference to the protected characteristic of disability. That position then changed with an eventual concession on the part of the Respondent that the Claimant did satisfy the requirements of the definition to be found in **Section 6 of the Equality Act 2010**.

222 During the course of the hearing the Tribunal has had the benefit of seeing medical reports and related documentation in relation to the Claimant. Notwithstanding the stance initially taken by the Respondent in relation to the "disabled person" issue, it has not, in the event, proved particularly controversial

as to when the "medical" material came to the attention of the Respondent or of what was its content. The Tribunal notes the Claimant's account of his relevant medical history set out in his witness statement, and that evidence has not been challenged.

223 **Section 20 of the Equality Act 2010** provides that:

> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.**
>
> **(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.**
>
> **(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.**
>
> **(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.**
>
> **(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to –**
> **(a) removing the physical feature in question,**
> **(b) altering it, or**
> **(c) providing a reasonable means of avoiding it.**
>
> **(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to –**
> **(a) a feature arising from the design or construction of a building,**
> **(b) a feature of an approach to, exit from or access to a building,**
> **(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or**
> **(d) any other physical element or quality.**
>
> **(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.**
>
> **(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.**

> **(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.**

224 In relation to **Section 20(3)**, the notion of a "substantial" adverse effect is clarified in **Section 212 of the Equality Act 2010** as an effect which is something "more than minor or trivial". This follows from the provision that:

> **(1) In this Act –**
> **…**
> **"substantial" means more than minor or trivial;**

225 It is common ground that the Claimant is a "disabled person" for the purposes of this claim.

226 The Tribunal has already expressed its view that the correct comparator for the purposes of this claim should be "a redeployed non-disabled member of staff".

227 The Claimant relies upon two distinct PCPs as set out in the "Agreed List of Issues".

228 The first PCP alleged is put in terms of:

> **… the requirements of the role as a Caretaker including manual handling, heavy lifting, driving tugs, walking distances, climbing stairs and being active for more than an hour or two a day.**

The comparator is "a redeployed non-disabled member of staff", and the alleged substantial adverse effect arising out of that first PCP is said to be that:

> **… the Claimant's disability prevented him from carrying out the above requirements of his role as a caretaker.**

This is contrasted with the alleged situation for a non-disabled employee without the Claimant's back and related conditions, who, it is submitted, would not have been so disadvantaged.

229 The second PCP is said to be:

> **… the requirement to undertake a 4-week trial period to assess his suitability (beyond his medical condition) for the post of Business Support Officer prior to being confirmed in the role.**

The comparator is "a redeployed non-disabled member of staff", and the alleged substantial adverse effect arising out of that second PCP is said to be that:

> **The Claimant had just 4 weeks to demonstrate his suitability and access any training.**

230 The Claimant sought to contrast this with the alleged situation for "a non-disabled new starter in the role" who, it is claimed, would have had a probationary period of 6 months in which to demonstrate his suitability and access any training. However, for reasons already set out, the Tribunal has taken the view that the appropriate comparator is "a redeployed non-disabled member of staff".

231 The Claimant's case is that the statutory duty to make reasonable adjustments, set out in **Section 20 of the Equality Act 2010**, was engaged in

relation to "the redeployment of the Claimant to the position of Business Support Officer", and he claims that the Respondent failed to make such reasonable adjustments as that duty required.

232 In particular, he submits that the question for the Tribunal comes down to whether the Respondent should have taken either or both of the following steps as constituting "reasonable adjustments" to accommodate the Claimant's disability and enable him to continue in employment, namely: (1) appointing the Claimant to the role of Business Support Officer subject only to his medical suitability with adjustments; and/or (2) appointing the Claimant to the role of Business Support Officer at the conclusion of his 4-week trial period given he had performed well so far in the role.

The First PCP

233 In relation to the first alleged PCP, the Tribunal reminds itself of the evidence received from Ms Henry. She arranged for the Claimant to be placed on the 4-week trial as Business Support Officer, and was responsible for the letter which was sent to the Claimant setting out the basis of the trial. Ms Henry was aware that the Claimant had come to them from the "ill-health redeployment pool". She further stated that Ms Small, to whom she entrusted the task of line management for the Claimant's trial period, had been made aware of this as well.

234 Ms Henry told the Tribunal that this was not the first time she had taken somebody from the ill-health redeployment pool for a trial period, and explained that "… some of the past redeployees passed their trial periods, whilst others did not". However, no evidence was given either by the Respondent or on behalf of the Claimant to indicate anything about the particular circumstances (including whether disability might have been a circumstance) of any of those past redeployees.

235 The Tribunal received an account of the areas into which the Business Support service was recruiting at the time of the Claimant's trial, and was given an indication of various requirements said to be expected of anybody who might be employed in such roles. That evidence was not challenged.

236 Ms Henry described how, when the full extent of the Claimant's back condition became known:

> **… we discounted him from many of the tasks undertaken by the Agile Support Team and focussed the trial on Business Visitors and the area of Systems and Transaction teams supporting Education Welfare and Special Education Needs …**

This resulted in the Respondent arranging for what was described as "a desk-based role", rather than a role reflecting the entirety of the potential requirements of the Business Support service without limitation.

237 Amongst the steps taken in the light of the information about the Claimant's back condition was a request for HR to undertake a "DBS check" – this being a Disclosure and Barring Service check as to the existence of a criminal record, a pre-requisite to working in specified areas, including in relation to education and special needs – in order to enable the Claimant to undertake tasks as part of the

Education Welfare and Special Education Needs team. However, the Tribunal was told that, at a late stage during the course of the trial period, the Respondent's intention to train the Claimant on "key systems … supporting areas of Education Welfare and Special Needs …" had to be abandoned, because at that stage "… we were still awaiting DBS clearance".

238 Ms Henry also told the Tribunal that, on learning that the Claimant had a period of annual leave booked in June/July during the period set for the trial period, she "… authorised an extension of two seeks to be added to his trial period".

239 This evidence on behalf of the Respondent as to what was done in the light of discovering the Claimant's back condition was not challenged.

240 The Tribunal accepts the proposition that the Claimant's disability gave rise to difficulties in undertaking the requirements of his original role as a Caretaker for which he had been contracted in 2004, and finds that this was such as to "put him at a substantial disadvantage" in relation to a relevant matter in comparison with persons who are not disabled. It is not in dispute that this role involved requirements to undertake manual handling, heavy lifting, driving tugs, walking distances, climbing stairs and for the Claimant to be active for more than an hour or two a day.

241 Given that, there is no real dispute on the issue of whether, in consequence, a statutory duty to make reasonable adjustments arose in relation to the Respondent.

242 In particular, the "first requirement" in **Section 20(1)(3) of the Equality Act 2010** is made out, and, in so far as the PCP relates to "a physical feature", the "second requirement" in **Section 20(1)(4)** is also engaged. In reaching that conclusion the Tribunal has, in accordance with **Section 20(13)**, had regard to the provisions of "the applicable Schedule", which, in relation to "Work" (Part 5), is **Schedule 8 of the 2010 Act**. The Tribunal has also taken into account the provisions of **Subsections (9) and (10) of Section 20 of the Equality Act 2010** in relation to the "second requirement".

243 It therefore follows and the Tribunal finds that the Respondent was under a statutory duty "… to take such steps as it is reasonable to have to take to avoid the disadvantage" occasioned by the first PCP.

244 The Tribunal is also satisfied and finds that – notwithstanding the initial stance taken by the Respondent on Day 1 in respect of whether the Claimant was a "disabled person" for the purposes of this litigation – the Respondent was aware of this situation and the challenges which it posed to the Claimant in being able to undertake elements of the role for which he was employed.

245 That being the case, the question for the Tribunal is whether the Respondent took "such steps as it is reasonable to have to take to avoid the disadvantage" suffered by the Claimant in the context of his disability and the first PCP applied by the Respondent.

246 The Tribunal reminds itself of evidence concerning "adjustments" in relation to the Claimant in the wake of an earlier "Stage 1 Absence Review Meeting"

meeting in April 2015 (see above at paragraph 31 of this Judgment). Mention has also been made of steps taken by the Respondent on receipt of an OH report provided in February 2016, in which it was made clear that the Claimant was fit to be redeployed to another role, provided that this was an office-based role (see above at paragraph 34 of this Judgment).

247 In the light of the evidence given by the Claimant and by Ms Henry, taken together with the relevant supporting documentation concerning the first PCP in the context of the redeployment of the Claimant to the position of Business Support Officer, the Tribunal finds that the Respondent took a number of steps which were clearly intended to avoid the disadvantage perceived as being suffered by the Claimant in the light of his back condition. Those steps went to precisely the physical considerations set out as the first PCP itself.

248 In the unanimous view of the Tribunal those steps taken by the Respondent constituted "such steps as it is reasonable to have to take to avoid the disadvantage" in those circumstances, and it therefore follows that, in respect of the first PCP, the Respondent satisfactorily discharged their statutory duty under **Section 20(3) and (4) of the Equality Act 2010**.

The Second PCP

249 Turning to the second PCP, the thrust of the criticism levelled against the Respondent throughout the hearing has been either that the wrong procedure was applied to the Claimant's circumstances or that decisions were made as to the future potential for the Claimant to discharge particular functions – it being alleged that such decisions were tainted by preconceptions of the Claimant's capability deriving from the fact of his disability.

250 That is rather different from the way in which the Claimant's case was developed during the course of the Case Management Hearing before Regional Employment Judge Potter in which the issues were originally discussed, and the way in which the issues were eventually agreed on Day 1 of the hearing, in terms that the Claimant "… had just 4 weeks to demonstrate his suitability and access any training".

251 The Tribunal notes the evidence concerning the involvement of the Claimant's trade union representative at various stages in the events prior to the dismissal, and accepts that attention was properly drawn by the Claimant's representative to the "Organizational Change Policy" which, as outlined above in this Judgment, came into play alongside the "Sickness Absence Management Procedure" and the "Ill-Health Redeployment Guidance".

252 Indeed, it is from a comparison of the provisions and procedures to be found in the Respondent's various formally documented procedures that the proposition in relation to "6 months" as compared with "just 4 weeks" arises. However, this is conveniently to overlook the fact that the PCP complained of in the "Agreed List of Issues" is the PCP of the "4-week trial period", which follows from application of the Respondent's "Sickness Absence Management Procedure".

253 It is also the case that the "6 month" point necessitated the submission on behalf of the Claimant that the appropriate comparator should be "a non-disabled new starter in the role" – which submission has been rejected by the Tribunal in finding that the appropriate comparator for the purpose of these claims is "a redeployed non-disabled member of staff".

254 It is also particularly instructive to have regard to what the submissions made on behalf of the Claimant say "should have been done" by the Respondent – in other words, the Claimant's version of what should have been the "reasonable steps" taken. Thus, one of the issues in the "Agreed List of Issues" for this Tribunal is the question of:

> **Should the Respondent have taken the following steps as reasonable adjustments to accommodate the Claimant's disability and enable him to continue in their employment:**
>
> **(a) appointing his to the role of Business Support Officer subject only to his medical suitability with adjustments; and/or**
>
> **(b) appointing the Claimant to the role of Business Support Officer at the conclusion of his 4-week trial period given he had performed well so far in the role.**

This is amplified in the "Claimant's Closing Submissions" in terms that:

> **(a) he should have been appointed to the role of Business Support Officer subject only to his medical suitability with adjustments. This was consistent with the Respondent's own Ill-Health Redeployment – Process Guidance and would have removed any disadvantage based on the limited duration of the trial period and/or unfounded assumptions being made about his abilities; and/or**
>
> **(b) he should have been appointed to the role of Business Support Officer at the conclusion of his 4-week trial period given he had performed well so far in the role as above. There were no concerns about his actual work performance – only assumptions about his future performance.**

255 It appears to the Tribunal that what is really being advocated here on behalf of the Claimant is that there should have been an insertion into an existing post (in this situation, the post of Business Support Officer) irrespective of the suitability (from all perspectives) of the intended incumbent. Short of that, the submission is that there has, inevitably, been a failure on the part of the Respondent to discharge the duty imposed by **Section 20 of the Equality Act 2010**.

256 In the view of the Tribunal, that submission goes too far. Whether or not one accepts the viability (or even desirability), in the circumstances of this case, of a specific resolution of the kind sought by Counsel for the Claimant, the task of the Tribunal is to determine whether the Respondent took "such steps as it is reasonable to have to take to avoid the disadvantage" faced by the Claimant as established by the available evidence.

257 It has to be borne in mind that the trial period relating to the post of Business Support Officer constituted just one of a number of initiatives seeking to meet the challenges faced by the Claimant in the wake of his long-term ill-health absence following deterioration in his medical condition. Furthermore, it has to be recalled that there had been ongoing application of the ill-health redeployment policies of the Respondent since April 2015. There had also been efforts to facilitate some form of "early retirement package" for the Claimant within the framework of the

Local Government Pension Scheme – something which continued even after Ms Calvey's decision to terminate the Claimant's employment on "capability" grounds. At no stage has it been suggested that these were mere cosmetic antics, or that anything done in this context by the Respondent had not been in good faith, yet all of these had come to naught.

258 The Tribunal has already made mention, in the context of looking at the first PCP, of steps taken by the Respondent to avoid the disadvantage under which the Claimant may have laboured in relation to that PCP. Those steps have relevance also to the discharge of the Respondent's statutory duty in respect of this second PCP.

259 Looking at the circumstances of this case in the round, the Tribunal does not accept the submission put on behalf of the Claimant that there should have been a confirmation into the post of Business Support Officer "come what may" – or even the rather disingenuous proposition that the Claimant should have been confirmed in that post "subject only to his medical suitability with adjustments".

260 Nor does the Tribunal find that the failure to appoint the Claimant to the role of Business Support Officer was in any way whatsoever tainted by disability-related considerations on the part of the Respondent. The reasons underlying the outcome of the trial period have been clearly set out and roundly criticized by the Tribunal in the context of its analysis leading to the conclusion that the Claimant was unfairly dismissed by the Respondent.

261 Indeed, the Tribunal notes in passing that it may arguably have been the case – had there been proper and adequate line management by Ms Small and a more questioning approach adopted on the part of Ms Henry – that the Claimant "should have" (on some objective criterion) been appointed to the role of Business Support Officer, if it were to be accepted that "he had performed well so far in the role". However, to accept the proposition that "he had performed well so far in the role" – which is what is put forward as the Claimant's case – must lead to the conclusion that the PCP had not in fact served (either in general terms or specifically in relation to the Claimant) to place a disabled employee undertaking the trial period at a "substantial disadvantage", given that, on his own case, the Claimant had satisfied the demands made of the trial such as to justify/deserve confirmation in the post.

262 In the light of the above, therefore, it follows that, in respect of the second PCP, the Tribunal finds that the Respondent satisfactorily discharged their statutory duty under **Section 20(3) and (4) of the Equality Act 2010**.

263 In the round, therefore, having regard to their findings in relation to both the first PCP and the second PCP, the unanimous decision of the Tribunal is that the claims alleging failure to make reasonable adjustments by reference to **Section 20 of the Equality Act 2010** are not made out and are dismissed.

264 By way of completeness, the Tribunal places on record that – as it was encouraged by Counsel for the Claimant to do – full regard has been had to the Opinions of Their Lordships in the case of **Archibald v. Fife Council, [2004] ICR 954**, in which the (then) House of Lords considered in detail the approach to be taken in cases where the question arose as to what might constitute the

"reasonable steps" required of an employer in relation to whom what is now the **Section 20 Equality Act 2010** duty arises.

265 It is noted that the **Archibald** case was supported and litigated by what was then the Disability Rights Commission, as "a test case on a point of principle" (see per Baroness Hale, at page 974E-F). The Tribunal also bears in mind that the statutory provisions under consideration in that case were as they appeared before the enactment of the **Equality Act 2010**.

266 On a superficial reading of the facts found in **Archibald**, there would appear to be something in common between that case and the present. Indeed, Counsel for the Claimant has invited the Tribunal to apply directly certain conclusions reached by Their Lordships in **Archibald**, on the basis that those accord with what are said to be the facts of the present case.

267 It should also be noted that certain observations made in the **Archibald** case – particularly in the Opinion of Baroness Hale – have received widespread criticism in academic commentaries, which generally regard that case as an example of the House of Lords taking "a particularly liberal approach" to the Claimant's position. Aim has been taken at the proposition that: "… to the extent that the duty to make reasonable adjustments requires it, the employer is not only permitted but obliged to treat a disabled person more favourable than others" (per Baroness Hale at page 973B), and since the coming into force of the **Equality Act 2010** the question has been raised as to what are the limitations upon "even a concept as elastic as reasonable adjustments". In that context, attention has been drawn to a series of decisions at the level of the Employment Appeal Tribunal which it is suggested reflect part of "continuing efforts to strike the appropriate balance". Amongst cases cited in relation to that proposition are **Royal Liverpool Children's NHS Trust v. Dunsby, [2005] UKEAT/0426/05; Tarbuck v. Sainsbury's Supermarkets Ltd, [2006] UKEAT/0136/06; and O'Hanlon v. HMRC, [2006] UKEAT/0109/06**.

268 However, this Tribunal is guided by the state of the decided law as it currently stands. Thus, **Archibald** continues to be relevant in so far as its reasoning can be applied to the post-2010 statutory provisions. Nevertheless, even if it is accepted that the propositions in **Archibald** continue to have validity in the light of the current statutory wording following enactment of the **Equality Act 2010**, the Tribunal is of the view that there are significant matters of fact-finding which make the situation in **Archibald** distinguishable from the findings of fact in this present case.

269 In reaching their conclusion, the Tribunal has paid particular attention to the warnings sounded by Their Lordships in **Archibald** as regards the proper approach to be taken at the level of the Employment Tribunal. This includes the need for due consideration of "reasonableness", which was a matter not considered by the Tribunal of fact in the **Archibald** case. Note has also been taken of the observation at page 972D-E that:

> **The duty is to take such steps as it is reasonable in all the circumstances of the case for the employer to have to take.** ***(emphasis added).***

Indeed, Baroness Hale herself recognises that the task posed for a Tribunal by the statutory provisions makes this "quite a difficult exercise to undertake".

NOTE

270 The Tribunal finally places on record that, in relation to its consideration of the applicable law concerning the matters arising by reference to the Claimant's **Equality Act 2010** claims, it came to the attention of the Tribunal during the course of their deliberations in Chambers on 9 and 10 April 2019 that an appeal in the case of **Owen v. AMEC Foster Wheeler Energy Limited and another** had been heard before the Court of Appeal on 19 March 2019. It was understood that matters directly touching issues arising in this case had been aired in the course of the **Owen** hearing.

271 At the time of the Tribunal's deliberations in Chambers, therefore, the outcome of the **Owen** case was not known and the Tribunal proceeded to reach their Judgment and to set out their reasoning without that information and on the basis of the law as understood at that time.

272 The decision of the Court of Appeal in the **Owen** case was subsequently handed down on 14 May 2019 and reported as **[2019] EWCA Civ 822**.

273 In the knowledge that a decision in **Owen** was forthcoming, the Employment Judge spoke informally with the other members of the panel and delayed promulgation of this Judgment until receipt of the reasons in **Owen**. This was done with a view to confirming whether the decision reached by this Tribunal might be affected by the pronouncements of the Court of Appeal in **Owen**.

274 In the event, the Tribunal is of the view that the observations of Singh LJ in **Owen** – particularly as those relate to the correct approach to be taken in disability cases where "indirect discrimination" is alleged or where the duty to make "reasonable adjustment" is alleged to arise – do not cause the Tribunal to modify its reasoning and conclusions reached during the deliberations in Chambers on 9 and 10 April 2019.

DISPOSAL

275 In the light of the above, therefore, the unanimous decision of the Tribunal is that:

(1) the Claimant was unfairly dismissed by the Respondent;

(2) the Claimant's claim alleging that he has been unlawfully discriminated against (indirect discrimination) by reference to Section 19 of the Equality Act 2010 is dismissed;

(3) the Claimant's claim alleging that he has been discriminated against by reason of "something arising in consequence of his disability" by reference to Section 15 of the Equality Act 2010 is dismissed; and

(4) the Claimant's claim alleging that the Respondent has failed to discharge a duty arising under Section 20 of the Equality Act 2010 to make reasonable adjustments in relation to circumstances touching his disability is dismissed.

CONSEQUENTIAL

276 In order to deal with matters arising in consequence of the Tribunal's finding that the Claimant was unfairly dismissed by the Respondent a remedy hearing will be listed for a date to be agreed.

Employment Judge Professor A C Neal
10th April 2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

09/07/2020.

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS