**Case Number: 1402407/2019**

# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr. M Ferguson**

**Respondent:** **Bristol City Council**

**Heard at:** **Employment Tribunal.On 3,4,5 and 6 September 2020. Deliberations and Judgment 6 September.**

**Before: Employment Judge Hargrove sitting with members Mr J Howard and Mr E Beese.**

**Representation**
**Claimant:** **Ms A Johns, Counsel**
**Respondent:** **Mr D. Stewart, Counsel**

**JUDGMENT** having been sent to the parties on 4 September 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

1. By an ET1 claim received on 27th of May 2019 the claimant submitted claims which included unfair dismissal, acts of discrimination arising from disability, and failures to make reasonable adjustments, up to and including his dismissal at an internal hearing on 25th of April 2019 on notice expiring on 17th of July 2019. The claimant had entered into early conciliation between the 1 and 13 May 2019. At a first case management hearing on the 16 January 2020 the claimant was given leave to add claims of direct discrimination and harassment. At a second case management hearing on the 7 August 2020 the parties were ordered to agree a final revised list of issues by the 28 August 2020, which has formed the basis for the evidence given to the tribunal at this hearing; and a statement of agreed facts, which is inadequate.

2. As to the revised list of issues, the claimant has withdrawn his claim of direct discrimination, and, during the full hearing, his claim of harassment, thus avoiding the necessity for the respondent to call Ann Wall, who had investigated his grievance concerning harassment, allegedly by Adrian Randall, Head of facilities management, in forwarding a chain of emails containing personal information about the claimant. This was a realistic concession: – it was not explained how his treatment related to his protected characteristic, namely disability.
3. The claimant gave evidence in support of his claims. The respondent called Tony Nichols (AN) as a witness as being the claimant's line manager, and John Walsh (JW) as being the claimant's dismisser at the Level 3 hearing.
4. As to **disability**, there are two impairments upon which the claimant now relies.

   4.1. First, PTSD, which was, according to a psychiatric report from Dr Bruce Jones dated 2 September 2005 at pages 55 to 77, first diagnosed by him in November 2011; and was caused by an accident at home in 1999 when he had had hot tar spilt on him from a tar boiler.There is much information as to the symptoms of PTSD and, in particular, its effects upon the claimant. It appeared that this report was prepared for an earlier ET claim made by the claimant against Bristol City College. The respondent conceded that the adverse effects of the PTSD did constitute a disability but it denied actual or constructive knowledge of that diagnosis until the claimant raised a grievance in respect of his treatment by Bristol Harbour, (where he started work on 4 August 2011). Section 15 of EQA requires the employer to show that it did not know and could not reasonably have been expected to know that the claimant had the disability. This issue is highly relevant to the claimant's first head of claim of unfavourable treatment because of something arising from this disability, dating from the period of sickness absence, initially from 22 July 2016 to 6 January 2017, which absence was extended by medical suspension on full pay from 6 February (backdated to 6 January 2017), even though the claimant's entitlement to full sick pay had expired. A time point also arises as to this head of claim, because his tribunal claim was not brought until 27 May 2019, well outside the three month time limit provided in section 123 (1) of EQA, unless the claimant was able to prove that there was a continuation of a further period of discriminatory treatment extending over a period ending within three months of the bringing of the tribunal claims, subject to the provisions concerning early conciliation.

   We have concluded that the respondent was not on notice that the claimant had PTSD such as to require further consideration until receipt of his grievance against his line manager in August 2016.

   4.2. The second impairment upon which the claimant relies as a disability is a back condition, significantly aggravated by an accident when, on 26 September 2018, 11 months after his return from medical suspension, he was attempting to remove a semi-submerged suitcase at Temple Back, the handle broke and he was catapulted backwards against the side of the vessel, landing on his back on a winch.The claimant reported sick and was signed off by his GP from 28 September 2018. He remained off sick until his dismissal on notice at a level 3 hearing under the procedure on 25 April 2019, the respondent having jumped from level 1 to level 3 in the respondent's SAMP following a resumed level 1 on 1 March 2019, skipping the level 2 process. These are the facts which the parties ought to have agreed prior to the hearing, which would have reduced the length of the Hearing. The precise identification of the back injury is not entirely clear, but it has always been

conceded that the injury did amount to a disability under the Act. The respondent has not disputed the issue and concedes that the claimant was dismissed in 2019 from his then post as MSS for a reason related to this back injury. The essential issue for the Tribunal under this head of claim was whether the respondent could justify the claimant's removal from his post as MSS, and his dismissal from employment with the respondent as pursuing a legitimate aim, namely, the provision of a safe system of working and the provision of the service, both for other employees and the public, having regard to the claimant's lengthy periods of absence, and having regard to the impact on the remaining 3 members of the MSS team.

5. Prior to the claimant's appointment as an MSS, the claimant had worked on a casual basis at the Harbour from around 2008. He was interviewed for the supervisor's post in August 2011 and was appointed to start on 1 November 2011. The claimant claims that his line manager, Tony Nichols, stated at the time that if the claimant was successful, he, TN, would resign. We reject the claimant's evidence on this point. Both the claimant and TN gave evidence to the employment tribunal,(as did Mr John Walsh, (JW) director workforce and change, who made the decision to dismiss).
6. The claimant also claims that he had reported to the respondent that he had PTSD in various written applications he made for employment. These are dated 11 January 2006, pages 78 to 79, 24th December 2008, pages 80-81, and 18 September 2009, pages 89- 90. He ticked the box "Yes" for disability in 2006, but it does not identify any impairment. He ticked the box "No" in answer to that question in 2008 when applying for a post of administrative officer – training, and also in 2009. He also ticked the box "No" on his application for the MSS post in August 2014. The respondent did not have actual or constructive knowledge from these communications.
7. There is a lengthy history of the claimant's absences from work compiled by TN in his report to the level three hearing at pages 553-554. He suffered a broken ankle at work which resulted in his being off work from 22 May 2012 to 19 June 2012. This was the subject of a personal injury claim by the claimant . A report was obtained from a Dr Webb dated 14 November 2012, which, in addition to dealing with the physical injury, also referred to his history of PTSD. It is understood that the claim for PI was settled. We conclude that the report will have been disclosed only to the respondent's insurers. We are satisfied that the respondent was not aware of the historic diagnosis of PTSD until August,2016 see paragraph 4.1 above.
8. The claimant's next significant period of absence was from 9 September 2014 to 21st of October 2014 for 43 days for "prolapsed disc in spine". This may or may not have been aggravated by the subsequent boat accident in September 2018, but it is only the later aggravation of injury which is relied upon as a separate disability, and only from September 2018.
9. The next significant absence was from 22 July 2016 to 5 January 2017 (168 days) followed by the claimant's medical suspension from 6 January 2017 to 27 October 2017.(280 days).The reasons for these absences were said to be PTSD, Stress and "Cardiac". This was a reference to the claimant having been diagnosed with a heart condition – identified as supraventricular tachycardia, or SVT, which the claimant also does not rely upon as a disability.
10. It is not so much the fact of the claimant's medical suspension from 6 January 2017 that the claimant claims as unfavourable treatment arising from his disability, namely the PTSD, but the length of it. The claimant did not suffer

any financial loss as a result because he was paid in full throughout the period of suspension. He claims that he was "psychologically damaged" (see paragraph 21 of the claimant's closing submission submission) because he was not permitted to return to work sooner.There is, however, no record of any such medical complaint to his GP during the period of medical suspension, although there are a number of entries relating to other matters including CVT, none of which relate to the disability engaged at this stage of the case, namely PTSD.

11. As to this head of claim, we conclude that it was presented out of time and that it would not be just and equitable to extend time in the circumstances. There was no continuing state of affairs after his return to work in October 7 2017, as defined in **Hendricks v Metropolitan Police Commissioner 2002** EWCA CIV1686. He remained at work until his subsequent back injury on 18 September 2018, 11 months later, apart from 3 days off with Cellulitis in July 2018, which condition had no connection with either of the impairments constituting disability. Certainly, the back injury was a totally different injury or impairment from PTSD. Time in fact began to run in respect of this head of claim, under section 123 (4) of EQA, when the employer might reasonably have been expected to allow a return to work, which the claimant places as being 6 February 2017, under his fit note. As to the just and equitable extension, we were referred to the test in **Bexley community centre v Robertson** and the discretionary factors contained in section 33 Limitation Act1980, mentioned in **British Coal Corporation V Keeble 1997 I RLR page 336**. The claimant has not asserted that he was ignorant of his right to bring a tribunal claim, or of time limits. He had brought an earlier Employment Tribunal claim. The respondent was entitled to conclude that the claimant was not bringing any further complaint in this respect, and he did not raise an issue, following his return in October 2017, until receipt of his ET1 on 29 May 2019, nearly 20 months later. Furthermore, we have found that the claimant's claim in this respect to be extremely weak on the merits. It was highly unlikely to succeed. The respondent had good reason to be concerned about the claimant's fitness to return to work without risk to himself or to other members of the MSS team, or to the public. That concern was not only because of the claimant's PTSD, about which they did not know until August 2016, but also because of his CVT, which is not alleged to be a disability. It took some time (until June 2017) for the claimant's GP to deal with an enquiry from occupational health about this condition. Occupational health then reported on 14 August 2017 (page 297) which gave the opinion that the claimant was fit to return to work for duties including lone working, but subject to the recommendation that he was to be exempted from confined space working. This itself remained a problem. There was also a problem in arranging mediation with the other members of the team affected by the claimant's absence. The claimant went off on agreed annual leave (paid) from 1 to 18 October 2017 and returned immediately thereafter. He was on full pay throughout this period, although his entitlement to full sick pay would have long expired. The respondent had legitimate concerns about the claimant's fitness to return to work. The actions of the respondent were justified in pursuing the legitimate aim of providing a safe working environment for the workforce and public, including the claimant. Finally, the claimant has a claim which we now consider in respect of his later dismissal on notice on 25 April 2019 following a further lengthy period of sickness absence from 28 September 2018. For each of these reasons we declined to exercise a discretion to extend time.

12. The claimant's absence record after his return from medical suspension in October 2017 is identified in Tony Nichols' (TN) report for the attendance reviews, pages 553-556, which led to the claimant's notice of dismissal at the level three hearing on 25 April 2019. At page 553 TN set out the claimant's more recent absences: –

    From 22 July 2016 to 10 October 2017, 168 days, ( for impairments including PTSD), followed by 280 days on medical suspension).

    From 2-4 July 2018, 3 days for cellulitis.

    From 28 September 2018 to 3 April 2019, 185 days (continuing).

13. The relevant events in the latter period were helpfully summarised by TN in Appendix 1 at pp. 557-563. We interpose within our summary of these events the alleged PCPs and failures to make reasonable adjustments.
14. From 27 September 2017 there were a series of update emails from the claimant to TN describing his condition, and a series of fit notes from his GP citing variously shoulder injury, soft tissue to the right side, broken ribs, and from October 2018, a herniated disc in the C2 to C6 region, lower back pain, and from November 2018 a suspected herniated disc in the lower spine. The claimant was initially scheduled for an MRI scan in late December, but this was cancelled apparently due to concerns about the effects on his PTSD of an examination in an enclosed MRI scanner, and replaced by a CT scan. The claimant reported that he could not have physiotherapy until the scan had taken place.
15. On 7 November 2018 the claimant was notified by T.N. that he had triggered level 1 in the sickness absence policy and that he wished to arrange a meeting to discuss it, the claimant having had 29 days sickness absence under the policy which provided for triggers of six working days in the preceding three months or 12 days in the preceding 12 months. The material parts of the policy are at pages 604-606 of the bundle. In fact, communications between TN and HR show that consideration was being given to visiting him at his home if he could not attend the office; and postponement until the result of an x-ray or CT scan was known.
16. There were then a further series of emails in the course of which TN notified a postponement of the level one meeting.
17. The claimant notified that a meeting at his home was inappropriate "for personal reasons", and suggesting a meeting at his parent's home "when my condition improves". He said he would agree to a telephone meeting. He also said he could not attend a meeting due to "severe pain".See page 389.
18. On 14th November the claimant notified a physiotherapy appointment on 17th of November and a further GP appointment on 16th of November.
19. On 19th November (pages 399 and 401) TN wrote to the claimant notifying a meeting at City Hall and suggesting an alternative place if he could not attend there, but that the respondent would accept written submissions with the meeting to be held in the claimant's absence. The claimant's absence had by then increased to 53 days
20. The claimant's latest sicknote from his GP on 29th November covered him until the 2nd of January 2019 (page 346). On the same day the claimant sent a lengthy written statement see pages 407 to 409.
21. On 3 December the level 1 meeting was postponed pending a reference for an occupational health report see page 415. Meanwhile on the 7th of December the claimant raised a grievance against TN citing "serious misconduct". The claimant attended occupational health on 8 January 2019 and the report, with the claimant's comments on it annexed, was obtained on 9th of January see pages 458-459.

22. On 15th February 2019 the claim was invited to a resumed level 1 meeting on the 1st of March at City Hall ( page 491). The letter repeated that written submissions would be accepted if the claimant was unable to attend. By that stage the claimant's absence had extended to 117 days. TN emailed separately saying that if the claimant could not attend at this location, "please could you suggest an alternative".
23. On 24th of February 2019 the claimant responded, page 494, stating "on reflection, I do not feel attending the meeting would be in any way helpful towards my recovery at this time". The claimant said he was "gradually recovering", but progress is very slow." I am finding (it) " increasingly frustrating and stressful…".
24. It is to be noted that the claimant did attend his grievance meeting with HR in person on 26th of February 2019 at a Bristol city council office. He said in evidence to the tribunal that a special arrangement was made for his daughter to drive him to the meeting, which could not be repeated for the resumed level 1 meeting. However we note that in response to an invitation from TN to supply an updated written statement on 25th February – page 499 – he said he was "not refusing to attend a meeting, but simply declining your invitation for the reasons given in my last email". (That of 24th of February).Nothing was said about difficulty in travel.
25. On 8th of March 2019 TN wrote to the claimant notifying him that he had decided to escalate the matter to a level 3 attendance meeting, and giving detailed reasons for that escalation. See pages 521 to 522. On 3 April 2019 JW wrote to the claimant inviting him to the level 3 attendance review meeting to be held in a room in the city hall on 25th April 2019 at 9 am.See pages 540 2541. "The purpose of the meeting is to consider your continued absence from work, medical condition and your ongoing employment situation. I must inform you that this could result in formal action up to and including dismissal".
    " I understand from management that there is a significant ongoing impact on the service and colleagues in covering the shifts, compromising health and safety and Harbour Authority's statutory duties. The work life balance of colleagues who have been populating a 4 person rota. with only 3 for a protected time is impacted, and the extended hours and the extra shift that is commencing at the end of March will exacerbate this and make it impossible for the service to run. Unfortunately because there remains no indication that you will be fit to resume work in the foreseeable future, there is no alternative but to review your ongoing employment.
    A management report detailing the background will be shared with you in due course.
    You have the right to be accompanied by your trade union representative or a work colleague please let me know.
    If you are unable to attend for any reason you can, if you wish, ask your trade union representative to attend to present on your behalf. In the event that you or your representative do not attend, the review meeting may be held in your absence to determine what action is to be taken in relation to your employment situation".

26. These events give rise to the following claims of PCPs, and failures to make reasonable adjustments: –
    (1) The practice of only conducting attendance review meetings face-to-face, thereby substantially disadvantaging the claimant in being unable to

attend. The suggested reasonable adjustment was conducting the meeting by telephone.TN says he was advised by HR not to do this.

(2) The practice of requiring employees to return to work from sickness absence to the same role that they worked in prior to that sickness absence. The claimant's closing submissions suggest that this PCP relates to the events of 2017, and not 2019. If that is so, that claim was also presented out of time.

(3) The practice of requiring employees to maintain a certain level of attendance to avoid being at risk of attendance review proceedings, the suggested reasonable adjustment being that the claimant should have been afforded an extension of trigger points under the attendance review procedure.

(4) The practice of continuing the attendance review procedure without obtaining updated relevant medical evidence. This refers to the fact that the latest occupational health advice received prior to the decision to dismiss the claimant from the MSS post was dated 8 of January 2019. It was said that the respondent should have got more up to date OH Advice.

(5) The Practice of allowing only a colleague or trade union representative as an employee's companion at attendance review meetings as set out in the level three invitation letter on 3 April 2019 at page 240. The claimant's case is that attendance at the Level 3 meeting would put him at a substantial disadvantage as a PTSD sufferer.

(6) The practice of requiring employees to work overtime.

27. The claimant's latest fit note from his GP dated the 3rd of April 2019 indicated a period of sickness absence from the 3rd of April to the 5th of May 2019. See page 543. In fact they continued throughout the claimant's notice period.

28. On 15th of April the claimant responded to JW's invitation "As I am not a member of a trade union and have lost contact with my colleagues, I will be unrepresented at our forthcoming meeting. Facing a panel of four persons from Bristol City Council, as you can imagine, is a daunting prospect. Would it be possible for you to arrange an independent notetaker to record the meeting in an impartial way"?

29. The meeting took place on 25th of April and was attended by the claimant and JW as chair, with TN presenting the management case and two HR consultants. The notes of the meeting or at pages 564 to 566. There are two matter of contention concerning the notes. The first is that before that meeting, the claimant had attended an MRI scan at a private clinic in Cheltenham, in an open scanner. This showed that the claimant had disc herniation at L2/5 and L5/S1.

The notes show that he mentioned this at the meeting, but that it was not followed up. The claimant also claimed that he had spoken to The Spire private hospital in Bristol before the meeting and had ascertained that he could pay £7000 for a private operation , with a short waiting list, with a recovery time of 3 weeks. There was a passage from the hospital website which he produced to the Tribunal at pages 657-658. There is no evidence that it was put before the meeting. We do not accept that there was any reasonable prospect of an early return to full working following such a significant spinal operation.

The second matter was the issue of redeployment if the claimant was dismissed from his MSS position, raised shortly in the meeting.

The notes show that the hearing started at 9.07, was adjourned at 9.45 and resumed at 10.34 when JW announced the decision with reasons. These were confirmed in a letter from JW of the same date at pages 567-568.

This concludes the chronology.

30. **Statutory provisions.**Section 136 deals with the burden of proof in discrimination cases.Section 136 (2) provides that "if there are facts from which the court could decide, in the absence of any other explanation, that a person A, contravened the provision concerned, the court must hold the contravention occurred". But Subsection (2) does not apply " if A shows that A did not contravene the provision".

It is initially for the claimant to prove facts from which the Tribunal could reasonably conclude that a contravention of the Act occurred; in this case, that the claimant was treated unfavourably because of something arising from disability. (See **Madarassy v Nomura International**) There is no doubt that the claimant was dismissed for because of something related to disability, the claimant's absences in particular because of his back condition, but also against the background of his lengthy absences in 2016/17, which were at least related to his PTSD, as well as other impairments.

The next provision is Section 15 of the Equality Act. Section 15(1) provides that:

"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.

(b).A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

That is the justification defence, the burden of which lies upon the respondent. The test for justification is set out in paragraphs 4.25 to 4.29 of the EH RC code of practice on Employment, which deals with objective justification in relation to PCPs, but also applies to the justification defence under section 15 (see paragraph 5.11). In particular, paragraph 4.27 provides "the question of whether the PCP is a proportionate means of achieving a legitimate aim should be approached in two stages: –

- Is the aim of the PCP legal and non-discriminatory, and one that represents a real objective consideration?
- If the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances.

Section 15(2) provides that :

"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".

We have already found that at the material time that the respondent was aware of both of the relevant impairments constituting disability.

**Unfair dismissal.** The burden lies upon the respondent to prove a reason for dismissal, in this case capability by reason of long term illness. It is not in dispute that that was the reason for dismissal in this case. The tribunal then has to consider, with a neutral burden of proof whether the dismissal for that reason was fair or unfair under section 98 (4): – "….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".
In the case of a capability dismissal caused by long-term sickness absence, a fair procedure requires in particular, consultation with the employee, a thorough medical investigation to establish the nature of the illness or injury and its prognosis, and consideration of other options, in particular alternative employment within the employer's business. An important issue is whether the employer can reasonably be expected to wait any longer. See for example **East Lindsey District Council v Daubney 1977 ICR page 577.** There is a correlation between the test of fairness of a dismissal for that reason , and the justification defence under Section 15 .See the judgement of Underhill LJ in **O'Brien V Bolton Saint Catherine's Academy 2017 ICR page 737, Court of Appeal.**
**Failure to make reasonable adjustments.** The relevant conditions are set out in sections 20 to 21 and paragraph 20 in schedule 8 of EQA. The initial burden lies on the claimant to identify a PCP applied by the respondent, which put the disabled person at a substantial disadvantage in comparison with persons who were not disabled, and to suggest a reasonable adjustment, at least at the hearing. The burden then shifts shifts to the respondent to prove that it did not know and could not reasonably be expected to know that the claimant had a disability (not in dispute in this case) and that the claimant was likely to be placed at the disadvantage.
31. **Conclusions**.

We have concluded that the decision, at least to dismiss the claimant from the MSS post was justified. The claimant's cumulative lengthy absences, we accept, had placed the harbour service under considerable pressure because during them, the work, done on a shift basis and depending on high and low tides taking place at unsocial hours, had to be undertaken by a reduced team of 3 people who had to share the extra work not carried out by the claimant. This, we accept, added an extra burden upon them and affected their work life balance. It also impacted upon the respondent's ability to provide a safe service to the public. In addition there would be an additional cost if someone had to be appointed to act up. The claimant was still on half sick pay. Furthermore, a constant feature of the claimant's latest absence was an inability to obtain a clear diagnosis of the precise extent of the claimant's injury and the prognosis for when the claimant was likely to be able to return to work. The claimant complains that the latest occupational health reports of January 2019 was out of date, and that and a more up-to-date report would have shown a clearer position.We think that the respondent was entitled to conclude that that that that was highly unlikely. We have considered the claimant's evidence of his own enquiries, including the results of the MRI scan, and the document purporting to show that the claimant might have been able to have a back operation privately without undue delay.Clearly he mentioned the MRI scan at the meeting on the 25th of April (which he had earlier sent to TN). It does not appear that the claimant said at the hearing that he would now be fit to return to work within a short period of time and he had the opportunity to do so. He said he could not drive but "things are on the up". He admitted he had damage to his spine caused by a significant injury. When asked when he could return to work, he said "I'm not sure." This was his opportunity to tell them, but he only said he "might need surgery". The respondent was entitled to conclude that there were no prospects of an early return to work, after a latest absence period of now 205 days. In those

circumstances we find that the dismissal from that job for disability related absences was justified as pursuing the legitimate aim of providing a safe and reliable service.

We now turn to the issues relating to the fairness of the dismissal from Employment and the alleged failure to make reasonable adjustments. We do not consider that the respondent adopted a practice of having face-to-face meetings under the SAMP. The claimant was given the opportunity of attending the level one meeting on third of December. The respondent offered to visit the claimant at his home, which he refused for personal reasons and suggested his parents home but only when his condition improved, which it did not stop. The meeting scheduled for third of December was then postponed , so there was no practice imposed then. It was eventually rescheduled for first March at City Hall. The respondent asked the claimant for an alternative if he could not attend that location, to which he responded on the 24th of February 2019 – see paragraph 23 above. He did not say he was unfit to attend, and did agree to provide written submissions. We note that he was able to attend a grievance hearing in person on the 26th of February. We conclude that he made a conscious decision not to attend and not to cooperate with the process. As to PID 3, the respondent had extended the trigger points substantially in relation to his last period of absence (and the earlier one). This was not a failure to make a reasonable adjustment. It was not reasonable to expect the respondent to extend the triggers any further. In this connection, we also find that the jump from Level 1 to Level 3 was also justified under the policy , having regard to the length of the claimant's absences, and the lack of prospect of a return to work within a reasonable time. As to PID4, we do not accept the respondent did apply a PCP in not having a more up-to-date medical report and, in any event, we do not accept that any more recent medical report would have demonstrated a likely return to full duties within the foreseeable future. As to PID 5, The claimant did not in advance of or at the meeting ask for anyone to attend on his behalf – he merely asked for an independent notetaker. The respondent's policy was clear and within the ACAS guidelines. At the meeting the claimant was recorded as having "confirmed he was happy to proceed without representation". There was no failure to make a reasonable adjustment. There might have been if the claimant had asked for someone else outside the policy to attend, and had been refused . As to PID6, the requirement to work overtime, there is no evidence that the claimant did work overtime. He did swap shifts from time to time, but he does not make any complaint in that respect.

There was however one serious failure, namely a failure to consider redeployment at all. This was specifically raised by one of the HR consultants at the meeting, who asked if it had been considered and received a reply from TN "No, there has been no chance to discuss this due to Mike not attending meetings". That was no excuse for not following the policy, and in particular the redeployment policy, (now disclosed), and the SAMP ( see in particular at page 606: "Level 3 – dealing with serious or repeated levels of unacceptable attendance, which is causing an adverse impact on the service, where the outcome could be dismissal. Possible outcomes from this meeting are dismissal, ill-health retirement, medical redeployment… ". It was not for the claimant to identify alternative jobs. Basic fairness required the issue of redeployment to be raised by the respondent, even if the claimant did not, and even if the policy documents did not require it. In this respect, the failure to consider redeployment was unfavourable treatment because of something arising from his disability and was not justified. It was unfair. In this limited respect only the claimant's claims of unfair dismissal and breach of Section 15 succeed. Whether there were any alternative jobs, in a large organisation , suitable for the claimant taking into account his disabilities, which he would have

been sufficiently fit to move into, and within a reasonable time, and for how long is a matter which the Tribunal will have to address at a future remedies hearing. With the consent of the parties, having announced our findings, the Tribunal gave some provisional indications. Further CM Orders were made on 5 October 2020.

.

_____

Employment Judge Hargrove

_____

Date 8 October 2020.

REASONS SENT TO THE PARTIES ON

.....30 October 2020.....

FOR THE TRIBUNAL OFFICE