EMPLOYMENT TRIBUNALS

Claimant: Mr A Jewitt

Respondent: The Health & Safety Executive

HELD AT: Manchester (by video platform) **ON:** 8 – 12, 15 and 19 February 2021 [and in chambers on 1 March, 9 + 19 April 2021]

BEFORE: Employment Judge Batten
Ms M Conlon
Ms B Hillon

Representation
For the Claimant: Ms K Boyle, Counsel
For the Respondent: Mr S Redpath, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. the complaints of direct disability discrimination, a failure to make reasonable adjustments and discrimination arising from disability fail and are dismissed; and

2. the complaint of unfair dismissal is not well-founded and is dismissed.

REASONS

1. The claimant presented his claim to the Tribunal on 11 February 2018, in which he brought claims of disability discrimination and unfair dismissal. The respondent entered its response on 17 March 2020.

2. On 22 May 2020, a case management preliminary hearing took place following which the claimant served further particulars of (1) the acts of direct disability discrimination relied upon, and (2) the reasonable adjustments contended for. The claimant also confirmed that he pursued a claim of discrimination arising from disability. The respondent entered an amended response on 14 October 2020.

3. The respondent has conceded that the claimant was a disabled person pursuant to the test in the Equality Act 2010 ("EqA") section 6 and schedule 1, by reason of depression and has accepted that it had the requisite knowledge of the claimant's disability at the relevant time.

4. It was agreed with the parties that the case would require a 7-day hearing. The first day of the hearing was devoted to reading the papers and documentary evidence, with oral evidence commencing on the second day. The witness evidence was concluded and submissions were delivered on the seventh hearing day. The Tribunal thereafter met in chambers, to consider the evidence and deliberate on the numerous factual allegations and legal tests.

Evidence

5. An agreed bundle of documents, running to 439 pages plus inserts, was presented at the commencement of the hearing in accordance with the case management Orders. The claimant produced additional disclosure and remedy documents at the start of the hearing. These were included in the main bundle by agreement and were allocated page numbers at the end of the bundle. References to page numbers in these Reasons are references to the page numbers in the agreed bundle.

6. The claimant gave evidence in chief from a written witness statement. He did not call any witnesses in support of his claim. The respondent called 3 witnesses. These were, in order of appearance: Mark Dawson, the

claimant's line manager for the majority of the material time; Barry Baker, Head of Operations – Field Operations Division (Scotland); and Sarah Jardine, Chief Inspector of Construction. Each of the witnesses gave evidence from a written witness statement and all witnesses were subject to cross-examination.

7. In addition, the Tribunal was provided with a cast list and chronology. Counsel for the respondent provided written closing submissions and case law authorities at the end of the hearing.

Issues to be determined

8. At the outset it was confirmed, with the parties' agreement, that the issues to be determined by the Tribunal were as follows:-

A) <u>Unfair Dismissal</u>

1. Was the Claimant's dismissal on grounds of capability a potentially fair reason under s. 98 Employment Rights Act 1996?

2. Did the Respondent act reasonably in treating the Claimant's ability to carry out his role as a sufficient reason to dismiss him?

3. Did the Respondent have a genuine belief at the time of dismissing the Claimant that he was incapable of maintaining an adequate level of performance?

4. In forming its belief on those grounds, did the Respondent carry out as much investigation into the matter as was reasonable in all the circumstances of the case?

5. Did the Respondent follow a fair procedure when dismissing the Claimant?

6. Was the Respondent's decision to dismiss the Claimant within the reasonable range of responses open to the reasonable employer faced with those circumstances?

B) <u>Disability Discrimination</u>

Disability – s. 6 Equality Act 2010 ("EqA")

7. The Claimant suffers from depression. The Respondent accepts that the Claimant's condition amounts to a disability for the purposes of section 6 of the EqA. The Respondent also accepts that it had the requisite knowledge of the Claimant's disability at the relevant time.

Direct disability discrimination – s. 13 EqA

8. Was the claimant subject to the following:

a. in May 2017, a failure by the respondent to change his line manager;

b. in May 2018, a failure by the respondent to change his line manager following a review of the stress risk assessment;

c. in 2017, a failure by the respondent to implement the assurances given to the claimant on his return to work;

d. in 2018, the respondent holding over the performance management procedure;

e. in August 2019, Mark Dawson retaining control of the performance management procedure;

f. in September 2019, Mark Dawson reviewing the performance management procedure;

g. in September 2019, Mark Dawson referring the claimant to a decision maker;

h. in October 2019, the holding of a stage 3 meeting;

i. on 30 October 2019, decision to terminate the claimant's employment;

j. on 1 November 2019, terminating the claimant's employment on the grounds of performance?

9. If so, would another Inspector, with similar performance issues, who was not disabled be treated more favourably?

10. In relation to 8 (a) was Inspector Mike Griffiths treated more favourably?

11. If so, was the reason for the Claimant's less favourable treatment because he was disabled?

12. In relation to 8(j), was Inspector Peter Harmer treated more favourably?

13. If so, was the reason for the claimant's less favourable treatment because he was disabled?

Failure to make reasonable adjustments – ss. 20 - 21 EqA

PCP (1)

14. Did the Respondent apply a provision, criterion or practice (PCP) of maintaining line management?

15. Did this provision, criterion or practice put the claimant at a substantial disadvantage when compared to colleagues who were not disabled, because, due to the nature of his disability, he was unable to perform in his role?

16. If so, would it have been reasonable for the respondent to change the Claimant's line manager to avoid this disadvantage?

PCP (2)

17. Did the respondent apply a provision, criterion or practice of performance management?

18. Did this provision, criterion or practice put the claimant at a substantial disadvantage when compared to colleagues who were not disabled because the nature of his disability negatively affected his performance and meant he was more likely to be subject to performance management?

19. If so, would it have been reasonable for the respondent to consider the impact of the claimant's disability on his performance before progressing with performance management to avoid this disadvantage?

Discrimination arising from disability – s. 15 EqA

20. Did the Respondent treat the Claimant unfavourably because of something arising in consequence of his depression? In particular,

a. Did the Respondent treat the Claimant unfavourably by dismissing him on grounds of poor performance?

b. Did the Respondent treat the Claimant unfavourably by no considering him for the CSCS on grounds of poor performance?

c. Did the Respondent treat the Claimant unfavourably by not considering him for the Visiting Officer role at Band 5 (2 bands lower??) on grounds of poor performance?

d. Was the Claimant's poor performance "something" arising in consequence of the Claimant's depression?

e. If so, was the unfavourable treatment a proportionate means of achieving a legitimate aim *[namely maintaining standards of performance and performance management]* because the

Respondent is entitled to maintain adequate levels of performance from its employees?

Findings of fact

9. The Tribunal made its findings of fact on the basis of the material before it taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities. The Tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts. Having made findings of primary fact, the Tribunal considered what inferences it should draw from them for the purpose of making further findings of fact. The Tribunal has not simply considered each particular allegation, but also stood back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination. The findings of fact relevant to the issues which have been determined are as follows.

10. The respondent is a public body with important statutory responsibility to monitor H&S, promote compliance with H&S legislation and if appropriate take enforcement action against employers and businesses, amongst others, for breaches of H&S legislation. The job of an Inspector at the respondent involves carrying out the respondent's important statutory functions through the inspection of premises, interventions and prosecutions, amongst other duties and responsibilities. The respondent's work is underpinned by the maintenance of records and production of reports. Inspectors are expected to keep up-to-date and detailed records of their work activities and time spent in order that the respondent is able to use those records in legal action and also to charge employers and workplaces for interventions. This is called the 'Fee For Interventions' or 'FFI' process and is an important part of the respondent's costs recovery program.

11. The Tribunal accepted the evidence of Mr Dawson, the claimant's line manager, that the role of a Band 3 Inspector requires a specific skill set including independent judgement, self-sufficiency in carrying out the role, adherence to the respondent's operational considerations, the ability to form conclusions and to conclude casework matters promptly and comprehensively.

12. The claimant was employed by the respondent from 23 March 2009 initially as a trainee Health & Safety ("H&S") Inspector at Band 4 of the respondent's personnel structure.

13. The claimant is a disabled person by reason of the disability of depression. The respondent concedes that at the material time it had knowledge of the claimant's disability. In April 2016, the respondent's OH adviser reported that the respondent should consider the claimant as a disabled person.

14. In order to be re-banded to Band 3, and to work as a fully qualified H&S Inspector, the claimant had to complete a diploma with Warwick University. The claimant did not achieve the diploma at the first attempt and, by May 2011, he was not meeting the expectations of the Warwick diploma programme. The claimant took some time to complete his studies, which he finally achieved in the performance year 2012 to 2013.

15. The respondent has written principles for managing poor performance which appear in the bundle at page 359, including that performance expectations will be specified in a combination of agreed work objectives, competency frameworks and job descriptions. Managers and employees are advised to keep a written record of their discussions around performance.

16. The respondent has a procedure for managing poor performance, which is expected to take no longer than 6 months. This is on the respondent's intranet and extracts from the intranet appear in the bundle at pages 367 - 373. Briefly, the procedure consists of stage 1 and 2 written warnings, which are to be issued at or shortly after a meeting to discuss the performance in question. Meetings are to be followed by a review period, normally a month, in which the employee is expected to improve their performance. In exceptional circumstances, including disability, the review period can be extended as a reasonable adjustment up to a maximum of 3 months. If the performance in question does not improve to the required level during the review period ,the procedure moves to the next stage. If an improvement in performance is achieved, a 12-months' sustained performance period is implemented. If performance dips in the 12 months, the manager should address the dip informally before moving to the next stage. Where an employee is on a final written warning, and performance is not sustained and the employee does not rectify the dip, the matter can be referred to an independent decision maker who must consider dismissal or downgrading at stage 3 of the process, by holding a meeting with the employee. There is a right of appeal at each stage of the performance management procedure. The appeals procedure is in the bundle at page 398.

17. The claimant was initially managed by Mr Steve Smith who gave the claimant a positive first appraisal. In Nov 2009, Mark Dawson became the claimant's line manager.

18. On 29 June 2011, Mr Dawson held an informal interview with the claimant about his performance. The claimant had failed and resubmitted a number of assignments but had not by then passed the Warwick diploma. He was told that the consequence of not passing the diploma would be that he would be unable to continue working as a HSE Inspector.

19. In the performance year 2012 – 2013, the claimant was re-banded to Band 3, and this was backdated to 23 March 2011, upon his completion of the Warwick diploma after several resubmissions and thereby completing his training as a HSE Inspector.

20. In November 2012, the respondent introduced a process known as "FFI" or "Fee for Intervention", which is a system for charging employers and businesses for certain work carried out by the respondent's Inspectors to ensure compliance with H&S law. Employers could be charged for an Inspector's time if an issue is found or if there is a need to write to the employer. The claimant's evidence was that effectively, the employer pays if there is a problem. The FFI system depends upon Inspectors recording accurately and promptly their time spent on individual inspections. Work has to be recorded promptly on the respondent's computer system in order that an employer can be charged appropriately and within a reasonable time period.

21. On 22 October 2013, the claimant went on a joint visit to a business premises, with a Band 1 manager, Mr Steve Smith. Mr Smith returned from the visit to report that he was dissatisfied with the claimant's performance and he wrote a highly critical report on the claimant.

22. On 18 November 2013, Mr Dawson held a meeting to review the claimant's performance in light of Mr Smith's report. The claimant acknowledged that the comments made by Mr Smith, on his performance, were fair. There followed a 'performance management report' (bundle pages 87 – 89) in which the claimant accepted that he had not yet sufficiently changed or improved his working. The claimant recorded his agreement that he will write an action plan to address the specific failings identified by Mr Smith.

23. In October 2014, the claimant had a cycling accident as a result of which he sustained a fractured skull and was absent from work for a period of time. On 24 December 2014, the claimant was subject to a medical review.

24. On 6 February 2015, the claimant undertook another a joint visit with Mr Smith who again returned to report that he was dissatisfied with the claimant's performance. He wrote another critical report on the claimant, albeit that Mr Smith acknowledged the visit had, in part, been a better visit

than before. Mr Smith recommended that the claimant be put back on a performance improvement plan. Mr Dawson duly produced an improvement plan for the claimant to follow to the end of the year.

25. On 8 June 2015, the claimant had a meeting with Mr Dawson which Mr Dawson described as being part of the respondent's formal unacceptable performance procedure. The claimant was aware of the seriousness of the meeting and he prepared notes beforehand. When asked to respond to the comments about his performance, the claimant focussed on the fact that there had been an 8-week delay in convening the meeting after the end of the improvement period and the claimant said that he was not told of specific expectations until 11 March 2015. Mr Dawson reminded the claimant that he had agreed that the improvement plan was achievable at the time, and that he had not voiced concerns to the contrary before their meeting. The claimant also complained about Mr Dawson referring to the possibility of dismissal, which the claimant considered to be a threat and something which the claimant suggested led to him becoming reluctant to raise issues with his manager in future.

26. On 15 June 2015, Mr Dawson issued the claimant with a first written warning which appears in the bundle at page 124a. This required the claimant to improve the quantity and quality of his field work, the timeliness of his work recording and to complete a named accident investigation. Mr Dawson also highlighted that there were issues with the claimant's completion and closure of investigations and inspection work. The claimant was told that 6 objectives for improvement, which were set out in the warning letter, would be incorporated into a formal improvement plan and steps were agreed to support the claimant in making improvements.

27. In August 2015, the claimant's line manager changed to Ms Faye Wingfield, who issued the claimant with the formal improvement plan on 5 October 2015. This appears in the bundle at pages 126 - 127.

28. In November 2015, the claimant sought a medical assessment on Ms Wingfield's advice, as a result of which he was referred to the local mental health team. In the interim, Ms Wingfield told the clamant that his improvement plan would be put on hold.

29. On 12 April 2016, an occupational health report identified that the claimant was suffering from depression but that he was fit for work and for completing his normal duties and normal hours.

30. On 26 April 2016, the claimant was subject to the respondent's end of year assessment process. This identified that, in the latter half of the summer 2015, new work allocation to the claimant had been significantly

scaled back and that his work progress over the year had been far below both what the claimant wanted and what the respondent needed. As a result, the claimant's end of year rating was 'must improve'. The assessment report appears in the bundle at pages 137-138.

31. In July 2016, Ms Wingfield met with the claimant to discuss and agree a new improvement plan since the previous plan had been put on hold for over 6 months. On 1 August 2016, the claimant was re-issued with a formal improvement plan for a period of 3 months – see bundle pages 141 - 143. The document notes that the claimant's work output was far below that of his peers, a number of jobs were identified as requiring progression and, in particular, 6 inspections were listed to be completed because they might merit prosecution.

32. On 28 November 2016, the claimant conducted a joint visit with Dave Charnock, the respondent's Operations Development manager. Afterwards, Mr Charnock reported that the claimant's performance required improvement in several areas including communication style and the focus and effectiveness of his inspections.

33. On 8 December 2016, the claimant undertook a joint visit with Mr Dawson, who reported that he was dissatisfied with the claimant's performance. Mr Dawson considered that the standard of inspection by the claimant was "below that which the HSE requires and should expect from a Band 3 Inspector of almost 8 years' experience". In addition, Mr Dawson identified an incorrect enforcement decision made by the claimant.

34. On 14 December 2016, the claimant had a work review meeting with Ms Wingfield. The notes of that meeting are in the bundle at pages 357 - 358. They record that the claimant admitted he was "not a lot further forward" in respect of the work identified in the improvement plan and the claimant said that he " … does want to fight for his job".

35. On 21 December 2016, Ms Wingfield wrote to the claimant, to invite him to a first formal meeting under the respondent's Managing Poor Performance procedure because the claimant's work performance remained below the expectations required. In the letter, Ms Wingfield informed the claimant that the meeting may result in a first written warning.

36. On 10 January 2017, the claimant attended a formal meeting with Ms Wingfield to discuss his performance under the 3-months improvement plan. The claimant agreed that his performance had not met any of the targets in the improvement plan, and Ms Wingfield told him that she would be issuing him with a warning and a further improvement plan for 4 weeks.

37. On 12 January 2017, a first written warning was issued to the claimant. Later that day, the claimant went to his GP and was signed off work, sick, from 13 January 2017 with work-related stress. The 4-week performance improvement plan had been due to start on Monday 16 January 2017 but did not, because the claimant was by then off sick. He remained on sick leave until 19 May 2017. Whilst off sick, the claimant undertook an 11-session course of cognitive behavioural therapy.

38. On 27 January 2017, occupational health reported that the claimant was absent from work with depression and stress which he attributed to work. The report, in the bundle at page 154, stated that it was unable to predict a return-to-work date and recommended that a stress risk assessment be carried out on the claimant.

39. At the beginning of April 2017, it was proposed that Mr Dawson became the claimant's line manager again, when Ms Wingfield retired.

40. On 10 April 2017, the respondent undertook a detailed stress risk assessment, carried out by Steve Parncutt, one of the respondent's team leaders and a Principal Specialist Inspector; see bundle pages 157 - 164. In the course of the assessment, the claimant expressed his view that he had a strained relationship with his line manager, Mr Dawson. The risk assessment therefore recommended, amongst other things, that the claimant have a temporary change of line manager whilst steps were taken to improve the relationship between the claimant and Mr Dawson.

41. On 22 May 2017, the claimant decided to return to work. The fit note which he obtained from his GP recommends that the claimant may benefit from altered hours, working up to a maximum of 3 days per week for the first few weeks of his return. By agreement, Dave Charnock was appointed as the claimant's line manager for the first few weeks of this phased return to work and until mediation had taken place between the clamant and Mr Dawson. The mediation took place on 15 June 2017 and resulted in an agreement (bundle page 156) between the claimant and Mr Dawson about their working relationship which acknowledged the need for structured meetings, time-bound action points and for a performance agreement to be developed and agreed by the end of June 2017.

42. By the beginning of December 2017, Mr Dawson had again become concerned about the claimant's performance and he referred the claimant to occupational health because of the continuing performance issues. The occupational health report which resulted identified problems with the claimant's confidence which meant that he had difficulties in making decisions which might be perceived as procrastination. The report concluded that the claimant was fit to undertake his full duties although he

required further counselling to address his problems and it stated that the claimant had agreed to seek further counselling.

43. In March 2018, the claimant had a total of 35 days off work sick, for an ear infection leading to a hearing issue. During his absence the claimant had dental surgery and time off to recover.

44. On 3 April 2018, the claimant attended a return-to-work meeting with Mr Dawson who indicted he would make a further referral to occupational health. On 6 April 2018, the claimant met again with Mr Dawson for a sickness absence review meeting, because the claimant had hit a sickness review trigger. In the course of the meeting Mr Dawson mentioned the need for further performance management of the claimant.

45. On 20 April 2018, the claimant had his end of year appraisal. Mr Dawson determined that the claimant should be rated as a "poor performer", the lowest rating possible. The claimant confirmed that the rating did not come as a surprise.

46. On 1 May 2018, the claimant had a telephone appointment with occupational health. The resulting report appears in the bundle at page 185, and notes that the claimant had a number of continuing health issues and remained depressed. The claimant's relationship with his manager is not mentioned in the report.

47. On 17 May 2018, Mr Dawson conducted a poor performance meeting with the claimant, in which 3 objectives and areas for improvement were identified. The minutes of the meeting are in the bundle at pages 190 – 194. Mr Dawson told the claimant that he was minded to issue a written warning but he decided to wait for medical evidence before making a final decision because of the possibility that the claimant's health problems might be impacting on his work. A medical report was expected from an ENT consultation which the claimant was due to have on 21 May 2018. In addition, Mr Dawson was considering a further referral to occupational health.

48. On 12 July 2018, Mr Parncutt met with the claimant to conduct a second stress risk assessment. His report was produced in August 2018. B201. In the course of discussions with Mr Parncutt, the claimant commented that on returning to work after a period of sickness absence, he had been disappointed to find that a number of his cases which were potential prosecutions had not been progressed in his absence and he sought to blame Mr Dawson for this.

49. On 14 September 2018, Mr Dawson issued the claimant with a first written warning, arising from the performance review in May 2018. The letter of

warning appears in the bundle at page B313, and records that the issue of this warning had been delayed in order to take account of the claimant's occupational health referral, MRI scan and stress review.

50. The first written warning was followed with a performance improvement period from 17 September 2018 to 19 October 2018. B207 or 315. The claimant's performance plan included a direction to the claimant to conduct at least 5 inspection visits per month, with 7 premises listed for action, and to progress a further inspection to approval stage. In addition, the claimant was to bring his records up-to-date including producing timesheets for all work done in the improvement period. The claimant's evidence, in his statement, was that this did not come as a huge shock to him and that it was expected.

51. On 26 October 2018, Mr Dawson met with the claimant to review the performance improvement period. The meeting notes record that: the claimant had failed to visit the 7 premises identified for inspection during the month of the improvement period – he had only visited 4 on the list; none of those visits were recorded; and outstanding work was identified including 2 notices of contravention which had not been sent out; the inspection requiring progress to the approval stage had not been progressed. In addition, the claimant had not completed timesheets for the improvement period nor had he submitted a schedule of work for the following month as required. At the end of the meeting, Mr Dawson told the claimant that the likely outcome would be that the claimant would move to stage 2 of the respondent's performance management procedure and that, in the interim, Mr Dawson would take advice on the claimant's health position.

52. On 14 November 2018, a stage 2 performance management meeting was held between the claimant and Mr Dawson. The claimant brought a work colleague with him as a companion. Mr Dawson reviewed the performance management meeting of 26 October 2018 and said that the claimant's work remained below the expected levels. He acknowledged that the claimant had made improvement in some areas and he expressed a hope that the claimant could build on that. It was agreed that the weekly Monday morning meetings had been useful and would continue. However, Mr Dawson confirmed that he would be issuing the claimant with a final written warning. The claimant said that his main issue was how to make sure the work recording was completed, and finding a structure to make sure it gets done.

53. On 20 November 2018, the claimant received a final written warning which appears in the bundle at page 329. The warning letter states that the issues with the claimant's performance were: (1) operational delivery – the volume of work being conducted by the claimant was very low across

inspection, investigation and enforcement; (2) timeliness – the length of time that the claimant was taking to complete work was excessive and a number of inspections and investigations were 'overdue'; and (3) work recording – the claimant was not always recording his work on timesheets or meeting performance standards for completion of the respondent's work processes. A further improvement period was set for 3 December 2018 to 18 January 2019. This was an extended period to take account of annual leave.

54. In January 2019, the claimant started seeing a psychotherapist.

55. On 25 January 2019, Mr Dawson met with the claimant to review the improvement period. Mr Dawson recognised that the claimant had made recent progress but described the period as of "2 contrasting halves" – the first period was relatively unproductive with no evident improvement while, following a period of leave, the latter period showed that targets for improvement were being "partially met", noting however that the required inspection still not been progressed. The meeting ended with Mr Dawson adjourning to consider his decision. He explained to the claimant that he would either recommend that the improvement period be considered as a sustained improvement or that the claimant would move to stage 3.

56. On 1 February 2019, Mr Dawson wrote to the claimant to acknowledge that his performance had recently improved and to inform the claimant that he would enter a 12-month 'sustained improvement period'. The claimant was therefore given a chance to demonstrate that he could sustain the improved performance shown in January 2019, over 12 months. The alternative under the respondent's performance management procedure was that Mr Dawson could have referred the claimant for dismissal. In his evidence, the claimant accepted that Mr Dawson had a choice as to how to treat him, and that Mr Dawson had chosen the lesser of the 2 outcomes, effectively giving the claimant a further opportunity to demonstrate improved performance. The Tribunal considered that the choice made by Mr Dawson was a reasonable adjustment to the procedure.

57. In the following months, Mr Dawson met with the claimant on a regular basis to discuss and review the claimant's performance in order to support him.

58. In August 2019, Mr Dawson gained a temporary promotion and, on 12 August 2019, Mr Boyd became the claimant's line manager. For consistency and continuity, Mr Dawson retained oversight of the claimant's performance management. This was explained to the claimant at the time and he raised no objection.

59. On 6 September 2019, Mr Dawson met with the claimant to review his performance. As a result of this review, Mr Dawson told the claimant that a formal review of his performance was needed. Mr Dawson said that he would meet with Mr Boyd to discuss matters and then send the claimant an invite to a formal meeting where it was possible that a referral to a decision maker could be made. Mr Dawson met with Mr Boyd on 9 September 2019, to discuss the claimant's performance. Mr Boyd expressed his opinion that the claimant was not meeting performance expectations.

60. On 16 September 2019, Mr Dawson conducted a performance review meeting with the claimant. This was a comprehensive review of the claimant's workload and performance. In the course of the meeting, the claimant told Mr Dawson that it had been decided by Mr Boyd that the claimant should not conduct inspections which would create more work until other work had been resolved. The notes of the review meeting are in the bundle at pages 243 – 248.

61. On 20 September 2019, Mr Dawson wrote to the claimant with the outcome of the review, to say that he had not maintained the expected performance during the sustained improvement period, following a final warning, and that he would refer the claimant to decision maker under the final decision stage of the formal managing poor performance process.

62. On 27 September 2019, the claimant was invited to a 'final decision meeting' which is the final stage of the respondent's Managing Poor Performance process. The invite letter, from Barry Baker, the respondent's Head of Operations (Scotland), stated that this was the final opportunity for the claimant to state his case before Mr Baker made a decision on the claimant's employment. The claimant was advised to let Mr Baker know of any mitigating factors such as illness, disability or a long-term health condition. Under the respondent's poor performance procedure, the decision maker must be satisfied that the evidence of the employee's performance shows that the performance has been and remains unsatisfactory, and there is no reasonable prospect of immediate improvement to the required standard; see bundle page 369.

63. Mr Dawson prepared a report to Mr Baker, entitled "Recommendation for Dismissal", accompanied by 8 appendices consisting of letters to the claimant, performance ratings, previous warnings, notes of performance meetings and a copy of the latest occupational health report, dated 5 July 2019. Mr Dawson's report includes a statement that the claimant's *"… physical and mental health fluctuates, with a resulting impact on his work performance"*. The claimant's statement, paragraph 140, says that the report contained statements which "*appeared to be either untrue or*

intentionally designed to mislead". This contention was not substantiated nor put to Mr Dawson and the Tribunal rejected it.

64. On 22 October 2019, the claimant attended the 'final decision meeting' with Mr Baker. The notes of the meeting are in the bundle at pages 253-260. The claimant was not given a copy of Mr Dawson's report in preparation for the meeting. However, the claimant agreed in evidence that he knew that his performance was to be discussed and that he was facing possible dismissal for that performance. The contents of the report and its appendices were discussed with the claimant at length and he was invited to comment on each aspect. The claimant focussed on his relationship with Mr Dawson and expanded on his view that he felt that his relationship with Mr Dawson had broken down. The Tribunal rejected that proposition. The evidence shows that the relationship had not broken down, that Mr Dawson had lengthy and detailed meetings with the claimant over many months and the claimant had contributed to discussions, accepting his shortcomings and asking for time and help to improve, which Mr Dawson had afforded to him. If the relationship with Mr Dawson had been as the claimant suggests, the Tribunal would have expected to see it recorded that the claimant challenged Mr Dawson's view of his performance in their meetings and/or to have appealed the numerous warnings he received and/or to have raised a grievance about his manager. Nothing of that description appears in the evidence and no appeal of any warning nor grievance was ever pursued by the claimant over several years.

65. On 30 October 2019, Mr Baker took the decision to dismiss the claimant for poor performance. Mr Baker's evidence, which the Tribunal accepted, was that he was well aware that the claimant was clinically depressed but that the claimant's health conditions did not form a factor in his decision. Mr Baker explained that he measured the claimant's performance against the respondent's baseline and acceptable levels of performance. Mr Baker considered that the claimant's performance was poor even in relation to the delivery expected of him, which had been adjusted downwards to take account of his disability and health issues. For example, Mr Dawson's report highlighted that the claimant was not undertaking the full range of regulatory work, even in the 12 months sustained improvement period and those limited aspects of his work which the claimant was undertaking were being inadequately performed, leading to failures in operational delivery. Mr Baker described the claimant as "… not even within touching distance of what I would expect a band 3 Inspector to be producing". The claimant did not dispute this assessment of the failings in his performance when they were put to him in cross-examination.

66. Mr Baker wrote to the claimant to confirm that he was dismissed from the respondent for poor performance and that his last day of service would be 1 November 2019. The dismissal letter, at pages 375 – 377, sets out the extensive history of the management of the claimant's performance and reviews. Mr Baker rejected the contentions that the claimant had made about a change of line manager, from Mr Dawson, and accepted that the claimant should have had a Performance Management Record in place, notwithstanding the performance procedure being undertaken. The claimant was not required to work his notice and was paid in lieu of his 11 weeks' notice entitlement.

67. Mr Baker also considered the claimant for the Civil Service Compensation Scheme ("CSCS") but declined to make an award to him. The scheme appears in the bundle at pages 429 – 436 and is designed for cases where staff depart on inefficiency grounds. The objective is to compensate an employee for loss of employment that is beyond their control and such compensation is not guaranteed. The conditions for payment under the scheme include a requirement for medical evidence that the employee's unsatisfactory performance is caused by an underlying medical condition, and that poor performance dismissal criteria should not be applied in such cases. Decisions about compensation are based on the employee's health condition and circumstances. The respondent's position was that the claimant had been dismissed for poor performance rather than poor performance due to an underlying health condition. On that basis, Mr Baker considered that the claimant did not qualify for the scheme.

68. Within the dismissal appeal procedure which Ms Jardine sent to the claimant on 13 November 2019, prior to the appeal hearing, there is a statement that an employee has a separate right to appeal against the part payment or non-payment of compensation under the CSCS, to the Civil Service Appeal Board. The claimant did not appeal this decision.

69. On 13 November 2019, the claimant appealed his dismissal. In his letter of appeal, the claimant said that work had caused him undue stress, that his working relationship with Mr Dawson had been an operative cause of that stress, and the subsequent anxiety and depression had affected his ability to do his job. The claimant challenged the fact that Mr Baker had considered only the period from September 2018 onwards, and he contended that he should have had a different line manager and not Mr Dawson. Appended to the appeal letter is a "Timeline" commencing in 2011 and extracts from a survey about how the respondent responds to stress in its workplaces. The timeline includes a statement by the claimant that, "*… had procedures been properly followed I would have had my employment terminated in 2015.*" See page 390 of the bundle.

70. On 4 December 2019, the claimant attended his appeal hearing which was conducted by Sarah Jardine. The notes of the meeting appear on pages 405 – 407. Ms Jardine approached the appeal as a review of the decision to dismiss, rather than a rehearing. She considered the claimant's points of appeal, and listened to what the claimant said about his view that historic information, before September 2018, would give a better picture of his case. She also considered his complaints about Mr Dawson. However, Ms Jardine went beyond the review of Mr Baker's decision in that, after the hearing, she spoke to Mr Dawson and also to the claimant's last line manager, Mr Boyd about the management of the claimant and his workload, prior to making her decision on the appeal.

71. On 19 December 2019, Ms Jardine sent the claimant an appeal outcome letter, turning down his appeal. The letter is in the bundle at pages 401 – 404. In her letter, Ms Jardine accepted that it would be appropriate to take into account the stress risk assessments, of April 2017 and August 2018, the return-to-work action plan and the mediation agreement. Nevertheless, her decision was to reject the claimant's appeal and uphold the claimant's dismissal on the basis that there was sufficient evidence that the claimant's performance had not met the required standard for a band 3 Inspector, during the 12 months sustained improvement period despite the respondent's continued support and a temporary change in line manager. The letter also states that the possibility of redeployment of the claimant into a band 5 Visiting Officer role had been considered by Mr Baker, even though the deadline for applications had just passed. Ms Jardine explained, however, that it had been decided that the claimant would not be suitable for such a role because of the similarities in the skill set required between the Visiting Officer role and the role of an Inspector. Ms Jardine apologised for the fact that this aspect and decision had not been communicated to the claimant by the respondent earlier.

The applicable law

72. A concise statement of the applicable law is as follows.

Unfair dismissal

73. Section 98 of the Employment Rights Act 1996 sets out a two-stage test to determine whether an employee has been unfairly dismissed. First, the employer must show the reason for dismissal or the principal reason and that reason must be a potentially fair reason for dismissal. The respondent contends that the reason for dismissal was the claimant's capability. Capability is a potentially fair reason for dismissal under section 98 (2) (a) of the Employment Rights Act 1996.

74. If the employer shows a potentially fair reason in law, the Tribunal must then consider the test under section 98(4) of the Employment Rights Act 1996, namely whether, in the circumstances, including the size and administrative resources of the respondent's undertaking, the respondent acted reasonably or unreasonably in treating that reason, i.e. capability, as a sufficient reason for dismissing the claimant and that the question of whether the dismissal is fair or unfair shall be determined in accordance with equity and the substantial merits of the case.

75. In considering the reasonableness of a capability dismissal for poor performance, the employer should previously have made the employee aware of its dissatisfaction and given details of the deficiencies identified, provided the employee with a reasonable time to improve and warned the employee of the consequences of any lack of improvement.

76. The Tribunal must also consider whether the decision to dismiss fell within the band of reasonable responses open to a reasonable employer in the circumstances of the case: Iceland frozen Foods Ltd -v- Jones [1982] IRLR 439.

77. In considering the fairness of a dismissal, the appeal should be treated as part and parcel of the dismissal process: Taylor v OCS Group Limited [2006] ICR 1602.

78. The ACAS Code of Practice on Disciplinary and Grievance Procedures contains guidance on the procedures to be undertaken in relation to a dismissal for capability. Although compliance with the ACAS Code is not a statutory requirement, a failure to follow the Code should be taken into account by a Tribunal when determining the reasonableness of a dismissal.

Disability discrimination

79. The complaint of disability discrimination was brought under the Equality Act 2010 ("EqA"). Disability is a relevant protected characteristic as set out in section 6 and schedule 1 of EqA.

80. Section 39(2) EqA prohibits discrimination against an employee by dismissing him or by subjecting him to any other detriment. By section 109(1) EqA an employer is liable for the actions of its employees in the course of employment.

81. The EqA provides for a shifting burden of proof. Section 136 so far as is material provides as follows:

(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.

82. Consequently, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the EqA. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

83. In *Hewage v Grampian Health Board [2012] IRLR 870* the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in *Igen Limited v Wong [2005] ICR 931* and was supplemented in *Madarassy v Nomura International PLC [2007] ICR 867*. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Direct discrimination

84. Section 13 EqA provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. The relevant protected characteristics include disability.

85. Section 23 EqA provides that on a comparison for the purposes of section 13 there must be no material difference between the circumstances relating to each case, and that the circumstances relating to a case includes that person's abilities if the protected characteristic is disability. The effect of section 23 EqA as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person without a disability.

86. Further, the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including Amnesty International v Ahmed [2009] IRLR 884, that in most cases where the conduct in question is not overtly related to disability, the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator. If the protected characteristic (in this case, disability) had any material influence on the decision, the treatment is "because of" that characteristic.

Reasonable adjustments

87. The duty to make reasonable adjustments, in section 20 EqA, arises where:

(a) the employer applies a provision criterion or practice which places a disabled employee at a substantial disadvantage in comparison with persons who are not disabled; and

(b) the employer knows or could reasonably be expected to know of the disabled person's disability and that it has the effect in question.

88. As to whether a "provision, criterion or practice" ("PCP") can be identified, the Equality and Human Rights Commission Code of Practice in Employment ("the EHRC Code") paragraph 6.10 says the phrase is not defined by EqA but "*should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one-off decisions and actions*".

89. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, section 212(1) EqA defines substantial as being "*more than minor or trivial*". In the case of Griffiths v DWP [2015] EWCA Civ 1265 it was held that if a PCP bites harder on the disabled employee than it does on the able-bodied employee, then the substantial disadvantage test is met for the purposes of a reasonable adjustments claim.

90. The duty is to take such steps as it is reasonable, in all the circumstances, to take to avoid the provision criterion or practice having that effect. The duty is considered in the EHRC Code. A list of factors which might be taken into account appears at paragraph 6.28, but (as paragraph 6.29 makes clear) ultimately the test of reasonableness of any step is an objective one depending on the circumstances of the case. An adjustment

cannot be a reasonable adjustment unless it alleviates the substantial disadvantage resulting from the PCP – there must be the prospect of the adjustment making a difference.

91. Under section 136 EqA, it is for an employer to show that it was not reasonable for them to implement a potential reasonable adjustment.

Discrimination arising from disability

92. The prohibition of discrimination arising from disability is found in section 15 EqA. Section 15(1) provides: -

> *(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.*

93. The proper approach to causation under section 15 was explained by the Employment Appeal Tribunal in paragraph 31 of Pnaiser v NHS England and Coventry City Council EAT /0137/15 as follows:

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

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant …...

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence

of B's disability". That expression 'arising in consequence of' could describe a range of causal links …[and] may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) ….. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

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

(g) …..

(h) Moreover, the statutory language of section 15(2) makes clear …. that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so.

94. In City of York Council v Grosset [2018] WLR(D) 296 the Court of Appeal confirmed the point made in paragraph (h) in the above extract from Pnaiser: there is no requirement in section 15(1)(a) that the alleged discriminator be aware that the "something" arises in consequence of the disability. That is an objective test.

95. The EHRC Code contains provisions of relevance to the justification defence. In paragraph 4.27, the EHRC Code considers the phrase "a proportionate means of achieving a legitimate aim" (albeit in the context of justification of indirect discrimination) and suggests that the question should be approached in two stages:-

(1) is the aim legal and non-discriminatory, and one that represents a real, objective consideration?

(2) if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

96. As to that second question, the EHRC Code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. It goes on to say the following at paragraph 4.31:-

although not defined by the Act, the term "proportionate" is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. But "necessary" does not mean that the [unfavourable treatment] is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.

97. In the course of submissions, the Tribunal was referred to a number of cases by Counsel for each party, in addition to those mentioned above, as follows:

- British Home Stores v Burchell [1980] ICR 303
- Foley v Post Office; HSBC v Madden [2000] ICR1238 CA
- J Sainsbury plc v Hitt [2003] ICR 111
- Sneddon v Carr-Gomm Scotland Limited [2012] IRLR 820 CS
- Nottingham City Transport v Harvey [2013] All ER (D) 267
- Hampson v Department of Education and Science [1989] ICR 179

The Tribunal took these cases as guidance but not in substitution for the statutory provisions.

Submissions

98. Counsel for the claimant made a number of detailed submissions which the Tribunal has considered with care but do not rehearse in full here. In essence it was asserted that:- the claimant accepted the respondent's reason for dismissal was capability but challenged the process; that the claimant's line management by Mr Dawson went to the root of the claimant's continued symptoms and that the relationship was fractured; it was Mr Dawson who compiled the report which led to the claimant's dismissal when the claimant had experienced issues with his management from 2015 onwards; Mr Baker failed to undertake a full investigation and so did not appreciate the link between the claimant's performance and his depression, or give sufficient weight to it and so failed to obtain further medical evidence prior to dismissing the claimant; Ms Jardine should have looked at the occupational health reports from 2018; the claimant believed that he had been treated less favourably than other Inspectors who had been poor performers; Mr Dawson did not make any reasonable adjustments to the performance management process or to the claimant's working situation and left warnings hanging over the claimant in 2016 and 2018 without progressing them; and that the performance management process put the claimant at a disadvantage – his poor performance arose because of his disability, and whilst performance standards are a

legitimate aim, the respondent's actions in performance-managing the claimant and ultimately dismissing him were disproportionate.

99. Counsel for the respondent made a number of detailed submissions which the Tribunal has also considered with care but do not rehearse in full here. In essence it was asserted that:- the claimant was dismissed for his significant under-performance which had extended over many years; that the respondent had undertaken a fair procedure which mirrors the ACAS Code of Practice; the respondent had investigated the claimant's performance and the reasons for it in detail and many times, often giving the claimant the benefit of the doubt and/or another chance before proceeding with the performance process; the respondent had given the claimant numerous opportunities to remedy his performance but the claimant was simply no capable of doing so; the respondent had a genuine belief in the claimant's incapability to perform the role of a H&S Inspector; the issue of the claimant's relationship with Mr Dawson was a 'red herring' and not borne out by the evidence; the claimant had several managers, all of whom had reasonably concluded that the claimant was significantly under-performing; and that the claimant's dismissal had nothing to do with his disability, reasonable adjustments had been made and that managing poor performance in the manner adopted by the respondent was a proportionate means of achieving the legitimate aim of maintaining standards of work.

Conclusions (including where appropriate any additional findings of fact)

100. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

101. The Tribunal took into account the credibility of the parties' witnesses. Where there was a conflict of evidence, the Tribunal preferred the evidence of the respondent's witnesses, whose testimonies were informed and considered. In particular, Ms Jardine's evidence was compelling and persuasive. She was very clear about what she could remember and had good recall. She gave cogent evidence about the role and remit of the respondent - she explained why the job and functions of an H&S Inspector were of critical importance and how poor performance in such a role can have far-reaching and damaging consequences for the public and in an employment context. When asked about his approach to the decision making at stage 3 of the performance management process, Mr Baker explained the reasons for his decision to dismiss the claimant in detail and also his decision on the CSCS criteria, accepting that he should have better communicated his decision to the claimant at the time. The Tribunal considered that Mr Baker gave honest answers about a difficult issue. Likewise, Mr Dawson took time to explain his approach to the claimant's performance management with care, demonstrating a concern

both for the claimant who was underperforming and for the respondent which needed its important work undertaken effectively and in a timely manner. In contrast, the claimant's responses to questions in cross-examination and questions from the Tribunal were, at times, evasive and contradictory. He often failed to answer the question which was put to him, going off at a tangent, and had to be reminded of what he had been asked in order to focus his thoughts on his answers. This meant that it was quite difficult to get a consistent clear narrative from the claimant.

102. The claimant sought throughout to assert that his relationship with his line manager, Mr Dawson, was broken or fractured, and he suggested that Mr Dawson was 'out to get him', contending that he had been concerned about Mr Dawson's management style from early on in his employment. The Tribunal considered the history of the relationship between the claimant and Mr Dawson, as set out in the evidence before it. Despite the view asserted by the claimant, there was no evidence before the Tribunal that the claimant had ever raised a grievance about Mr Dawson during his employment. The Tribunal noted that the claimant had received 3 first written warnings over a period of over 3 years. The claimant did not appeal at any stage of the performance management process, until he was dismissed, despite that each of the warning letters advised the claimant that he had a right of appeal and how to do so. Instead, the claimant agreed on occasions that his performance warranted a warning and he confirmed in evidence to the Tribunal on several occasions that he was not surprised to get warnings about his performance.

103. In addition, despite the claimant's efforts to portray his performance issues as stemming from his relationship with Mr Dawson and his view of the claimant's performance, the Tribunal noted that, independently, at least 3 of the claimant's managers and senior managers, including Ms Wingfield, Mr Smith and Mr Boyd, had formed a view at different times and for different reasons, that the claimant was not demonstrating satisfactory performance in the role of H&S Inspector and that he was not up to the job. The views of all these managers aligned with Mr Dawson's assessment of the claimant.

104. In considering the issues in relation to the claimant's performance and his dismissal, the Tribunal was mindful of the nature of the respondent as a public enforcement body with important statutory functions, designed to protect the public, and the responsibility which the respondent has to carry out those functions efficiently and effectively. The claimant's witness statement, paragraph 2 demonstrates his understanding of the role and the required standards.

Unfair Dismissal

105. The Tribunal accepted the respondent's submission that the claimant's dismissal was on grounds of capability, for poor performance, which is a potentially fair reason under s. 98 ERA. The Tribunal also considered that the respondent acted reasonably in treating the claimant's inability to carry out his role as a sufficient reason to dismiss him. This was because the Tribunal considered that the respondent had a genuine belief, at the time it dismissed the claimant that he was incapable of maintaining an adequate level of performance. Mr Dawson's evidence was that the claimant had not even been doing 50% of the job of an H&S Inspector and that his performance was not regularly sustained in the period before Christmas 2018. However, Mr Dawson gave the claimant the benefit of the doubt due to a short period of improvement in his performance in January 2019 and Mr Dawson then allowed the claimant an opportunity to demonstrate that he could sustain this improvement over 12 months. By that stage, the claimant was being line managed by Mr Boyd who had placed the claimant on a very restricted remit in an effort to control the amount of work the claimant received so that he had time and space to remedy a number of investigations and inspections which were long overdue. In his report to Mr Baker, Mr Dawson says that the claimant's "… *participation and willingness to engage in the improvement process has not been in question but any improvements that have been made have proven difficult to achieve, do not encompass all of the areas identified for improvement and ultimately have not been maintained throughout the 12-month sustained improvement period."* The Tribunal considered this to be an accurate assessment of the situation in October 2019.

106. The Tribunal considered that the respondent had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. Mr Dawson's report was comprehensive. Counsel for the claimant challenged Mr Baker's assertion, in his statement, that the claimant's health conditions did not form a factor in his decision to dismiss, arguing that it should have done. Counsel highlighted the statement in Mr Dawson's report, that "*the claimant's physical and mental health fluctuates, with a resulting impact on his work performance*", as something which should have alerted Mr Baker to a need to make further enquiries about that aspect. Whilst the Tribunal considered that Mr Baker had accepted the conclusions in Mr Dawson's report when deciding to dismiss the claimant, it was clear that, at the appeal stage, Ms Jardine had gone beyond the report's contents to make further enquiries. She gave evidence that the respondent's procedure provided that only in exceptional circumstances should information predating the 12 months' period leading up to the consideration of dismissal, be revisited. The most recent occupational health report on the claimant was available as an appendix to Mr Dawson's report. Ms Jardine had looked at more historic information including the stress risk assessments in 2017 and 2018, the work action plan from 2015, and the mediation agreement together with

the notes of meetings with the claimant from September 2018 onwards. She also spoke to both Mr Dawson and Mr Boyd. At his appeal hearing, the claimant had complained that events from 2018 onwards were not a complete picture, and that there was more "context" to consider but without articulating the relevance of earlier events or procedures. The Tribunal considered that it was unreasonable for the claimant to expect that the respondent should have gone back to 2011 or to suggest that, from the very beginning of the performance processes, he should not have been expected to perform the full range of an H&S Inspector's duties or to record his work.

107. In respect of the procedure which the respondent followed when dismissing the claimant, the Tribunal considered that this was a fair procedure. The claimant's performance had been the subject of regular discussion and review on a weekly or monthly basis and the Tribunal considered that the notes of discussions demonstrate efforts by Mr Dawson to be constructive and supportive of the claimant. The claimant had been given warnings followed by clear performance improvement plans which listed by name the inspections and interventions which the claimant was required to work on, thereby spelling out, in detail what he was required to do in order to demonstrate improvement. The Tribunal noted that the claimant was not dismissed by his line manager but by a senior manager, Mr Baker, who examined the performance management which Mr Dawson had undertaken, including the performance plan and reasonable adjustments that Mr Dawson had put in place. Mr Baker reasonably concluded that the claimant should be dismissed for poor performance, because he had been performing at a level far below that of other H&S Inspectors. The claimant appeared to argue that, because he was disabled, he should not have been dismissed for his poor performance – the Tribunal rejected that suggestion, and considered that it would not have been reasonable to expect the respondent to simply allow the claimant to do whatever he could manage in the Inspector role, such that whatever level of performance he achieved should be deemed acceptable because he was disabled.

108. The respondent did not give the claimant a copy of Mr Dawson's report prior to his meeting with Mr Baker which resulted in his dismissal. That was irregular but the Tribunal considered, on a balance of probabilities, that it was not fatal to the respondent's conduct of the procedure overall or the decision to dismiss. It is unclear when the claimant was sent the report. If he had been given a copy prior to his meeting with Mr Baker, the claimant would have had notice of the issues that Mr Baker was going to consider, and an opportunity to plan his responses to the points in the report. However, the claimant had already been through similar and very detailed discussions in numerous performance review meetings with Mr Dawson, during the earlier stages of the performance management

process leading up to the 12 months sustained improvement period. Mr Dawson's report reflected the matters raised and discussed previously. Further, the Tribunal noted that Mr Dawson's report refers to his relationship with the claimant and the mediation. The Tribunal found the description of their relationship to be consistent with the surrounding evidence and at odds with what the claimant contended about their relationship in these proceedings. In any event, the Tribunal considered that, by the time of his appeal hearing, the claimant had seen the report and was very familiar with the matters of concern and the arguments he was facing about his performance. The claimant came to the appeal well-prepared and he accepted in cross examination that there were no surprises in Mr Dawson's report. In effect therefore the Tribunal considered that this defect (of failing to provide the claimant with a copy of Mr Dawson's report before the meeting with Mr Baker) was not fatal and remedied at the appeal stage.

109. The Tribunal has also considered whether the respondent's decision to dismiss the Claimant fell within the reasonable range of responses open to the reasonable employer faced with the circumstances of this case and has concluded that it did. As explained above, the appeal conducted by Ms Jardine remedied any apparent defects. The fact was that the respondent had given the claimant considerable support, leeway and the benefit of the doubt over many years in the hope that he would address the numerous and serious performance issues highlighted, which persisted and the claimant had shown that he was unable to improve to any significant degree or to sustain such improvement over time. Ms Jardine explained to the Tribunal that her discussions with the claimant's line manager, Mr Boyd, revealed that he was managing the claimant's work on a risk basis and that Mr Boyd was spending the equivalent of one day per week managing the claimant, in preparing for and conducting meetings with the claimant and also speaking to him several times a day. Ms Jardine described this involvement with the claimant as an unsustainable management effort. In those circumstances, dismissal fell squarely within the range of reasonable responses.

110. In light of all the above, the Tribunal concluded that the complaint of unfair dismissal is not well- founded and shall be dismissed.

Disability Discrimination

111. Notwithstanding the respondent's concession on disability, the Tribunal was concerned about the absence of any independent or detailed medical evidence concerning the precise nature and effects of the claimant's disability. There was no evidence of the claimant's health issues or diagnoses in the bundle, save for a single occupational health report and the stress risk assessments. None of these documents suggested that

the writers had in fact seen the claimant's medical records, as might be expected, and there was nothing to explain the holistic effects of the claimant's disability. This resulted in a lack of clarity around the precise nature of the claimant's disability and how it might affect him and his work performance, as he contended and there was nothing to explain the very significant extent to which the claimant was incapable of performing the duties of a H&S Inspector. For example, the claimant's witness statement, paragraphs 55 and 56 refer to difficulties with note taking, work recording and writing but the claimant relates this to his dystonia. The claimant's absence from work, sick, in March 2018 was because of oral surgery and ENT issues. Importantly, the Tribunal noted that there was a complete lack of evidence before it of the clinical condition the claimant claimed beyond the fact that he had told the respondent's personnel from time to time that he had depression, nor any evidence that the claimant's poor performance arose in consequence of his depression and/or any evidence to demonstrate how, if at all, it had the effect(s) the claimant contended for. Such medical evidence is also a requirement for the consideration of compensation payable under the CSCS.

112. In the bundle, at page 422, within the claimant's additional disclosure documents, is a letter about the claimant from Judith Townsley, a Psychoanalytic Psychotherapist, dated 28 January 2021. The letter is not on headed paper, it does not set out Ms Townsley's qualifications and experience nor her involvement with the claimant, it is not signed and Ms Townsley was not called by the claimant to be cross-examined on the contents. The Tribunal considered that much of the content was not relevant to the issues in this case, and the claimant did not refer to it. The Tribunal therefore did not attach any weight to it.

Direct disability discrimination

113. The Tribunal considered the factual allegations in the list of issues in turn.

114. As to the allegations numbered 8 a, b and e in the list of issues, about a change in the claimant's line manager, away from Mr Dawson, the Tribunal has made findings on this aspect at paragraphs 102 and 103 above. In April 2017, the stress risk assessment recorded that the claimant had said that his relationship with his manager was strained. A recommendation was made for a "temporary" change in line manager, as a "short-term arrangement". Ms Wingfield had in fact been the claimant's line manager albeit that, when she retired, the claimant was to return to being managed by Mr Dawson. However, the respondent did give the claimant an alternative manager upon his return from sick leave, Dave Charnock, to support the claimant until the mediation with Mr Dawson, which concluded with an agreement between the claimant and Mr Dawson to work together to improve their working relationship. The mediation

agreement of 15 June 2017, which appears in the bundle at page 156, is written in positive terms and does not suggest the broken relationship that the claimant sought to portray in his evidence to the Tribunal. After the mediation agreement had been concluded, the claimant did not complain nor raise a grievance about the outcome of the mediation or of his return to being managed by Mr Dawson which he had agreed to. The Tribunal accepted the unchallenged evidence of the respondent's witnesses about the small size of its Carlisle office where Mr Dawson was, for the vast majority of the relevant time, the only available manager. The alternative would have been for the claimant to be managed remotely, by a manager situated in another office. The Tribunal accepted the respondent's submission that remote management was not appropriate whilst the claimant was being performance managed and given the high degree of intervention which such required. This was also a reason why Mr Dawson retained control of the claimant's performance process in August 2019 and also for consistency of approach.

115. Further, the occupational health report the following year, dated 1 May 2018, makes no mention of any issues arising from the claimant's relationship with his manager and the stress risk assessment of August 2018 contains no recommendation to change the claimant's manager. The Tribunal also noted the claimant's evidence, in paragraph 94 of his statement was that he "hoped" he might be offered a change of manager, despite that in fact he did nothing to pursue that hope. In light of the above, the Tribunal did not consider that the claimant had made out a case that his line manager should have been changed or that any failure to do so, by the respondent, was going against what had somehow been agreed.

116. The claimant contended that, in 2017, he had been given assurances about his return to work which the respondent then failed to implement. The Tribunal found no evidence of such assurances given by the respondent and so was unable to understand how the claimant made out this allegation or to what it referred. A sick note dated 22 May 2017, shows that the claimant's GP had recommended a phased return to work on 3 days per week and reduced hours. However, paragraph 69 of the claimant's witness statement, states that he had decided to return to work in order to try to resolve his problems at work, after discussion with his CBT counsellor. In addition, the claimant concluded the mediation agreement in June 2017 and raised no issues about any failure by the respondent in relation to his return to work either in the mediation process or at that time.

117. The claimant complains that, in 2018, the respondent held over the performance management procedure until he returned to work after oral surgery. It was clear from the claimant's evidence that he had expected, or

hoped, that his performance management to be dropped or re-started at a later date from the beginning of the procedure, due to his absence, but it was not. The claimant also complained that nothing had been done to progress his work during his absence. However, the Tribunal considered that the claimant was seeking to deny the content of Mr Dawson's letter to him of 24 May 2018, when Mr Dawson reminded the claimant that he had decided to pause the process to await a further occupational health consultation, before deciding whether to issue the claimant with a formal warning. In fact, a warning was not issued until September 2018, thus affording the claimant an effective pause to the procedure for over 6 months. There was no evidence before the Tribunal to suggest that the respondent had ever indicated that performance management would be abandoned or restarted if an employee was absent for a period of time, nor does the procedure suggest that is a possibility. In any event the claimant did not complain nor raise a grievance about such treatment at the time.

118. The claimant also raises the steps undertaken by the respondent in performance managing him, as acts of less favourable treatment, including: in September 2019, Mr Dawson reviewing the performance management procedure and referring the claimant to a decision maker; the holding of a stage 3 meeting in October 2019; and the decision to terminate his employment on 30 October or 1 November 2019 on the grounds of performance. The claimant advanced 2 other H&S Inspectors, MG and PH, as having similar performance issues to him and who were subject to performance management. The claimant's case was that these 2 Inspectors were not disabled and were treated more favourably than he was in the application of the performance management process. However, the claimant brought no evidence of the circumstances or treatment of either of these 2 Inspectors. In contrast, Mr Dawson's evidence, which was unchallenged, was that, in one case the Inspector had demonstrated that they were able to make improvements in performance over a sustained period and was now fulfilling the role of an Inspector, whilst in the other case the individual's employment had been terminated on medical grounds, as opposed to for performance issues. The Tribunal considered that there was no evidence before it upon which to make a finding of less favourable treatment and the claimant did not pursue these individuals as comparators, in submissions.

119. In light of the above, the Tribunal did not consider that the claimant had been subjected to less favourable treatment or that any of the treatment about which he complained for his direct discrimination complaint was in fact because of his disability.

Failure to make reasonable adjustments

120. The respondent accepted that the PCPs contended for, namely (1) maintaining line management, and (2) performance management amounted to PCPs which were applied to the claimant.

121. However, the Tribunal did not consider that the claimant was put at a substantial disadvantage by the PCP of maintenance of line management. For the purposes of the performance management process, the claimant was line managed largely by Mr Dawson – see the Tribunal's findings about the Carlisle office and the possibility of remote management at paragraph 114 above. The claimant has sought to argue that his relationship with Mr Dawson was broken and that this relationship impacted on his performance but the Tribunal rejected that argument – see paragraph 102 above. In addition, the claimant had a number of managers during his employment and from time to time he was managed by several other individuals. These included Ms Wingfield, whom the claimant contended in evidence had been very supportive towards him. The Tribunal noted, however that Ms Wingfield had issued the claimant with an improvement plan in October 2015 and a first written warning for poor performance in January 2017. In addition, the evidence showed that several senior managers formed the same conclusions about the claimant's poor performance at various times, through their dealings with him – see paragraph 103 above. For the purposes of his direct discrimination complaint, the claimant asserted that the failure to change his line manager was an act of less favourable treatment but the Tribunal did not find this to be so – see paragraphs 114 and 115 above.

122. Further, the Tribunal considered that the issue of whether it would have been reasonable for the respondent to change the claimant's line manager to avoid any disadvantage is not made out, in light of the matters set out above in paragraph 121. The fact is that the claimant was line-managed by a number of individuals during his employment and he has not shown that he suffered any disadvantage as required for this complaint which, in essence, is about Mr Dawson's management of the claimant alone. As previously stated, the claimant did not raise an issue about the maintenance of Mr Dawson as his manager or request a change of manager, nor pursue a grievance about his manager and/or any failure to change his manager during his employment.

123. In respect of the PCP of performance management, the Tribunal considered that it might be possible that the nature of the claimant's disability negatively impacted his performance but the claimant brought no evidence to demonstrate that it did or how it did, if that was the case. The Tribunal only had the claimant's assertion of such, without any supporting evidence. In the circumstances, the Tribunal was unable to conclude that

performance management did in fact put the claimant at a substantial disadvantage, noting that the claimant had on a number of occasions been declared fit to do his job and without any disadvantage being raised as might be expected.

124. In relation to the question of whether it would have been reasonable for the respondent to consider the impact of the claimant's disability on his performance before progressing with performance management to avoid any disadvantage, the Tribunal has found that the respondent did in fact consider the impact of performance management on the claimant, on several occasions, before proceeding. For example, Mr Dawson paused the process in order to obtain occupational health advice in December 2017, April 2018 and again in May 2018 and he also waited for and considered the stress risk assessments in April 2017 and August 2018. Likewise, Ms Wingfield had sought occupational health advice in November 2015 in order to consider the impact of performance management on the claimant. The process was delayed on each occasion in order to support the claimant and to explore how the respondent might do so.

125. The Tribunal was also mindful of the evidence of Ms Jardine who said that, in the course of their discussions, the claimant had not been able to articulate what appropriate management or support for him should consist of. In his statement, paragraph 178, the claimant identifies reasonable adjustments in terms of a reduced caseload, a change in line manager, assistance to resolve historic incomplete timesheets, allowing him the full 12 months to demonstrate improvement and moving him to the Band 5 Visiting Officer role. The Tribunal considered each of these and was satisfied that the respondent had in fact made efforts to make many of the reasonable adjustments contended for. The claimant had been given a substantially reduced caseload with no new work allocated to him for some time, he had been given assistance by way of guidance and time to sort out his timesheets and work recording, and the respondent had considered moving him to the Band 5 Visiting Officer role although this had been found to be unsuitable in light of the similarities in skill set. As previously explained, the claimant's line manager had changed from time to time but options in the Carlisle office were limited. Further, the Tribunal considered that the claimant had misunderstood the nature of a "sustained improvement period" the purpose of which is for an employee to demonstrate an improved level of performance and to maintain that level of performance over the 12 months. It appeared to the Tribunal that the claimant was seeking another 12 months in which simply to try to reach the standard required rather than 12 months to maintain the standard reached. In any event the claimant had shown that he was highly unlikely to do so. Ultimately, the respondent concluded that the claimant's

performance was far worse than others, that he was simply unable to make any significant improvement, and that there had been periods of the claimant's employment when he had not been subject to performance management and yet his performance was still significantly poor.

Discrimination arising from disability

126. The claimant contended that his poor performance was something which arose from his disability, depression. As already stated, the claimant brought no evidence to establish a link or any correlation between his performance and his disability. The Tribunal was therefore unable to conclude that the claimant's performance was "something arising in consequence of his disability" which is required to be established for the pursuit of a claim under section 15 EqA.

127. In considering the matters which the claimant said were unfavourable treatment, the Tribunal accepted that dismissal was unfavourable treatment. Mr Baker had dismissed the claimant because of his poor performance and Ms Jardine had turned down the claimant's appeal. Both senior managers at the respondent assessed the claimant as not being up to the job. The burden of proof is on the claimant to show that the unfavourable treatment was because of something which arose in consequence of his disability and the claimant has failed to bring evidence to show that. Indeed, whilst the claimant challenged the procedure undertaken by the respondent, he had said that, if the procedure had been undertaken in a way he considered to be correct, he would have been dismissed in 2015 for his performance.

128. As to the CSCS scheme, the Tribunal has found that the claimant was in fact considered for, but found not to be not entitled to compensation under the CSCS scheme – see paragraph 67 of the findings of fact. In those circumstances, the claimant was not treated unfavourably in the manner he pleads. He did not appeal the decision under the CSCS scheme, despite being notified of a right of appeal and where to direct such an appeal, by Ms Jardine.

129. The Tribunal has found that the claimant was in fact considered for the Visiting Officer role at Band 5 – see paragraph 71 of the findings of fact. In those circumstances, the claimant was not treated unfavourably in the manner he pleads.

130. Lastly, the respondent has argued that any unfavourable treatment as contended for by the claimant was a proportionate means of achieving a legitimate aim, namely maintaining standards of performance and performance management. The Tribunal considered that it must be a

legitimate aim for an employer to seek to maintain and promote adequate levels of performance from its employees. Likewise, dismissing the claimant for failing to meet the standards required, after undertaking a fair performance management procedure, including the respondent having made the claimant aware of its dissatisfaction and concerns, giving details of the deficiencies identified, providing the claimant with a reasonable time (in this case many years) to improve and having warned the claimant of the consequences of any lack of improvement, was a proportionate means of achieving that legitimate aim. The alternative would be that, because the claimant was disabled, he could never be subject to performance management or dismissed for poor performance.

131. In light of all the above conclusions on the discrimination complaints, the claim of disability discrimination fails and is dismissed.

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Employment Judge Batten
11 June 2021

JUDGMENT SENT TO THE PARTIES ON

17 June 2021

FOR THE TRIBUNAL OFFICE