EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr O Maruf	**v**	Network Rail Infrastructure Limited

Heard at: Bury St Edmunds (by CVP)

On:
09, 10, 11, 12, 15, 16 and 17 February 2021
27 & 28 April and 4 June 2021 (In Chambers - no parties present)

Before: Employment Judge Laidler

Members: Mr A Hayes
Mr C Grant

Appearances
For the Claimant: Mr S Crawford (Counsel)
For the Respondent: Mr T Welch (Counsel)

RESERVED JUDGMENT

1. The claims of direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments, harassment and victimisation under the Equality Act 2010 fail and are dismissed.

2. The claimant was dismissed by reason of capability.

3. The respondent acted fairly in all the circumstances in treating that reason as one to justify the dismissal of the claimant. The claim of unfair dismissal fails and is dismissed.

REASONS

1. The claimant brought two sets of proceedings.

2. The issues in the case were clarified at a preliminary hearing before Employment Judge Warren on 21 February 2020 which was attended by the two Counsel who appeared on behalf of the parties at this hearing.

3. The issues which had been agreed by the parties and which were attached to Judge Warren's summary are as set out below. Some notes have been made on them to reflect matters that were withdrawn at this hearing.

The Issues

4. The issues are as follows:-

Disability Discrimination

1. At all material times did the Claimant have a mental impairment?

2. Did the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day to day activities?

3. Was the effect sufficiently long term (or expected to be sufficiently long term) as defined in the Equality Act 2010?

4. Did the Respondent know or could it reasonably be expected to have known of the Claimant's disability at the relevant time(s)?

5. If so, from what did the Respondent have or could it reasonably have such knowledge?

Direct Disability Discrimination

6. Has the Respondent acted as alleged in:

(i) instigating and holding an ill health severance meeting on 5 September 2018;

(ii) giving the Claimant a 4-week timescale for redeployment;

(iii) ~~failing to uphold the Claimant's grievances on 5 November 2018~~;

(iv) ~~failing to uphold the Claimant's grievance appeal on 4 February 2019~~.

(iii) & (iv) were withdrawn at this hearing.

7. If so, did any of the above alleged conduct constitute the Respondent treating the Claimant less favourably than they treated others (either a non-disabled person or a person with a different disability) whose abilities are not materially different to those of the Claimant? The Claimant relies on a hypothetical comparator.

8. If so, was such treatment because of the Claimant's disability?

9. Can the Respondent show a non-discriminatory reason for any proven treatment?

Discrimination Arising from Disability

10. Did the Respondent act as alleged in:-

    (i) failing to appoint a designated person from HR/recruitment (one to one) to help the Claimant with redeployment;

    (ii) failing to identify suitable alternative roles;

    (iii) failing to consider and/or discuss suitable alternative roles with the Claimant;

    (iv) not following its own policy on ill health and reasonable adjustments and placing the claimant onto the Redeployment Register in a case of ill health/disability;

    (v) failing to alert HR/recruitment that the reason the Claimant was seeking redeployment was due to his anxiety/depression;

    (vi) failing to alert HR/recruitment that the process of redeployment was a reasonable adjustment for the Claimant's condition;

    (vii) failing to appoint/redeploy the Claimant to a suitable alternative role;

    (viii) requiring Claimant to attend work and/or attend work to undertake his role as Senior Asset Management Analyst;

    (ix) failing to use alternative methods (other than work email) to make contact with the Claimant in respect of redeployment;

    (x) failing to use the reasonable adjustments checklist before holding an ill health severance meeting;

    (xi) instigating and holding an ill health severance meeting on 5 September 2018;

    (xii) giving the Claimant a 4-week timescale for redeployment;

    (xiii) dismissing the Claimant on 13 June 2019;

(xiv) ~~failing to make a bonus payment that disregarded disability-related sickness absence~~. This was withdrawn at this hearing.

11. If so, did any of the above conduct amount to the Respondent treating the Claimant unfavourably?

12. Did the Claimant's disabilities cause, have the effect or result in 'something'? The Claimant asserts that the 'something arising' was:

    (i) the Claimant's inability to undertake his existing role due to the mental impairment;

    (ii) the exacerbation of stress and anxiety by having to review work emails, search for job vacancies, apply for them and/or review their suitability;

    (iii) a period/periods of sick leave.

13. If so, did the Respondent treat the Claimant unfavourably because of something arising in consequence of his disability? The Claimant asserts the unfavourable treatment was those acts mentioned in paragraph 10 above.

14. Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim within the meaning of Section 15(1)(b) of the Equality Act 2010?

Failure to Make Reasonable Adjustments

15. Did or would the Respondent apply a provision, criterion or practice (PCP) to the Claimant which it would also apply to employees who do not share the Claimant's disabilities? The PCPs relied upon are:

    (i) requiring the Claimant to attend work and/or attend work to undertake his role as Senior Asset Management Analyst;

    (ii) placing the Claimant onto the Redeployment Register for the purposes of redeployment in cases of ill-health/disability;

    (iii) requiring the Claimant to undertake an active role in seeking suitable alternative roles;

    (iv) notifying the Claimant of redeployment opportunities via his work email address.

16. If the Respondent did apply such PCP, did the PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who do not share the Claimant's

disabilities? The Claimant contends that he has been placed at a substantial disadvantage because:

(i) he was unable to undertake his existing role due to his mental impairment;

(ii) the Redeployment Register was suitable only for redundancy cases, required the Claimant's active involvement and did not identify him to a role, taking into account the effects of his disability;

(iii) given the nature of his disability and sickness absence, he needed additional support securing and identifying to a suitable alternative role;

(iv) given the nature of his disability and sickness absence, the Claimant required minimal contact with the Respondent so as not to exacerbate his symptoms and was unable to seek his own suitable alternative roles or apply for them;

(v) given the nature of his disability and sickness absence, reviewing his work emails and work systems exacerbated his symptoms.

17. If so, did the Respondent know, or could it reasonably be expected to know, that the Claimant would be placed at a substantial disadvantage?

18. If the Respondent was aware of the disadvantage or could reasonably be expected to be aware of it, did it take such steps as was reasonable to have to take to avoid the disadvantage?

19. Would the following steps alleged by the Claimant have been ones that it was reasonable for the Respondent to have to take (and did the Respondent take them):

(i) appointing a designated person from HR/recruitment to help the Claimant be redeployed;

(ii) informing the individual responsible at HR/recruitment that the redeployment process was due to the claimant's depression/anxiety and represented a reasonable adjustment;

(iii) identifying the Claimant to a suitable alternative role without the Claimant's input or involvement being required;

(v) considering and discussing all suitable alternative roles with the Claimant when they arose;

(v) redeploy the Claimant to a suitable alternative role without the need for an interview process;

(vi) directing all redeployment communications to his personal email address and/or personal telephone so as to reduce exposure to work matters.

Disability Harassment

20. Did the Respondent act as alleged:

(i) by instigating and holding an ill health severance meeting on 5 September 2018;

(ii) by giving the Claimant a 4-week timescale for redeployment;

(iii) ~~by failing to uphold the Claimant's grievances on 5 November 2018~~;

(iv) ~~failing to uphold the Claimant's grievance appeal on 4 February 2019~~.

The last two were withdrawn at this hearing.

21. If so, did any of the above alleged treatment amount to the Respondent engaging in unwanted conduct?

22. If so, did any such unwanted conduct relate to the Claimant's disabilities?

23. If so, did such conduct have the purpose or effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? In determining this the Tribunal must take into account the perception of the Claimant, the other circumstances of the case and whether it is reasonable for the conduct to have such an effect.

Victimisation

24. Did the following amount to protected acts:

(i) lodging a grievance in respect of disability discrimination and failure to make reasonable adjustments on 11 September 2018;

(ii) discussions within the grievance meetings;

(iii) lodging an appeal against the grievance outcome on 15 November 2018;

(iv) discussions within the grievance appeal meetings.

25. Did the Respondent believe that the Claimant had carried out a protected act (or might do)?

26. Was the Claimant subjected to a detriment by the Respondent? The Claimant relies upon the following alleged detriments:

(i) the failure to uphold the Claimant's grievances of discrimination and failure to make reasonable adjustments on 5 November 2018;

(ii) the failure to uphold the Claimant's grievance appeal of discrimination and failure to make reasonable adjustments on 4 February 2019.

27. If the Respondent acted as described above, did it amount to a detriment?

28. If so, did the Respondent subject the Claimant to such detriment because of the alleged protected act(s)?

Time limits

29. Are there continuing acts of discrimination or have any of the above complaints been issued out of time?

30. If any of the complaints have been issued out of time, would it be just and equitable for the Tribunal to extend time to consider the complaints?

Unfair Dismissal (Capability)

31. Did the Respondent have a fair reason pursuant to Section 98(2)(a) of the Employment Rights Act 1996 for dismissing the Claimant namely for a reason relating to his capability?

32. Was the Claimant's dismissal fair pursuant to Section 98(4) ERA 1996 namely:

(i) did the Respondent reasonably believe that the Claimant lacked the capability for performing work of the kind that he was employed by the Respondent to do?

(ii) did the Respondent take reasonable steps to ascertain the true medical position?

(iii) did the Respondent adequately consult with the Claimant?

(iv) did the Respondent give adequate consideration to alternative employment?

(v) did the Respondent follow its own procedures before terminating the Claimant's employment, particularly, by identifying a suitable role for the Claimant and redeploying him into it?

(vi) did the Respondent follow a fair procedure (including the appeal procedure) in terminating the Claimant's employment?

(vii) did the Respondent's decision to dismiss fall within the band of reasonable responses?

Discrimination and Victimisation Remedy

33. If the Claimant was discriminated against, what compensation is he entitled to and in particular:

(i) injury to feelings?

(ii) personal injury damages?

(iii) aggravated damages?

(iv) loss of earnings?

(v) Interest?

(vi) Any further bonus entitlement?

34. Should the Tribunal make any recommendations? The recommendations sought are:

(i) Redeployment in disability cases to be dealt with on a case-by-case basis via HR;

(ii) Managers and HR to receive further training on issues of redeployment.

Remedy (for Unfair Dismissal)

35. Should there be a reduction in any basic award payable to the Claimant on the grounds that any conduct of the Claimant prior to his dismissal was such that it is just and equitable to reduce or further reduce the amount of the basic award, in accordance with Section 122(2) ERA 1996?

36. If so, what is the amount by which the basic award should be reduced or further reduced?

37. What financial loss has the Claimant sustained in consequence of the dismissal insofar as that loss is attributable to the action taken by the Respondent?

38. Having regard to any such losses what amount the compensatory award is just and equitable in all the circumstances including any reduction on the basis the Claimant failed to mitigate his losses and any reduction on the basis the Claimant would or might have been fairly dismissed had a fair procedure been followed: *Polkey v AE Dayton Services Limited*? Section 123(1).

5. The tribunal heard evidence from the claimant and from:-

5.1 John Saxelby, Trade Union Representative.

5.2 Paul Sellar, work colleague.

6. For the respondent the tribunal heard from the following:-

6.1 Chris Madden.

6.2 Russell Shanley.

6.3 Emma Osborn.

7. The tribunal had a digital bundle which ran to 1561 pages although actually there was significantly more pages than that number because pages had been inserted. Some of the representatives had a paper copy of the bundle but the tribunal was referring to a digital version and the page numbers that are referred to in these Reasons refer to the digital page numbers.

8. From the evidence heard the tribunal finds the following facts.

The Facts

9. The first claim issued by the claimant was received on 26 April 2019 following a period of ACAS Early Conciliation between 18 February and 8 March 2019.

10. The second claim was issued on 23 July 2019 arising out of the claimant's dismissal, following a period of Early Conciliation on 16 July 2019.

11. The claimant brings complaints of unfair dismissal and of disability discrimination. In his claim form he stated that he satisfied the definition of disabled due to anxiety and depression from May 2018. As will be

discussed below in his witness statement at paragraph 7 he stated that he believes that from January 2018 he met the definition of being disabled.

12. The claimant commenced work with the respondent on 9 September 2009 as a Senior Analyst on a Band 3B.

13. His contract is seen in the bundle at page 72.

14. The following Policies are relevant to these proceedings and the claimant's employment.

Policies

Managing for Health Monitoring and Managing Absence

15. This guide provides an overview for all line managers to enable the effective management of attendance within the respondent.

16. In relation to long-term absence defined as absences of over 20 days or those employees whose sickness might turn into a long-term absence Occupational Health would be instructed so that the respondent can "better understand the illness". It recognises that there will be occasions when employees are unable to return either to their role or alternative roles. The policy makes it clear:

> "Each case needs to be examined, to understand all the issues and we need to work with the individual employee and our occupational health providers to understand each case. There can never be one size fits all policy. The Company must judge each case on its merits."

17. The policy describes how once having obtained advice from Occupational Health there may be a scenario where the employee has a long-term medical problem involving a long period of absence "as they are undergoing treatment for a serious illness, which could include a mental illness". The policy reminded managers to be aware of what was then the Disability Discrimination Act and that they should work with the HR team on long-term health issues.

18. The policy is then divided into sections dealing with short-term absences and those dealing with more long-term absences. In relation to the latter Occupational Health will have highlighted that those employees have a genuine medical reason for absence and as such must be "managed with empathy and compassion". Again reference is made to what was then the Disability Discrimination Act and that those on long-term sickness may have a disability which "may involve making workplace adjustments that continue to help them to perform their role".

19. The policy further acknowledges there will be occasions when the employee will be unable to return to work in their own role and a suitable

alternative role should then be sought. It should always be the last option to exit an employee using the ill health severance scheme.

Redeployment policy

20. The policy statement at the outset of this policy refers in particular to those at risk of redundancy. The purpose of the policy and procedure is to help mitigate any risk of redundancy as far as is reasonably practicable. The policy however goes on to state that the respondent also recognises its obligation to support employees to find alternative suitable work where there are unable to continue in their current role due to disability or ill-health.

21. The policy sets out at section 1.2 the following principles;

> "Network Rail will seek suitable alternative employment opportunities for employees who are at risk of redundancy or who are unable to continue in their current role due to disability/ill-health.
>
> Employees who are at risk of redundancy will be offered a vacant role if it is a suitable alternative role or would be suitable following a period of training within a reasonable timescale."

22. In a section headed Procedure the policy explains at 2.1 under 'Notification' that HR business partners 'will notify HR Data Changes (HRDC) of any role clarity employees who have been served formal notice of redundancy'. HRDC will 'flag' the individual on the HRMS as a redeployee and that status will show against their name on iRecruitment when they apply for internal vacancies.

23. In relation to finding suitable alternative work section 2.2 states that where a vacancy arises the resourcing team will search the redeployment pool prior to any form of recruitment advertising being launched. The resourcing team will contact the employee to ascertain their suitability and interest in the role and provide this information to the hiring manager.

24. Employees being redeployed due to disability/ill-health will also take up the new alternative role subject to a trial period of three months, reviewed weekly. If the new alternative role does not prove suitable and all reasonable steps have been taken to make reasonable adjustments then ill health severance may be considered.

Everyone Managing Disability in the Workplace – A Guide to Reasonable Adjustments

25. This guide is designed to support the implementation of the reasonable adjustment policy. It outlines the duties of the respondent and contains examples of the types of adjustments that can be made. Line managers are reminded that they also need to consider whether they have met their duty to make reasonable adjustments before and during the use of all other

policies for example when managing for attendance, flexible working and performance -related pay payments, disciplinary and grievances.

26. The guide sets out the definition of disabled and then provides guidance on the duty to make reasonable adjustments. At section 3 it explains that the duty exists to give disabled employees equal access as non-disabled employees, to everything that is involved in doing and keeping a job. When a manager knows that one of their team is disabled they have a duty to take steps to remove, reduce or prevent the barriers that individual faces at work. Examples of those barriers are given. Guidance is then given on what may be a reasonable adjustment and a bullet point list of matters that might wish to be considered when deciding what is reasonable. These are stated to include;

> "When considering costs and resources you need to look across the whole of Network Rail not just your team, department or depot. The size of our organisation means that we would be expected to make considerable efforts to remove, reduce or prevent barriers in employment…
>
> If an adjustment would increase the risks to the health and safety of anybody, including your disabled employee then you should consider this when deciding what is reasonable. Your decision must be based on a thorough assessment of risks and not on assumptions…
>
> It may take several different adjustments to address disadvantage…
>
> Any adjustments made should not make a health condition worse…"

27. The policy then looks at different types of disability and at section f) discusses mental health. Some of the possible adjustments are considered including a phased return to work and a mentor or buddy in the workplace to support an employee especially when they return to work after a period of absence.

28. In section 7 the policy deals with specific adjustments for specific situations from recruitment through to redeployment. It is made clear that if an individual can no longer fulfil their current role even after reasonable adjustments have been made it may be an adjustment to redeploy them into another role with or without suitable adjustments. The policy states:-

> "once you have found a suitable role for the employee, they should be transferred directly into the role. They should not undergo any kind of competitive interview or recruitment process because being redeployed is their reasonable adjustment. Employees should not be asked to find an alternative role or apply for other posts in the circumstances. The main element that must be taken into account is that when an employee is redeployed because they can no longer do their current job due to their disability then redeploying them is an adjustment and should be treated in the same way as any other reasonable adjustments taking into account the following factors: –
>
> Effectiveness

> Practicality
>
> Cost
>
> Disruption
>
> Risk
>
> In assessing suitability it is important to ensure that none of the barriers that the employee face in their current role are replicated in the role that they are being redeployed into."

Grievance policy

29. In a section dealing with the purpose of the policy it is made clear that every effort should be made for the majority of problems relating to work or the work environment to be resolved informally between employees and their immediate line manager in the course of their normal working relationship. The purpose of the procedure is to provide a framework for dealing promptly and fairly with problems relating to work or the work environment which have not been resolved through the normal working relationship. Where use of the formal procedure is necessary the manager hearing the grievance will have the authority to hear and resolve the grievance and receive appropriate advice and guidance from HR. Following a grievance where the working relationships have been affected the relevant manager and employee should work actively to re-establish good working relationships and monitor the situation for a reasonable period of time.

Your Pay - A new pay structure for Role Clarity Bands 1 – 4

30. In an introduction to the new structure in 2015 by the Chief Executive it was explained that four years previously Network Rail and the Transport and Salaried Staffs' Association (TSSA) agreed to work together to review bands 1 – 4 of the pay structure. The business collaborated with the TSSA in a joint working group to design and implement the new transparent pay structure and the booklet had been produced to explain the changes in detail. In addition to the booklet employees would have received a personal letter advising where their job had been placed in the new structure and explaining what that would mean when it went live on 1 September 2015.

31. There was another message in the booklet from the General Secretary of TSSA. In this he explained that the joint working group formed between the union and the respondent's representatives was tasked with designing and delivering a new pay structure that would suit its 'role clarity band 1 – 4 population' and promote greater transparency and equality. The structure now presented was the accumulation of many months of close collaborative working between the two parties. Two senior union lay representatives were seconded on a full-time basis to work for the project team. As the new structure evolved the union would continue its

involvement in shaping the way forward and working alongside the respondent.

32. There were five key points to the new pay structure:

> "1. the banding structure 1 – 4 would remain unchanged.
>
> 4. within each band there would be new narrower pay ranges and employees would be able to see how bands 1 – 4 jobs sat within the new pay structure.
>
> 5. salary details for individuals would not be published, only pay ranges for jobs.
>
> 6. as a result of implementing the project no one's base pay would be decreased."

33. There then followed a table which showed bands 1 – 4 with pay ranges A to C in each band with C being the highest and A the lowest. Within that range were zones with maximum salaries applied to each zone. The tribunal heard from the claimant's trade union representative Mr Saxelby in connection with this matter who explained that there was considerable overlap between the zones in different pay bands. For example the claimant as a 3B was on £42,000 and had he moved down to Band 4 that salary would have been within the zone 1 of pay range 4C.

34. This document also set out the employee's right to appeal the pay range that their job had been allocated. There were two grounds for appeal: –

> "1 – That the job description does not adequately reflect the accountabilities of the job as at 1 July 2015
>
> 2 – it is believed a job with an equivalent combination of skills or from an equivalent labour market has been allocated to a higher pay range."

35. The time limit for the appeal was within two months from the date of the letter the employee had received about their banding.

36. On 11 October 2013 the claimant had a return to work interview with his then line manager. This showed that he had had three instances of absence in the last six months one day of stress, one week with a viral infection and stress and three weeks stress making a total of 21 days. It was noted as one of the key points that stress and his role concerns had been discussed, his line management changed and his grievance was being progressed.

Claimant's grievance October 2013

37. The claimant raised a grievance about the change in banding of the Train Performance Modeller role held by him from band 4 to band 3.

38. The grievance outcome was dated the 28 October 2013 from Hannah Linford, Project Manager. The grievance was not upheld it being concluded that the Train Performance Modeller role was correctly banded as a Band 4 role. Detailed reasons for having come to that decision were set out in the letter.

39. The claimant appealed this decision by letter of the 6 November 2013. He refuted each of the points made in the grievance outcome letter and concluded "overall I believe the JD and banding are not fit for purpose and have not been addressed in the reply".

40. On 15 November 2013 the claimant had an informal meeting with his line manager. He was at that time looking at other roles and had had an interview for a Senior Analyst Energy Services role and was yet to hear back in relation to two other roles. He had also been asked to apply for a Band 4 analyst role in the finance department and intended to do so. His Manager noted that she was aware of his appeal against the grievance outcome.

41. In a section headed "post meeting notes" the claimant had provided his review paperwork and the comments on his review the line manager considered reflected his state of mind in relation to work at the present time:

> "The last six months have been horrible all based on issues especially with my line manager and the job. I have no motivation to do anything especially when I get little to no recognition of the work I do…
>
> The last six months have clearly shown that I am not valued by management in this team (but valued by people outside this team as well as other colleagues in the same team) hence why I am applying for jobs outside of this team."

42. In an outcome letter 28 November 2013 the claimant's grievance appeal was not upheld.

43. In or about February 2014 the claimant's job tile changed to Senior Analyst Band 3B.

Whole Life Costing Manager role

44. In July 2015 this role was advertised. It is the role the claimant believes he was actually performing. He did not get an interview. At paragraph 26 of his witness statement he sets out how he was told this was because he did not have a degree. The role was actually not filled at that time. The respondent agreed to and did fund the claimant's degree course with the Open University. The claimant alleges that Andy Kirwan said that they would sort out the Whole Life Costing role after the claimant's first year results on his degree. The claimant states that that implied that if his grades were high enough "the role was mine" (paragraph 26).

45. The tribunal does not accept that the claimant was offered the role in this way. Perhaps the claimant hoped that would be the case but the tribunal is satisfied that no guarantee was given to him. The claimant would not have had a degree at the end of his first year and would therefore still not have met an essential criteria for the role. It is not credible to suggest that the respondent would then have merely given him that job if his grades were good.

46. In September 2015 the claimant started his Open University degree funded by the respondent.

47. In 2016 the title of the claimant's role changed to Senior Asset Management Analyst.

48. On 16 June 2016 Chris Madden became the claimant's line manager.

49. The claimant relies upon an invite he was given by Andy Kirwan to attend his team awayday in December 2016 (paragraph 28). The claimant refers to Andy Kirwan's presentation showing the claimant as being "borrowed" into the role. The claimant states that he was happy that it had finally been admitted on a piece of paper that he was doing the Band 3C Whole Life Costing role. He acknowledges that in a subsequent informal meeting both Andy Kirwan and Chris Madden stated that the claimant was not doing that managerial role and denied that the presentation had meant that he was.

50. The claimant was referred to Occupational Health and a report seen dated 9 May 2017 following a telephone consultation. The claimant reported feeling worse since his last assessment and attributed this to work related stress which the adviser understood management were aware of. He reported trouble falling asleep, feeling irritated and feeling tired amongst other stress related symptoms. In the opinion of the Occupational Health adviser:-

> "a face-to-face supportive discussion with management is required to identify and address the employees perceived potential stress always. Management may therefore wish to consider completing a stress risk assessment which will help to implement a plan to address the perceived work issues and to support the individual with these perceived work issues."

51. It was the opinion of the OH adviser that the claimant was fit to perform his job role and that the claimant was able to take micro breaks of 2 to 3 minutes after every hour which he supported.

52. The stress risk assessment was carried out (seen in the bundle at page 590). There was correspondence between the claimant and Chris Madden around about 26 May 2017 in connection with it. One of the action points noted was "to determine the level of the role current undertaken by OM. Is this a 3B or is 3C a better reflection?".

53. By email of 26 May 2017 the claimant informed Chris Madden "I will be taking stress leave". It is worth quoting the email:-

> "After today's talk and considerable amount of time you have had to resolve this issue, I believe you have not tried to resolve this issue.
>
> The fact there are multiple issues that have not been remotely resolved for example such as the how my role is really the WLC band 3C in Andy's team, and relative pay of 4C versus my role. Also you have shown the complete lack of competence in contacting HR urgently to discuss this specific matter but rather contacting them about a generic benchmarking question – which of course they would say there isn't a problem.
>
> Because of this and the amount of stress you have caused, I will be taking my doctors advice and taking stress leave. Whilst on leave I will also be writing a grievance against the 3C issue."

54. This email was sent at 15:41 in response to Chris Madden's email of the same day at 12:47. The claimant had given no time for the action points in that email to be carried out.

55. The claimant was off work from 26 May 2017 and did not return to work. The tribunal is satisfied that the reason he was off work at this point was solely to do with his issues concerning the banding for his role.

56. The next fit note was dated 5 June 2017 which stated the claimant was not fit to work due to "work-related stress". When the claimant submitted this to Chris Madden on the same day he stated in his email that he had been given an assessment by his doctor which "suggested I have moderate depression". That is not what the fit note stated. It is also not stated in the medical records for that date seen in the bundle.

57. The claimant was assessed by Occupational Health on the 19 June 2017 and a report produced on that date. The adviser had reviewed the records and had undertaken a telephone assessment with the claimant. The claimant had advised that the work-related situation had continued to deteriorate and "he felt no option but to refrain from attending work, which was supported by his GP". At the assessment the claimant continued to present with anxiety - related symptoms such as sleeping difficulties and constantly worrying about work. He was due to be further assessed by his GP later that day. The adviser further understood the claimant was due to meet with management the following day "in order to discuss strategies that need to be considered and then implemented in order to address the work-related issues". The report concluded:-

> "In my opinion, Mr Maruf would be fit to return to work if the work-related issues are satisfactorily resolved.
>
> I would suggest that the situation needs to now be managed by management rather than occupational health as Mr Maruf is motivated to return to work as soon as possible after the issues have been addressed.
>
> I have not arranged to review Mr Maruf but please do not hesitate to re-refer him if his symptoms deteriorate and he is not able to return to work."

58. At this point the work-related issues were the banding. There is no evidence of any other issues between the claimant and his line manager. The claimant's own email of 26 May made it clear that as Chris Madden did not agree with him about that issue he was going off on what he called "stress leave". When cross examined the claimant stated that the detail of the problems he was having with Chris Madden were in his witness statement. The tribunal cannot find anything about the relationship with Chris Madden at that time other than in relation to the banding/remuneration issues.

Claimant's grievance 20 June 2017

59. By email of 20 June 2017 the claimant sent to Chris Madden and Andy Kirwan his grievance about the job and banding issue. This was expanded upon in a document sent subsequently seen at page 606 of the bundle. In this the claimant summarised his grievance as:-

> "the objectives, accountability and job description of my current role as Senior Asset Management Analyst band 3B is in fact those of the Whole Life Cycle Costing Manager [Electrical Power] is band 3C. This grievance is made for relevant parties of Network Rail to formally acknowledge that I have been conducting the WLC band 3C role."

60. There is nothing else in that grievance about other issues the claimant was having with Chris Madden. He is comparing his job description with that of the WLC role.

61. The claimant's grievance was acknowledged by Nigel Best by letter of 3 July 2017. He summarised the claimant's grievance as has been set out above and specifically stated that if there were any other related issues the claimant would like to have considered as part of this grievance the claimant should put them in writing as soon as possible. The tribunal has not seen a reply to that letter from the claimant.

Occupational Health report 9 July 2017

62. Again this was conducted by way of a telephone consultation. The adviser summarised that the claimant reported that he:-

> "perceives that he is not being valued and remunerated for the appropriate grade of the job he is doing. He reported that he has had numerous discussions with management but does not feel that his point of view has been acted on appropriately. This has been causing him to feel frustrated and emotionally overwhelmed."

63. He was assessed as having moderate anxiety due to this ongoing perception of how he had been unfairly treated at work. The claimant did not feel he would be able to return to work after his current fit note expired on 11 July 2017 as:-

> "he is still feeling emotionally overwhelmed about work. However he reports that should these issues be resolved he feels that his emotional composure will improve to a point where he will be able to return to work". [emphasis added]

64. In the professional opinion of the Occupational Health adviser the claimant was medically fit. He remained unsuitable to return to work:-

> "due to his perception about his work issues which are having a negative effect on his cognitive and behavioural functions. The cause of his absence and inability to return to work is of a non-medical nature." [emphasis added]

65. For that reason additional medical, psychological or Occupational Health interventions were unlikely to have a significant benefit until the work related issues had been addressed to a resolution.

66. It appears from subsequent email correspondence that the claimant took issue with this report and wished it to be amended to state that he would be able to return to work once the work-related issues were "fully resolved".

Grievance hearing - 13 July 2017

67. Notes were seen in the bundle at page 626 which appear to be those of Scott Saxelby. He started by summarising the claimant's grievance as him believing he had been fulfilling the accountabilities and objectives associated with the Whole Life Costing Manager role and that he had argued that his banding should be increased from 3B to a 3C. His preferred outcomes were listed as:-

> "Official recognition of role
> Transparent pay award
> Formally take up a position within Andy's team"

68. Some minutes appear at page 628 of the bundle which again appear to be Scott Saxelby's. Chris Madden is noted to have started the meeting by stating that:-

> "an offer was made to the claimant which would enable him to transfer to Andy Kirwan's team in a wholesale capacity although the condition of the transfer to that other team would be that he would remain on a band 3B, that due to recent recruitment restrictions the vacant band 3C roles within Andy Kirwan's team cannot be advertised."

69. The grievance was heard by Nigel Best and his report and the outcome letter sent to the claimant on 24 July 2017 (page 635). This was concluded after a thorough investigation with Mr Best having spoken to the claimant, Chris Madden and Andy Kirwan with witness statements attached to the report. He concluded that having reviewed the evidence and in particular the job descriptions for the two roles there were material differences in the expectations between the Senior Analyst position and the Whole Life Cycle Costing Manager position. The latter required an increased level of

breadth in accountability as well as in terms of essential qualifications and experience. He did not therefore uphold the first point in the claimant's grievance.

70. With regard to the second aspect of the claimant's grievance whilst he acknowledged that the claimant was recognised as providing a whole life costing role he did not agree that the claimant was being recognised as being in the band 3C manager role.

71. With regard to the allegation that the claimant had been advised by the Whole Life Costing Manager that he would not achieve an interview for the 3C role owing to his lack of a numerate degree qualification, the wording of the essential requirements for the role were quite clear and the claimant did not currently hold a degree in a numerate discipline as was relevant to the senior asset management analyst role and had not yet achieved formal chartership status by a recognised professional body which is required for the whole life costing manager role. He did not believe anything untoward had been stated as the job descriptions were quite clear in listing their essential requirements.

72. In conclusion Mr Best recommended an assessment of the claimant's career development plan and progress against it as clearly the sooner he could acquire a formal degree qualification the better. With regard to remuneration the claimant was judged to have a salary comparable to his peers assessed against the existing Band 3B role. However in addition he was being sponsored by the respondent with both fees and matched study leave to complete a university degree course. It was to be noted that degree sponsorship was not an automatic entitlement to everyone in the industry or the respondent and had been made at a previous line manager's discretion. Many of the claimant's peers could argue that the company had already been generous in the way it had been accommodating the claimant's needs.

73. With regard to taking up a position in Andy Kirwan's team it was noted that both managers interviewed had stated that they had offered this opportunity of a transfer at a Band 3B but that the claimant had rejected the offer. The solution was still available and would represent a prudent way forward for the claimant to realise his ambition to join the Whole Life Costing team on a permanent basis.

74. The claimant's next fit note was dated 19 July 2017 stating all "stress-related problems".

Appeal against grievance outcome

75. The claimant submitted an appeal against the grievance outcome (page 645). He questioned Mr Best's impartiality as he was a peer of Chris Madden and Andy Kirwan and stated there was a question as to whether the investigation had been conducted with bias and was not independent. He therefore requested that for the next level of appeal the

grievance manager appointed be independent of anyone in Brian Tomlinson's Risk Analysis and Assurance team.

76. A fit note dated 27 July 2017 again stated the claimant was unfit to work due to work-related stress which should be assessed by work Occupational Health team. The doctor had put a cross in the box 'may benefit from workplace adaptations' but none were suggested.

77. By letter of 21 August 2017 Chris Madden invited the claimant to meet to discuss his ongoing absence following his recent referral to Occupational Health. The purpose of the meeting was to establish the claimant's current circumstances and to discuss the way forward as well as discussing the Occupational Health report and the information provided by Occupational Health to management.

Occupational health report – 22 August 2017

78. This was provided following a telephone consultation with the claimant that day. The claimant was still displaying stress-related symptoms including anxiety, sleep disturbance and appetite/food problems. The claimant reported these symptoms were due to work-related factors as the claimant felt he had been carrying out an enhanced role and that he is not receiving the rewards for this. The claimant had reported that his anxiety is heightened if he thinks about work and returning to his current job role/management line. In the opinion of the Occupational Health adviser the claimant was unfit for work due to his symptoms of anxiety. The adviser thought it unlikely the claimant would be able to return to work unless "the current perceived work-related issues are resolved". With regard to the outlook the adviser stated that if the issues were resolved between the two parties to a satisfactory level to both parties the claimant was likely to be able to return to work then. He was unable to give an exact timescale for this. This report does not refer to any other issues between the claimant and management save for the claimant's perception about his role and banding.

79. The welfare meeting took place between Chris Madden and the claimant on 24 August 2017 (summary at page 663.) The claimant agreed to maintain contact at least fortnightly, was happy with the occupational health report and discussed opportunities. The claimant's preferred outcomes were noted to be being successful with his application to the role within the Telecoms team and 'to get a role elsewhere within the business where they are strong on and need statistical analysis, such as the analysis and forecasting team or the reliability improvement team.' With regard to a role elsewhere the claimant was of the view that that was the Chris Madden and HR to sort out for him. This was at a time, even on the claimant's own case, when he did not satisfy the definition of disabled under the Equality Act. They discussed however that the best person to help identify the right role and to effect this was the claimant. Chris Madden had noted an action to identify opportunities within the business that would fit the claimant's criteria. Whilst the claimant states at paragraph 38 of his witness

statements that discussions never took place about another role he makes no other criticisms of that meeting.

Appeal against Grievance outcome – 6 October 2017

80. By letter of 7 September 2017 the claimant was invited to a grievance appeal hearing on the 27 September 2017. The date was subsequently changed to 6 October 2017. Paul Ashton who was to hear the appeal set out in that letter a summary of the grounds of appeal and made it clear that no other points would be considered during the meeting.

81. Minutes of the meeting was seen in the bundle at page 670. The meeting was chaired by Paul Ashton and the claimant confirmed in evidence that he saw no bias with Mr Ashton and considered him a fair person to hear the appeal. The claimant was accompanied by his trade union representative at the appeal hearing and they were also asked about Mr Ashton's independence. Both the claimant and his representative confirmed at the outset of the meeting that they were satisfied that Mr Ashton was independent of others who had taken part in the process.

82. The claimant continued to argue at the appeal through his representative that he had in effect been doing the Whole Life Costing Manager role. After an adjournment Mr Ashton gave his conclusions and outcome. The evidence confirmed to him that the claimant was not officially covering the Whole Life Costing Manager role in a secondment or showing on an official organisational chart as being in that post. There was a difference between carrying out whole life costing activities and being in the managerial role. Performing some of the activities and objectives did not mean the claimant was performing the accountabilities in line with the managerial job description. There was no evidence that the original grievance hearing had not been independent and its decision was upheld. He believed that the claimant needed to have a discussion with Chris Madden 'to get things straight on where things are going to sit in the future'.

83. The Tribunal accepts that after the appeal meeting the claimant went to see Chris Madden. The claimant does not dispute that he did go to see him but disputes Mr Madden's version of what took place. The Tribunal accepts Mr Madden's version of what then took place as it is consistent with the claimant stance throughout that he wanted the recognition of his role even though the appeal and grievance had not upheld his position. The tribunal is therefore satisfied that the claimant told Chris Madden he expected to be off for a long time and perhaps would not return to work. They talked about the opportunities within the team and Chris Madden informed him he was keen to see him back in the team. The claimant was unhappy with the option of returning to his job and grade and would only accept a promotion as he thought that was what he deserved. The claimant also stated that the welfare conversations he was having with Chris Madden were of little value. The claimant did not wish to speak to anyone from the respondent anymore and they discussed him being upset from the previous grievance meeting and a number of options for arrangements to continue with

assisting his welfare. The claimant suggested he would be happy to speak to a particular member of the team Paul Sellar (Senior Asset Management Analyst). The claimant did accept that this was his suggestion. He stated that because of how he was being treated he asked that Paul Sellar take over the health and well-being side as they had a strong relationship. Having someone he trusted he felt would help facilitate his return to work. Paul Sellar was appointed the claimant's welfare manager on 12 October 2017. The tribunal is satisfied however that this was not an appointment in a formal sense and that Paul Sellar was acting more as a go-between reporting back to Chris Madden.

84. In paragraphs 44–45 of his witness statement the claimant refers to this. He felt from the start that Chris Madden had no empathy and not want to assist him. He states that he did not do anything like enough to try to help the claimant resolve his issues. The claimant felt he had been taken advantage of within his role by having been used to undertake higher grade work for little recognition. When he complained nothing had been done to try and resolve the issues. He believed the relationship with his own line manager Chris Madden had broken down and that he was not willing to help him which is why the claimant decided that Paul Sellar should be appointed based on their strong working relationship. The tribunal is satisfied from having heard all of the evidence that the reference to the relationship breaking down is solely about the banding issue. This had by this point been looked at by others within the organisation who had not upheld the claimant's grievance or his appeal against it and it was not just about Chris Madden.

85. The claimant's GP signed a fit note dated 20 October 2017 stating work-related stress. He did not specify any advice that could be taken to assist the claimant to return to work. When the claimant sent this fit note to Chris Madden however he stated his doctor had suggested the following changes in order for him to come back to work but there is no evidence of that. These were:-

> "a) pay me for doing a band 3C Whole Life Costing role "which you have basically ignored and sent to an unfair and biased grievance process in order for you to not be accountable to fix this issue".
>
> b) all the following:
>
> 1) for all of the claimant's Whole Life Costing Work and accountability to be given to Andy Kirwan as "both you and Andy are both appalling managers".
>
> 2) As the claimant believed all his arguments about his role had been ignored he would only do basic analysis and reporting but would not do the statistical analysis.
>
> 3) for him to have a different manager as Chris Madden had "literally zero management skills (you have zero empathy skills and have appalling line management skills)".

Or

c) you and HR find me and analysis job in another team."

86. He concluded that the problem showed how Chris Madden and other members of the company 'lacked empathy skills, line management skills and completely lacked any form of logic where they would rather me be off on stress leave and get paid to be off rather than resolving the issue and getting all the value.'

87. Chris Madden replied immediately stating that he was keen to go through this in person and it looks by the claimant's reply that they were going to meet on the Tuesday although no notes of this have been seen.

88. The tribunal notes that a fair amount of the cross examination of Chris Madden focused on suggesting that if he had thought the allegations the claimant was making against him in this and other emails were unfounded he could have disciplined the claimant. His evidence was consistent, and the tribunal accepts that although he could see the claimant was upset about the banding he believed they could still work through the issues and still have a working relationship.

89. After each of the meetings he had with the claimant Paul Sellar sent him an email summarising their meeting. One of the first was dated 2 November 2017. The claimant raised an issue about using annual leave and time off in lieu when his sick pay went down to half pay. The claimant had asked if Chris Madden could produce a formal letter setting out an action plan to resolve matters for the claimant in the expectation that a satisfactory outcome could be reached.

90. In an email of the 21 November 2017 the claimant asked Chris Madden if they could have a chat in person to see if "you are going to do anything to sort this mess out?". Chris Madden replied that he could be free either Thursday or Friday. The claimant asked if they could have a chat before Thursday as he had found out some news about something that had happened in the wider team which was making him angry. The tribunal accepts Chris Madden's evidence from his witness statement (paragraphs 29–30) that it appears this was about a secondment role the claimant had applied for. He was frustrated that it had been offered to someone else in the modelling team. It was a band 3C role at the time but Chris Madden did not have any further details about it. He had no involvement in the role of the secondment at the time but offered to find out any relevant information that might help. The claimant was not keen on that suggestion. With regard to a Band 2 role the claimant had applied for and was interviewed for the claimant was unhappy with the feedback he received and believed there had been "foul play" with regard to the process and the appointment. The claimant felt it would be a waste of time applying for feedback. The claimant considered the individual who had been appointed to the role he had applied for was "unsuitable".

91. Chris Madden had sent to the claimant a Band 3B analysis role in finance that the claimant felt was not appropriate as he needed to be in a Band 2 role as he would only be working for someone who did not know what needed to happen within the company to make analysis a success. He told Chris Madden he would be reviewing job opportunities but felt at the time there were no opportunities within the business. Chris Madden offered to speak to those involved with the analytics strategy for the function and about how this might shape some opportunity but the claimant was dismissive of that as an option. He told Chris Madden he would be off for the next six months as he would receive half of his salary and then he might return at that point on a lower grade and perform menial tasks. The Tribunal accepts that that was indeed said as it matches up with what the claimant had been saying previously and was another economic threat to the respondent. It is quite clear the claimant knew what his sick pay entitlement was and had worked out how long he was going to stay off sick. This the tribunal has concluded was a calculated decision. He did not want to look at the Band 2 role even though he was given details of it.

92. The claimant appears to have made an assumption (paragraph 48 of his witness statement) that the person appointed to the Whole Life Costing Analyst Band 2 role did not have a proven Whole Life Costing background.

Claimant's grievance against Andy Coleman – 24 November 2017

93. The claimant submitted a grievance against Andy Coleman in relation to the above appointment to a Band 2 Whole Life Costing Analyst role. He wanted answers to what he believed had been "foul play" in this appointment. He asked for a full investigation as to why the role had been given to someone other than to himself. It is to be noted that this grievance was against another member of the respondent and not about the claimant's relationship with Chris Madden.

Claimant's grievance against Chris Madden – 26 November 2017

94. The claimant then did raise another grievance against Chris Madden addressed to Brian Tomlinson. He referred to this being his "only option to resolve the predicament that had resulted in me being on stress leave on the last 6 months".

95. He stated in the grievance itself that he had been on "stress leave" the last 6 months because:-

> "1 I have been conducting a band 3C Whole Life Cycle Costing Manager role (rather than my band 3B Senior Asset Management Analyst role) and not getting the official pay and recognition of doing so,
>
> 2 The action caused by Mr Chris Madden and Mr Andy Kirwan with regards to point 1."

96. He acknowledged in the grievance that it had originally been heard by Nigel Best and then Paul Ashton on appeal but stated that they were

obviously biased to agree with Mr Kirwan and Mr Madden by saying that the claimant did not do that role. He alleged that during his time off Chris Madden had shown a complete lack of any managerial ability. He had never tried to rectify the issue only suggesting the claimant raise a grievance because he knew how the grievance process is biased to agree with the person in the higher role and that he had no aptitude to actually sort the issue out. He also alleged that Andy Kirwan had shown no aptitude to sort it out by denying that the claimant was doing the Band 3C role and by ignoring the claimant on numerous occasions (work related and promotions).

97. The claimant stated that:-

> "the ridiculous thing about the situation was that it cost Mr Madden and Mr Kirwan (and ultimately you) more financially by me being off on stress leave and loss in productivity rather than Mr Madden and Mr Kirwan admitting that they had both caused a messed up situation and paying appropriately to sort this out before I went on stress leave"

98. Either they sorted 'this mess out' otherwise the resulting outcome would be that the claimant would return reluctantly after another six months of stress leave as a Band 4C analyst in the team getting paid the same poor salary and producing basic reporting/data administration. He assumed Mr Tomlinson did not want a situation like that where statistical analysis and WLC 'goes essentially down the drain due to poor management/leadership'.

99. The tribunal accepts that the claimant was again issuing an economic threat to the respondent if it did not give him what he wanted. This is again before, even on the claimant's own case, he satisfied the definition of disability.

100. The claimant continued to have meetings with Paul Sellar. On 7 December 2017 Paul Sellar sent him a summary of the notes he had made from their meeting the previous day. The claimant was scheduled to be away in Canada returning on Christmas Eve. In his response to Paul Sellar he again emphasised that the only outcome was to come back as a band 4C on the same pay doing something basic. The tribunal does not consider that a viable option bearing in the mind that the whole tenor of the claimant's grievances was feeling undervalued.

101. By email of 8 December 2017 Chris Madden confirmed he had spoken to Andy Coleman. He outlined the claimant's concern and confirmed Mr Coleman was more than happy to provide the claimant with feedback relating to the Band 2 Whole Life Cycle Role within Telecoms. The claimant stated he would like a written response followed by a meeting in person.

Meeting – 4 January 2018

102. A meeting took place between the claimant, Brian Tomlinson and Lisa Belsham on 4 January 2018 of which there are no minutes. The

claimant asserts that Lisa Belsham took over within 5 to 10 minutes of the meeting starting and was highly aggressive. Brian Tomlinson said they could not go over the grievance as it had been concluded The claimant's evidence is that he stated they had to either redeploy him at Band 2, going down to a Band 4 role or move him to somewhere else within the business, up or sideways. What the tribunal has seen is an email from the claimant of 5 January 2018 to his trade union representative Angela Belcher (in the Scott Saxelby's absence on holiday). In that he does states that HR took over aggressively and alleges that the representative was "very ignorant and big headed and I think was frankly lying about certain things". The tribunal has to conclude that the claimant's expressed view of this meeting was because those present were not agreeing with him and giving him the role he wanted, which now extended to a Band 2 role.

Occupational Health report – 18 January 2018

103. This report merely recorded that the claimant's GP had referred him for counselling and that he had a further appointment with his GP on 29 January to consider medication. The Occupational Health adviser suggested a review again in approximately four weeks time.

104. The fit note signed by the GP on 29 January 2018 was the first to state "depression and anxiety". It is from this point that the claimant claims that he satisfied the definition of disabled within the meaning of the Equality Act 2010.

105. The claimant had another meeting with Paul Sellar on the 14 February 2018 (page 718). They had discussed how the respondent could support any potential return to work and the claimant felt that could be achieved but only in certain specified circumstances, namely:-

> "The first option would be to come back into the Asset Management Analyst team retaining your current salary but moving down to a band 4C grade with me as your line manager. You added that you did not wish to have any dialogue or interaction with Chris Madden, Brian Tomlinson or Andy Kirwan.
>
> The other option would be to secure a new role in another area of Network Rail."

106. With regard to the claimant's studies he had been able to keep on top of assignments but this had become more difficult over the last few weeks.

107. There was reference to mediation that had been offered at the meeting on 4 January. After reflecting on this the claimant had decided there would be little point.

108. The claimant did not want to continue using the respondent's laptop due to distress it was causing him during his sick leave. He knew he needed to find another role however accessing the work laptop and seeing everything that was going on exacerbated his symptoms. He wanted to be able to see a list of available jobs, discuss what other jobs he could do and wanted to then be supported by someone who would be able to pinpoint suitable

roles and put him forward for them. Correspondence from February 2018 from Paul Sellar, Chris Madden, HR and grievance managers had all gone to the claimant's personal email address.

Occupational Health report – 21 February 2018

109. The Occupational Health adviser found the claimant medically fit for work and noted that he had provided two solutions for his return, namely:-

    1. to be reinstated on a lower grade to his role as analyst.

    2. to have a managed move to a different role within the organisation should such a post be available.

110. The claimant had not accepted the outcome of the grievance and it seemed that the local relationships had broken down permanently. The Occupational Health adviser's interpretation of the legislation was that the claimant's condition was unlikely to be considered a disability because it had not lasted longer than 12 months nor was it likely to last longer than 12 months and it was not having a significant impact on his ability to carry out normal day-to-day activities.

111. The claimant did not accept this report and set out in an email of 25 February 2018 how he considered it to be wrong and why he believed he satisfied the definition of disabled.

112. In HR notes disclosed as part of these proceedings, in view of the above Occupational Health report Chris Madden was advised that there was no medical basis to justify redeployment on medical grounds. As such redeployment through the redeployment process would not be justified.

113. The claimant met with Paul Sellar on 5 March 2018 and as usual there was a summary of their discussion (page 735). They had talked about the claimant's concerns about the Occupational Health report which did not in the claimant's view accurately reflect the conversation they had on the call. Paul Sellar agreed to discuss this with Chris Madden.

114. With regard to the claimant's return to work the claimant had made it clear he did not wish to return to his current role with the existing line management arrangements in place.

115. The claimant continued to study which was a challenge but he was working on assignments for submission in March. In an email exchange with Angela Belcher on 21 February 2018 the claimant referred to his studying and that he was well on the way to a first class degree.

116. In a subsequent meeting on 23 March 2018 the claimant and Paul Sellar again spoke about the claimant returning to his current role or seeking an alternative one in the company. He also noted that the claimant had received a very good mark for his most recent piece of coursework.

117. By the time of a meeting with Paul Sellar on 13 April 2018 the issue of the Occupational Health report had still not been resolved. They had however talked about the claimant returning to work. The claimant said that he could not see how he would be able to return to work at the end of May "as work have still not resolved the problem which is when you will have been absent for 12 months". The claimant wished to complete his exams first before any possible return. He reiterated that he did not want to return with Chris Madden as his line manager and undertaking the same work as before. The claimant had added that he could foresee himself needing to return to work whilst in an unfit condition "purely for financial reasons".

Occupational Health report – 31 July 2018

118. Administering an assessment questionnaire at this appointment the adviser determined that the claimant had anxiety and depression symptoms which were at the moderately severe and moderate levels respectively. The claimant was unfit for work due to the severity of his anxiety and depression symptoms. He would not feel able to work with his previous manager and mediation appeared not likely to be helpful. The solutions were stated to be either to deploy him to a lower grade as analyst or redeployment to another role within the organisation. In either case ensuring that the claimant was with a manager with whom he could establish a relationship of trust. If that could be achieved the claimant was likely to improve and may be able to return to work without undue delay and may then remain well subject to the relationship of trust between him and management being maintained. The adviser believed that considering the Equality Act and that the claimant had been certified with sick leave by his GP for over a year, had a diagnosis of anxiety and depression and continue to report significant symptoms he was likely to be considered disabled at this stage due to his condition as it could be said to have had long-term (for over a year) with a significant impairment on day-to-day activities. It is from this point that the respondent has acknowledged in these proceedings that the claimant satisfied the definition of disabled under the Equality Act.

119. The claimant and Paul Sellar met on 10 August 2018 and Paul Sellar confirmed the points they discussed in an email of the same date. With regard to return to work two options were discussed:-

    1. reporting to Paul in a Band 4 role. It was noted that Chris and Paul were to review that option.

    2. seeking opportunities via the redeployment team. Chris Madden was to speak to Helen Speirs initially with the intention of then being progressed with the redeployment team.

120. There was also a post - meeting note added to the email that there was a further meeting held that day between Chris Madden, Paul Sellar and the claimant to discuss a third potential option which had been discussed

previously. In summary the proposal would see the claimant lead a team of two Statistical Analysts initially on a three-month trial basis working with other teams in the National Centre to improve analytical and statistical capability within STE (Safety, Technical and Engineering, the department that the claimant was then in) all delivering high-end statistical value to the business and continuous improvement. It was noted that this was the claimant's "preferred option" and Chris Madden was to review it.

121. There is reference to this option in the notes Chris Madden send to HR on the HR direct system sent on the 13 September 2018. He recorded that this would have given the claimant a promotion. He further noted that if this were to happen the claimant would be willing to return to work and even have direct dealings with all those he feels he said cannot have contact with. He felt this would be recognition that the business had been wrong about him including the grievance which was not upheld. Chris Madden noted he had discussed this with local HR and would follow this up that week.

122. In a note dated 14 August 2018 on the HR system it was recorded that Chris Madden had concluded that none of the three options were viable. Chris Madden's evidence to this Tribunal was that that was based on advice he was receiving from local HR. He did not recall if the policies on reasonable adjustments were discussed or that the claimant might have a disability being factored in. He did not recall any reference to policy documents at this point. He acknowledged however that they would have been pertinent to this discussion. His defence was that it was not for the line manager to know all of the policies and that is why they seek support from HR.

Ill health severance quotation

123. By letter of the 29 August 2018 Chris Madden invited the claimant to a meeting on 5 September to discuss Ill Health Severance arrangements as to date they had been unable to find a suitable alternative role for him.

124. In an email of 30 August 2018 the claimant wrote to Paul Sellar advising that he had seen two suitable vacancies on the internal website. He had written an email to Charlotte Edmondson in the redeployment team about them. The tribunal did not see any response from Charlotte Edmondson in relation to these. At this time the claimant was not on the redeployment register

125. Paul Sellar met with the claimant on the 31 August 2018 and noted that the claimant had been feeling worse because of recent events surrounding the meeting to discuss ill health severance

126. A fit note dated 3 September 2018 signed the claimant off work with anxiety and depression until 30 September 2018.

Ill health severance meeting – 5 September 2018

127. This meeting was conducted by Chris Madden with Scott Saxelby present as the claimant's trade union representative. It was noted at the outset that the meeting would discuss the options of remaining in the business and explore the possibility of ill health severance. They discussed the options that had been raised on 10 August 2018. The minutes noted that these had been reviewed and it was concluded that options one and two would not work on the basis that there was no justification for promotion from a business point of view. Putting restrictions on who was able to work with the claimant within the team and wider teams was also not practicable. With regard to option three Sue Pattison had been in contact with the redeployment team to add the claimant onto the redeployment register from 5 September 2018. Scott Saxelby raised concerns that the claimant had had little opportunity to look for suitable alternative roles but also that that was what the redeployment process should be doing on his behalf. To this Chris Madden's response was Ill Health Severance had been initiated as there had been no suitable roles within the team found for the claimant and that Occupational Health had mentioned the unsuitability of the claimant returning to work.

128. The meeting concluded by noting the next steps which was that there would be a four-week timescale for redeployment. It was acknowledged that a question was raised about that being little time to find an alternative role.

129. Scott Saxelby wrote to Chris Madden on 18 September with some comments on the notes taken in the meeting. He was still not satisfied about the four week time period. He had spoken to the redeployment team since the meeting and they were completely unaware of the claimant's situation. He was not on their register and they therefore had not been involved in any process to find him an alternative post. Scott Saxelby noted that he had asked in the meeting for evidence that serious attempts have been made to find alternative employment for the claimant but that had not been satisfactorily provided.

130. Scott Saxelby also noted that the meeting had been arranged not only to consider ill-health severance but also to consider the option of staying in the business. That he said had never really been considered at the meeting and the only course of action being considered was to manage the claimant out of the business.

Claimant's grievance – 7 September 2018

131. The claimant submitted this grievance to Brian Tomlinson against Chris Madden and the respondent in respect of disability discrimination. He stated that he did not believe that adequate steps had been taken to find him alternative employment and that both Mr Madden and Network Rail had failed to uphold the principles of the Equality Act. Reasonable adjustments had not been considered. For the first time the claimant raised

an allegation of harassment against Mr Madden and the respondent. This he said could be seen by "lying, denying reasonable changes, showing discrimination against disability and showing clear intent of terminating my contract due to disability and ill-health thus creating a fully toxic environment that is not a safe place to work nor has shown any duty of care during this process".

132. By letter of 20 September 2018 the claimant was invited to a meeting on 3 October 2018 to discuss his grievance. This was then rescheduled and passed to Russell Shanley to chair on 9 October 2018.

133. In an email to Scott Saxelby of 18 September the claimant stated he had been in contact with the redeployment team. They had stated to him that as this was a long term health and disability issue it was HR's responsibility on a case-by-case basis. Paul Sellar also asked the local HR team and they had stated "the redeployment team are unable to help you due to the fact that ill-health severance discussions have begun".

134. It seemed to the tribunal that there was a breakdown in communication between the redeployment team and HR. Although the tribunal can see why HR may have to deal with the matter due to there being a long-term health condition it is not clear what they were actually doing.

135. As part of her appeal investigation Emma Osborn discovered that the claimant was on the redeployment register from 13 September 2018 (her witness statement paragraph 16).

136. The claimant had a meeting with Paul Sellar on 21 September 2018 when he explained that the previous week 13th of September he had experienced considerable headache pain and was advised to go to hospital where the claimant was kept in for observation overnight. No issues were found. Since discharge the claimant had been taking paracetamol to manage the pain but was still experience symptoms similar to those he was admitted to hospital for although not as severe. In a fit note of 4 October 2018 the claimant was declared not fit for work until 21 October 2018 due to headache.

137. By letter of 9 October 2018 Chris Madden invited the claimant to a meeting on 18 October 2018 to discuss next steps regarding his employment. The claimant was advised that a possible outcome could be to terminate his employment on the grounds of capability under the ill-health severance procedure. The claimant's grievance had not at this point been heard and was against Chris Madden.

Grievance hearing – 9 October 2018

138. The claimant's grievance hearing took place before Russell Shanley on 9 October 2018. The claimant was present with Scott Saxelby and Sue Pattison was present as an HR representative. The notes show that there was a disagreement between them as to the working of the

redeployment policy. Scott Saxelby was convinced that the redeployment team could stop a job from being advertised. Russell Shanley stated that he would look into the workings of it. The claimant spoke about one adjustment being official recognition that his role was not a 3B role 'which would allow me to forget about everything that's caused all of this. I can essentially try rebuild it'. The claimant was here stating that he could work with all those he had complained about including Chris Madden if his role was recognised at the grading he considered to be appropriate.

139. In an email of 10 October 2018 Russell Shanley made it clear to the claimant that there was no reason why the ill-health severance process could not progress in parallel with his investigation into the grievance and the claimant would be contacted by Chris Madden who as his line manager was responsible for the ill-health severance. He would not be intervening into that matter as it was not appropriate for him to do so.

140. By email of 18 October Russell Shanley advised the claimant he had completed his investigation and they now needed to meet to discuss the outcome. He had a period of annual leave so the earliest he could meet would be 31 October.

141. Russell Shanley had meetings with the following to discuss the claimant's grievance:-

141.1 Paul Sellar

- he had not been at the meeting held by Brian Tomlinson although he recalled the claimant had wanted him there it that had not been allowed.

- He had not been at any conversation/meeting between the claimant and Brian Tomlinson so couldn't comment on the harassment allegations. He did not think though he had seen a 'toxic environment' created.

- He couldn't say there was more that Brian Tomlinson or Chris Madden could have done.

- That overall Chris Madden had done all he could but that involving HR earlier might have been advantageous.

141.2 Brian Tomlinson

- That the discussion in January 2018 was an informal discussion about the claimant returning to work.

- He didn't think it right for Paul Sellar to attend as he worked for Chris Madden.

- He didn't think Lisa Belsham had been aggressive at the meeting.

- That the claimant had put the proposal of a Band 2 role with 2 subordinates and this had been rejected as it was a 'self-proposal' rather than defined by organisational design.

- He had not perceived evidence that Chris Madden singled out members of his team for different treatment.

141.3 Chris Madden

- He had discussed the claimant with Brian Tomlinson at his one-ones but not formally and not in detail.

- The band 2 suggestion with two band 3 subservient posts had been rejected as it was not appropriate for the claimant to design the role and he had not been assessing what would be best for the business but what was best for him.

- He felt that the claimant's allegation of him creating a 'toxic environment' might be to help with a grievance case now or in the future or to justify why he can't return to work.

- with regard to redeployment he was working with Helen Speirs who spoke about the process and Sue Pattison who spoke to the redeployment team and enacted the process and kept him informed.

- He did not receive any updates about roles available.

- the claimant was working with Paul Sellar taking his own "proactive approach" with the help of Paul.

141.4 Lisa Belsham

- it had been deemed inappropriate to have Paul Sellar at the meeting when the claimant would discuss Chris Madden who Paul reported to.

- Brian Tomlinson had explained it was not in his gift to revisit the earlier grievance.

- She mentioned the Band 2 role the claimant wished to draw up with two others below him.

- The claimant didn't want to work with Chris Madden, Andy Kirwan or Nigel Best.

- She did not recall being aggressive.

- The claimant felt he should be at least band 3C or 2.

- She disputed lying about any part of the process.

- She had made it clear that he was a band 3 and any discussion about salary would have to be in connection with an interview for a specific role.

142. By letter of 29 October the claimant was invited to the reconvened grievance hearing on 5 November 2018. At that meeting he was informed that his grievance had not been upheld. A detailed report was prepared by Russell Shanley (page 890). The tribunal is satisfied that it was thorough and impartial. The report was sent to the claimant on 7 November 2018. He was advised that his right to appeal within 10 days should be calculated from the date of that email.

The claimant's appeal against the grievance outcome

143. The claimant submitted his appeal against the grievance outcome on 15 November 2018 stating that it "disregards a vast majority of NR's policies and the law which clearly state what needs to be done". The claimant set out large sections from the respondent's policies and asserted that HR & Chris Madden should have been searching for roles 'as it is my reasonable adjustment due to disability'. He alleged that there had been 'plenty of roles' that he could have been moved to the first being Whole Lifecycle Costing Manager, stating that:

> '…your argument about this role would be invalid as if NR actually conducted reasonable adjustments properly then this adjustment would have happened in January 2018 before the symptoms worsened due to NR's incompetence'

The reason that the claimant had not been given that managerial role was because he did not possess the essential criteria for it. That had been determined at previous grievances and appeals. It would not have been a reasonable adjustment to promote the claimant into it.

144. Emma Osborn was appointed to deal with the claimant's appeal and wrote to him on 13 December 2018 introducing herself. She had already had a brief discussion with Scott Saxelby and invited the claimant to a meeting on 19 December to discuss the grievance. She acknowledged in her email that this was less than the usual seven days notice but understood that the claimant and the union wished to have a discussion before Christmas. It did take place on that day.

145. Minutes of the appeal hearing was seen in the bundle at page 928. She made it clear at the outset that she may need after their meeting to talk to

more people and get back to the claimant in January. Scott Saxelby noted that that was what they were expecting.

146. Emma Osborn clarified with the claimant and his trade union representative his points of appeal. Harassment by Chris Madden was said to be one of them but the claimant stressed that the issue of disability was the main one. The claimant was still challenging the February 2018 Occupational Health report. He submitted it was null and void and could not be used. He claimed that Chris Madden should have realised prior to February 2018 that the claimant had a disability. He alleged that insufficient effort had been made to get reasonable adjustments and one option would be redeployment into another role. Scott Saxelby intervened to say that nothing had been done until he pushed for it. As a result of him raising it there had been a meeting when redeployment was discussed.

147. Emma Osborn conducted various interviews to understand the position. She met with Sue Pattison on 11 January 2019. Sue Pattison confirmed that she had been involved when the Occupational Health report on 31 July 2018 had been received but it was Helen Spiers who had led the conversation during that time and had suggested ill-health severance as an option. The fitness to work statements from the claimant stated anxiety and depression between January 2018 to October 2018 but then one had said headaches for 3 weeks. They decided not to proceed with the second stage of the ill-health severance process as they were concerned about the prognosis. The claimant had subsequently informed them that his GP had got it wrong and that the fitness for work statement should actually have confirmed he was suffering from anxiety and depression. A decision was then made to refer the claimant back to Occupational Health.

148. Sue Pattison had explained to her that finding a suitable role for the claimant was difficult as he refused to work with certain individuals. There was a need for the claimant to assist with the job search so she could understand what roles he believed were suitable particularly given the restrictions he had put in place.

149. The redeployment flag was on the system for the claimant from 13 September 2018 so anyone who saw the claimant's name for a suitable role could ensure he was considered if he met the requirements. Miss Osborn ascertained from Sue Pattison that the redeployment system is not a candidate tracking system and that the checks for each individual in respect of the role banding were completed manually.

150. Miss Osborn also had a conversation with Helen Spiers who had supported Chris Madden before Miss Pattison took over on or about July 2018. She referred to the meeting that took place in August 2018 following the Occupational Health report of July 2018 and felt that the claimant's proposals to return to work were either unreasonable or very constraining. He wanted to return to work in a promoted role with his own hand picked team and did not want to work with his current team. She explained that it was difficult to find the claimant a role that was not working with anyone

who had been in his team as it was the team that worked closely with the analytical type of work the claimant wanted to do. The second outcome namely ill-health severance seemed the most practical solution.

151. Miss Osborn also spoke to Paul Sellar to understand from him what he felt his remit was in being a welfare point of contact for the claimant. He had initially spoken to the claimant on 31 August 2018 prior to a welfare meeting about vacancies for potential Band 3 and 4 roles. There were a couple of Band 3 finance analyst roles that looked promising at the time but the claimant did not apply for these. The claimant was not on the redeployment list until 13 September 2018. He had spoken to the claimant on 23 October 2018 and offered to look through the vacancy list with him but the claimant was of the view that because he was on the redeployment list at that stage he did not need to look at roles himself and that Network Rail should be looking at it all for him. Mr Sellar confirmed to Miss Osborn that he would speak to the claimant once every two to three weeks about his health and wellbeing and would document the discussions and send them to Mr Madden to make him aware of any key issues to assist and support the claimant where possible.

152. The grievance appeal hearing reconvened on 4 February 2019. Emma Osborn explained to the claimant she was not upholding his grievance appeal. She had found that Network Rail and Chris Madden had fairly applied the respondent's policies and processes although she had identified areas where the respondent could review and improve. She did not find any evidence of harassment by Mr Madden and had found he had made every effort to support the claimant.

153. With regard to Paul Sellar being a "workplace buddy" she came to the conclusion that the term "reasonable adjustment" was said in the context of long term sickness support not in recognition of a confirmed disability. They did not think at the time that the claimant was potentially disabled. They had agreed to this to support the claimant. She believed that they had treated the claimant as fairly as someone who could be disabled and put adjustments in place to support the claimant with a return to work.

154. With regard to when the respondent recognised the claimant's disability she clarified that this was recognised on receipt of an Occupational Heath report dated 31 July 2018. She had found it reasonable for the respondent to not have recognised the claimant's potential disability earlier when Occupational Health had not suggested the claimant was disabled nor could be considered to be so under the definition in the Equality Act. The report dated 31 July 2018 was the first that mentioned that the claimant could be disabled. Mr Madden had taken advice from HR in January 2018 when the fitness to work statement stated depression and anxiety for the first time. Miss Osborn found there was a learning point where she suggested the HR direct system needed to be more robust in its signposting for managers although she confirmed that the fit note did not necessarily trigger that the claimant had a disability at that point.

155. Miss Osborn also considered whether the respondent had taken a rigid approach to determine when the claimant might have been disabled but in any event she felt the support had been there for the claimant despite this view and that he had been treated in effect no differently then if he did have a disability.

156. Although they may not have been described as reasonable adjustments in the context of disability Miss Osborn was satisfied that the respondent had offered a number of things to the claimant over a period of time. Mr Sellar supplied welfare support trying to mitigate factors that heightened the claimant's anxiety and efforts were taken to assist the claimant with finding an alternative role.

157. From the evidence she had taken from the various witnesses she had been informed that due to his absence from work and the advice he was not fit to work it was felt that starting the redeployment process was not appropriate because it could cause the claimant further stress. She was also informed that the claimant's specialism was very niche and there were not many redeployment options particularly with the additional constraints that the claimant did not want to return to work, working for Chris Madden. In view of his niche role it was particularly important for him to engage in the process.

158. With regard to the ill-health severance process Miss Osborn was satisfied that looking for roles, redeployment and ill-health severance were not mutually exclusive processes.

159. Going forward it would be arranged that Miss Pattison would be the point of contact and be a redeployment case manager for the claimant to try and progress matters and assist him finding a role as the redeployment team did not have the resource to actively manage his case as ordinarily they manage cases for individuals at risk of redundancy. The claimant stated to Miss Osborn that he would be raising an Employment Tribunal claim and told her that as part of that process he could request anything from Network Rail. He then proceeded to ask for information relating to roles advertised from May 2017 onwards in Band 4 to 2 roles. She agreed to look into whether or not the claimant could be provided with that information.

160. The claimant had produced as Appendix A to his witness statement a 34 page document of roles throughout the respondent organisation. It is understood he received these following a freedom of information request. These the claimant considered were suitable alternative roles. The tribunal however accepts the evidence given by Emma Osborn that there are approximately 157 jobs on this list and she ruled out about 80% of them on the grounds of the band or location. Band 2 she did not think was reasonable as a redeployment as it would have been a promotion. She also ruled out Band 4B as 4C would cover the claimant's salary but 4B would not. Based on what the claimant told her at appeal she ruled out jobs not reasonably commutable from Milton Keynes for example Swindon,

Cardiff etc as it was not what the claimant felt was reasonable. As she was familiar with the commute to London and/or Birmingham even though expensive she did feel that they could be considered and left those in.

161. From 13 September 2018 the claimant's name was on the list of people to be considered for every single vacancy that is approved. The first thing the manager is asked is if anyone is on the redeployment list. They would look at band, title and CV. Anything not within the claimant's band and location he would have to engage with the process to say he would be interested as it would not be obvious to the redeployment team. They would then advise the hiring manager and he would be someone they could consider. The claimant would not have to apply, there would be a suitability check with the hiring manager to agree if the job was suitable. Emma Osborn the tribunal accepts could not see on the list any obvious matches until the end of January 2019. In February/March 2019 she could see a couple of roles in the right band and Milton Keynes and would have expected redeployment to speak to the hiring manager. Before that there were 10 to 15 that did not match the band or location but the claimant would have had to say he was interested.

162. When Paul Sellar amended the notes of his discussion with Emma Osborn in January 2019 he added that the claimant had met with him on 23 October to get his IT account unlocked and password reset which was successful on his laptop. The purpose of that was for Paul Sellar to be able to help facilitate/close out an action from the previous meeting. As the claimant was by then on the redeployment register his view was that this was not an activity he should be doing as the respondent should be progressing it for him. Paul Sellar did not have any notes of that particular meeting. At their 31 August 2018 meeting they had looked together at the vacancy list for potential Band 4 & 3 roles. He confirmed that there were a couple of Band 3 finance analyst roles that looked promising. The claimant was not then on the redeployment register and did not apply for those roles.

163. It is from this point that the respondent states the claimant was not engaging with redeployment.

164. There was another Occupational Health report dated 7 February 2019 (page 1065). This recorded that the claimant stated his initial work issues related mainly to his grade and remuneration. He had discussed with the advisor how he did not agree with the outcome of his grievance and appeal. His mood remained low and sleep poor. His concentration was also poor. He was limited in his level of activity and had poor motivation. He was troubled by ongoing anxiety. He felt the headaches and digestive symptoms were related to his anxiety and depression. Administering an assessment questionnaire indicated that he had symptoms of "severe anxiety and depression". He had received some CBT the previous year which he had found of limited benefit. He was reluctant to take medication but would be discussing this further with his GP. The advisor noted the

claimant remained "very preoccupied about the work issues which continued to concern him". The claimant did not feel he could return to his usual role. The claimant had reported that he had been keen previously to be considered for an alternative role whether at his own grade or another grade. He now thought he would not be able to settle back to another role given his ongoing psychological health issues and his feeling towards the respondent. The claimant had said that "he is planning to take steps externally to pursue his work concerns". The claimant had said there were no adjustments that would allow a return to work at this time. The advisor concluded:-

> "Mr Maruf remains unfit for work at the present given his level of ongoing anxiety and depression. I am not aware of any adjustments that would allow a return to work at this time. It appears unlikely that Mr Maruf will be able to get back to work certainly in the short to medium term."

165. By letter of 8 March 2019 the claimant was invited to a further meeting on 19 March 2019 to establish the claimant's current circumstances and discuss the way forward including the possibility that the claimant might be required to leave the organisation under ill-health severance. The meeting would discuss the up to date Occupational Health report and any information provided to the respondent by Occupational Health.

166. A fit note dated 15 March 2019 stated the claimant may be fit for work taking into account the following advice and the doctor had marked a cross next to a phased return to work, amended duties and work place adaptations. It did not provide any further detail other than to state "should be assessed by work Occupational Health team".

Welfare meeting – 19 March 2019

167. The meeting was chaired by Chris Madden and the claimant was accompanied by Scott Saxelby his trade union representative. It was noted that the claimant had been absent on long term sick since May 2017 and that the Occupational Health report stated that the claimant was unable to return. The claimant took issue with this and stated that Occupational Health had not said he was unfit to work but that the report said that if "Network Rail don't, if the management sort out the issues, then I would be able to return with (sic) undue delay". Scott Saxelby confirmed that the report said that unless things change the claimant could not come back to work. The claimant stated no recruitment team had contacted him but then said that they had contacted him and said it was not their responsibility it was the line manager's and HR on a case by case basis.

168. The claimant was adamant that nothing had been done to redeploy him. He stated that Chris Madden had broken the law and not done reasonable adjustments as he should have done which had made the claimant's symptoms worse. He had completely ignored the policy creating a toxic environment. If Chris Madden had done what he was supposed to do the claimant would have been redeployed the previous year into another role

or another part of the company and "the things causing my disability would have disappeared". The claimant stated his GP had always said that his symptoms were "re-active issue caused by work".

169. The tribunal saw an email of 22 March 2019 from Suzanne Barrass emailed to Chris Madden in which she answered questions he had raised with regard to the redeployment process. She confirmed that when an employee HR record is flagged for redeployment by the HR Business Partner the Talent Redeployment team would enter the employee's details on the redeployment register which is a confidential share point site with access restricted to HR and Resourcing employees only. Prior to advertising vacancies Resourcing teams would be expected to check the redeployment register for any potential job matches to their vacancies and if any potential matches are found they would discuss this both with the redeployee and the hiring manager. The redeployment register contains details such as CV, employee job history, preferences, commutable distance, grade, home location, key skills and qualifications. From this it is clear that the employee's preferences including commutable distance would go on the register so there would be a need for them to engage in the process.

170. The next sicknote was dated 28 March 2019 stating the claimant was not fit for work and this time it did not state that any adaptations or adjustments should be made and no comments were provided.

171. By email of 29 March 2019 Chris Madden followed up the previous meeting. He wished to meet again to discuss ill-health severance arrangements. A meeting was scheduled for 11 April 2019. It actually took place however on 18 April 2019.

Meeting – 11 April 2019

172. This was again chaired by Chris Madden and Scott Saxelby was with the claimant. Sue Pattison attended as Senior HR Business Partner.

173. They discussed the fact that the CBT the claimant had had had finished the previous year and discussed medication which the claimant did not wish to take. Chris Madden referred back to the previous Occupational Health report of 7 February which stated there were no adjustments that would allow a return to work and the fit note states the claimant was not fit and there were no adaptations. It was therefore appropriate to say that ill-health severance was an option. Sue Pattison went through the quotation and there were discussions about how this had been calculated.

174. Sue Pattison also raised the fact that the claimant was still on the redeployment list but understood that it provided the claimant's work email as his contact details. The claimant said he had not provided that to the redeployment team and had not given them his CV. Sue Pattison agreed to clarify the email address with the redeployment team and the claimant

confirmed he had not been looking at work emails or the work laptop as it triggered all of the problems he had been having. The claimant believed he had already given consent for the use of his personal email. It appeared there was still data protection issues in relation to using that.

175. Sue Pattison then made it clear they would continue to look at redeployment for the next 4 weeks and if nothing changed then a dismissal due to ill-health severance would be discussed on the basis that the claimant's absence had been over 12 months and the Occupational Health report indicated a return was not anticipated. The claimant took issue with this asking why they were giving another 4 weeks and that they were just prolonging process. This was making everything worse. Chris Madden made it clear that if nothing changed in the next 4 weeks they would go with an ill-health severance dismissal. The claimant remained adamant that nothing was going to change within that 4 week period.

176. Sue Pattison queried with the claimant how if he said he wished to have redeployment he would be able to do that when he could not look at his work laptop and would not engage in with Network Rail.

177. A fit note dated 18 April 2019 declared the claimant not fit for work due to anxiety and depression.

178. By letter of 30 April 2019 Chris Madden wrote to the claimant inviting him to a further meeting on 7 May 2019 when they would discuss the claimant's employment. The possible outcome was that the claimant's employment would be terminated on the grounds of capability under the ill-health severance procedure.

Occupational Health report – 22 May 2019

179. The claimant remained unfit for work due to his ongoing anxiety and depression. The advisor was not aware of any adjustments that would allow a return to work at this time. It appeared unlikely that the claimant would be able to get back to work in the short to medium term and he remained unfit for work within Network Rail "for the foreseeable future". With regard to a long term outlook "Mr Maruf remains very preoccupied about the work issues which continue to concern him. It remains to be seen the extent to which his psychological health difficulties settle.".

180. By letter of 5 June 2019 (page 1148) Chris Madden wrote to the claimant inviting him to a meeting to discuss his employment on 13 June 2019 making it clear the possible outcome could be to terminate the employment on the grounds of capability under the ill-health severance procedure. The quotation provided for that meeting for the ill-health severance was £46,999.63.

Final ill-health severance meeting – 13 June 2019

181. This hearing was again conducted by Chris Madden. The claimant was accompanied by Scott Saxelby and Helen Speirs Senior HR Business Partner was present. There was initial discussion about the estimate that had been provided. Chris Madden then discussed the further Occupational Health report identifying that the claimant remained unfit for work and that they were not aware of any adjustments that could be made. Helen Speirs talked about redeployment and how the claimant had made it clear at the previous meeting he could not even open his laptop or anything related to Network Rail without it exacerbating his illness and that it was standard Network Rail process for anyone out of the business for more than 12 months and with no foreseeable return to go down the ill-health severance process. They had a duty of care to the claimant and by his own volition he could not engage with the respondent without exacerbating his condition and in conjunction with the Occupational Health reports this supported the view that there was no possibility of a return to work. If the claimant had felt he was able to return to work that should have been identified with the Occupational Health doctor. With redeployment she said there is a certain burden on the individual to enter into that process. The claimant had not identified he would be well enough to be in that position. The claimant's employment was terminated on the grounds of ill-health. This was confirmed to him in a letter dated 13 June 2019. This clarified the payments that had been made to the claimant. He was advised of his right to appeal within 10 days of the date of that letter.

The claimant's appeal against dismissal – 20 June 2019

182. The claimant appealed against the decision to terminate his employment. He believed that the respondent could have taken greater steps to ensure he was redeployed to a suitable role and they had not made reasonable adjustments to accommodate him.

183. The claimant advised he was unavailable between 1 July and 31 August for his appeal to be heard. He was advised that the appeal had been assigned to Thierry Bontoux. By letter of 20 August 2019 the claimant was invited to an appeal hearing on 11 September 2019. The appeal hearing did take place on that date. The claimant was again accompanied by Scott Saxelby. The hearing was chaired by Mr Bontoux. He made it clear that he was reviewing the case not investigating it and was only looking at the documentation. He had read through the fit notes, Occupational Health reports and the welfare meeting notes. Scott Saxelby stated that the claimant felt discriminated against and alleged that the August meeting was only held because he himself had gone to HR and asked them what they were doing about getting the claimant back to work. They were not doing anything about it, it was alleged. They thought it was about looking for alternative roles so the claimant could return to work but then Chris Madden moved to presenting an ill-health severance estimate.

184. After an adjournment to consider matters Mr Bontoux resumed the hearing and advised the claimant that he would be upholding the original decision. He had not heard anything or read anything in the documents that demonstrated any discrimination. This decision was communicated to the claimant in a letter dated 16 September 2019.

Relevant Law

Statutory Provisions – Equality Act 2010

185. The tribunal has taken into account the following provisions.

186. S.6 – Disability:-

> "(1) A person (P) has a disability if—
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

187. The tribunal has also taken into account the Guidance on mto be taken into account in determining questions relating to the definition of disability (2011) and in particular the following provisions. Section B:-

> "**B1 - Meaning of 'substantial adverse effect'**
>
> The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect. This is stated in the Act at S212(1). This section looks in more detail at what 'substantial' means. It should be read in conjunction with Section D which considers what is meant by 'normal day-to-day activities'."

188. Section C:-

> "**C1 – The meaning of long term effects**
>
> The Act states that, for the purpose of deciding whether a person is disabled, a long-term effect of an impairment is one:
>
> • which has lasted at least 12 months; or
>
> • where the total period for which it lasts, from the time of the first onset, is likely to be at least 12 months; or
>
> • which is likely to last for the rest of the life of the person affected (Sch1, Para 2)
>
> Special provisions apply when determining whether the effects of an impairment that has fluctuating or recurring effects are long-term. (See paragraphs C5 to C11). Also a person who is deemed to be a disabled person does not need to satisfy the long-term requirement. (See paragraphs A9 to A10)."

189. At Section C3 the guidance states that "likely" should be interpreted as meaning that it could well happen.

190. Section C4 states that in assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age).

191. Direct Discrimination – s.13(1) states:-

> "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."

192. Discrimination arising from disability – s.15 states:-

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

193. Duty to make reasonable adjustments – s.20(2) and (3) state:-

> "(2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

194. Harassment – s.26(1) states:-

> "(1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

195. Victimisation – s.27(1) and (2) state :-

> "(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act."

196. Burden of proof – s.136(1), (2) and (3) state:-

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

197. The claimant also brings a complaint of unfair dismissal contrary to the Employment Rights Act 1996. It is for the employer to establish the reason for dismissal and that it was a potentially fair reason falling within s.98 of the Employment Rights Act. The employer in this case relies upon capability within the meaning of s.98(2)(a). This is defined in s.98(3)(a) as meaning "his capability assessed by reference to skill, aptitude, health or any other physical or mental quality".

198. If the employer fulfils the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason show 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. (sub-section 4)"

199. The tribunal has also had regard to the Code of Practice on Employment (2011). In relation to direct discrimination the Code makes it clear at 3.11:-

> "Because of" a protected characteristic has the same meaning as the phrase "on the grounds of" (a protected characteristic) in previous equality legislation. The new wording does not change the legal meaning of what amounts to direct discrimination. The characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause."

200. At 3.14 it is made clear:-

> "Direct discrimination is unlawful, no matter what the employer's motive or intention, and regardless of whether the less favourable treatment of the worker is conscious or unconscious. Employers may have prejudices that they do not even admit to themselves or may act out of good intentions – or simply be unaware that they are treating the worker differently because of a protected characteristic."

201. In most circumstances direct discrimination requires that the employer's treatment of the worker is less favourable than the way the employer treats, has treated or would treat another worker to whom the protected characteristic does not apply. This other person is referred to as a comparator. (Section 3.22)

202. Section 23(1) of the Equality Act makes it clear that in comparing people for the purposes of direct discrimination there must be no material difference between the circumstances relating to each case. As it is not always possible to identify an actual person whose relevant circumstances are the same or not materially different a comparison will sometimes need to be made with a hypothetical comparator.

203. The Code makes clear that in dealing with direct disability discrimination the comparator for direct disability discrimination is the same for other types of direct discrimination. However, for disability, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled persons impairment but who has the same abilities or skills as the disabled person regardless of whether those abilities or skills arise from the disability itself. (Section 3.29)

204. Dealing then with discrimination arising from disability this is covered in Chapter 5 of the Code of Practice. It makes it clear at 5.5 that it only requires the disabled person to show they have experienced unfavourable treatment because of something connected with their disability. If the employer can show that they did not know and could not reasonably have been expected to know that the disabled person had the disability it will not be discrimination arising from disability. The employer may avoid discrimination arising from disability if the treatment can be objectively justified as a proportionate means of achieving a legitimate aim.

205. Section 5.8 makes it clear that there must be a connection between whatever led to the unfavourable treatment and the disability. The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet (Section 5.9).

206. With regard to knowledge it is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it.

207. The duty to make reasonable adjustments is dealt with at Chapter 6 of the Code and in particular what is meant by 'reasonable steps':

> 6.23
>
> The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.
>
> 6.24
>
> There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.
>
> 6.25
>
> Effective and practicable adjustments for disabled workers often involve little or no cost or disruption and are therefore very likely to be reasonable for an employer to have to make. Even if an adjustment has a significant cost associated with it, it may still be cost-effective in overall terms – for example, compared with the costs of recruiting and training a new member of staff – and so may still be a reasonable adjustment to have to make.
>
> 6.26
>
> [Sch 21] Many adjustments do not involve making physical changes to premises. However, where such changes need to be made and an employer occupies premises under a lease or other binding obligation, the employer may have to obtain consent to the making of reasonable adjustments. These provisions are explained in Appendix 3.
>
> 6.27
>
> If making a particular adjustment would increase the risk to health and safety of any person (including the disabled worker in question) then this is a relevant factor in deciding

whether it is reasonable to make that adjustment. Suitable and sufficient risk assessments should be used to help determine whether such risk is likely to arise.

6.28

The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- whether taking any particular steps would be effective in preventing the substantial disadvantage;

- the practicability of the step;

- the financial and other costs of making the adjustment and the extent of any disruption caused;

- the extent of the employer's financial or other resources;

- the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

- the type and size of the employer.

6.29

Ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

Relevant Case Law

208. In Pnaiser v NHS England and anor [2016] IRLR 170 EAT, Mrs Justice Simler (as she then was) summarised the proper approach to determining s.15 claims as follows in paragraph 31:-

> "(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: see *Nagarajan v London Regional Transport [1999] IRLR 572*. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises…

(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. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability 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) For example, in *Land Registry v Houghton UKEAT/0149/14* a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. 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) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of *Weerasinghe* as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(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. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under.
>
> (i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

209. It is important not to confuse cause and effect. Treatment can exacerbate the disability condition but that does not necessarily mean that it was "because of something arising in consequence of the disability".

210. The tribunal should focus on whether the something arising was the operative cause of the treatment complained of. It is irrelevant if there were other effective causes of the treatment (Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893 EAT and Charlesworth v Dransfields Engineering Services Limited EAT0197/16).

211. In R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]: Mummery LJ stated in relation to objective justification that:-

> ". . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."

212. He accepted the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80:-

> "First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"

213. It is no defence if the respondent did not know that the "something" leading to the unfavourable treatment was a consequence of the disability.

214. In O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145 the Court of Appeal considered the relationship between the test for unfair dismissal and that of proportionality under s15. Whilst recognising they are different it was stated that in relation to long-term sickness dismissal the considerations are likely to be similar, Underhill LJ stating:

> 'It would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee is disabled within the meaning of the 2010 Act. The

law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law. Fortunately I see no reason why that should be so'

Reasonable Adjustments

215. As set out in Environment Agency v Rowan [2008] IRLR 20 a tribunal should have regard to:-

> "(a) The provision, criterion or practice applied by or on behalf of the employer; or
>
> (b) The physical feature of premises occupied by the employer;
>
> (c) The identity of non-disabled comparators (where appropriate); and
>
> (d) The nature and extent of the substantial disadvantage suffered by the claimant."

216. Although not defined in the Equality Act the phrase "provision criterion or practice" should be construed widely (paragraph 6.10 of the Code). More recent guidance has been provided by the Court of Appeal in Ishola v Transport for London [2020] EWCA Civ 112:-

> "35 The words 'provision, criterion or practice' are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. I also bear in mind the statement in the Statutory Code of Practice that the phrase PCP should be construed widely. However, it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words 'act' or 'decision' in addition or instead. As a matter of ordinary language, I find it difficult to see what the word 'practice' adds to the words if all one-off decisions and acts necessarily qualify as PCPs, as Mr Jones submits. Mr Jones' response that practice just means 'done in practice' begs the question and provides no satisfactory answer. If something is simply done once without more, it is difficult to see on what basis it can be said to be 'done in practice'. It is just done; and the words 'in practice' add nothing…
>
> 37 In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reason able adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.
>
> In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if

> it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one." (per Simler LJ).

217. Counsel for the respondent handed up a number of cases as authority for the proposition that the duty to make reasonable adjustments will not be triggered in cases of long term sickness absence where the employee is unfit for work or there is no return to work date on the horizon.

218. In The Home Office v Collins [2005] EWCA Civ 598 the Court of Appeal considered the case of an employee who was an insulin dependant diabetic. In the first 6 months of her employment she was absent from work for 27 days. She was absent for a further 4 days between April and August 2001 including hospital visits. None of the absences between July 2000 and June 2001 were stated to be attributable to diabetes and/or depression. Concern was reported in January 2001 and again in March 2001 about the extent of her absences. Her probationary period was extended for a further 6 months. She was told her sickness record would continue to be monitored. The claimant became concerned and upset and in August 2001 was signed off work by her GP with stress and depression never to resume work with the employer. In September 2002 her employment was terminated. The Court of Appeal found that the tribunal had been entitled to conclude:-

> "34 … that it was reasonable for the appellants not to pursue the possibility of a phased return to part time work until the respondent could indicate a definite date of her return to work for any period of time. The tribunal noted that all material times the respondent was medically certified as unfit to return to work."

219. The EAT followed the decision in Collins in a case of NCH Scotland v McHugh UKEATS/0010/06. It found that the trigger point for a duty to arise is when the employee who is absent indicates that she will be returning to work. If adjustments will have no practical effect in mitigating the substantial effect on a disabled person of the atmosphere in which she works, there is unlikely to be any breach of the duty to make reasonable adjustments. The Court determined at paragraph 41:-

> "We agree that a managed programme of rehabilitation depends on all of the circumstances of the case; but it does include a return to work date. And certainly, if additional management and supervision is to be required, they must be arranged in advance and not in a vacuum. Similarly if additional costs were to be incurred by (not this case) the purchase of new equipment to counteract the effect of the environment on the disabled person, there would be no need to spend the money in advance of a clear indication that the claimant was returning. In our judgment, applying the trigger approach cited above [in Collins] it was not reasonable for the respondent to pursue the possibilities which the tribunal noted until there was some sign on the horizon that the claimant would be returning."

220. The question of the "trigger point" was again considered by the EAT in Doran v Department for Work and Pensions UKEATS/0017/14. The Court held that no duty to make reasonable adjustments arose when the claimant was certified as unfit for any work and had given no indication of when she might be able to return to work. At paragraph 43 the Court stated:-

> "… on the facts of this case, there was no indication from the claimant that she was fit to return to work if adjustments were made for her. Her medical certificates were to the effect that she was not fit for any work. The ET was entitled to find that the ball was in her court to discuss the offer of the post of administrative assistant with a phased return when she became fit to do some work. … in my opinion, the ET was entitled to hold in the light of the cases of McHugh, Collins and London Underground that the duty to make reasonable adjustments was not triggered in the present case because the claimant did not become fit to work under reasonable adjustments. … on the facts found by the ET in this case, there is in my opinion no foundation for the argument that the respondent benefitted by its own neglect of duty when it failed to arrange the case conference in accordance with its own procedures. Such an argument would be dependent on their having been acceptable evidence that the claimant or the GP would, more likely than not, have given information to the respondent which would indicate that she was fit to return to work under reasonable adjustments. There is no evidence to that effect."

220 It was made clear in Tarbuck v Sainsbury Supermarkets Ltd [2006] IRLR 664 EAT that although it will be good practice to consult with the employee that is not in itself a reasonable adjustment because it does not remove any disadvantage.

Submissions

221. Both Counsel handed up written submissions and then spoke to them orally and it is not proposed to recite those again in these Reasons.

Conclusions

Disability

222. The claimant went off work with what he described as "stress leave" on the 26 May 2017 never to return to work. The fit notes provided by his GP stated work related stress up until 29 January 2018 when the fit notes stated that the claimant was unfit to work due to depression and anxiety.

223. Whilst accepting that from the period May 2017 to January 2018 the claimant's stress and anxiety were effecting his day to day activities as set out in his Impact Statement, the tribunal does not accept they were at that point "substantial" and nor had the effects lasted 12 months nor could it be said at that point that they were likely to last more than 12 months.

224. The claimant has changed his position a number of times as to when he states he satisfied the definition of disabled from and one of those dates is the January 2018 date. However, that was the first point at which the

claimant was diagnosed by his GP with depression and anxiety, and it had not lasted 12 months and nor was there evidence at that point that it was likely to last for 12 months.

225. The tribunal also notes that in February 2018 in an email exchange with his trade union the claimant stated he had achieved 93% in his third year module of study with the Open University and was on track for a first. Whilst not seeking to diminish the fact that the claimant was suffering with other effects from his anxiety and was subsequently diagnosed with depression he was able to function to the extent to achieve that well in his studies.

226. There was further reference to his studies in correspondence with Paul Sellar (page 750) in which they were talking about a possible return to work when the claimant stated he wished to complete his exams before any possible return. He remained able therefore to focus and carry out his degree work.

227. In an Occupational Health report of 31 July 2018 (page 771) for the first time the Occupational Health adviser suggested that the claimant was likely to be classed as disabled under the Equality Act by virtue of his depression and anxiety and the respondent accepts in these proceedings that the claimant did so satisfy the definition from the beginning of August 2018. It is from that time that the tribunal also finds that the claimant satisfied the statutory definition of disabled but not before.

228. There was some discussion in the evidence of Emma Osborn (paragraph 54) that it may be that the respondent could have accepted the claimant was disabled from May 2018 and this date was advanced by the claimant's counsel in his closing submissions. However the basis of that appeared to be only that he had first gone off on sick leave in May 2017. The tribunal does not accept that the evidence demonstrated a 'steady decline towards the ultimate state of depression and anxiety' as advanced by the claimant's counsel and that he satisfied the definition of disabled from May 2018.

Direct Disability Discrimination

229. Two of the allegations were withdrawn by the claimant and the only allegations therefore of less favourable treatment under this head of claim were:-

    (i) instigating and holding an ill health severance meeting on 5 September 2018;

    (ii) giving the claimant a 4-week timescale for redeployment;

(i) – the ill-health severance meeting

230. This was not held "because" the claimant was disabled. It was because he was unable to return to work both in his doctor's view and that of Occupational Health. He had been absent from work since May 2017 and the respondent had no indication as to when he could return. A hypothetical comparator being a non-disabled person in the same situation would have been treated the same.

(ii) – a 4 week timescale for redeployment

231. The claimant was not given that timescale "because of" his disability. In fact the timescales were regularly extended and the claimant's employment not in fact terminated until June 2019.

Discrimination arising from disability

232. The claimant states that the "something arising" was as set out at paragraph 12 of the Agreed List of Issues as follows:-

    (i) the claimant's inability to undertake his existing role due to the mental health impairment;

    (ii) the exacerbation of stress and anxiety by having to review work emails, search for job vacancies, apply for them and/or review their suitability;

    (iii) a period/periods of sick leave.

233. The tribunal does not accept that (i) and (ii) arose in consequence of the claimant's disability. The claimant went off on what he described as "stress leave" in May 2017 because he was not happy about his banding. He did not accept the outcome of grievances he had raised. When he went off sick he had not raised any issues about Chris Madden with regard to harassment or inappropriate treatment of him save for the fact that he had not been given the banding that he believed he should have or the role that he believed he should have. The tribunal has to accept the submission of the respondent's counsel that the "cause of the claimant's stress was his inability to accept the outcome of grievances he raised about salary banding". The claimant continued to demand that he be placed into the role of Whole Life Costing Manager. The tribunal accepts the further submission made on behalf of the respondent that when Occupational Health referred to the resolution of "work related issues" what was being referred to was the issue of the claimant's job title/banding. It had nothing to do with line management beyond the fact that Mr Madden was not giving the claimant the role he believed he should have.

234. The claimant did not mention Mr Madden at all in his initial grievances which were exclusively about the banding. Although the claimant refers to a "toxic environment" created by Mr Madden the tribunal has not seen

evidence of that, even from the claimant's own witness Paul Sellar. It was of note that in the claimant's counsel's cross examination of Mr Madden he focussed on the rude and unprofessional statements the claimant had made to Mr Madden suggesting that the claimant had been insubordinate and might have been disciplined.

235. As early as October 2017, before on his own case he satisfied the definition of disabled, the claimant told Chris Madden, following his Appeal hearing before Paul Ashton that he expected to be off a long time and perhaps would not return to work. The claimant was unhappy about returning to Chris Madden's team to his job and grade and would only accept a promotion.

236. Later in October 2017 the claimant wrote to Chris Madden demanding the Band 3C Whole Life Costing Manager role. in November 2017 he told Chris Madden that he would be off for the next 6 months as he would receive half of his salary and then he might return at a lower grade and perform 'menial tasks'.

237. Even in his grievance of 26 November 2017 the claimant specifically stated that he had been off because 'I have been conducting a band 3C Whole Life Costing Manager role … and not getting the official pay and recognition of doing so'. He made it clear that if the 'mess' i.e. the banding issue, was not sorted out he would return 'reluctantly' after another 6 months as a band 4C analyst 'producing basic reporting/date administration'.

238. Of significance is the comment that the claimant made in his grievance (page 831) that if he was given the Whole Life Costing Manager role he could "forget all about everything that's caused all of this". That demonstrated that his 'issues' were all about getting the role and title he sought and not the actual relationship with his managers. The management would have remained the same if he was merely given the role he sought.

239. The tribunal has to take account also what had occurred prior to the claimant's last period of absence. The claimant raised a grievance and an appeal against the grievance outcome in 2013 in relation to the Train Performance Modeller role. in his appeal he specifically alleged that the job description and banding were 'not fit for purpose.' In a subsequent informal meeting with his then line manager the claimant expressed not feeling valued by management. This only supports the tribunal's conclusions that the work related issues experienced by the claimant were and continued to be about banding and not relationship issues with his managers, other than that they did not agree with him about banding.

240. It is therefore not accepted that the 'something arising' was in consequence of the claimant's disability but arose because of his refusal to accept the outcome of his grievances. The claimant's sick leave and failure to return to his role were both an existing state of affairs before his disability which continued after it and cannot, as submitted by the respondent's counsel, have 'arisen in consequence' of the claimant's disability.

241. For these reasons also a lower band role would quite clearly have been unworkable. The claimant wanted the recognition that he believed he deserved of the managerial role. He wanted to be promoted. It would have been a mistake to have redeployed him into a band 4C role. Even as late on as December 2018 when his appeal was heard by Emma Osborn the claimant was still making it clear that it was the Whole Life Cycle Manager role that he wanted.

242. The tribunal has still however considered the alleged unfavourable treatment relied upon by the claimant at paragraph 10 of the List of Issues, and concludes as follows.

(i) – failing to appoint a designated person from HR/recruitment to help the claimant with redeployment

243. The tribunal has to accept that it has not seen evidence that one was appointed but it does not accept that this was unfavourable treatment. It accepts the evidence of Emma Osborn that the system of being placed on the redeployment register was "working". The tribunal is satisfied that there were no suitable roles for the claimant as what he wanted was promotion and given the claimant's attitude to HR had one been appointed then the result would have been the same namely that the claimant would have told them it was not for him to engage with the search for jobs.

(ii) – failing to identify suitable alternative roles

and

(iii) – failing to consider and/or discuss suitable alternative roles with the claimant

244. The tribunal is satisfied that the respondent did endeavour to identify suitable roles both through the redeployment register and with the assistance of Paul Sellar. It accepts the evidence as stated in its findings that in the meeting of 31 August 2018 they looked at some potential vacancies in Band 3 and 4, and on the 23 October when it was confirmed the claimant had reviewed the internal vacancy list. Paul Sellar also assisted the claimant gain access to his work laptop to assist him in job searches. The tribunal accepts there were no suitable roles.

(iv) – not following its own policy on ill-health and reasonable adjustments and placing the claimant onto the redeployment register in a case of ill-health/disability

245. The tribunal does not accept that the respondent failed to follow its own policy. The policy made it clear that it could be used not only in cases of

redundancy but also ill-health. The respondent did not initiate ill-health severance until the claimant had been off for over 1 year with no foreseeable return to work being likely. Even when ill-health severance had been initiated the respondent continued to consider redeployment and the claimant was on the register. That was to the claimant's advantage.

(v) – failing to alert HR/Recruitment that the reason the claimant was seeking redeployment was due to his anxiety/depression

and

(vi) – failing to alert HR/recruitment that the process of redeployment was a reasonable adjustment for the claimant's condition

246. Although the tribunal has not heard from Sue Pattison and Helen Speirs it is clear from Emma Osborn's investigations that they both knew about the claimant's condition and why he was seeking redeployment.

(vii) – failing to appoint/redeploy the claimant to a suitable alternative role

247. There was not a suitable role available but in any event the claimant was not fit for work.

248. There is evidence though that not only had Paul Sellar discussed vacancies on 31 August 2018 and 23 October 2018 but the search for roles and options open to the claimant were discussed at meetings held on 4 January 2018, 10 August 2018, 5 September 2018, 9 October 2018 and 19 December 2018.

(viii) – requiring the claimant to attend work and/or attend work to undertake his role as Senior Asset Management Analyst

249. The claimant was not being required to attend work and his absence since May 2017 had been managed in accordance with the respondent's policies.

(ix) – failing to use alternative methods (other than work email) to make contact with the claimant in respect of redeployment

250. The tribunal has found evidence as set out in its findings that both Chris Madden and Paul Sellar used the claimant's personal email address. Reference page 802. The claimant also acknowledged that he had been telephoned by the redeployment team.

(x) – failing to use the reasonable adjustments checklist before holding an ill-health severance meeting

251. This checklist appears at page 337. The tribunal accepts the respondent's submission set out at paragraph 12.8 that this was not unfavourable

treatment and neither did it put the claimant at a disadvantage. The respondent knew what the claimant was asking for but neither Occupational Health nor the claimant's general practitioner had identified reasonable adjustments that would assist the claimant in returning to work.

(xi) – instigating and holding an ill-health severance meeting on 5 September 2018

252. This meeting was set up in accordance with the respondent's policies and the advice of HR. The tribunal does not accept it was unfavourable treatment, it was in fact to the claimant's advantage as his condition was deteriorating without the situation being resolved and therefore it was only right that ill-health severance be explored. This ultimately led to the claimant receiving approximately £47,000.

(xii) – giving the claimant a 4-week timescale for redeployment

253. As soon as this was challenged by the claimant and on his behalf this was abandoned and the claimant had significantly longer to obtain alternative employment. It is not accepted that this amounted to unfavourable treatment.

(xiii) – dismissing the claimant

254. The respondent rightly accepts that this amounted to unfavourable treatment and the tribunal must find that it did.

255. (xiv) in relation to the bonus was withdrawn.

256. The only matter therefore that the Tribunal accepts amounted to unfavourable treatment was the dismissal of the claimant. This was not for something arising in consequence of his disability for all the reasons set out above. However in the event that it were 'something arising' the tribunal is satisfied that the respondent has shown that this treatment was a proportionate means of achieving a legitimate aim. The claimant had been absent for over 1 year with no sign as to when he would be fit to return to work. In the last OH report of 7 February 2019 the adviser again stated that the initial work issues had been about his 'grade and remuneration'. He remained 'very preoccupied about the work issues which continue to concern him'. He had told the adviser he did not accept the outcome of the grievances and appeals. The adviser stated that the claimant remained unfit for work and did not make any adjustment recommendations. Indeed he stated that it was unlikely that the claimant would be able to get back to work 'certainly in the short to medium term'. This was the last resort after everything had been done to try and find the claimant another role. The respondent did act proportionately.

Failure to make reasonable adjustments

257. The first question that needs to be answered by the tribunal is whether the respondent applied a provision, criterion or practice (PCP) to the claimant which it would also apply to employees who did not share his disability. As set out in the List of Issues there were four PCPs relied upon:-

(i) – requiring the claimant to attend work and/or attend work to undertake his role as Senior Asset Management Analyst

258. As has been set out above this was not a requirement of the respondent. The claimant was not required to return to work at the relevant time.

(ii) – placing the claimant onto the Redeployment Register for the purposes of redeployment in cases of ill-health/disability

(iii) – requiring the claimant to undertake an active role in seeking suitable alternative roles

and

(iv) – notifying the claimant of redeployment opportunities via his work email address

259. The tribunal has concluded that these three PCPs do not fall within the definition set out in s.20 of the Equality Act and as further clarified by the Court of Appeal in the Ishola case. They do not at the very least amount to "some form of continuum in the sense that it is the way in which things generally are or will be done".

260. The words used at the end of paragraph 37 in Ishola as set out above are very relevant to the facts of this case. Where, as in this case, direct discrimination and disability related discrimination have not been made out because the act/decision was not done/made by reason of disability 'it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP'. That is exactly what has been done in relation to i), ii) and iv) as can be seen from the list of issues.

261. Further, the claimant has not established that if these did amount to PCPs they put him at a substantial disadvantage in comparison with persons who did not share his disabilities. As has been concluded above it was not in the initial stages the claimant's mental impairment that was stopping him undertaking his existing role. Even after, on his case, he satisfied the definition of disability, the claimant was still seeking the Whole Life Costing Manager role or a promotion.

262. A number of adjustments suggested on behalf of the claimant at paragraph 19 of the list of issues come within the definition of consultation rather than being a separate and distinct duty (Tarbuck v Sainsburys Supermarkets Ltd [2006] IRLR 664). This is particularly the case with items (ii), to (iv) and (vi).

263. The tribunal also has to apply the case law cited above in relation to when the duty to make reasonable adjustments is triggered in cases of this nature. Home Office v Collins is very similar on the facts save that in that case the OH report had stated that the claimant would be capable of full and effective service after a period of part time working. No suggestion of that nature has been made in the case before this tribunal. In McHugh the claimant had been off with depression for 3 years and the EAT was satisfied that putting in place a rehabilitation programme for the employee did depend there being a return to work date. It would not be reasonable it held, as in this case, for the employer to pursue the possibilities until there was some sign 'on the horizon that the Claimant would be returning'. There was none in the case before this tribunal.

264. The case of Doran is also relevant the court holding that the duty to make reasonable adjustments had not been triggered when the medical evidence indicated that the employee was not fit to work. That is the same as the case before this tribunal.

265. Counsel for the claimant attempted to distinguish these authorities in submissions by stating that the mental impairment in them was attributable to something outside the employment relationship. He submitted that was not the case here where it was caused significantly by the relationship with the claimant's line manager. The tribunal has however not accepted that argument from the evidence heard by it as made clear. The reason the claimant first went off work and remained off was because he did not accept the outcome of his grievance with regard to banding. That was also preventing him from returning both before and then after it is accepted he met the definition of disability.

266. In relation to the suggested adjustments the appointment of a designated person from HR or recruitment to help the claimant falls within the case of McHugh. HR were in fact involved but the claimant was not fit to work in any role. The respondent would have been acting contrary to its own OH advice to have put him into another role. Helen Spiers and Sue Pattison knew of the claimant's condition and why he was seeking redeployment. The tribunal repeats its conclusions as in the s15 claim above. There were no suitable roles and the claimant remained unfit to work.

267. With regard to the fifth suggested adjustment of redeployment to a suitable role without the need for an interview process, the claimant was not fit to return to work and as such the duty was not triggered.

268. With regard to (vi) there is evidence that the claimant's personal email and telephone were being used to communicate with him.

Harassment

269. The claimant claims the following as acts of harassment:-

(i) – by instigating and holding an ill health severance meeting on 5 September 2018

and/or

(ii) – by giving the Claimant a 4-week timescale for redeployment

The other two allegations having been withdrawn.

270. The tribunal does not accept that those two matters amounted to unwanted conduct which amounted to harassment within the meaning of s.26 of the Equality Act 2010 applying the objective test in the light of all of the circumstances.

271. The ill-health severance process was instigated on the advice of HR in view of the claimant's long term absence from work. When it was objected to in September 2018 by the claimant's trade union representative it was not pursued at that point

272. Applying the authority of Pemberton v Inwood [2018] EWCA Civ 564 it was not reasonable for that conduct to be regarded as violating the claimant's dignity or creating a hostile environment for him.

273. Whilst the claimant had relied also upon the failure to uphold his grievance and his grievance appeal those matters were withdrawn.

Victimisation

274. Even accepting that the claimant committed protected acts as set out in paragraph 24 of the List of Issues he was not subjected to a detriment "because" he had done a protected act. The failure to uphold his grievance on 5 November 2018 and the failure to uphold the grievance appeal on 4 February 2019 were, the tribunal accepts from hearing these witnesses, reasoned decisions by the decision makers Mr Shanley and Miss Osborn, and were not because of the alleged protected acts.

Time Limits

275. The tribunal is satisfied that both claims were received within time and no submissions were made to the contrary.

Ordinary Unfair Dismissal

276. The claimant was dismissed by reason of capability, a potentially fair reason falling within section 98 ERA.

277. The claimant had by June 2019 been off work for approximately 2 years with no date for his return. The latest OH report of February 2019 stated he was unfit to return to work. The respondent's belief therefore that the claimant was unable to return was a genuine one based on the medical evidence.

278. The respondent acted fairly in treating that reason as one to justify the dismissal of the claimant within the meaning of s98(4). It is not for this tribunal to substitute its view for that of the employer. The decision to dismissal was within the band of reasonable responses.

279. The respondent applied a fair procedure throughout. It waited a long time before activating the ill health severance procedure. Even when started the actual dismissal meeting did not happen until June 2019. Regular meetings were held with the claimant, at which he was accompanied by his trade union representative and had every opportunity to state his position. Consideration was given to redeployment but there were no suitable vacancies and the claimant remained unfit to return.

280. The claimant was made well aware through the ill health severance process that dismissal may be the outcome in all the circumstances.

281. The respondent acted fairly in its dismissal of the claimant.

_____
Employment Judge Laidler

Date: 5 July 2021

Sent to the parties on: .19.7.2021...
THY
.....
For the Tribunal Office