**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: S/4106027/2019**

**Held in Edinburgh on 10, 11, 12, 13, 14, and 17 May and 17 June 2021 (Members' Meeting).**

**Employment Judge: Mrs M Kearns**
**Members: Mrs J Lindsay**
**Mr D MacFarlane**

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| **Mr S Lamond** | **Claimant**<br>**In Person** |
| **Scottish Ministers** | **Respondent**<br>**Represented by:**<br>**Mr D Long**<br>**Solicitor** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous Judgment of the Employment Tribunal is that:-

(1) the claims presented under sections 15, 20 and 21 Equality Act 2010 are well founded; and that

(2) the claimant was unfairly dismissed in terms of Section 98 of the Employment Rights Act 1996.

A hearing will be fixed to determine remedy;

(3) The claim under section 13 Equality Act 2010 is dismissed;

(4) The claim of automatically unfair dismissal contrary to section 100 Employment Rights Act 1996 is dismissed;

(5) The claim for holiday pay is dismissed.

## REASONS

1. The claimant who is now aged 66 years was employed by the respondent as a Customer Services and Sales Manager until his dismissal with notice took effect on 24 May 2019. On 1 May 2019, having complied with the early conciliation requirements, he presented an application to the Employment Tribunal in which he claimed direct disability discrimination, discrimination arising from disability and discrimination by breach of a duty to make reasonable adjustments. He also claimed automatically unfair dismissal under section 100(1)(a) and (c) Employment Rights Act 1996 and 'ordinary' unfair dismissal contrary to section 98. Finally, he claimed holiday pay as an unauthorised deduction from wages.

**Issues**

2. It was agreed during the course of proceedings that the current hearing would determine liability only.

3. The respondent accepts that the claimant was at all relevant times a disabled person as defined by section 6 of the Equality Act 2010 ("EqA") by reason of the following physical and mental impairments: hip, back and groin problems following an injury at work in 2010 and anxiety and depression.

4. The parties had agreed a list of issues for the Tribunal in the following terms:-

"*Unfair dismissal*

*1. Was the claimant dismissed for a reason set out in section 100(1)(a) or (c) of the Employment Rights Act 1996?*

*2. If not what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996? (The respondent asserts that it was a reason relating to the claimant's capability)*

*3. If so was the dismissal fair or unfair in accordance with section 98(4) of the Employment Rights Act 1996?*

*Direct discrimination because of disability, S13 Equality Act 2010*
*It is not in dispute that the respondent dismissed the claimant.*

*4. Did the dismissal constitute "less favourable treatment", i.e. did the respondent treat the claimant less favourably than it treated or would have treated others (comparators) in not materially different circumstances?*

*5. If so was it because of the claimant's disability?*

*Discrimination arising from disability- S15 Equality Act 2010*
*6. Was the claimant treated unfavourably by being dismissed?*

*7. If so was this due to something arising in consequence of his disability, namely his sickness absence?*

*8. If so, was the treatment pursuant to a legitimate aim?*

*Reasonable adjustments S20 & 21 Equality Act 2010*

*9. Did the claimant's request for partial retirement submitted on 06 June 2018 constitute a request for reasonable adjustments?*

*10. If so, was the respondent's refusal of that request based on the application of a particular provision criteria* [sic] *or practice (PCP)?*

*The PCP relied on by the claimant is the requirement to work full time.*

*11. Did the respondent have such a PCP?*

*12. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that he was unable to do so?*

*13. If so, did the respondent know, or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?*

*14. If so, would it have been reasonable for the respondent to have taken these steps at any relevant time and did they fail to do so?*

*Unauthorised deductions from wages - S13 Employment Rights Act 1996*

*15. Does the respondent's decision not to pay the claimant on the termination of his employment for 11 days' holidays constitute an unauthorised deduction from the claimant's wages in accordance with ERA section 13?*

*16. If so how much was deducted?"*

## Evidence

5. The parties lodged two joint bundles of documents and referred to them by page number ("1/" and "2/"). It had been decided at the case management stage that the respondent would lead its evidence first at the hearing. The respondent called the following witnesses: Mrs Adele Rae, the claimant's former line manager who took the decision not to grant his application for partial retirement; Ms Kate Skibtschak, HR Business Partner; Mrs Lindsay Docherty, who heard the claimant's appeal against his dismissal; and Mr Andrew Door who heard the claimant's appeal against

the refusal of his partial retirement application and who also dismissed him. The claimant gave evidence on his own behalf and called his former colleague, Mrs Elizabeth Pearce.

## Findings in Fact

6. The parties had prepared a list of agreed facts, which are shown in italics and incorporated into the findings in fact below.

7. The following facts were admitted or found to be proved:-

8. The respondents are the Scottish Ministers on behalf of the Scottish Prison Service ("SPS"). The SPS has a department known as 'SPS Industries'. The SPS Fauldhouse site ("Fauldhouse") where the claimant worked is a warehouse and distribution centre for SPS Industries.

9. A number of Scottish prisons have production workshops where, as part of their rehabilitation, prisoners can learn skills including engineering and working with timber or textiles. Where necessary, prisoners also learn the basic social skills required to hold down a job, such as reliability and punctuality in attending work; keeping themselves clean and tidy and basic budgeting. The prison production workshops manufacture products for use internally within the prison service and for sale externally. For example, they manufacture cell furniture, garden furniture, PPE, police and prison uniforms, denims for prisoners, stable doors, waste skips and other items. The primary objective of the workshops is to enable prisoners to develop occupational skills such as welding and carpentry. However, garden furniture, textiles and engineering products from the prison workshops that are not required for internal use are sold. By dint of government regulations, SPS can only make wholesale external sales. Retail sales are not permitted.

10. At all relevant times, there were 12 members of staff working at Fauldhouse. The staff were split among three teams: a warehousing team, a production team and a sales team. The warehousing team comprised three storemen and a warehouse and

distribution manager. The warehousing team receive, store, audit and despatch the finished goods produced in the prisons. It is also their responsibility to book the goods into the stocking system.

11. The production team instruct the prison workshops on what to produce and the sales team find out what will actually sell. They then effect the sales. The sales and production teams are office based. At the time of the tribunal hearing, they were all working from home due to the Covid 19 pandemic. Prior to the pandemic, the turnover of finished goods sold for external revenue was approximately £1 million per annum. Goods produced for internal use were also worth approximately £1 million per annum.

12. *The claimant was employed by the respondent from 01 April 1995 to 24 May 2019. Between 06 October 2006 and the date of his dismissal he was employed as a customer services and sales manager based in Fauldhouse.* The claimant's role involved liaising with internal and external customers, finding out their requirements and working with the production team to ensure they could fulfil customer orders. The claimant also handled customer complaints, credit control and serious organised crime checks. The claimant was line manager to two members of staff, Mr Chris Lamb, Computer Aided Designer and Mrs Elizabeth Pearce, Customer Service Administrator. Mr Lamb's job is to design computer models, drawings and instructions for the various products to be built in the prison workshops. Mrs Pearce's job is customer service and sales administration. The claimant was expected to contribute to an annual business plan indicating what he would be concentrating on for that year. He reported to the Fauldhouse General Manager. From late 2014 until around June 2018, the claimant's line manager was Colin Bell. His second line manager was Mr Andrew Door. Around the beginning of June 2018 Mrs Adele Rae took over from Mr Bell as the claimant's direct line manager.

13. Every January the claimant's department was audited. Normally the auditors were in for a couple of days and were friendly. In January 2017 the auditors spent 10 or 12 days auditing the claimant's department and the claimant noticed they were not as friendly as usual.

14. In or around April or May 2017 the claimant noticed that despatch notes, sales invoices and sales orders he was working on were going missing from his desk and cupboard after he left the office at 4pm. He would come in the next day to resume working on them and they would be gone. The claimant remarked on it with colleagues and people started to say things to him like: "*I think you're losing the plot*" or "*it must be an age thing*". The claimant became very stressed. A note would come through from despatch or a sales order would come in. He would lock it in his desk or his cupboard and the next day it was gone. An articulated lorry would turn up to collect the goods and the claimant would not be able to find the paperwork. The claimant knew he had done the paperwork and had got it ready, but it had disappeared. This happened a lot in April and May 2017. On or about 23 June 2017 the claimant was approached by the stores manager who told him that a junior colleague who was off sick with work related stress wanted to speak to him. Unbeknown to the claimant this same colleague had sent a message to Mrs Pearce in January 2017.

15. The claimant set up a meeting with the stores manager and the junior colleague on 26 June 2017. The colleague told the claimant that when he and Mrs Pearce left the office at 4pm, other named members of staff would rummage around in his desk and cupboard and take his papers away. He told the claimant that the people concerned had a key for his cupboard. The claimant was very alarmed and he sent an email to the respondent's HR Department raising the matter with them. Mr Door was on holiday and HR said they would wait until he came back. When Mr Door returned to work in July 2017, he instigated a 'broad general investigation'. The broad general investigation interviewed a number of staff but did not interview the junior colleague who had contacted the claimant through the stores manager. The claimant complained about this omission.

16. Between 29 June and 4 July 2017, the claimant was off with work related stress. On 10 July 2017 the claimant drove to work but could not go in and his GP signed him off again with work related stress.

17. When an employee is signed off with work related stress the respondents' HR Department send out a 'Hazard Identification Form' ("H.I.F.") for completion. On 21 July 2017 the claimant completed and returned the H.I.F. (2/125) to the respondent's HR Department. A number of "organisational stress hazards" were identified in the form.

18. The claimant returned from sickness absence on 28 July 2017. He participated in a back to work interview with Mr Door on 24 August 2017. A note was kept (2/118 – 123). The reason for his absence was recorded as "work related stress exacerbating chronic hip condition". This was vouched by a medical certificate (2/124). The hip condition was recorded on the back to work form as a disability. At the meeting the claimant asked Mr Door what was happening about the H.I.F he had submitted in July. Mr Door said that HR were looking into it.

19. The claimant received a call from HR after his interview with Mr Door to say that Mr Door had passed the H.I.F form onto them. However, the claimant did not hear anything further from HR about it, so he contacted them in September 2017 asking what was happening about the stress risk assessment that was supposed to take place in relation to the issues he had identified in his H.I.F. They told him they had spoken to Mr Door and there was "no case to answer".

20. One positive effect of the broad general investigation Mr Door had initiated in July 2017 was that from that point onwards the claimant's papers no longer went missing and everything seemed to go back to normal. However, the claimant still experienced conflict with his line manager, Colin Bell. Towards the end of November 2017, the claimant received a call from Mr Bell to discuss his Personal Performance Management Plan ("PPMP"). The respondent's managers are all asked to complete an annual PPMP and to agree objectives with their line manager by the end of May each year. A half year review of progress toward the objectives normally takes place in October. The claimant had contacted Colin Bell several times about his PPMP in the months since May 2017 and Mr Bell had told him not to worry about it. At the end of October, the claimant contacted Mr Bell again and reminded him that the PPMP had not yet been set. Mr Bell told him: "Look we'll deal with it later". The

claimant had done PPMPs for his staff earlier in the year using the previous year's objectives agreed with Mr Bell. He reviewed the progress of his staff against their plans in October 2017. On 30 November 2017, Mr Bell called the claimant in for his initial PPMP meeting and the Plan was completed (2/151 – 164). Mr Bell told the claimant: "We'll set your plan today and schedule your interim review for 7 December 2017".

21. The claimant attended the Interim Review meeting on 7 December 2017. At the meeting Colin Bell recorded on the PPMP form (2/155): "The IYOs were only set at the Interim Review meeting. They are, however, fully achievable prior to 31st March 2018". The claimant was very unhappy about this. He pointed out to Mr Bell that he should have been given the objectives by the end of May and could then have disseminated them to his staff and been working towards them. He complained that instead of this he was being given "three and a bit months" to carry them out. The meeting became a bit heated. Two days later, the claimant was signed off sick with work related stress. On 21 December 2017 he submitted a further Hazard Identification Form (1/222 – 3). The form stated that the claimant had identified the following organisational stress hazards: "Communication (insufficient/ aggressiveness). Support - lack of it. Interpersonal conflict - unresolved. Management style. Harassment/ bullying. Volume of work."

22. The claimant was a disabled person as defined in the Equality Act 2010 ("EqA") by reason of a hip and groin injury following an accident at work in or around 2010. He was also disabled as defined in the EqA by reason of anxiety and depression from at least January 2018. His disability and particularly his anxiety and depression made him less able to cope with a full-time role and more susceptible to work-related stress than a non-disabled person would have been. As such, he was more likely than a non-disabled person to be absent with work related stress, which put his continued employment at greater risk.

23. The claimant returned to work from sick absence in mid-January 2018. On 26 and 31 January 2018 the claimant had meetings with Mr Door to discuss the Hazard Identification Form he had submitted on 21 December 2017. A note was kept of the

discussions (2/166 – 172). After discussing and exploring the issues, the claimant and Mr Door "*explored possible controls and actions that might be taken to tackle the cited stressors*". Under the heading: "*Actions taken/Proposed*" the note recorded: "SL to consider part-time working options from April 2018. Maybe on a job-share basis or could involve change of role at Fauldhouse? … Change of role for SL at Fauldhouse? Options are very limited at Stewart's level. Would need a reorganisation of duties within the team. SL not keen but will consider depending on the proposal. Stewart likes the role he is in at the moment. AD to consider any possible options here. Redeployment elsewhere in SPS? See above, there may be options but Stewart would need to be content that the opportunity was suitable when compared to his present role. The issues that Stewart feels he have [sic] with his present working environment may be a factor in Stewart's consideration of any potential move, especially if a move allowed him to address some of the hazards identified."

24. *The claimant had 20 periods of absence between April 2011 and January 2019 which totalled 395 working days of absence. The given reason for the majority of these absences is recorded as 'Stress, Groin injury and Musc/Skel System Symptoms'.*

25. On 12 March 2018 the claimant was called to the SPS headquarters by Mr Door and Ms Cornwall of HR. Mr Door told the claimant that he was being suspended pending an investigation into an allegation of gross misconduct made against him. The claimant told Mr Door what the junior colleague had told him on 26 June. Mr Door said he could not respond but there would be an investigation. The claimant telephoned Mrs Pearce to tell her he had been suspended and would not be in the following day.

26. *The respondent wrote to the claimant on 12 March 2018 to inform him that he was to be investigated for gross misconduct. The claimant was suspended from work with immediate effect pending the outcome of the investigation under the respondent's code of conduct process.* The allegation was that (1/268): "on 26 March 2017 you…submitted a document to Catherine Topley, Director of Corporate

Services, raising concerns regarding Misconduct & Inappropriate Behaviours within Central Stores Fauldhouse. It is alleged that in 2017 you created a false allegation into alleged theft within the main office at Central stores and further to the allegation of theft alleged inappropriate behaviours by your colleagues within Central stores and HQ, with the intention for those colleagues to be investigated." The notification stated that the investigation would be conducted by Stacey Woodrow and that it should be concluded by 2 April 2018. The letter of suspension included the following paragraphs:

"*Normal absence management arrangements apply during any period of suspension. If you are unwell you should contact the establishment, following the normal sick absence procedure.*

*During this period of suspension you may take annual leave as you wish. However if you have any pre- booked holidays arranged you should bring this to the attention of Gavin Weetman. Normal policy and procedure in relation to the management of holiday entitlement applies during this period of suspension. No more than 10 days can be carried over to the following leave year."*

27. On 13 March 2018 (the day after she had been informed by the claimant of his suspension), Mrs Pearce sent the claimant a copy of a text exchange (1/130) she had had with the junior colleague in 2017 regarding the matters he had brought to the claimant's attention at that time. This made reference to two Fauldhouse colleagues who had been making allegations of corruption against the claimant and going through his desk and cupboard, removing his papers after he left the office.

28. The claimant had an initial interview with Ms Woodrow. As he was suspended, he did not have access to his desk. Locked in his desk drawer was a transcript of his interview with the store manager and junior colleague on 26 June 2017. The claimant considered that this was objective evidence supporting the allegations he had made about the two colleagues. He therefore informed the Investigation Manager about the transcript and she went to his desk to try and retrieve it. However, she found that the drawer to his desk was unlocked and the transcript was not there.

29. The claimant suffered an acute stress reaction to his suspension and he had a breakdown. *The claimant's trade union representative Iain Scott raised concerns to the respondent about the effect that participating in a code of conduct investigation may have on the claimant's health. In recognition of this the respondent made a referral to Occupational Health in respect of the claimant. This was communicated to the claimant by letter on 16 March 2018.* (Their report was issued on 31 July 2018).

30. *The claimant submitted a fit note to the respondent dated 19 March 2018 which outlined that he was not fit for work due to an acute stress reaction which was work related. The claimant provided further fit notes and remained off sick liaising with the respondent's HR Department about his ongoing sickness absence.*

31. Towards the end of May 2018, supported by his family and GP, the claimant started to feel a bit better. His GP said he could probably get back to work within around 4 to 6 weeks.

32. *On 01 June 2018 the claimant was informed by email by the respondent that their occupational health provider had not yet received a report from the claimant's general practitioner. This email also reminded the claimant that the code of conduct process could not be instigated until they had a report from their occupational health provider.*

33. *On 06 June 2018, while on sick leave, the claimant wrote to the respondent submitting a partial retirement application form* (2/174). The form was submitted to Dannine Stenhouse at the SPS HR Department together with a covering letter dated 6 June 2018 (2/173) and headed: 'Partial Retirement Application Form'. The letter stated:

"Dear Ms Stenhouse

I appreciate you sending me the relevant details on Partial Retirement & Pension.

As previously discussed with Andrew Door (Head of Procurement) in February 2018, I advised that I had been considering this option for a number of months due to ongoing health issues and would make a decision on this come June 2018. I would now like to apply for this and have attached the relevant paperwork, which you kindly sent me.

I would like this to start on 1st August 2018. I am not sure what the timescales are re pension etc and would appreciate any further information that you can provide.

Yours sincerely
Stewart Lamond"

34. The application form (1/174 – 5) asks the applicant to state their current working pattern and the proposed new working pattern. The claimant stated that his current role was 37 hours per week, Monday to Thursday 07:30 to 4pm and Friday (working from home) 08:00 to 3.30pm. He stated that he was seeking 19 hours per week, ideally on a week on/week off basis. The form does not ask the reasons for the application. Ms Stenhouse emailed the form to Colin Bell on 11 June 2018 (2/177) with the message: "Hi Colin, We have received a Partial Retirement Application from Stewart Lamond which I have attached. If you can now progress for Stewart. Kind regards Dannine."

35. *The claimant submitted a fit note to the respondent dated 20 June 2018* [(1/308)] *the fit note stated that the claimant was not fit to work but that he was willing to consider a return part time or on amended duties.* The fit note stated that the condition rendering him unfit for work was "Acute stress reaction (work related)." It also stated that he may benefit from a phased return to work.

36. As from the beginning of June 2018, Colin Bell was no longer the claimant's line manager and he forwarded the message on to Adele Rae, who had taken over from him on or around 4 June 2018. Mrs Rae contacted HR to inquire whether there was anyone with the relevant skills and experience looking for a job share. She was told

there was not. She considered the application and sent the claimant a written response dated 12 July 2018 (2/179). The response was in the following terms:

"Dear Stewart

Thank you for your partial retirement request from your role as Customer Services & Sales Manager at SPS Fauldhouse.

As I am relatively new to the role of General Manager at SPS Fauldhouse, and as such your new line manager, I have discussed the role with both my line manager (Andy Door) and your previous line manager (Colin Bell) to gain an overall understanding of your role prior to submitting this response.

**Background**

As I understand it, you are eligible to apply for partial retirement, given that you are over 60 years old. You have completed an application with your proposal being to reduce your current working arrangement of 37 hours per week to 19 hours per week. I am aware that you have previously intimated that you wish to retain to work flexibly from home on any Fridays you are scheduled to attend work, where possible. Your proposal has also indicated that you would be willing to job share. Ideally, your proposal would be to work one week on (full time) and one week off, although you are flexible regarding working patterns within the above context.

**Customer Services & Sales Manager Role**

I have considered your application based upon the information provided in your request as well as the information provided in your Core Role Outputs (CRO's), and your contractual obligations described in your job description. In doing so, I have identified that there are several key areas of business need within this role, with the main priorities being namely:

- **Sales and Customer Management** - this function is key to the main service delivery of SPS Fauldhouse. This task involves proactively managing and

ensuring that all customer inquiries, sales, transport, invoicing and credit notes are dealt with effectively and efficiently. A large part of the success of this function is reliant upon maintaining customer relationships and providing consistency and continuity of service.

- **Sales Forecasting and Pricing** - this functionality is vital in the strategic planning of the overall service delivery of SPS Fauldhouse both to internal and external customers. The ongoing sales forecasting of products is to ensure appropriate and relevant information is used to support production planning and ensure production workshops operate at an optimal level. The two priority service deliverables in this part of the role is to ensure there is continually work in the workshops (internal customer) and that there are no stock-outs (external customer). Consistency and continuity of service are fundamental to this element of the business

- **Credit Control** - this role incorporates the responsibility of establishing and setting credit limits for new customers and maintaining current customer's credit limits as well as setting and maintaining credit limits, the key service deliverable is to ensure that customers do not exceed their credit limit and this is done mainly through the effective and efficient customer relationship management.

- **Customer Complaints** - this role also incorporates the overseeing and analysis of customer complaints as well as proposing and carrying out corrective action. The essential service deliverables being to enhance the customer experience, fundamentally reduce complaints, and enhance developments in procedures/ systems and products (where possible).

- **Management and Leadership** - the role is responsible for the Direct Line management of 2 staff (band C and band E). This incorporates strong clear and strategic leadership as well as providing appropriate and timely direction, support, motivation and guidance to allow staff to complete their own activities

on time and to the appropriate standards. In addition, provide, on an ad hoc basis, support and guidance to any member of staff.

- **Senior Management Planning and Infrastructure** - the role has an integral part in the planning, developing, establishing, implementing and maintenance of the corporate business plans for this establishment. This includes the annual plans for business as usual and the business improvement plan.

- **Policies and Procedures** - the role is responsible for the maintenance and integrity of current sales and customer service processes and procedures which support the SPS Fauldhouse operation. This involves developing, implementing, maintaining, reviewing and improving the key policies and guidance. The liaison between the relevant authorities and SPS regarding regulations, legislation and development and production is critical to the business need.

In reviewing the requirements of the role, it is clear the proposed approach would have a direct impact on the overall SPS Fauldhouse functionality. My main area of concern is the impact on service delivery. The proposal would, even in the short to mid-term, reduce operational capacity within SPS Fauldhouse. This may have a negative impact not only on SPS Fauldhouse, but all its stakeholders too (i.e. external customers, and other SPS establishments). By reducing the number of hours worked by the individual in the above role, or indeed job sharing, there may be a reduction in knowledge, understanding and/or competence at SPS Fauldhouse leading to a reduction in the consistency and continuity of service.

I have also explored different solutions, such as alternative working patterns to that proposed and find that, due to the interdependencies around the functionalities of the role itself, it would be extremely challenging to split the role evenly. Moreover, to reduce the hours of the individual performing the role and/or the removal of some tasks from this role may have a direct impact on the job itself. To introduce a job sharing element to this role would see an increase in the resources required for the

management of the role and this would lead to a less efficient and less productive staffing solution.

There is a clear need for consistency and continuity of service in the requirements of this role. Whilst exploring the feasibility of other possible solutions, I have been unable to identify a suitable structure which would be able to support the business need of this particular role. Therefore, it is with regret, I am unable to support this application and do not give my approval for this request at this time.

Should you require any additional information around this request, please do not hesitate to contact me."

37. At the point when Mrs Rae considered the claimant's partial retirement application, she had been managing the claimant for a matter of days. The claimant was absent from work. Mrs Rae had not been told that the claimant was disabled, although she knew he was off sick, and had been for some months. As his line manager, she was entitled to see his fit notes, OH and absence records. She chose not to access the claimant's records because she did not think they would be relevant to her decision. Mrs Rae confined herself to the information on the partial retirement request form. She did not view the application as a request for reasonable adjustments. She either did not have or did not notice the covering letter in which the claimant referred to his ongoing health problems. If Mrs Rae had realised the claimant was disabled, she would have dealt with his application for partial retirement very differently, by requesting advice from OH and using the procedure outlined in Paragraph 25 of the respondents' Managing Attendance Policy (1/471).

38. Paragraph 25 of the respondent's Managing Attendance Policy (1/471) states: "If an employee requests an adjustment to their working conditions as a result of their disability this will in most cases be referred to SPS Occupational Health Advisers who will provide appropriate advice or appropriate measures to be taken **(see Annex 6)**". This procedure was not used in the claimant's case.

39. Annex 6 is entitled: “Questions to be included in pro forma letter to OH” and states so far as relevant:

> “Assuming the employee is disabled, are there any arrangements or physical features which place the employee at a substantial disadvantage compared with non disabled persons working at SPS?
>
> Assuming the employee is disabled, are there any reasonable modifications which (if operationally feasible) which [sic] prevent any such disadvantage? Please advise what disadvantage each modification attempts to address.
>
> It may be that the modifications are not reasonably or operationally feasible or are insufficient to allow the employee to perform their contractual role. If so, are there any redeployed roles which (if operationally feasible) might be performed by the employee? Please advise what problems these redeployed rules attempt to address.
>
> Please advise whether the employee is fit to participate in a capability hearing. The capability hearing normally entails [insert description] and involves a consideration of the scope for modification or redeployment but may result in the termination of the employee’s employment for want of capability to perform their contractual role. If you do not consider the employee fit to attend the capability hearing please advise whether there are any reasonable modifications, which (if operationally feasible) would allow the employee to participate to some degree. Please note that the capability hearing may still require to proceed even if the employee is not fit to participate to some degree.”

40. The claimant had been shocked and very distressed by his suspension. However, the text message Mrs Pearce had forwarded to him on 13 March 2018 had reassured him that he could prove to the code of conduct investigator that there had been something going on and he had referred the investigator to the transcript in his desk of his meeting with the stores manager and colleague on 26 June 2017. It had been a blow that the transcript was no longer in his desk, but the claimant had begun to

feel more positive again in the period to 12 July 2018 with the support of his GP and his family and he was hoping to participate in the investigation and get back to work part time on 1 August 2018 (2/173). The refusal of his partial retirement request had an adverse effect on the claimant's mental health. The claimant felt he knew the job well after twenty years in it and that he knew it could be done part time. He felt the reasoning in Mrs Rae's letter was full of 'meaningless grandiose language' that made it look as though the job involved taking big decisions all the time, whereas in fact it was a middle management job, quite a lot of which involved administration. The claimant felt Mrs Rae's letter 'bigged up' the job. For example, "senior management planning and infrastructure" referred to by Mrs Rae involved setting a plan, which took a day or two once a year. Furthermore, the claimant had put Mr Lamb in charge of customer complaints and Mr Lamb was managing it well. All in all, the claimant felt devastated by the refusal of his partial retirement request and his mental health declined after the refusal was communicated to him, reducing his resilience and ability to face the disciplinary investigation and separately extending his absence which ultimately resulted in his dismissal. The prospect of returning to the workplace full time, rather than part time caused him to become stressed which exacerbated his anxiety and depression so that he could not face the code of conduct hearing or returning to work at that time.

41. By email dated 22 July 2018 (2/182) the claimant advised Mrs Rae that he was very disappointed with her decision. In the email he told her:

"In March 2010 I had a serious accident/ injury at work and was subsequently off work for over seven months or so. A large heavy sewing machine, which was placed on a broken pallet and not banded securely, toppled over on top of me pinning me to the ground severely damaging my left hip and back.

Since then my condition has gotten progressively worse year upon year and coupled with a stress and anxiety condition, I have had to take a fair bit of sick leave and annual leave which has increased over the past few years.

I was off 2nd December 2017 with work related stress in relation to a bullying matter and other issues, which I will not trouble you with at this point. However, when I returned to work in January 2018, I met with Andrew Door who did my back to work interview. This was an undoubtedly the most intense back to work interview I had ever attended where we went through a wide range of issues relating to my medical condition, attendance at work and what SPS could offer in terms of support.

During the back to work meeting with Andrew Door we discussed the matter of my ongoing health condition and the fact that I was having to take more time off work due to illness health (sick leave and using annual leave). I put forward a proposal to Mr Door that I was now seriously considering applying for partial working think it over for a few weeks and make a decision early April 2018 and look to make an application after I returned from holiday and discussed with my family.

Mr Door was very supportive, and I have to say enthusiastic about my proposal and actually said “why wait, why don't you do it now”. I was slightly taken aback but delighted by his response and advised that I will take a few weeks to discuss with my family and make it official thereafter. We then went on to discuss the pros and cons of partial working and Mr Door actually commented that there was indeed a member of staff who was looking for such an opportunity (AA) as he was also in a part time position. I commented that this was an excellent idea as AA knew the ropes in relation to customer services and was an excellent salesman having done the job previously. It seemed a perfect fit as we are both the same age and only have a few years left to work until full retirement.

You can now see why your decision has disappointed and devastated me - as here we were a few weeks back when Mr Door was enthusiastic and supportive about my proposal for partial working, yet some weeks later there appears to be a complete turnaround and I cannot comprehend why? I am sure that you can now appreciate my concerns and the effect this is having on my chronic medical condition including severe anxiety and depression.

I was also disappointed that my chronic medical condition, which was caused by negligence within the workplace, never played any part in your decision making. I can only assume that you were not aware of my condition being new in post. However, my previous line manager Colin Bell, and second line manager Andrew Door were fully aware of my chronic medical condition but it appears they may not have brought you up to speed on the situation, which I consider disappointing if that was indeed the case. Can you perhaps clarify?

I also appreciate that you have raised a number of points about the role of customer services and sales manager and your take on potential problems with job sharing. However, I feel that these matters can be easily overcome as I am very experienced and can bring any potential candidate up to speed in a matter of weeks. Putting things into perspective we are looking at a middle management role here and not trying to train anyone to become a doctor or medical professional?

Hope that you can reconsider this decision based on what I was advised a few weeks back during my meeting with Andrew Door."

42. On receipt of the claimant's email, Mrs Rae contacted Mr Door by email dated 26 July 2018 (2/187). In the email, she quoted the claimant's email and then stated: "I would be grateful if you could provide clarification and, indeed, verification of the above information to allow this to be considered further."

43. Mr Door replied to Mrs Rae by email dated 26 July 2018. In relation to the partial working request, Mr Door stated: "This was not a "proposal" as such. Stewart suggested that he was considering making an application for part time working. This is something Stewart had raised previously with me and also with his line manager, Colin Bell. I understand that Colin had been open to the notion of exploring options here, as was I." In relation to the statement that he had been supportive/enthusiastic about the partial retirement proposal and had said "why wait, why don't you do it now", Mr Door said: "I do recall saying this simply because all we were doing was exploring options here. There was no reason not to start that process in my view. It is preferential to bottom out such matters. If a colleague were to change their working

pattern we would need to plan for it. In the case of Stewart's role, there are all sorts of considerations." Mr Door appeared to agree that he had responded positively to the suggestion and that the claimant had indicated that he would take a few weeks to discuss it with his family and would make it official thereafter. With regard to the suggestion of AA as a job share partner, Mr Door could not remember whether he or the claimant had suggested AA. He said that the matter had been hypothetical because the claimant had not decided at that stage whether he would make a part-time working request. He said he found the claimant's interpretation "a little odd". Mrs Rae considered Mr Door's response and decided that there was nothing in it that would change her view about whether it was appropriate to grant partial retirement.

44. Also on 26 July 2018 Mrs Rae contacted Sarah Cornwall of HR about a possible job share. Ms Cornwall emailed the other HR Business Partners to ask whether they had any employees in their establishments who had requested partial retirement and might have the skills for the role. They all replied to say they did not have a suitable match. Nobody appears to have contacted AA.

45. *On 31 July 2018 an occupational health report* (1/313) *was completed in respect of the claimant by a Senior Occupational Health Nurse.* The respondent received the report on that date. The report was in response to a management referral made on or about 19 March 2018 which did not appear to be in the bundle of documents. The report stated that the claimant was temporarily unfit for work for 4 – 6 weeks. It contained the following notes:

"The purpose of an OH report is to provide advice on an employee's medical condition, fitness to work and guidance on how workplace adjustment might assist the individual including indicating relevant timeframes for potential recovery. It is not designed to provide or replace HR advice." It also stated: "The report and my recommendations are based on my critical evaluation of the following sources of evidence:

- referral document

- assessment carried out today which lasted for 15 minutes;
- GP report .”

46. The report stated: “Please note: the responsibility for determining whether any suggested recommendations or adjustments are operationally achievable is a management responsibility and will be considered in line with your company's policies and procedures.” The report went on:

“**Current Circumstances**

As you are aware we obtained consent to write to Stewart’s GP for further medical information. We are now in receipt of this and the following report is based on the information gained from the GP report.

Stewart has attended his GP on a few occasions when he reported workplace stress, his GP initially signed him off work and commenced him on appropriate medication. He was reviewed in March of this year and referred for counselling, he remains on the waiting list for an appointment, there is a considerable lengthy waiting time for counselling services in the NHS.

The GP has commented on some specific issues within the working environment which were contributing to his stress and anxiety. He also advises of classic symptoms of anxiety. Stewart attended his GP again on the 20th June, when it was noted that there had been some improvement in symptoms as a result of an increase in medications and time out of work. The GP advises that “he had voiced his intention to think about going back to work if a change in deployment or work patterns could be accommodated for him. Hopefully a work pattern or job that did not give him the anxiety levels that he has been indeed suffering with recently.”

I have spoken with Stewart today, and he is in agreement with the information obtained from his GP. It would be likely that a return to work would be achievable if the above comments could be fulfilled.”

47. *The claimant's application for partial retirement was dealt with in the first instance by his line manager Adele Rae. Ms Rae wrote to the claimant on 08 August 2018* [(2/208) to respond to his email of 22 July 2018 and] *to explain that she was unable to support his application for partial retirement and that he had a right to appeal against this decision.* In the letter, Mrs Rae said: "I have now had the opportunity to discuss the points you have raised with Andy Door and his recollection is different from that outlined in your email. Andy does recall exploring options at the meeting held in January 2018, but these were notional and any discussion around this topic would be heresay [*sic*] with the intent being for all options to be explored when an application had been submitted. I'm sure you will appreciate from the time of this discussion in January 2018 until the time of your application in June 2018, the management, and indeed the strategic direction, of SPS Fauldhouse has changed. I have taken all points raised into account when reviewing your application and failed to find any new information which would fundamentally change my original decision." Mrs Rae informed the claimant that he had a right to appeal within 14 days of receiving the decision. In refusing the claimant's application, Mrs Rae at all times interpreted the application as someone looking to reduce their hours coming up to retirement. The claimant made Mrs Rae aware of his disability and the substantial disadvantage he was at in being required to continue in the role full time in his email of 22 July and the correspondence that followed it, but Mrs Rae did not take this into account. She did not request or review the claimant's sickness absence record. Also in the claimant's records were a number of OH reports stating that the claimant was likely to be disabled as defined by the Equality Act 2010.

48. The claimant replied to Mrs Rae's letter of 8 August 2018 (2/208) by email dated 13 August 2018 (2/209). He pointed out that Mr Door's own note of the meeting on 30 January 2018 had stated "SL to consider part time working options from April 2018… May be on a job share basis or could involve change of role at Fauldhouse.." The claimant stated that he intended to appeal against Mrs Rae's decision and he asked Mrs Rae to answer a few questions by 16 August so he could include them in his appeal letter. So far as relevant, the email stated: "As you are aware I am allowed to work from home on Fridays due to my chronic medical condition. In light of you

rejecting my application for partial working can you therefore give consideration to allowing me to work from home on more than one day per week. Everyone agrees that this was very successful and is of great benefit to both SPS and myself. I am more than happy to discuss options and timescales or alternative proposals?" He also stated " I have to say that I continue to be very disappointed with the lack of credible support and consideration by the SPS in relation to my disability as well as my ongoing general health and wellbeing. I consider that I am being treated very unjustly here. While rejecting my application for partial working is bad enough, no one (my line management, HR Department, Employee Wellbeing team) has offered any other positive solutions or help. When you consider my progressive illness and disability are as a direct result of an accident at work, I find it difficult to comprehend the stance that SPS continue to take. What is forgotten here is quite simple to understand "if I did not have the accident at work in March 2010 I would not be in such poor medical health today" yes, it's as simple as that!"

49. Mrs Rae responded to the claimant's questions by email dated 14 August 2018 (2/213). So far as relevant, she stated: "**Home working**- I would be able to consider any change in the current home working arrangements as long as the request was in accordance with SPS policies. Any such request can be made on a Home Working Request and Declaration of Responsibility Form. To assist in the process, I have reviewed the Occasional Homeworking Policy to seek clarity around the options that may be available around working from home more than one day a week and the policy advises that home working will not be carried out for longer than a single working day within a working week. A copy of the aforementioned form and policy is available from HR." On 20 August Mrs Rae advised the claimant that HR would liaise with him directly about this (2/219-20).

50. The claimant's role was Band F. During the claimant's absence, elements of his role involving administration (such as customers telephoning to place orders) were carried out by Mrs Pearce (Band C) and Mr Lamb (Band E). Mrs Pearce undertook the administration tasks such as handling standard orders from customers where there were no complications. Mr Lamb spoke to customers about research and development of bespoke products and handled complaints and corrections. The

production manager took on the authorisation of sales and purchase orders. Other elements, such as strategic planning and credit control were taken on by Mrs Rae.

51. *The claimant appealed against the decision to reject his application for partial retirement. His appeal* (2/215 – 8) *was considered by his second line manager Andy Door who rejected the appeal. This was communicated to the claimant by letter on 04 September 2018.* The claimant appealed against Mrs Rae's decision to reject his partial retirement application by appeal form dated 17 August 2018 (2/215 – 8). In his appeal form he included the following points:

"I find the assumptions and rationale behind Adele's decisions to be somewhat inconsistent and lacking foundation, with her main concern being "**impact on service delivery**". (We are talking primarily about an administration function here which would be covered by two experienced members of staff, F band managers with a very minimal training curve. Training could be provided (by myself) to minimise the small learning curve. I would imagine there are similar administration/ management functions within the SPS that are similar in nature that are part of job share arrangements)." The claimant explained "During these discussions I advised Mr Door that I was considering partial working from April 2018 as all the medical professionals I had consulted over a period of time (and my family) suggested that I should consider working less hours as my medical condition (chronic in nature) is not going to get any better going forward. Mr Door immediately offered his support, saying **why wait until April 2018, just do it now!** I was taken aback by the thought of making a decision there and then (January 2018) and advised Mr Door that I would consult with my family and basically look to go ahead in April 2018."

52. Towards the end of his appeal form the claimant stated:

"Putting everything aside I find myself in a situation where following an accident at work in March 2010, where negligence was established, I have been left (through no fault of my own) with a chronic health condition. I would have thought that the Scottish Prison Service would seriously consider my request for partial working and not just be intent to reject my application without offering any kind of solution. This

is in complete contradiction to the Equality Act 2010 (General Equality Duty & Policy and Decision Making.)

Quote from Equality Act 2010: **Understanding (or assessing) the impact of your policies & procedures on people with different protected characteristics is an important part of <u>complying</u> with the general equality duty. You need to ensure that you have sufficient information in order to be able to evaluate the impact effectively. The equality act explains that having due regard for equality involves removing disadvantages suffered by people due to their protected characteristics.**

As I have stated repeatedly I am open to other alternatives/ solutions on Partial Working but no one (Line Managers, HR, and Equality Team) has come up with anything other than complete out of hand rejection on any proposal or solution I have put forward." [Emphasis in original).

53. The claimant's appeal against the refusal of his partial retirement application was heard by Mr Door. By the point at which Mr Door came to consider the appeal the respondent knew or ought to have known that the claimant had a disability and that being required to work full time in his role would cause him to become stressed and exacerbate his existing conditions of hip and groin pain, anxiety and depression, thereby making sick absence more likely. The respondent had received communications from the claimant to this effect.

54. Mr Door went about making the decision on the claimant's appeal in the following way: He reviewed the appeal itself and Mrs Rae's assessment and the deliberation Mrs Rae had made to satisfy himself that her assessment was a fair one and that she had given fair consideration to the appeal. He then asked himself whether there were any other factors that would allow him to uphold an appeal and concluded that the appeal had no basis. He did not consider any additional factors. Although the claimant had brought his disability to the respondent's attention and in their 31 July report, OH had referred to the claimant's request for a work pattern that did not give him the anxiety levels he had been suffering to that point, Mr Door did not take either his disability or the stated disadvantages into account in his decision. Indeed, he

considered that there was no new information that would allow him to intervene and uphold the appeal.

55. Mr Door wrote to the claimant with his decision on the claimant's appeal against the refusal of his partial retirement application by letter dated 4 September 2018 (2/221 – 3). He referred to the claimant's statement in his appeal that the role was "primarily an administration function which could be covered by two experienced members of staff". This was the nub of the difference between the claimant and his managers. Mr Door's view was that the role was "primarily not an administrative function". He stated in the appeal outcome letter: "There are necessary and important administrative elements but this is the minority aspect. What is required is a range of tasks that require operational experience, judgement and professional execution". With regard to the meeting he had had with the claimant in January, Mr Door accepted that he had encouraged him to consider "potential plans" for making a part-time working request, but said that since that time, a General Manager (Mrs Rae) had been appointed. He went on: "This appointment itself will support a considerable amount of organisational change to assist the function to progress; Some of which is already underway."

56. Finally, Mr Door stated:

> "You refer (17 Aug) to SPS's decision to reject your part-time working application and indicate that this is contradictory to the Equality Act 2010.
>
> I note that you indicate that SPS should consider a protected characteristic here in arriving at any decision. SPS is fully aware of your medical condition and indeed I know that your present and previous line managers have made a point of considering this and any reasonable adjustments that can be made in the course of your work with SPS. This includes, for example, accommodating a previous request to work flexibly - home working on a Friday which Colin Bell as FLM and I as SLM, consented to." Mr Door advised the claimant that his decision was to reject the claimant's part-time working partial retirement request and that his decision was final with no further right of appeal.

57. The claimant became increasingly depressed during the period between 12 July and November 2018. By mid-November he was feeling very low.

58. *On 11 October 2018 following further discussion between the claimant and the respondent about the claimant's fitness to attend work to participate in the code of conduct investigation the respondent made another referral to occupational health in respect of the claimant* (1/270 – 7)*.* In the referral it was explained that the claimant had previously been seen by OH who had advised that he was fit to participate in the code of conduct investigation. However, the claimant had not agreed and had requested to participate in writing. The interviewer had sent him questions requesting a written response, but the material had caused the claimant's anxiety to worsen and he had now stated he was not fit to participate in the investigation at all. The referral requested OH to advise.

59. *The claimant was seen by occupational health physician Dr Reed who produced a report dated 15 November 2018* (1/327 – 9). He found that the claimant's health was quite substantially affected and appeared to have become worse over time during his period of suspension. He assessed the claimant as suffering from significant depression which was having a substantial effect on his mood, motivation and ability to think or make decisions. He stated that it was likely the claimant would be regarded as disabled under the Equality Act 2010. Dr Reed stated that there was a very significant work-related element which was reflected in the thoughts and ruminations of the claimant in the context of his depressive symptoms. He assessed the claimant as not fit to work and not fit to attend a face-to-face investigatory meeting. The only possible way of the code of conduct matter being resolved was said to be by written responses, although it was acknowledged that that had been tried without success. Dr Reed stated: "I find it hard to think of any other reasonable method in which the required outcome could be achieved at present. However if Mr Lamond's health improved in future I think there would be much greater possibility of the process becoming concluded. However as things stand his health has been moving in the wrong direction and it is not clear when recovery would be achieved allowing him to engage in the process more successfully." Dr Reed was unable to

identify a timeframe for this. At the end of the report, Dr Reed stated: "In my view if he was fit in July this year he is no longer fit based on my assessment and I believe all prospects of achieving a return to work have diminished over time. Further occupational health review can be requested at any time depending on how this case evolves."

60. By 6 December 2018 the claimant was beginning to feel a lot better and he emailed (1/142) Gavin Weetman who had been allocated to him as a 'keep in touch' person. In the email he said: "The occupational health doctor highlighted a particular area "Future Plans and next Steps", which I am convinced, as is my GP, will get me back on track to the extent where I can fully concentrate and participate in conclusion of the investigation. Thankfully, this will be within the scope of HR and the SPS policy in relation to Employee Wellbeing notwithstanding the Equality Act.

I have managed to source help from a solicitor friend and with her help now start to look at the periphery aspects of the investigation and look for clarity on a number of points in relation to my case. I will work on this over the next few weeks and respond via the investigation officer. All in all, things are looking more positive."

61. By letter dated 17 December 2018, Ella Marshall HQ HR Manager wrote to the claimant about Dr Reed's OH report and stated:

"I note from the content of the report that Dr Reed has indicated that you are unable to participate in the Code of Conduct investigation at this time (even with the adjustments which have been suggested and, unfortunately, Dr Reed was unable to identify any other adjustments for participation in the conduct investigation), that you are unfit for work and a return to work is not currently foreseeable. Following the information provided by Occupational Health and from your email to HR confirming your GP has assessed you as unfit for work, your absence has been recorded as sickness absence, rather than suspension from 4 December 2018."

62. The letter went on: "As Occupational Health have advised you are unfit for work and a return to work is not foreseeable at this time, you will now be managed through

the long term absence provisions of the SPS Capability process." The claimant was invited to an interview in the week commencing 7 January 2019.

63. Over Christmas 2018 the claimant's daughter and brother helped him to feel more positive. His GP told him he needed to get back to work. He said to the claimant: "Get the investigation out of the way. You've got all the evidence you need now. Go and get it done." He encouraged the claimant to make positive plans for next steps and the claimant began to feel better. The claimant visited his GP for an appointment on 3 January 2019. His GP assessed the claimant on that date and prepared a fit note (1/337 - 8) on his behalf dated 3 January 2019 which stated: "you may be fit for work taking account of the following advice: If available and with your employer's agreement, you may benefit from: altered hours". In the comments section underneath, the GP had written: "Mr Lamond feels he could cope with reduced hours 15 – 20 hrs?"

64. *The claimant attended a managing absence meeting with Ella Marshall, Human Resources manager for the respondent on 09 January 2019 to discuss the occupational health report of 15 November 2018 and management of his absence through the SPS capability process. At this meeting the claimant provided the respondent with a fit note dated 03 January 2019 which noted that he may be fit to work* (1/337 – 8)*.*

65. In addition to Ms Marshall, the meeting on 9 January 2019 was attended by Ms Glasgow, note taker, the claimant and his trade union representative, Iain Scott. A note was taken (1/339 – 42). The following discussion took place:

"Ian queried the SPS stance if Stewart's GP was of the medical opinion that he was fit to return to work and would not provide medical certificates. Ella confirmed that the SPS would continue to record Stewart as absent from work, based on OH advice, and would expect medical certificates to be submitted. Stewart again emphasised that he felt this was unfair. Ella stated that there is recent medical advice from OH to indicate that Stewart is unfit to return to work in any capacity. Stewart advised that he is not receiving the benefit of CBT and feels that the SPS

have one outcome in mind, capability. Stewart explained that he has two years left to work before retiring and queried how the capability process would benefit him. Ella reiterated that there is clear medical advice from OH to support that Stewart is unfit to return to work in any capacity, there is no option for redeployment and he does not qualify for medical retirement."

66. *Kate Skibtschak HR business partner for the respondent produced a report dated 15 January 2019* (1/345) *in respect of the claimant's absence profile dating back to 12 March 2018 when he was suspended from work. The report made reference to the contents of the occupational health report of 15 November 2019 and recommended termination of the claimant's employment on the grounds of capability.* In the report, Ms Skibtschak summarised the claimant's attendance history as follows: "He has had 20 periods of absence between April 2011 and January 2019, totalling 395 days. Mr Lamond has a history of back, groin and hip pain resulting from an accident at work and these, alongside a number of periods of stress/anxiety/acute stress reaction account for the majority of his recorded absences over this period."

67. At paragraph 12 of her report, Ms Skibtschak stated: "Mr Lamond submitted a GP medical certificate on the 3rd January 2019 which advised that Mr Lamond may be fit to undertake reduced hours. In such cases where information is provided by a GP that does not align with the information provided by the Occupational Health Service medical information, SPS will progress medical cases in line with the information provided by Occupational Health as they have the understanding of SPS and the role being undertaken by the individual. In Mr Lamond's case the decision was made to follow the guidance provided by Occupational Health and continue to record Mr Lamond as being unfit for work."

68. At paragraph 14 of her report Ms Skibtschak stated: "The purpose of the Capability Meeting is to allow the Scottish Prison Service to consider whether the member of staff can provide regular and effective service into the future. At the meeting the Scottish Prison Service has to consider the following options:

**Option 1**

This would be that there is the prospect of Mr Lamond not only returning to his full role but also providing regular and reliable service into the future. If this is believed to be the case then a date should be set within a reasonable time frame for Mr Lamond to resume his full contractual role. The MAAPP refers to a reasonable time frame for a return to work date as being within three months.

**Option 2**

This would be that there is no prospect of Mr Lamond returning to work within his contractual role in the future and providing regular and reliable attendance. If this was believed to be the case then it would be reasonable to conclude that a decision is made to terminate employment."

69. At the end of her report, Ms Skibtschak stated: "There is no evidence provided that indicates the possibility of Mr Lamond being able to return to his substantive contractual role, therefore termination of employment with the appropriate notice on the grounds of capability is the recommended course of action."

70. The respondent's Managing Absence Policy requires (1/492) that *inter alia* the following must be provided to the decision-maker and the employee in advance of a capability hearing: "Up to date Medical Advice obtained (of no less than 2 months) from SPS Occupational Health Advisers in relation to the employee."

71. *On 15 January 2018 the claimant was invited to a capability hearing which was scheduled to take place on 2[6 January] 2019. He was provided with a copy of the report produced by Ms Skibtschak at this time.* The 'notification of capability interview' letter (1/352) advised the claimant: "At the interview we will go over in some detail your medical history, and how it has been managed. If you are unable to indicate when you can return to work, or if a return to work is not a reasonable prospect, the service may have to consider terminating your employment." The claimant was shocked by the letter and report because he thought it was a response to his GP fit note and it set him back a bit. The respondent's template 'notification of capability interview' letter from Annex 23A of their Managing Absence Policy (1/562) states: "At the interview we will go over in some detail your sickness absence record,

and how it has been managed. I hope at the meeting you will be able to let me know when you think you will be able to return to work, and if you are able, we can arrange a return to work programme for you. If you are unable to indicate when you can return to work, or if a return to work is not a reasonable prospect, the Service may have to consider terminating your employment."

72. *The capability hearing was rescheduled to 15 February 2019 and went ahead on that date. The hearing was conducted by Andy Door the claimant's 2nd line manager.* The claimant attended accompanied by his trade union representative, Iain Scott. Also in attendance were Ms Skibtschak and Ms Glasgow, who took notes (1/355 - 383). During the meeting Mr Door referred to the OH report dated 15 November 2018 and the claimant asked about the fit note provided by his GP on 3 January 2019 which stated that he may be fit to return to work on reduced hours (1/361). Mr Door stated: "Well obviously the issue here, as Kate set out, is that there is conflicting information. We've got two clinical opinions which say something slightly different so one of those two opinions has to prevail Stewart and… the policy is to utilise the Occupational Health opinion and that's what we do." There was discussion of a reasonable adjustment the respondent had made for the claimant in 2017, by allowing him to work from home on a Friday (1/368). Mr Door told the claimant: "I would like to think that underlines our openness, willingness to consider reasonable adjustments.." With regard to part time working, Mr Door stated: "Part-time working - the issue with part-time working, I'm more than happy to discuss it. Adele would have been your Line Manager during that period and I considered a request for that indeed an appeal around that but I'm satisfied that this is a full-time role and I cannot see a way that we could operate the role in the present circumstances on a part-time basis. That is not a reflection on you, that's a reflection on the job requirements of the Sales & Customer Services Manager role which remains full time."

73. At the hearing, the claimant read out a statement he had prepared (1/372 – 9). In the statement he referred to Mr Door's hearing invite letter in which he had said that if the claimant was unable to indicate when he could return to work then SPS might have to consider termination of his employment. He also challenged Ms Skibtschak's report conclusion that no evidence had been provided indicating the possibility of his

returning to his role. The claimant stated that his GP had noted he would be fit to return on reduced hours. He said that his GP had also proposed a return to work on 22 June 2018 but that both proposals had been rejected by SPS. He also referred to his partial working application and subsequent appeal which were rejected on the basis that the new General Manager was "going in a new strategic direction". He suggested that that would be robust enough to accommodate partial working in one post, particularly one that was "a primary administration function and not some nuclear scientist post". He referred (1/373) to his return to work meeting with Mr Door in early 2018 when he had first discussed partial retirement with him "as I was struggling with some aspects of my health and that stressful situations are making my condition worse". The claimant said he had been devastated by the refusal of his partial retirement request and that his health had deteriorated after that. The claimant pointed to the history in his file of work-related stress exacerbating his existing hip, back and groin condition. The claimant referred to the respondent's Management of Stress at Work Policy, Procedure and Risk Assessment.

74. There were no employee safety representatives or safety committees at the claimant's workplace. In the claimant's statement referred to above, the claimant brought up the following circumstances connected with his work and relating to the period prior to June 2018: "By failing to have a full time Manager in charge to deal with complex and just basic staff issues was a failure on the part of SPS to provide the necessary authority and duty of care. Lack of senior managerial presence with no one in actual charge allowed cliques to form and become part of a toxic culture which pushed most staff into isolation when working not as a team but in silos. Legal requirement to assess the risk to self and others, under health & safety law and consistent with our normal risk and hazard assessment procedures, the line managers must assess the risk of stress, to ill health caused by or made worse by work. Risk assessment involves identifying pressures at work that could affect your perceived ability to cope or elevate stress levels to potentially harmful levels…. I consider that the SPS have failed to comply with any of these legal requirements to address and comply with all the issues I have noted in terms of risk assessment. I consider that the SPS have failed their duty under the Health & Safety at Work Act 1974. I make reference to the hazard record, PP8, that I filled in and sent to you at

HR, I listed 7 areas of concern but there was no complete follow up done to complete the risk assessment and finalise it but more importantly a responsibility to ensure a safe working environment." The claimant said that where a line manager received notification that an employee's absence was attributed to stress, a preliminary investigation should be done by HR and "It is important where practicable that the employee does not return to the same circumstances, where practicable which may have led to the original bout of absence." The claimant said that he had not been aware that any preliminary investigation had been done by HR. He stated "due to the severity of stress and anxiety I was experiencing in the circumstances around work related stress issues, with a number of staff potentially being involved, I probably should not have been allowed to return to the same circumstances which led to my first bout of absence. By putting me back in the environment I was put at risk and I now consider that my health was impacted and I've not fully recovered.." The claimant referred to the Occupational Health report which stated that his case had a very significant work-related element and that his medical condition would be classed as a disability. He said he felt that most managers were not aware of their legal obligations under the Health and Safety at Work Act in relation to stress at work to assess the risk of work-related stress and identify pressures at work that could affect perceived ability to cope or elevate stress to harmful levels. He asked for evidence that this had been done. Finally, the claimant proposed that he could return to work "on a trial in a different area".

75. *The claimant was written to on 22 February 2019* (1/401 – 3) *with the outcome of the capability hearing. The decision made by Mr Door was to terminate the claimant's employment.* The letter stated: "After reviewing all the relevant information, and giving you a full opportunity to state your case I regret to inform you that as there appears to be no reasonable prospect of you returning to work within the foreseeable future I have decided to terminate your employment." The letter informed him of his right of appeal.

76. The claimant's health deteriorated after the capability hearing. He had been upset by Ms Skibtschak's letter and the recommendation of termination of employment it contained. He felt that it had 'tipped him over the edge' and that the hearing was a

fait accompli. As happened after the rejection of his application for partial retirement in July 2018, the prospect of returning to the workplace full time, rather than part time once again caused him to become stressed which exacerbated his anxiety and depression so that he again could not face the code of conduct hearing or returning to work. On 20 February 2019 his GP signed him off sick for eight weeks because of recurrent hip/groin pain and work-related stress (1/399). The claimant's mental and physical health deteriorated after that.

77. *The claimant wrote to the respondent on 23 February 2019 to appeal against the decision to dismiss him.* His grounds of appeal were stated in a letter dated 27 February 2019 (1/404 – 8). One of the claimant's grounds of appeal was that: "There appears to be no consideration that my industrial injuries and disabilities were work related and the fact that where my health is today is wholly attributable to the Scottish Prison Service not providing a safe working environment and a duty of care under the Health and Safety at Work Act 1974 & Equality Act 2010." The claimant stated that he had completed a Hazard Identification Form but had not received the ongoing support and follow up action plan/monitoring required under the risk assessment guide. He stated that the SPS Management of Stress at Work Policy and Procedure and Risk Assessment Process had not been followed. In particular, he complained that SPS had not taken appropriate measures to assess and control risk; had taken four weeks to conduct his back to work interview; and had failed to ensure that he did not return to the same circumstances which led to the original bout of absence. With regard to his dismissal, his position, in summary was that: "There were other options/ choices available, redeployment and partial working, but there appeared to be no alternatives on the table other than outright dismissal." The claimant said that the respondent had not taken his stress and mental health issues seriously enough. And that this had exacerbated his condition.

78. *An appeal hearing was scheduled to take place on 04 April 2019. This went ahead as scheduled and was chaired by Lindsay Docherty.* A minute was taken (1/414 – 443). Prior to the hearing the members of the Appeal Board read Ms Skibtschak's report (1/345). They also had the claimant's capability file and the minutes of the Capability Interview on 15 February 2019. During the hearing the claimant stated

that he considered that Mr Door's decision to dismiss him was disability discrimination. He stated (1/427): "I'm being dismissed because I have disabilities, both of which have been attributed to work related incidents by my GP, occupational health physicians, My SPS Scheme Medical Adviser… There is a policy in place to deal with workplace stress, management of stress at work policy, procedure and risk assessment process. My line manager continually failed in her duty to manage effectively implement this policy in accordance with what the policy purports." The claimant went on: "Employers have a legal obligation to protect employees from stress at work by doing a risk assessment and acting on it. I provided the risk assessment hazard identification record form but it was never followed through or indeed acted upon as per policy." The claimant stated: "An extract from CIPD in relation to once the employee return to work, [*sic*] the manager give the individual lighter duties, different job, fewer... initial return to work. This never happened I was just left to get on to on with things as nothing had ever happened. No support, no real discussion, I was put back in the same hostile environment and given a back to work interview some thirty days after I returned to work."

79. At the time of making the decision to uphold the dismissal and reject the appeal, Ms Docherty believed that the claimant had been off sick for the full period of his absence, beginning on 12 March 2018 and culminating in the capability hearing on 15 February 2019. The correct facts regarding the nature of the claimant's absence are set out below. His periods of sickness absence were from 19 March to 29 June 2018 and from 5 December 2018 to the date of the capability hearing on 15 February 2019. Thereafter, the claimant remained off sick until 24 May when his notice period expired.

80. *The claimant's appeal against dismissal was not upheld. This was communicated to him in writing by Ms Docherty on 15 April 2019.*

81. The claimant's annual contractual holiday entitlement was 42 days per year.

*Breakdown of absence from work*

82. *The claimant did not return to work at any point from 12 March 2018 until his final day of employment on 24 May 2019.*

83. *The claimant was absent from work due to suspension from 12 to 18 March 2018.*

84. *The claimant was absent from work due to sickness absence between 19 March 2018 and 29 June 2018.*

85. *The claimant was suspended from work between 30 June 2018 and 04 December 2018.*

86. *The claimant was recorded as absent from work due to sickness absence from 05 December 2018 until 24 May 2019.*

*Annual Leave*

87. *The claimant used no annual leave during the period 2019/2020. Upon the claimant's termination in 2019 he had accrued 13 days of annual leave entitlement for that period. He also had an additional 21 days of annual leave outstanding from the previous year.*

88. *Upon his dismissal he was paid for the 13 days holiday which he had accrued during the 2019/ 20 holiday year along with ten days holiday which he was allowed to carry over from the previous year.*

89. *Document number 208 in the Joint List of Documents for the Claimant and the Respondent Volume 2 is the respondent's annual leave policy which was in place at the time when the claimant was dismissed.* The Policy states so far as relevant:

"**6. Carry forward of annual leave into the next annual leave year**

Staff members may carry forward up to 10 days annual leave entitlement into the next annual leave year (pro-rata for part time staff members). Staff members are not

entitled to carry forward annual leave in excess of the permitted 10 day carry forward unless they have been specifically prevented from taking the annual leave in excess of that limit by either SPS management or by the operation of any SPS or Civil Service Policy (see Section 7 below for what constitutes 'specific prevention'). Any annual leave entitlement in excess of the permitted 10 day carry forward not taken will be lost. Additional guidance on carry forward of annual leave which is unused due to long term sickness absence is provided at 10.4.

……

**9. Annual leave during suspension from work**

The arrangements and procedures set out in the Policy continue to apply in full during a period of suspension from work and staff members can take annual leave whilst suspended from work by following the procedure at Section 4. For the purposes of Section 6 "Carry forward of annual leave into the next leave year", suspension from work will not by itself be regarded as a 'specific prevention' and the normal carry forward limits apply. If a staff member chooses not to take their right to annual leave, any days above the normal carry forward limit of 10 days will be lost."

90. With regard to annual leave during sickness absence, the Policy provides that annual leave continues to accrue during a sickness absence of up to six months but stops accruing thereafter subject to the staff member accruing at least the statutory minimum annual leave entitlement of 28 days. The Policy also provides that annual leave can be taken during sickness absence and must be agreed and authorised in advance by the line manager. The Policy provides under '**10.4 Rules for carry forward of annual leave not taken due to sickness absence'** that the normal carry forward limit of 10 days between one leave year and the next will apply unless the staff member has been specifically prevented from taking annual leave because of sickness absence. In these circumstances, the Policy states that specific prevention could only be that either: the staff member did not return to work until after the end of the leave year; or the staff member was not permitted to use all the accrued leave. The Policy states that where either of these conditions arises, the

staff member will be permitted to carry forward the lesser amount between: the number of days owed but not taken in the leave year; or 28 days.

91. The claimant notified ACAS in accordance with the Early Conciliation rules on 17 April 2019. He received his early conciliation certificate on 25 April 2019. He presented his ET1 to the Employment Tribunal on 1 May 2019.

## Observations on the Evidence

92. Most of the relevant evidence in this case was not in dispute. Where there was a conflict between the claimant's evidence and that of the respondent's witnesses, on balance we preferred the claimant's evidence. The claimant made appropriate concessions in cross examination and was a credible witness. Where he had difficulty remembering a particular detail, he was honest about this. We have discussed particular points of conflict in the evidence further in the discussion section below.

93. We were a little mystified by the claimant's testimony about his papers going missing and then his being informed that colleagues were going through his desk and cupboard after he had gone home. This testimony was supported by Mrs Pearce and to some extent by the text at (1/130). This evidence was neither challenged by the respondent, nor explained by their witnesses. We have done our best with the findings in fact on these matters on the basis of the unchallenged material before us.

94. With regard to the evidence given by the respondents' witnesses, this is discussed further in the Discussion and Decision section below.

## Applicable Law

### Time Limits

95. Section 123 Equality Act 2010 provides so far as relevant as follows:

"***123 Time limits***

*(1) Proceedings on a complaint within section 120 may not be brought after the end of –*

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

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

*(2) ….*

*(3) For the purposes of this section –*

*(a) conduct extending over a period is to be treated as done at the end of the period;*

*(b) failure to do something is to be treated as occurring when the person in question decided on it.*

*(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –*

*(a) when P does an act inconsistent with doing it, or*

*(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."*

Direct disability discrimination

96. Section 13 Equality Act 2010 provides as follows:

"***13 Direct Discrimination***

*(1) 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."*

Discrimination arising from disability claim

97. Section 15 EqA provides:

"***15 Discrimination arising from disability***

*(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."*

Disability Discrimination claim – failure to make reasonable adjustments

98. Section 20 Equality Act 2010 provides so far as relevant:-

***"20 Duty to make adjustments***

*(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; And for those purposes, a person on whom the duty is imposed is referred to as A.*

*(2) the duty comprises the following three requirements.*

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

*(4) …….*

*(5) ....."*

99. Section 21 Equality Act 2010 provides:-

***"21 Failure to comply with duty***

*(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*

*(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person....."*

100. Schedule 8 to the Equality Act 2010 concerns the duty to make reasonable adjustments at work. Part 3 concerns limitations on that duty. Paragraph 20 of Schedule 8 deals with lack of knowledge of disability. It states:

***"20 Lack of knowledge of disability, etc***

*(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know -*

*(a) ……*

*(b) …that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.*

Burden of Proof

101. Section 136 EqA provides:-

*"**136 Burden of proof***

*(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."*

Dismissal for a reason related to health and safety

102. Section 100 ERA provides, so far as relevant as follows:

"***100 Health and safety cases***

*(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that –*

*(a) Having been designated by the employer to carry out activities in connexion with preventing or reducing risks to health and Safety at Work, the employee carried out (or proposed to carry out) any such activities.*

*(b) …..*

*(c) being an employee at a place where -*

*(i) there was no such representative or safety committee; or*

*(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,*

*he brought to his employer's attention, by reasonable means, the circumstances connected with his work which he reasonably believed were harmful to health and safety."*

**Discussion and Decision**

**Sections 20 & 21 EqA – Reasonable Adjustments**

*9. Did the claimant's request for partial retirement submitted on 06 June 2018 constitute a request for reasonable adjustments?*

103. With regard to the claim for reasonable adjustments, the first question in the agreed list of issues was whether the claimant's partial retirement request - submitted while the claimant was off sick and before the expiry of his fit note in mid-2018 - "constituted a request for reasonable adjustments". Mr Long said this was an important point because it related to the respondent's state of knowledge*. He submitted that it was not about disability itself but the respondent's knowledge that the claimant would be put at a substantial disadvantage. Before we can consider the issue of the respondent's knowledge of disadvantage, we first have to determine the issues of whether the respondent applied to the claimant a provision, criterion or practice which put him at a substantial disadvantage in comparison with persons who are not disabled and if so, the nature of that substantial disadvantage. We have to be clear what the substantial disadvantage was before we can consider the evidence regarding knowledge. We have therefore considered issue 9 alongside issue 13 below.

104. In Environment Agency v Rowan [2008] IRLR 20 the EAT gave general guidance on the approach Tribunals should adopt in reasonable adjustment claims. So far as relevant for present purposes, the EAT held that "*An employment tribunal considering a claim that an employer has discriminated against an employee .... by failing to comply with the ... duty must identify:*

*(a) the provision, criterion or practice applied by or on behalf of an employer, or;*

*(b) ……;*

*(c) the identity of non-disabled comparators (where appropriate); and*

*(d) the nature and extent of the substantial disadvantage suffered by the claimant.*

They observed that "*An employment tribunal cannot properly make findings of a failure to make reasonable adjustments under ss.3A(2) and 4A(1) without going through that process. Unless the employment tribunal has identified the four matters at (a)–(d) it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage."*

*10. If so, was the respondent's refusal of that request based on the application of a particular provision, criterion or practice (PCP)?*

105. The PCP relied on by the claimant was the requirement to work full time.

*11. Did the respondent have such a PCP?*

106. It was Mr Long's submission that no such requirement existed at SPS. He said that there was no provision criterion or practice at SPS that demanded that employees work full time. He submitted that Mrs Rae and Mr Door had testified that if a suitable candidate for a job share had been available, they would have approved it. Mr Long referred to the judgment of the Court of Appeal in Ishola v Transport for London EWCA Civ 2020 112 and in particular paragraph 35 in which, giving the leading judgment, Lady Justice Simler noted in relation to the concept of a PCP*: "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"*. Mr Long argued that the Court held that the phrase 'PCP' did not cover all one-off decisions made by the employer and that a PCP can only be established if there's a continuum in the sense of how things are or will be done by the employer. He submitted that there was no such continuum here and that, by contrast, the decision not to grant partial retirement was a one-off decision that did not constitute a PCP. We did not accept this submission for the following reasons.

107. In Ishola, the claimant had argued that the employer's failure to resolve two complaints he had submitted before dismissal amounted to a PCP. The Tribunal had held that this was not a PCP and the EAT had agreed, noting that this failure did not deal with any other individual apart from the claimant. The EAT had stated: *"Although a one-off act can sometimes be a practice, it is not necessarily one."* At paragraphs 38 - 9 the EAT said this:

*"38. 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.*

*39. In that sense, the one-off decision treated as a PCP in Starmer is readily understandable as a decision that would have been applied in future to similarly situated employees. However, in the case of a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future, it*

*seems to me the position is different. It is in that sense that Langstaff J referred to "practice" as having something of the element of repetition about it. In the Nottingham case in contrast to Starmer, the PCP relied on was the application of the employer's disciplinary process as applied and (no doubt wrongly) understood by a particular individual; and in particular his failure to address issues that might have exonerated the employee or give credence to mitigating factors. There was nothing to suggest the employer made a practice of holding disciplinary hearings in that unfair way. This was a one-off application of the disciplinary process to an individual's case and by inference, there was nothing to indicate that a hypothetical comparator would (in future) be treated in the same wrong and unfair way."*

108. With this guidance in mind, we considered whether Mrs Rae and thereafter Mr Door were applying to the claimant a provision, criterion or practice that the role of Customer Sales and Services Manager ("CSSM") may not be done on reduced hours but requires to be done full time. We concluded that they were and that this did amount to a PCP. In our view, it was clear from Mrs Rae's decision letter of 12 July 2018 (2/179) that she was making a decision based on her view of the nature of the post, which decision would apply in future to similarly situated employees requesting to work in the post on reduced hours, so that a hypothetical CSSM comparator would in future be treated in the same way. To borrow the wording of Starmer, it was 'a decision that would have been applied in future to similarly situated employees'. In her letter, Mrs Rae states for example: "*By reducing the number of hours worked by the individual in the above role, or indeed job sharing, there may be a reduction in knowledge, understanding and/or competence at SPS Fauldhouse leading to a reduction in the consistency and continuity of service.*" She goes on: "*due to the interdependencies around the functionalities of the role itself, it would be extremely challenging to split the role evenly. Moreover, to reduce the hours of the individual performing the role and/or the removal of some tasks from this role may have a direct impact on the job itself. To introduce a job sharing element to this role would see an increase in the resources required for the management of the role and this would lead to a less efficient and less productive staffing solution.*" It was also clear from the note of the capability hearing that Mr Door was doing the same. Mr Door is recorded as saying to the claimant: "*That is not a reflection on you, that's a*

*reflection on the job requirements of the Sales & Customer Services Manager role which remains full time*." (See paragraph 72 above)

109. Our answer to questions 10 and 11 of the list of issues is accordingly: Yes, the respondent applied to the claimant a PCP of requiring that the role of CSSM must be done full time/may not be done on reduced hours and this was a PCP since Mrs Rae's letter and Mr Door's approach indicated that it would apply to other individuals in the role of CSSM in the future.

*12. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that he was unable to do so?*

110. Section 20(3) EqA states that: *"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."* In this case, the question for us, having accepted that there was a PCP applied to the claimant requiring that his role of CSSM be done full time, was whether that requirement placed him at a substantial disadvantage in comparison with non-disabled people. This is a question of fact assessed objectively and measured by comparison with what the position would be for non-disabled people. The claimant in this case relies on the disabilities of his hip and groin condition and anxiety and depression. We accepted the claimant's evidence that both conditions, but especially his anxiety and depression made him less able to cope with working full-time and more susceptible to work-related stress than a non-disabled person would have been. Thus, the substantial disadvantage to which he was put by this PCP in comparison with other similarly situated workers of the respondent not suffering from his disabilities was that because of his disabilities, he was susceptible to work related stress, could not cope with the prospect of returning to work full time, could not face his disciplinary investigation, required to be absent and was then dismissed. A non-disabled person would be able to cope in the role full time; would not be absent and would therefore not be at risk of dismissal.

111. We should make clear here that Mr Long's submission was that the appropriate comparators in this case would be SPS employees who are not disabled but who submit partial retirement requests. He stated that it was difficult to see how, in comparison to that group, the claimant had been put to any disadvantage. We considered Mr Long's submission, but we respectfully disagreed with him about the appropriate comparators. In Sheikholslami v University of Edinburgh [2018] IRLR 1090, at paragraph 52 Simler LJ said this regarding the issue of comparators in reasonable adjustment claims: *"It was not necessary for the claimant to satisfy the tribunal that someone who did not have a disability but whose circumstances were otherwise the same as hers would have been treated differently since a like-for-like comparison is not required in a reasonable adjustments claim. Even in a case where disabled and nondisabled employees are treated in the same way and are both subject to the same sanction when absent from work, that does not eliminate the discrimination: if the PCP bites more harshly on the disabled employee, putting that employee at a substantial disadvantage compared to the non-disabled, that is sufficient (see Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265, [2016] IRLR 216 (Court of Appeal)). Here, the claimant's case was more straightforward: she compared herself with fellow non-disabled employees who could attend work and were not exposed to the risk of termination; but it is not difficult to see how a requirement to return to the place where perceived discrimination occurred might bite more harshly on a mentally impaired person than on a person with stress but who is not mentally impaired."*

112. As set out above, we concluded that the appropriate comparators are other employees in the CSSM role who are not disabled and can cope with full time work without absence, who are not therefore liable to dismissal.

113. Mr Long further submitted that the OH report of July 2018 made clear that the claimant was also open to redeployment [i.e. a change of role]. On that basis, said Mr Long, the refusal to allow partial retirement was not the primary problem here. What the claimant wanted to do was to spend less time at Fauldhouse. If that is correct, then, said Mr Long, the refusal to reduce his hours was not the factor that

put him at a disadvantage. We rejected this argument for two reasons. Firstly, per Environment Agency v Rowan we have to determine whether the PCP put the claimant at a substantial disadvantage and if so, what the substantial disadvantage was. We accepted the claimant's evidence that he found the refusal of his partial retirement request devastating and that his mental health declined after the refusal was communicated to him, reducing his resilience and ability to face the disciplinary investigation and separately extending his absence which ultimately resulted in his dismissal. The claimant's evidence to this effect was supported by the email he sent to Mrs Rae on 22 July 2018 (2/182) in which he told her: **"***You can now see why your decision has disappointed and devastated me - as here we were a few weeks back when Mr Door was enthusiastic and supportive about my proposal for partial working, yet some weeks later there appears to be a complete turnaround and I cannot comprehend why? I am sure that you can now appreciate my concerns and the effect this is having on my chronic medical condition including severe anxiety and depression*." Secondly, for what it's worth, this seemed to us to amount to an argument on causation of the sort disapproved by Simler LJ in Sheikholslami at paragraph 48: *"It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question as the employment tribunal appears to suggest at para [200] (repeatedly emphasizing the words 'because of her disability'). For this reason also, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances.*" We therefore answer the question at issue 12 in the affirmative.

*13. If so, did the respondent know, or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?*

114. With regard to the claim for reasonable adjustments, we now address question 9 in the agreed list of issues: whether the claimant's partial retirement request constituted

a request for reasonable adjustments. Mr Long submitted that this point related to the respondent's state of knowledge. He said that the issue was not about disability itself but the respondent's knowledge that the claimant would be put at a substantial disadvantage. With regard to page 2/174 (the partial retirement application), Mr Long said that the claimant had made his application in mid-2018 but he had done nothing to communicate what sort of disadvantage he might suffer by not being allowed partial retirement. Mr Long submitted that no evidence had been led about what sort of disadvantage the claimant might suffer due to failure to make reasonable adjustments. He argued that the request was rejected on reasonable grounds and that the claimant did not suggest to the respondent that it was requested as an adjustment for disability. His submission was that the claimant did not explain to his employer how working full time would put him at any disadvantage. Furthermore, submitted Mr Long, the respondent could not have known that he would be placed at any such disadvantage based on the information available to them.

115. We reminded ourselves that the substantial disadvantage to which the claimant was put by the PCP in comparison with non-disabled employees of the respondent was that both his disabilities, but especially his anxiety and depression made him less able to cope with working full-time and more susceptible to stress when in the workplace than a non-disabled person would have been, leading to sick absence and risk of dismissal. A non-disabled person would have been able to cope in the role full time; would not have been absent and would therefore not have been at risk of dismissal.

116. We considered the facts in relation to what the respondent knew about this disadvantage and when. The claimant had repeatedly been absent with work related stress in 2017. He had filled in two 'Hazard Identification Forms' identifying "organisational stress hazards". The claimant had participated in a back to work interview with Mr Door on 24 August 2017, the note of which (2/118 – 123) recorded that the reason for his absence was "work related stress exacerbating chronic hip condition". This was vouched by a medical certificate (2/124). The hip condition was recorded on the back to work form as a disability. At the capability hearing on 15 February 2019 Mr Door referred to the respondent having made a reasonable

adjustment for the claimant in 2017 by allowing him to work from home on a Friday (see paragraph 72 above). On 9 December 2017, the claimant was signed off sick again with work related stress. He returned to work from sick absence in mid-January 2018 and had two meetings with Mr Door. Under the heading: "*Actions taken/Proposed*" the note of the meetings recorded that the claimant was to: "*consider part-time working options from April 2018. Maybe on a job-share basis or could involve change of role at Fauldhouse? … … The issues that Stewart feels he have [sic] with his present working environment may be a factor in Stewart's consideration of any potential move, especially if a move allowed him to address some of the hazards identified*."

117. The claimant's covering letter dated 6 June 2018 with which he submitted his partial retirement application (2/173) stated: "*As previously discussed with Andrew Door (Head of Procurement) in February 2018, I advised that I had been considering this option for a number of months due to ongoing health issues and would make a decision on this come June 2018….*" On 20 June 2018, the claimant submitted a fit note to the respondent (1/308)] which stated that he was not fit to work but was willing to consider a return part time or on amended duties. The fit note stated that the condition rendering him unfit for work was "Acute stress reaction (work related)." It also stated that he may benefit from a phased return to work.

118. At the point when Mrs Rae considered the claimant's partial retirement application, she was entitled to see his fit notes, OH and absence records. She said in evidence that she chose not to access the claimant's records because she did not think they would be relevant to her decision. Paragraph 25 of the respondent's Managing Attendance Policy (1/471) states: "*If an employee requests an adjustment to their working conditions as a result of their disability this will in most cases be referred to SPS Occupational Health Advisers who will provide appropriate advice or appropriate measures to be taken* ***(see Annex 6)***". In cross examination, the claimant referred Mrs Rae to a GP certificate from his file dated 12 December 2017 (1/137) which stated he was off sick due to acute work-related stress and the flare up of an existing condition. He also showed her an OH report of the same date which stated that his "Musculo-skeletal health concerns" were likely to be a disability under

the Equality Act 2010. Mrs Rae said she was unaware of this. The claimant asked her: "*Do you accept you should have known I had a disability based on my sick absence records and OH reports?* Mrs Rae said: "*If I had been privy to your records at the time then yes but I did not have access to them."* The claimant asked her: "*You were my line manager so you could have had access to them?"* Mrs Rae replied: "*Yes. I chose not to because I didn't think it was relevant to the part time request because there was no reference to your medical history in the request."* The claimant pressed her further and she said: "*I took up the role on 4 June 2018. The application came in on 14 June from* Colin Bell *How would I have been aware of your disability? I took the decision on the partial retirement request based on the information in it. There was no indication disability was the reason. Under the Managing Absence Policy (1/471) if you had said disability it would have been dealt with very differently.*"

119. As we have set out more fully in the findings in fact above, the claimant advised Mrs Rae in an email dated 22 July 2018 (2/182) that he had had a serious injury at work in 2010, severely damaging his hip and back and had been off work for seven months; that his condition had become progressively worse year upon year and coupled with a stress and anxiety condition had increasingly resulted in him having to take sick leave. He also informed Mrs Rae that he had discussed with Mr Door at a back to work interview in January 2018, his ongoing health condition and the fact that he was having to take more time off work due to illness. He said that at that meeting he and Mr Door had discussed a wide range of issues relating to his medical condition, attendance at work and what support SPS could offer. He indicated that they had discussed partial working as a possible solution and that Mr Door had been enthusiastic about this. He stated to Mrs Rae in the email: "*I am sure that you can now appreciate my concerns and the effect this is having on my chronic medical condition including severe anxiety and depression.*" He went on: "*I was also disappointed that my chronic medical condition, which was caused by negligence within the workplace, never played any part in your decision making*."

120. Mrs Rae testified that when she received this email on 22 July, she had already made her decision and that the only way it could be reconsidered was through the

appeals process, so she investigated the claimant's email content and went back to him with information that might help him with an appeal. We did not accept her evidence to this effect for the following reasons. Neither Mrs Rae nor Ms Skibtschak took us to any policy document that stated that she could not reconsider the decision. Furthermore, her testimony on this point was inconsistent with the email of 26 July she sent to Mr Door (2/187) about the claimant's email of 22 July: "*I would be grateful if you could provide clarifications and, indeed, verification of the above information to allow this to be considered further."* Her evidence was also inconsistent with the words she signed off with in her letter of 8 August 2018. In that letter she suggests that she both could and did review the application: "*I have taken all points raised into account when reviewing your application and failed to find any new information which would fundamentally change my original decision*." Mrs Lindsay asked Mrs Rae: "*These two documents suggest to me that you had reviewed or reconsidered the application?*" Mrs Rae replied: "*The terminology I've used may have been wrong. The reason I was looking at it was to provide support so consideration could be given to the appeal and to establish grounds for an appeal I could support. My terminology could have been off.*" We did not find this a credible explanation of the statements in the correspondence.

121. Even if she had not seen the covering letter to the claimant's partial retirement application, Mrs Rae was specifically on notice of the claimant's disability and disadvantage with effect from his email to her dated 22 July 2018. Mrs Lindsay asked Mrs Rae whether, under normal circumstances OH reports were shared with line managers. She replied that under normal circumstances they were. We considered that Mrs Rae therefore saw or ought to have seen the OH report on the claimant of 31 July 2018 (1/131), incorporating information from his GP, which stated that he was temporarily unfit for work for 4 – 6 weeks and included the following statements: *"Stewart has attended his GP on a few occasions when he reported workplace stress, his GP initially signed him off work and commenced him on appropriate medication. …. The GP has commented on some specific issues within the working environment which were contributing to his stress and anxiety. He also advises of classic symptoms of anxiety. Stewart attended his GP again on the 20th June, when it was noted that there had been some improvement in symptoms as a result of an*

*increase in medications and time out of work. The GP advises that "he had voiced his intention to think about going back to work if a change in deployment or work patterns could be accommodated for him. Hopefully a work pattern or job that did not give him the anxiety levels that he has been indeed suffering with recently*." …*"I have spoken with Stewart today, and he is in agreement with the information obtained from his GP. It would be likely that a return to work would be achievable if the above comments could be fulfilled*." Mrs Rae responded again that once a decision has been taken on partial retirement it can only be reconsidered on appeal.

122. The claimant replied to Mrs Rae's letter of 8 August 2018 (2/208) by email dated 13 August 2018 (2/209). He told her: "*As you are aware I am allowed to work from home on Fridays due to my chronic medical condition. In light of you rejecting my application for partial working can you therefore give consideration to allowing me to work from home on more than one day per week. Everyone agrees that this was very successful and is of great benefit to both SPS and myself. I am more than happy to discuss options and timescales or alternative proposals?*" He also stated " *I have to say that I continue to be very disappointed with the lack of credible support and consideration by the SPS in relation to my disability as well as my ongoing general health and well being*. *I consider that I am being treated very unjustly here. While rejecting my application for partial working is bad enough, no one (my line management, HR Department, Employee Wellbeing team) has offered any other positive solutions or help. When you consider my progressive illness and disability are as a direct result of an accident at work, I find it difficult to comprehend the stance that SPS continue to take. What is forgotten here is quite simple to understand "if I did not have the accident at work in March 2010 I would not be in such poor medical health today" yes, it's as simple as that!"*

123. The claimant appealed against Mrs Rae's decision to reject his partial retirement application by appeal form dated 17 August 2018 (2/215 – 8) in which he stated: "*During these discussions I advised Mr Door that I was considering partial working from April 2018 as all the medical professionals I had consulted over a period of time (and my family) suggested that I should consider working less hours as my medical condition (chronic in nature) is not going to get any better going forward.*" Towards

the end of his appeal form the claimant stated: "*Putting everything aside I find myself in a situation where following an accident at work in March 2010, where negligence was established, I have been left (through no fault of my own) with a chronic health condition. I would have thought that the Scottish Prison Service would seriously consider my request for partial working and not just be intent to reject my application without offering any kind of solution. This is in complete contradiction to the Equality Act 2010 (General Equality Duty & Policy and Decision Making.)*". He went on: "*Quote from Equality Act 2010:* ***Understanding (or assessing) the impact of your policies & procedures on people with different protected characteristics is an important part of <u>complying</u> with the general equality duty. You need to ensure that you have sufficient information in order to be able to evaluate the impact effectively. The equality act explains that having due regard for equality involves removing disadvantages suffered by people due to their protected characteristics.*** *As I have stated repeatedly I am open to other alternatives/ solutions on Partial Working but no one (Line Managers, HR, and Equality Team) has come up with anything other than complete out of hand rejection on any proposal or solution I have put forward.*" [Emphasis in original].

124. The question of whether an employer could reasonably be expected to know of a person's disability and disadvantage is a question of fact for the Tribunal. We concluded on the basis of the facts set out above that, at the point when Mrs Rae received the claimant's email of 22 July and certainly by the time Mr Door came to consider the claimant's appeal against the refusal of his partial retirement application the respondent knew or could reasonably have been expected to know that the claimant had a disability and that being required to work full time in his role would cause him to become stressed, exacerbate his existing hip and back condition and his anxiety and depression and lead to further sickness absence, putting him at increased risk of dismissal. The respondent had received numerous communications from the claimant to this effect. The claimant had brought his disability to the respondent's attention and in their 31 July report, OH had referred to the claimant's request for a work pattern that did not give him the anxiety levels he had been suffering to that point, factors which could amount to a substantial disadvantage in working in his post full time. Indeed, it seemed to us that Mr Door

acknowledged this in his decision: "*SPS is fully aware of your medical condition and indeed I know that your present and previous line managers have made a point of considering this and any reasonable adjustments that can be made in the course of your work with SPS. This includes, for example, accommodating a previous request to work flexibly - home working on a Friday which Colin Bell as FLM and I as SLM, consented to*."

125. Thus, our answer to issue 13 is that the respondent knew or could reasonably have been expected to know that that the claimant was likely to be placed at the disadvantage in question.

*14. If so would it have been reasonable for the respondent to have taken these steps at any relevant time and did they fail to do so?*

126. Section 20(3) EqA provides that 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.*" The issue here is whether it would have been reasonable for the respondent to take the step of allowing the claimant to work in the CSSM role part time. Mr Long answered this question in the negative. It was his position that the duty to make reasonable adjustments had not yet arisen. As authority for this proposition, he cited: NCH (Scotland) v McHugh UKEATS/0010/06. He argued that the ratio of that case is that it is not reasonable for an employer to pursue the available options for reasonable adjustments for an employee who is off sick until there is some sign on the horizon that the claimant is returning to work. Mr Long submitted that there was no obligation to make reasonable adjustments in this case because the claimant did not return to work due to sickness absence, suspension and his inability - as a result of his health - to engage with the code of conduct process. The duty is to make reasonable adjustments, not to consider them. Adjustments cannot be made for an employee who is not at work. His submission was that as the claimant never returned to work, the duty never arose.

127. We considered the ratio of McHugh. In that case it was held that the trigger point for a duty to make reasonable adjustments to arise is when an employee who is absent indicates that he will be returning to work because whilst the employee is off sick, the adjustments can have no practical effect. If adjustments will have no practical effect in mitigating the substantial disadvantage, there is unlikely to be any breach of the duty. The case of The Home Office v Collins [2005] EWCA Civ 598 was applied in McHugh. The facts in Collins were that the claimant had been absent from work for over a year and this had followed a poor attendance record during the first six months of employment. In January 2002, return to work in 6 to 8 weeks was contemplated but the claimant had still not returned to work by September 2002 and the prognosis on 22 August was that she should be able to return, on a part-time basis, in "3/6 months". A sick note covering four weeks from 10 September 2002 was submitted. At paragraph 34 of his judgment Pill LJ said this: *"34. In those circumstances, the tribunal were entitled to conclude that it was reasonable for the appellants not to pursue the possibility of a phased return to part-time work until the* [claimant] *could indicate a definite date for her return to work for any period of time. The tribunal noted that at all material times the* [claimant] *was medically certified as unfit to return to work."* The reasonable adjustment contended for in Collins was to offer part-time instead of full-time work. At paragraph 42 the Court of Appeal (Pill LJ) said this: *"Assuming that to be within the scope in principle of reasonable steps, such an offer would plainly not have been a reasonable step by reference to section 6(4)(a), because it could not prevent the effect in question. The employee was not ready to return to work after a long absence, even if part time work were offered, and whatever she herself might have hoped. As the ET found, she would not be ready to return for some months yet."*

128. In McHugh the claimant had been absent for three years. The additional facts relevant to the "trigger" point in that case are referred to in paragraph 40 of the EAT judgment: *"… at all relevant times, the Claimant was presenting no willingness or ability to return to work, nor was that the medical evidence. The highest it could be put in the documents which were supplied to us ….. is that on 7 May 2004 the Respondent was in receipt of an eight-week medical certificate and as she had shown some improvement, the Respondent wished to have her medically examined*

*again. It is true that as long ago as 4 February 2003 a consultant psychiatrist had indicated her opinion that the Claimant was fit to work, but that was not a consistent view or one which was taken at the time.*"

129. The present case is somewhat complicated by the code of conduct investigation. However, applying the ratio of McHugh and Collins to this case, the relevant facts are these: The claimant was off sick from 19 March to 29 June 2018. Towards the end of May 2018, supported by his family and GP, the claimant started to feel a bit better and his GP said he could probably get back to work within around 4 to 6 weeks. With regard to the code of conduct investigation, although it had been a blow that the transcript of his interview with the junior colleague was no longer in his desk, the claimant had begun to feel more positive in the period to 12 July 2018 with the support of his GP and his family and he was hoping to participate in the investigation and get back to work part time on 1 August 2018 (2/173). This was the context in which the claimant submitted his partial retirement request on 20 June 2018, seeking to return to work part time. He also submitted a fit note on 20 June which stated that he was not fit to work but was willing to consider a return part time or on amended duties. The claimant was then suspended on 30 June 2018 and his partial retirement request was refused on 12 July 2018. The unexpected refusal of his partial retirement request had an adverse effect on the claimant's mental health. We accepted the claimant's evidence that he knew the CSSM job well after twenty years in it. He submitted that the reasoning in Mrs Rae's letter was full of 'meaningless grandiose language' that 'bigged up' the job. After careful consideration of the claimant's and Mrs Pearce's evidence and also Mrs Rae's evidence under cross examination by the claimant, the Tribunal accepted the claimant's submission. The effect on the claimant's mental health of the refusal of this proposed adjustment was significant and we accepted the claimant's evidence that it reduced his resilience and ability to face the disciplinary investigation, thereby extending his absence which ultimately resulted in his dismissal. We considered whether the claimant's indication (in the June partial retirement application and covering letter) that he was proposing to return to work part time with effect from 1 August 2018 triggered the duty to make reasonable adjustments at that point per McHugh. We concluded that whatever the claimant might have hoped at that stage, unfortunately he was not, at that point, in

fact fit to take part in the conduct investigation because although OH had said on 31 July 2018 that he was fit to participate in the investigation, the evidence was that the claimant had disagreed and had requested to participate in writing. The interviewer had then sent him questions asking for a written response, but the material had caused the claimant's anxiety to worsen and by early October he was saying he was not fit to participate in the investigation at all. Thus, we accepted Mr Long's submission, based on McHugh and Collins that the duty to make adjustments was not triggered at that point.

130. The claimant was still suspended and he remained so until 4 December 2018. On 11 October 2018 following further discussion between the claimant and the respondent about the claimant's fitness to attend work to participate in the code of conduct investigation the respondent made another referral to occupational health (1/270 – 7) requesting advice on this. We accepted the claimant's evidence (supported by OH reports) that he became increasingly depressed during the period between 12 July and November 2018 and that by mid-November he was feeling very low. The claimant was seen by occupational health physician Dr Reed who produced a report dated 15 November 2018 (1/327 – 9). He assessed the claimant as suffering from significant depression which was having a substantial effect on his mood, motivation and ability to think or make decisions. Dr Reed stated that it was likely the claimant would be regarded as disabled under the Equality Act 2010. He assessed the claimant as not fit to work and not fit to attend a face to face investigatory meeting at that time.

131. The claimant was recorded as off sick from 5 December 2018 onwards. However, by 6 December 2018 the claimant was beginning to feel a lot better, and he emailed (1/142) Gavin Weetman who had been allocated to him as a 'keep in touch' person. In the email he said: "*The occupational health doctor highlighted a particular area "Future Plans and next Steps", which I am convinced, as is my GP, will get me back on track to the extent where I can fully concentrate and participate in conclusion of the investigation*". He went on: "*I have managed to source help from a solicitor friend and with her help now start to look at the periphery aspects of the investigation and look for clarity on a number of points in relation to my case. I will work on this over*

*the next few weeks and respond via the investigation officer. All in all, things are looking more positive*."

132. Over Christmas 2018 the claimant's daughter and brother helped him to feel more positive and his GP told him he needed to get back to work, saying to the claimant: "*Get the investigation out of the way. You've got all the evidence you need now. Go and get it done*." He encouraged the claimant to make positive plans for next steps and the claimant began to feel better. The claimant visited his GP for an appointment in early January 2019. His GP assessed him and prepared a fit note (1/337 - 8) on his behalf dated 3 January 2019 which stated: "*you may be fit for work taking account of the following advice: If available and with your employer's agreement, you may benefit from: altered hours*". In the comments section underneath, the GP had written: "*Mr Lamond feels he could cope with reduced hours 15 – 20 hrs?*" The Tribunal considered these facts in the light of McHugh and Collins. In McHugh it was held that the trigger point for a duty to make reasonable adjustments to arise is when an employee who is absent indicates that he will be returning to work because it is only at that point that it might be said that making the adjustment may have the practical effect of mitigating the substantial disadvantage. In Collins, the claimant had been absent from work for over a year and was still signed off sick by her doctor. Thus, at all material times she was medically certified as unfit to return to work. As in this case, the reasonable adjustment contended for was to offer part-time instead of full-time work. However, in Collins, (paragraph 42 Pill LJ): *"..such an offer would plainly not have been a reasonable step… because it could not prevent the effect in question. The employee was not ready to return to work after a long absence, even if part time work were offered, and whatever she herself might have hoped."* By contrast, in the present case, the claimant's GP had certified on 3 January 2019 that he may be fit to return on reduced hours. We applied McHugh and Collins to the facts of this case. At the meeting with Ella Marshall on 9 January 2019, the claimant did present the respondent with a fit note from his GP certifying that he may be fit to return to work. A return to work would involve him participating in the conduct investigation. We accepted the claimant's evidence that he felt able to do so at this point with support from his family, a solicitor who was helping him and his GP. Thus, in January 2019 the claimant was indicating his intention to return and requesting

the adjustment of reduced hours to enable him to do so. Thus, whilst we accept as entirely correct Mr Long's submission that the duty is to make reasonable adjustments, not to consider them. We reject his submission that the duty never arose. We consider the timing of the trigger of the duty below.

133. Before looking at timing, it is necessary to answer the question whether the adjustment contended for by the claimant would have been a reasonable step which the respondent failed to take. The duty, once triggered, is *"to take such steps as it is reasonable to have to take to avoid the disadvantage."* As the EAT emphasized in Royal Bank of Scotland v Ashton 2011 ICR 632, since [section 20 Equality Act 2010] is concerned with practical outcomes, rather than fair procedures, a Tribunal must look at whether the adjustment proposed by the claimant is itself reasonable. The sorts of factors which a Tribunal might consider in making that assessment are listed in paragraph 6.28 of the EHRC Code.

- whether taking any particular step 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, eg advice from Access to Work;
- the type and size of the employer.

134. (We observe in passing that the EHRC Employment Code suggests in paragraph 6:33 both: 'altering the disabled employee's hours of work' (including permitting part time working) and 'allocating some of the worker's duties to another person' as examples of possible adjustments.)

135. The claimant was suffering from anxiety and depressive symptoms as well as physical problems with his back, hip and groin. The substantial disadvantage to

which he was put by the PCP was that he was less able to cope with working full-time and more susceptible to stress when in the workplace than a non-disabled person would have been, leading to sick absence and risk of dismissal. We concluded that the reduction to his hours would have taken the pressure off him, giving him more time to rest and recover. It would have reduced the amount of time he spent in the workplace which he found stressful. We concluded that in this case there was a reasonably good prospect of the adjustment removing the disadvantage on the evidence before us, thus enabling the claimant to face the code of conduct hearing and return.

136. With regard to practicability, we were not persuaded by the content of Mrs Rae's letter of 12 July 2018. The claimant spent quite a long time on this in cross examination and using his knowledge and lengthy experience of the role, he succeeded in considerably undermining many of the statements in the letter. We accepted the claimant's evidence that the role was primarily an administrative one. Mr Door agreed that at his meeting with the claimant in January 2018 at which the reduction in hours was discussed, he had said to the claimant: "*why wait, why don't you do it now?*" We accepted the claimant's evidence that Mr Door had been enthusiastic about the proposal. Mr Door's erstwhile enthusiasm for the proposed adjustment appeared to us to lend considerable support to the claimant's evidence that the adjustment was practicable and we so find.

137. With regard to other factors, having rejected Mrs Rae's evidence, we did not conclude that there were significant resource or organisational issues on the evidence we accepted. Clearly, if the claimant worked fewer hours, he would receive less pay. The respondent would presumably also be able to recruit someone to take the other half of the job.

138. We next considered whether partial retirement itself was capable of being a reasonable adjustment. Since the point of making reasonable adjustments is to enable disabled employees to attend work, it is clear that full retirement would not be a reasonable adjustment. However, what was effectively proposed by the claimant in this case was a reduction in hours. That took the form of partial retirement

for reasons to do with his age. On the evidence we accepted, we concluded that granting either partial retirement or allowing the claimant to do his role part-time would have been a reasonable step which the respondent failed to take. Subject to the considerations about timing below, we conclude therefore that the respondent did fail in its duty to take this reasonable step and that the claim under sections 20 and 21 EqA succeeds.

*When did the duty arise?*

139. Breach of a duty to make reasonable adjustments is usually regarded as a failure to do something for limitation purposes. Section 123(3)(b) EqA provides that: "*(b) failure to do something is to be treated as occurring when the person in question decided on it."* As time limits are jurisdictional in the Employment Tribunal we considered when the duty arose in this case and when the respondent failed in its duty. The claimant handed his fit note of 3 January 2019 indicating that he may be fit to work on reduced hours to the respondent at a capability meeting with Ms Marshall, HR Manager on 9 January 2019. The matter was then passed to Ms Skibtschak of HR who prepared a report in which she advised the claimant's managers that the OH report of 15 November 2018 stating that the claimant was not fit to return to work in any capacity should prevail over the fit note from his GP dated 3 January 2019 stating that he may be fit to return on reduced hours. This was advice rather than a decision.

140. A capability hearing then took place on 15 February 2019. The decision-maker was Mr Door. The claimant attended accompanied by his trade union representative, Iain Scott. During the meeting, Mr Door told the claimant: "*Part-time working - the issue with part-time working, I'm more than happy to discuss it. Adele would have been your Line Manager during that period and I considered a request for that indeed an appeal around that but I'm satisfied that this is a full-time role and I cannot see a way that we could operate the role in the present circumstances on a part-time basis. That is not a reflection on you, that's a reflection on the job requirements of the Sales & Customer Services Manager role which remains full time*."

141. On 22 February 2019, Mr Door wrote to the claimant with the outcome of the capability hearing. The decision was to terminate the claimant's employment. On the evidence before us we concluded that Mr Door's decision not to permit the claimant to return to work in his CSSM post part-time was taken on or around 15 – 22 February 2021. As the claimant notified ACAS in accordance with the Early Conciliation rules on 17 April 2019; received his early conciliation certificate on 25 April 2019; and presented his ET1 to the Employment Tribunal on 1 May 2019, no issue of time bar arises in relation to his reasonable adjustment claim.

**Section 15 EqA – Discrimination Arising from Disability**

*6. Was the claimant treated less favourably by being dismissed?*

*7. If so was this due to something arising in consequence of his disability, namely his sickness absence?*

*8. If so, was the treatment pursuant to a legitimate aim?*

142. In relation to the section 15 claim, Mr Long accepted that the bar for unfavourable treatment is low and that dismissal would meet the test. The reason given for the dismissal by Mr Door was the claimant's ongoing absence from his post of CSSM. We concluded that the claimant's absence from his CSSM post arose in consequence of his disability; firstly as a direct result of his anxiety, depression and hip, back and groin problems; and secondly because of the effects of these conditions on his ability to face the code of conduct investigation.

143. Thus, the key question was whether the treatment was a proportionate means of achieving a legitimate aim. In his submissions, Mr Long concentrated on the issue of whether the treatment was pursuant to a legitimate aim, rather than proportionality. He stated that there must be evidence that the respondent's actions contribute to the pursuit of a legitimate aim. He cited BA v Starmer 2005 IRLR 862 as authority for the proposition that it is not necessary for the respondent to have consciously considered the legitimate aim when deciding on action. The question is

whether, looked at objectively, the action can be seen as justified. Mr Long submitted that the legitimate aim was "*the burden on other staff caused by the claimant's absence and the respondent's inability to recruit to the post*" [while the claimant remained in the post but absent]. He also referred to the "*the burden on the public purse of the claimant remaining in employment*". Mr Long said there had been extensive evidence from Mrs Rae and Mr Door regarding the nature of the claimant's role and the impact of his absence on the other team members, especially Mrs Rae. He emphasized that the respondent was unable to recruit for a replacement while the claimant was still in post. He submitted that if the respondent could recruit, this would alleviate the burden on former colleagues. He said that Mrs Rae was clear that the burden on her was great and Mr Door was clear that the redistribution of the claimant's work especially managerial/ strategic work was not tenable in the long term. We were dubious about much of this evidence on both counts. Mrs Rae's evidence was somewhat undermined in cross examination by the claimant and also by the evidence of Mrs Pearce whom we regarded as a thoroughly credible witness. Mr Door's evidence about the redistribution of the claimant's managerial/strategic work was somewhat undermined by his volte-face on the issue of whether the CSSM role could be done part-time. However, we were prepared to accept that in principle securing performance of the claimant's duties was a legitimate aim.

144. Thus, the key question is whether the claimant's dismissal was a proportionate means of achieving that aim. Had the claimant remained signed off sick and had it simply been a question of considering the claimant's level of absence against the absence policy and looking at the claimant's prognosis as at 15 November 2018, dismissal may well have been a proportionate means of securing the performance of his duties (by a replacement employee). However, the claimant had a fit note from his GP dated 3 January 2019 and was asking to return to work on reduced hours. At the absence management meeting with Ella Marshall on 9 January 2019 an odd exchange took place between Ms Marshall and the claimant's TU representative, Iain Scott: "*Ian queried the SPS stance if Stewart's GP was of the medical opinion that he was fit to return to work and would not provide medical certificates. Ella confirmed that the SPS would continue to record Stewart as absent from work, based on OH advice, and would expect medical certificates to be submitted*."

145. If the claimant, in possession of his fit note, had managed to return to work on reduced hours, that would have gone some way toward achieving the respondent's aim of securing performance of his duties. Since he would have been working and being paid part-time, the respondent could have recruited to secure performance of his remaining duties. If he had not managed to return, in spite of being pronounced fit, then dismissal may well have been proportionate at that point. Thus, put shortly, the Tribunal concluded that moving straight to dismissing a long-serving employee who is in possession of a fit note and asking to return to work, without giving him the chance to try and do so and without making a reasonable adjustment was not a proportionate means of achieving the legitimate aim of securing performance of his duties. In reaching this conclusion we bear in mind the additional hurdle before the claimant in this case of the code of conduct investigation.

146. In relation to the Tribunal's finding that the respondent failed to take the reasonable step of allowing the claimant to work part-time hours, which may have enabled him to face the code of conduct hearing and thereafter to have returned to work, we cannot see how it could be proportionate to dismiss when the problem may have been solved imminently by a less radical solution. Our view in this is supported by paragraph 5.21 of the EHRC Employment Code which states: "*If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified*."

147. In the circumstances of this case, we have concluded that dismissal was not a proportionate means of achieving the respondent's aim and that the section 15 claim of discrimination arising from disability is well-founded. The claim succeeds.

## Section 13 EqA – Direct Discrimination

*4. Did the dismissal constitute "less favourable treatment", i.e. did the respondent treat the claimant less favourably than it treated or would have treated others (comparators) in not materially different circumstances?*

*5. If so was it because of the claimant's disability?*

148. With regard to the claimant's section 13 claim for direct disability discrimination, in answer to the question whether the dismissal constituted less favourable treatment, Mr Long said the answer was simply 'no'. No evidence had been led from which the tribunal could draw this conclusion. The respondent's witnesses had been quite clear on this point. The decision to dismiss the claimant was based upon evidence about his fitness to work and disability had played no part in the decision. Mrs Docherty had been clear about this. Her conclusion was that had the claimant's condition not been classified as a disability, she would have come to the same conclusion. When asked about this during the hearing, Mr Door said that the respondent did not treat the claimant as disabled and that he would not have treated him as disabled. Therefore, the claimant was not dismissed for disability and did not think he had been dismissed because he was disabled. We agree that on the evidence we accepted, the claimant was not dismissed because of his injury and/or anxiety and depression. Indeed, the tribunal's conclusion, as explained above, was that his dismissal was due to something arising in consequence of his disability, namely his sickness absence. The claim for direct discrimination is accordingly dismissed.

## Automatic Unfair Dismissal – Health and Safety

1. *Was the claimant dismissed for a reason set out in section 100(1)(a) or (c) of the Employment Rights Act 1996?*

149. The claim under section 101(1)(a) was withdrawn by the claimant during the course of his evidence and is accordingly dismissed. Section 101(1)(c) provides that an employee shall be regarded as unfairly dismissed if the reason or principal reason for his dismissal is that being an employee at a place where *there was no health and*

*safety representative or committee etc, "he brought to his employer's attention, by reasonable means, the circumstances connected with his work which he reasonably believed were harmful to health and safety."*

150. During his evidence in chief, the EJ read section 101(1)(c) to the claimant and asked him: "*Is it your position that the reason or principal reason why you were dismissed was because you brought to your employer's attention by reasonable means, circumstances connected with your work which you believed were harmful or potentially harmful to health and safety?*" The claimant replied "*I was dismissed due to capability but if my employer had followed the policies and addressed the issues I would not have been in the position I was to be dismissed on capability*." He went on: "*They did not recognise I had a disability. It's easy for someone to say I didn't know you had a disability but they should have known. I was treated less favourably. I was not given any consideration that I had a disability. They knew I had a protected characteristic*." Mr Long submitted that the recommendation from Ms Skibtschak (page 345) was to dismiss based on capability. There was no mention of health and safety factoring into her thinking. Mr Door was similarly clear in his evidence about the reason for dismissal. When asked whether the hazard investigation form had any bearing on the reason for dismissal, Mr Door had said no, that had been a separate matter. Mr Long submitted that when he had asked the claimant whether, in his view the hazard investigation form was the reason or principal reason for dismissal, the claimant had responded: "*I think the reason for dismissal is capability. If the issues had been addressed properly, I would not be in this position*". Thus, said Mr Long, Mr Door was clear that capability was the reason for dismissal and the claimant agreed. No evidence had been led which would allow the Tribunal to draw the conclusion that the claimant's dismissal was in anyway connected to having reported issues of Health and Safety at Work let alone that such matters were the principal reason for dismissal. Mr Long submission was that capability is a potentially fair reason for dismissal under section 98(1) of the Employment Rights Act and the respondent says that was the reason. We agree with Mr Long that the evidence before the Tribunal did not suggest that the reason or principal reason for the dismissal was that the claimant brought to his employer's attention by reasonable means, circumstances connected with his work which he reasonably believed were

harmful or potentially harmful to health and safety. The claimant did bring such matters to the attention of the respondent from time to time during the course of his employment, but there was no evidence that his having done so was any part of the reason for his dismissal. The claim under section 101(1)(c) is accordingly dismissed.

## ‘Ordinary’ Unfair Dismissal

*2. If not what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996. (The respondent asserts that it was a reason relating to the claimant’s capability)*

151. Section 98 of the Employment Rights Act 1996 (“ERA”) indicates how a tribunal should approach the question of whether a dismissal is fair. There are two stages. The first stage is for the employer to show the reason for the dismissal and that it is a potentially fair reason. If the employer is successful in establishing the reason for dismissal, the tribunal must then move on to the second stage and apply Section 98(4) which requires the tribunal to consider whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably.

*Reason for dismissal*

152. We concluded that the respondent had shown that it dismissed the claimant by reason of his ill health. Under s. 98(3)(a) ERA capability may be assessed by reference to health. Capability is a potentially fair reason for dismissal under s 98(2). We therefore find that the respondent has shown the reason for dismissal and that it is a potentially fair reason as required by section 98(1) ERA.

*3. If so was the dismissal fair or unfair in accordance with section 98(4) of the Employment Rights Act 1996?*

*Reasonableness*

*Submission for respondent*

153. In his able submission on behalf of the respondent, Mr Long set out the law regarding reasonableness in long-term ill health dismissals. He reminded us that the leading case on fairness of ill health dismissals under section 98(4) ERA is East Lindsey District Council v Daubney 1977 ICR 566 (EAT). In that case, it was held that it is for the respondent to establish the medical position: "*Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health, it is necessary that he should be consulted and the matter discussed with him, and that in one way or another, steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employers' medical advisers will cause them to change their opinion. There are many possibilities. Only one thing is certain, and that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done*." Mr Long submitted that these conditions were met in this case. The claimant had reported unfit for work on the 19th March 2018. He had been unfit for a number of months. The respondent had progressed the code of conduct investigation and the claimant and his trade union representative raised concerns about the claimant's fitness to participate.

154. Mr Long submitted that the circumstances of this case were relatively unusual. While the claimant was suspended from work, he was claiming ill health in relation to his capacity to participate in the code of conduct investigation but was not providing fit notes. For this reason, the respondent obtained the second occupational health

report to ascertain the claimant's true position. The resulting OH report was, he submitted, in definitive terms about the claimant's incapacity to return to work. The claimant was written to on 17 December 2018 and told that he would be managed under the MAP. He had a meeting with the respondent's HR department on Wednesday 9 January 2019 to consult with him and explain next steps. It was clear from the content of that meeting that the claimant was made aware that dismissal was a potential outcome and that the respondent would prefer the evidence of an occupational health physician to that of the claimant's GP. There was a capability interview on 15 February 2019. At this meeting and also at the meeting on 9th January, the claimant was given the opportunity to discuss his concerns. The claimant appealed against the outcome of the capability meeting and attended the appeal hearing. A further opportunity was given to him at the appeal to state his case at length.

155. Mr Long submitted that the following factors were relevant to the question of the reasonableness of the dismissal:

(i) The nature of the claimant's condition. Mr Long submitted that at the point of dismissal, the claimant's illness was a complex mental health problem with no objective sign of improvement.

(ii) The prospect of a return to work and the likelihood of the recurrence of the illness. The decision makers had an OH report which was unequivocal regarding the claimant's prospects of a return to work and said that this was not foreseeable.

(iii) The need for the employer to have someone doing the work. Mr Long submitted that the claimant's absence had caused significant difficulties due to the need to redistribute his workload among colleagues. This impacted on a number of members of staff including Mrs Rae. Mrs Rae and Mr Door had given evidence regarding the nature of the claimant's work. Contrary to the claimant's position, his role as a band F manager was not an administration role. This was clear from the communications between Mrs Rae, Mr Door

and the claimant in relation to his application for partial retirement. Mr Long submitted that Mrs Pearce's evidence was consistent with that of Mrs Rae in that Mrs Pearce accepted that the work she had taken on as a band C member of staff was appropriate for someone working in an administrative grade in a non managerial position.

(iv) The extent to which the claimant was made aware of the position. Mr Long submitted that the claimant had been communicated with transparently about the possibility of dismissal stemming from the capability process.

156. Mr Long submitted that the Burchell test was also relevant to ill health dismissals. He referred to the case of DB Schenker Rail v Doolan UKEAT/0053/09, which he said was authority for the proposition that in ill health dismissals, there must be a genuine belief in health as the reason for dismissal. There should be a reasonable ground for that belief and the respondent should have carried out a reasonable investigation. Mr Long stated that both Mr Door and Mrs Docherty had a genuine belief which was reasonably held in the claimant's lack of capability. Mr Long submitted that Schenker confirmed that no higher standard was required for investigations into long term sickness cases than for investigations into conduct cases. In addition, he said, the strength of a prima facie case can factor into the level of investigation required. In this case the employee was faced with an OH report which was unequivocal and stated plainly that the claimant was not medically capable of attending work due to depression; that return to work was not foreseeable and that all prospects of achieving a return to work had diminished over time. Faced with evidence this strong, there was no immediate or obvious requirement for the respondent to conduct any further investigation into the claimant's health. Mr Long referred to A v B, in which the Inner House of the Court of Session had held that the Employment Tribunal had set the bar too high in deciding that the dismissal of an employee who had been off for a year was unfair because the respondent could have made further medical inquiries. The employer should be able to take medical opinion at face value.

157. Mr Long next referred the Tribunal to the case of Liverpool Area Health Authority v Edwards UKEAT/322/77 in which the EAT had stated that they did not think an employer faced with a medical opinion is required to evaluate it as a layman unless it is plainly erroneous or no examination has taken place. The OH report in this case had been properly commissioned. There was nothing to say it was flawed and the claimant agreed it was a good report. The respondent was entitled to take the report at face value. In any unfair dismissal claim it is almost inevitable that a claimant could identify a flaw in the respondent's process. No flaw in this case would be sufficient to render the decision unfair. The claimant had raised the issue of the timing of the occupational health report. The MAP at page 491, Section 8, paragraph 21 states that the report should be no more than two months old. Mr Long stated that the policy does not require that the capability meeting take place within two months of an occupational health report. What the policy requires is that the manager making the decision is given a copy of the medical evidence within two months. Ms Skibtschak said that was her understanding and this was supported by the evidence of Mr Door which was unchallenged. The delay in the process could be attributed to the festive period. Also, the claimant had had a period of leave which had delayed the meeting of 9th January and any subsequent delay was caused by the claimant rescheduling the capability hearing.

*Submissions of claimant*

158. The claimant submitted that there had been numerous policy failures by the respondent. His position was that had these failures not occurred his physical and mental health would not have deteriorated in the way they did. He said that the non-completion of the hazard identification process and non-compliance with the stress at work policy had caused him problems. With regard to the MAP he referred to annexes 23B and 23A. He pointed out that Mr Door's actual capability interview invite letter had departed from the template in significant respects; he had substituted the reference to the claimant's sickness absence record with a reference to his medical history. He had also removed a large section regarding discussion

about return to work. Mr Door had ignored his GP's advice and had relied instead upon out of date OH advice. The claimant said that in early 2019 he had been feeling that it all looked encouraging and he would be able to get back to work and then he had received Ms Skibtschak's report recommending his dismissal. The claimant said that the respondent had acted unreasonably. He should have been permitted to come back to work to clear up the code of conduct investigation. Something had been going on in the office with senior colleagues involved. There had allegedly been unfounded allegations of theft, yet no action had been taken against anyone and instead, action had been taken against the claimant for reporting it.

*Tribunal deliberations on reasonableness*

159. We considered the issue of the reasonableness of the dismissal as assessed under s 98(4). We reminded ourselves that the question is not whether we, the members of this tribunal would have dismissed the claimant. The test is an objective one and we are not permitted to substitute our view. The test to be applied is "*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 that must be *"determined in accordance with equity and the substantial merits of the case."* If, following consultation with the employee and a reasonable medical investigation, an employer concludes that the employee's medical condition is unlikely to improve and that there is no prospect of a return to work in the foreseeable future even if adjustments are made, dismissal may be fair.

160. Mr Long had stated in his submissions that the respondent had applied its Managing Absence Policy ("MAP"). The claimant took issue with this. He highlighted a number of matters which he felt were departures from Policy. One such alleged departure was in relation to 1/492 which appears to suggest that the OH report relied upon by the SPS for these purposes should not be more than two months old. Mr Long said that Ms Skibtschak's understanding was that what the policy requires is that the manager making the decision is given a copy of the medical evidence within two months. He submitted that this was supported by the unchallenged evidence of

Mr Door. The Policy wording on this matter is somewhat confusing. However, for the purposes of the test in section 98(4), the tribunal accepted that an employer is entitled in principle to resolve evidential conflicts. In light of the confusing wording of the Policy (quoted at paragraph 70 above), we did not conclude that the respondent had necessarily departed from the MAP in this matter, though another employer may well have chosen to instruct a further OH report in such circumstances.

161. The tribunal considered carefully the submission that the respondent had followed its MAP in other respects. However, as mentioned in relation to reasonable adjustments above, Mrs Rae specifically stated in evidence that she had not followed the Policy in relation to considering reasonable adjustments because she had not realized the claimant was disabled. She testified that in relation to the partial retirement request: "*Under the Managing Absence Policy (1/471) if you had said disability it would have been dealt with very differently.*" She indicated that, had she realized the claimant was disabled, she would have requested input from OH at the point of determining the adjustments issue in accordance with paragraph 25 of the MAP. Clearly, this error took place a number of months before the capability hearing. However, Mrs Rae's failure to follow the policy at that point and her failure to rectify that once she became aware of the claimant's disability and disadvantage, along with Mr Door's failure to sort it all out on appeal had a serious impact. It is important to bear in mind that the test for disability discrimination is separate and distinct from the test for unfair dismissal and that a dismissal that amounts to unlawful discrimination arising from disability under the EqA does not automatically fail the reasonableness test under s.98(4) ERA (see HJ Heinz Co Ltd v Kenrick 2000 ICR 491). However, if an employer fails to make a reasonable adjustment that would have avoided the need to dismiss a disabled employee, the employer may fall foul of the reasonableness test in section 98(4). We concluded that this required to be taken into account along with the other issues in determining whether dismissal was reasonable in the circumstances of this case.

162. The claimant's fit note of 3 January 2019 (1/337 - 8) stated: "*you may be fit for work taking account of the following advice: If available and with your employer's agreement, you may benefit from: altered hours*". In the comments section

underneath, the GP had written: "*Mr Lamond feels he could cope with reduced hours 15 – 20 hrs?*" In her report prior to the capability hearing Ms Skibtschak advised: "*Mr Lamond submitted a GP medical certificate on the 3rd January 2019 which advised that Mr Lamond may be fit to undertake reduced hours. In such cases where information is provided by a GP that does not align with the information provided by the Occupational Health Service medical information, SPS will progress medical cases in line with the information provided by Occupational Health as they have the understanding of SPS and the role being undertaken by the individual. In Mr Lamond's case the decision was made to follow the guidance provided by Occupational Health and continue to record Mr Lamond as being unfit for work*." At the end of her report, Ms Skibtschak stated: "*There is no evidence provided that indicates the possibility of Mr Lamond being able to return to his substantive contractual role, therefore termination of employment with the appropriate notice on the grounds of capability is the recommended course of action*." The tribunal were concerned that instead of leaving it to the decision-maker to weigh up the evidence once he had listened to what the claimant and his representative had to say, Ms Skibtschak's report effectively prescribed which medical evidence Mr Door should accept and reject and recommended dismissal. In addition, it was not correct to say that there was "no evidence" indicating the possibility of the claimant returning to work. The GP fit note was evidence even if Ms Skibtschak thought it should be disregarded. These aspects of the report gave the unfortunate impression that the outcome of the hearing had been predetermined prior to consulting with the claimant at the capability hearing.

163. We mention in passing that this impression was reinforced by the amendment of the template capability hearing invite letter to which the claimant adverted. The 'notification of capability interview' letter (1/352) sent to the claimant advised him: "*At the interview we will go over in some detail your medical history, and how it has been managed. If you are unable to indicate when you can return to work, or if a return to work is not a reasonable prospect, the service may have to consider terminating your employment*." The respondent's template 'notification of capability interview' letter from Annex 23A of their Managing Absence Policy (1/562) states: "*At the interview we will go over in some detail your sickness absence record, and*

*how it has been managed. I hope at the meeting you will be able to let me know when you think you will be able to return to work, and if you are able, we can arrange a return to work programme for you. If you are unable to indicate when you can return to work, or if a return to work is not a reasonable prospect, the Service may have to consider terminating your employment*." Of course, an employer is entitled to disregard and amend its templates if it deems it appropriate to do so. However, the difference here between the template letter and that sent to the claimant omitting the reference of the respondent arranging a return to work programme was unfortunate.

164. With regard to the appeal, Mr Long submitted that Ms Docherty, chair of the ADAB appeal panel had been clear that dismissal was due to the claimant's long period of absence and no evidence of a return to work within a reasonable time period. On this last point, it was of concern to the tribunal that Ms Docherty appeared to be labouring under the misapprehension that the claimant had been off sick for almost a year, whereas, as set out in the statement of agreed facts, by the time of the capability hearing on 15 February 2019, the claimant had been sick from 19 March to 29 June 2018 and from 5 December 2018 to 15 February 2019 (and thereafter until 24 May when his notice expired). The remainder of that time he had been suspended.

165. We accept Mr Long's submission that all that is normally required in an ill health case is that the employee should be consulted and the matter discussed with him and that one way or another steps should be taken to discover the true medical position. We also accept that, for the purposes of section 98(4) it was a matter for the respondent to decide whether to accept the GP fit note or rely upon the OH report of 15 November. However, in considering the question whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating the claimant's ill health as a sufficient reason for dismissing him in February 2019, we consider that the failure by the respondent to make the reasonable adjustment of permitting the claimant to reduce his hours and return via the code of conduct investigation when he requested to do so in January 2019, taken together with the apparent predetermination of his

case take his dismissal outside the band of reasonable responses that a reasonable employer might have adopted in this case.

**Unauthorised deductions from wages- S13 Employment Rights Act 1996**

*15. Does the respondent's decision not to pay the claimant on the termination of his employment for 11 days' holidays constitute an unauthorised deduction from the claimant's wages in accordance with ERA section 13?*

*16. If so how much was deducted?"*

166. The claimant's claim for holiday pay was added to his complaint by way of amendment on 23 July 2019. At a Preliminary Hearing on 18 and 19 November 2019, the claimant confirmed that the claim was one of unauthorised deductions from wages contrary to section 13 Employment Rights Act 1996. The claimant's position is that on the termination of his employment, he was only paid 10 days' holiday pay in respect of the holiday year 2018/19 rather than the 21 days' holiday pay he states he was entitled to for unused annual leave from that leave year.

167. The respondent's holiday year ran from 1 February to 31 January in any 12 month period. The claimant's contractual annual leave entitlement was 42 days. The claimant's position was that the carry-over of more than 10 days from the previous holiday year was at line management discretion. He had not taken 21 days' leave from the previous holiday year and he ought to have been permitted to carry over 21 days. He was therefore owed a further 11 days' holiday pay on termination of employment. On behalf of the respondent, Mr Long referred us to their Annual Leave Policy. Put shortly, this provides that all staff may carry forward up to 10 days' annual leave entitlement but may not carry forward more than that unless they have been specifically prevented from taking it by management or the operation of a Policy. Unused leave in excess of 10 days is lost. Annual leave accrues and staff can take leave whilst suspended. The normal carry forward rules apply - 10 days may be carried forward and the rest is lost.

168. With regard to annual leave during sickness absence, the Policy provides that annual leave continues to accrue during a sickness absence of up to six months but stops accruing thereafter subject to the staff member accruing at least the statutory minimum annual leave entitlement of 28 days. In the holiday year 2018/19 the claimant was off sick for a total of 111 working days. He had not reached the six-month limit. The Policy also provides that annual leave can be taken during sickness absence and must be agreed and authorised in advance by the line manager. The Policy provides under '**10.4 Rules for carry forward of annual leave not taken due to sickness absence'** that the normal carry forward limit of 10 days between one leave year and the next will apply unless the staff member has been specifically prevented from taking annual leave because of sickness absence. In these circumstances, the Policy states that specific prevention could only be that either: the staff member did not return to work until after the end of the leave year; or the staff member was not permitted to use all the accrued leave. The Policy states that where either of these conditions arises, the staff member will be permitted to carry forward the lesser amount between: the number of days owed but not taken in the leave year; or 28 days.

169. We considered the agreed facts with the Policy wording in mind. The claimant's annual contractual holiday entitlement was 42 days per year. On the agreed facts, in the leave year 2018/19 the claimant was absent through sickness from 19 March to 29 June 2018 and again from 5 December 2018 to 31 January 2019 (a total of 111 working days or 22.5 weeks). He was off sick at the end of the leave year and was dismissed during the following leave year. However, we do not think that per se prevented him from taking his leave as there appeared to be evidence that he had indeed taken annual leave (as he was entitled to) during his sickness absence. The 10 day carry forward limit also applies to sickness absence unless the specific prevention rules apply. The onus was on the claimant to make his case that the 11 days' payment was properly due to him in terms of the Policy by showing that he was within the specific prevention category. He did not meet that onus.

170. The case law (NHS Leeds v Larner [2011] IRLR 894) regulates the statutory leave entitlement, which was exceeded in any event in this case. If the claimant had 21 days remaining, he must have taken the other 21 days of his 42-day entitlement and it was clear from correspondence that he did indeed take annual leave whilst off sick (for instance over Christmas). He carried forward and was paid for 10 days, so he received 31 days which exceeds the 28-day statutory entitlement. The dispute about the amount properly payable to the claimant by way of annual leave is therefore a contractual argument and it was the claimant's onus to make out his case that the sum is due to him in terms of the contract. He did not meet that onus and the claim for unauthorized deductions is accordingly dismissed.

Employment Judge: Mary Kearns
Date of Judgment: 04 October 2021
Entered in register: 05 October 2021
and copied to parties

*I confirm that this is the Judgment in the case of Lamond v Scottish Ministers 4106027/2019 and that I have signed the Judgment by electronic signature.*