EMPLOYMENT TRIBUNALS

Claimant: Mr A Firth

Respondent: Yorkshire Ambulance Service NHS Trust

HELD at Hull (CVP) **ON:** 6, 7, 8 and 9 December 2021

BEFORE: Employment Judge Miller
Members: Ms H Brown
Mr L Priestley

REPRESENTATION:

Claimant: In person
Respondent: Mr B Williams, Counsel

JUDGMENT having been sent to the parties on 12 January 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction and issues

1. The claimant was and, at the time of the hearing remained, employed by the respondent. Following a period of early conciliation that started and finished on 30 December 2020, the claimant made a claim of disability discrimination on 13 January 2021.
2. The claim was about how the introduction of Covid-19 restrictions – and particularly the need to wear a mask in certain situations – affected the claimant.
3. There was a preliminary hearing for case management before Employment Judge Eeley on 30 March 2021 and at that hearing the issues to be determined at the hearing were identified. Those issues are substantively set out in the conclusions below so we will not recite them here. They are, however, attached as an appendix to this judgment.

The hearing

4. The hearing was conducted remotely by video. We were provided with an agreed electronic file of documents of 525 pages. The claimant produced a witness statement which we read and he attended and gave oral evidence. He also produced witness statements from his sister, Ms Rachel Morgan, his partner, Ms Fiona Firth and his father Mr Brian Firth. They did not attend to give oral evidence. Their evidence concerns predominantly the impact of the respondent's alleged actions on the claimant. We read the statements and gave the appropriate weight.

5. The respondent produced witness statements from Mr Thomas Haworth, A & E Locality Manager and the claimant's line manager from August 2018 until April 2021; Ms Claire Lindsay who was at the material time Sector Commander and Ms Jayne Whitehouse who was at the material time Group Station Manager. The respondent's witnesses attended and gave evidence.

6. We were also provided with written submissions by Mr Williams.

7. We have made such findings of fact as are necessary to make our decision - we have not necessarily made a finding on every disputed issue. We have also considered the parties' respective written and oral submissions.

Findings of fact

Lockdown and masks

8. The claimant was employed by the respondent as an emergency technician Level 1 called an EMT1 and his employment with the respondent started in 2008.

9. In March 2020, as everyone knows, there was a national lockdown as a result of the Covid-19 pandemic and shortly thereafter the respondent imposed the requirement in line with national guidance for its staff, including those in the role of the claimant, to wear face coverings. Particularly, the obligation was to wear PPE of a certain specified standard which included face masks.

The claimant's disability

10. It was agreed that the claimant was at the relevant time disabled by reason of anxiety. The claimant explained, and it was not disputed, that he experiences attacks of anxiety in some circumstances and he has dealt with this for a number of years with a combination of medication and breathing techniques.

The claimant's job

11. The claimant's job as an EMT1 included, amongst other things, requiring him to do handovers of patients. Handing over patients means imparting information to the medical professional at the hospital about the health of the patient in the ambulance that the claimant had brought in or helped to bring in.

12. There are two people in an ambulance crew. One of them would be driving and one attending the patient, and the practice was that driving and attending was swapped each time the ambulance was called out. It was the claimant's evidence that the person attending the patient must do the handover, but we will return to that later.

13. An EMT1, the claimant's role, is classed as a non-qualified person. The claimant will travel either with a paramedic or an EMT2 each of which job was

clinically qualified. The claimant said that in most cases he was competent to attend the patient and do the handover. In complex cases attendance and handover would be left to the clinically qualified paramedic or EMT2.

14. The claimant's evidence was that although he had a great deal of experience and felt competent handing over most of the time, in reality he was acting at the edge of or outside his competence on some occasions and he refers to 'winging it'.

15. The respondent initially said that it was not part of the claimant's job to do the handovers. The claimant said it was an integral part of his job. We refer to the job description and we find, and in the end it was agreed, that handovers were part of the claimant's job subject to some nuances. We will come back to that again later as well.

16. The formal policy is that clinicians make the decisions about handovers and there is an established practice that it is shared more often than not. However, the claimant agreed that he did not do the most complex clinical handovers.

The claimant's anxiety during his job

17. The claimant experienced instances of anxiety when handing over patients to medical professionals. This was not all the time. The claimant did not know when the anxiety would arise but prior to the pandemic he had dealt with symptoms of anxiety, which included panic attacks and sweating, by engaging in breathing exercises. When he was wearing a mask as he was required to do the claimant was unable to effectively undertake those breathing exercises to manage his panic attacks.

18. From March the claimant struggled with this for three months. He did not raise it with HR or any managers and he did not ask his partner on the ambulance to undertake handovers on any occasion. The claimant said, and we accept, that he believes he would have felt singled out and compelled to give an explanation for not doing handovers if he had asked and that is why the claimant did not made requests of his own volition at that time.

19. The claimant's evidence was that he undertook seven or eight calls a day, half of which he attended and half of which he drove, and he said that he experienced panic attacks three or four times a week. They were unpredictable and his condition varied. By 3 June 2020 the claimant was unable to cope any more with the situation and he went off sick. He told HR at the time that it related to mask use and breathing. He did not say that it related specifically to handovers.

First Occupational Health report

20. On 8 June 2020 there was an occupational health report. This explains the claimant's difficulties as follows.

    "He is struggling wearing face masks particularly when going into patient homes and undertaking assessments and also when at hospital. He begins breathing rapidly and then feels a panic attack starting".

21. The claimant did not explain the detail of the problem at that time – that the anxiety attack he experienced on some handovers combined with using masks prevented his ability to do the breathing exercises.

22. On 9 June 2020 Mr Haworth, the claimant's line manager, made enquiries of whether the PPE requirements could be adjusted and it was confirmed by the respondent that they could not. It is right to say that the claimant accepted a necessity for masks and one alternative option was an RPE hood. This is described as a full head covering with a separate air supply. It was used by some people at the start of the pandemic and is used less frequently now, but it is still used. It is used predominantly when undertaking aerosol distribution treatments like CPR or dealing with Covid positive or suspected Covid positive patients. That was an option that was explored by the respondent for the claimant at that time.

Second Occupational Health report and long term absence meeting

23. On 6 July 2020 there was another occupational health assessment and the claimant again did not explain the details of the problems with the mask and specifically he did not say the handovers were the problem. He said that he probably told half the story. The occupational health report says

    "He attributes the current flare up of his anxiety to wearing the new face mask/shield, which are part of the PPE equipment for Covid-19. He tells me that the mask causes him to hyperventilate and his brain interprets it as a panic attack and this triggers off the symptoms".

24. We note here that this explains Mr Haworth's subsequent responses which focused on the need to have an alternative for masks to remove the need for masks at all. We will come back to that below.

25. On 7 July 2020, the occupational health report was produced and the first long term absence meeting between the claimant and Mr Haworth took place. By this time the claimant had had two of the counselling sessions provided by the respondent. Mr Haworth agreed in cross-examination that the claimant had not told him at that meeting that the problem was specifically with handovers. Mr Haworth says that he suggested removing handovers at that meeting and the claimant denies that that was suggested by Mr Haworth at that time.

26. Mr Haworth said in evidence that this suggestion came from the information that the problem was in hospital which he took from the occupational health report on 8 June. The potential to stop doing handovers was not in the outcome letter from that meeting and we find that the conversation about handovers did not happen at that point. We think that the dates have probably got mixed up. Mr Haworth says that the outcome letters are just a summary but he does refer to some alternative options that were discussed including re-deployment in the long term or alternative duties in the short term. Mr Haworth obviously takes his job seriously and he has been reasonably consistent and impressive in his recording of the issues that he has discussed and we therefore think it is likely that it would have been mentioned in the letter if removing handovers was an option that was discussed at that time.

27. It is also not mentioned in the brief notes of the meeting. We are not saying that Mr Haworth was being disingenuous or misleading, or attempting to mislead the Tribunal in his evidence. We suspect that he has merely got the dates mixed up and we simply prefer the evidence of the claimant on this point.

28. We also refer to the fact that the claimant was happy with the respondent's response to this point and had been throughout up to October. It is unlikely that

the claimant would have been so upset by the idea of suggesting that he go back to work in the later grievance meeting if the possibility of removing the handovers had been raised before. The claimant does agree that there was a discussion about wearing a hood instead of a mask at this meeting and the claimant rejected this idea on the basis that it would mark him out as different and consequently he would have to explain why he was wearing it. Mr Haworth said in cross-examination that people do still wear hoods for all sorts of different reasons and he gave the example of people wearing glasses. That is because the hood is referred to as fed by a separate tube and does not restrict breathing or cause glasses to mist up in the way that masks can. It is also commonly used, as mentioned above, in the case of treatment that causes aerosol distribution. Mr Haworth said that actually hood use goes uncommented on, and it is not a particular issue. We prefer the evidence of Mr Haworth on this that different people do wear different PPE for different reasons and it is unlikely that, had the claimant worn a hood, it would have been significantly commented on by colleagues.

29. We find from this meeting, therefore, that the claimant did not tell Mr Haworth about the detail of the problems he had with his mask at this meeting and that there was not a conversation at this meeting about removing handovers from the claimant. That is because if Mr Haworth did not realise that the handovers were the main issue there would have been no need for him to raise it.

30. We do conclude that by the end of this meeting Mr Haworth understood that the claimant had a problem with masks and that his anxiety was worse when wearing one, even though it was not explicit why. On the basis that masks would continue to be a likely requirement for the foreseeable future in the EMT1 job, the possibility of alternative duties or re-deployment seemed like the most reasonable way forward and that was discussed at this meeting.

Secondment and second long term absence review

31. There was then an email exchange on 14 July and the claimant said he had considered the secondment following the meeting and he agreed with Mr Haworth that secondment was the best option at that point. The claimant said he misunderstood what secondment meant and Mr Haworth said he was then talking about alternative duties in the short term. In any event the claimant contacted his previous supervisor in the Patient Transport Service and they agreed they would be happy to have the claimant back there. Patient Transport Service is the service which take patients to pre-arranged hospital appointments. The claimant believed there was no need for a patient handover in this service. The claimant did know the reasons for his problems which was that his anxiety was increasing in complex handovers and he was unable to manage it properly at this point even if Mr Haworth did not. The Patient Transport Service therefore seemed like a reasonable alternative to the claimant.

32. On 17 August there was a second long term absence review meeting. The claimant said that by this point he had still not told Mr Haworth about the reasons for his problems with the masks. Mr Haworth says in his witness statement that the claimant told him at this meeting that

"The claimant had received the further counselling session on coping strategies but informed me that these were in relation to breathing techniques that he had

already been applying and as such offered no further assistance. The techniques were of use during normal circumstances but did not assist when he wore a mask. I informed the claimant that I would make some further enquiries to see if we would be able to accommodate him wearing a full face visor instead of a mask (which might assist with his breathing and anxiety)."

33. This is reflected in the outcome letter of that meeting. In the event, full face visors were not considered an acceptable alternative by the respondent's infection prevention and control department and the claimant has not taken any issue with this decision about the relative suitability of full face visors or the need for masks.

34. Clearly, Mr Haworth knew at this point that the problem was with breathing exercises to control the claimant's anxiety. He says that in the letter. It is not clear that he knows that it arises from handovers. In his witness statement the claimant says at paragraph 13 that he told Mr Haworth he would like to return to the Patient Transport Service as they have to wear masks but not undertake clinical handovers. The claimant does not say when this conversation was. The move to Patient Transport Service first appears in an email on 14 July 2020, so we find that Mr Haworth knew that breathing exercises were a problem at this point but not handovers. If he knew that handovers caused the particular problem with the mask use then the obvious solution would be to remove the handovers at that point. If he did not know that, it is difficult to conclude why he would continue to focus on the difficult issue of removing masks if the simple solution of removing handovers was available to him.

35. On 20 August 2020 there was an exchange of WhatsApp messages between the claimant and Mr Haworth. Mr Haworth said he had referred the claimant to occupational health to discuss the possibility of the claimant working in Patient Transport Services and the wearing of masks. In his witness statement Mr Haworth said he'd arranged some shift shadowing in Patient Transport Services as well as the occupational health referral and this was to see if working in Patient Transport Services whilst still wearing a mask was a viable option. This is consistent with Mr Haworth not knowing the exact nature of the claimant's problem at the time but understanding that it related to the breathing exercises. Again we ask ourselves why he would focus on the mask problems if the main issue would be resolved by removing the handovers.

Third long term absence meeting

36. On 27 August 2020 there was a third long term absence meeting. At that meeting it was agreed that the claimant could not return to his EMT1 role as long as the requirement to wear masks continued. The claimant says he told Mr Haworth after this meeting that handovers were the problem. It is Mr Haworth's evidence that he discussed handovers with the claimant previously which we rejected. In the letter of 27 August there is no mention of handovers. Again it refers to difficulties with face masks generally and it says

"unfortunately the head of safety for Yorkshire Ambulance Service, Iffa Settle stated that the full face visor would not negate the need to wear a face mask as part of Level 2 PPE when dealing with patients. As a result of this you could not feasibly see how you could return to your substantive role in A&E."

37. We think it likely, and find, that the claimant had not made it clear even by then that the specific problem was with handovers. In any event Mr Haworth agreed that they should then be looking at re-deployment.

38. In that letter Mr Haworth said

    38.1. The claimant would be on the re-deployment register and be set up on TRAC which is the internal re-deployment system and the way in which available jobs are notified to people on the re-deployment register.

    38.2. The claimant could apply for a secondment and then return to EMT1 role when circumstances permit.

    38.3. The claimant could take with him his 25% unsocial hour supplement that he was receiving as an EMT1 for working unsocial hours in his new role as the claimant was unable to continue in his role due to disability.

    38.4. The claimant could work for Patient Transport Services as an interim measure pending permanent new employment

    38.5. That a Band 4 job, which is the same band as the claimant's EMT1 role, in PTS comms was available but it was office based and the claimant preferred to wait for an operational role. Mr Haworth suggested applying for a less than perfect role until something better came up. He says that if the claimant had a return date he could arrange alternative duties for a maximum of three months. (In the event Patient Transport Services were happy to take the claimant on an interim basis and HR had agreed three months of these alternative duties).

    38.6. "If after three months the claimant had not secured an alternative role he would need to be referred to the head of operations." This referral could result in the claimant's dismissal on the ground of capability or ill health.

39. Mr Haworth said that the claimant dismissed the idea of the office based role. In cross-examination the claimant said that as he understood he could take his 25% supplement with him, he did not need to consider an office role as he could manage on a Band 3 role with that 25% until a more favourable Band 4 job came up. He understood that one would be available in the near future.

Application for PTS Team Leader role

40. The claimant then did return to work having been off sick since 6 June as an ambulance care assistant in patient transport services from 31 August. The claimant continued to be paid a Band 4 with the 25% supplement. On 25 September the claimant found out about the Band 4 PTS team leader role through the TRAC system. The claimant said he checked the essential criteria and identified that he would with his experience score well and be suitable for the job. The claimant applied and was offered an interview. We refer here to the respondent's re-deployment and at risk staff management guidance which says

    "These management guidelines outline the key principles of the re-deployment process and the steps that should be taken to help staff secure alternative roles within the Trust where, as a result of ill health, disability or organisational change, their employment could be at risk."

41. We find that this guidance applied to the claimant. It is clear from the letter of 27 August that the claimant's employment was at risk if he did not secure

permanent employment. This guidance sets out the arrangements for putting an at risk employee on the re-deployment register. It says effectively that when a vacancy is identified, HR must identify the potentially suitable candidates from their employment risk register. Then it says

"Staff members on re-deployment or at risk who are identified as potentially suitable for a vacancy at the same band as their current role (or one band lower) and who meet or are close to meeting the essential criteria must be considered for the role.

The individual's suitability for the role should be assessed. An appointable score must be set prior to the commencement of the interview/assessment process and the staff member must be offered this position if they meet this. A trial period can be considered. A competitive process should only be applied if more than one re-deployment/'at risk' candidate is identified.

If an applicant does not meet the minimum essential criteria as detailed in the person specification, consideration should be given as to whether they can meet the minimum criteria within a reasonable timescale with a minimal amount of training.

The interview/assessment process should be conducted in accordance with the Trust's Recruitment and Selection Policy and associated guidance".

42. In the claimant's case, he submitted an application and was offered an interview for that role on 6 October. Another candidate was also interviewed for the role. We find that the other candidate was not on the at risk register. There was no evidence that he was and the claimant requested disclosure of documents showing that it was. None were provided. We conclude therefore that the reason no evidence of the other candidate's at risk status was provided was because the other candidate was not at risk. There was also no evidence that the recruiting officer had set a threshold score to assess the appointability of the claimant for this role and we conclude that that is because he did not do so. The claimant was said to have scored 14 out of 40 in the interview. This was less than the other candidate and we find that the other candidate was appointed because he performed better at interview.

43. We find that the respondent did not follow their guidance in respect of this job. The claimant was subjected to a competitive interview in circumstances where he ought not to have been. We do not know if he would have been appointed had the guidance been applied, but the fact that he got an interview suggests there was at least a possibility that the claimant met or came close to meeting the essential criteria for the job. There was also no discussion or consideration of a trial period or training in respect of this job. The claimant said, and it was not disputed, that he was unaware of this policy, guidance or practice before the disclosure process of the Tribunal and we accept the claimant's evidence about that. The claimant said that he just knew he felt he had been unfairly treated in this application.

Ambulance care assistant role

44. On 8 October the claimant then applied for a permanent Band 3 ambulance care assistant job at Keighley. He was offered it initially on 9 October. Although this would be a reduction in pay the claimant considered that this was manageable as long as he had the 25% supplement. The claimant believed he

would continue to receive the supplement with his job but when he asked about it at the interview the claimant was told it was not actually payable. He discussed this with Mr Haworth and they had a meeting on 9 October. The notes of this meeting were agreed as accurate and they say that Mr Haworth confirmed that he had made a mistake and he apologised for it. The 25% supplement would not be payable in the new role unless that role attracted the allowance anyway. The claimant asked about the original three month deadline to obtain a new role and Mr Haworth agreed that it could be extended by six weeks to 8 January.

45. At this point the claimant continued to be paid at his Band 4 rate with a 25% supplement throughout. Mr Haworth suggested that the claimant apply for other Band 4 roles and particularly in the emergency operation centre or ambulance vehicle preparation departments. He thought the claimant would have the skills for those jobs and Mr Haworth told the claimant he would provide support and assistance to him to help him secure one of those roles. The claimant agreed that he understood that if he did not accept the Band 3 role or get a Band 4 role that he was happy with, potentially he was facing referral to the Head of Operations and possible dismissal at the end of the re-deployment period. The claimant agreed that Mr Haworth told him that. The claimant did not want to pursue the roles that had been identified to him. Mr Haworth said that the claimant said it was because he preferred to be patient facing. The claimant said it was because his confidence had been knocked by being turned down for the PTS supervisor role. He said he had knowledge and experience of that role but the other roles were unfamiliar to him. He thought the chance of his anxiety being a problem in supervisory roles with which he was unfamiliar was significant. He said that the prospect of applying for these other roles in the circumstances at the time scared him to death.

46. In his witness statement the claimant said

> "I was very upset in this meeting, I felt that I had had the rug pulled from under me. I explained to Mr Haworth that without pay protection I could not afford to take the Band 3 PTS role I'd been offered as this means an £8000 drop in pay. He apologised and said that if I could not afford to take up my role on PTS then I would have to apply for roles that pay more through the re-deployment register. He said he would look at extending my alternative duties until 08/01/21 to make up for time lost while I was on PTS. I explained to Mr Haworth the effect that it was having on my already fragile mental health. He apologised again but said there was nothing he could do. I asked if there was any pay protection they could give me that would allow me to complete my move to PTS but he said HR had told him there was not. He also stated again that if I did not secure another role before 08/01/21 then he would refer me to the Head of Operations".

47. The claimant understood that this could result in his dismissal.

48. We find that the conduct of Mr Haworth in that meeting was appropriate. It was not unreasonable or oppressive. It was reasonable to extend the re-deployment period in response to his error and we accept that Mr Haworth was concerned about the claimant's prospects of obtaining a new job. He was concerned for his welfare and he was trying to be encouraging. We find that while the claimant understood that he would have the Band 3 job along with the

25% supplement it was reasonable for him to wait for a job with which he was comfortable and suitable and address his anxiety and preferences.

49. After that point, the point at which he knew that he wouldn't be able to take the 25% supplement with him, the claimant was still entitled to not apply for jobs but he could not reasonably complain about the reduction in pay that would come with that. It was reasonable for the claimant to feel how he did at that point and we make no criticism of him for not applying for jobs, it is clear that he was anxious and upset and we completely understand why. However, there can also be no criticism of Mr Haworth for encouraging those applications. He was fulling his obligations towards the claimant at that point.

50. Around this time the claimant describes a serious exacerbation of his anxiety resulting in thoughts of suicide and it is clear that the claimant was in a bad place. The claimant did not apply for any roles in the period after the alternative duties review meeting on 9 October. The claimant says this was because, at least in part, of how he was feeling and we accept that.

Alternative duties review meeting

51. The next meeting was the alternative duties review meeting on 9 November 2020. There is a record of that meeting which is also agreed as accurate by the claimant. At this point we note that the claimant was still being paid a Band 4 with the 25% enhancement.

52. The claimant says he was told four times in the meeting by Mr Haworth that if he did not secure another role by 8 January 2021 Mr Haworth would have no choice but to refer the claimant to Head of Operations. Mr Haworth said he was just trying to impart the seriousness of the situation. He thought that the claimant did not appreciate it. Mr Haworth was unable to say whether he did say this four times or not. Despite this, we find that Mr Haworth was being reasonable and his actions were reasonable in this meeting. He was in fact responding to a question from the claimant about whether the Head of Operations had the ability to terminate his contract. In our view, the actions of Mr Haworth had been generally supportive throughout. He was quick to admit his error and apologise and he offered help. It is entirely consistent that he was concerned for the claimant in trying to encourage him to apply for jobs. We reiterate and emphasise that we do not doubt that the claimant felt how he felt in the context of his health at the time, but objectively we find this did not amount to a threat by Mr Haworth.

53. A number of other issues were discussed in that meeting including Mr Haworth reviewing the adjustments that had previously been discussed. These are said in the letter to include alternatives to wearing face masks although this was not possible. It does not mention in the letter removing handovers from the EMT1 role although Mr Haworth refers to that in his witness statement. The paragraph in his witness statement was not directly challenged by the claimant but he did put it in cross-examination that the first time removing handovers was suggested was in a meeting on 16 December with Miss Whitehouse. We think that if it had been a previous suggestion it would have been mentioned in this letter and it was not. We find that Mr Haworth did not suggest removing handovers from the role of the EMT1 then and again we don't think that Mr Haworth was being disingenuous. We think it's likely that it was just a mistake in recollection.

54. Although we will refer to the WhatsApp message in due course, we find that removing masks was the only option suggested as it is the only suggestion in the letter which was otherwise long and detailed. Other matters in the letter include confirmation that the re-deployment period will be extended to 8 January 2021 and that the PTS role comprised of alternative duties, not a secondment or temporary re-deployment, and it was therefore temporary. This would usually be for three months but it had been extended on this occasion because of the issue about the 25% supplement.

55. The claimant asked for a total of three months' extension from the date of that meeting, being 9 November 2020, but Mr Haworth said that that was not possible and it was limited to 8 January 2021. Mr Haworth identified some more potential roles to the claimant and offered support for the claimant from him and others including support with interview skills and IT skills. The letter concludes

    "I will allow a further six weeks to give you sufficient time to look and apply for an alternative role. This will take you to 8 January 2021. If you do not successfully secure an alternative position, then I will arrange for a formal attendance hearing with the Head of Operations. You asked whether the head of operations has the capability to terminate your contract of employment. I confirm that he has several options available at his discretion, but he could terminate your contract of employment on the grounds of capability due to ill health. I appreciate that this is not a pleasant position to be in and I said that we all collectively want you to secure an alternative role in the Trust to avoid having to attend a Formal Attendance Hearing."

56. We find that Mr Haworth did warn the claimant of the risk of referral to the Head of Operations but we think, on the balance of probabilities, he was doing this to reinforce the precariousness of the claimant's position and to encourage him to look for permanent roles. It is clear, and we find, that the specific reference to potential dismissal was in response to a question from the claimant and we find that objectively Mr Haworth was not threatening or making a threat even if the claimant did genuinely perceive it to be so.

57. Mr Haworth then confirmed that the claimant would need to submit an application and attend an interview for any jobs that he might be interested in. As mentioned above, we find that this letter accurately reflects the content of the meeting on 9 November. The claimant says that after that meeting he felt under pressure to apply for jobs he was not qualified for. He was concerned that once he took a new job he would be stuck in that job. It was a reasonable perception for the claimant that he might be stuck in a job. No one had told him about the option of trial period in any of these roles and the claimant's perception of how he had faired in the previous application process combined with his anxiety reasonably made him reluctant to apply for these roles. Nonetheless we do find that Mr Haworth was not applying pressure even though the claimant perceived it as pressure. We think the pressure would be natural for anybody in these circumstances but actually it wasn't coming from Mr Haworth.

Further jobs

58. On 11 November 2020, Mr Haworth sent the claimant, by WhatsApp, details of a potential job. The claimant's response was firstly that he did not meet the

essential criteria because he did not have GCSEs in maths and English. Mr Haworth said that actually those were only desirable criteria, and in any event he would signpost the claimant for additional support in his application. Then the claimant raised the concern about where he would have to work and about whether the hours would fit in with his flexible working relationships. Mr Haworth said that the claimant needed to focus on the application and then worry about those arrangements later.

59. Then the claimant raised concerns about the mask issue and says as follows

"If I have to wear a mask around colleagues then I can't do it for the same reasons I can't go back to A&E. I feel safe on patient transport services because I don't have to communicate with colleagues in a professional manner while wearing a mask."

60. In the same message the claimant says

"If you remember, we talked about what triggers my anxiety at my last long term sickness review. I told you I struggle at work having to communicate with colleagues when I'm under pressure especially when I'm not confident about what I'm talking about."

61. We find that this must refer to the meeting on 9 November and we therefore find that this meeting was the first occasion on which the claimant explained the difficulties to Mr Haworth that wearing masks caused him, including potentially in relation to handovers. We do find, however, that it was still not wholly explicit at this point.

62. Then the claimant concluded in the same text trail but the following day:

"Hi Tom. I have to step away from this now it really is making me poorly. I can't apply for other roles for the reasons above. I've checked with Di and they do have to wear masks.

I was happy in my job until I was forced to wear a mask which in turn has exposed my disability. Someone is responsible for this and has a duty of care for my mental health well being, I am essentially a vulnerable adult.

If John McSorly wants to terminate my contract can you tell him to contact me directly. I will make no other contact until any official meetings."

63. It is clear that the claimant is stepping away from discussions with Mr Haworth at this point and things escalated very quickly thereafter to the grievance.

64. In cross-examination the claimant confirmed this message was in fact a reflection of how he was feeling at the time. He does not actually blame the respondent for anything that happened in June 2020. It is clear, and again we find, that the claimant was obviously finding this situation very difficult to deal with at that time.

The grievance

65. On 16 November the claimant submitted his grievance. In the grievance the claimant was explicit about the problems he had with mask wearing, and he said

"I would normally feel anxious when handing over to doctors and nurses, but with my medication and breathing techniques I was able to function normally which allowed me to really enjoy my job.

This all changed when Covid broke out and we had to start wearing masks. My issue is that when I get anxious my respiratory rate goes up, I found that while wearing a mask I couldn't use my breathing techniques and my anxiety and breathing would escalate especially when handing over at hospital, when trying to talk I could hear my voice quivering, I would start sweating profusely and shaking, I would then become aware that everyone was looking at me because I couldn't get my words out, I wanted to rip my mask off because I couldn't breathe.

I was extremely embarrassed by these episodes and after a few weeks I found I couldn't function at work and I went on sick on 3 June."

66. The claimant goes on to say

"My Line Manager was fantastic, really supportive and together we looked at different ways to get around wearing masks, unfortunately this was not possible and there was no way of getting around wearing the mask while handing over."

67. The claimant's case has been consistent on this point throughout. He has had no criticism of Mr Haworth prior to October. In his grievance the claimant sets out a clear chronology of what had happened and he refers to previous attempts at reasonable adjustments which are limited to alternatives to wearing a mask. This is consistent with our findings that the offer of removing handovers was not previously considered by Mr Haworth.

68. The claimant concludes by saying in his grievance

"I truly believe the Trust has discriminated against me for my disability, you have made no meaningful reasonable adjustments as required by law and you have breached your duty of care to me by causing me considerable psychological harm. I feel like I have been intimidated with threats of contract termination, in 3 meetings I was warned 6 times that if I didn't find an alternative job then my contract could be terminated, all this leads me with no other options than to wait for you to call me to Manor Mill, meanwhile every day that passes my anxiety is getting worse."

69. Although the narrative and explanation is clear it is not clear at this point what resolution the claimant is asking for, so Ms Whitehouse, who was appointed as the grievance officer, requested that information. The claimant's reply was

"I would like the Trust to honour the 25% pay protection originally offered me, at least until I retire in 7 years time.

I was told by Ewelina from HR that I wasn't entitled to any pay protection at all, however, I have had correspondence from my union rep which suggests otherwise, I have attached the extracts and the agenda for change.

Please could you look into the injury allowance and pay protection as set out in the agenda for change handbook."

70. The claimant said in cross-examination that he got the seven year figure 'off the top of his head'. We do not need to consider the injury allowance as the claimant agreed that that was not applicable. The grievance was later clarified by the claimant on 5 December as

"If the Trust cannot provide a reasonable reason why I am not entitled to pay protection as laid out in the Agenda for change, section 22 Part 14 then I would

like to be given the pay protection so I can accept the role I was offered as Ambulance Care Assistant.

I would also like compensating for the psychological harm inflicted on me and my family over the last 2 months."

71. In that letter the claimant also said

"I accept that mistakes are made with regard to the Trust offering to allow me to keep my own social enhancement, I also accept that the Trust is not obliged to honour that offer.

I also accept the Trust is not intentionally discriminated against me when it comes to my anxiety by its disability and I appreciate the support I received over the summer.

My issue is the meeting on the 9th of October, when my LM informed me that the Trust had made a mistake about the unsocial hour's enhancement payment, he said he had liaised with HR who told him I was not entitled to any pay protection at all".

72. It is clear, and we find, that the primary focus of the grievance and the claimant's concerns was the pay protection and its subsequent removal. This is hardly surprising and not unreasonable. The claimant had said that he could not afford to accept the Band 3 PTS role without the 25% supplement.

The grievance meetings

73. There were two grievance meetings. The first was on 16 December 2020 and the second on 13 January 2021. At the first meeting the claimant explained the difficulties he had with wearing a mask. That he could manage on PTS as he did not have to do patient handovers. He said he had no difficulty talking to patients. There was some conflicting evidence on this point and Miss Whitehouse said that there was a need to do patient handovers in PTS whereas the claimant said that in all the time he had worked on PTS he had not had to do handovers. Miss Whitehouse did confirm that the ambulance care assessments do not have any clinical responsibility. We find, therefore, that even if handovers are required on PTS they are likely to be of a different character of those on A&E. They are likely to be less complex and we accept the claimant's evidence that he is significantly less prone to anxiety or panic attacks when working on Patient Transport Services than in A&E.

74. It was clear to Miss Whitehouse at this meeting that the issue for the claimant in the EMT1 job was the patient handovers. She then suggested removing that role from him and we find that this is the first time that this option was suggested to the claimant. The claimant rejected this suggestion. His reasons were that it would require the claimant to only drive rather than attend with the patient in the back of the ambulance, whereas the practice was to alternate. The claimant said that attending was hard work and less popular than driving. His second reason was that he would have to explain why he could not do handovers and this would mean disclosing his disability and finding that people would talk about him or gossip.

75. We have already addressed this briefly, but it is clear from the job description that EMT1 staff are required to communicate, report and document patients' history, condition and treatments to a full range of medical staff including

colleagues, nurses, doctors and consultants either en route to or on arrival at definitive care. Miss Whitehouse initially said that it was not part of the claimant's job and removing handovers would be straightforward, but then in oral evidence she said

"it is in the job description but generally not a requirement of a non-clinician to do a complex handover."

76. Miss Whitehouse explained that the clinical responsibility for the patient remains with the paramedic or clinically trained EMT and there would always be one person on the crew with the EMT1 who had the clinical qualification. They can and should handover where the situation was complex.

77. The claimant's evidence was that he did not always have a deep understanding of what he was discussing at handovers. He was not clinically trained and this could be a factor in his panic attacks. Although he said had had lots of experience and picked up a lot over the years, the respondent's response was that the claimant really ought not to be doing handovers in these circumstances in any event.

78. We prefer the evidence of Ms Whitehouse on this point: that the clinical responsibility for the patient remains with the clinically qualified member of staff notwithstanding the job description. The claimant also said that the person who attends with the patient in the back of the ambulance is the person who has to do the handover and Miss Whitehouse said that this was not necessarily the case. Again we prefer the evidence of Miss Whitehouse on this that the information can be shared with the clinical member of staff where necessary. More importantly, however, the claimant ought not be attending where it was not clinically appropriate for him to do so anyway. We find that it was reasonable therefore for handovers to be limited for the claimant as suggested by Ms Whitehouse in terms of sharing the role.

79. The second objection and question about reasonableness related to the issue of whether the matter could be kept confidential. The claimant was concerned that people would know and gossip if he stopped handing over. The respondent had two responses to this.

80. Firstly they said it could be confidential. There was no need for anyone to know why the claimant was not doing handovers. Ms Whitehouse said there were other people with adjustments and this included, for example, people who could not drive. The claimant was not aware of this which suggests that the confidentiality had been maintained and meant that there was potential for pairing in those circumstances. The respondent also has policies to maintain confidentiality. In practical terms it meant that the arrangement could be trialled and monitored. The claimant could also potentially work with a dedicated crew member to limit the risk of the disclosure. The claimant considered that this was impracticable and he refers to holidays and sickness absences by way of example.

81. Secondly the respondent said the ambulance staff were sensitive and it was unlikely that people would not be understanding in any event. There could be a limited disclosure with the claimant's agreement to the dedicated crew member. The claimant referred in his response to the grievance outcome to a person who had the adjustment of not working nights and said that he had been referred to in potentially derogatory terms by a nickname it is not necessary to

state. Ms Whitehouse was unaware of this but the claimant was clearly reluctant to consider any disclosure of his health or disability issues.

82. The claimant relies on this as the allegation that he was pressured to disclose his health information to colleagues. Ms Whitehouse said in her witness statement that all she was proposing to disclose was that the claimant could not do handovers. There was no reason to tell anyone why. She referred back to others who had adjustments and that people did not know the reason for those adjustments.

83. The claimant accepted the grievance outcome letter as accurate and the respective positions of Ms Whitehouse and the claimant that we have set out are recorded in there.

84. We find overall that the offer to make the adjustments was reasonable. Ms Whitehouse said the same in the grievance outcome as she said in evidence and that she was confident the role could be confidentially adjusted. We prefer Ms Whitehouse's evidence and think that the proposed adjustment could have been kept confidential but we find that the claimant was in a position where he was, really, just extremely concerned about going back to A&E at all. That is what has come out subsequently. It was not clear at the time and the claimant did not tell Ms Whitehouse that at that point. The reasons for rejecting the adjustments given at the time were possibly, in hindsight, not the real reasons for rejecting them.

85. In contrast to Ms Whitehouse's offer, we find that the claimant's response was not objectively reasonable. There was no opportunity to allow Ms Whitehouse to fully explain and trial the suggestions. The claimant was clearly set in his view that he could not go back to A&E. Unfortunately, he did not make that clear at the time and as far as the respondent was concerned the only significant issue that prevented the claimant's return to his EMT1 role was the difficulty with the handovers. We conclude therefore that the respondent made a reasonable offer to address this and the claimant unreasonably, in the context of the information the respondent had at the time, rejected this offer.

86. The claimant's concern was that his grievance had been about pay protection and re-deployment but now Ms Whitehouse was changing the goalposts and trying to get him back to his old job. We do not agree that Ms Whitehouse was changing the goalposts.

87. The claimant's difficulties obviously stemmed from the problems at handover and certainly on the information that Ms Whitehouse had that was a conclusion that she was entitled to reach. This was the first time the difficulties had been made explicit, although they had been alluded to previously, and Ms Whitehouse was proposing adjustments that would allow the claimant to remain in his main job and consequently on his full Band 4 salary along with the 25% enhancement.

Occupational Health

88. After the first grievance meeting on 16 December 2020 the claimant saw occupational health on 24 December. We note here that we think this was a commendable response from Ms Whitehouse and we give her credit for going back to Occupational Health in light of the clear and new information from the claimant. Occupational Health said that the claimant was fit to work in the

Patient Transport Service's job but not capable of doing patient handovers in A&E and they said that this required management intervention.

89. On 6 January 2021, Ms Whitehouse extended the claimant's pay protection by a further month and the claimant continued at this point to receive the Band 4 salary together with the 25% enhancement. The claimant confirmed that he had recently at that time been offered formally the PTS Band 3 job and the manager would keep that open for him until the grievance concluded. We observe that this meant that the Band 3 job had been kept open for the claimant effectively for the best part of three months.

90. The grievance meeting was reconvened on 13 January 2021. The claimant said in his witness statement

"Unfortunately Ms Whitehouse doubled down on the Trusts position and rejected my claim for pay protection under 22.14, they did not address the main issue in my grievance which is the period between 09/10/20 and 13/01/21as outlined above. She did however offer me one year of full pay with enhancements backdated to September 2020."

91. In respect of pay protection the claimant sought to rely on the respondent's pay protection policy and particularly paragraph 22.14 of the Agenda for Change handbook. This says:

"22.14 Eligible employees who have to change jobs permanently to a position on lower pay due to a work related injury, illness and/or other health condition, will receive a period of protected pay that is the same as local provision for pay protection during organisational change".

92. We did not see the document from which this paragraph was extracted but the claimant said it applied in these circumstances as he had had to change jobs. Ms Whitehouse said in her witness statement and in the grievance outcome that this did not apply to the claimant because, following the occupational health report, the claimant was not required to permanently change jobs. The claimant's primary role could be adjusted so that he could continue in it by removing handovers and, in any event, the claimant's anxiety was not work related, injury, illness and/or other condition.

93. We do not think it can be right that this policy only applies to injuries or illnesses sustained at work. We conclude that had there been something in the Agenda for Change handbook that made it clear that this only applied to injuries or illnesses sustained at work whether by provision of definitions or other provisions dealing with general disability moves for example we would have been shown it. The only sensible way of reading this is that it refers to on the one hand "work related injury or illness" and on the other hand "other health condition". This is because aside from the injury or illness it is difficult to see how else a health condition could arise. The "other" must refer to a health condition resulting in a permanent move that is not work related.

94. The claimant said in oral evidence in cross-examination that now he has a phobia of returning to the EMT1 role. He referred to the document at page 358 which was his application for Injury Support Allowance which was sent to Ms Whitehouse on 10 December. This says

"I believe I have suffered a psychological injury at work which has left me struggling to get my anxiety back under control, the mere thought of returning to

my substantive role absolutely terrifies me, with or without the masks. I think it will take me a very long time to get back to how I was before Covid broke out. I am now waiting for more counselling which has been arranged through my GP."

95. He also says

"I've found that the masks were not an issue on PTS as I was under no pressure to perform, or handover at hospitals."

96. In submissions Mr Williams said that this showed it was difficult for the claimant to return to an EMT1, but not impossible. We think that the claimant's account goes further than that, but the Occupational Health advice which was obtained after this information had been provided is that the claimant can not do handovers, not that the claimant is too anxious to return to working as an EMT1.

97. It also appears from the reference to PTS in the occupational health report that the removal of handovers and pressure from his role as an EMT1 would alleviate the problem. We find that it was reasonable for Ms Whitehouse to rely on the Occupational Health report and conclude that the Agenda for Change policy did not apply on the grounds that the claimant was not *required* to permanently be removed from his role.

98. Finally in the grievance Miss Whitehouse agrees to extend full pay protection (which is the Band 4 plus 25%) to 1 October 2021 if the claimant accepts the Band 3 PTS job.

99. Thereafter the claimant appealed and the appeal was rejected. On 12 February 2021 the claimant accepted the Band 3 job with pay protection until 1 October 2021. In our view nothing turns on the appeal outcome, the claimant did not challenge it and we therefore make no further findings about that.

The law

Discrimination arising from disability

100. Section 15 Equality Act 2010 says:

(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.

101. Paragraph (1)(a) includes the following elements. The respondent must have treated the claimant unfavourably. There is no need for a comparison with another person. It is just a question of whether the claimant was treated unfavourably or not.

102. The unfavourable treatment must be because of something arising in consequence of the claimant's disability. This comprises of two elements. There must be something arising and that something must be in consequence of the claimant's disability. The Tribunal must ask two questions

102.1. did the respondent treat the claimant in an unfavourable way because of an identified something; and

102.2. did that something arise in consequence of the claimant's disability.

103. The second question is an objective one. Did the something actually arise in consequence of the claimant's disability (anxiety in this case)?

104. There must actually be an objective link even if not a direct link (*York City Council v Grossett* [2018] IRLR 746) between the disability and the something arising. The question for us is what is the nature of the required link?

105. The test we are required to apply is whether the claimant's disability was an effective cause of the "something". Even if there was an additional cause, the actions will be in consequence of the claimant's disability if his disability had a significant influence on the unfavourable treatment.

106. Even if all these elements are present, the actions of the respondent will not amount to discrimination under section 15 Equality Act 2010 if the respondent can show that the treatment of the claimant was for a legitimate aim and the treatment was a proportionate means of achieving that aim.

107. The legitimate aims on which the respondent relies for section 15 are

107.1. the requirement to operate within its financial restraints and to allocate funds and resources appropriately to demonstrate value for taxpayer's money; and

107.2. the need to apply the respondent's policies fairly and consistently.

108. The aims were not disputed by the claimant and although cost alone cannot amount to a legitimate aim, if there is a particular reason to limit expenditure that might be sufficient.

109. The Employment Tribunal must balance the needs of the employer as represented by the legitimate aim that is being pursued against the discriminatory effect of the measures taken in pursuance of that aim on the individual concerned. This necessarily involves considering whether there was an alternative less discriminatory step that could have been taken and to this extent section 15 overlaps with the failure to make reasonable adjustments.

110. Finally, for this section, the actions of the respondent will not amount to discrimination if they did not know and couldn't reasonably have been expected to know the claimant had the disability on which the claim is based. In this case the respondent agrees that they did know at the relevant time about the claimant's disability of anxiety.

Indirect discrimination

111. In respect of indirect discrimination, section 19 Equality Act 2010 says

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

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

112. This applies to the protected characteristic of disability and we will address the provisions, criteria or practices (PCPs) under the failure to make reasonable adjustments.

113. Similarly to section 15 indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim. This requires the same balancing exercise. In the case of indirect discrimination the respondent relies on the unchallenged names of

113.1. protecting the health and safety of staff and patients

113.2. complying with national guidance in respect of the Covid-19 pandemic and

113.3. ensuring the continued running of the respondent's service.

Failure to make reasonable adjustments

114. Section 20 – Duty to make adjustments says, as far as is relevant:

(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.'''

115. A provision criterion or practice (PCP) must have an element of repetition about it, or at least the potential to be repeated. It cannot be a one off act applied solely to the claimant and must at least be the way in which things generally are or will be done. In the case of *Isola v Transport for London* [2020] EWCA Civ 112 from which that principle comes, the court went on to further hold that "the act of discrimination that must be justified is not the disadvantage which a claimant suffers (or adopting Mr Jones' approach, the effect or impact) but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done".

116. Section 21 – Failure to comply with duty says

(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.

117. Paragraph 20 of Schedule 8 – Lack of knowledge of disability, etc provides that

(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—

….

(b) in any case referred to in Part 2 of this Schedule, 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.

118. We refer also to paragraph 20 schedule 8 which provides that

(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—

….

(b) in any case referred to in Part 2 of this Schedule, 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.

119. Although there is some similarity in respect of knowledge between section 20 and section 15 claims, schedule 8 requires additionally knowledge of whether the disability is likely to put the claimant at the particular disadvantage on which they rely. The correct statutory construction of this involved asking two questions –

119.1. did the employer know that the employee was disabled and that his disability was liable to affect him in a manner set out in the section? If the answer to that question is "no", there is a second question; namely

119.2. ought the employer to have known the employee was disabled and that his disability was liable to affect him in the manner?

120. The test whether an adjustment is reasonable is an objective one. It must be effective in both theory and practice. In our view reasonableness must include reasonableness from the perspective of both the employer and the employee.

121. In *G4S Cash Solutions v Powell* [2016] UKEAT/0243/15/RN the EAT held

"There is no reason in principle why section 20(3) should be read as excluding any requirement upon an employer to protect an employee's pay in conjunction with other measures to counter the employee's disadvantage through disability. The question will always be whether it is reasonable for the employer to have to take that step".

Harassment

122. Section 26 Equality Act 2010 says, as far as is relevant,

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

….

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

123. Again the relevant protected characteristics include disability.

124. In the case of *Grant v Land Registry* [2011] IRLR 748 CA, Elias LJ said:

> "there is harassment if the purpose of the conduct is to create circumstances violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for [him] or if that is the effect of the conduct even though not intended. Where it is the purpose, such as where there is a campaign of unpleasant conduct designed to humiliate the claimant on the proscribed ground, it does not matter whether that purpose is achieved or not. Where harassment results in the effect of a conduct, that effect must actually be achieved. However the question of whether conduct has an adverse effect is an objective one – it must be reasonably considered to have that effect – although the victim's perceptions are relevant factor for the Tribunal to consider. In that regard when assessing the effective remark the context in which it is given is always highly material".

125. Elias LJ then went on to caution against cheapening the significance of the words of the statute and said that those words are

> "an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment".

126. There is both, therefore, a subjective test (did the conduct actually have the proscribed effect?) and an objective test (was it reasonable for the conduct to have that effect?). One off acts can amount to harassment but they must be sufficiently serious to do so.

Conclusions

127. We consider our conclusions by reference to the list of issues.

Discrimination arising from disability

128. In respect of the claim under s 15, discrimination arising from disability, we consider the alleged unfavourable treatment and the "things arising in consequence" together.

129. The "things arising in consequence" are said to be:

129.1. The claimant's sickness absence from 3 June 2020?
129.2. The claimant's inability to carry out the full normal duties of his pre-existing job role?
129.3. The claimant's inability to communicate with professionals-whilst wearing a mask?
129.4. The claimant's inability to carry out "handovers" whilst wearing a mask?

130. The first allegation of unfavourable treatment was

Taking the claimant out of his pre-existing job role after 9 October but failing to provide him with a permanent alternative role which he was able to carry out fully (even with this disability) at a comparable level of pay with pay protection of 25% enhancement for a minimum of 3 years, or alternatively permanent 25% enhancement protection.

131. Firstly we have found that the respondent did not take the claimant out of his role. The claimant was off sick and it was agreed that re-deployment would be considered. The claimant was for a long time, until he accepted the Band 3 role, entitled to return to his job.

132. The respondent did fail to provide the claimant with an alternative role, however, and this was unfavourable treatment. It is not completely clear which thing arising in consequence is said to be the reason for this unfavourable treatment. The reason for the claimant leaving the role was his inability to perform full duties, do handovers and always/consistently communicate with professionals. In reality this all part and parcel of the same issue. We find that these "inabilities" were in consequence of his disability.

133. However, the reason for the claimant not returning to work was firstly the claimant's failure to communicate the real difficulties he was having and secondly his failure to agree the reasonable adjustments. Disability was still an effect of cause, however, even though other factors contributed.

134. In respect of the failure to provide a job however, this was not because of any of these things. This was not something arising in consequence of the claimant's disability. Read as whole, and in light of the claimant's lack of criticism of the respondent up to June 2022 the alleged unfavourable treatment must refer we think to the failure to provide a new job. This is not related to the claimant's disability at all. It is, at worst, a failure by the respondent to apply their policy or, at best, the claimant's failure to meet the criteria for the job. Either way the reasons for it were not related to the claimant's disability.

135. In respect of the issue with pay protection, we have found that the reason for the failure to protect pay for a longer period was because the respondent genuinely considered, and we agree, that the relevant pay protection policy did not apply to the claimant. That was the reason for not protecting his pay in the circumstances claimed and it was unconnected with his disability.

136. The second allegation of unfavourable treatment is

Pressurising the claimant to apply for roles for which he was not qualified and which were not suitable during the period from 9 October to 3 November,

137. We found that this did not happen. The claimant perceived pressure but it was not applied by Mr Haworth. The alleged act is linked to disability – but for his disability the claimant would not need to be looking for work – but we have found that the allegation did not happen as the claimant states. There simply was no pressure put on the claimant, objectively viewed, to apply for roles for which he was not qualified.

138. The third allegation of unfavourable treatment is

Threatening the claimant (between 9 October 2020 and 13 January 2021) with the termination of employment if he was unable to obtain a suitable alternative role within the respondent's three month deadline.

139. Again, objectively, we found that this was not unfavourable treatment. The allegations as put by the claimant did arise from disability in the same way that were described above. There is a connection between the claimant being put in the position that he was and his disability, notwithstanding intervening events: namely, the failure to accept the adjustment offered and the failure to inform the respondent of the real problem. However, the unfavourable treatment alleged by the claimant was not made out. We have found that the claimant was not in fact threatened with the termination of his employment. The acts of Mr Haworth were (objectively viewed) supportive and reasonable and entirely to be expected in the circumstances.

140. The fourth allegation of unfavourable treatment was

Pressurising the claimant to disclose his medical condition and medical history to friends and colleagues at work between 9 October 2020 and 30 January 2021.

141. Again, we found that this did not happen in the way the claimant alleges. The allegation, as put, would be potentially adequately causally linked to the claimant's disability in the same ways as the other allegations but in fact there was no unfavourable treatment by the respondent for the reasons we have explained. We found that Ms Whitehouse did not put pressure on the claimant to disclose his disability. In fact she sought to find ways to avoid him having to tell people about his disability.

142. The fifth allegation of unfavourable treatment is

Failing to offer the claimant the PTS team leader role without the need for competition, at Band 4 and with the 25% pay enhancement.

143. This is similar to the first issue. The treatment was not because of something arising in consequence of the claimant's disability. We found that this is not related to the claimant's disability at all. It is at worst a failure to apply policies as we said or, at best, the claimant's failure to meet the criteria for job. Either way this treatment was not something that arose in consequence of the claimant's disability.

144. The final alleged unfavourable treatment for section 15 is

Failing to extend the pay protection measures in his current (as of 2021) job and instead deciding that they should end in October 2021.

145. There is no basis on which to link this decision to the claimant's disability and we think it does not really make sense as an allegation. The decision to award pay protection was related to the claimant's disability and, to that extent, it is connected with the claimant's absence and inability to perform his role. However awarding pay protection for a year is not unfavourable treatment, it is favourable treatment. It could be unfavourable treatment to *limit* the pay protection to a year where there is a separate, identifiable obligation to provide pay protection for longer than a year. However, the claimant has not explained where any such obligation might come from and we have been unable to identify it. This is not, therefore, unfavourable treatment.

146. In light of our findings it is not necessary to address the legitimate aims. For the reasons set out above, the claimant's claims under section 15 are unsuccessful.

Indirect discrimination

147. Turning to indirect discrimination, looking first at the PCPs, did the respondent have the following PCPs?

    That the claimant should carry out the full normal duties of his pre-existing job role, including carrying out patient facing tasks, handovers and communicating with other professionals whilst wearing a mask.

148. We find the respondent did have this PCP. Ultimately we don't think it was really disputed but clearly mask wearing was the policy of the respondent at the time and handovers were to the extent explained above agreed as part of the claimant's job.

    That the claimant should carry out the full duties of his pre-existing role while wearing a mask, with the exception of handovers or other tasks which involved communication with other professionals whilst wearing a mask.

149. We find that this was not a PCP. Specifically, it was a one off decision for the benefit of the claimant following the decision of Ms Whitehouse at the grievance. It does not have the requisite characteristics of repetition, nor is it required to be applied to other people not in the claimant's circumstances.

150. Next, we consider whether the respondent applied the PCPs to the claimant. We will address the application to the claimant of the second alleged PCP in any event and for the sake of completeness, but we reiterate that we have concluded that it did not actually amount to a PCP.

151. The first PCP was actually applied to the claimant up to 3 June 2020 and the second, had it been a PCP, was intending to be applied to the claimant but never actually took effect.

152. Next we consider whether the respondent applied the PCP's to people without the claimant's disability or if it would have done so.

153. The first PCP was applied to everybody. It is clear that it applied to everybody in the claimant's role.

154. As to the second alleged PCP – it was a proposed adjustment to accommodate the claimant's disability.

155. We cannot say that it would have been applied to others without the claimant's disability in light of the very particular circumstances of the claimant. In fact, it was proposed *because* of the claimant's disability which would seem to suggest that it would inherently not be applied to people without the claimant's disability.

156. Did the PCPs put persons with whom the claimant shares his disability at a particular disadvantage when compared with persons who do not share the claimant's disability and was the claimant put to that disadvantage? We address each of the alleged disadvantages as set out in the list of issues.

    He was unable or found it more difficult to carry out the full job role while wearing a mask.

157. We find that the first PCP did put the claimant at that disadvantage. Mask wearing while handing over did on occasions cause the claimant difficulties managing his anxiety in the way he has described.

158. The second PCP did not put the claimant at a disadvantage in those circumstances even if it were a PCP as it was an accommodation to remove that disadvantage.

159. The second alleged disadvantage is

    That the claimant was unable to deploy breathing techniques to deal with anxiety while wearing the mask.

160. For similar reasons the first PCP did cause that disadvantage to the claimant and the second PCP did not. It removed the disadvantage even if it was a PCP. It was particularly intended to reduce the anxieties – it did not add to the claimant's difficulties.

161. The third alleged disadvantage is

    That the claimant had to take sick leave.

162. The first PCP did cause this disadvantage. We found that the claimant could not do the job with that PCP and that led to him going off sick. The second PCP did not cause the disadvantage, it wasn't applied and even if it was a PCP it is unlikely to have caused the claimant to go off sick because its intention was to remove the anxiety provoking circumstances.

163. The fourth alleged disadvantage is

    That the claimant had to change job role.

164. We find that neither PCP caused this alleged disadvantage. Suitable adjustments were proposed which would have removed the need to change role once the claimant had clarified the problems that he had.

165. Without the proposed reasonable adjustments, the first PCP could have caused this disadvantage but it did not as a matter of fact subject the claimant to any disadvantage because he was never put in the position where he had to change job role once he had made clear what the actual problem was.

166. As with the previous alleged disadvantage, the second PCP was in fact the solution that was proposed and would not have caused this disadvantage.

167. The fifth alleged disadvantage is

    That the claimant suffered a diminution in pay.

168. This was not as a result of either PCP but was a consequence of the failure by the claimant to agree the reasonable adjustments of removing the handovers which was, in our view, the obvious way to address the PCPs.

169. We further find that there has been no actual diminution in pay prior to the claimant putting in his claim. We do accept that overall it is possible that taking a long term view, it could have resulted in a reduction in pay but in any event we find that did not arise from either PCP.

170. The final alleged disadvantage is

    To step back from handovers/communicating while wearing a mask the claimant would have to disclose some medical condition or medical history to

one or more colleagues or friends at work in order to explain tha change to his working practices.

171. This relates to the second alleged PCP which we have found was not in fact a PCP. We find that that PCP would not have subjected the claimant to those disadvantages in any event as we found that the measures that Ms Whitehouse proposed would mean that the claimant was not in fact required to disclose any of his medical history. The need to disclose medical history did not naturally or as a matter of fact arise from this PCP.

172. We found that the first three disadvantages were caused by the first PCP. However in our view the legitimate aims of protecting the health and safety of staff and patients; complying with national guidance in responding to Covid-19 pandemic; and ensuring the continuing running of the respondent's service are unarguably legitimate.

173. The way the respondent dealt with the issue overall was a proportionate means of achieving that aim. The steps that the respondent took or proposed included

    173.1. temporary alternative duties with one year pay protection at the claimant's substantive pay rate;

    173.2. the offer of reasonable adjustments

    173.3. the support of Mr Haworth in the attempts to find alternative work

    173.4. Mr Haworth also from a very early stage explored other options such alternative PPE.

174. The respondent very properly balanced the needs of the claimant against the achievement of their aims and made every accommodation that they were able to in respect of the claimant in light of the information available at the relevant time. For those reasons the claimant's claims of indirect discrimination are unsuccessful.

Failure to make reasonable adjustments

175. The first two PCPs the claimant relies on are the same as those as of indirect discrimination and for the same reasons we find that the first PCP was a PCP and the second one is not.

176. The third PCP that only applies for the purposes of reasonable adjustments is

    That the claimant should apply and compete for appointment to alternative roles rather than being slotted into suitable alternative roles without such competition.

177. We find this was not a PCP. It did happen, as we found that the respondent failed to follow the policy but that is what it was, it was a failure to follow the policy. It was not a provision criterion or practice. There was no evidence or suggestion that this had ever happened otherwise. In fact Mr Haworth's evidence was that as a recruiting manager he had and would follow the policy. Fault lay with the other recruiting manager but we cannot find it as a PCP as it was, as far as we can tell, a one off incident.

178. Did the PCPs put the claimant at a substantive disadvantage.

179. Again this is similar to the issues in respect of indirect discrimination. The first alleged disadvantage is

    The claimant was unable, or found it more difficult, to carry out the full job role whilst wearing a mask.

180. We found that the first PCP did create this disadvantage and that should be clear from our findings.

181. The second PCP (were it PCP) did not subject the claimant to this disadvantage. It was an adjustment for the claimant's benefit intended to remove the disadvantage from the first PCP.

182. In respect of the third alleged PCP (again, were it a PCP) we can not see any connection between the failure to appoint the claimant to a role and the difficulties in doing his existing job.

183. The second alleged disadvantage was that the claimant

    Was unable to deploy breathing techniques to deal with anxiety while wearing a mask.

184. Again this was a disadvantage arising from the first PCP. It was not a disadvantage arising from the second PCP and, again, that is because the second PCP was intended to remove that disadvantage. Similarly, we can not see how the third PCP is connected in any way with this alleged disadvantage.

185. The third alleged disadvantage was

    The claimant had to take sick leave.

186. Again this was a disadvantage arising from the first PCP in that the claimant was unable to perform his role in those circumstances. It did not arise from the second alleged PCP (were it a PCP) because that was intended to remove that disadvantage and similarly the third PCP as far as we can see is unconnected with the need to take sick leave.

187. The fourth alleged disadvantage is that

    The claimant had to change job role.

188. The first PCP did cause this disadvantage in the absence of any adjustments to the role. The claimant was unable to continue to perform the role for the reasons that we have found and that the claimant explained.

189. The second PCP did not cause the claimant to have to change job role for the reasons that we have already explained. Firstly it removed the disadvantage from having to do the handovers with the professionals and secondly we found that there was no real risk of the claimant having his health details disclosed which would have meant he had to leave the role rather than comply with the adjustments.

190. Again in respect of the alleged third PCP there is no connection. It simply does not make sense as a disadvantage arising from the third PCP.

191. The fifth alleged disadvantage was that the claimant

    Suffered a diminution in pay.

192. The claimant's pay did not go down as we have already found but ultimately it could have done and in the very long term it did. On balance, we think that that

disadvantage potentially arose from the first PCP. In the absence of any reasonable adjustments, the claimant was unable to carry on doing his job. There was limited pay protection provision and the claimant's pay might have gone down.

193. The second PCP, for the similar reasons already expressed did not result in the alleged disadvantage. The claimant could have stayed in his role with the application of the second alleged PCP.

194. In respect of the third alleged PCP, if it were a PCP, (which we have found, it was not) then a failure to put the claimant into a job without a selection process would and could have resulted in a diminution in the claimant's pay in the circumstances of the case. However, as already stated, this was not a PCP.

195. The final alleged disadvantage is

    In order to step back from handovers, communicating with professionals while wearing a mask the claimant would have to disclose his medical condition or medical history to one or more colleagues or friends at work in order to explain the change in his working practices.

196. We found that this did not happen and, on the balance of probabilities, would not have happened. We accept the evidence of Ms Whitehouse that she provided sufficient mitigation to protect the claimant. In any event this could really only have arisen from the second alleged PCP and we found that that was not a PCP.

197. In respect of knowledge, it should be clear from our findings that the respondent had knowledge of the disadvantage set out in the claim from 16 December 2020, but not before.

198. The claimant sets out in the list of issues some proposed steps that could have been taken to avoid the alleged disadvantages.

199. It should be clear from our findings that the respondent did take all the reasonable steps that they needed to take to avoid the disadvantage arising from the first PCP, which is the only PCP we found. That was by implementing or offering to implement what has been referred to as the second PCP, but more accurately by removing the obligation to do the handovers.

200. The difficulties that claimant had with the handovers only finally came to the respondent's attention in December 2020. They could not reasonably have known about that before then, as the claimant had given different explanations for the problems up to that point. The proposal to remove the obligation to do handovers was a reasonable adjustment as we have already found and the claimant's refusal to accept it was objectively, and on the information available to the respondent at the time, unreasonable. The respondent was not required to do anything else.

201. The respondent did not know, if it is in fact the case, that the claimant was unable to return at all to his previous role. That is something that has only come out recently in the course of these proceedings. All the perceived or potential disadvantages arising from what the respondent knew could be alleviated by removing the handover requirement. We found that there was little or no real risk of the breach of confidentiality that the claimant feared and the claimant's reaction was, in light of what the respondent knew and objectively speaking,

unreasonable. The respondent was not required to take any additional steps beyond those which they did take to alleviate the disadvantage in terms of new roles or pay protection. For that reason the claimant's claim for reasonable adjustments fails.

202. Finally we deal fairly shortly with the harassment claims.

203. The first alleged "conduct" was

    Pressuring the claimant to apply for roles which he was not qualified for and which were not suitable for him (during 9 October 2020 to 13 January 2021).

204. As we have already found, this did not happen as the claimant alleged. We fully accept the claimant felt under pressure and he was having a very difficult time and we make no criticism of the claimant for that at all but objectively speaking Mr Haworth just did not subject the claimant to that pressure.

205. The second alleged "conduct" was

    Threatening the claimant with the termination of his employment if he could not obtain a suitable alternative employment role within the respondent's 3 month deadline

206. Again we found that this did not happen as alleged. We fully accept the claimant's perception of what Mr Haworth was saying but we cannot criticise Mr Haworth for the way he conducted himself. He was merely providing information. In fact, an employer would be criticised for not warning an employee of potential consequences if they did not obtain alternative employment or return to their previous role in the claimant's circumstances.

207. The final alleged conduct was

    Pressurising or requiring the claimant to disclose his medical condition or history to friends or colleagues at work (in order to explain why he would be stepping back from certain aspects of his job).

208. We found again that this did not happen as alleged. The evidence of Ms Whitehouse was that there would be sufficient mitigation to prevent the claimant's medical information being disclosed. She sought to find ways to avoid that being disclosed and Ms Whitehouse certainly was not pressurising or requiring the claimant to disclose his medical condition. Again, we do not criticise the claimant at all about his concerns about that. It is clear that the claimant is a private person and he has managed successfully to manage his anxiety for a long period. We understand that it would be upsetting to feel like that was going to change. But viewed objectively we find that the claimant was not subjected to pressure or any requirements to disclose his medical condition by the respondent.

209. For these reasons, the claimant's claims are unsuccessful.

210. We feel it is important to note that we found that the way that both parties put their case has been reasonable, both have been extremely helpful and we are grateful for that.

211. We hope that it is clear that we do not doubt the claimant's perception of his treatment and we certainly do not doubt that he struggled and continues to do so. We recognise that the claimant has had an extremely difficult time and it has been difficult for him.

212. We have to find, however, that the respondent has, objectively, acted reasonably and supportively generally overall.

Employment Judge Miller
Date 1 March 2022

REASONS SENT TO THE PARTIES ON
Date: 7 March 2022

Appendix – list f issues

The Issues

37. The issues the Tribunal will decide are set out below.

1. **Discrimination arising from disability (Equality Act 2010 section 15)**

1.1 Did the respondent treat the claimant unfavourably by:

1.1.1 Taking the claimant out of his pre-existing job role after 9th October 2020 but failing to provide him with a permanent alternative role which he was able to carry out fully (even with his disability), at a comparable level of pay with pay protection of the 25% enhancement for a minimum period of 3 years, or alternatively permanent 25% enhancement protection.

1.1.2 Pressurising the claimant to apply for roles for which he was not qualified and were not suitable during the period from 9th October to 3rd November 2020.

1.1.3 Threatening the claimant (between 9/10/20 and 13/1/21) with the termination of his employment if he was unable to obtain a suitable alternative role within the respondent's 3 month deadline.

1.1.4 Pressurising the claimant to disclose his medical condition and medical history to friends and colleagues at work (between 9/10/20 and 13/1/21).

1.1.5 Failing to offer the claimant the PTS Team Leader role without the need for a competition, at Band 4 and with the 25% pay enhancement.

1.1.6 Failing to extend the pay protection measures in his current (as of 2021) job and instead deciding that they should end in October 2021.

1.2 Did the following things arise in consequence of the claimant's disability:

1.2.1 The claimant's sickness absence from 3rd June 2020?

1.2.2 The claimant's inability to carry out the full normal duties of his pre-existing job role?

1.2.3 The claimant's inability to communicate with professionals whilst wearing a mask?

1.2.4 The claimant's inability to carry out "handovers" whilst wearing a mask?

1.3 Was the unfavourable treatment because of any of those things?

1.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent will clarify its case in this regard within the Amended Response.

1.5 The Tribunal will decide in particular:

1.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

1.5.2 could something less discriminatory have been done instead;

1.5.3 how should the needs of the claimant and the respondent be balanced?

2. Indirect discrimination (Equality Act 2010 section 19)

2.1 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

2.1.1 The PCP that the claimant should carry out the full normal duties of his pre-existing job role, including carrying out patient facing tasks, handovers and communicating with other professionals whilst wearing a mask.

2.1.2 The PCP that the claimant should carry out the full duties of his pre-existing role, whilst wearing a mask, with the exception of handovers or other tasks which would involve communication with other professionals whilst wearing a mask.

2.2 Did the respondent apply the PCP(s) to the claimant?

2.3 Did the respondent apply the PCP to people without the claimant's disability or would it have done so?

2.4 Did the PCP put persons with whom the claimant shares his disability at a particular disadvantage when compared with persons who do not share the claimant's disability, in that:

2.4.1 He was unable or found it more difficult to carry out the full job role whilst wearing a mask?

2.4.2 He was unable to deploy breathing techniques to deal with anxiety whilst wearing said mask?

2.4.3 He had to take sick leave?

2.4.4 He had to change job role?

2.4.5 He suffered a diminution in pay?

2.4.6 To step back from handovers/communicating whilst wearing a mask the claimant would have to disclose his medical condition/medical history to one or more colleagues or friends at work in order to explain the change to his working practices.

2.5 Did the PCP put the claimant at that disadvantage?

2.6 Was the PCP a proportionate means of achieving a legitimate aim? The respondent will set out its aims in its Amended Response.

2.7 The Tribunal will decide in particular:

2.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;

2.7.2 could something less discriminatory have been done instead;

2.7.3 how should the needs of the claimant and the respondent be balanced?

3. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

3.1 The respondent accepts that it knew or could reasonably have been expected to know that the claimant had the disability during the relevant period?

3.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

3.2.1 The PCP that the claimant should carry out the full duties of his pre-existing job role, including carrying out patient facing tasks, handovers and communicating with other professionals whilst wearing a mask.

3.2.2 The PCP that the claimant should carry out the full duties of his pre-existing role whilst wearing a mask, whilst being excused from undertaking handovers or other tasks involving communication with other professionals whilst wearing a mask.

3.2.3 The PCP that the claimant should apply and compete for appointment to alternative roles rather than being slotted into suitable alternative roles without such a competition.

3.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

3.3.1 He was unable to or found it more difficult to carry out the full job role whilst wearing a mask?

3.3.2 He was unable to deploy breathing techniques to deal with anxiety whilst wearing said mask?

3.3.3 He had to take sick leave?

3.3.4 He had to change job role?

3.3.5 He suffered a diminution in pay?

3.3.6 In order step back from handovers/communicating with professionals whilst wearing a mask the claimant would have to disclose his medical condition/medical history to one or more colleagues or friends at work in order to explain the change to his working practices?

3.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

3.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

3.5.1 Providing the claimant with permanent job role which he was fully able to perform, at comparable pay and with the 25% pay enhancement for a minimum of 3 years, or alternatively permanently.

3.5.2 Providing the claimant with suitable alternative employment at comparable pay without the claimant having to go through a competitive selection process.

3.5.3 Offering the claimant the PTS Team Leader role at Band 4 with the 25% pay enhancement without requiring the claimant to undergo a competitive selection procedure.

3.5.4 Extending the subsequently agreed pay protection measures beyond the termination date in October 2021 so that they would remain for a period of 3 years.

3.6 Was it reasonable for the respondent to have to take those steps and when?

3.7 Did the respondent fail to take those steps?

4. Harassment related to disability (Equality Act 2010 section 26)

4.1 Did the respondent do the following things:

4.1.1 Pressurise the claimant to apply for roles which he was not qualified for and which were not suitable for him (during the period 9th October 2020 to 13th January 2021).

4.1.2 Threaten the claimant with the termination of his employment if he could not obtain a suitable alternative employment role within the respondent's 3 month deadline.

4.1.3 Pressurise/require the claimant to disclose his medical condition or history to friends or colleagues at work (in order to explain why he would be stepping back from certain aspects of his job).

4.2 If so, was that unwanted conduct?

4.3 Did it relate to disability?

4.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

4.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

5. Remedy for discrimination or victimisation

5.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

5.2 What financial losses has the discrimination caused the claimant?

5.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

5.4 If not, for what period of loss should the claimant be compensated?

5.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

5.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

5.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

5.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

5.9 Did the respondent or the claimant unreasonably fail to comply with it?

5.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

5.11 By what proportion, up to 25%?

5.12 Should interest be awarded? How much?