EMPLOYMENT TRIBUNALS

Claimant:	**Jason Lock**	
Respondent:	**Bryn Afon Community Housing Ltd**	
Heard at:	**Cardiff**	**On: 13 April, 14 April, 19 April, 20 April, 22 April, 25 April, 26 April, 27 April, 28 April 2022,**
Before:	**Employment Judge R Brace** **Members:** **Mrs M Humphries and** **Mr A Fryer**	

Representation:
Claimant: In person
Respondent: Ms A Johns (Counsel)

RESERVED JUDGMENT

By consent the name of the Respondent is amended to Bryn Afron Community Housing Ltd

The Claimant has permission to amend his claims to include claims as set out in the agreed List of Issues and to include claims under s.15 Equality Act 2021.

It is the unanimous decision of the Tribunal that:

1. The Claimant is not a disabled person pursuant to s.6 Equality Act 2010 at the relevant time by reason of his carpel tunnel syndrome.

2. The complaints of harassment (s.26 Equality Act 2010) are not well-founded and are dismissed.

3. The complaints of direct discrimination (s.13 Equality Act 2010) in relation to the failure to disclose the HAV form and/or carry out a risk assessment in April 2017 are out of time, time is not extended.

4. The remaining complaints of direct discrimination (s.13 Equality Act 2010) are not well founded and are dismissed.

5. The complaints of discrimination arising from disability (s.15 Equality Act 2010) are not well founded and are dismissed.

6. The complaints of indirect discrimination (s.19 Equality Act 2010) are dismissed as:

    a. out of time and time is not extended (claim in respect of period of time prior to October 2017); or
    b. not well founded (claim in respect of period of time following November 2018).

7. The complaints of failure to make a reasonable adjustments (s.20/21 Equality Act 2010) in relation to the PCP of requiring employees to carry out their contracted role is well founded in that the Respondent failed to make a reasonable adjustment from 24 August 2018 in:

        i. Failing to adjust the Claimant's role by assigning tasks to him that did not involve heavy manual handling in line with PHA recommendations; and/or
        ii. By failing to deploy the Claimant to undertake miscellaneous tasks and/or as an electrician with a 'buddy' alongside him to assist with any tasks he struggled with; and/or
        iii. Providing the Claimant with an auxiliary aid of a step-ladder and/or a hop-up platform.

8. The remaining complaints of failure to make a reasonable adjustments (s.20/21 Equality Act 2010) are dismissed.

9. The Claimant's grievance and his ET1 claim amount to 'protected acts' under s.27(2) Equality Act 2010, but the complaints of victimisation (s.27 Equality Act 2010) are not well-founded and are dismissed.

10. A one hour telephone preliminary hearing (telephone or CVP) will be listed to consider further case management for a further remedy hearing.

REASONS

1. Early conciliation commenced on this claim on 18 January 2019 and ended on 1 March 2019 [1]. On 7 March 2019, the Claimant filed his ET1 [2] claiming disability discrimination.

2. The Claimant is now 52 years of age and commenced working with the Respondent on 8 December 2008 as a plasterer. He is no longer in employment with the Respondent, his employment having ended since the issue of this claim.

3. Whilst the Claimant did issue a second claim in relation to events that post date this claim [1029], a second claim which was at one stage consolidated with this claim, that second claim has now been struck out and claims arising from the termination of the Claimant's employment do not form part of this claim.

The claims

4. The Claimant's ET 1 referred to the diagnosis of cervical spondylosis and a right shoulder compression operation in 2016, together with possible carpal tunnel. The Claimant claimed that no risk assessments had been done at all or after he returned to work in October 2016. The Claimant claimed that he was a higher multi-skilled operative.

5. The Claimant asserted he was again diagnosed with possible bilateral carpal tunnel and cervical spondylosis in October 2017 and complained that:

    a. no welfare visit had been undertaken for 9 months;
    b. he was refused to return to work for adjusted role;
    c. he was not informed that a temporary supervisor role was available;
    d. he had his qualifications questioned and declared a risk to the business; and
    e. when he returned to work, there had been no risk assessment and the Respondent "broke their policies" regarding grievance and attendance.

6. He alleged that he had been bullied and threatened in one meeting and was harassed by the supervisor after making it clear that he did not wish to discuss his concerns with him. He also complained that he was nearly "pensioned off".

7. The ET1 claim referred to 'victimisation' and 'harassment' in general terms only.

8. In the ET3 [25], the Respondent asserted that the Claimant was a trade operative (plasterer) and disputed that the tribunal had jurisdiction to consider those parts of the claim predating 19 October 2018 as a result of the dates of the early conciliation certificate and on the basis that the Respondent did not admit that there had been a continuing act.

9. Whilst the Respondent denied that the Claimant was disabled at the time of the alleged discriminatory treatment, it was admitted that he Respondent had knowledge of various conditions of the Claimant and that they had been informed by the Claimant that from 2014 he had the following:

    a. the inflammation and knee joint pain;
    b. osteoarthritis;
    c. rotator cuff syndrome/shoulder/arm pain;
    d. lower back pain;
    e. cervical spondylosis;
    f. anxiety with depression.

10. On 17 June 2019 [62], at a case management hearing before Judge Moore, discrimination arising from disability was clarified and explained to the Claimant who confirmed that he was not bringing a claim under s.15 Equality Act 2010 ("EqA 2010). The Claimant was directed to complete a schedule, prepared by the Respondent, setting out his disability discrimination complaints and, in respect of each act or omission relied on, the dates, brief details what happened identification of the person or persons involved, to say whether it amounted to direct discrimination or breach of the duty to make reasonable adjustments or victimisation. The Claimant was also directed to confirm whether, in respect of the reason adjustments claim, he agreed that the PCP was "a requirement to maintain regular attendance at work" ("Claimant's Schedule").

11. The Claimant's Schedule was filed on 28 July 2019 [52] which referred to 23 claims as being claims of 'Duty of Care' HASAW, Equality, Victimisation and Harassment. The Claimant also sought to amend his claim to bring a further 11 claims of discrimination and again used general terms to describe the particular type of disability discrimination claim he was bringing.

12. On 28 August 2019, the Respondent filed an amended ET3 Rider [84] denying in general the claims of direct disability discrimination, harassment, failure to be reason adjustments and victimisation. It was understood at that stage that the Claimant was not claiming indirect discrimination and/or discrimination arising from disability. The ET3 Grounds of Response was in narrative format and indicated that further detail was required from the Claimant in order to understand the allegations. Despite that general pleading, the Respondent then attempted to plead to the claims as it understood them.

13. A further case management hearing took place on 5 September 2019 before Judge Harvard [95], when the Claimant, with the consent of the Respondent was permitted to amend his claim to include the additional allegations contained in paragraph 24 to 33 of the Schedule and the Respondent was provided with permission to serve an amended response to that claim. It was also agreed by the Respondent that allegations 1-13 of the Schedule were simply relabelling of the claims that were already in existence in the ET1. The Respondent's solicitor confirmed that she was not pursuing a request for further information of the claims at that time.

14. On 5 September 2019, the Respondent submitted its further amended ET3 Grounds of Resistance and again indicated that the Claimant's Schedule did not provide a full explanation of the claims that the Claimant was pursuing and that further detail was needed to understand the allegations [101]. The case was listed for a 5 day hearing commencing on 4 November 2019.

15. That hearing was postponed due to the ill-health of the Claimant and relisted for March 2020. In February 2020, at case management before Judge Jenkins, both parties confirmed that all case management orders had been complied with and no further orders were required and it appeared that the case was ready to be hearing. The hearing was postponed in February 2020 again due to the Claimant's ill-health and the re-listing was delayed as a result of the Covid-19 pandemic.

16. On 2 July 2020, the Claimant issued his second claim (1601481/2020) which related to the Claimant's dismissal and the claims were consolidated [1029]. This final hearing was listed for the consolidated claim for 10 days.

17. For reasons set out in the Case Summary of Judge Harfield's case management order of 23 March 2022 [1153] the second claim was struck out leaving the first claim, this claim remaining to be heard.

18. At that case management hearing the Claimant's application for a postponement was refused but before Judge Harfield could get clarity on the claims and issues arising from the Claimant's claims, the Claimant left the hearing and the Judge was unable to discuss with the parties the claims that the Claimant was bringing or the issues arising from the claims. Orders were made by Judge Harfield for the Respondent to send to the Claimant a list of Issues and for the Claimant to agree or propose amendments to the draft list of issues in advance of the final merits hearing and directed that the second day of this hearing would listed for case management to discuss that list of issues.

Further case management Day 2, Day 3 and Day 4

19. The first day of the hearing was dedicated to the Tribunal reading time and the second, third and fourth days were given to case managing the case, which

included explaining to the Claimant how a tribunal claim proceeds, considering an application from the Claimant to adduce additional documentary evidence, discussion of the complaints and issues arising from those complaints and time-tabling.

20. The discussion of the complaints and clarification of the type of discrimination claim and issues arising from such claims, resulted in a further application from the Claimant to amend his claim in order to bring claims of direct discrimination (s.13 EqA 2010), discrimination arising from disability (s.15 EqA 2010) indirect discrimination (s.20/21 EqA 2010), harassment (s.25 EqA 2010) and victimisation (s.27 EqA 2010).

21. The Respondent's counsel agreed that the majority of the amendments were essentially re-labelling issues. These amendments were permitted as minor amendments. Ms Johns objected to the Claimant now claiming that a number of his claims were properly brought under s.15 EqA 2010.

22. After considering representations from both parties, the Claimant was given permission to bring certain claims under s.15 EqA 2010 (as reflected in the following List of Issues) and oral reasons were provided to the parties during the hearing.

23. Following extensive case management, the following issues were agreed to be the List of Issues arising from the complaints brought by the Claimant. Within the List of Issues only cross-references to claims in the Claimant's Schedule are in bold and [] and references to page numbers in the Bundle are in bold. The Respondent concedes that the Claimant was a disabled person and that it had knowledge of such disabilities at the relevant times in relation to:

    a. Anxiety, depression and stress from 23 January 1989 onwards;
    b. Knee osteoarthritis from 19 December 2016 onwards; and
    c. Cervical spondylosis and rotator cuff syndrome from 28 July 2015 onwards.

Time limits

1. *Were the Claimant's discrimination complaints presented within the time limits set out in s.123(1)(a) Equality Act 2010?*

2. *The Claimant approached ACAS for the purpose of early conciliation on 18 January 2019 and the certificate was issued on 1 March 2019. The Claimant presented his claim on 3 March 2019. The Respondent contends that any complaints relating to acts that occurred on or before 19 October 2018 are out of time and outside the Tribunal's jurisdiction.*

3. *Do any acts that occurred on or before 19 October 2018 form part of a continuing series of acts within the meaning of s.123(3)(a) Equality Act 2010, the last of which is in time?*

4. *Would it be just and equitable for the Tribunal to extend time pursuant to s.123(1)(b) Equality Act 2010?*

Disability

5. *The Claimant relies on the following conditions as disabilities (**p.47**):*

   (i) Anxiety, depression and stress from 23 January 1989 onwards;
   (ii) Knee osteoarthritis from 19 December 2016 onwards;
   (iii) Carpal tunnel syndrome from 26 April 2017 onwards; and
   (iv) Cervical spondylosis and rotator cuff syndrome from 28 July 2015 onwards.

6. *The timeframe of the Claimant's allegations is 26 April 2017 to 19 July 2019.*

7. *The Respondent accepts conditions (i), (ii) and (iv) amounted to a disability at the relevant time and that it had knowledge of these disabilities at the relevant time.*

8. *Did the Claimant's carpal tunnel syndrome amount to a disability from 26 April 2017?*

   (i) Did the Claimant's carpal tunnel syndrome have an adverse effect on his ability to carry out normal day to day activities?

   (ii) Was the adverse effect substantial (i.e. more than trivial)?

   (iii) Was the adverse effect long term (i.e. had it lasted or was it likely to last for at least 12 months)?

9. *Did the Respondent know, or could it reasonably be expected to know, that the Claimant's carpal tunnel syndrome amounted to a disability?*

Direct discrimination – s.13 Equality Act 2010

10. *Did the Respondent, because of the Claimant's disability, treat him less favourably than it treated or would have treated others in not materially different circumstances?*

11. *The Claimant alleges the following acts occurred and that they amounted to direct discrimination:*

    (a) *The Respondent did not disclose the HAV form dated 26 April 2017 (**p.280**) to the Claimant and did not carry out a risk assessment on 26 April 2017 **[2]**. The Claimant relies on Aaron Vincent as a comparator. The Claimant says the Respondent would have disclosed an HAV form to Aaron Vincent.*

    (b) *The Respondent did not refer the Claimant to Occupational Health for 90 days from 23 October 2017 to 23 January 2018 **[4]**. The Claimant relies on a hypothetical comparator. The Claimant says the Respondent would have referred an employee with an injury that did not amount to a disability to Occupational Health sooner.*

    (c) *The Respondent did not carry out a welfare visit for 9 months from 23 October 2017 to 6 July 2018 **[5]**. The Claimant relies on Aaron Vincent as a comparator. The Claimant says the Respondent carried out a welfare visit for Aaron Vincent in a shorter period of time.*

    (d) *Cath Hughes wrote in an email to Paul Blackwell on 16 March 2018 (**p.318**): "I think that we have to start considering if we can sustain this level of absence" **[6]**. The Claimant relies on a hypothetical comparator. The Claimant says the Respondent would not have said this about an employee who had been absent from work for the same length of time but who did not have a disability.*

    (e) *The Respondent did not implement the recommendations set out in the OH reports of 26 April 2017 (HAV form **p.280**) **[3]**, 18 May 2018 (**p.328**) **[7]**, 13 August 2018 (**p.338**) **[11]** and 3 October 2018 (**p.350**) **[13]** and Craig Allford disregarded the Claimant's qualifications in May 2018 **[24]**. The Claimant relies on Aaron Vincent and Kevin Thomas as comparators. The Claimant says the Respondent allowed Aaron Vincent to perform adjusted duties when he was injured **[9]** and allowed Kevin Thomas to undertake surveying when he was injured **[8]**. In respect of disregarding his qualifications, the Claimant relies on a hypothetical comparator.*

*(f) Following the welfare visit on 6 July 2018 the Respondent took 7 weeks to send out a follow up letter on 23 August 2018 (**p.342**) **[10]**. The Claimant relies on Aaron Vincent as a comparator and/or a hypothetical comparator. The Claimant says the Respondent did not delay in sending a follow up letter to Aaron Vincent and/or it would not have delayed in sending a follow up letter to an employee who had had a welfare visit but was not disabled.*

*(g) The Respondent sent out two differing welfare letters on 15 October 2018 (**p.359**) and 19 October 2018 (**p.366**) **[14]**. The Claimant relies on Aaron Vincent as a comparator and/or a hypothetical comparator. The Claimant says the Respondent did not send out two differing welfare letters to Aaron Vincent and/or it would not have sent out two differing welfare letters to an employee who was not disabled.*

*(h) The Respondent raised the issue of ill-health retirement and brought along the relevant paperwork to the welfare meeting in October 2018 **[14]**. The Claimant relies on a hypothetical comparator. The Claimant says the Respondent would not have raised the issue of ill-health retirement with an employee who had been absent for the same length of time but who was not disabled.*

*(i) The Respondent did not offer a temporary role to the Claimant to cover Ashley Bayliss' post while he was absent from work in October 2018 for 3-4 weeks **[15]**. The Claimant relies on Chris Thomas and Steve Jenkins as comparators. The Claimant says the Respondent offered the temporary cover role to Chris Thomas and Steve Jenkins.*

*(j) After the Claimant provided a letter from his consultant on 5 November 2018 (**p.375**) and a letter from his GP on 7 November 2018 (**p.380**), the Respondent did not allow the Claimant to return to work until he had seen Occupational Health **[16]**. The Claimant relies on a hypothetical comparator. The Claimant says the Respondent would have allowed a non-disabled employee who had been absent for the same length of time to return to work without seeing Occupational Health.*

*(k) On 3 December 2018 Ashley Bayliss approached the Claimant in his van and accused him of being unprofessional **[21]**. The Claimant relies on a hypothetical comparator. The Claimant says Ashley Bayliss would not have accused a non-disabled employee of being unprofessional in the same circumstances.*

*(l) Martyn Savage conducted the Claimant's ARM on 5 December 2018 instead of the Claimant's line manager Ashley Bayliss **[22]**. The Claimant relies on a hypothetical comparator. The Claimant says if a non-disabled employee had been absent for the same length as time the ARM would have been conducted by their line manager.*

*(m) At the ARM on 5 December 2018 Martyn Savage referred to three absences instead of one absence **[22]**. The Claimant relies on a hypothetical comparator. The Claimant says the Respondent would not have referred to three absences of an employee who had the same absence record as the Claimant but who was not disabled.*

*(n) During the grievance investigation in January 2019 the Respondent's witnesses made false statements to the investigator **[24]**. The Claimant relies on a hypothetical comparator. The Claimant says the Respondent's witnesses would not have made false statements during a grievance investigation in relation to a grievance submitted by an employee who was not disabled. The statements that the Claimant alleges to be false are:*

*i. Martyn Savage said Paul Blackwell had been managing the Claimant's absence and there was no diagnosis (**p.464**).*

*ii. Craig Allford said the Claimant's qualifications did not fit the Respondent's needs and the phrase "I had to look at the risk to the business" was a reference to the Claimant being a risk to the business (**p.484**).*

*iii. Ashley Bayliss said he had asked the Claimant to stand on a ladder and raise his arms; that he was limited on the work he could give the Claimant and that he was too much of a risk; and that the Claimant had gone missing for 4 weeks (**p.485**).*

*iv. When questioned on when the Respondent had received a prognosis for the Claimant's condition Kimberly Williams said: "later than October" (**p.507**).*

*v. Cath Hughes said: "I started gently explaining he needs to be more proactive" (**p.509**).*

(o) *In February 2019 Ashley Bayliss made it a policy that the Claimant had needed a scan to return to work in August 2018 (**p.956-957**) **[25]**. The Claimant relies on a hypothetical comparator. The Claimant says Ashley Bayliss would not have made this a policy in relation to a non-disabled employee.*

(p) *Ian Harris did not deal with two issues in the Claimant's grievance **[26]**. The Claimant relies on a hypothetical comparator. The Claimant says Ian Harris would have dealt with these issues if a non-disabled employee had raised them. The two issues are:*

i. *Sue Price accepted that the Respondent had not organised enough welfare visits during the Claimant's absence.*

ii. *The Claimant said he had been fit to return to work and was not allowed to do so, whereas Aaron Vincent had been allowed to return to work when he was not fit to do so.*

(q) *After the Claimant went off sick on 6 March 2019 the Respondent delayed too long in referring him to Occupational Health on 7 March 2019 (**p.572**) **[27]**. The Claimant says he should have been referred on 6 March 2019. The Claimant relies on a hypothetical comparator. The Claimant says the Respondent would have referred an employee who was not disabled to Occupational Health the same day they went off sick.*

(r) *The Respondent started an informal investigation on 9 April 2019 in which it accused the Claimant of badgering Aaron Vincent despite there being no complaint from Aaron Vincent, and accused him of inappropriate behaviour by walking out of a team meeting, being aggressive and going against the Respondent's values **[28]**. The Claimant relies on a hypothetical comparator. The Claimant says the Respondent would not have started an informal investigation in respect of an employee in the same circumstances as the Claimant but who was not disabled.*

(s) *The Claimant reported the content of the meeting on 9 April 2019 to HR and received no response **[28]**. The Claimant relies on a hypothetical comparator. The Claimant says the Respondent would have replied to an employee who had complained about the content of a meeting but who was not disabled.*

(t) *The Respondent sent a disciplinary investigation letter to the Claimant on 26 April 2019 (**p.651**) **[29]**. The Claimant relies on a hypothetical comparator. The Claimant says the Respondent would not have sent such a letter to a non-disabled employee in the same circumstances.*

(u) *The Respondent did not complete a stress risk assessment until 12 June 2019. The Claimant says this should have been completed in November 2018 **[31]**. The Claimant relies on a hypothetical comparator. The Claimant says the Respondent would have completed a stress risk assessment sooner for an employee who was suffering with stress but who did not have a disability.*

(v) *After the disciplinary investigation letter of 26 April 2019 (**p.651**) the Respondent did not contact the Claimant to organise an investigation meeting until 18 July 2019 (**p.742**) **[29]**. The Claimant relies on a hypothetical comparator. The Claimant says the Respondent would not have delayed so long in organising an investigation meeting for an employee who was not disabled.*

Discrimination arising from disability – s.15 Equality Act 2010

Cath Hughes' comment on 16 March 2018

12. *Was the Claimant's absence from 23 October 2017 something arising in consequence of his disability?*

13. *Did the Respondent treat the Claimant unfavourably because of his absence when Cath Hughes wrote in an email to Paul Blackwell on 16 March 2018 (**p.318**): "I think that we have to start considering if we can sustain this level of absence"? **[6]***

14. *Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The Respondent relies on the legitimate aims of managing employee attendance and ensuring it has sufficient staff to carry out the required work.*

Ill-health retirement in October 2018

15. *Was the Claimant's absence from 23 October 2017 something arising in consequence of his disability?*

16. *Did the Respondent treat the Claimant unfavourably by raising the issue of ill-health retirement and bringing along the relevant paperwork to the welfare meeting in October 2018? **[14]***

17. *Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The Respondent relies on the legitimate aim of ensuring employees on long term sickness absence are aware of the potential option of ill-health retirement.*

Return to work in November 2018

18. *Was the Claimant's absence from 23 October 2017 something arising in consequence of his disability?*

19. *Did the Respondent treat the Claimant unfavourably by not allowing him to return to work after he had provided a letter from his consultant on 5 November 2018 (**p.375**) and a letter from his GP on 7 November 2018 (**p.380**) until he had seen Occupational Health? **[16]***

20. *Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The Respondent relies on the legitimate aim of ensuring it is safe for employees who have been on long term sickness absence to return to work.*

Considering Stage 2 ARM on 5 December 2018

21. *Was the Claimant's absence from 23 October 2017 to 19 November 2018 something arising in consequence of his disability?*

22. *Did the Respondent treat the Claimant unfavourably by considering at the Stage 1 ARM on 5 December 2018 proceeding to a Stage 2 ARM in circumstances where this was unwarranted? **[22]** The Claimant accepts he did not proceed to a Stage 2 ARM.*

23. *Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The Respondent relies on the legitimate aim of following its Absence Management policy.*

Conduct on 5 December 2018

24. *Was the Claimant's absence from 23 October 2017 to 19 November 2018 something arising in consequence of his disability?*

25. *Did the Respondent treat the Claimant unfavourably at the ARM on 5 December 2018 by Carleen Martin saying: "If this happens again it won't last this long" and Martyn Savage dealing with three absences instead of one?* ***[22]***

26. *Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The Respondent relies on the legitimate aim of upholding attendance standards.*

Indirect discrimination – s.19 Equality Act 2010

Power tools and repetitive tasks

27. *Did the Respondent apply a PCP of requiring Trade Operatives to use power tools and carry out repetitive tasks?* ***[3]***

28. *Did that PCP place individuals with cervical spondylosis and rotator cuff syndrome and/or carpal tunnel syndrome at a particular disadvantage compared to those without a disability? The Claimant says the PCP would exacerbate these conditions.*

29. *Did the PCP put the Claimant at that particular disadvantage?*

30. *Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The Respondent relies on the legitimate aims of providing a safe environment for its residents and ensuring upkeep and maintenance of its housing.*

Failure to make reasonable adjustments – s.20/21 Equality Act 2010

Power tools and repetitive tasks

31. *Did the Respondent apply a PCP of requiring Trade Operatives to use power tools and carry out repetitive tasks?* ***[3]***

32. *Did that PCP place the Claimant at a substantial disadvantage in comparison with those who were not disabled? The Claimant says the PCP exacerbated his cervical spondylosis and rotator cuff syndrome and/or carpal tunnel syndrome.*

33. *Did the Respondent know or could it have reasonably been expected to know that the Claimant was likely to be placed at any such disadvantage?*

34. *Were there reasonable steps not taken by the Respondent that could have been taken to avoid the disadvantage? The Claimant suggests a reasonable adjustment would have been to carry out a risk assessment.*

Welfare visits

35. *Did the Respondent apply a PCP of not carrying out welfare visits after every Occupational Health appointment?* ***[5]***

36. *Did that PCP place the Claimant at a substantial disadvantage in comparison with those who were not disabled? The Claimant says the PCP meant he was not given an opportunity to discuss reasonable adjustments to enable him to return to work.*

37. *Did the Respondent know or could it have reasonably been expected to know that the Claimant was likely to be placed at any such disadvantage?*

38. *Were there reasonable steps not taken by the Respondent that could have been taken to avoid the disadvantage? The Claimant suggests a reasonable adjustment would have been to organise a welfare visit after every Occupational Health appointment.*

Adjusted role

39. *Did the Respondent apply a PCP of requiring employees to carry out their contracted role?*

40. *Did that PCP place the Claimant at a substantial disadvantage in comparison with those who were not disabled? The Claimant says the PCP meant he was not able to work from 23 October 2017 onwards.*

41. *Did the Respondent know or could it have reasonably been expected to know that the Claimant was likely to be placed at any such disadvantage?*

42. *Were there reasonable steps not taken by the Respondent that could have been taken to avoid the disadvantage? The Claimant suggests the following measures would have been reasonable adjustments:*

    *(i) Adjusting his role by assigning tasks to him that did not involve heavy manual handling in line with the Occupational Health recommendations on 18 May 2018 (**p.328**) **[7]**, 13 August 2018 (**p.338**) **[11]** and 3 October 2018 (**p.350**) **[13]**.*

    *(ii) Deploying him as an Electrician with an auxiliary aid of a step ladder and/or a hop-up platform. **[24]***

    *(iii) Deploying him as an Electrician with a "buddy" working alongside him to assist with any tasks he struggled with. **[24]***

    *(iv) Offering the Claimant to cover Ashley Bayliss' role while he was absent from work in October 2018 for 3-4 weeks. **[15]***

Harassment related to disability – s.26 Equality Act 2010

43. *Did the following acts occur?*

    *(a) Craig Allford disregarded the Claimant's qualifications in or around May 2018. **[24]***

    *(b) On 3 December 2018 Ashley Bayliss approached the Claimant in his van and accused him of being unprofessional. **[21]***

    *(c) During the grievance investigation in January 2019 the Respondent's witnesses made the following false statements to the investigator: **[24]***

        *i. Martyn Savage said Paul Blackwell had been managing the Claimant's absence and there was no diagnosis (**p.464**).*

ii. *Craig Allford said the Claimant's qualifications did not fit the Respondent's needs and the phrase "I had to look at the risk to the business" was a reference to the Claimant being a risk to the business (**p.484**).*

iii. *Ashley Bayliss said he had asked the Claimant to stand on a ladder and raise his arms; that he was limited on the work he could give the Claimant and that he was too much of a risk; and that the Claimant had gone missing for 4 weeks (**p.485**).*

iv. *When questioned on when the Respondent had received a prognosis for the Claimant's condition Kimberly Williams said: "later than October" (**p.507**).*

v. *Cath Hughes said: "I started gently explaining he needs to be more proactive" (**p.509**).*

(d) *The Respondent started an informal investigation into the Claimant on 9 April 2019 in which the Respondent accused the Claimant of badgering Aaron Vincent despite there being no complaint from Aaron Vincent, and accused him of inappropriate behaviour by walking out of a team meeting, being aggressive and going against the Respondent's values. **[28]***

(e) *The Claimant reported the content of the meeting on 9 April 2019 to HR and received no response. **[28]***

(f) *The Respondent sent a disciplinary investigation letter to the Claimant on 26 April 2019 (**p.651**). **[29]***

(g) *The Respondent did not complete a stress risk assessment until 12 June 2019 (**p.719**). **[31]***

(h) *In a letter on 2 July 2019 the Respondent said the Claimant may be subject to disciplinary action in relation to his audio recordings (**p.730**). **[32]***

(i) *After the disciplinary investigation letter of 26 April 2019 (**p.651**) the Respondent did not contact the Claimant to organise an investigation meeting until 18 July 2019 (**p.742**). **[33]***

44. Did the above acts amount to unwanted conduct?

45. Was the unwanted conduct related to the Claimant's disability?

46. Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

47. Taking into account the Claimant's perception and the other circumstances of the case, was it reasonable for the conduct to have that effect?

Victimisation – s.27 Equality Act 2010

Grievance on 13 November 2018

48. Did the Claimant's submission of his grievance on 13 November 2018 amount to a protected act in accordance with s.27(2) Equality Act 2010?

49. Did the Respondent subject the Claimant to a detriment because he submitted his grievance? The Claimant relies on the following detriments:

(a) On 3 December 2018 Ashley Bayliss approached the Claimant in his van and accused him of being unprofessional. ***[21]***

(b) During the grievance investigation in January 2019 the Respondent's witnesses made the following false statements to the investigator: ***[24]***

*i. Martyn Savage said Paul Blackwell had been managing the Claimant's absence and there was no diagnosis (**p.464**).*

*ii. Craig Allford said the Claimant's qualifications did not fit the Respondent's needs and the phrase "I had to look at the risk to the business" was a reference to the Claimant being a risk to the business (**p.484**).*

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*and that he was too much of a risk; and that the Claimant had gone missing for 4 weeks (**p.485**).*

iv. *When questioned on when the Respondent had received a prognosis for the Claimant's condition Kimberly Williams said: "later than October" (**p.507**).*

v. *Cath Hughes said: "I started gently explaining he needs to be more proactive" (**p.509**).*

(c) *The Respondent started an informal investigation into the Claimant on 9 April 2019 in which the Respondent accused the Claimant of badgering Aaron Vincent despite there being no complaint from Aaron Vincent, and accused him of inappropriate behaviour by walking out of a team meeting, being aggressive and going against the Respondent's values. **[28]***

(d) *The Claimant reported the content of the meeting on 9 April 2019 to HR and received no response. **[28]***

(e) *The Respondent sent a disciplinary investigation letter to the Claimant on 26 April 2019 (**p.651**). **[29]***

(f) *The Respondent did not complete a stress risk assessment until 12 June 2019 (**p.719**). **[31]***

(g) *In a letter on 2 July 2019 the Respondent said the Claimant may be subject to disciplinary action in relation to his audio recordings (**p.730**). **[32]***

(h) *After the disciplinary investigation letter of 26 April 2019 (**p.651**) the Respondent did not contact the Claimant to organise an investigation meeting until 18 July 2019 (**p.742**). **[33]***

<u>Tribunal claim on 3 March 2019</u>

50. *Did the Claimant's submission of his Tribunal claim on 3 March 2019 amount to a protected act in accordance with s.27(2) Equality Act 2010?*

51. *Did the Respondent subject the Claimant to a detriment because he submitted his Tribunal claim? The Claimant relies on the following detriments:*

    (a) The Respondent started an informal investigation into the Claimant on 9 April 2019 in which the Respondent accused the Claimant of badgering Aaron Vincent despite there being no complaint from Aaron Vincent, and accused him of inappropriate behaviour by walking out of a team meeting, being aggressive and going against the Respondent's values. ***[28]***

    (b) The Claimant reported the content of the meeting on 9 April 2019 to HR and received no response. ***[28]***

    *(c) The Respondent sent a disciplinary investigation letter to the Claimant on 26 April 2019 (**p.651**).* ***[29]***

    *(d) The Respondent did not complete a stress risk assessment until 12 June 2019 (**p.719**).* ***[31]***

    *(e) In a letter on 2 July 2019 the Respondent said the Claimant may be subject to disciplinary action in relation to his audio recordings (**p.730**).* ***[32]***

    *(f) After the disciplinary investigation letter of 26 April 2019 (**p.651**) the Respondent did not contact the Claimant to organise an investigation meeting until 18 July 2019 (**p.742**).* ***[33]***

Evidence

24. The Tribunal had before it a bundle of some 1,788 pages and the parties were informed that unless a witness referred to a document in their witness statement, or the Tribunal was referred to a specific document on questioning or summing up the parties should not assume that we had read such a document. References to documents in the agreed bundle are references in these written reasons with [X]. The additional documents that were permitted were included in a separate bundle and are referred to as [JPEJ Bundle x].

25. The Tribunal also had before it a witness statement from the Claimant (page 1-16 Witness Bundle) and from the following witnesses of the Respondent. The

titles given were the titles included in the written witness statements as opposed to current roles in the Respondent organisation:

a. Carleen Martin (previously HR Business Partner), no longer employed by the Respondent ;
b. Kimberley Williams (HR Adviser);
c. Ashley Bayliss (Repairs Supervisor);
d. Craig Allford (Project Manager);
e. Neil Jones (Responsive and Void Manager and Claimant's union representative);
f. Ian Harris (Head of Direct Services and grievance Appeal Officer), no longer employed by the Respondent;
g. Adrian Herbert (Plans Services Manager and grievance Investigation Officer); and
h. Martin Savage (Contracts Manager).

26. The Tribunal had also been provided with witness statements from the following witnesses for the Respondent:

a. Cath Hughes (HR Business Partner);
b. Sue Price (HR Business Partner); and
c. Shaun Jones (team Leader).

27. The Respondent confirmed that these were no longer employed by the Respondent and had not responded to requests by the Respondent to attend on a voluntary basis to give live evidence. The Respondent did not wish to apply for witness summons to require their attendance. Whilst the Claimant did have a desire to cross-examine such witnesses, particularly Cath Hughes, he likewise had no wish to apply for a witness summons to require their attendance.

28. A timetable was agreed for the cross-examination of the Claimant of one day, and the Claimant had three days to cross-examine the 9 witnesses of the Respondent.

29. Witness statements were taken as read. The Claimant and the Respondent witnesses present were asked questions of by the opposing party and the Tribunal.

30. It was agreed that the Tribunal would consider evidence in relation to liability first and only if the Claimant was successful, would we then consider remedy. Evidence was completed by the end of day 8 of the hearing and submissions were taken from the parties on the morning of day 9.

31. Regular breaks every hour were agreed as an adjustment for the Claimant who confirmed that he did not require any other adjustments. An application was made for Ashley Bayliss to give evidence remotely due to his hearing impairment. This application was refused and the witness was required to give evidence in person. A hearing loop was provided by HMCTS which unfortunately did not operate with the witness's hearing aid but the evidence was given with little to no issue with the witness's ability to answer questions.

Facts

32. The following findings of facts were made based on balance of probabilities and on the evidence before the Tribunal.

Terms and Conditions and Claimant's role

33. The Claimant was employed on terms and conditions set out in a statement of particulars signed on 8 December 2008 [187]. The job title given was as a Plasterer Band 2 based at the Respondent's central office in Llantarnum ("Particulars"). He was contracted to work 37 hours per week. The particulars also provided that the Claimant could be employed in a new service area or given alternative duties other than those to which he was initially appointed as necessary to meet the needs of the Respondent [189].

34. The particulars also provided for sickness pay in accordance with the sickness absence policy which, after five years of service, provided the Claimant was six months full pay and six months' half pay [191].

35. There is a dispute as to whether the Claimant was employed as a 'Plasterer' or as a 'Multi-Skilled Operative'.

36. Whilst we found that originally the Claimant was employed as a plasterer and that he was assigned to 'jobs' that were focussed on plastering, the Claimant had over the years progressed through the Respondent's grading structure and was referred to as a Plasterer / Multi-skilled operative. Indeed this is how he was referred to within the Grievance Investigation Report prepared by Adrian Herbert [522].

37. Whilst none of the witnesses had included evidence within their witness statements as to where the Claimant worked and what his day to day duties included, this evidence was obtained in live evidence through additional questions asked by the Tribunal and the parties.

38. We found that the Claimant was employed in the Respondent's Responsive Repairs department, a department responsible for repair work in tenanted properties, works included all types of housing repair that would routinely be required in a domestic dwelling including:

a. Painting;
b. Plastering;
c. Electrical;
d. Plumbing;
e. Carpentry; and
f. Miscellaneous or 'odd jobs' e.g. fixing cabinetry, replacing locks etc.

39. The Claimant was employed as a plasterer / multi-skilled operative and would be allocated to 'jobs' based on his plastering role. The system adopted by the Respondent, when a tenant needed repair works on a tenanted property, would be for the tenant to call the Respondent's customer services call centre, or 'Hub' as it was referred to and, based on the information given by the tenant, the customer services operative would log the call based on what they considered was required, whether electrical works or plumbing or other repairs. An automated customer relationship management software would allocate the repair work required to the operatives based on their primary skill or core trade, in the Claimant's case, plastering. This plastering would involve small repair plastering and could also involve the Claimant being required to undertake other minor works such as electrical or carpentry as required to 'make good' any works carried out.

40. During the Claimant's employment with the Respondent he progressed through the Respondent's banding scheme ultimately reaching Grade 4 – that of Higher Multi-Skilled Operative [JPEG 7].

41. During the course of his employment with the Respondent, the Claimant also achieved City & Guilds qualifications and NVQs including:

    a. EAL Level 3 NVQ Extended Diploma in Installation & Commissioning [JPEG 17] on 11 March 2015;
    b. Level 3 City & Guilds in Electrotechnical Technology Installation (Buildings and Structures) [JPEG 19] on 27 June 2013;

Absence in 2015 and 2016

42. In 2015, the Claimant was absent from work with conditions that had been identified as rotator cuff syndrome and cervical spondylitis and on 26 August 2015, the Claimant's supervisor and HR met with the Claimant as part of a welfare visit to discuss his ongoing absence from work as a result of his conditions. The Claimant was subsequently sent a letter setting out the discussions that had taken place [219] and it was agreed that the Respondent would refer him to their Occupational Health Adviser ("OHA") to ascertain if he would be able to return to work and if so, what adjustments would be required.

43. The Respondent subsequently received the occupational health assessment by way of letter dated 22 September 2015 [227] in which it was reported that they had concluded that the Claimant was not currently fit for his substantive role as a plasterer but that he was fully fit for the redeployed role that the respondent has suggested as a temporary adjusted role, namely

    a. Undertaking surveys and providing technical; details
    b. Inputting data
    c. general surveying duties that would not normally entail entering attic spaces working at height for ladders …….[226].

44. At that stage:

    a. it was considered that a prognosis was not possible to predict but that there was a "very good chance" that the Claimant would make a full recovery in the future;
    b. that it was not possible to make an accurate prediction as to how long that was likely to take.
    c. That it was hoped that once recovered, recurrence would not be likely, but again this was very hard to make an accurate prediction.
    d. No additional support was considered necessary but that it was likely that they would recommend a phased return.

45. The Claimant returned to work undertaking surveying duties in an adjusted duties capacity [231] and on 14 June 2016, the Claimant had surgery .

46. Following surgery it was anticipated that the recovery period would be 6-8 weeks and the Respondent anticipated that following the recovery the Claimant would be fit to return to full duties [247]. An appointment was arranged for the Claimant to see the Respondent's OHA on 18 July 2016.

47. The Claimant attended that appointment and a report was provided to the Respondent [257]. It was considered that the long-term prognosis was likely to be very good , that the Claimant was likely to make a good recovery but that further treatment was required and the likelihood of recurrence was impossible to predict at that stage. They recommended that the Claimant continue in the redeployed position avoiding manual or heavy work, doing mainly surveying and inspections. It was recommended that he recovered from the surgery so that he could gradually segue into doing heavier work. It was suggested that the claimant could initially do "the odd easier plastering job and gradually build up and he is back during his full usual role."

48. It was estimated that it would be 4 to 6 weeks before he was fit enough to resume plastering but that they considered the Claimant will be fit to work in the foreseeable future.

49. The Claimant returned to work in August 2016 and at some point resumed his full time plastering role without adjustments.

HAVS Assessment – April 2017

50. On 26 April 2017, the Claimant attended a Hand Arm Vibration Health Surveillance with the Respondent's OHA, known as a HAVS assessment.

51. The HAVS assessment recorded that the Claimant was aware that the OHA would be writing to the Respondent and had given the OHA permission to disclose details that had been discussed with him during the consultation and that the Claimant would be given a copy of the report [280].

52. The HAVS assessment indicated that:

    a. it was possible that the employee had carpal tunnel syndrome;
    b. that he was fit to work with exposure to hand transmitted vibration;
    c. that restrictions to exposure should be implemented and that exposure should be limited to less than or equal to 100 HSE;
    d. that the Claimant had been advised to report any concerns to management; and
    e. that the organisation should review the risk assessments and ensure that exposures were reduced to as low a level as reasonably practicable.

53. The HAVS assessment indicated that the Claimant had symptoms of tingling in his hands which woke him at night and troubled him when he was driving, drilling or using a trowel for long periods and that he had been advised to go to his GP to obtain a referral for nerve conduction studies to establish a diagnosis and treatment plan.

54. Following this referral, on 24 May 2017, a personal vibration risk assessment was carried out by the Claimant's then supervisor Paul Blackwell [282]. That assessment reflected that:

    a. The Claimant had been referred to his GP for possible carpal tunnel syndrome and that in accordance with that health report the Claimant was to use hand tools only and not to use any power tools;
    b. The Claimant had been advised that he should limit time spent on repetitive tasks.

55. It was indicated that there would be an assessment review following advice from the Claimant's GP.

56. The Claimant asserts that he had never seen this HAVS assessment before and that the subsequent risk assessment had never been passed on to him or implemented. He relies on the fact that the assessment was not signed by him.

57. Paul Blackwell has not given evidence in these proceedings but the Claimant was challenged on cross examination that he might have forgotten seeing the form. The Claimant maintained that the first time he saw this risk assessment was on receipt of his subject access request in 2018.

58. We concluded that on the basis that the HAVS assessment confirmed that a copy had been given to the Claimant, that it was more likely than not that the Claimant had received the HAVS assessment. We accepted the Claimant's evidence that he had not received a copy of the risk assessment.

Sickness Absence 30 October 2017

59. On 30 October 2017, the Claimant was absent from work, the first fit note stating that it was because of work-related upper limb disorder [287]. He was to eventually remain off work until 19 November 2018 and in that period was referred on a number of occasions to the Respondent's OHA.

First OHA Assessment 23 January 2018

60. On 5 January 2018, the Claimant was sent a letter confirming that the Respondent had arranged for an appointment with its OHA [293].

61. The Claimant has asserted that this referral should have been made immediately in accordance with the Respondent's Managing Attendance Procedure ("AMP") [146]. The Claimant relied on section 14 of the AMP which provided that:

    a. An occupational health referral would always be made when an employee had been absent for 20 working days; and
    b. If an employee was signed off with a musculo skeletal conditions, stress, depression or anxiety an immediate referral would be made unless there are valid reasons not to [158].

62. Cath Hughes, HR Business Partner, who was at that time providing HR support to the Claimant's then manager, Paul Blackwell, has not provided live evidence to this tribunal but we noted that throughout this period the Claimant's fit notes recorded that the Claimant was not fit to work at all in any capacity throughout. Carleen Martin gave evidence, which we accepted, that there were circumstances where a delay of 8 weeks might arise when an employee wouldn't necessarily be referred, giving examples of oversight, where the individual was very unwell or where the organisations knew that the condition could take a while to resolve.

63. We did not find that two months for a referral to occupational health assessment was an unreasonable time frame particularly taking into account Christmas and New Year intervening and the Fit notes from the GP which confirmed that the Claimant was not fit for work.

64. Within the subsequent OHA report, the following were confirmed [300]:

    a. the Claimant had experienced the return of his right shoulder pain and discomfort the limitation of movement;
    b. he had several months of bilateral pins and needles and numbness affecting both hands and forearms;
    c. despite the operation and the Claimant enjoying a period symptom-free, he was now presenting with great limitation of movement in his right shoulder with great difficulty bringing his right arm above shoulder level.
    d. In addition he was also presenting with bilateral pins and needles and numbness affecting both hands and forearms and that this was particularly worse at night time;
    e. that his symptoms remained stable since being on sickness absence;
    f. that he was finding many day-to-day simple tasks to be quite difficult.

65. The OHA considered that the Claimant was unfit to work in any capacity and that a consultant opinion would be needed. They confirmed that they had written to the Claimant's GP for a medical report and asked to review him in a month's time indicating that they had found it difficult at that time to determine prognosis for a return to work in the short and immediate timeframe until further specialist medical opinion had been sought. They considered the Claimant's prognosis for the long term good. No description of 'day to day tasks' was included in the OHA report.

66. A further OHA appointment was arranged for 1 March 2018. The Claimant did not attend, cancelling at short notice [312]. A further appointment was arranged for 13 March 2018.

    OHA – 13 March 2018

67. The Claimant did attend that appointment and a copy of the report was provided to the Respondent [315].

68. The report indicates that the Claimant had reported that:

    a. he been to see a consultant hand surgeon;
    b. had been informed that the likely diagnosis was that he had bilateral carpal tunnel syndrome;
    c. he been referred for nerve conduction studies to confirm that diagnosis;

d. that it was planned that he would have a carpal tunnel syndrome release procedure done on both wrists and that would require a 6 to 8 week post-operative recovery.

69. The Claimant also informed the OHA that he had been referred to an orthopaedic surgeon with regard to his shoulder and he was awaiting an appointment with the surgeon who had already operated on him.

70. He also reported that he was still presenting with significant pain, discomfort, numbness and tingling in both of his hands and that his right shoulder had become a little worse since he had been last reviewed. He reported as having difficulties with simple day-to-day activities – these again were not specified or described.

71. It was the OHA's assessment that:

a. the Claimant was presenting with a working diagnosis of bilateral carpal tunnel syndrome and would need to have bilateral carpal tunnel release procedures;
b. the Claimant was unfit for work at present in any capacity at that time; and
c. that the Claimant was limited by his ongoing right shoulder problem.

72. They considered that both conditions were likely to give rise to the Claimant being a disabled person under the Equality Act 2010 and they did not consider that any specific adjustments or alterations were feasible to facilitate his return to work and did not consider that a temporary redeployment was possible due to his current symptoms.

73. They asked to review him in two months and a further occupational review was arranged with the OHA for 17 May 2018.

Cath Hughes email 16 March 2018

74. On 16 March 2018, Cath Hughes sent an email to the Claimant's line manager, who was still Paul Blackwell [318], enclosing a copy of the OHA Report, confirming the Claimant was not fit for work in any capacity and would not be in work for some time as two carpal tunnel operations were needed and that the Claimant had issues with his shoulder. She attached a copy of his absence history and stated the following

'*I think we have to start considering this level of absence.'*

75. Whilst we had no evidence from Cath Hughes, as she has now left the Respondent's business and has not given live evidence, we did not find such a comment to be unreasonable in the context of the role of HR, which was to

provide support to managers in the business who were responsible for managing employee's sickness absence and the Claimant's continued absence from work at that point for nearly 5 months with no anticipated return date and was a reasonable response in the circumstances.

OHA Report - May 2018

76. On 3 May 2018, the OHA wrote confirming that they had received the report from the Claimant's GP which confirmed that their report from 13 March 2018 was still valid [325].

77. The Claimant attended the OHA again on 17 May 2018 and, on 18 May 2018, the Respondent was sent their report [328].

78. Within that report the OHA confirmed that:

    a. the Claimant had explained that his carpal tunnel syndrome remained the same and that he was presenting with ongoing shoulder issues;
    b. that he had not made an appointment to see an orthopaedic shoulder specialist and therefore it was uncertain as to what the surgical management of the condition would be;
    c. that he was able to perform tasks that did not involve heavy lifting, pushing or pulling and will be keen to consider any form of temporary employment that would allow him to come back to the workplace.

79. It was their opinion that:

    a. the Claimant was still presenting with two underlying chronic medical conditions, likely bilateral carpal tunnel syndrome and long-standing right shoulder pain;
    b. he was still unfit for substantive role as plasterer and should avoid any tasks that would involve any form of heavy manual handling tasks including heavy lifting, pushing or pulling;

80. It was also their opinion that consideration could be given to a temporarily redeployed position which did not involve any of those restrictions, that the Claimant's mobility was normal and he would be fit for any type of office-based duties or administration/inspection/supervision type duties. OHA asked if management could consider any temporarily redeployed positions that may be available until the Claimant's underlying medical conditions had been fully investigated and managed and reported that they considered that the Claimant's ultimate prognosis for return to work in his substantive role as plasterer was "excellent".

81. They considered that the underlying conditions amounted to disabilities under the Equality Act 2010.

82. Whilst the May 2018 OHA Report indicated that the Claimant could return to office based or administration/inspection/supervision type duties, we have no evidence from Paul Blackwell, who was managing the Claimant's sickness absence at that point, and a written statement only from Cath Hughes[1] only which simply refers to a discussion of '*any opportunities for office based duties that C could undertake. There were none'.*

83. It also appears that around this time Paul Blackwell was absent himself on sick leave and his line manager, Martyn Savage, the Area manager for Responsive Repairs became aware from HR that the Claimant was looking to undertake an electrician role. He spoke at the time with Craig Allford, the qualifying supervisor for the NICEIC and asked for his opinion as to whether or not he considered the Claimant had the appropriate skill set to work in an electrical role. It was Craig Allford's opinion, after reviewing the Claimant's qualifications, that the Claimant did not have the qualifications expected of a fully competent electrician. He had concerns not only regarding the Claimant's qualifications, but also about his competence and experience as well as his physical ability as a result of his shoulder injury, to undertake an electrician role.

84. Craig Allford maintained on questioning in live evidence that he was not familiar with the courses that the Claimant had attended and confirmed that this remained his opinion regarding the Claimant's skills when later questioned during the grievance investigation by Adrian Herbert.

Welfare Meeting - 6 July 2018

85. On 6 July Cath Hughes, HR business partner and Ashley Bayliss, met with the Claimant to discuss his ongoing sickness absence. It appears that by this point Pail Blackwell had left and Ashley Bayliss had taken over responsibility that month as the Claimant's supervisor and for managing the Claimant's absence.

86. The Claimant complains that this meeting should have taken place prior to this date, relying on Section 4.1 of the AMP which provides that where an employee is absent from work due to sickness, the manager must ensure that the employee does not feel isolated, vulnerable or out of touch and that regular contact is maintained: by telephone, in writing or welfare visits.

87. We found that the AMP did not make express provision for a specific date that welfare meetings should take place during the absence period or within a particular time frame.

88. No note of that welfare meeting (or indeed any other meetings) is contained in the agreed Bundle, but a letter dated 23 August 2018 was subsequently sent to the Claimant recording matters discussed. It also included reference to the

[1] CHWS para 5

further occupational health report that was subsequently received on 17 August 2018 [342].

89. The letter indicated that at the meeting they had discussed:

    a. that the Claimant could not do any work above shoulder level which ruled out plastering work; and
    b. that they had discussed the possibility of the Claimant doing electrical work, for which he was qualified and that it was concluded that the shoulder restriction also ruled that out.

90. The Claimant at no time objected to the contents of the letter or at the time indicate that the letter was incorrect in any way. We found that the Claimant had at that meeting discussed and likely agreed that he could not do either electrical work or plastering work as a result of his shoulder restriction.

91. The letter did not indicate that:

    a. the Claimant was asked if he could do basic movements on shoulders and / or lift his arms; or
    b. that the Claimant indicated that he felt he could return to work if an auxiliary aid such as a step-ladder or hop-up, or if another tradesman, a 'buddy' could be provided to undertake the tasks that he was unable to undertake.

92. As a result we found that it was more likely than not that these matters were not discussed in that meeting and the Claimant did not raise these potential adjustments with them at this time.

93. We also found that at that point the Claimant was expressing frustration at the length of his sickness absence – the letter refers to that.

OHA Report – August 2018

94. On 17 July 2018, a further review was arranged by the Respondent for the Claimant to meet their occupational health advisor on 7 August 2018 [335] and in July, the Claimant's Trauma and Orthopaedics specialist confirmed that they had decided to refer the Claimant for physiotherapy on his right hand shoulder and neck.

95. The Claimant again attended the OHA on 7 August 2018 and the August OHA report following that confirmed that the Claimant had reported that [338].

    a. he recently had physiotherapy for his right shoulder and was due to see a consultant surgeon the following week the first time following his discharge post operation;

b. the clinical position had changed very little since been on sickness absence and that he was still presenting with pins and needles and numbness;
c. nerve conduction studies had shown that he was presenting with mild left sided carpal tunnel syndrome;
d. he was still experiencing difficulty with pain in his neck shoulder extend into his right upper limb and had great difficulty using his shoulder above shoulder height and that as a result he felt he would be unable to do his role as a plasterer because of his ongoing condition;
e. whilst he was keen to return to work, he realised that the role of plastering was not when which would be capable of present given his right shoulder presentation

96. It was the opinion of the OHA that the Claimant was currently unfit for substantive role as a plasterer but that he would be fit to return in any other capacity provided that the following adjustments and alterations could be made:

a. that he should avoid his role as a plasterer;
b. that he should avoid heavy manual handling tasks, including heavy pushing, pulling or lifting;
c. that he would have great difficulty performing tasks above shoulder height;
d. that he would be fit for any other tasks provided those adjustments could be provided and if such a post were available then he could return to work as soon as possible.

97. They asked to see him in a month following his appointment with his specialist and offered to review any job descriptions in the interim period for any redeployed positions to see if they would be suitable for the Claimant's needs.

98. No job descriptions, and/or list of duties that were undertaken by the Claimant, were sent at this stage by the Respondent to the OHA to get guidance from the OHA on what duties the Claimant could and could not undertake.

Welfare Visit - August 2018

99. In the previous month Paul Blackwell ceased being the Claimant's supervisor and Ashley Bayliss assumed responsibility for supervising the Claimant and managing his sickness absence.

100. On or around 24 August 2018, the Claimant attended a further welfare meeting with Ashley Bayliss accompanied by Cath Hughes. Again no notes of that meeting are available but following that meeting on 10 September 2018, Cath Hughes wrote to the Claimant confirming matters that had been discussed [342].

101. Around this time, Kimberley Williams, HR Advisor appears to have taken over responsibility from Cath Hughes for providing HR support to Ashley Bayliss in managing the Claimant's sickness absence. Following a further meeting with the Claimant, she reported within a letter to the Claimant that he informed them at a recent meeting that:

a. the issue was not with his shoulder but in his neck;
b. that he was on a waiting list for an MRI scan to diagnose the issue and provide recommendations on treatment; t
c. hat the MRI scan could be up to 8 weeks and
d. that he was concerned that his sick pay was concluding in October [344].

102. We found that this was the first indication that an MRI was awaited to confirm treatment required.

103. The date for the MRI scan was confirmed for Tuesday, 18 September 2018 and therefore as a result, OHA appointment arranged for 11 September was postponed to 2 October 2018.

104. The letter also confirmed that they had discussed options whilst the Claimant was unable to work as a plasterer:

a. She was aware that the Claimant was also an electrician but that his current condition would make it difficult to conduct either role;
b. that they would need some recommendations from occupational health to ensure any work done would not be detrimental to his health;
c. that the Respondent did not have an ability to place a tradesman into office-based roles at that time suggesting that they look into internal vacancies where his skills and experience could fit;
d. they had discussed updating the Claimant's CV with office relevant skills so that he was able to apply when a suitable vacancy arose in the application and interview skills training that could be arranged;
e. they referred him a provider of financial advice as well as counselling and that the union had been contacted to see if any financial support was available.

105. Kimberley Williams confirmed that the Respondent would be in touch once the OHA report had been received and confirmed that she was aware that the Claimant was in regular contact with Ashley Bayliss.

106. Again the letter does not refer to the Claimant indicating that he could return to work as an electrician with an auxiliary aid, such as a step-ladder or hop up or buddy. Again we found that if the Claimant had mentioned that he felt he could return to work with an auxiliary aid, it would more likely than not have been referred to. It was not. We concluded that the Claimant was not at this point giving any indication that he felt he could return with such adjustments

but was accepting of the Respondent's position that there was no ability to place him in an electrician role due to his condition.

107. Again the Claimant did not respond to say the letter was incorrect. On cross-examination the Claimant confirmed that he did not as he wasn't concerned about '*what was going on at that time'* and that he '*didn't realise what had happened before or what was to come otherwise he would have'.* We found that if the letter had been incorrect, the Claimant would have indicated that to the Respondent at the time. He did not.

108. Therefore we found that the Claimant did not refer to or discuss these auxiliary aids and more likely than not agreed that he could not return to work at that time in another capacity, including as an electrician.

109. With regard to what adjustments were considered for the Claimant, Kimberley Williams gave evidence[2] that she had looked at alternative roles but that the Respondent did that they did not have any office jobs available. Both Ashley Bayliss and Kimberley Williams were questioned on their thought processes on adjustments for the Claimant at this time, their written statements providing little evidence on the issue:

110. Kimberley Williams' evidence was that:

a. it was her understanding from Ashley Bayliss was that the business did not have a suitable alternative role for the Claimant at this time;
b. that as HR adviser, she would take advice from the supervisor regarding the possibility of the Claimant being able to undertake an electrician role, as she was not an electrician; and
c. that she had no confidence from the business, that the Respondent could give the Claimant amended duties.

111. She was also questioned on the adjustments that the OHA had recommended. Her response was that as she was not an electrician herself, she relied on the Claimant's supervisors and it was her understanding from Ashley Bayliss that there was no suitable alternative roles for him, as any of the tasks could potentially harm the Claimant as they involved pushing, pulling or lifting and they did not wish to place the Claimant at a detriment because of his condition.

112. Ashley Bayliss' evidence was that:

a. He did not accept that Claimant was fit for work in any capacity;
b. That he did not accept that the Claimant could open a ladder as he had limited movement in his shoulder, or carry tools due to their weight.

[2] KWWS para 4

113. Ashley Bayliss gave evidence that the 'final decision' on adjustments had been made by his line manager, Martyn Savage, then Area Manager in charge of Responsive Repairs. Whilst we had found that Martyn Savage had been briefly directly involved in the management of the Claimant's absence in May 2018, during a period when Paul Blackwell was off sick, he did not assume responsibility for managing the absence throughout. Ashley Bayliss had taken responsibility in July 2018 and, as he reported to Martyn Savage as his Area Manager, Ashley Bayliss would have and did update and inform Martyn Savage of his management of the Claimant; that Martyn Savage was 'kept in the loop', as he termed it.

114. We found that decisions regarding what if any adjustments could be made for the Claimant were likely to have been made by Ashley Bayliss with HR support from Kimberley Williams and that Martyn Savage, as line manager, who have approved any decision through his line management of Ashley Bayliss. We also found that Martyn Savage became more heavily involved from October 2018, and directly involved after the Claimant's return to work for the ARM meeting conducted later in December of that year.

115. Both Kimberley Williams and Ashley Bayliss maintained in live evidence that they were awaiting an MRI for the Claimant. They considered that this was needed in order to get a firm diagnosis and to then find out what tasks the Claimant could or could not do, when they would then send to the OHA a list of 'jobs' or duties to comment on, and would then find out what weight the Claimant could and could not lift, as this had not been indicated.

116. We found that neither Kimberley Williams nor Ashley Bayliss sent such a list at any time to OHA, instead taking the view that they required an MRI scan before progressing this. Whilst we failed to understand what an MRI would have delivered by way of clarification of what the Claimant could or could not do, we did nevertheless find that both were of the genuine belief that they needed to wait for the results of the MRI scan.

117. Ashley Bayliss was also questioned on whether he had considered adjustments recommended by the OHA in order for the Claimant to return to work and was questioned on the suggested adjustments.

    a. With regard to adjusting his role by assigning tasks that did not involve manual handing, he questioned how the Claimant could drive or carry tools and believed that this would have needed a total change of role for the Claimant;

    b. With regard to deploying the Claimant in an electrician role, we found Ashley Bayliss's evidence to be confused. His initial position on questioning was that the Claimant did not have qualifications or experience to undertake an electrician role and, when further questioned

on qualifications, his evidence was that the Claimant did not possess level 3 NVQ or City and Guilds qualifications. After having been questioned by the Claimant further with referenced to his certificates of qualifications contained in the JPEG Bundle, Mr Bayliss was specifically asked by the Tribunal if he accepted that the Claimant did in fact possess relevant qualifications, Mr Bayliss accepted that he did.

c. Hr then answered that the Claimant did not have the relevant experience to work on his own. When questioned what was required to be able to work on his own, Ashley Bayliss confirmed that he needed to be 'competent' and that this would require attendance at a week's course and an examination at the end of that course, admitting that he had now, for the first time and during the hearing, looked at the Claimant's qualifications properly.

d. With regard to the suggested adjustment of a step-ladder or a hop up, he expressed concern that he would not be comfortable with the Claimant working at height having the use of only one arm and did not accept that the Claimant would have been able to undertake work at height due to his inability to lift his arm above should height;

e. Finally, with regard to a 'buddy', he confirmed that he did not consider this option as had only considered other roles in an office environment. He did not consider it an option as he considered that the Claimant was unfit for work.

f. He also gave evidence that the Respondent had:

   i. accepted that another plasterer, KR, could not fully plaster ceilings because he suffered from angina;
   ii. that the Respondent had assisted him by controlling the tasks he was given and able to undertake, such as plastering patchwork, as he had such health issues and they had no wish to 'discriminate against him'.
   iii. that the Respondent did pair people up and that trades such as bricklayers and plasterers '*can bounce off each other';* and
   iv. that they would give KR smaller work as opposed to full wall plastering and that he would then work with an electrician and be '*paired up'.*

118. We found that despite evidence from the Respondent's witnesses that 'jobs' were allocated through the automated CRM system, that this automated allocation was capable of manual override and that the Respondent had for some employees made adjustments to their roles such that they were assigned specific tasks only and given a 'buddy'.

119. We also found that during this time Ashley Bayliss did not consider that:

a. Deploying the Claimant to an electrician role as he had concluded that he was not qualified or competent or physically able to carry out such a role;
b. adjusting the Claimant's role to assign tasks to him that did not involve heavy manual handling;

120. On 1 October 2018, Kimberley Williams wrote to the Claimant confirming that his last fit note had expired on 18 September 2018 and that he needed to provide a fit note to his manager Ashley Bayliss [348]. The letter reflected that Ashley Bayliss had been trying to contact the Claimant without success. She warned him that failure to make reasonable contact and provide up to date fit notes could be classed as a breach of the AMP and result in his absence as unauthorised.

121. As a result of this contemporaneous document and lack of Fit note from the Claimant for this period, we found that the Claimant had been out of contact with the Respondent during this period.

OHA Report – October 2018

122. The Claimant did however attend the OHA on 2 October 2018 and again the OHA prepared their report which was provided to the Respondent by way of letter dated 3 October 2018 [350]. They reported that the Claimant had explained to them:

a. he had now been seen by his consultant specialist and had been informed that his current presentation was not related to his right shoulder but may be related to a neck problem;
b. he had an MRI scan and opinion from the cervical spinal surgeon regarding the cause of his right upper limb symptoms;
c. he explained there had been no change in his condition since being on sickness absence and he still had great difficulty with movement of his tight shoulder and lifting the arm above shoulder height level.

123. The OHA reported that the Claimant's condition was likely to be viewed as a disability and that management should consider the adjustments and alterations: –

a. that he was unfit for his role as a plasterer at present;
b. that he should avoid heavy manual handling tasks, including heavy pushing, pulling or lifting;
c. that he should avoid performing tasks above shoulder height level.

124. The OHA also again reported that the Claimant was fit to perform any other task or role which did not involve those tasks. They did not consider that management could make any specific adjustments to facilitate the Claimant's return to his substantive role as a plasterer but a medical redeployment would be feasible to a role which included those adjustments and alterations, confirming that the Claimant was keen to consider any such options. They also confirmed that he had written to the Claimant's GP for a copy of the MRI scan.

Welfare Visit - October 2018

125. A further welfare visit took place shortly after receipt of the October 2018 OHA Report. A letter relating to that meeting was sent in error to the Claimant on 15 October 2018 [359]. That letter is clearly a draft showing some unfinished sentence drafting and references to links that were not included. We accepted the Respondent's evidence that sending the Claimant an unfinished draft letter was simply a human error.

126. A final draft was sent out on 19 October 2010 [366]. We found that the letter reflected the 'state of play' as Kimberley Williams and Ashley Bayliss saw it at that point; that the Claimant had still not received his MRI results but that the OHA wanted to see those results. The letter confirmed that as the Claimant could not lift his arm above shoulder height, he was unable to complete his work as an electrician and that his ability to carry out trade duties was limited by his physical constraints.

127. The letter also confirmed that the Claimant at the meeting had asked for return to work to office duties.

128. The Claimant had asked if he could cover for a supervisor who was off on sick. This was rejected as not possible citing the following reasons:

a. *The Claimant was currently signed off as unfit in any capacity with no diagnosis which means that we cannot offer you any role as we do not know what might be suitable or what adjustments or alterations should be made. There is no understanding of what you can safely do.*

b. *it is not appropriate to backfill a sick absence with someone who is currently off sick themselves. In addition to the reasons above, a phased return would be necessary to slowly build back up your fitness for work in any role, which does not fit the business need for temporary cover.*

129. In that letter Kimberley Williams confirmed that she had considered whether any vacancies satisfied the criteria set out by the OHA, but that there were no vacancies and that due to restructuring there were limited vacancies.

The Claimant had asked if the Respondent could create a role for him. She confirmed that they would not.

130. The letter also indicated to us, and we found, that again neither Ashley Bayliss nor Kimberley Williams considered what adjustments to duties could be made to any trade role, whether as electrician or otherwise, to enable the Claimant to return to work. Rather they focussed on the whole job and where they considered that the Claimant was at risk in undertaking any aspect of the role, they considered that this meant that the Claimant could not return to work.

131. Again however we do not find that the Claimant at that meeting raised the possibility of auxiliary aids such as step-ladders or hop ups, or the possibility of being allowed to return with a 'buddy' undertaking physical tasks that the Claimant could not undertake. If this had been raised by the Claimant, it would have been included in that letter and/or the Claimant would have likely raised that omission.

132. Rather we found that the Claimant accepted at that point that he could not return to work and that was he was seeking was a return to work within an office-based role.

133. The evidence from the Respondent's witnesses was that they did not consider that a three-four week temporary cover role was appropriate to offer the Claimant as an alternative role due to the length of his own sickness absence at that time and the consequential likely need for a phased return over the period of the cover. We accepted that evidence as a genuine and reasonable response to this particular position.

Ill-health retirement

134. The letter also reflected that at the meeting:

a. ill-health retirement was also discussed, the letter confirming that if the OHA confirmed that the Claimant remained unable to return to his substantive role on a permanent basis, they would be in a position to consider ending the Claimant's employment.

b. That Kimberley Williams had told the Claimant that the business was struggling to accommodate his level of absence and that she had taken along consent forms to the meeting for the Claimant to complete so that the Claimant could be referred to an independent OHA to obtain an opinion of ill health retirement.

135. On cross examination, Kimberley Williams gave evidence, which we accepted, that ill health retirement as an option would have been offered to any employee who had been off on long term sickness absence for such a period.

136. Whilst we found that the Respondent did not understand what the Claimant could or could not safely do, because they had failed to ask the OHA the question, we did find that at the same time they did genuinely hold the view that the Claimant could not return to work as they considered that they needed the MRI scan.

137. We further found that the Respondent's decision to raise the possibility of ill-health retirement was because they genuinely held the view that the Claimant was signed off as unfit in any capacity and they could not offer him a role as they held the view that there was '*no understanding of what [the Claimant' can safely do.' .*

138. At some point just after this meeting, the Claimant spoke to Kimberley Williams and confirmed to her that he was fit to return to work. Whilst the Claimant had relied on transcripts for some 23 covertly recorded conversations with work colleagues, he was unable to locate the transcript in which the Claimant had asserted that he had been told by Kimberley Williams that he could return to work on provision of confirmation from his GP and spinal surgeon. On cross-examination. Kimberley Williams could not recall having such a conversation. As such we did not find that Kimberley Williams did advise the Claimant that he could return to work on receipt of such confirmation.

139. In any event, we found that the documentation that the Claimant did subsequently provide did not contain confirmation that the Claimant was fit to return to his role as a plasterer at the Respondent as:

a. The letter from the Claimant's Consultant Spinal Surgeon of 5 November 2018, whilst reporting that the Claimant's symptoms had improved and that intervention would not be beneficial and continuing physiotherapy would result in more of a range of movement and strength in his shoulder, did not confirm the Claimant was fit for work [375];

b. The letter from the Claimant's GP of 7 November 2018, whilst confirming that the Claimant had regained a good deal of movement to his right shoulder and as such the Claimant felt that he was ready to return to work, also confirmed that they did *not* provide 'fit to work' notes [380].

140. As a consequence, the referral for ill-health retirement was cancelled by Kimberley Williams. She decided to seek further information from OHA as the Claimant had now declared himself fit for work and wanted to return to all aspects of his role including plastering. She voiced concern and sought guidance on the change in the Claimant and asking if they considered the

Claimant was fit to return to his role [380-379]. She referred him to the OHA. We found that this was a reasonable response in the absence of confirmation from his treating clinicians that the Claimant was fit to return as a plasterer.

Grievance

141. On 13 November 2018, the Claimant submitted a grievance in accordance with the Respondent's grievance procedure [387] essentially complaining that medical evidence indicated that he was fit to return to work since May 2018 with adjustments or amended duties in line with the Equality Act 2010. He complained that the Respondent should have amended his current role in line with the Equality Act 2010 and that the refusal of his application for a temporary role had also amounted to discrimination. As an outcome to his grievance he sought compensation for his loss of pay.

OHA Report -15 November 2018 and return to work

142. On 15 November 2018, the Respondent received the report from OHA [395] confirming:

a. that the Claimant was now presenting with a full and painless range of movement at right shoulder join and full range of neck movements, that he still had cervical spondylitis and a reduction in movement and stiffness in his right shoulder, but that the right shoulder issue had now 'virtually resolved' as a result of recent intensive physiotherapy.

b. that in their opinion the Claimant was fit to return to his substantive role in all aspects but would require a phased return to work over three weeks. They did not consider that there were any specific adjustments or alterations required and that the Claimant could perform manual handling duties with care and appropriate training.

c. That they considered he would be fit for the foreseeable future and asked to see him one month after return to work.

3 December 2018 – Ashley Bayliss discussion

143. The Claimant returned to work on Monday 19 November 2018 and on 3 December 2018 Ashley Bayliss had a conversation with the Claimant, a conversation that the Claimant covertly recorded. An agreed transcript of the recording was contained in the Bundle [891].

144. Ashley Bayliss was unable to recall the conversation but recalled that the Claimant had not been responding to his calls, evidence which was unchallenged and which we accepted. That Ashley Bayliss could not recall the

detail of the conversation was unsurprising taking into account the content of the conversation and the period of time that has lapsed.

145. The transcript reflects that the conversation related to Ashley Bayliss discussing with the Claimant his concerns that the Claimant had not been answering his mobile phone and telling the Claimant that he was personally worried about him. The conversation is difficult to follow from the transcript but we found that the Claimant was complaining that Ashley Bayliss had at some point called the Claimant 'unprofessional' for not answering his phone when Ashley Bayliss had sought to keep in contact with the Claimant and more generally regarding his work. The Claimant's grievance does appear to be referred to within that conversation but other than finding that Ashley Bayliss was aware that the Claimant had lodged a grievance, no other findings of fact can be made regarding Ashley Bayliss' knowledge of the grievance at that point.

146. We found that the content of the conversation reflected that Ashley Bayliss was supportive of the Claimant.

Sickness Absence Review – 5 December 2018

147. By way of letter dated 27 November 2019, the Claimant was asked to attend a formal absence review meeting on 5 December 2018 [421] in relation to his sickness absence from October 2017 to November 2018.

148. The Claimant attended that review meeting which was conducted by Martin Savage, Ashley Bayliss' line manager, supported by Carleen Martin, HR Business Partner, in the absence of both Cath Hughes and Kimberley Williams.

149. Prior to the meeting, there had been an email exchange between Martin Savage, Cath Hughes and Kimberley Williams as to whether he or Ashley Bayliss, the Claimant's supervisor, should conduct the meeting.

150. Whilst the ARM provide that the line manager would conduct such a meeting, and the evidence of Carleen Martin and Kimberley Williams was that it was customary for the line manager to take the meeting, we also accepted the evidence from Martin Savage that he had been advised by HR that this should be him due to the level of the Claimant's sickness absence and to impress upon the Claimant the seriousness of the issue for him if his sickness absence persisted. We did not consider that decision to be an unreasonable one.

151. Although no notes were taken in that meeting, we again have within the Bundle:

a. the letter from Martin Savage to the Claimant of 5 December 2018 [428]; and
b. from the Claimant a transcript of a covert recording he had made of the meeting [899].

152. We heard evidence from Carleen Martin that whilst she had not been involved in any discussions with Martyn Savage in advance of the meeting, but did consider it reasonable for Martyn Savage to take the meeting and that such a step was not unusual for the organisation taking into account the Claimant's particularly long absence. She had also printed off a record of all the Claimant's sickness record so that Martin Savage could see the extent of the Claimant's sickness absence over the previous three years which was then discussed in the meeting as well as his absence over the previous 282 days as she wanted Martyn Savage to be in possession of all the information and to see the recent absence in that context.

153. The Claimant's conditions were discussed and the occupational health report from 15 November 2018 which indicated the degenerative nature of his cervical spondylosis. The Claimant agreed that now no adjustments were required for him. The Claimant's grievance was not discussed but the Claimant reiterated that he had not been allowed back to work since May 2018.

154. The Respondent's AMP was discussed and it was confirmed that the Claimant was at Stage 1 of the AMP. This had also been queried by Martin Savage prior to the Stage 1 meeting. The emails exchanged in advance of the Stage 1 meeting [419-415] reflect that Martin Savage had asked HR not only who should undertake the ARM meeting but also what stage it should be. This was reviewed by Kimberley Williams who confirmed that the meeting should be held as a Stage 1 meeting within the ARM.

155. The Respondent's ability to sustain high levels of sickness absence was also discussed and Carleen Martin informed the Claimant that if he was absent for a lengthy period again, it would not '*go on for this length of time* ' and would '*come you an end sooner'*. The Claimant was informed that an adjustment had been made to the AMP in terms of the target set.

156. A letter sent to the Claimant on 5 December 2019 which made reference to the Claimant having been off work on three separate occasions in the last three years [428]. The Claimant complained that only his absence from October 2017 to November 2018 was under consideration. This was agreed and an amended letter was sent later that day [430]. Carleen Martin gave evidence, which we accepted that it was not unusual to listen to an employee's concerns and reconsider their position, which was why the second letter had been issued. This letter confirmed that the Claimant had been off work for 231 days in that period and confirmed that the Claimant's absence target had been adjusted to 1 day of sickness absence over three months and 6 days in the

following nine months. He was informed that if absence levels exceeded such targets it could mean an escalation to Stage 2 ARM.

Grievance Investigation

157. Adrian Herbert was appointed grievance investigation officer and as part of his grievance investigation met with the Claimant and his trade union representative Neil Jones on 4 January 2019 [459].

158. At that meeting the Claimant raised concerns that:

a. he was qualified as an electrician as well as a plasterer and had not been offered any alternative work;
b. another member of the team 'AV' had been given 'menial' tasks and 'little jobs in the office' and had returned to work and that he was raising him as a comparator;
c. that he had been told of a temporary supervisor role but had not been permitted to apply;
d. that he had been fit for work and that he could have been 'paired up'. We found that this was the first time that the Claimant referred to an adjustment of working with a 'buddy';
e. Cath Hughes advising Martyn Savage to undertaking his ARM meeting was 'bullying'.

159. During the course of his investigation Adrian Herbert also interviewed Martyn Savage, Craig Allford, Ashley Bayliss, Kimberley Williams and Cath Hughes. Notes of their investigation meetings are included in the Bundle.

160. The Claimant asserts that false statements were made by each in the course of those meetings. We made the following findings in the context of 'false' meaning not true, but made to seem true in order to deceive others. In relation to the allegation that:

a. Martyn Savage said that:

i. Paul Blackwell had been managing the Claimant's absence. We found that he had said this but not in isolation. He had added the words '…. *until he went off'.* We therefore found that this was not and incorrect or a false statement;

ii. '*the reports didn't say what was wrong we had no diagnosis*…..', we found that the OHA reports did refer to the Claimant's conditions only as '*likely'* bi-lateral carpel tunnel syndrome and a 'shoulder condition'. The specific diagnosis however was not confirmed. We found that the statement was not a false statement;

b. Craig Allford said that the Claimant's qualifications did not fit the Respondent's needs and he considered the Claimant was a *'risk to the business'* , we accepted Craig Allford's evidence that he believed the qualifications to be more commercial and not fitting the Respondent's needs. To that extent, albeit we found that it was likely a wrong statement, in that the Claimant did have the appropriate level 3 NVQ and City & Guilds qualifications we did not find that Craig Allford made a false statement. ;

c. Ashley Bayliss said he had:

i. asked the Claimant to stand on a ladder and raise his arms, the Claimant on cross examination could not recall if Ashley Bayliss had asked him to take such action and therefore we did not find that the Claimant had proven that this statement was false;

ii. that he was limited on the work he could give to the Claimant, this was in our view a statement of Ashley Bayliss's opinion and therefore nothing to suggest that such a statement was 'false'; and

iii. that the Claimant had gone missing for 4 weeks. We found that the Claimant had failed to submit Fit notes for a period, and the Claimant and Ashley Bayliss did discuss the Claimant not answering his mobile phone when Ashley Bayliss sought to contact him. We did not find that the Claimant had proven that this was a false statement;

d. Kimberley Williams had said the prognosis '*was later than October'*, the Claimant confirmed on cross examination that he was not alleging that Kimberley Williams was trying to mislead the investigator. We found that it was more likely than not that Kimberley Williams was referring to the November 2018 letters and the Claimant had not proven that she had made a false statement to the investigator; and

e. Cath Hughes said '*I started gently explaining he needs to be more proactive'* , the Claimant did not recall Cath Hughes saying this and gave evidence that as a result in his opinion, she had not said this. We did not find that the Claimant had proven that this statement was false.

Grievance Report and Grievance Appeal

161. A report was prepared in which Adrian Herbert concluded that it was

'*apparent that no adjusted duties or redeployment could be found. I am also satisfied that expertise and advice within the business was sort [sic] regarding JL's electrical skills and qualifications. I am happy that Bryn Afon explored all avenues to try to accommodate JL to allow him an early return to work.'*

162. He reported that he could not find any evidence to uphold the claim.

163. The Claimant appealed on 8 February 2019 and was invited to attend a grievance appeal on 21 February 2019 [529]. In the notes of the appeal meeting, it is reflected that Sue Price, HR Business Manager supporting Ian Harris, Grievance Appeal Manager, confirmed to the Claimant that it was not usual for 9 months to have elapsed from October 2017 to July 2018 with no welfare meeting and that they would need to check what had been agreed.

164. The Grievance Appeal Report was provided by way of letter dated 5 March 2019 confirming that the appeal had been dismissed [559]. The letter did comment on the complaint regarding the welfare meeting, finding that HR had historically made 'only occasional contact' in the early period of absence.

165. The letter did deal with the comparator that the Claimant had raised, 'AV' indicating that whilst there were similarities, in that AV had a shoulder injury limiting upper limb movement and was in the same core trade as the Claimant, plastering, there were material differences between the Claimant and AV in that AV's OHA referral outcome was that:

a. AV had lost muscle mass and power;
b. that AV could carry out part time work; and
c. that the OHA had not specified any restrictions other than a phased return.

166. We also heard live evidence, which we accepted, that AV had suffered his injury in a road traffic accident and his financial losses could be recoverable from the insurance company within the accident claim.

167. We accepted this evidence and found that these were material differences between the Claimant and his comparator.

March 2019 Sickness Absence/Referral to OHA

168. On 6 March 2019, the following day, the Claimant reported as sick with a stress/mental health related absence and on 7 March 2019 the Claimant was referred to the OHA [572]. We found that there was no delay in referring the Claimant and that the Respondent acted as soon as reasonably possible, making a referral almost immediately.

169. On 7 March 2019, the Claimant filed his ET1 claim [2].

170. On 8 March 2019, the Claimant emailed indicating that he considered that his mental health had been brought on by the business regarding its treatment of his sickness absence.

171. The Claimant attended OHA on 12 March 2019 who reported that the Claimant had explained to him that:

a. he had recently gone through the grievance process and appeal;
b. he had felt aggrieved and upset with the outcome;
c. felt frustrated and aggrieved by work related issues and in particular with regards to his grievance.

172. The OHA confirmed that the Claimant was fit for his substantive post in all aspects and that his recent sickness absence was as a result of work related issues revolving around recent grievance and appeal processes [582].

173. On the same day the Claimant returned to work [578].

Disciplinary Action

174. It appears that by this time the Claimant's conduct more generally was giving managers concern, in particular:

a. In March, Ashley Bayliss had been informed through reports to him from trade colleagues of the Claimant, that the Claimant had been covertly recording his conversations with them. They were uncomfortable and as a result Ashley Bayliss had consulted HR [593];

b. Within the same email, Ashley Bayliss also raised concerns that the Claimant had been questioning AV on his own absence management processes;

c. on 3 April 2019, Martyn Savage had been concerned at the Claimant's conduct in a trade meeting, where the Claimant had walked out of the meeting. He raised the matter with HR [600]:

d. In turn, Kimberley Williams confirmed that she had spoken to AV who informed her that he was uncomfortable with the Claimant '*quizzing him on his ailments'* and his return to work and had been upset and embarrassed that the Claimant had commented that AV had been driving for another operative. She also confirmed that another trade operative was uncomfortable that the Claimant was recording conversations with them.

175. A meeting was arranged to discuss the Claimant's conduct. This was an informal meeting to discuss the conduct issues that had been reported. The meeting was conducted by Martyn Savage and Ashley Bayliss. Notes were prepared which we do not consider to be a verbatim note of the meeting [630]. The Claimant also covertly recorded that meeting [976]. The transcript is in large part difficult to follow but the Claimant referred only to a very small section at [978].

176. We found that Martyn Savage did acknowledge that the Claimant was aggrieved and upset at the outcome of the grievance and that it is likely that he also acknowledged that the Claimant had or was intending to take employment tribunal proceedings.

177. However we also found that the Claimant was upset and agitated at that meeting but during the meeting the Claimant was encouraged to talk about what was impacting on him.

178. We also found that the Claimant admitted asking AV about his absence, that he had left work without permission. Matters regarding the Claimant's conduct was also discussed including:

a. an allegation that on 4 April 2019 the Claimant had been rude to a third party, a Travis Perkin's operative and had said '*Fuck you all'* to another member of staff whilst at that Travis Perkins' premises. The Claimant admitted the comment but denied that it was directed at anyone in particular;
b. that he was rude to AV;
c. that he was recording conversations on his phone.

179. Following the meeting, the Claimant emailed HR complaining about the meeting and asking if HR advice was sought prior to the informal meeting. No response was received and on 18 April 2019, the Claimant chased for a reply [546]. He received a response later that day [652].

180. On 26 April 2019, Martyn Savage wrote to the Claimant [651] confirming that he considered that there were conduct issues that required an investigation under the Respondent's disciplinary procedure and that an investigating manager would be appointed to investigate:

a. Inappropriate behaviour at the Travis Perkins' Service Desk on 3 April 2019;
b. Inappropriate comment made about colleagues;
c. Covertly recording conversations with colleagues.

181. Pending that investigation meeting, on 17 May 2019 the Claimant was found in work sitting at the chief executive's desk. It appears that he was

unresponsive and concerns were held regarding his mental health. He was later collected from the office by his wife. An OHA assessment was arranged for him for the following week [662] and he was informed that he was not required to attend for work in the interim [658].

182. On 21 May 2019, the Claimant confirmed that he was intending to return to work but, on 22 May 2019, the Respondent received the OHA report confirming that the Claimant was unfit for work in any capacity [680]. The Claimant initially refused consent to release the OHA report and failed to report his sickness absence following the appointment.

183. On 12 June 2019, following a further OHA appointment, the OHA confirmed that the Claimant was medically fit to return to work and a full report would be released once the Claimant had consented [713]. This was provided on 13 June 2019, which confirmed that the Claimant was fit to return and a phased return to work was not necessary. They indicated that a stress risk assessment would be appropriate [715].

184. The Claimant returned to work on 12 June 2019, when a stress risk assessment was completed [721].

185. On 17 June 2019, the Claimant attended the first case management hearing in relation to his claim and raised with Judge Moore that he had in his possession some covert recordings that he wished to reply on. The Claimant was subsequently written to and reminded to obtain consent for such recordings and a failure to do so could lead to conduct being considered under the disciplinary procedure [730].

186. On 18 July 2019, Neil Jones invited the Claimant to attend an investigation interview [742].

187. Matters after this date do not relate to this claim.

The Law

<u>s.13 EqA 2010 Direct Disability Discrimination</u>

188. In the Equality Act 2010 direct discrimination is defined in Section 13(1) as:

> (1) A person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

189. Disability is a protected characteristic.

190. The provisions are designed to combat discrimination and it is not possible to infer unlawful discrimination merely from the fact that an employer has acted unreasonably: **Glasgow City Council** v **Zafar** [1998] ICR 120

191. The concept of treating someone "less favourably" inherently requires some form of comparison. Section 23 provides that when comparing cases for the purpose of Section 13 "there must be no material difference between the circumstances related to each case." In **Shamoon** v **Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 Lord Scott noted that this means, in most cases, the tribunal should consider how the Claimant would have been treated if they had not had the protected characteristic. This is often referred to as the hypothetical comparator. Exact comparators within s.23 EqA 2010 are rare and it may be appropriate to draw inferences from the actual treatment of a near-comparator to decide how an employer would have treated a hypothetical comparator.

192. The protected characteristic must have had at least a material influence on the decision in question. Unfair treatment by itself is not discriminatory; what needs to be shown in a direct discrimination claim is that there is worse treatment than that given to an appropriate comparator; **Bahl** v **Law Society** 2004 IRLR 799.

S.15 EqA 2010 - Discrimination arising from disability

193. Discrimination arising from disability is defined in s15 EA 2010:

> (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.

194. Section 15(2) applies only if the employer did not know (and could not reasonably have been expected to know) about the disability itself: ignorance of the consequences of the disability is not sufficient to disapply s15(1).

195. Under s15 EA 2010 it is the treatment which must be justified, rather than any policy which might lie behind the treatment. The test is reasonable necessity and the Tribunal must make its own objective assessment, weighing the real needs of the undertaking against the discriminatory effect of the unfavourable treatment. If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable

treatment, it will be very difficult for them to show that the treatment was objectively justified (EHRC Code, para 5.21).

196. As for the correct approach when determining section 15 claims we refer to **Pnaiser** v **NHS England and others** UKEAT/0137/15/LA at paragraph 31.

197. The relevant steps to follow are summarised as follows:

a. the tribunal must identify whether there was unfavourable treatment and by whom – no question of comparison arises;
b. the tribunal must determine the cause of the treatment, which involves examination of conscious or unconscious thought processes. There may be more than one reason but the "something" must have a significant or more than trivial influence so as to amount to an effective reason for the unfavourable treatment;
c. motive is irrelevant when considering the reason for treatment;
d. the tribunal must determine whether the reason is "something arising in consequence of disability"; the causal link between the something that causes unfavourable treatment and disability may include more than one link – a question of fact to be assessed robustly;
e. the more links in the chain between disability and the reason for treatment, the harder it is likely to be able to establish the requisite connection as a matter of fact;
f. this stage of the causation test involves objective questions and does not depend on thought processes of the alleged discriminator;
g. knowledge is required of the disability only, section 15 (2) does not extend to requirement of knowledge that the "something" leading to unfavourable treatment is a consequence of disability;

198. It does not matter precisely which order these questions are addressed. Depending on the facts the tribunal might ask why the respondent treated the claimant in an unfavourable way in order to answer the question whether it was because of "something arising consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment.

199. When considering justification, the role of the Tribunal is to reach its own judgment, based on a critical evaluation, balancing the discriminatory effect of the act with the business/organisational needs of the Respondent.

<u>S.19 EqA 2010 – Indirect Discrimination</u>

200. S.19 of the Equality Act 2010 is in the following terms:-

> (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 15 relevant protected characteristic of B's.

(2) For the purposes of sub-section (1), a provision, criterion or practice is discriminatory in relation to a relevant characteristic of B's if –

(a) A applies, or would apply, if the person to 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 person 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.

201. **Ishola** v **Transport for London** [2020] IRLR 368 (CA) Paragraphs 35-39 the Court of Appeal confirmed that a one-off act could amount to a practice but it must be capable of being applied in future to similarly situated employees.

S.20 Duty to make reasonable adjustments

202. Section 20 EqA states that: …

(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.

203. Section 21 EqA states that:

(1) A failure to comply with the first … 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.

204. The Equality and Human Rights Commission's Code of Practice on Employment contains guidance on the Equality Act, on what is a reasonable step for an employer to take will depend on the circumstances of each individual case (para 6.29). The examples previously given in section 18B(2) DDA remain relevant in practice, as those examples are now listed in para 6.33 of the Code of Practice.

205. The duty to make adjustments comprises three discrete requirements, any one of which will trigger and obligation on the employer to make any adjustment that would be reasonable and a failure to comply with the requirement is a failure to make reasonable adjustments and an employer will be regarded as having discriminated against the disabled person.

206. In **Environment Agency** v **Rowan** [2008] ICR 218, the EAT set out how an employment tribunal should consider a reasonable adjustments claim (p24 AB, para 27). The tribunal must identify:

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

207. PCP is not defined within the EqA 2010. EHRC Code of Practice (6.10) states that the phrase should be construed widely and could include informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions.

208. In **Cumbria Probation Board** v **Collingwood** [2008] All ER (D) 04 (Sep), EAT, HHJ McMullen said that "it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage". The EAT in that case then went on to uphold a finding of a failure to make a reasonable adjustment which effectively gave the claimant 'a chance' of getting better through a return to work.

209. Finally, the duty to make adjustment arises by operation of law. It is not essential for the claimant himself to identify what should have been done (**Cosgrove** v **Ceasar and Howie** [2001] IRLR 653, EAT). Indeed, the EAT held in **Southampton City College** v **Randall** [2006] IRLR 18 that a tribunal may find a particular step to be a reasonable adjustment even in the absence of evidence that the claimant had asked for this at the time.

210. S.212 (1) EqA 2010 defines 'substantial disadvantage' as one which is more than minor or trivial and whether such a disadvantage exists in a particular case is a question of fact and it is to be assessed on an objective basis (EHRC CoP, 6.15).

<u>s.26 EqA 2010 - Harassment</u>

211. Section 26 of the Equality Act defines harassment under the Act as follows:

> (1) A person (A) harasses another (B) if –
> A engages in unwanted conduct related to a relevant protected characteristic, and
> (a) the conduct has the purpose or effect of –
> (b) violating B's dignity, or
> (c) creating an intimidating, hostile, degrading, humiliating or offensive environment for B
> (2) A also harasses B if – A engages in unwanted conduct of a sexual nature, and the conduct has the purpose or effect referred to in subsection (1)(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 circumstances of the case; whether it is reasonable for the conduct to have that effect.

s.27 EqA 2010 - Victimisation

200. Section 27 EqA 2010 provides that a person victimises another person if they subject that person to a detriment because the person has done a protected act or because they believe that the person may do a protected act.

201. Section 27(2) defines a protected act as:

a. bringing proceedings under the Equality Act;
b. giving evidence or information in connection with proceedings under the Equality Act;
c. doing any other thing for the purposes of or in connection with the Equality Act;
d. making an allegation (whether or not express) that the respondent or another person has contravened the Equality Act.

202. To subject an employee to a detriment is to treat them in a manner which a reasonable worker would or might consider to be to their disadvantage in the circumstances in which they had to work (**Shamoon** [2003] ICR 337, HL). It is not enough that the detriment would not have occurred but for the protected act: the protected act must be a real reason for the detriment, although it need not be the main or only reason.

S.136 EqA 2010 - Burden of Proof

203. Section 136(2) EqA 2010 provides that if there are facts from which the court (which includes a Tribunal) could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred.

204. Section 136 (3) EqA 2010 provides that subsection (2) does not apply if A shows that A did not contravene the provisions.

205. Guidance as to the application of the burden of proof was given by the Court of Appeal in **Igen** v **Wong** 2005 IRLR 258 as refined in **Madarassy** v **Nomura International Plc** [2007] ICR 867. The Court of Appeal emphasised that there must be something more than simply a difference in protected characteristic and a difference in treatment for the burden of proof to shift to the respondent. They are

not, without more, sufficient material from which a Tribunal could properly conclude that, on the balance of probabilities, the respondent had committed an act of discrimination.

206. With regard to the reasonable adjustments claims, in **HM Prison Service** v **Johnson** 2007 IRLR 951 EAT, the EAT make it clear that it is insufficient for a Claimant simply to point to a disadvantage caused by the PCP pr physical feature (or now, potentially, lack of auxiliary aid) and then place the onus on the employer to think of what possible adjustments could be in place to ameliorate the disadvantage. This was confirmed in **Project Management Institute** ("PMI") v **Latif** [2007] IRLR 579 where the burden of proof was set out by the EAT in at paragraphs 55 – 57 (p138 AB):

a. The Claimant must prove that the duty to make reasonable adjustments arose – i.e. there was a PCP and that caused him or her a substantial disadvantage;
b. the Claimant must identify the "broad nature" of adjustments which should have been made (at any stage during the hearing will be sufficient - paragraph 57).
c. the Respondent must show that the suggested adjustments were not reasonable given its particular circumstances.

207. This does not mean that the Claimant is under a duty to show how the employer had failed to comply with a reasonable adjustment. What a Claimant must do is raise the issue as to whether a specific adjustment should have been made (**Jennings** v **Barts and the London** NHS EAT 0056/12). Elias P in Latif made it clear that in some cases the proposed adjustment may not be identified until after the alleged failure to implement it or, in exceptional cases, not until the Tribunal hearing

Conclusions

Disability

– s.6 EqA 2010 (para 8 List of Issues)

208. That the Claimant was disabled at the relevant times and that the Respondent had knowledge of disability at the relevant times is admitted in relation to: anxiety, stress and depression (from 23 January 1989 onward); knee osteoarthritis (from 19 December 2016 onwards); and cervical spondylosis and rotator cuff syndrome (from 28 July 2015 onwards). The first issue we considered was whether the Claimant was a disabled person under s.6 EqA 2010 by reason of his carpal tunnel syndrome.

209. The Claimant had indications of 'possible' carpel tunnel syndrome as early as April 2017, but described symptoms were of 'tingling' only with a reduced grip and

strength, and pins and needles. All symptoms appear to have disappeared by November 2018.

210. Save for having certain numbness when driving long distances, the Claimant did not complain of any other impact on normal day to day activity. We did not consider use of heavy power tools to be a normal day to day activity and by October 2017, the Claimant had ceased using power tools in any event, being absent from work.

211. Whilst we were satisfied that there was an adverse impact, and that such an adverse impact had lasted more than 12 months by November 2018, we were not persuaded that the Claimant had demonstrated to us that such an adverse impact on his normal day to day activities were:

a. Prior to April 2018, likely to last 12 months, in order to meet the definition prior to this date of 'long term'; and/or in any event
b. At any time, 'substantial'. We concluded that any adverse impact on the Claimant's normal day to day activity was not more than minor or trivial.

213. Therefore, on the evidence before us, we concluded that the Claimant was not at the relevant times a disabled person by reason of his carpel tunnel syndrome.

Discrimination complaints

214. Rather than deal with the complaints within each category of discrimination complaint, we have dealt with the treatment complained of in chronological order. Where the Claimant has brought a complaint of both direct discrimination and harassment in respect of the act complained of, the Tribunal considered whether the act if proven amounted to harassment and if not, then considered whether it was an act of direct discrimination.

April 2017 - Failure to disclose HAV form/ failure to carry out risk assessment - s.13 EqA 2010 - Direct discrimination (para 11(a) List of Issues)
Failure to implement the recommendations set out in the HAV assessment – s 13 EqA 2010 – Direct discrimination (para 11(e) List of Issues)

215. We were not persuaded that there had been any failure to send to the Claimant a copy of the HAV assessment form, but concluded that it was possible that the Claimant had not been provided with a copy of the risk assessment subsequently. We did not find that there had been no risk assessment at all as, on the face of the document, this had been undertaken, despite lack of signatures.

216. We concluded that there was no evidence or suggestion that anyone other than Paul Blackwell had been involved in managing the Claimant at this time or in these assessments. Any failure, whether to pass on the risk assessment and/or

implement the recommendations would not have, in our view, formed part of any continuing act of discrimination in any event and such claims would have been out of time.

217. As we had found that the Claimant had been sent a copy of the HAV assessment form in April 2017, we did not consider the fact that the Claimant had not received copies of the risk assessment late in 2018 by way of his SAR, would have justified the delay by the Claimant and we did not consider that it was just and equitable to extend time and both complaints were dismissed on that basis.

218. In any event, we were not persuaded that a failure to either send the HAV assessment form or failure to carry out the risk assessment was, or inferred direct discrimination.

219. We did not consider that AV was an appropriate comparator in any event. We concluded that AV was in materially different circumstances in that AV had a physical shoulder injury caused by a road traffic accident, where OHA recommendation had been that he return to work on a phased return to improve his condition. There was no evidence before us in any event to find that the Claimant's comparator, AV, was or would have been treated any differently.

220. For the avoidance of doubt, we also concluded that a hypothetical comparator in not materially different circumstances, would have been an employee off work on sickness for the same length of the time as the Claimant with a shoulder injury who was not disabled, would not have been treated any differently or more favourably than the Claimant.

221. The complaints under s.13 EqA 2010 therefore do not succeed and is dismissed.

Application to the Claimant of a PCP of requiring trade operatives to use power tools and carry out repetitive tasks – s.19 EqA 2010 - Indirect discrimination (para 27-39 List of Issues) and s.20/21 EqA 2010 - Failure to make reasonable adjustments (para 31-34 List of Issues)

222. In relation to both the indirect discrimination and failure to make a reasonable adjustments, for the period prior to October 2017 when the Claimant began his sick leave, the Respondent contends that the claims are out of time and that it is not just and equitable to extend time.

223. For the reasons already provided in relation to the previous direct discrimination claim, we concluded that claims existing in relation to the period of time prior to October 2017, when the Claimant commenced sick leave, were also out of time and that it was not just and equitable to extend time.

224. The Respondent accepts that the PCP of requiring trade operatives to use power tools and carry out repetitive tasks existed.

225. In relation to any claim after the Claimant returned to work in November 2018, and in relation to the claim of indirect discrimination, the Respondent:

    a. submits that this PCP did not disadvantage the Claimant post November 2018; and
    b. in addition, and in any event, seeks to justify the PCP in accordance with s.19(2)(d) EqA 2010, on the basis that the PCP was a proportionate means of a legitimate aim as trade operatives are required to ensure upkeep and maintenance of housing and safe environment for tenants, use of such tools and repetitive work was a basic requirement of job.

226. We concluded that a PCP of requiring trade operatives to use power tools and carry out repetitive tasks, was applied when the Claimant returned to work in November 2018. We also concluded that such a PCP would put persons who shared the characteristic of disability by reason of cervical spondylosis at a particular disadvantage when compared with others who do not live with such a condition as the same could exacerbate pre-existing conditions. Neither elements of the complaint was in dispute.

227. We were not satisfied however that the Claimant had demonstrated that this PCP had in fact placed him at a disadvantage following his return to work in November 2018 as:

    a. The OHA reports indicated that he could return to work as a plasterer, which included use of power tools and repetitive tasks, without adjustment.
    b. There was no evidence that the Claimant had any further issue or complaint about his shoulder when undertaking such tasks;
    c. there was no medical indication that such a PCP would cause or exacerbate his existing condition at that time; and
    d. there was no medical evidence that this PCP did cause or exacerbate the Claimant's condition at this time.

228. In any event, even if we were wrong on that issue, we concluded that the Respondent could show that the treatment was a proportionate means of achieving a legitimate aim of providing a safe environment for its residents and ensuring upkeep and maintenance of its housing.

229. The complaint of indirect discrimination therefore fails and is dismissed.

230. In relation to the reasonable adjustment claim, we were likewise not persuaded that the Claimant had demonstrated that this PCP exacerbated his cervical spondylosis and rotator cuff and/or carpel tunnel syndrome in the period following his return to work in November 2018.

231. On that basis any complaint in relation to a failure to make a reasonable adjustment in relation to this PCP following the Claimant's return to work in November 2018 also fails and is dismissed.

No referral to OH for 90 days - S.13 EqA 2010 - Direct Discrimination (Para 11(b) List of Issues)

232. Whilst we did find that there was a delay, the Claimant was not referred to occupational health until 23 January 2018, we did not conclude that this led to either a finding or inference of unlawful discrimination. There was no evidence to show or infer that a hypothetical comparator with an injury would have referred to the OHA sooner.

233. The Claimant has not discharged the burden of proof in establishing facts from which we could find or infer discrimination.

234. In any event, we accepted the evidence from Carleen Martin that there could be many reasons for a delay, particularly where an employee was unfit for work and the reasons were known for the absence. In this case, the Claimant was continually unfit for work and if the Respondent were required to demonstrate why the treated the Claimant as they did, we were satisfied that the explanation was this.

235. The complaint does not succeed and is dismissed.

Cath Hughes' comment on 16 March 2018 – s.13 EqA 2010 Direct Discrimination (para 11 (d) List of Issues) and/or s.15 EqA 2010 Discrimination arising from disability (para 12-14 List of Issues)

236. Whilst we had found that Cath Hughes had made such a comment in an email to the Claimant's supervisor in March 2018, the Claimant had only become aware of such a comment on provision to him of documents following his SAR in late 2018 and would not have been aware of such a comment contemporaneously.

237. In any event, we did not consider that such a comment was anything more than a reasonable comment, made by an HR manager to the supervisor who was seeking to manage the absence of an employee who had been away from the workplace on long term sickness absence for nearly 5 months. We concluded that there were no facts from which we could infer or find less favourable treatment and that Cath Hughes was referencing the Claimant's absence rather than his disability.

238. In any event, we concluded that the Claimant had by that time been off work for five months and it was explicable and reasonable for HR managers to have been

raising at that stage how best to manage a return to work and whether such an absence could be sustained by the business.

239. The complaint under s.13 EqA 2010 is not well-founded and is dismissed.

240. It is not in dispute that the Claimant's absence from 23 October 2017 was the 'something arising' in consequence of the Claimant's disability, in relation to this and indeed all complaints brought under s.15 EqA 2010.

241. We did not conclude that such a comment placed the Claimant at a 'disadvantage' (para 5.7 EHRC Employment Code) or that such a comment evidenced that the Claimant had been treated unfavourably by the subsequent application of the Managing Attendance Policy generally or by Cath Hughes specifically. We concluded that comment caused as the HR manager was supporting the supervisor who was seeking to manage the absence of an employee who had been away from the workplace on long term sickness absence for nearly 5 months.

242. The complaint brought under s.15 EqA 2010 also does not succeed and is dismissed.

Craig Allford disregarded the Claimant's qualifications in May 2018 - s.43 EqA 2010 – harassment (para 43 (a) List of Issues)

243. We did not make findings that Craig Allford had disregarded the Claimant's qualifications. We found that it was his opinion that the Claimant's qualifications were not relevant qualifications.

244. The Claimant has not demonstrated facts which support the treatment complained of and the complaint does not succeed.

245. In any event, even if we were to give the word 'disregard' a more liberal interpretation, to the effect that he 'disregarded' or 'discounted' the Claimant's qualification, we were still satisfied with the explanation from Craig Allford, which we accepted as candid and truthful, even if ultimately he was wrong, which was that in his opinion, the Claimant's qualifications were not relevant. This was the reason that he 'disregarded' the Claimant's qualifications which was not a reason related to his disability.

246. The complaint is not well-founded and is dismissed.

Failure to carry out a welfare visit for 9 months – Section 13 EqA 2010 (Para 11 (c) List of Issues)

247. Whilst we had found that the first welfare visit had not been carried out for 9 months since the commencement of the Claimant's sick leave:

a. we did not find it was an express term of the AMP that there would be welfare meetings within a set period and/or after every occupational health appointment;
b. we did view this in the context that the earlier March 2018 occupational health report had indicated that the Claimant was not fit to work in any capacity; and
c. there was no suggestion by the Claimant that his supervisor during this period, Paul Blackwell, had not kept in other contact with him.

248. In those circumstances, we did not consider that there were any specific facts which could give rise to a finding of less favourable treatment, or an inference of discrimination. We did not consider that AV was an appropriate comparator in any event as, for the reasons given, AV was in materially different circumstances to the Claimant. Likewise, we did not consider that this was less favourable treatment than a hypothetical comparator would have received.

249. The complaint is not well-founded and is dismissed.

PCP of not carrying out welfare visits after every occupational health appointment – s.20/21 EqA 2010 – failure to make reasonable adjustments - (para 35-38 List of Issues)

250. We deal with this claim of reasonable adjustments at this point in that it relates to the management of welfare visits.

251. The Claimant's case has been difficult to understand. In answers to questions from the Tribunal at case management, the Claimant asserted that others had been receiving welfare visits after each occupational health appointment and he had not been. He maintained that the failure to arrange welfare visits for him after each occupational health appointed amounted to a PCP.

252. In answer to questioning from the Respondent's representative, the Claimant was also firm in his answers that this was a PCP that only applied to him and that '*others were getting welfare visits'.*

253. We found that whilst such a PCP would have had the necessary element of repetition about it, as the Claimant had insisted that this practice had not applied and would not have been applied to others who were not disabled within the Respondent's employment, the pleaded PCP was not made out.

254. The claim of failure to comply with the duty to make reasonable adjustments in relation to welfare visits after every occupational health appointment is therefore not well-founded and is dismissed.

<u>Failure to implement recommendations set out in the OH reports</u> / <u>Failure to make reasonable adjustments</u> – s.13 EqA 2010 - direct discrimination (para 11(e) List of Issues) and s.20/21 2010 failure to comply with duty to make reasonable adjustment – (para 39-42 List of Issues)

255. It has been accepted by the Respondent that the PCP was applied and did place the Claimant at a substantial disadvantage. The Respondent also accepts that the Claimant had knowledge of disability and disadvantage. In that regard, it is the Tribunal's role to focus on whether there was a reasonable step not taken by the Respondent that could have been taken to avoid the disadvantage.

256. With regard to the Claimant's substantive role, whilst the Tribunal accepted that his trade role was as a plasterer, which would have taken around 80% of his time, his role also included responsibility for carrying out other miscellaneous duties, which included 'odd jobs' including fixing cabinetry, some electrical works etc.

257. Whilst the Respondent's witnesses did give evidence that as the occupational health assessment was that for the Claimant to return to work, any role would need to avoid heavy lifting, pushing and pulling, and that this would cover most of the Claimant's tasks including driving a car and/or picking up tools, we also found that the Respondent:

    a. had not provided to the OHA a list of the Claimant's tasks or duties for guidance from him, and
    b. had no risk assessment of what weight-bearing the Claimant could undertake.

258. They had reached conclusions of how practicable it would have been for the Claimant to undertake tasks without the Claimant's input, occupational health input or indeed any real risk assessment.

259. We concluded that they had instead made their own assessment of what the Claimant could or could not do, had focused largely on what availability there was for an office-based role, and had not put their minds to whether the Claimant's role could be adjusted by assigning him tasks that did not involve heavy manual handling, whether in his plasterer role or an electrician role, with or without a 'buddy'.

260. We had also found that the Claimant had been raising the possibility of an electrician's role from around May 2018, a point when Martyn Savage had spoken to Craig Allford about the Claimant's qualifications. We concluded that it was likely that at that point an electrician role was discounted on the basis that the Claimant

was not qualified or competent, as well as on the basis of their view that he lacked the physical capacity to undertake work at height due to his shoulder issue.

a. The lack of qualifications and/or competence for an electrician appears not to have been addressed with the Claimant during his sickness absence, only his physical capacity to undertake such a role;

b. Whilst we had found that the Respondent's witnesses had formed the genuine view that the Claimant was neither qualified nor competent to carry out such a role, we concluded that this was likely a mistaken view as, had the Respondent's enquired further with the Claimant as they did during this hearing, they would likely have been satisfied that the Claimant did have the necessary qualifications (NVQ level 3) and that with just a week's course and examination, would have been 'competent';

c. We concluded that whilst the Respondent was not expected to have made every possible enquiry, they did not undertake a reasonable enquiry into the Claimant's skills and qualifications as an electrician.

261. With regard to the Claimant's physical capacity to undertake such work, whilst we accepted that the Claimant did not contradict correspondence he had received from the Respondent, in which they referenced that:
   a. his physical condition would meant that it would difficult for him to conduct such a role [344], and later
   b. that he would be unable to complete his work as an electrician [366],

   we remind ourselves that whilst it is good practice to consult a disabled person over what adjustments might be suitable, the duty to make reasonable adjustments is on the employer. We did however take into account the fact that the Claimant did not proactively challenge this view in determining whether it was reasonable for the employer to have considered the Claimant for deployment into an electrician role, and when.

262. We did not find that the Claimant had suggested auxiliary aids, such as step ladders or hop-ups or a 'buddy' until after he had returned to work. Whilst we were not persuaded that a ladder or a hop-up would have enabled the Claimant to undertake work at any height, for example we were not persuaded that this would have enabled the Claimant to work at ceiling height due to his inability to lift his arms above his shoulder height, we were also not persuaded that there was any evidence that this would either be a health and safety risk or that it was impracticable in all scenarios of work. We concluded that such an auxiliary aid might have been effective.

263. It had also been Ashley Bayliss' evidence that the Respondent had adjusted another plasterer's role by assigning tasks to him that did not involve him plastering ceilings, because of that plasterer's health condition, and that that employee had

been partnered or had been a 'buddy' with an electrician. In our view this demonstrated to us that such an adjustment was both practicable within the Respondent's business, and within what would have been a reasonable cost for this employer. We concluded that such a step again might have been effective particularly in the context of what the Respondent had done for others.

264. We did take consider the adjustments that had been made for AV, but accepted the Respondent's evidence, that as AV had been injured in a road traffic accident and consequentially had any loss of earnings met with an insurance claim, that the cost of adjustments for AV were met, or were likely to be met, with that claim and that this would have factored in what was reasonable for AV which would not have been applicable to the Claimant.

265. When taking an holistic approach, we were satisfied that the Claimant had identified in broad terms the nature of the adjustments that would have ameliorated or improved the disadvantage.

266. We were not satisfied however that the Respondent had shown that the disadvantage would not have been eliminated or reduced by the proposed adjustments and/or that the adjustments were not reasonable ones to make

267. We therefore concluded on the evidence that there would have been a chance of the Claimant being able to work if the following steps had been taken, steps which we considered to be reasonable of:

a. Adjusting the Claimant's role, by assigning tasks to him that did not involve heavy manual handling in line with the OHA recommendations; and/or
b. Deploying the Claimant, to undertake the miscellaneous tasks and/or as an electrician, with a 'buddy' working alongside him to assist with any tasks he struggled with; and
c. Providing the Claimant with an auxiliary aid of a step-ladder and/or a hop-up platform.

268. We also concluded that it would have been reasonable to have taken such a step following the receipt of the 13 August 2018 August occupational report, when the OHA had asked for job descriptions and raised specific adjustments beyond office/supervisory roles and by, at the latest at the welfare meeting on 24 August 2018.

269. With regard to the temporary cover role to cover Ashley Bayliss absence in October 2018, we did not consider that it reasonable for the Claimant to have been offered a supervisory role on a short term basis on the basis of practicability when the position was short term temporary absence cover as:

a. This was a senior role to that in which the Claimant was employed;
b. The Claimant would have required training to undertake the cover;

c. The Claimant had been absent himself for nearly 12 months at that time and would likely have required a phased return to work over that period.

270. We concluded that this was not a reasonable step to take and that complaint claim was not well-founded.

Taking 7 weeks to send out a follow up letter on 23 August 2018 – s.13 EqA 2010 – direct discrimination (para 11 (f) List of Issues)

271. We did find that the Respondent had taken 7 weeks to send out a follow up letter following the welfare meeting in July 2018. The Claimant confirmed in live evidence that he did not have access to evidence that the Respondent did not delay with AV, just a belief. There was no evidence to find that the Respondent did not delay equally with AV. Neither were there any facts from which we could find that the Respondent would not have equally delayed with a hypothetical comparator.

272. We concluded that there were no facts from which we could find or infer that the delay was because the Claimant was a disabled person.

273. The complaint is not well founded and is dismissed.

Sending out two differing welfare letters in October 2018 – s.13 EqA 2010 – direct discrimination (para 11 (g) List of Issues)

274. Whilst we did find that two differing welfare letters were sent out in October 2019, we accepted the evidence from the Respondent's witnesses and found that the first had been sent in error, before drafting had been completed. The Claimant also accepted on cross-examination that the sending of the first letter may have been an accident.

275. We concluded that it was as likely that AV and/or a hypothetical comparator would have been subject to the same human error as the Claimant and there was no evidence before us to find or infer that this amounted to less favourable treatment of the Claimant because he was disabled.

276. The complaint is not well founded and is dismissed.

Raising ill-health retirement and brought along relevant paperwork in October 2018 - – s.13 EqA 2010 – direct discrimination (para 11 (h) List of Issues) – s.15 EqA 2010 discrimination arising from (para 15-17 List of Issues)

277. We did find that the Respondent did raise ill-health retirement with the Claimant, and did bring paperwork to the welfare meeting in October 2018,. We concluded that such treatment could amount to lor infer less favourable or unfavourable treatment, in the context of our finding that:

    a. the Respondent failed to revert to occupational health in August 2018, following the OHA's offer to review any job descriptions; and
    b. the Respondent failed to ask the OHA for practical guidance on what the Claimant could and could not do,

278. We concluded that this was sufficient to shift the burden in this instance to the Respondent to explain their treatment of the Claimant.

279. In that regard however, we accepted that Respondent's position that simply raising, and/or bringing along paperwork to investigate the possibility of ill-health retirement, was just a step in the ARM process with the Respondent informing the Claimant of his options. We accepted Kimberley Williams' evidence that this was standard practice and that such a step may have been to the Claimant's benefit.

280. We concluded that this was not less favourable or unfavourable treatment of the Claimant, despite the Claimant viewing this as negative behaviour from the Respondent.

281. We did not conclude that the Respondent would have treated a hypothetical comparator more favourably or that this amounted to unfavourable treatment.

282. The complaints are not well founded and is dismissed.

The Respondent did not offer the Claimant a temporary role to cover Ashley Bayliss' post in October 2018 whilst he was absent for 3-4 weeks S.13 EqA 2010 – direct discrimination (para 11(l) List of Issues) s.20/21 – failure to make a reasonable adjustment – (para 41 (iv) List of Issues)

283. We did find that the Respondent did not offer the Claimant a temporary role to cover Ashley Bayliss' post but made no findings of fact beyond that treatment to find or infer that the Claimant had been treated less favourably.

284. With regard to the temporary cover role to cover Ashley Bayliss absence in October 2018 as an adjustment, we had concluded that it was not reasonable for the Claimant to have been offered a supervisory role on a short term basis on the basis of practicability when the position was short term temporary absence cover as:

    a. This was a senior role to that in which the Claimant was employed;
    b. The Claimant would have required training to undertake the cover;

c. The Claimant had been absent himself for nearly 12 months at that time and would likely have required a phased return to work over that period.

285. On the basis of those findings we did not find or infer that the Claimant had been subjected to less favourable treatment and the direct discrimination complaint claim was also not well-founded and was dismissed.

The Respondent did not offer allow the Claimant to return following the letter from his consultant and GP in November 2018 – s.13 EqA 2010 – direct discrimination (para 11 (j) List of Issues) and s.15 EqA 2010 – discrimination arising from (para 18-20 List of Issues)

286. We did find that the Respondent required the Claimant to attend an appointment with the OHA prior to being allowed to return to work in November 2018, but had also found that this was a reasonable step to take taking into account:

a. The Claimant had been off work and unfit to return as a plasterer for the previous 12 months, since October 2017;
b. The October 2017 OHA Report had reported that the OHA still considered that the Claimant was unfit for his role as a plasterer,
c. The Claimant had reported that he was fit for work in full capacity less than a month after that last OHA Report; and
d. Neither the Consultant letter nor the GP letter confirmed the Claimant was fit to return to work. Indeed, the GP had expressly stated that their letter was not a 'Fit for work' report.

287. There were therefore no facts from which we could find or infer discrimination. We considered that such a step was a fair and reasonable one for this employer to take to ensure that it was safe for the Claimant to return to work and we did not consider that this amounted to either less favourable treatment or unfavourable treatment. The cause of the referral was as the Respondent had not received confirmation that he was fit to return to work.

288. This complaint is not well founded and is dismissed.

On 3 December 2018 Ashley Bayliss approached the Claimant in his van and accused him of being unprofessional – s.13 EqA 2010 – direct discrimination (para 11 (j) List of Issues), s.26 EqA 2010 – harassment (para 43(b) List of Issues) and s.27 – victimisation – (para 49(a) List of Issues)

289. We did find that Ashley Bayliss and the Claimant had a conversation on or around 3 December 2018 as the Claimant had not been answering his phone, that

this was the reason for such a conversation and, during that conversation, the Claimant did make a reference to Ashley Bayliss referring to him as being 'unprofessional' for not answering his phone.

290. Whilst we were satisfied that the Claimant would have considered such conduct to have been unwanted, we did not consider that the Claimant had established facts from which we could find or infer harassment related to the Claimant's disability. In turn, for the same reason we did not find that such conduct amounted to less favourable treatment. Rather we concluded that the conduct complained of was related to and because of the Claimant's own behaviour in not responding to calls.

291. We found that the grievance did complain of discrimination and did as a result fall to be a 'protected act' under s.27(2) EqA 2010, an issue accepted by the Respondent.

292. We were also mindful of the fact that the conversation took place shortly after the Claimant had lodged his grievance and the both specifically refer to the Claimant's grievance in that conversation. These were facts from which we could find or infer that the conversation was because of that grievance.

293. However, we were satisfied that there was no link with grievance and the grievance was not the reason for either the conversation or indeed any criticism being levelled at the Claimant. Rather we were satisfied that the conversation and any criticism of the Claimant was because the Claimant had not been answering his phone. There was nothing in the content of the transcript of that discussion that indicated any adverse motive from Ashley Bayliss. Rather we had found that he strived to tell the Claimant that he was concerned about him.

294. The complaints are not well founded and are dismissed.

ARM on 5 December 2018: Martyn Savage conducted the ARM, referred to three absences not one, consideration of moving to Stage 2 ARM and Carleen Martin's comment – s.13 EqA 2010 – direct discrimination (para 11 (l) and (m) List of Issues), s.15 EqA 2010 – discrimination arising from harassment (para 21-23 and para 24-26 List of Issues)

295. We did find that:

a. Martyn Savage did conduct the ARM, not Ashley Bayliss, the Claimant's supervisor;
b. Martyn Savage had queried with HR in advance of the meeting on 5 December 2018 which stage of the ARM process had been reached and it was confirmed that this was Stage 1. There was no consideration of moving to Stage 2;

c. At the meeting the Claimant's three absences, and not only his absence from October 2017 – November 2018, was discussed;
d. Carleen Martyn did say to the Claimant in the meeting '*If this happens again it wont last this long'.*

296. However we also found that:

a. The rationale for Martyn Savage conducting the ARM was to impress upon the Claimant the seriousness of the issue;
b. Carleen Martin had pulled together details of the Claimant's total absences; and
c. A letter correcting the period of absence under consideration to the one period from October 2017-November 2018 had been sent to the Claimant immediately he had raised concern.

297. We were not persuaded however that these facts could properly lead to finding or an inference being drawn of less favourable treatment, either in relation to either Martyn Savage conducting the meeting, or in the reference to the three absences being referred to.

298. In any event, the Respondent had, we concluded, provided an adequate explanation for why Martyn Savage conducted the meeting, an explanation which we considered to be reasonable. Carleen Martin had also explained the references to all the Claimant's absences and again, we did not consider it unreasonable to have referred to the totality of the Claimant's sickness within such a meeting.

299. We therefore did not consider that there had been less favourable treatment of the Claimant because of his disability in comparison to a non-disabled comparator.

300. The complaints of direct discrimination were not well founded and were dismissed.

301. With regard to the complaints of discrimination arising from disability,

a. we did not find that the Respondent considered proceeding to a Stage 2 meeting. Rather we found that Martyn Savage simply raised a query as to which stage of the process the Respondent had progressed to. In those circumstances, we concluded that the Claimant had not demonstrated that he has been subjected to unfavourable treatment as alleged. That s.15 EqA 2010 claim was not well founded and was also dismissed.

b. Whilst we did find that Carleen Martin did say the words alleged at that meeting, we did not consider that this was unfavourable treatment. Rather, we accepted the Respondent's position which was that she was simply informing the Claimant of how any absences would be handled in future.

c. We again concluded that the Claimant had not been subjected to unfavourable treatment but in any event, if we were wrong on that, we further concluded that such a conduct was justified in that the Respondent had the legitimate aim of upholding attendance standards, the Claimant had been off for a significant period and the comment was a proportionate means of communicating to the Claimant that the Respondent had to ensure that it had enough staff to conduct delivery of its services.

302. The complaints brought under s15 EqA 2010 are also not well-founded and are dismissed.

During the grievance investigation false statements were made to the investigator - s.13 EqA 2010 – direct discrimination (para 11 (n) List of Issues), s.26 EqA 2010 – harassment (para 43(c) List of Issues) and s.27 – victimisation – (para 49(c) List of Issues)

303. We did find not find that false statements had been made by to the investigator by any of the Respondent's witnesses. On that basis, all complaints in relation to this allegation are not well-founded and are dismissed.

In February 2019, Ashley Bayliss made it a policy that the Claimant had needed a scan to return to work in August 2018 s.13 EqA 2010 – direct discrimination (para 11 (o) List of Issues)

304. Whilst we had found that both Ashley Bayliss and Kimberley Williams had become focussed on receiving the MRI scan from the Claimant's NHS clinicians in order to determine what if any reasonable adjustments could be made for the Claimant, which could infer discrimination we were satisfied that they would have taken the same approach with a hypothetical comparator and that the reason for the treatment was not disability.

305. The complaint of direct discrimination is not well founded and is dismissed.

Ian Harris did not deal with two issues in the Claimant's grievance s.13 EqA 2010 – direct discrimination (para 11 (p) List of Issues)

306. We had found that Ian Harris had in his Grievance Appeal outcome letter dealt with both:

a. The delay in the welfare visit; and
b. The Claimant's comparison of treatment with that of AV.

307. The complaint of direct discrimination was therefore not well founded and is dismissed.

The Respondent delayed too long in referring the Claimant to occupational health on 7 March 2019 - s.13 EqA 2010 – direct discrimination (para 11 (q) List of Issues)

308. We had found that the Claimant was absent from work on sick leave on 6 March 2019 and on 7 March 2019 made a referral to their OHA. There was not a delay at all and on that basis the claim fails.

309. The complaint of direct discrimination is not well founded and is dismissed.

The Respondent started an informal investigation on 9 April 2019 and had sent to the Claimant a disciplinary investigation letter on 26 April 2016 - s.13 EqA 2010 – direct discrimination (para 11 (r) and (t) List of Issues), s.26 EqA 2010 – harassment (para 43(d) and (f) List of Issues) and s.27 EqA 2010 – victimisation (para 49(c) and (e) List of Issues)

310. We dealt with these two complaints together.

311. We had made findings that:

a. AV had spoken to Ashley Bayliss and had raised concerns that the Claimant had been questioning him on his own absence management processes;

b. Subsequently, when Kimberley Williams had spoken to AV, he had informed her that he was uncomfortable with the Claimant 'quizzing' him on his ailments and his return to work and that he had been upset and embarrassed that the Claimant had commented that AV had been driving in favour of another operative, that the Claimant had called him a 'chauffeur'. There had therefore been a complaint from AV regarding the Claimant's conduct; and

c. That the Claimant had been invited to an informal meeting to discuss such issues on 5 December 2019 and that these issues also included the complaints made by colleagues that they were uncomfortable that the Claimant was covertly recording their conversations with them and a concern that the Claimant had, whilst at Travis Perkins' premises, shouted a comment about the Respondent, a comment that the Claimant had admitted making; and

d. The Claimant was sent a letter inviting him to a disciplinary investigation on 26 April 2019.

312. We found that there was a cogent and reasonable trail of evidence which led to both the invite to the informal meeting and to the formal disciplinary.

313. Whilst we accepted that such treatment would have been unwanted by the Claimant, we were not persuaded that the informal meeting or the subsequent invite to a disciplinary investigation meeting was related to the Claimant's disability. Rather, we concluded that the Claimant was invited discuss concerns about the Claimant's conduct, both informally and in a formal disciplinary investigation,

because of the Claimant's own conduct, following concerns having been raised by AV, Martyn Salvage and the Claimant's trade colleagues.

314. The complaints of harassment was therefore not well-founded and are dismissed.

315. We made no findings of fact from which we could find or draw an inference of discrimination. We were not persuaded that the Respondent had a hypothetical comparator would have been treated any differently to the Claimant. We concluded that the informal meeting and indeed the subsequent disciplinary action against the Claimant was because of the Claimant's own conduct and not because of his disability.

316. The complaints of direct discrimination is therefore also not well-founded and are dismissed.

317. With regard to the victimisation claim, again we accepted that the Claimant had undertaken a 'protected act' in raising a grievance.

318. We had also found that:

a. The informal meeting had taken place some five months after the Claimant had lodged his grievance, but only one month after the outcome of the grievance and appeal and the submission of the Claimant's ET1; and
b. that Martyn Savage had made reference to both the grievance and a potential employment tribunal claim, within the meeting.

319. However, despite the proximity of the meeting to the grievance and the issue of the claim, and indeed reference by Martyn Savage to the tribunal claim, we were still not persuaded that these were the cause of the meeting or formal invite, or even a significant influence for either. We were not persuaded that there was any malice or deliberate intent or even subconscious motivation behind the request for the Claimant to discuss his own conduct. We had reviewed the Claimant's transcript of his covert recording of the meeting and the Whatsapp exchanges which demonstrated to us a firm but supportive management of the Claimant in the face of deteriorating conduct from their employee clearly unhappy with the grievance outcome.

320. We concluded that the Claimant's own misconduct, conduct which warranted both an informal discussion and, subsequently, formal disciplinary action, was the reason for the treatment.

321. The complaints of victimisation was also not well-founded and are dismissed.

The Claimant reported the content of the meeting on 9 April to HR and received no response s.13 EqA 2010 – direct discrimination (para 11 (s) List of Issues), s.26 EqA

2010 – harassment (para 43(c) List of Issues) and *s.27 EqA 2010 – victimisation (para 49(d) List of Issues)*

322. We had made findings that the Claimant had complained about the meeting to HR on 9 April and again on 18 April 2019 but that HR had responded to the Claimant later that day.

323. We therefore did not find that the Claimant did not receive a response and the Claimant had not established the treatment relied on.

324. The complaints are therefore not well founded and are dismissed.

The Respondent did not complete a stress risk assessment until 12 June 2019 s.13 EqA 2010 – direct discrimination (para 11 (t) List of Issues), *s.26 EqA 2010 – harassment (para 43(g) List of Issues)* and *s.27 EqA 2010 – victimisation (para 49(f) List of Issues)*

325. It is admitted that the stress risk assessment in relation to the Claimant's mental health was not completed until June 2019.

326. We had also found that the first occasion that the OHA had recommended a stress risk assessment for the Claimant was following the occupational health assessment on 12 June 2019, and that one not been recommended:

a. following the November 2018 assessment, to assess the Claimant's fitness to return to work following his sickness absence; nor indeed
b. following the March 2019 OHA assessment, despite the Claimant having absented himself from work with a stress/mental health related absence.

327. Again, whilst we accepted that such treatment would have been unwanted by the Claimant, particularly when he was struggling with his mental health we were not persuaded that the referral not made until June 2019, was related to his disability. Rather, we concluded that the Claimant was not referred until June 2019 because that was the first time a recommendation had been made for one by occupational health.

328. The complaint of harassment was therefore not well-founded and is dismissed.

329. We made no findings of fact from which we could find or draw an inference of discrimination. We were not persuaded that the Respondent had a hypothetical comparator would have been treated any differently to the Claimant. We concluded that the stress risk assessment was made in June 2019 was due to the recommendation of the OHA not being made until then, and not because of the Claimant's disability.

330. The complaint of direct discrimination is therefore also not well-founded and is dismissed.

331. With regard to the victimisation claim, again we accepted that the Claimant had undertaken a 'protected act' in raising a grievance.

332. However, again we did not conclude that either the grievance or these proceedings were the cause for the the referral for a risk assessment in June 2019 rather than November 2018, nor a significant influence on the determination to refer the Claimant for an assessment. Again, we concluded that the timing of the risk assessment was as a result of:

a. The lack of earlier OHA recommendation for a risk assessment;

b. The June OHA recommendation for a risk assessment.

333. The complaint of victimisation was also not well-founded and is dismissed.

The Respondent informed the Claimant that he may be subject to disciplinary action in relation to his audio recordings and did not contact the claimant to organise an investigation meeting until 18 July 2019 s.13 EqA 2010 – direct discrimination (para 11 (v) List of Issues), *s.26 EqA 2010 – harassment (para 43 (h) and (i) List of Issues)* and *s.27 EqA 2010 – victimisation (para 49(g) and (h) List of Issues)*

334. Again we deal with these two complaints together.

335. We had found that there was a period between 26 April 2019 and 18 July 2019 when the Respondent did not organise an investigation meeting. However, we also found that during this time the Claimant had been found uncommunicative in the chief executive's office and had been subsequently off work with his ill-health until 12 June 2019.

336. Whilst we accepted that such a delay would have been unwanted and might in itself infer discrimination, we took into account that the Claimant had been off sick for a proportion of that time and did not conclude that there was any link with the Claimant's disability, or indeed the protected act.

337. We therefore concluded that the complaints in relation to this act were not well-founded and were dismissed.

338. We had found that the Claimant had been written to following the case management hearing in which he had confirmed that he had a number of covert recordings.

339. Whilst the timing of the letter is in close proximity to the ET claim, a protected act, and was sent following issues raised at case management of this claim, we

did not consider that those facts indicated that the threat of disciplinary action was because of the issue of the claim itself (or indeed the grievance). We did not conclude that it even had a significant influence. We concluded that the reason for the treatment was again the Claimant's own conduct in covertly taping his conversations with work colleagues.

340. These complaints were also not well founded and are dismissed.

Time

341. We have set out earlier in these conclusions that the complaints arising before the Claimant commenced his sick leave in October 2017 are out of time, that it is not just and equitable to extend time and such claims are dismissed.

342. In relation to the remaining acts, we concluded that they were continuing acts and all were brought within the primary time limit as extended by the early conciliation provisions.

Summary

343. In summary, the Claimant's claim in respect of s.20/21 EqA 2010, failure from 24 August 2018 to comply with the duty to make a reasonable adjustment, being the date of the welfare meeting with the Claimant following receipt by the Respondent of the occupational health report, is well-founded.

344. A short telephone case management hearing will be listed to determine what, if any, further case management is required and a remedy hearing will be listed for one day in relation to remedy in respect of that one successful complaint.

345. All other complaints brought by the Claimant are dismissed.

Employment Judge R Brace

Date **5 May 2022**

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 6 May 2022

FOR EMPLOYMENT TRIBUNALS Mr N Roche