THE EMPLOYMENT TRIBUNALS

Claimant: **Mr K Hopkins**

Respondent: **Ministry of Defence**

HELD AT: **Middlesbrough** **ON:** **7, 8, 9 and 28 February and 2 March 2022**

In chambers: 7 March 2022

BEFORE: **Employment Judge Aspden**
Ms B G Kirby
Ms D Newey

REPRESENTATION:

Claimant: **Mr P Morgan, counsel**
Respondents: **Ms D Bayne, counsel**

RESERVED JUDGMENT

The unanimous judgement of the Tribunal is that none of the claimant's claims under the Equality Act 2010 are well-founded. The claims are dismissed.

REASONS

Claims and Issues

1. The claimant brings claims of disability discrimination. His complaints are contained in a claim form which was received at the Tribunal on 15th June 2020. The respondent defends the claims.

2. In his grounds of complaint, the claimant identifies the specific complaints he is making as being the following.

2.1. Complaints that the respondent failed to comply with a duty to make reasonable adjustments under Sections 20-21 of the Equality Act 2010 by doing the following:

(a) Refusing to offer the claimant an alternative role.
(b) Refusing to permit homeworking.
(c) Failing to make reasonable adjustments to the disciplinary process for ill health absence.

2.2. Complaints that the respondent treated the claimant unfavourably because of something arising in consequence of his disability, and thereby subjected the claimant to discrimination within Section 15 of the Equality Act 2010, by doing the following:

(a) Pressing the claimant for ill health retirement.
(b) Refusing to let the claimant work from home.
(c) Failing to pay the claimant full sick pay.
(d) Issuing the claimant with a final written warning.
(e) Threatening the claimant with dismissal.
(f) Pre-determining the claimant's grievance.

2.3. A complaint that the respondent refused to move the claimant to another role and that this was either:
(a) unfavourable treatment because of something arising in consequence of the claimant's disability, and therefore discrimination within Section 15 of the Equality Act 2010, or
(b) direct discrimination because of the claimant's disability, within Section 13 of the Equality Act 2010.

3. It is common ground between the parties that, at all material times:
3.1. The claimant had a disability within the meaning of that term in Section 6 of the Equality Act 2010 by virtue of a mental impairment – Post Traumatic Stress Disorder (PTSD); and
3.2. the respondent knew the claimant had that disability.

4. The complaints being made by the claimant were discussed at a Case Management Hearing before Employment Judge Martin on 7th September 2020. That Case Management Hearing resulted in a draft list of issues being prepared which was said to have been agreed by the parties' representatives.

5. Ahead of this hearing Mr Bayne prepared an outline chronology and cast list to which Mr Morgan had no objection. Mr Bayne also prepared a Case Summary identifying certain issues that could helpfully be clarified to ensure that both the claimant's and the respondent's case are properly understood. Mr Morgan filed a response to that Case Summary.

6. At the start of the hearing we discussed the complaints being made and the issues that the tribunal would or may have to decide to determine the claims. Mr Bayne subsequently confirmed the justification arguments the respondent relies on to defend the Section 15 claims.

7. With regard to the complaint about issuing a final written warning, the claimant alleges in his grounds of complaint that he was given a final written warning after Lt Col Potter started a disciplinary process against him due to sickness absence in February 2020. At the Case Management Hearing this allegation was expanded to include 'subjecting the claimant to a disciplinary process.' In his response to Mr Bayne's Case Summary, however, Mr Morgan said the claimant no longer contends that there was a disciplinary process or that the claimant was issued with a final written warning as alleged in the grounds of complaint. We discussed this matter at the beginning of the hearing and Mr Morgan confirmed that this complaint is withdrawn.

8. The basis on which the remaining claims are made is set out below. For ease of reference we have numbered the complaints as Complaints 1 to 7.

Complaint 1: complaints of failure to make reasonable adjustments

9. In relation to the complaints that the respondent failed to comply with a duty to make reasonable adjustments, the claimant alleges in the grounds of complaint that the respondent had the following provisions criteria or practices (PCPs) that put him at a substantial disadvantage in comparison with other employees who did not suffer from PTSD:

    9.1. Attending work/achieving a certain level of attendance.
    9.2. Not permitting homeworking.
    9.3. Refusing moves to an alternative role where there is a risk that the move would be unsuccessful.

10. At the Case Management Hearing an additional PCP was identified as being relied upon by the claimant, namely: 'attend at work and carry out day to day duties'.

11. In his grounds of complaint the claimant did not identify the disadvantage that he alleges the PCPs relied on put him at in comparison with people without a disability. In response to a request to clarify this point Mr Morgan said disadvantages were 'that the claimant was not able to work in the office with TT (a colleague) after September 2019 and that his recovery and future return to work were affected by his (correct or otherwise) belief that Lt Col Potter was attempting to terminate his employment after 25th November 2019.'

12. The claimant's case (as noted above) is that, to comply with a duty to make reasonable adjustments, the respondent should have taken the following steps to avoid those disadvantages:

    12.1. offered the claimant an alternative role;
    12.2. permitted him to work from home; and
    12.3. 'made reasonable adjustments to the disciplinary process for ill health absence.'

13. In his Case Summary, Mr Bayne asked for clarification of the adjustments to the 'disciplinary process for ill health absence' that the claimant was alleging should have been made. Mr Morgan's initial response was that he wished to give that further

consideration but that he was likely to be saying the respondent should have adhered closer to its policy ie its process for ill health absence. At the start of the second day of the hearing Mr Morgan provided a written response to the questions asked. In relation to the adjustments to the 'ill health absence process' that ought to have been made Mr Morgan said the claimant's case is that the respondent should have taken the following steps to avoid the disadvantage relied on.

13.1. An earlier referral to Occupational Health, during the period from the Claimant's earlier absence in September 2018.
13.2. Making a referral to Occupational Health to address the issues that affected the Claimant's ability to work, again from September 2018.
13.3. A greater level of discussion with the Claimant as to the obstacles to his return to work, from September 2019.
13.4. Adjusting the process to allow the Claimant a different point of contact rather than Lt Col Potter, from the date of the OH report on 23 December 2019.

14. It was apparent that what Mr Morgan was now saying was not consistent with the claimant's grounds of complaint or with other elements of the claim being presented by the claimant. It is clear that the claimant's complaint, as made to the Tribunal, is about alleged discrimination that the claimant says occurred whilst he was absent from work from September 2019. Mr Morgan's suggestion that adjustments should have been made in 2018 were inconsistent with the case as presented. In any event, even on the claimant's own case as clarified by Mr Morgan in this hearing, the PCPs relied upon did not put the claimant at a substantial disadvantage in comparison with persons without a disability until September 2019 and, therefore, a duty to make adjustments to take steps to avoid that disadvantage could not have arisen before September 2019.

15. When we invited Mr Morgan's comments on that issue, he said the failure to make reasonable adjustments must have started in September 2019 or July 2019. Mr Morgan settled on September 2019 after we pointed out that the suggestion that the claimant's complaint was that the respondent failed to make reasonable adjustments in July 2019 faced the same difficulties as the suggestion that the complaint was that the respondent failed to comply with the duty in 2018.

16. However, a further difficulty with the complaint that Mr Morgan now sought to advance was that none of the suggested adjustments to the relevant policy had been referred to or even alluded to in the grounds of complaint. Mr Bayne took issue with the claimant seeking to allege that those were adjustments that ought to have been made and that the failure to do so breached a duty to make adjustments. In response to our questions, Mr Bayne said the respondent's understanding, based on the claim form, was that the complaint that the claimant had made to the Tribunal was that there should have been adjustments to the formal absence management process from around February 2020, when that formal process began. Mr Bayne acknowledged that, in the grounds of complaint, that process had been described as a 'disciplinary process', which was inaccurate, but said that, for the purposes of the complaint of failure to make reasonable adjustments, he was willing to accept that the claimant was alleging that the adjustments that should have been made were to the formal absence management process, which process began in February 2020.

17. We heard submissions from both Mr Morgan and Mr Bayne as to what, on a fair reading, the complaint made by the claimant in his grounds of complaint concerned. Having considered those submissions we agreed with Mr Bayne that, on a fair reading of the grounds of complaint read as a whole, the complaint at paragraph 42 that the respondent failed to make reasonable adjustments 'to the disciplinary process for ill health absence' can only have been a reference to the formal absence management process that began in February 2020. That being the case, the question for us to consider (if we found a PCP had put the claimant at a substantial disadvantage, as alleged) was whether the following were steps that it was reasonable for the respondent to take to avoid the disadvantage and which it failed to take:

    17.1. Adjusting the formal absence management process that began in February 2020 by having a greater level of discussion with the Claimant as to the obstacles to his return to work.
    17.2. Adjusting the formal absence management process that began in February 2020 by allowing the Claimant a different point of contact rather than Lt Col Potter.

18. In his closing submissions, Mr Morgan appeared to suggest that there were other adjustments the respondent should have made, specifically:
    18.1. Allowing the claimant to do his existing job from a different location.
    18.2. Continuing to give the claimant support in the same way he was being supported before his absence in September 2019.
    18.3. Not commencing the formal absence management process in February 2020.

19. Mr Bayne took issue with what appeared to be an attempt to change the basis on which the claim had been advanced. In response, Mr Morgan confirmed he was not seeking to expand the claimant's case. Therefore, the adjustments for us to consider are those referred to in paragraphs 13 and 17 above.

Complaint 2: complaint about pressing the claimant for ill health retirement

20. With regard to the complaint that the respondent pressed the claimant for ill health retirement (para 2.2(a) above), the claimant makes the following allegations in his grounds of complaint.

    20.1. His Line Manager, Lieutenant Colonel Potter, made it clear to the claimant from the start of his period of sick leave which began in September 2019, that he would 'push for the claimant to be medically retired'.
    20.2. At a meeting in November 2019, the claimant was 'informed that he would be referred to Occupational Health because of the respondent's wish for him to be medically retired'.
    20.3. His Line Manager subsequently commenced a disciplinary process against the claimant due to sickness absence, gave him a final written warning and, in February 2020, informed the claimant that 'either ill health retirement or dismissal would follow'.
    20.4. After the claimant raised a grievance, Lt Col Potter told him that 'no matter the outcome of OH/grievance, he will still look to end his employment'.

21. As recorded above, at this hearing Mr Morgan withdrew the allegations that the respondent commenced a disciplinary process against the claimant and gave him a final written warning.

22. At the Case Management Hearing the 'something arising' in consequence of the claimant's disability that was said to be the reason for this alleged unfavourable treatment (and all of the other alleged unfavourable treatment on which the section 15 claims are based) was identified as:

    22.1. the claimant's state of health and absence from work; and
    22.2. the claimant's colleague acting as a trigger for PTSD.

Complaint 3: complaint about failing to allow the claimant to work from home

23. With regard to the allegation that the respondent refused to allow the claimant to work from home (para 2.2(b) above), the claimant alleges in his grounds of complaint that he asked to work from home on certain days during a meeting with Lt Col Potter in November 2019. He also alleges that he made 'numerous requests for reasonable adjustments of being moved to another role or working from home' between November 2019 and February 2020.

Complaint 4: complaint about failing to pay full sick pay

24. With regard to the complaint about failing to pay full sick pay, the claimant alleges in his grounds of complaint that his pay was reduced to SSP from December 2019.

25. During his closing submissions, and having heard Mr Bayne's submissions for the respondent, Mr Morgan made the following concessions:

    25.1. the respondent's failure to pay full sick pay to the claimant from December 2019 was not unfavourable treatment; and
    25.2. therefore, the complaint that the respondent contravened section 15 of the Equality Act 2010 by failing to pay full sick pay from December 2019 could not succeed.

Complaint 5: complaint about threats of dismissal

26. Regarding the complaint of threats of dismissal, the claimant makes the following allegations in his grounds of complaint.
    26.1. Lt Col Potter told him during a meeting in November 2019 that even if the claimant returned to work Lt Col Potter would 'look to dismiss him anyway'.
    26.2. He received a final written warning after a disciplinary process was commenced against him in February 2020 and was 'informed that either ill health retirement or dismissal would follow'. As recorded above, Mr Morgan said at the outset of the hearing that the claimant no longer alleges that there was a disciplinary process or that he was given a final written warning. It is common ground, however, that there was a meeting between the claimant and Lt Col Potter in February 2020 and the claimant does not withdraw his allegation that Lt Col Potter told him 'either ill health retirement or dismissal will follow.'

26.3. After the claimant raised a grievance with the respondent, Lt Col Potter told the claimant that 'no matter the outcome of OH/grievance, he would still look to end his employment'.

Complaint 6: complaint about grievance procedure being predetermined

27. The claimant submitted his grievance on 4th March 2020. He presented his claim to the Tribunal on 15th June 2020. Therefore, this complaint concerns the period between 4th March and 15th June 2020 (before the grievance process was concluded).

Complaint 7: complaint about the respondent refusing to move the claimant to another role

28. In his grounds of complaint, the claimant alleges that he made numerous requests to be moved to another role between November 2019 and February 2020, which were refused by the respondent.

Evidence and Findings of Fact

29. We heard evidence from the claimant on his own behalf. For the respondent, we heard evidence from Lt Col Potter.

30. We were referred to a number of documents in a file of documents prepared for this hearing and a supplementary file prepared by the claimant's representatives. We took into account the documents to which we were referred. References to numbers in square brackets in these reasons are to pages in the bundle.

31. Important elements of this case are dependent on evidence based on people's recollection of events that happened some considerable time ago. In assessing that evidence we bear in mind the guidance given in the case of Gestmin SGPS -v- Credit Suisse (UK) Ltd [2013] EWHC 3560. In that case Mr Justice Leggatt observed that is well established, through a century of psychological research, that human memories are fallible. They are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. In the Gestmin case, Mr Justice Leggatt described how memories are fluid and changeable: they are constantly re-written. Furthermore, external information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all. In addition, the process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to parties. It was said in that case: 'Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.' In light of those matters, inferences drawn from the documentary evidence and known or probable facts tend to be a more reliable guide to what happened than witnesses' recollections as to what was said in conversations and meetings. It is worth observing from the outset that simply because we do not accept one or other witness'

version of events in relation to a particular issue does not mean we considered that witness to be dishonest.

32. The claimant has PTSD. He has had this condition since 2006. He was diagnosed with complex PTSD in 2018. The condition stems – at least in part - from the claimant's experiences during active service with HM Forces.

33. On 5 June 2018 the claimant started work for the MOD as an Information Manager in the School of Infantry (SCHINF) HQ. His job role was to look after the management and processing of information, data management systems and the internal website. The post had been recently established.

34. On 30 July 2018 Lt Col Potter took up a post as the Chief of Staff at the School of Infantry. Lt Col Potter was responsible for controlling and co-ordinating a small headquarters that was responsible for delivering the training to the Army. The headquarters had about twenty four people. As a whole, SCHINF contained approximately 1,000 permanent staff of whom around 200-250 were civilians. Many of those civilians were ex-military. Before becoming the Chief of Staff Lt Col Potter had only limited experience of managing MOD Civil Servants. He had not had to manage ill health procedures. As Chief of Staff, Lt Col Potter was the claimant's Line Manager.

35. At the end of August 2018 the claimant began a period of sickness absence. Initially, the claimant was absent for a reason that was not related to his PTSD. However, he then experienced a severe episode PTSD and the claimant was unable to return to work. From September 2018 the claimant's absence was attributed to PTSD.

36. At around that time Lt Col Potter was told by someone that the claimant had attempted suicide. Lt Col Potter's evidence was that he also believed or, as he put it, 'became aware' that the claimant had tried to commit suicide on other occasions subsequently. The claimant denies he had attempted to take his own life on any occasion. The claimant's evidence was that he had 'suicidal ideation'. We do not need to decide whether or not the claimant did in fact attempt to take his own life. What we do find, however, is that Lt Col Potter genuinely believed the claimant had attempted suicide.

37. On 1st November 2018 Lt Col Potter and the claimant started discussing a gradual return to work. We were referred to a number of messages passing between the claimant and Lt Col Potter. Lt Col Potter was sympathetic towards and supportive of the claimant. Lt Col Potter and the claimant agreed that the claimant would have a phased return to work, building up his hours gradually. The claimant returned to work on that basis in mid-December 2018.

38. On 12 December 2018 the claimant asked to be allowed to work from home at certain periods during the week. He gave the reasons for asking for home work as to allow him to care for his children. Lt Col Potter considered the claimant's application. On 20 December he sent the claimant an e-mail in which he put forward a counter proposal that would involve the claimant starting late on a Tuesday and Thursday and working from home two afternoons a week. The claimant replied by e-mail of 9th January with an alternative proposal. Lt Col Potter's evidence to the Tribunal was that, at that time, 'genuine working from home could not be achieved at the time due

to the shortage of MOD laptops'. We find as a fact that, at this time, the respondent's usual policy was not to allow SCHINF HQ employees to work from home.

39. On 10th January 2019 the claimant's graduated return to work was due to end, with the claimant returning to full time hours and duties. The claimant and Lt Col Potter had a return to work discussion that day. On the afternoon of 10th January 2019 the claimant had an appointment for EMDR therapy. The claimant then had what he described at the time as a 'major breakdown'. The claimant was admitted to hospital that day for his safety and to undergo intense treatment. The claimant told Lt Col Potter 'I have never broken the way did this afternoon, and hospital was the only option the Psychiatrist had at that point. I am sorry, I felt I was better, but today proved otherwise'.

40. The claimant began a period of sick leave. Throughout the claimant's absence Lt Col Potter was in regular communication with the claimant. He was concerned and supportive. Lt Col Potter did not involve HR in matters other than to ensure they were updated regarding the claimant's sickness absence.

41. The claimant's sick leave continued until 23rd April 2019. The claimant asked Lt Col Potter if he was happy for him to return to work on reduced hours, starting back at three hours per day and gradually increasing his hours. Lt Col Potter agreed to that suggestion. The claimant then took a period of annual leave before returning to work in May 2019. The claimant returned to work with reduced hours and a reduced workload.

42. The claimant continued to receive treatment for his PTSD. Lt Col Potter also allowed the claimant to take time off for medical appointments and residential courses designed to assist his recovery. In August the claimant told Lt Col Potter that treatment for PTSD was ongoing, that it was still at a difficult stage and that it was still very testing and draining. He had been having four to five sessions of treatment a week. He told Lt Col Potter in August that he thought the plan from the beginning of September would be for him to have three sessions a week to allow his brain and body time to rest and digest the treatment. He said he was mentally and physically drained. He also told Lt Col Potter that he was hoping to go on some courses or programmes through Help for Heroes. He thanked Lt Col Potter for his support.

43. Lt Col Potter was pleased when the claimant returned to work because he believed it was a sign the claimant was getting better. However, Lt Col Potter knew the claimant was far from well and he feared that the claimant would take his own life. For that reason, Lt Col Potter wanted to avoid taking any action that he thought might lead the claimant's mental health to deteriorate. At this time Lt Col Potter was not familiar with the respondent's policies on attendance management or the role of Occupational Health. Lt Col Potter did not involve HR or Occupational Health because he thought that doing so would be the start of a process that might lead to capability proceedings and, ultimately, the termination of the claimant's employment. Lt Col Potter was concerned that that could derail the claimant's recovery or, worse, trigger a relapse.

44. Between April and September 2019 the claimant did not increase his working hours and Lt Col Potter did not put him under any pressure to do so. Although the claimant

was working reduced hours, he was being paid full pay. The claimant was not given a great deal of work to do and what he was given to do was not vital so that if the claimant did not deliver the issues that would be caused would be minimal. Over this period Lt Col Potter's communications with the claimant were overwhelmingly supportive. The claimant kept Lt Col Potter informed of his treatment and about how he was feeling.

45. Lt Col Potter was aware that this arrangement could not go on indefinitely. He was of the opinion that if the claimant was not back to full time work and productivity by Christmas he would have to consider managing the claimant's attendance in a more formal way. Over the summer Lt Col Potter told the claimant he needed to start building up his working hours and responsibilities until he was working full time. Lt Col Potter asked the claimant to try to do that by Christmas 2019. Lt Col Potter told the claimant to prioritise his medical care and treatment. By asking the claimant to try to return to his full hours and responsibilities by Christmas 2019, Lt Col Potter hoped that would give the claimant a goal to work towards.

46. During August and September 2019 the claimant had some health concerns that were separate from his PTSD.

47. On 28 June 2019 one of the claimant's colleagues (referred to in this judgment as TT) had told the claimant something about himself that was of concern to the claimant and, when he heard about it, to Lt Col Potter. TT was already the subject of a Police investigation. Lt Col Potter asked the claimant to write down what TT had said and e-mail it to him. This the claimant did. The claimant's e-mail was passed to the Police. The Police ultimately took no action against TT. TT had not been at work during the Police investigation. He returned to work when the Police investigation ended.

48. TT's return to work precipitated a deterioration in the claimant's mental health. The claimant's adverse reaction to TT's presence was related, in part, to TT's racial background. On 16 September 2019 the claimant was unable to go to work. He told Lt Col Potter that he had had a bad weekend and that anxiety had been controlling him. He said that he had intended to go into work but had a 'wobble' that morning and had got very worked up. In a message to Lt Col Potter that day the claimant linked his anxiety to TT, saying that he could not think or look at him without being reminded of his issues. In messages to Lt Col Potter that day the claimant said that what TT had told him had made his mind 'go into overload'. He said 'my therapist feels, that in their opinion, the further I am away from someone that makes me feel so uncomfortable, is the best and safest option for me personally going forward. I don't know what that means going forward, but if it means I have to move roles, to something else, whether that be within SHINF/ITC/Catterick or other, I don't know?'. The claimant referred in his message to not wanting to 'end up back how I felt earlier this year'.

49. The following day the claimant messaged Lt Col Potter saying he had been awake with anxiety since the early hours of the morning and would not be in. He said he was going to see his doctor as he had not been sleeping. He added 'I have been thinking, and I do feel that a move would be the best option going forward. I need to look after my health, and I know you have my best interests, but I just feel I am heading back to where I was earlier this year'. Lt Col Potter replied immediately that the priority had

to be the claimant's mental health and ongoing recovery, there was no pressure on him to return to work until he was ready and he asked him to focus on his medical appointments and his short term health. Lt Col Potter said 'we can discuss the longer term plan later when things have settled down. Keep strong and let me know how things go. My phone is always on'.

50. Later that day the claimant told Lt Col Potter that his GP wanted him to take sick leave but that he, the claimant, had declined because he could not afford to take sick leave. He asked Lt Col Potter what he advised the claimant should do. Lt Col Potter replied saying he could not advise the claimant what to do as only he, the claimant, understood his situation. Lt Col Potter suggested that the claimant's mental health and recovery must come first and that everything else was less important or could wait.

51. The following day the claimant replied saying he would 'see how it goes this week if that's ok?' The claimant referred again to being worried that he would end up in the same poor condition he had been in at the beginning of the year and said he was having two sessions of treatment that day and the next day with his therapist. Over the next few days the claimant told Lt Col Potter that his 'anxiety and thoughts' had 'gone up tenfold' and that he could not switch off or sleep. In one of his messages to Lt Col Potter the claimant said 'I just find this all too much to deal with, I am tired of it all, and just want it to stop'. Lt Col Potter replied that the claimant should prioritise his mental health and treatment over everything else. He asked the claimant not to worry about work. At this time, the claimant was having at least one session of therapy a day with some extra sessions. This was, as the claimant put it, a means of trying to get him 'a little more mentally stable'.

52. On 24th September the claimant asked Lt Col Potter if he needed a sick note for the previous week and Lt Col Potter asked him to get a sick note when he next saw his doctor.

53. On 26th September the claimant messaged Lt Col Potter saying that his treatment was intense at that time. He also said 'my specialists feel that I should take you up on your offer of allowing me to move roles, as they feel it will not only improve my mental state immediately, but also in the future as I won't be near a major trigger'. Lt Col Potter asked the claimant if he could come into work to discuss what happens next. We accept that Lt Col Potter was extremely concerned about the claimant and feared that he might try to end his life.

54. By late September 2019 Lt Col Potter started to form the opinion that the graduated return to work that he had agreed with the claimant in April 2019 had failed: the claimant had not managed to increase his hours since April 2019 and he was now on sick leave.

55. On 4th October 2019 Lt Col Potter met with the claimant. At the meeting, the claimant said he wanted to change roles. Lt Col Potter agreed to look at that.

56. One of the allegations made by the claimant in his grounds of complaint is that, from the start of his period of sick leave in September 2019, Lt Col Potter made it clear to the claimant that he would push for the claimant to be medically retired. That was denied by Lt Col Potter. In his evidence in chief (his witness statement) the claimant

repeated the allegation that, from the start of his sickness absence, Lt Col Potter 'made it clear that he would push for me to be medically retired'. In his witness statement, however, the claimant made no reference to Lt Col Potter having mentioned ill health retirement at the October meeting. Nor did the claimant identify, in his witness statement, any specific conversations before that meeting during which either Lt Col Potter or the claimant mentioned ill health retirement. When questioned by Mr Bayne, the claimant said Lt Col Potter pressured him to take medical retirement at the meeting on 4th October 2019 and in 'numerous conversations thereafter'. We have been shown a number of text messages that passed between the claimant and Lt Col Potter. There is no reference to medical retirement in any of the messages that passed between the claimant and Lt Col Potter before or after the 3rd October 2019 meeting, until 25th November 2019 (when the claimant and Lt Col Potter had another meeting). We did not find the claimant's account to be reliable so far as this allegation is concerned. We find that Lt Col Potter did not mention medical retirement to the claimant until a meeting on 25th November 2019.

57. On 9th October the claimant sent a message to Lt Col Potter saying 'my therapist worries that I'll not be able to move forward with my therapy, with me currently knowing I'll have to return to face a trigger within the working environment. I also have the worry of reduced pay whilst I'm off on the sick getting all this sorted, it's just adding to the worries running through my mind at present'. The claimant said he was tired, struggling to sleep and was finding the therapy very draining.

58. After the October meeting, Lt Col Potter checked what vacancies there were in SCHINF. He identified two. Both jobs entailed line managing challenging people who, in some cases, could have difficult problems to deal with. Lt Col Potter decided the roles would not be suitable for the claimant.

59. Lt Col Potter had, by this time, started to believe it was unlikely that the claimant would be able to return to full capacity and capability. In October 2019 Lt Col Potter got in touch with Defence Business Services (DBS), the MOD's Civil Service HR Specialists, and was assigned a caseworker, Mr Jones. Mr Jones talked Lt Col Potter through the management of sickness absence procedures that should be followed and told Lt Col Potter that he should refer the claimant to Occupational Health for an assessment of his suitability to continue working in the MOD Civil Service.

60. In messages on 27th October and 11th November the claimant repeated that his therapists were keen that he move away from TT. On 11th November the claimant also asked Lt Col Potter if he could find out when his sick pay expired, saying 'I am currently the only person receiving a wage to the house, and will lose everything if I'm not careful'.

61. In response, Lt Col Potter asked the claimant if he could come in for a chat about 'what we do next'. He said 'we need to come up with a solution if your sick pay is about to end but you can't return to work in the HQ'. A few days later Lt Col Potter asked the claimant if he could come in the following week so that he could talk through the claimant's options. They agreed that the claimant would come in to speak to Lt Col Potter on 25th November 2019.

62. Ahead of the meeting on 25th November 2019 Lt Col Potter prepared a letter about an Occupational Health referral. Lt Col Potter used a template to prepare the letter. In that letter Lt Col Potter said 'I am making a referral because I am concerned about your health and that it is affecting your attendance at work. You have no clear return to work date. I am seeking early indications as to whether ill health retirement could be appropriate for you'. In that letter, Lt Col Potter asked the claimant for permission to seek Occupational Health advice on the claimant's behalf. The letter said 'the aim of the consultation is to provide me with Occupational Health advice tailored to your specific condition to enable me to support you to perform in your post'.

63. Although Lt Col Potter told the claimant ahead of the meeting that the purpose of the meeting was to discuss the claimant's options, he had decided to do little more than hand the claimant the letter asking his permission to refer him to Occupational Health. Lt Col Potter thought the claimant would react badly at the meeting and was concerned the claimant might become violent. For that reason Lt Col Potter asked his deputy to attend the meeting too.

64. Lt Col Potter and the claimant gave differing accounts in evidence as to what was said at the meeting. We return to this later in our findings of fact. What is not disputed is that Lt Col Potter handed the claimant the letter he had prepared about the Occupational Health (OH) referral. For his part, the claimant thought the meeting was to discuss possible alternative roles. The claimant was unhappy that Lt Col Potter wanted to refer him to Occupational Health and considered that a betrayal.

65. On 25th November, after the meeting, the claimant e-mailed Lt Col Potter saying he had read the letter and did not feel he had much of a choice but to attend the OH appointment. He added:

> *'Is there nothing you can do, I am begging you, I wasn't expecting this, I was under the impression that I was going to be given another position elsewhere. I hope there is a means of you being able to support me with a move elsewhere, it doesn't have to be Catterick, just somewhere local, even another Civil Service Department? I can't lose everything, if I do, I am going to just crash, I just know it. I have a young family, a home, I'll lose it all. I have worked so hard to pick myself up, with everything that has happened, and I feel I have been kicked again'.*

66. Later that day the claimant messaged Lt Col Potter asking if he had received his e-mail and saying 'is there anything that can be done, a priority move, supported move, even if it means I'll have to leave MOD to another department? I can't afford to lose everything, Mike, and its heading that way at present'. Lt Col Potter replied 'I will fight for you as hard as I can'. The claimant then responded saying 'I just can't afford to lose my job, losing it will just put me at rock bottom all over again. I will move to another department/establishment within the local area if that's a possibility'.

67. Later that evening Lt Col Potter replied to the claimant's e-mail from earlier in the day saying:

> *'This is not a kicking and please don't regard it as such. While I cannot promise anything, hopefully, this is a way to stop you going onto no pay in January 2020. If we do nothing now, you will have no money in January. I will start to the OH*

process. I will also request that your pay continues until a decision is made about your future. I cannot promise this will be successful as I don't control the process, however, no one wants to see you lose everything financially. You remain a part of the team and I promise you I will fight very hard for you.'

68. In this email Lt Col Potter said nothing about the claimant's suggestions about alternative work.

69. The next day, the claimant e-mailed Lt Col Potter asking if he could find out how much his pension would be worth if he was to be medically retired.

70. In one of his messages of 25th November, the claimant had said 'Having made contact with EWS [the Employee Welfare Service] again, they seem to think I could move establishment, or even departments under disability/illness grounds impacted by the workplace'. On 26th November Lt Col Potter e-mailed the claimant responding to what the claimant had said about a move. Lt Col Potter said 'EWS is right by saying that, in theory, you can move positions. However, they do not have the Occupational Health report stating whether you can continue working for the MOD Civil Service or not. I have looked for alternate positions for you within SCHINF or the ITC but there is nothing for you. You can look for alternate positions within either the MOD or the wider Civil Service, but Occupational Health will still need to assess you'. With regard to medical retirement Lt Col Potter said 'the medical retirement process can take months and may not be approved. I have asked for your pay to continue until a decision is made on your future, but there is no guarantee this will be approved either. As soon as I find out, I will let you know'.

71. On 26th November 2019, Lt Col Potter completed an Occupational Health referral form. In that form Lt Col Potter set out the questions he wanted Occupational Health to address as follows:

'Please advise whether Mr Hopkins can continue working for the MOD Civil Service or whether he should be recommended for (a) ill health retirement – preferably; or (b) managing loss of capability.

Please advise whether Mr Hopkins should be considered for a full pay extension until a decision is made about his future.

Please advise on any decline in attendance or performance which is wholly or partially due to an underlying health problem.'

72. It appears, from messages sent by the claimant to Lt Col Potter following his subsequent appointments with Occupational Health, that the claimant was under the mistaken impression that all of the questions asked of Occupational Health in the referral were about the claimant 'being released' from the Civil Service and made no mention of the claimant's ability to return to work.

73. On 29th November 2019 the claimant e-mailed Lt Col Potter some questions about the meeting that had taken place on 25th November saying 'I felt there was a lot of information to take in, and I need to get it clear in my head at this stage'. In that e-mail the claimant said, amongst other things: 'I felt that as my Line Manager, you feel it is best I retire on medical grounds?' and 'you told me that there was a possibility in

the beginning of this said absence, that I could move roles, but you stated that you are no longer willing to support a move at the same grade to another department or sector, and as such, you feel I should now medically retire from the Civil Service?' The claimant then sent another e-mail later that night with a further question: 'In October, we had a meeting, and you offered me the ability to move roles, and stated, it would be classed as personal development. However, you said this week, that you feel I am not fit to continue working, and those options of moving are no longer an option, is that correct? I just remember you stating that you don't think I am well, or fit enough to return to work in any capacity, and the best option is to go for medical retirement?'

74. Lt Col Potter replied to those e-mails on 4th December 2019. He said:

> *'I am afraid I now think it is time for you to leave the MOD Civil Service. You have been away from work longer than the organisation can tolerate and I don't think you will return. I have tried to look for alternative employment for you within the ITC, but I have failed to find anything suitable for you. Unfortunately, I also don't believe you are capable of working in the wider Civil Service and you are about to go onto Statutory Sick Pay in Jan 2020 unless we do something now. If you can't be employed on medical grounds and your pay is about to be reduced, then I am afraid there are few options left other than to seek a medical retirement for you. I am sorry if this a shock, but I think this is the best option for you and the organisation, as there is a possibility (not confirmed) of financial compensation …'*

75. On 9th December 2019 Lt Col Potter sent an e-mail to two of his colleagues asking if he could temporarily employ the claimant as a driver whilst the Occupational Health process was undertaken. The MOD's Civilian Workforce Advisor subsequently told Lt Col Potter that it was not a good idea to employ someone who was suicidal as a driver.

76. In mid-December 2019 the claimant's pay was reduced to half pay in accordance with the respondent's usual policy. The claimant's Occupational Sick Pay was due to end of 3rd January 2020 whereupon he would just receive Statutory Sick Pay if he remained absent. The claimant and Lt Col Potter had e-mail discussions about the claimant taking annual leave on full pay. This was agreed and arrangements were made for that to happen.

77. On 16th December the claimant e-mailed Lt Col Potter. The claimant asked a number of questions in his e-mail including to do with his pay, what he would get if he was to be medically retired and if there were any roles Lt Col Potter could advise on within the Civil Service 'under reasonable adjustments?'

78. Lt Col Potter replied by e-mail of 19th December. With regard to alternative jobs Lt Col Potter said 'I have looked for other jobs for you in the ITC at C2 grade and lower and I am afraid there is nothing for you. There may be other jobs in Catterick or the North East but you would need to look for those'. Lt Col Potter went on to say that his recommendation was that the claimant went to the Occupational Health consultation (which was due to take place on 23rd December). Lt Col Potter said that at the start of January 2020 the claimant would have a choice:
    - *'Return to work full time in SCHINF on full pay but with no entitlement to paid sick leave.*
    - *Stay off on statutory sick pay.*

- *Look for another job either in the civil service (if Occupational Health permit) or outside.*'

79. The claimant replied to that e-mail by WhatsApp saying 'in our meeting in October I said I would have taken one of the few vacancies available at that time within the ITC, but you said you felt you couldn't support me with a move to either of those roles. I am just really confused …'. Lt Col Potter replied the next day saying:

    'the key thing is the Occupational Health referral on 23rd December. This will decide whether you can work in the Civil Service or not, but I think the report may take some time to get to me. This means unless Occ Health say otherwise, you could return to full time work on full pay in Jan. Before you went sick this time, I told you there were a number of options open (a) return to work full time; (b) move jobs in the Civil Service; (c) leave the Civil Service. I now can't see you returning to work full time in SCHINF if you can't work with TT. I can't move you to another role in the ITC as none are suitable for you. This means potentially leaving SCHINF. Since your sick pay is about to run out, after the Occ Health report you will need to decide what to do next. Until the Occ Health report arrives your options are return to work, or stay off sick on Statutory Sick Pay. Financially your pay will drop slightly at the end of Dec, but will drop dramatically at end Jan. This means you need to make a decision in early Jan.'

80. The claimant replied soon afterwards saying that at the meeting in November Lt Col Potter had given him two options (a) medical retirement, (b) seeking employment outside of the Civil Service 'as you feel I should now leave the Civil Service as my illness is concerning and also I have exceeded the time off, that would otherwise be allowed'. The claimant said in that e-mail that his plan had been to 'return to work after Christmas in one of the roles you said were available to me in the meeting back in October'. The claimant said, however, that Lt Col Potter had said he 'wouldn't be supporting a move elsewhere, and would be 'recommending that I am now to be medically retired' but that he could 'get a job elsewhere in the meantime whilst the PC health process is conducted …. But nevertheless you would still be recommending that I am to be medically retired'.

81. In a reply the following day Lt Col Potter said:

    'we are trying to help you urgently, especially as your entitlement to sick pay is about to run out. If we did nothing and you didn't or couldn't return to work, you would run out of money in January with no plan for the future. I do think that your best option is to leave the Civil Service, ideally on medical grounds, but the decision relies on the Occ Health recommendation. Until their report is received you have the option of returning to work full time if you wish and if you are able. If Occ Health recommend retirement, we can pursue that. If they don't, then we can look at other options. I hope that helps …'.

82. As noted above there is a dispute on the evidence as to what was said by Lt Col Potter in the meeting on 25th November 2019. The meeting itself was not minuted. However, the messages exchanged between the claimant and Lt Col Potter following that meeting assist us in deciding what was said, particularly the emails from the days immediately after the meeting ie those up to and including 4th December 2019. We infer from those e-mails and messages that Lt Col Potter did not simply hand over the

letter he had prepared asking the claimant to agree to an Occupational Health referral. We make the following findings of fact as to what was said at the meeting:

82.1. We find it more likely than not that Lt Col Potter said something to the claimant to explain why he was seeking an Occupational Health referral and we find it more likely than not that Lt Col Potter said the following or something along the following lines: that he did not think the claimant was well or fit enough to return to work in any capacity and that he thought the best option for the claimant was to apply for medical retirement. That accords with Lt Col Potter's evidence to the Tribunal as to what he believed at the time and is also evidenced by Lt Col Potter's e-mail to the claimant of 4th December. We are not persuaded that Lt Col Potter put the issue of medical retirement any more strongly than that at the meeting of 25th November 2019. The claimant alleges that Lt Col Potter 'made it clear that he would push' for the claimant to be medically retired. We do not accept that was the case.

82.2. The claimant alleges in his grounds of complaint that, at this meeting, Lt Col Potter 'refused to move the claimant to another role or to even put the claimant forward for consideration for alternative roles' and that Lt Col Potter stated that the claimant would not be suitable for other roles because of his mental health and that he 'would be unwilling to move the claimant to another role because if the claimant did not manage the new role well, then it would look bad on him'. Those allegations are, however, at odds with the claimant's own evidence in his witness statement. There, the claimant said that Lt Col Potter told him, in this meeting, that he would investigate moving the claimant to an alternative working location but that he still felt it was now in the best interests for all involved that the claimant leave the Civil Service in its entirety. That evidence is not consistent with the allegation that Lt Col Potter, at this meeting, refused to look for alternative work. Furthermore, had Lt Col Potter refused to look for alternative roles for the claimant it is surprising that the claimant persisted in asking about a move in the messages and e-mails that followed the meeting. We find it more likely than not that, at the 25th November meeting, Lt Col Potter:

82.2.1. told the claimant that, after the October meeting, he had identified a couple of vacancies but that he did not think they were suitable for the claimant because they involved a lot of line-management; and

82.2.2. told the claimant that he did not think the claimant was well enough to return to work in any capacity; but

82.2.3. did not refuse to move the claimant to another role or refuse to put the claimant forward for consideration for alternative roles; and

82.2.4. did not tell the claimant he would be unwilling to move the claimant to another role because it would 'look bad on him' if the claimant did not manage the new role well.

82.3. The claimant alleges in his grounds of complaint that Lt Col Potter told him during this meeting that even if the claimant returned to work Lt Col Potter would 'look to dismiss him anyway'. We do not accept Lt Col Potter said that. Had he done so it is surprising that the claimant did not refer to this statement when he emailed on 29th November setting out his recollection or perception of what Lt Col Potter had said.

82.4. The claimant alleges that he asked to work from home in this meeting. There is no mention in any of the claimant's e-mails or messages at this time of working from home. We find that the claimant did not ask to work from home in the meeting in November 2019.

83. The claimant's evidence to this Tribunal was that as well as corresponding by text or WhatsApp message and e-mail, he and Lt Col Potter had numerous telephone conversations over this period of absence. The claimant's evidence was that during those conversations Lt Col Potter pressed him to take early retirement. Lt Col Potter's evidence was that this was not the case: they did not have numerous telephone conversations and he deliberately tried to confine communications to written form. Lt Col Potter accepted that he had had one conversation with the claimant by telephone: his evidence was that he had asked to speak to the claimant because he needed some information for the Occupational Health referral. In assessing this difference in the evidence, we have found it helpful to consider the numerous email and text messages that passed between the claimant and Lt Col Potter. The threads of messages appear complete with no obvious gaps and do not contain references to numerous telephone calls. Indeed, there is only one reference to a telephone conversation. If there had been numerous of telephone calls, we would have expected there to be references to more than just one of them in email or text messages. In certain other respects we found the claimant's recollection of discussions he had with Lt Col Potter to be unreliable. For example, we have explained above why we do not accept his evidence that Lt Col Potter pressed him to retire when they met in early October 2019. In addition, the claimant suggested (when being questioned by Mr Bayne) that he had had 'numerous' meetings with Lt Col Potter during this period of absence. On further questioning, however, the claimant accepted that he and Lt Col Potter only had three meetings between the start of this period of absence and him starting these Tribunal proceedings. On balance, we find it unlikely that there were numerous of telephone calls as alleged by the claimant. We prefer Lt Col Potter's evidence on this matter. We find that Lt Col Potter did not have any telephone conversations with the claimant during which Lt Col Potter either pressed the claimant to take early retirement or suggested that the claimant would or might be dismissed.

84. On 23rd December 2019 the claimant had a telephone appointment with an Occupational Health Advisor. Following that appointment, the advisor prepared a brief report. In that report the OH Advisor noted that the claimant had felt he was 'ambushed' at the meeting in November 2019 and 'now has no trust'. Regarding his state of health and medical treatment, the OH Advisor said 'he is under the care of a Psychiatrist (previously receiving support from a Psychologist) who he sees several times a week either by phone or face to face. He explained he had been making good progress and had planned to return in the new year but, unfortunately, the meeting in November 2019 changed that'. The OH Advisor said she had assessed the claimant's psychological health during their appointment using recognised assessment tools and this 'indicated severe symptoms which remains a barrier to him returning to work at this time and which he attributes purely to the perceived work related issues'. The OH Advisor expressed the opinion that the claimant remained unfit for work 'due to the ongoing situation in work'. She said she was arranging for the claimant to speak to an Occupational Health Physician which would 'address any questions with more accuracy'.

85. After his appointment the claimant sent a message to Lt Col Potter telling him that he had had his appointment and that he was going to be reviewed by a doctor. The claimant said in that message 'I can't help but feel I was never to be allowed to return, and the outcome will always be, me to leave'. Lt Col Potter replied that day saying 'the outcome of the Occ Health process is not prejudged. They will advise on whether you can carry on working in the Civil Service or not. It is probably worth discussing in more detail with the doctor once you see them'.

86. We find that before the OH report was obtained, Lt Col Potter did look into whether there were other vacancies in SCHINF or the ITC. The claimant has not identified any other vacancies in SCHINF or the ITC that were available and we find that the only vacancies were the two line manager roles and a role as a driver. Lt Col Potter did not look into whether there were other vacancies in the MOD but outside SCHINF and the ITC because he believed he would not have authority to move the claimant to a position outside SCHINF. He also thought it would be inappropriate to move the claimant to another role whilst he was signed off as unfit for work by his GP. Furthermore, in the absence of medical advice saying otherwise, Lt Col Potter believed that the claimant was not well enough to return to work in any capacity.

87. On 13th January 2020 the claimant had an appointment with the Occupational Health doctor. After that appointment the doctor (Dr Stipp) prepared a report. Dr Stipp described himself as a Consultant Occupational Physician. He said his report was an interim report. The assessment took place over the telephone. Although Dr Stipp referred to the claimant having been off work since 16th September 2019 he made no reference to the claimant's previous absences or the fact that the claimant had not been performing his full duties since his previous absence. Dr Stipp gave a brief account of the claimant's current state of health and said that the claimant 'does not report progress towards recovery at present. He experienced difficulty dealing with the mental workload of his role with MOD on top of the PTSD symptoms. I advise that Mr Hopkins is not fit to return to work. There is no foreseeable return to work date at present'. Dr Stipp said he would request a medical report from the Specialist Psychiatrist who was treating the claimant and then arrange an assessment with the claimant to discuss the contents of that report before addressing the questions asked in the referral letter. There was no mention in this report of TT.

88. On the day after the claimant's appointment with Dr Stipp, Lt Col Potter e-mailed the claimant asking him how the medical had gone. Lt Col Potter said that the report 'should indicate whether you can continue working for the Civil Service or whether retirement should be considered and on what grounds. If retirement is recommended, we can start to have a look at what financial package may or may not be available to you'. Lt Col Potter also asked the claimant for a sick note as the claimant's last note had expired on 14th October. He asked that the note cover the period from then to now.

89. In an e-mail of 14th January the claimant referred again to the meeting in November and said 'I said during the meeting in November, that I would have taken another role of which you spoke of previously, I even stated I had intentions of returning to work in the new year, but I was told that wouldn't be the best outcome for me, and that I should now leave the Civil Service, whether that be medically retired, or I leave on my own

accord. And as a result of that, I am lost, feel worse than ever and simply a failure for having a mental disability'.

90. Lt Col Potter responded by e-mail the following day, 15th January 2020. In his e-mail he said 'the decision to medically retire or dismiss you has not been made, nor will the process begin until the Occupational Health report is received and they recommend it'. Lt Col Potter also said 'while I have looked for other roles for you in SCHINF and the ITC a number of times, there is nothing suitable for you. Unless Occ Health say otherwise, you are still free to look elsewhere for a job in the Civil Service'. In this e-mail Lt Col Potter also told the claimant that he would be sending the claimant a letter inviting him to a 'continuous absence review meeting' in the next few days.

91. The claimant responded later that day referring again to wishing to move roles and saying that, when they had met in November 2019 he had been hoping to return to work in the new year. The claimant said that during both Occupational Health assessments he had been told that he would not be able to return to work until a full report had been prepared.

92. Lt Col Potter replied the following day saying:

> *'the Occ Health assessment is required as you have been off sick for so long. Once their report is received and if they recommend that you cannot work in the Civil Service, then the formal process to medically retire or dismiss you is likely to start … At the Nov 19 meeting, at no point did you say you were planning to return to work in SCHINF in the New Year. As I said in my e-mail below, if your doctor signs you off as fit you could return to work in SCHINF tomorrow. Until the Occ Health report arrives and if it says you can no longer work here, there is nothing stopping you from returning. What I did state was that I couldn't move you elsewhere as there were no jobs that were suitable for you. If you want or wanted a Civil Service job outside SCHINF you are free to look for one. Since there was no indication that you are coming back to work in SCHINF and I cannot move you to another role in SCHINF, then I am afraid I have to look at other options for your future which could include retirement or dismissal'.*

93. Lt Col Potter went on to say:

> *'You are free to seek employment elsewhere outside the civil service temporarily or permanently, as the Occ Health advice only applies to civil service jobs not civilian jobs.*
>
> *You are free to move roles within the civil service now, however, there is no role suitable for you in SCHINF. Yes I know about your medical condition and I have tried repeatedly to find you a suitable job, but there is nothing for you. Have you looked for Civil Service jobs outside SCHINF?*
>
> *… The final Occ Health report has not been received, until it is you can return to work if you wish <u>and</u> if your civilian doctor signs you off as fit to work. There is nothing stopping you…'.*

94. A few days later the claimant provided a sick note to cover the period 15th October 2019 to 16th February 2020. The sick note said the claimant was assessed on

17th January 2020 and the doctor advised that he was not fit for work because of PTSD. The claimant's doctor did not suggest the claimant may be fit for work in a different role or with other adjustments.

95. On 22nd January Lt Col Potter sent a letter to the claimant asking him to attend what was described as a 'continuous absence review meeting' on 4th February 2020. The letter was in a standard form. It said:

> *'As you have now been absent for longer than 28 consecutive days, we should meet to discuss what further assistance or support you require to enable you to return to work, and whether formal action is appropriate.*
> *…I will give you the opportunity at the meeting to discuss any problems which maybe prolonging your absence, and I will also explain what help and support is available, which may involve making temporary workplace adaptations or reasonable adjustments to help you return to work if possible.*
>
> *One of the purposes of the meeting is to enable me to consider whether to progress formal action. I will consider whether this is appropriate. I must remind you that if I do this and you are not able to return to work within a reasonable timeframe, your employment with the Department could be affected …'.*

96. The meeting was subsequently rearranged to take place on 20th February 2020.

97. In the meantime, on 11th February 2020, the claimant had another telephone assessment with a Consultant Occupational Physician, this time Dr Torbohm. Dr Torbohm prepared a report following that assessment. Dr Torbohm said 'management seek advice regarding his prognosis regarding a return to work'. Dr Torbohm expressed the view that the claimant remained severely unwell' and was 'clearly unfit to return to work'. Dr Torbohm noted that the claimant was receiving all the appropriate treatment but that it was not possible to advise on a return to work. Dr Torbohm said a medical report from the claimant's specialist had not yet been received but was being requested again and that a further review would be undertaken on receipt of the report. Dr Torbohm said he did not expect the claimant to be able to return to work in the meantime.

98. The formal continuous absence review meeting took place between the claimant and Lt Col Potter on 20th February 2020. At that meeting there was a discussion between them as to whether the claimant was fit enough to return to work. The claimant said he could return in another job. Lt Col Potter replied that Occupational Health had said the claimant was not fit to return to work. There was a discussion of alternative roles. Lt Col Potter said he had tried in October to find the claimant alternative roles but that the job he had found had had a lot of line management and was not suitable. In the context of the discussion around fitness for work Lt Col Potter stressed that the Occupational Health decision was the 'key to further action'. Lt Col Potter also said that the claimant's GP signing him back to work was also key and that he needed a fit to return to work note from the claimant's GP with any adjustments to consider before he could look into them. During the course of the meeting Lt Col Potter told the claimant that he had treated the claimant's situation as lightly as he could but as he was now on nil pay he was following the continuous absence process. Lt Col Potter told the claimant that there would be another meeting where the options that could be

looked at were ill health retirement, ill health dismissal, downgrading and no further action.

99. Although not referred to in the minute of that meeting, the claimant said that in this meeting he asked about the possibility of working from home. The claimant's evidence is supported by an e-mail the claimant sent to Lt Col Potter on 20th March 2020. In that e-mail the claimant referred to the fact that other people were now working from home (during Covid) saying 'I didn't think work had enough computers to allow home working, as was disclosed to me in February's meeting?'. Lt Col Potter responded to that e-mail the same day saying they had obtained some additional laptops the previous day and adding 'unless you tell me otherwise, I don't think your situation has changed. You have run out of sick pay. No doctor has signed you off as fit for work. Since you are not in work, there is no option of you either working from home (if we had a laptop to give you) or placing you on special paid leave'. We find it more likely than not that the claimant did ask, at this meeting on 20th February 2020, about the possibility of working from home and Lt Col Potter said something about there not being enough computers to allow working from home.

100. The claimant alleges that, during this meeting, Lt Col Potter stated that he had 'had enough of it all now, and that the next stage was a disciplinary process'. The claimant also alleged in his witness statement that Lt Col Potter told him in this meeting that he was going to commence a disciplinary process against the claimant due to sickness absence'. When cross-examined however, the claimant accepted that Lt Col Potter had not in fact said those things, that the words referred to in his statement were not Lt Col Potter's words but that the claimant felt that is what Lt Col Potter was implying 'in a nutshell'. As to what was said in this meeting we find as follows:

100.1. Lt Col Potter did not say to the claimant, as alleged, that he had had enough of it all now.
100.2. Lt Col Potter did not say that the next stage was a disciplinary process.
100.3. Lt Col Potter did not give the claimant a final written warning as alleged in the grounds of complaint (an allegation that was withdrawn at the outset of this hearing).
100.4. Lt Col Potter did not tell the claimant that either ill health retirement or dismissal would follow.
100.5. Lt Col Potter told the claimant that options that could be looked at in the future were ill health retirement and ill health dismissal. He also told the claimant that another option that could be looked at was 'no further action'.
100.6. There was a discussion about the potential for adjustments to be made once the claimant received medical advice that he was fit to return to work.

101. Following that meeting, Lt Col Potter decided not to progress formal action at that stage. This was because he was awaiting further advice from Occupational Health. Lt Col Potter sent a letter to the claimant explaining this. He added 'once the Occupational Health report is received, the decision to then consider dismissal or downgrading may be taken'.

102. On 2nd March 2020 the claimant contacted ACAS to begin early conciliation. Two days later the claimant raised a grievance against Lt Col Potter. In his grievance the claimant referred to the meeting in November 2019. He said that in that meeting 'I

was told I would be referred to Occ Health, and that ill health retirement was my best option. I [asked] [Lt Col Potter] about the roles he had spoke of in October, and I was informed that the roles spoken of previously, had managerial duties, and he didn't think I could take those roles on. However I was never contacted about any of the vacant roles, and was unable to express any interest in the vacant posts, a decision was made on my behalf'. In his grievance the claimant said he was aggrieved because reasonable adjustments had not been offered and because 'correct policies/procedures were not followed correctly until a meeting held in Feb 2020, and as such false guidance and information has been disclosed to me'. The claimant also alleged that the meeting 'in October 2019' was 'misleading' because it was a formal meeting; that in the 'October meeting', and since then, he had been 'informed by management that I should now leave the Civil Service and that I should now seek employment elsewhere'; and that 'I wasn't offered the chance to move roles, and a decision regarding vacancies within the organisation, were made on my behalf'. We think it likely that the claimant was confusing the October 2019 meeting with the one that had taken place in November 2019.

103. In March 2020, the Covid 19 pandemic led the respondent to consider different ways of working. As a consequence, the respondent relaxed its usual policy of not allowing home-working for employees based in SCHINF HQ. From then on, some employees were allowed to work from home, provided there was a laptop available for them to use. If there was no laptop available, however, the policy remained that an employee was unable to work from home.

104. On 23rd March 2020, a Consultant Occupational Physician, Dr Flynn, telephoned the claimant as Occupational Health had not yet received a report from his specialist. In a subsequent report Dr Flynn referred to the claimant having said he was improving until 'an incident at work in November 2019 where he had felt ambushed'. Dr Flynn continued 'He is currently on no pay, and there is apparently an unresolved grievance as well. Feeling unsafe, unresolved and unwanted changes can be a trigger for aggravating symptoms of this kind of illness, and thus medically consistent with the recent absence.' Dr Flynn also noted that the claimant had been left without the therapy he needs due to a combination of factors and that the claimant reported no improvement in symptoms and function. Dr Flynn expressed the opinion that the claimant was not medically fit for work due to the intrusive symptoms and that a return to work date could not be predicted as it 'depends on accessing therapy but also resolving the triggers of concern'. Dr Flynn said the claimant would be reviewed in four weeks.

105. The claimant's grievance was referred to a Mr Small to deal with. He was to be the 'deciding officer' under the respondent's grievance procedure. Arrangements were made for the grievance to be investigated by an Investigating Officer, Ms Gillborn. Mr Small prepared terms of reference for the grievance investigation which he sent to Alex Jones in DBS and which were then sent on to Ms Gillborn. Those terms of reference set out the claimant's complaint and broke it down into five 'Heads of Complaint.' For each Head of Complaint the terms of reference listed a number of questions to be asked of the claimant and Lt Col Potter.

106. On 7th April 2020 Ms Gillborn interviewed the claimant as part of her investigation into the claimant's grievance. The interview was thorough, professional and betrayed

no overt signs of bias. Later that month Ms Gillborn interviewed Lt Col Potter as part of the grievance investigation. Again, the interview was thorough and professional with no overt signs of bias. She also asked somebody about job vacancies that had been available.

107. On 5th May 2020 the claimant had another telephone assessment with Dr Torbohm, one of the Consultant Occupational Physicians to whom he had spoken before. Dr Torbohm prepared a report in which he said that management were seeking advice regarding if and when the claimant would be able to return to work. Dr Torbohm said:

> *'The claimant's medical situation is very complex. In summary Mr Hopkins has been experiencing significantly traumatising events ranging from his childhood to his time in the military. Over the years he has been receiving multiple intense treatments including various admissions to psychiatric hospitals, residential trauma focus therapy, input from Psychiatric Nurses and more recently EMDR, which is ongoing. He is on multiple medications, some of which at a relatively high dose. In addition to the past trauma he has experienced the interaction by his current manager as also very traumatising. I am not in a position to comment, whether any of that was inappropriate. From a medical point of view I am however clear that in his mind he is linking the repeated ongoing past trauma experiences to the more recent interaction with his manager. It is my impression that that link is now deeply ingrained, and the way in which Mr Hopkins feels he has been treated by his management team, has impacted his mental health further and affects his ability to work at his current MOD establishment alongside the management team, who he feels have worsened his mental health disability.'*

108. Addressing the claimant's current capacity for work Dr Torbohm said the claimant remained unfit for any work. Under a heading 'Current Outlook' Dr Torbohm said:

> *'Due to the current Coronavirus situation he has not been receiving the treatment, he would have required and might have benefited from. It is however my opinion that even with the treatment his condition will not sufficiently improve to allow him to return to work for his current MOD establishment again, alongside the management team, who he feels have worsened his mental health disability…. [I]t is … my medical opinion that Mr Hopkins will remain unfit to return to work for his current MOD establishment for at least the foreseeable future and probably permanently, also a result of how he now feels he has been treated by his local management team.'*

109. Dr Torbohm was saying in that report essentially two things: firstly, the claimant needed to have treatment before he was fit for any work; and even then he would not be able to work at his current MOD establishment because he could not work with Lt Col Potter.

110. Ms Gillborn completed her investigatory report into the claimant's grievance on 6th May 2020. The report is detailed. Ms Gillborn set out the claimant's complaint as follows:

> *'The complainant alleges that he has not been supported by his Chain of Command/Line Manager and has been a victim of a persistent campaign against*

him due to his mental health disability known as PTSD from traumas he experienced previously. He states he was not formally offered reasonable adjustments under the Equality Act 2010. He fears that he will be either retired through ill health or dismissed from his role as a result of his mental health disability. He also feels that his place of work has made his symptoms worse. He also feels that he should remain on full pay.'

111. The complaint was broken down into five 'Heads of Complaint' as per the terms of reference prepared by Mr Small.

112. In her summary of findings and conclusions Ms Gillborn made a number of criticisms of the way in which the claimant' situation had been handled. Specifically, she made the following observations.

112.1. Lt Col Potter should have had more support in managing the claimant's absences.

112.2. Policies should have been applied earlier than they were and Lt Col Potter should have engaged sooner with HR, Occupational Health and others. Occupational Health advice should have been sought at the time of the claimant's previous absences.

112.3. The meetings between Lt Col Potter and the claimant in October and November 2019 should have been 'within Policy guidelines.'

112.4. More could have been done to support the claimant and Lt Col Potter in 'in seeking out workplace alternatives to lessen the anxiety and workplace stress.'

112.5. More options could have been explored/considered in-line with Policy as part of a work place adjustment. Lt Col Potter should have been given more advice and support on options available.

113. Notwithstanding those criticisms, Ms Gillborn expressed the opinion that the evidence did not support the claimant's complaint.

114. On 19th May 2020 a grievance meeting took place between the claimant and Mr Small by Skype to discuss the claimant's grievance. The claimant had seen the investigation report. It was discussed in this meeting. Following that meeting Mr Small decided not to uphold that grievance. The claimant was told of this decision on 28th May 2020. Mr Small sent the claimant a report outlining his conclusions on that date. His conclusions included the following.

114.1. Rejecting the claimant's complaint that he had been the victim of a persistent campaign against him and that he was not supported by Lt Col Potter, Mr Small concluded that Lt Col Potter had been 'nothing but fully supportive.'

114.2. Rejecting the claimant's complaint that he had not been offered reasonable adjustments, Mr Small referred to the fact that there had been an agreed phased return to work after the claimant's earlier absence. He also suggested (erroneously) that Lt Col Potter had agreed that the claimant could work from home part of the time in December 2019 (it had in fact been December 2018).

114.3. Rejecting the claimant's complaint that his place of work had worsened his symptoms, Mr Small said the evidence suggested Lt Col Potter had explored future options and would support a move away from SCHINF in the future if the claimant was fit to work but that it would have been impossible to consider a move until the claimant was fit to attend work.

114.4. Rejecting the claimant's complaint that he feared that he would be either retired through ill health or dismissed, Mr Small said Lt Col Potter had provided the claimant with 'all options and guidance in-line with the current policy.'

115. The claimant subsequently appealed Mr Small's decision.

116. One of the claimant's complaints is that the outcome of the grievance was predetermined. In his closing submissions Mr Morgan argued that evidence for such a finding could be found in the fact that Ms Gillborn expressed the opinion that the evidence did not support the claimant's complaint, and Mr Small rejected the claimant's complaint, notwithstanding Ms Gillborn's criticisms of the way the claimant had been managed. Mr Morgan also referred to the fact that neither Mr Small nor Ms Gillborn were called to give evidence. He submitted that we should infer from those matters that the outcome of the claimant's grievance was predetermined by Mr Small and Ms Gillborn.

117. Looking at the evidence in the round, we are not persuaded that the outcome of the claimant's grievance was predetermined by either Mr Small or Ms Gillborn. On the contrary, we find that the investigation was thorough and carried out with open minds. The fact that Ms Gillborn did not shy away from criticising Lt Col Potter and those she believed should have supported him is not indicative of her having determined in advance not to uphold the claimant's grievance. Her overall conclusion that the evidence did not support the claimant's grievance is understandable when considered in light of the way in which the claimant framed his complaints. In any event, if Ms Gillborn had decided not to uphold the grievance before she began her investigation (which appears to be what the claimant is suggesting) it is difficult to understand why she would criticise managers' handling of the claimant's situation at all. The fact that she did so is evidence of an open mind, not the contrary. As for Mr Small, he explained his conclusions in some detail. In so far as there is any material difference between his conclusions and Ms Gillborn's findings, it would seem to be in relation to the question of whether reasonable adjustments were made during the claimant's absence from work that began in September 2019. Mr Small concluded that it would not have been appropriate to offer the claimant another role at that time given the complex nature of the claimant's condition and the fact that he was not fit for work. That was a conclusion that was reasonably open to him.

118. On 15th June 2020 the claimant presented his claim to the Tribunal.

119. On 30th June 2020 the claimant had another telephone consultation with Occupational Health. On this occasion the claimant spoke to a Mr Saunders, an Occupational Health Advisor. Mr Saunders noted that the claimant had 'very real anxiety over his workplace location' and that 'his symptoms are unlikely to improve until his perceived workplace issues are dealt with'. Mr Saunders also referred to the fact that the claimant was not receiving any pay as a 'major stress factor' that was increasing the claimant's anxiety. He noted 'in my opinion, unless there can be some agreement on location of workplace, Mr Hopkins is unlikely to be able to return to work'. In relation to the claimant's current capacity for work Mr Saunders expressed the view that the claimant's 'symptoms are unable to be managed within the workplace at present. He is not fit for work'. As for the 'current outlook' Mr Saunders said 'Mr Hopkins has an underlying condition which is likely to recur. I am unable to predict

the frequency or duration of any further absence.' In response to a question as to whether the claimant's health was 'incompatible with their work which could result in a danger to themselves or others' Mr Saunders said 'no. I am not aware of any reason why this would be so'.

120. On 14th July 2020 there was an appeal hearing into the claimant's appeal against the rejection of his grievance. The meeting was conducted by Mr Watton, who had been appointed as the manager responsible for dealing with the appeal. The claimant was accompanied by the Regional Officer for Unite the union. Mr Watton subsequently interviewed Lt Col Potter. Mr Watton reconsidered the claimant's complaint and decided not to uphold it. By letter of 3rd August 2020 Mr Watton told the claimant his decision.

121. On 24th September 2020 the claimant's GP signed a fit note stating that the claimant was fit to return to work, provided it was at a location other than SCHINF HQ. About a week later there was a change in the claimant's reporting line when Lt Col Potter left the post of Chief of Staff to a posting in Belfast. The new Chief of Staff of SCHINF was Lt Col Whittaker.

122. On 20th October 2020 the claimant had a telephone appointment with an Occupational Health Advisor, Mrs Snape. She advised that the claimant was fit to resume work duties as of that date. She said in her opinion the claimant was fit to undertake his work tasks in regards to his admin and computer duties but she expressed the opinion that it was unlikely he would remain in work unless the 'perceived work related issues are addressed prior to his return to work'. In particular, she expressed the view that it was unlikely he would be able to sustain his return to work in his usual work department in the long term. She noted that the claimant 'associates his work department as the main barrier for his return to the workplace'.

123. The claimant returned to work in December 2020. The office he worked in was on an alternative camp. He returned to work on a phased basis.

Legal Framework

124. It is unlawful for an employer to discriminate against an employee by subjecting them to a detriment: section 39(1)-(4) of the Equality Act 2010.

125. For the purposes of section 39, a detriment exists if a reasonable worker (in the position of the Claimant) would or might take the view that the treatment accorded to them had, in all the circumstances, been to his or her detriment: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. As May LJ put it in De Souza v Automobile Association [1986] ICR 514, 522G, the tribunal must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that they had thereby been disadvantaged in the circumstances in which they had thereafter to work. However, as was made clear in Shamoon, an "unjustified sense of grievance cannot amount to 'detriment'".

126. The Equality and Human Rights Commission has issued a Code of Practice containing guidance as to the application of the Equality Act 2010. By virtue of section

15(4) of the Equality Act 2006, the code should 'be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant'.

Direct discrimination

127. Section 13 of the Equality Act 2010 provides that it is direct discrimination for someone to treat an employee less favourably because of a protected characteristic than they treat or would treat others. The protected characteristics include disability as defined in section 6 of the 2010 Act.

128. In determining whether there is direct discrimination it is necessary to compare like with like. This is provided for by section 23 of the Act, which says that in a comparison for the purposes of section 13 there must be no material difference between the circumstances relating to each case.

129. The circumstances relating to a case include a person's abilities if the protected characteristic is disability.

130. To establish a claim of direct discrimination, the less favourable treatment must have been because of the protected characteristic itself, not something occurring in consequence of it: Ahmed v The Cardinal Hume Academies UKEAT/0196/18 (29 March 2019, unreported).

Discrimination arising from disability

131. A person discriminates against a disabled person if they treat that person unfavourably because of something arising in consequence of their disability and they cannot show either (a) that they did not know, and could not reasonably have been expected to know, that the employee had the disability; or (b) that the treatment was a proportionate means of achieving a legitimate aim: Equality Act 2010 s15.

132. 'Unfavourably' must be interpreted and applied in its normal meaning; it is not the same as 'detriment' which is used elsewhere but a claimant cannot succeed by arguing that treatment that is in fact favourable might have been even more favourable: Williams v Trustees of Swansea University Pension and Assurance Society [2018] UKSC 65, [2019] IRLR 306.

133. Simler P in Pnaiser v NHS England [2016] IRLR 170, EAT, gave the following guidance as to the correct approach to a claim under Equality Act 2010 s 15:

- A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B.
- The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must

have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

- The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

134. For an employer to show that the treatment in question is justified as a proportionate means of achieving a legitimate aim, the legitimate aim being relied upon must in fact be pursued by the treatment.

135. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the reasonable needs of the undertaking. The Tribunal must weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure or treatment and make its own assessment of whether the former outweigh the latter: Hardys & Hansons plc v Lax [2005] IRLR 726, CA. In doing so the Tribunal must keep the respondent's workplace practices and business considerations firmly at the centre of its reasoning (City of York Council v Grosset UKEAT/0015/16, upheld by the Court of Appeal [2018] EWCA Civ 1105, [2018] IRLR 746) and in appropriate contexts should accommodate a substantial degree of respect for the judgment of the decision-taker as to the respondent's reasonable needs (provided he or she has acted rationally and responsibly): O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145, [2017] IRLR 547; Birtenshaw v Oldfield [2019] IRLR 946. To be proportionate the conduct in question has to be both an appropriate and reasonably necessary means of achieving the legitimate aim; and for that purpose it will be relevant for the Tribunal to consider whether or not any lesser measure might have served that aim: Birtenshaw v Oldfield [2019] IRLR 946.

136. The Code of Practice referred to above states at paragraph 21: '5.21 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. …'

Failure to make reasonable adjustments

137. Under section 39(5) of the Equality Act 2010 a duty to make reasonable adjustments applies to an employer. A failure to comply with that duty constitutes discrimination: Equality Act 2010 s21.

138. Section 20 of the Equality Act 2010 provides that the duty to make reasonable adjustments comprises three requirements, set out in s 20(3), (4) and (5). This case is concerned with the first of those requirements, which provides that where a provision, criterion or practice of an employer's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer must take such steps as it is reasonable to have to take to

avoid the disadvantage. Section 21(1) provides that a failure to comply with this requirement is a failure to comply with the duty to make reasonable adjustments.

139. In considering whether the duty to make reasonable adjustments arose, a Tribunal must consider the following (Environment Agency v Rowan [2008] IRLR 20):
   139.1. whether there was a provision, criterion or practice ('PCP') applied by or on behalf of an employer;
   139.2. the identity of the non-disabled comparators (where appropriate); and
   139.3. the nature and extent of the substantial disadvantage in relation to a relevant matter suffered by the employee.

140. The concept of a 'provision, criterion or practice' is a broad one, which is not to be construed narrowly or technically. Nevertheless, as the Court of Appeal said in Ishola v Transport for London [2020] EWCA Civ 112, [2020] IRLR 368:

'[t]o test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. However widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief that the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP. In context, and having regard to the function and purpose of the PCP in the 2010 Act, all three words carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. 'Practice' connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises.'

141. A duty to make reasonable adjustments does not arise unless the PCP in question places the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial (ie more than minor or trivial) and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled: Royal Bank of Scotland v Ashton [2011] ICR 632, EAT.

142. Simler P in Sheikholeslami v Edinburgh University [2018] IRLR 1090 held:
'The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. …'

143. The Equality Act 2010 provides that a substantial disadvantage is one which is more than minor or trivial: see s 212(1). The EHRC Code of Practice states that 'The fact that both groups [ie disabled and non-disabled persons] are treated equally and

that both may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability. Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability.'

144. An employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the employee is likely to (ie could well) be placed at a substantial disadvantage by the PCP relied on.

145. The predecessor to the Equality Act 2010, the Disability Discrimination Act 1995, contained guidance as to the kind of considerations which are relevant in deciding whether it is reasonable for someone to have to take a particular step to comply with the duty to make adjustments. Although those provisions are not repeated in the Equality Act 2010, the EAT has held that the same approach applies to the 2010 Act: Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43, [2015] ICR 169. This is also apparent from Chapter 6 of the EHRC's Code of Practice, which repeats, and expands upon, the provisions of the 1995 Act. The 1995 Act provided, as does the Code of Practice, that in determining whether it is reasonable for an employer to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular, to—

145.1. the extent to which taking the step would prevent the substantial disadvantage;

145.2. the practicability of the step;

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

145.4. the extent of the employer's financial and other resources;

145.5. the availability to the employer of financial or other assistance to help make an adjustment; and

145.6. the type and size of the employer.

146. The duty necessarily requires the disabled person to be treated more favourably in recognition of their special needs: Archibald v Fife Council [2004] UKHL 32, [2004] IRLR 651.

147. The adjustment contended for need not remove entirely the disadvantage: Noor v Foreign and Commonwealth Office [2011] ICR 695, EAT. Nor must the claimant prove definitively that the adjustment will remove the disadvantage: provided there is a prospect of removing the disadvantage, the adjustment may be reasonable: Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10, [2011] EqLR 1075.

148. In Royal Bank of Scotland v Ashton [2011] ICR 632, the EAT emphasised that when addressing the issue of reasonableness of any proposed adjustment the focus has to be on the practical result of the measures that can be taken. The duty to make adjustments is, as a matter of policy, to enable employees to remain in employment, or to have access to employment. It will not extend to matters which would not assist in preserving the employment relationship.

149. It is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment: Ashton. The duty to make reasonable adjustments involves taking substantive steps rather than consulting about what steps might be taken: Tarbuck v Sainsbury Supermarkets Ltd [2006] IRLR 664, EAT. However, an employer cannot use the lack of knowledge that would have resulted from consultation as a shield to defend a complaint that he has not made reasonable adjustments.

150. In the case of Doran v Department for Work and Pensions UKEAT/0017/14 the EAT held the duty to make reasonable adjustments was not triggered where the employee was not fit to work even if adjustments were made.

Burden of proof

151. The burden of proof in relation to complaints under the Equality Act 2010 is dealt with in section 136, which sets out a two-stage process.
   151.1. Firstly, the Tribunal must consider whether there are facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an unlawful act of discrimination against the claimant. If the Tribunal could not reach such a conclusion on the facts as found, the claim must fail.
   151.2. Where the Tribunal could conclude that the respondent has committed an unlawful act of discrimination against the claimant, it is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed, that act.

152. The Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] IRLR 258 made the following points in relation to the application of the burden of proof:
   152.1. 'It is important to bear in mind in deciding whether the claimant has proved facts from which the Tribunal could conclude that there has been discrimination that it is unusual to find direct evidence of … discrimination: few employers would be prepared to admit such discrimination, even to themselves and in some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in.'
   152.2. In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
   152.3. It is important to note the word 'could' in the legislation. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
   152.4. In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
   152.5. Where the claimant has proved facts from which the Tribunal could conclude that the respondent has treated the claimant less favourably because of disability, it is then for the respondent to prove that it did not commit that act or, as the case may be, is not to be treated as having committed that act. To

discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

Conclusions

Complaint 1: complaints of failure to make reasonable adjustments

The PCPs

153. In relation to the complaints that the respondent failed to comply with a duty to make reasonable adjustments, the claimant alleges that the respondent had the following provisions criteria or practices (PCPs) that put him at a substantial disadvantage in comparison with other employees who did not suffer from PTSD:

153.1. Attending work/achieving a certain level of attendance and carrying out day to day duties.
153.2. Not permitting homeworking.
153.3. Refusing moves to an alternative role where there is a risk that the move would be unsuccessful.

<u>The first PCP</u>

154. Mr Bayne accepted that the Respondent had a policy of requiring employees to attend work and achieve a certain level of attendance. He did not dispute that the PCP extended to requiring employees to perform the day to day duties of the job they were employed to do.

<u>The second PCP</u>

155. We have found as a fact that:
155.1. in December 2018, the respondent's usual policy was not to allow SCHINF HQ employees to work from home;
155.2. in March 2020, the respondent relaxed its policy. From then on, some employees were allowed to work from home, provided there was a laptop available for them to use. If there was no laptop available, however, the policy remained that an employee was unable to work from home.

156. In light of those findings we find that until March 2020 the respondent had a practice of not usually allowing SCHINF HQ employees to work from home and then from March 2020 it had a practice of not allowing home-working unless a laptop was available.

<u>The third PCP</u>

157. When he was making his closing submissions we asked Mr Morgan what evidence there was to show that the respondent had a policy of 'refusing moves to an alternative role where there is a risk that the move would be unsuccessful.' Mr Morgan did not identify any such evidence. Rather, he replied that if we did not consider there was

such a PCP he 'did not want to go around the houses' and that the point was covered by other complaints made.

158. We have found that Lt Col Potter did not, as was alleged by the claimant, tell the claimant that he would be unwilling to move the claimant to another role because it would look bad on him if the claimant did not manage the new role well. He did decide that a post involving line management would be unsuitable for the claimant. He also decided not to offer the claimant a position as a driver after being advised such a role would not be suitable for someone who was at risk of committing suicide.

159. Bearing in mind the case of *Ishola*, we are not satisfied that the fact that the claimant was not offered alternative roles is evidence that the respondent had a practice of refusing moves to an alternative role where there was a risk that the move would be unsuccessful.

160. The claimant has not proved that it was a provision, criterion or practice of the respondent's to refuse moves to an alternative role where there was a risk that the move would be unsuccessful. Therefore we do not consider this PCP further.

Whether the first and/or second PCPs put the claimant at a comparative disadvantage

161. The claimant's case is that the first PCP (the requirement to attend work, achieve a certain level of attendance and perform the day to day duties of the job they were employed to do) and the second PCP (the practice of not usually allowing SCHINF HQ employees to work from home) put the claimant at a substantial disadvantage in comparison with persons without a disability. The disadvantage alleged was described in the following terms by Mr Morgan:
    161.1. 'the claimant was not able to work in the office with TT (a colleague) after September 2019'; and
    161.2. 'his recovery and future return to work were affected by his (correct or otherwise) belief that Lt Col Potter was attempting to terminate his employment after 25th November 2019.'

<u>The first PCP</u>

162. Mr Bayne accepts that the PCP of requiring employees to attend work and perform their usual duties <u>would have</u> put the Claimant at a disadvantage compared to a non-disabled person, if the respondent had applied that practice to the claimant, in that, since August 2018, he had not been able to comply with it. As we understand it, Mr Bayne's position is that the PCPs were not in fact applied to the claimant and, therefore, he cannot be said to have been disadvantaged by them.

163. With regard to the first PCP, we find that although the respondent relaxed its expectations of the claimant after from his first absence in September 2018, the contractual requirements of his role remained. As such, there remained a requirement on him to attend work, achieve a certain level of attendance and perform the day to day duties of the job. The fact that the claimant had not previously faced any detrimental consequences for failing to satisfy those requirements did not mean they ceased to apply. The PCP remained. The claimant was disadvantaged by it because

he could not satisfy the requirement to attend work and perform the duties of his job and therefore his future employment was at risk. That disadvantage stemmed from his disability. Someone without a disability was less likely to be unable to work.

164. We are satisfied that the PCP of requiring employees to attend work and perform their usual duties put the Claimant at a disadvantage that was more than minor or trivial in comparison with a non-disabled person. The disadvantage was the risk to the claimant's future employment due to his inability to comply with those requirements.

165. Mr Bayne did not suggest that the respondent did not know the PCP was likely to put the claimant at that disadvantage. We find that it did know that was the case.

<u>The second PCP</u>

166. Mr Bayne submits that the practice of not usually allowing SCHINF HQ employees to work from home did not disadvantage the claimant in the period with which we are concerned (from the beginning of the claimant's absence in September 2019 to the date of the claim in June 2020) because throughout that period the claimant was not capable of working from home in any event.

167. There is ample evidence that, certainly from December 2019 onwards the claimant was not capable of working in any capacity. In particular:

167.1. The Claimant was signed off by his GP as unfit to work in any capacity.
167.2. On 23rd December 2019 the Occupational Health adviser expressed the opinion that the claimant was unfit for work.
167.3. Dr Stipp's opinion on 13th January 2020 was that the claimant was not fit to work, and there was no foreseeable return to work date at that time.
167.4. On 11th February 2020, Dr Torbohm expressed the view that the claimant remained severely unwell' and was 'clearly unfit to return to work'.
167.5. In March and May 2020, the advice remained that the claimant was not fit for work and needed to have treatment before he was fit for any work.
167.6. Neither the claimant's GP nor any of the Occupational Health advisers or consultants suggested at any time before the claimant's claim was brought that he may be able to carry out his duties effectively from home.
167.7. Neither the claimant's GP nor any of the Occupational Health advisers or consultants suggested at any time before the claimant's claim was brought that, at the time of their advice, the claimant may be fit for work in a different role.

168. The claimant's case is that his condition deteriorated following his meeting with Lt Col Potter on 25th November 2019 and, if the adjustments sought had been made before then, he would have been able to return to work. We note, however, that the claimant was undergoing daily therapy sessions from as soon as his absence began in September 2019. Furthermore, he told the Occupational Health adviser in December that, before the meeting in November 2019, his plan had been to return to work in the new year. We find it more likely than not that the claimant was not well enough to work in any capacity, whether working from home in his existing job or working in a different job, at any time from 16th September 2019 to the date of these proceedings. That being the case, we accept Mr Bayne's submission that the claimant was not put at a disadvantage between September 2019 and the date of his claim by

the respondent's practice (which applied up to March 2020) of not usually allowing SCHINF HQ employees to work from home nor by its practice (from March 2020) of not allowing home-working unless a laptop was available.

169. If follows from this that the existence of the second PCP did not trigger any duty to make reasonable adjustments.

Adjustments

170. We have found that the respondent's first PCP of requiring employees to attend work and perform their usual duties put the claimant at a substantial disadvantage in comparison with a non-disabled person, in that the claimant's future employment was at risk due to his inability to comply with those requirements. It follows that the respondent was under a duty to take such steps as it was reasonable to have to take to avoid that disadvantage.

171. The claimant's case (as noted above) is that, to comply with a duty to make reasonable adjustments, the respondent should have:

171.1. offered the claimant an alternative role;
171.2. permitted him to work from home; and
171.3. made reasonable adjustments to the formal absence management process that began in February 2020.

172. When considering those adjustments we must bear in mind that we have found it more likely than not that the claimant was not well enough to work in any capacity, whether working from home in his existing job or working in a different job, at any time from 16th September 2019 to the date these proceedings were presented.

173. The claimant's case, as we understand it, is that his condition deteriorated following his meeting with Lt Col Potter on 25th November 2019 and, if he had been offered an alternative role before then away from TT, or been told before then that he would be able to do his existing job from home, his condition would have improved rather than deteriorated and he would have been able to return to work soon after 25th November 2019.

174. Even if the claimant wished to return to work, the respondent owed the claimant a duty to take reasonable care of his health and safety. Therefore, it was appropriate for the respondent's managers to be guided by those with medical expertise when deciding whether the claimant should be permitted to return to work in any capacity and, if so, in what capacity. That was especially important given the following:

174.1. The claimant's condition was severe and complex. This was evidenced by the following:
174.1.1. The claimant had already had two significant periods of absence from work before the absence that began in September 2019.
174.1.2. He had not been able to return to his full time hours and full duties after those absences.
174.1.3. He had had thoughts of suicide and had previously been hospitalised for his safety.

174.1.4. He had been having extensive treatment for some time and after the September 2019 deterioration was having therapy sessions daily.

174.2. The triggers for aggravating symptoms of the claimant's condition were unpredictable. The respondent did not know and cannot reasonably have been expected to know whether allowing the claimant to return to work in a different role or work from home might aggravate the claimant's symptoms. Dr Stipp reported that the claimant had said he had had difficulty dealing with the mental workload of his existing role on top of the PTSD symptoms referred to the claimant. Furthermore, working from home could lead to a sense of isolation from colleagues. Working in a different role might bring its own challenges, such as line managing other employees in difficult situations.

174.3. Lt Col Potter was concerned that if the claimant's symptoms were aggravated there was a risk the claimant might try to take his own life. Those concerns were not groundless in light of the fact that the claimant had, in the past, thought about suicide, had been hospitalised for his own safety earlier in the year and in light of the tenor of emails the claimant sent to Lt Col Potter in and after September 2019.

175. As noted above, the claimant's work history since joining the respondent illustrates the severity and complexity of the claimant's condition. It is also relevant in deciding what steps it is reasonable for the respondent to have to take given the respondent's legitimate interest in ensuring those it employs are capable of performing the job they are engaged to do. The immediate trigger for the deterioration in the claimant's condition that led to his absence from September 2019 was the claimant's reaction to TT. However, that was not the only factor affecting the claimant's ability to do his job. Even before his most recent absence began in September 2019, the claimant had not been able to fully perform his role for some 12 months, having carried out his role to its full extent for less than three months before his first period of absence. That first period of absence lasted some three months. Then, very soon after the claimant's return to work from that absence, and immediately upon the claimant returning to full duties, the claimant experienced a very severe deterioration in his mental health. Consequently, the claimant was unable to work again for more than three months. When the claimant returned to work in May 2019 he remained unable, because of his PTSD, to do his job to the full extent. That was the case up to and including until September 2019. Over that four-month period the claimant was on shorter hours and a reduced workload but full pay. He had not managed to increase his hours. Over this period the claimant was having a significant amount of treatment. He was clearly doing everything in his power to try to get better. However, through no fault of his own, he was not able to do so.

176. Given the above, the respondent's cautious approach was warranted.

177. In seeking OH advice, Lt Col Potter specifically asked for advice as to whether the claimant was capable of working for the MOD civil service. From the date of the first Occupational Health advice (23 December 2019) until the date of the claim, none of the medical advisers suggested the claimant would be able to return to work in the foreseeable future if he could be allowed to work from home or in a different role. We acknowledge that, if the claimant had been promised he would be able to move to a

different role (or work from home) when well enough to return that might have relieved one of his sources of anxiety and assisted in his recovery. However, it is not reasonable to expect the respondent to earmark a vacant post for the claimant, rather than engage someone else, when it did not know how long the claimant's absence might continue, what kind of responsibilities and hours he may be able to undertake if and when he was fit for some duties, and what was the likelihood of future absences. In all the circumstances we find that offering the claimant a different role or allowing the claimant to work from home are not steps that it was reasonable for the respondent to have to take over that period the date of the first Occupational Health advice (23rd December 2019) until the date of the claim.

178. As for the period before the first OH report, ie between 16th September and 23rd December 2019, in the absence of medical advice suggesting that the claimant would be able to return to work in the foreseeable future if he could be allowed to work from home or in a different role, we find that offering the claimant a different role or allowing the claimant to work from home was not a step that it was reasonable for the respondent to have to take at that time. It was reasonable for the respondent to obtain advice from Occupational Health before considering such adjustments.

179. Mr Morgan criticised the respondent for not getting a report from Occupational Health sooner (although we note that the claimant himself was critical of Lt Col Potter for making an OH referral in November rather than simply finding him another role). However, even if an OH referral had been made sooner we are not persuaded that the advice would have been that the claimant was, or would be in the foreseeable future, capable of working from home or in a different role.

180. Taking into account all of the relevant circumstances, we find that offering the claimant a different role or allowing the claimant to work from home are not steps that it was reasonable for the respondent to have to take.

<u>Adjusting the formal absence management process that began in February 2020</u>

181. The claimant also contends that the respondent should have made adjustments to the formal absence management process in or after February 2020. The adjustments Mr Morgan says should have been made are:
   181.1. 'a greater level of discussion with the claimant as to the obstacles to his return to work'; and
   181.2. allowing the claimant a different point of contact rather than Lt Col Potter.

182. The respondent was only required to take steps to avoid the specific disadvantage caused by the relevant PCPs. In this case, that disadvantage was the risk to the claimant's employment due to his inability to attend work and perform his usual duties.

183. Engaging in 'a greater level of discussion with the claimant as to the obstacles to his return to work' is not a practical step that, in itself, would have helped the claimant to perform his duties and get back to work. The claimant was not capable of returning to work in any capacity at that time. In any event, the respondent was actively seeking Occupational Health advice and the OH advisers, in turn, were seeking guidance from the claimant's treating medics. It was appropriate for the respondent to await that

advice before having further discussions about the barriers to the claimant returning to work and how they might be overcome.

184. As for allowing the claimant a different point of contact rather than Lt Col Potter, again that is not a step that would have helped the claimant return to work at the time with which we are concerned. As Dr Torbohm advised in May 2020, the claimant needed to have treatment before he was fit for any work. Had he reached the point at which the claimant was fit for some work then changing the claimant's reporting line may well have been an adjustment that it was reasonable to make. That stage had not been reached, however, at the point at which this claim was made.

185. We find therefore that neither engaging in a greater level of discussion with the claimant as to the obstacles to his return to work nor allowing the claimant a different point of contact rather than Lt Col Potter were steps that it was reasonable for the respondent to have to take.

186. During his closing submissions Mr Morgan suggested, for the first time, that the respondent should have adjusted its policy by not holding the meeting in February 2020, although when challenged Mr Morgan said he was not seeking to change the way the claim was put. That being the case, it is unnecessary for us to consider this submission. In any event, if the claimant had put his claim in this way we would have rejected the submission that the respondent failed to comply with a duty to make reasonable adjustments by holding the February meeting. Avoiding holding the meeting in February would not have avoided the disadvantage relied on by the claimant ie the fact that the claimant's future employment was at risk due to his inability to comply with the requirements to attend work and perform their usual duties. Not holding a formal meeting with the claimant would not have helped him return to work any sooner. Furthermore, the suggestion that the February meeting should not have been held is at odds with Mr Morgan's submission that the respondent should have engaged in 'a greater level of discussion with the claimant as to the obstacles to his return to work.' In any event, given the duration of the claimant's absence it would be unreasonable to expect the respondent to avoid holding a formal meeting to discuss that absence.

187. For those reasons, we conclude that the claimant's complaint that the respondent failed to comply with a duty to make reasonable adjustments is not well founded.

Complaint 2: complaint about pressing the claimant for ill health retirement

188. In respect of specific allegations made by the claimant we have found as follows.

188.1. Lt Col Potter did not 'make it clear to the claimant from the start of the claimant's period of sick leave which began in September 2019 that he would push for the claimant to be medically retired.' Lt Col Potter did not say to the claimant at any time that he would push for the claimant to be medically retired.

188.2. Lt Col Potter did not tell the claimant, whether at the meeting on 25th November 2019 or any other time, that he wished for the claimant to be medically retired.

188.3. Lt Col Potter did not tell the claimant, in February 2020, that 'either ill health retirement or dismissal would follow'.

188.4. Lt Col Potter did not tell the claimant that he would look to end the claimant's employment regardless of the outcome of the claimant's grievance and occupational health referrals.

188.5. Lt Col Potter did not tell the claimant in February 2020 that he had 'had enough of it all now' or that the next stage was a disciplinary process.'

189. In the meeting on 25th November 2019, Lt Col Potter said the following or something along the following lines: that he did not think the claimant was well or fit enough to return to work in any capacity and that he thought the best option for the claimant was to apply for medical retirement. Lt Col Potter did not put the issue of medical retirement any more strongly than that at the meeting of 25th November 2019. We find that it is not apt to describe what Lt Col Potter said on that occasion as 'pressing' the claimant to take medical retirement.

190. Subsequently, Lt Col Potter sent an email on 4th December 2019 in which he repeated that he thought the best option for the claimant was to take medical retirement if that is available. Lt Col Potter sent that email in response to specific questions from the claimant asking Lt Col Potter to confirm what he had said at the meeting on 25th November and, in particular, to confirm if Lt Col Potter thought medical retirement was best for him. Given that context we do not consider that the fact that Lt Col Potter repeated his opinion as to what would be best for the claimant constituted 'pressing' the claimant to take ill health retirement.

191. On 20th December 2019 Lt Col Potter repeated his opinion that medical retirement was best for the claimant. Again, Lt Col Potter was responding to an email from the claimant in which the claimant specifically alluded to Lt Col Potter having said that he believed medical retirement was the best option for the claimant. It is apparent that Lt Col Potter's purpose in sending that email was to explain to the claimant why he thought that was the case ie that the claimant's sick pay was due to expire and so he would be left with no income otherwise unless he could return to work. This followed emails from Lt Col Potter on 19th and 20th December in which Lt Col Potter had outlined other options, which included remaining on sick leave. Again, in context we find that this email did not constitute pressing the claimant to take ill health retirement.

192. Looking at the evidence in the round, we are not persuaded that Lt Col Potter 'pressed the claimant to take ill health retirement' as alleged. At most, Lt Col Potter encouraged the claimant to consider ill-health retirement as an option; that, in itself, was not unfavourable treatment in the circumstances, given that the signs were that the claimant was not well enough to return to work, his sick pay was due to end shortly, and if the claimant were left without any income that could have extremely severe consequences for the state of the claimant's mental health.

193. The respondent did not press the claimant for ill-health retirement, as alleged or at all. Therefore, the claimant's complaint that the respondent discriminated against him by pressing the claimant for ill-health retirement is not made out.

Complaint 3: complaint about failing to allow the claimant to work from home

194. We have found that, contrary to what is alleged in the grounds of complaint, the claimant did not ask Lt Col Potter if he could work from home during the meeting on 25th November 2019. Nor did the claimant make 'numerous requests for reasonable adjustments of … working from home' between November 2019 and February 2020. The claimant did not broach the possibility of working from home until he met with Lt Col Potter in February 2020. Lt Col Potter said something about there not being enough computers to allow working from home.

195. In March 2020, the respondent relaxed its usual policy of not allowing home-working for employees based in SCHINF HQ. From then on, some employees were allowed to work from home, provided there was a laptop available for them to use.

196. The reason Lt Col Potter did not allow the claimant to work from home from March 2020 was the fact that the claimant had been signed off by his GP as unfit for work. That was something arising in consequence of the claimant's disability. It was also the case that the available laptop computers had been allocated to others to use, although we find that, even if a laptop had been available, Lt Col Potter would not have allowed the claimant to work from home whilst he was signed off by his GP as unfit for work.

197. The respondent's case is that:

197.1. the claimant was not well enough to work in any capacity over the period from 16 September 2019 and the date this claim was made and, therefore, not allowing the claimant to work from home was not unfavourable treatment of him; and

197.2. even if this was unfavourable treatment, it was a proportionate means of achieving the legitimate aim of protecting the claimant's health and wellbeing.

198. We accept that the claimant perceived the inability to work from home as disadvantaging him because he wanted to return to work notwithstanding that he had been signed off as unfit for work by his GP and OH advisers had said he was unfit for work in any capacity.

199. We accept that declining the claimant's request to work from home was a means of protecting the claimant's health and wellbeing and that objective was a legitimate one. Although the claimant wished to return to work, the respondent owed the claimant a duty to take reasonable care of his health and safety. Therefore, it was appropriate for the respondent's managers to be guided by those with medical expertise when deciding whether the claimant should be permitted to return to work in any capacity. That was especially important given the severity and complexity of the claimant's condition; the fact that the triggers for aggravating symptoms of the claimant's condition were unpredictable; and the fact that there was reason to believe there was a risk the claimant might try to commit suicide. The claimant's work history since joining the respondent illustrated the severity and complexity of the claimant's condition: even before his most recent absence began in September 2019, the claimant had not been able to fully perform his role for some 12 months, having carried out his role to its full extent for less than three months before his first period of absence. Given that history, the respondent's cautious approach was warranted. At this time, the consistent advice of those with medical expertise was that the claimant was not fit to work. The Claimant was signed off by his GP as unfit to work in any

capacity. The Occupational Health advice on 13th January 2020 was that the claimant was not fit to work, and there was no foreseeable return to work date at that time. On that occasion, Dr Stipp reported that the claimant had said he had had difficulty dealing with the mental workload of his role with MOD on top of the PTSD symptoms. On 11th February 2020, Dr Torbohm expressed the view that the claimant remained severely unwell' and was 'clearly unfit to return to work'. In March and May 2020, the advice remained that the claimant was not fit for work and needed to have treatment before he was fit for any work. Neither the claimant's GP nor any of the Occupational Health advisers or consultants suggested at any time before the claimant's claim was brought that he may be able to carry out his duties effectively from home.

200. Taking into account all of the relevant circumstances, we are satisfied that declining the claimant's request to work from home was an appropriate and reasonably necessary means of achieving the legitimate aim of protecting the claimant's health and wellbeing. That was the case in February, when the claimant first made the request, and remained the case up to and including the date when the claimant presented this claim in June 2020.

201. Therefore, the complaint that the respondent discriminated against the claimant by declining his request to work from home is not well founded.

Complaint 4: complaint about failing to pay full sick pay

202. In light of Mr Morgan's concessions, this complaint is not made out.

Complaint 5: complaint about threats of dismissal

203. In respect of specific allegations made by the claimant in his Grounds of Complaint we have found as follows.

203.1. Lt Col Potter did not 'make it clear to [the claimant] that he would push for the claimant to be medically retired', from the start of the claimant's sick leave or at all.

203.2. Lt Col Potter did not tell the claimant in the meeting in November 2019 that Lt Col Potter would 'look to dismiss him anyway' even if the claimant returned to work. Lt Col Potter told the claimant on 25th November that he thought the best option for the claimant was to apply for medical retirement. That was not a threat of dismissal. Nor was it a threat of dismissal when Lt Col Potter repeated that opinion in emails in December 2019 in response to specific questions from the claimant.

203.3. Lt Col Potter did not tell the claimant, in February 2020, that 'either ill health retirement or dismissal would follow'. At the meeting Lt Col Potter told the claimant that there would be another meeting where the options that could be looked at were ill health retirement, ill health dismissal, downgrading and no further action. That was not a threat of dismissal: it was merely informing the claimant of the potential outcomes of the absence management process, one of which was dismissal. Following that meeting Lt Col Potter told the claimant that no further action was being taken at that time.

203.4. Lt Col Potter did not tell the claimant that he would look to end the claimant's employment whatever the outcome of his grievance or OH referral.

204. The respondent did not make threats of dismissal, as alleged or at all. Therefore, the claimant's complaint that the respondent discriminated against him by making threats of dismissal is not made out.

Complaint 6: complaint about grievance procedure being predetermined

205. The claimant has not proved that the outcome of his grievance was predetermined by either Mr Small or Ms Gillborn. Therefore, the claimant's complaint that the respondent discriminated against him by predetermining his grievance is not made out.

Complaint 7: complaint about the respondent refusing to move the claimant to another role

206. In his grounds of complaint, the claimant alleges that he made numerous requests to be moved to another role between November 2019 and February 2020, which were refused by the respondent.

207. We have found that the claimant asked Lt Col Potter for a move to a different role on a number of occasions, starting in September 2019. Initially, in October 2019, Lt Col Potter agreed he would look into the possibility of a move. Clearly he did not refuse to move the claimant at that point.

208. We have found that Lt Col Potter identified two vacancies in SCHINF in October 2019, both of which involved line managing challenging individuals. Lt Col Potter decided not to move the claimant to either of those roles. In that sense it might be said that he 'refused' to move the claimant to either of those two roles.

209. In December 2019 Lt Col Potter identified that there were roles as a driver that he might be able to move the claimant into, at least on a temporary basis. He decided not to do so, having been advised that it would not be appropriate for someone who was at risk of suicide. In that sense it might be said that the respondent 'refused' to move the claimant to a driving role.

210. We have found that Lt Col Potter did not, as alleged by the claimant, refuse to move the claimant to another role in the meeting of 25 November. He looked into whether there were other vacancies in SCHINF or the ITC but the only ones available were those referred to above. Lt Col Potter did not actively look for any other vacant roles that the claimant might be moved into and nor did anyone else at the respondent (or at least not in the period with which this claim is concerned). The claimant has not identified any specific vacancies that were available and which the respondent refused to move him to. We have some reservations as to whether the failure to actively look for any other vacant roles in the MOD that the claimant might be moved into can properly be described as a 'refusal' to move the claimant. However, we have analysed it as such below.

Direct discrimination

211. As noted above, Lt Col Potter decided not to move the claimant to either of the two vacancies in SCHINF that he identified in October 2019, both of which involved line managing challenging individuals.

212. We find that Lt Col Potter's reasons for that decision were that the claimant had been signed off as unfit for work by his GP and, in any event, he did not think it was appropriate, at that time, for the claimant to work in a role that involved being responsible for managing challenging individuals because such a role would be stressful and Lt Col Potter believed the claimant would be unable to cope with the challenges of the role; that the stress of the role could derail the claimant's recovery and cause a deterioration in the claimant's health and that could lead the claimant to take his own life.

213. We are satisfied that Lt Col Potter's belief as to the claimant's ability to cope with a line management role were not based on a stereotypical view of the abilities of people with PTSD or, for that matter, of people with mental health impairments. Rather, Lt Col Potter's belief was based on what the claimant had told him about his state of mind and the extensive treatment he had received and was receiving; the fact that the claimant's GP had signed him off as unfit for work; the fact that the claimant had not (even before the difficulties he experienced with TT) managed to perform his current role to its full extent since September the previous year; and his belief that the claimant had attempted suicide in the past.

214. In deciding whether Lt Col Potter treated the claimant less favourably, because of his disability, than he would have treated someone else in circumstances that were not materially different we consider an appropriate hypothetical comparator would be an employee without a disability (or with a different disability to that of the claimant, for example a physical disability) who:

214.1. had a condition that could be aggravated by stressful situations;
214.2. had been signed off as unfit for work by their GP;
214.3. had been unable to perform their existing role to its full extent for over a year; and
214.4. for whom the alternative role could pose a risk to health and safety, the extent of which could not be assessed without medical advice.

215. We are satisfied that Lt Col Potter would have treated such a hypothetical comparator no more favourably than the claimant. He would have concluded that the role was unsuitable for such an individual and would have declined to move the hypothetical comparator to the available role.

216. We find, therefore, that Lt Col Potter did not directly discriminate against the claimant by failing to move him to one of the available line manager roles.

217. As noted above, in December 2019, before the first OH report was obtained, Lt Col Potter identified that there were roles as a driver that he might be able to move the claimant into, at least on a temporary basis. He decided not to do so, having been advised that it would not be appropriate for someone who was at risk of suicide.

218. We find that the reason for that decision was that Lt Col Potter believed there was a risk that the claimant might try to take his own life and that, because of that risk, a driving role was unsuitable for the claimant. We are satisfied that Lt Col Potter's belief as to the suitability of a driving role was not based on a stereotypical view of people with PTSD or, for that matter, of people with mental health impairments. Rather, Lt Col Potter's belief was based on his belief that the claimant had attempted suicide in the past coupled with what the claimant had told him about his state of mind and the extensive treatment he had received and was receiving.

219. In deciding whether Lt Col Potter treated the claimant less favourably, because of his disability, than he would have treated someone else in circumstances that were not materially different we consider an appropriate hypothetical comparator would be an employee without a disability (or with a different disability to that of the claimant, for example a physical disability) who was believed to have attempted suicide in the past, whose GP had certified as unfit for work for reasons to do with their mental health, and who had recently sent emails to Lt Col Potter indicating that they were in a very poor state of mind for which they were receiving intensive treatment.

220. We are satisfied that Lt Col Potter would have treated such a hypothetical comparator no more favourably than the claimant. He would have decided that a driver role was unsuitable for such an individual and would have declined to move the hypothetical comparator to the available role.

221. We find, therefore, that Lt Col Potter did not directly discriminate against the claimant by failing to move him to a driver role.

222. As for the failure to actively look for any other vacant roles outside SCHINF/ITC, this was in part due to Lt Col Potter's belief that he did not have authority to move the claimant into such a role. It was also because Lt Col Potter thought it would be inappropriate to move the claimant to another role whilst he was signed off as unfit for work by his GP. Furthermore, in the absence of medical advice saying otherwise, Lt Col Potter believed that the claimant was not well enough to return to work in any capacity. That was confirmed by those with medical expertise. That advice initially took the form of the claimant's GP certifying that the claimant was unfit for work and then was subsequently confirmed by OH advisers in December 2019 and January, February, March and May 2020.

223. In deciding whether the respondent treated the claimant less favourably, because of his disability, than it would have treated someone else in circumstances that were not materially different we consider an appropriate hypothetical comparator would be an employee without a disability (or with a different disability to that of the claimant, for example a physical disability) in the following circumstances:

223.1. who had been unable to perform their existing role to its full extent for over a year before the most recent absence;
223.2. who had been signed off as unfit for work by their GP and whom OH advisers said was not fit for work; and
223.3. who had a condition the symptoms of which could be aggravated by triggers that were unpredictable.

224. We are satisfied that the respondent would have treated such a hypothetical comparator no more favourably than the claimant. The respondent would not have actively sought an alternative role for such a person in the absence of medical advice that they were capable of carrying out an alternative role.

225. We find, therefore, that the respondent did not directly discriminate against the claimant by failing to actively look for any other vacant roles for the claimant.

Section 15

226. The decision not to move the claimant to a different role, whether a line manager role in SCHINF, a driving role or some other role in the MOD was made because of a number of factors. They included:

226.1. The fact that the claimant was not capable of performing his existing role.
226.2. Lt Col Potter's concern that the claimant may try to take his own life.
226.3. The claimant's previous absences from work and the fact that the claimant had not returned to full duties after his absence in early 2019.

227. All of those things arose in consequence of the claimant's disability.

228. We accept that the claimant perceived the decision not to move him to another job as disadvantaging him. The claimant's sick pay entitlement reduced at the end of 2019 and ran out in January 2020 and he wanted to return to work notwithstanding that he had been signed off as unfit for work by his GP and (from December 2019) OH advisers had said he was unfit for work in any capacity.

229. Mr Bayne submits that failing to move the claimant to a different role was a proportionate means of achieving the legitimate aims of protecting the claimant's health and wellbeing and ensuring that the MoD's resources were appropriately allocated.

230. In the context of the claimant's complaint that the respondent failed to comply with a duty to make reasonable adjustments (complaint 1 above) we have explained that, in our judgement, moving the claimant to another role was not a step that it was reasonable for the respondent to have to take. For the same reasons we accept that failing to move the claimant to a different role was a proportionate means of achieving the aims identified by Mr Bayne, both of which were legitimate aims.

231. We accept that declining to move the claimant to another role was a means of protecting the claimant's health and wellbeing and that objective was a legitimate one. Although the claimant wished to return to work, the respondent owed the claimant a duty to take reasonable care of his health and safety. The claimant's condition was complex and its triggers unpredictable. It was appropriate for the respondent's managers to be guided by those with medical expertise when deciding whether the claimant should be permitted to return to work in any capacity and, if so, in what kind of job. The Claimant was signed off by his GP as unfit to work in any capacity. The Occupational Health advice on 13th January 2020 was that the claimant was not fit to work, and there was no foreseeable return to work date at that time. On that occasion, Dr Stipp reported that the claimant had said he had had difficulty dealing with the

mental workload of his role with MOD on top of the PTSD symptoms. On 11th February 2020, Dr Torbohm expressed the view that the claimant remained severely unwell' and was 'clearly unfit to return to work'. In March and May 2020, the advice remained that the claimant was not fit for work and needed to have treatment before he was fit for any work.

232. We also accept that declining to move the claimant to another role was a means of ensuring that the MoD's resources (including its workforce) were appropriately allocated. The respondent has a legitimate interest in ensuring those it employs are capable of performing the job they are engaged to do. It is not appropriate to expect the respondent to earmark a vacant post for the claimant, rather than engage someone else, when it did not know how long the claimant's absence might continue, what kind of responsibilities and hours he may be able to undertake if and when he was fit for some duties, and what was the likelihood of future absences.

233. Taking into account all of the relevant circumstances, we are satisfied that declining the claimant's request for a move to another position was an appropriate and reasonably necessary means of achieving the legitimate aims of protecting the claimant's health and wellbeing and ensuring that the MoD's resources (including its workforce) were appropriately allocated. That remained the case up to and including the date when the claimant presented this claim in June 2020.

234. Therefore, the complaint that the respondent discriminated against the claimant by refusing to move him to another role is not well founded.

EMPLOYMENT JUDGE ASPDEN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 9 May 2022