EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Frantisek Havelec	**v**	University Hospitals Sussex NHS Foundation Trust

Judgment with Reasons

Heard at: **Southampton**

On: **7,8,9,10 (in chambers) and 11 March 2022**

Before: **Employment Judge Rayner**
Mr P Flanagan
Mr N Thornback

Appearances
For the Claimant : **In Person**
For the Respondent: **Ms H Patterson (Counsel)**
Interpreter : **Mr P Slama**

Determination of the Claims

1. The Claimant 's claims of direct disability discrimination are dismissed.

2. The Claimant 's claims of discrimination for a reason arising from his disability are dismissed.

3. The Claimant 's claim that his employer failed to make reasonable adjustments are dismissed.

4. The Claimant was fairly dismissed, and his claim of unfair dismissal is dismissed.

5. Verbal judgement was delivered to the parties on 11 March 2022. The Claimant having requested written reasons they are provided as follows:

Written Reasons

1. The Claimant brings claims of disability discrimination and unfair dismissal against the Respondent.

The hearing

2. The Claimant represented himself before us. Whilst he speaks good English, an interpreter, Mr Slama, was provided to assist him, as English is not his first language. The panel were very grateful for Mr Slama's assistance throughout the hearing.

3. That the Respondent was represented by Ms Patterson of counsel.

4. The Claimant gave evidence on his own behalf and called Mr Andrew Flowers, his trade union representative as a supporting witness.

5. The Respondent called 7 witnesses: Dave Harbutt, Associate director of Operations; David McLaughlin, Director of Estates and Facilities who heard the Claimants appeal against dismissal; Gillian Sorrell, head of Domestics; Jaqui Campbell, western porting manager, who interviewed the Claimant for an internal job; and Suzanne Fisher, Director of operations and facilities, who made the decision to dismiss the Claimant.

6. In addition, Mrs Winchester gave evidence under a witness order and had not produced any witness statement.

7. The Tribunal was provided with an electronic and paper copy of a bundle of 1222 pages, and read those pages referred to by the witnesses in their statements and the documents referred to during the course of cross examination.

8. The bundle contained a number of occupational health reports which were commissioned by the Respondent throughout the material times in the Claimant 's employment and we have had particular regard to them.

9. The Claimant was employed as a band 3 Domestic Supervisor by the Respondent NHS Trust from the 25 July 2005 until 27 May 2020.

10. The Claimant has had a number of significant periods of sickness absence which arise from his disability. The periods of absence of particular relevance to this claim are as follows:

    10.1. The Claimant was absent from work with musculoskeletal problems from the 13 June 2017 until 17 November 2017. This was in respect of his knee injury.

    10.2. The Claimant was absent from work from the 2 August 2018 until the 2 January 2019 with anxiety; stress; depression and other psychiatric illnesses.

    10.3. The Claimant was absent from work with other musculoskeletal problems from the 28 February 2019 until termination of his contract by reason of incapacity on the 27 May 2021. This was due in the main to Rheumatoid Arthritis, but other complex health problems were contributory.

11. Following a capability process, which was the subject of some of the Claimant's claims of discrimination and the focus of much of the evidence before us, the Claimant was dismissed on the 27 May 2020. He contacted ACAS on the 25 August 2020 and was issued with an ACAS early conciliation certificate on the 9 September 2020. He submitted his ET1 claim on the 8 October 2020.

12. The parties were ordered to Co-operate in the production of an agreed list of issues, following a case management hearing before Employment Judge Self on 26 August 2021. At that hearing Employment Judge Self determined that the Claimant was disabled within the meaning of the Equality Act 2010, as follows.

    12.1. The Claimant was disabled by reason of a knee injury from the 1st of January 2017 until the present.
    12.2. The Claimant was disabled by reason of depression and anxiety from the 1st of December 2018 until present
    12.3. The Claimant was disabled by reason of rheumatoid arthritis from the 15 March 2019 to the present day.

13. The Claimant's first absence was therefore as a result of his disability of a knee injury.

14. The Claimant's second absence, from August 2018 until January 2019 for anxiety and depression, is disability related absence for the purposes of the Equality Act 2010 from the 1 December 2018.

15. The Claimant's third absence, from the 28 February 2019 until termination of his contract is all disability related.

16. The Respondent admits that it knew of the Claimant's disabilities at all material times, and therefore admit that they knew that the Claimant was disabled by reason of each of these impairments during those periods of time.

The issues in the case

17. The parties had agreed a list of issues in advance of the hearing, which is in the bundle from page 104- 108. In addition to time points, and the question of whether or not there is a continuous course of conduct, the issues are as follows, underlined;

Direct disability discrimination

18. Did the Respondent treat the Claimant less favourably than it treated or would have treated others in not materially different circumstances?

19. The Claimant relies on the following acts of less favourable treatment
    19.1. The Respondent's decision not to appoint the Claimant to an assistant domestic manager role in January 2018. The Claimant relies on his knee injury.

19.2. The Respondent's decision not to appoint the Claimant to the role of Assistant Portering and Waste Manager in November 2019. The Claimant relies upon all of his disabilities.

19.3. Jackie Campbell (portering manager) stating in an email sent days before he was interviewed that the Assistant Portering and Waste Manager role was very physically demanding and/or querying whether the Claimant could carry out this role due to his disability. The Claimant relies upon all of his disability's, and

19.4. The Respondent's failure to arrange a workplace assessment by access to work in December 2019. The Claimant relies on all his disabilities

20. If the less favourable treatment did occur was the Claimant treated this way because of his disability or disabilities?

21. Was the Claimant treated less favourably than a hypothetical comparator?.

Failure to Make Reasonable Adjustments

22. Did the Respondent apply the following provisions criterion or practises

22.1. The requirements of the Claimants job role
22.2. The physical shared busy office space in which the Claimant was required to work.

The Respondent does not admit that it applies the pcps above.

23. If so, did the pcps put the Claimant and individuals that share his disability/disabilities is at a substantial disadvantage in comparison to individuals who do not share his disability/disability's? The Claimant avers that he was put at a substantial disadvantage when compared with those not sharing his disability disability's because

23.1. The requirement to bend stretch walk long distances and work on his feet all exacerbated the physical symptoms which arose from his rheumatoid arthritis and or knee injury the requirement to work in a busy shared office space heightened his depression and anxiety because he was required to have significant contact with others which he found difficult

24. At all material times did the Respondent know or ought it reasonably have been expected to know that the Claimant was likely to be placed at the substantial disadvantage relied on?

25. What steps(adjustments) could have been taken to avoid the substantial disadvantage relied on? The Claimant avers the steps that should have been taken by the Respondent are:

25.1. Redeployment to a new role;
25.2. Adjustment to his current role so that the more physical aspects of his work could have been allocated to others;
25.3. The allocation of his own or dedicated private desk workspace

26. Was it reasonable for the Respondent to have to take those steps and when?

27. If so did the Respondent take all steps as were reasonable in the circumstances to prevent the PCP having that disadvantageous effect?

Discrimination Arising Inconsequence of Disability

28. Did the Respondent treat the Claimant unfavourably by

28.1. Deciding not to appoint the Claimant the role of assistant portering and waste manager in November 2019. The Claimant relies on all of his disability's Jackie Campbell(portering manager), stating in an email sent days before the Claimant was interviewed about the assistant portering and waste manager role was very physically demanding and/or querying whether the Claimant could carry out this role due to his disability the Claimant relies upon all of his disabilities.

29. If the Claimant was treated unfavourably was the unfavourable treatment because of something arising in consequence of the Claimant's disability? The Claimant prefers that the something arising was *the Claimants mobility issues*.

30. If the Claimant was treated unfavourably, did the Respondent have a legitimate aim? The legitimate aim is said to be *to ensure that the individual appointed to the role was able to meet the requirements or functions of the role so that the Respondent could deliver the service it was required to deliver.*

31. Was the unfavourable treatment a proportionate means of achieving of that legitimate aim?

32. The tribunal will decide in particular was the treatment an appropriate and reasonably necessary way to achieve those aims

32.1. Could something less discriminatory have been done instead

32.2. How should the needs of the Claimant and the Respondent be balanced

Unfair Dismissal

33. Was the Claimant dismissed for potentially fair reason within section 98 one and two of ERA 1996? The Respondent asserts that the Claimant was dismissed on grounds of capability(ill health).

34. Was the dismissal fair in all the circumstances including the size and administrative resources of the employers undertaking and did the Respondent act reasonably in treating the Claimants capability (Ill health) as sufficient reason for dismissing the Claimant within the meaning of section 98(4) ERA 1996.

Confirmation of the Issues at hearing

35. At the start of the hearing the parties confirmed the issues were as set out, and Claimant was asked to clarify what he relied on as being the *something* arising from his disability for the purposes of this section of 15 claim. The Claimant confirmed that he was relying on *the Claimant's mobility issues* as arising from his disability

36. The Respondent was asked to confirm its legitimate aim for the purposes of the section 15 claims, and confirmed that the legitimate aim in respect of the decision not to appoint the Claimant to the Assistant Portering and Waste Management role in November 2019, was to ensure that the individual appointed to the role was able to meet the requirements or functions of the role so that the Respondent could deliver the service it was required to deliver.

37. In respect of the alleged unfair treatment in the form of an email sent by Jackie Campbell in advance of the interview for that post, the Respondent asserts that the legitimate aim was that of ensuring all candidates were aware of and met the essential requirements of the roles they were applying for.

38. At the start of the hearing the Claimant made an application to amend by the addition of several new allegations to his claim.

39. The application to amend was granted, in respect of one matter only, and the parties were given reasons for that amendment verbally. No written reasons have been requested in respect of that decision.

40. The amendment allowed was to add one further allegation, as follows:

    40.1. *With respect to the job of interim Deputy Domestic Manager at a meeting on the 17 April 2018 Dave Harbutt, the Operations Manager (facilities) informed the Claimant and Andrew Flowers, the union representative, that he had appointed Brian Hammersley into the job role of the Interim Deputy Domestic Manager at Saint Richards Hospital, despite the fact that there was not, prior to this appointment any recruitment process carried out, so potential candidates including the Claimant did not have opportunity to apply for this post .*

41. The Claimant states that this was an act of direct disability discrimination, and he relies upon his knee injury.

The Time Point

42. One of the issues in this case is the question of jurisdiction in terms of time limits.

43. The Respondent asserts that the Claimant's claims for disability discrimination are all out of time and that therefore the Tribunal only has jurisdiction to hear the Claimant's claims, if an extension of time is granted on grounds that it is just and equitable to do so or, if the Claimant is able to prove that his claims, unless they form part of a continuous act of discrimination. The Respondent asserts that it would not be just and equitable to extend time in this case and further denies that the Claimant can demonstrate that the various allegations he makes form part of a continuous act of discrimination within the meaning of the Equality Act 2010.

44. The Claimant has asserted that the acts and omissions he relies upon form part of a continuous course of conduct, and in any event, that it would be just and equitable to extend time in respect of any maters which are found proved but are out of time.

45. The following dates are relevant to these considerations. The Claimant was dismissed on the 27 May 2020, and he contacted ACAS on the 25 August 2020. This was within the initial 3- month time period. He was issued with an ACAS early conciliation certificate on the 9 September 2020. He submitted his ET1 claim on the 8 October 2020. This was within a month of the Certificate date, and thus his claim of unfair dismissal and any discrimination alleged in respect of dismissal its self is within time.

46. This means that any matters or claims arising prior to the 26 May 2020 are potentially out of time.

47. When considering time points and whether to extend time on grounds that it would be just and equitable to do so, we reminded ourselves that we may take into account any relevant factors and that this may include the merits of any claim of discrimination as well as the prejudice to the parties and of course any explanation provided by the Claimant for a failure to file a claim within the primary time limit.

48. We did not determine any time point at the outset, but reminded ourselves what we must take into account, should we need to do so.

Findings of fact, discussion and conclusions

49. The factual background to the claims is not really disputed. What is disputed is the reason and explanations for the decisions which were made about the Claimant's employment, and the reasons for not appointing him to the two posts he has identified, and about the work that he was and was not able to do. We have therefore structured our judgement by first setting out, in brief, the factual context, then considering each of the allegations made by the Claimant making findings of fact and then drawing conclusions in respect of those allegations.

Overview and Chronology

50. The Claimant suffered an injury to his knee in 2016 as a result of an accident whilst he was gardening. As a result of this injury, he suffered significant pain levels for

which he took medication. In June 2017 of the Claimant was referred by the Respondent to occupational health in respect of the knee injury.

51. A report was provided on the 7 June 2017 making a number of recommendations to be discussed with the Claimant. These included the following:

    51.1. a phased return to work of 50% for the first 2 weeks and 75% for a further 1-2 weeks following the surgery due on his right knee on 13 June 2017
    51.2. to carry out tasks as assessed as light moving and handling tasks and avoid any heavy moving and handling heavy cleaning or other equipment or objects without suitable help and support
    51.3. to arrange a DSE self-risk assessment and I will arrange a referral to the manual handling team
    51.4. that suitable tasks would include office-based tasks such as filing out time sheets, checking emails and supervision of the day-to-day activities of the domestic department as you stated is part of his responsibilities
    51.5. To refrain from walking long distances or standing for long periods until the right knee pain improves
    51.6. Ensure suitable breaks are taken
    51.7. To remain on the above tasks until completed the phased return to work and confident to carry out all his contracted tasks without increase in pain and discomfort in his right knee
    51.8. To review Frantisek's progress as advised by yourself once he returns to work following the above surgery

52. A second occupational health referral was made later in the year and a consultation took place on the 13 September 2017. The Claimant had had surgery on his knee in June 2017 and was deemed to be temporarily unfit for work, with a return-to-work date of the 13 October 2017 at the earliest. The Claimant remained in pain and was walking with crutches but remained unable to walk other than short distances for some time.

53. The OH report noted that the Claimant's role at the hospital included standing for long periods of time and carrying heavy loads. Various adjustments were recommended for discussion once the Claimant was signed as being fit to return to work. These included a phased return to work at 50% for two weeks, 75% for two weeks; and various recommendations about what he could and could not do. It was recommended that he could engage with office-based tasks such as filling out timesheets or checking emails and so on, but that he should refrain from walking all but very short distances on return to work and that he should be given adequate rest breaks.

54. It was also suggested that a DSE or self-risk assessment with the manual handling teams would take place.

55. The Claimant was invited to attend an informal sickness meeting on the 6 October 2017. This was the date that he had been due to return to work. The Occupational health review took place on the 24 October 2017, but that report stated that he still

had ongoing problems, with significant symptoms of pain and difficulty with his mobility. He was using two crutches and had difficulty flexing or extending his knee joint. The Claimant remained medically unfit for work with return to work before the end of the year being unlikely.

56. The Claimant was provided with the informal sickness review meeting outcome on the 11 December 2017. This summarised the background and stated that Brian Hammersley would be managing the Claimant's attendance and that a further meeting would take place on the 6 February 2018. The expectation was that there would be a significant improvement in attendance and that if his attendance did not improve then the meeting at the two-month review period may result in the first stage letter of concern being recorded.

57. The Claimant attended a further occupational review on the 12 December 2017 which recorded that the Claimant was now fit for work with temporary adjustments. In fact, the Claimant had returned to work on reduced hours on the 17 November 2017 but was reporting struggling with walking more than 200 metres at a time and requiring rests due to pain.

58. It is recorded in this occupational health report that the Claimant considered that he was able to carry out the majority of his contractual duties which were office based but it was noted in the report that he was struggling with his mobility. Occupational health did not at that point consider the Claimant to be a disabled person within the meaning of the Equality Act 2010, although subsequently the Employment Tribunal has determined that the Claimant was a disabled person from January 2017.

59. On his return to work, a manual handling assessment and general assessment was carried out by Mrs Winchester.

60. Mrs Winchester attended the Tribunal to give evidence under a witness order and had not produced a witness statement, and we return to that the discussion below.

61. The Claimant remained at work, and in early January 2018 raised his first concerns that he should have been appointed to the role of assistant domestic manager.

62. In February 2018 the Claimant was booked onto a supervisory training course, following and there was an exchange of emails about the Claimant's concerns regarding the assistant domestic manager role.

63. The Claimant attended further occupational health reviews on the 21st of February 2018 and the 17th of April 2018. Occupational health wrote to Brian Hammersley on 24 April 2018 regarding the restrictions which had been placed with the payment for the previous five months. The recommendation was that these restrictions would continue.

64. On the 2 August 2018 the Claimant started a further period of sickness absence and remained absent from work until the 2 January 2019.

65. The Claimant attended at a further occupational health review on the 2 January 2019 and on the 3 January 2019 was provided with the outcome of the informal sickness absence review meeting.

66. The Claimant then returned to work but was again signed off on sickness absence on the 28 February 2019. he did not return to work until his dismissal full capability.

67. on the 15 March 2019 the Claimant attended at an occupational health review.

68. on the 3 May 2019, after some failed attempts to set up sickness review meetings the Claimant was invited to a first stage formal sickness absence meeting. what the Claimant was unable to attend, and a further invitation was issued on the 15 May 2019. The Claimant was informed the outcome of that meeting on the 24 May 2019 which had taken place in his absence.

69. In June 2019 the Claimant appealed against the stage one letter of concern which was issued to him, and a date for the appeal hearing was notified to the Claimant on the 12 August 2019. The Claimant was unable to attend, and the meeting was rearranged, taking place on the 6 September 2019. The Claimant was informed that his appeal had been unsuccessful on the 17 September 2019.

70. On the 20 September 2019 the Claimant was invited by Jill Sorrell to the second stage formal absence meeting. On the 1 October 2019 the Claimant sentence email to Jill Sorrell stating that he would not be able to attend the meeting that being set for that day. Jill Sorrell responded providing further possible dates for the meeting.

71. In October 2019 the Claimant attended a further occupational health review, and only 9 October 2019 the Claimant attended at the second stage sickness absence meeting. The Claimant was sent the outcome of that stage two meeting on the 15 October 2019. The Claimant appealed against the stage two letter of concern on the 28 October 2019.

72. On the 13 November 2019 the Claimant raised grievance.

73. Only 20 November 2019 the Claimant was invited to an appeal hearing in respect to his appeal against the second stage sickness absence letter of concern.

74. The appeal hearing took place on the 2nd of December 2019 the same day does the Claimant attended a further occupational health review.

75. However, before the occupational health review and before the appeal hearing had taken place the Claimant had applied for and been invited to interview in respect of the role of assistant portering and waste manager. The Claimant makes allegations of disability discrimination in respect of that role.

76. Following the appeal hearing a second stage sickness review meeting took place only 10th of December 2019 the Claimant was again referred for an occupational health review

77. Only 11 December 2019, the Claimant's email to Miss Campbell requesting that his interview for the role of assistant portering and waste manager could take place other than the St Richards hospital

78. Also on the 11 December the Claimant received correspondence from Mr. McLaughlin giving him the outcome of his appeal. His appeal had been dismissed.

79. On the 11th of December the Claimant also received the outcome of the stage two sickness review, which was a further letter of concern.

80. Only 12 December 2019 Miss Campbell wrote to the Claimant agreeing that the interview could take place at a different site. In that email she also made various other comments which are the subject matter of the Claimant's disability discrimination claim and which are discussed in greater detail below.

81. On the 6 January 2020 the Claimant raised a further grievance.

82. Only 15 January 2020 the Claimant was invited to a final stage sickness absence meeting the Claimant s grievance

83. At around the same time the Claimant was invited to a grievance meeting.

84. The Claimant was referred again to occupational health on the 6 February 2020.

85. On the same date the Claimant received a letter from Mr Harbutt providing a rearranged date for the final sickness absence meeting, to a date after the occupational health review and report

86. On the 14 February 2020, Kanwal Baig wrote to Jillian Sorrell in respect of an application the Claimant had made under the access to work professionals. This correspondence forms part of one of the Claimant's discrimination claims and is discussed in more detail below.

87. Only 18 February 2020 a final sickness absence meeting was set up but was adjourned, so that it could be reconvened once further information had been received from the occupational health practitioner and from the Claimant's own specialist.

88. On the 18 February 2020 the Claimant received an email from Ms Baig in respect of his access to work application stating that nothing had been heard from the Claimant s employer

89. Over the 18 February 2020, the Claimant involved his representative Mr Andrew Flowers in respect of the communications between the Respondent and Access to Work.

90. On 25 February 2020 the Claimant attended at a grievance meeting.

91. The Claimant then attended an appointment with a consultant on the 26 February 2020, and on the 28 February 2020 he was sent a letter by Suzanne Fisher regarding the outcome of the final sickness absence meeting which was to be reconvened on the 31 March 2020

92. The Claimant requested a change to this date as he intended to take some annual leave from the 22 March 2020 until the 26 April 2020.

93. On the 3 March 2020 he attended at a further occupational health review.

94. The Claimant was also provided with an outcome of his grievance hearing on the 3 March 2020

95. The final sickness absence meeting was reconvened for the 19 May 2020, but the Claimant wrote to the Respondent on the 14 May stating that he would not be attending the reconvened final hearing due to being at high risk due to covid and due to ongoing pain.

96. Enquiries were made as to whether or not the Claimant could attend by a video link or teleconference or whether he could provide a written statement. On the 18 May 2020 the Claimant provided a written statement.

97. The hearing that proceeded in the Claimant's absence and on the 21 May the Claimant was sent the outcome of the final stage sickness absence hearing which was a decision to dismiss him on grounds of capability.

98. Following this, there was an agreement to extend the date of the Claimant's termination to the date that he had received and read the relevant documentation, following which the Claimant appealed the decision on the 21 June 2020.

99. There was some delay in establishing a suitable date for hearing the Claimant's appeal, due to the lack of availability of venues and holiday commitments but a date was eventually set for a hearing on the 29 September 2020.

100. The Claimant initially indicated that he would be able to attend the hearing but, on the 29 September 2020, asked for the hearing to be adjourned because of the unavailability of his representative and witnesses. This was agreed by the Respondents, and the Claimant was invited to a reconvened hearing of the appeal on the 20 October 2020. The appeal hearing took place on that date, and Mr McLaughlin who heard the appeal sent the appeal outcome to the Claimant. his decision was to dismiss the Claimant's appeal and uphold the original decision to dismiss the Claimant.

The Relevant Legal Tests

Direct discrimination

101. S. 13 of the Equality Act 2010 provides that a person is subject to direct discrimination if :

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

102. Under section 13, a comparison must be made between the treatment of the Claimant and another person, actual or hypothetical. When making that comparison, section 23(1) states

"On a comparison of cases for the purposes of sections 13, 14 or 19, there must be no material difference between the circumstances relating to each case."

103. When considering whether or not direct discrimination had taken place in this case, we considered and applied Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):
"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

104. In applying the test and before the reverse burden of proof is triggered, we must consider whether, the facts we have found could lead to a conclusion that the prohibited factor, in this case the Claimant's disability, may have or could have been the reason for any of the treatment we have found to have occurred.

105. We approached the case by applying the test in *Igen v Wong* [2005] EWCA Civ 142, and took into account that in order to shift the burden of proof to the Respondent, requiring a full explanation for any detriment or adverse treatment, the Claimant must prove more than a difference in treatment between himself and any comparator, actual or hypothetical, and a difference in protected characteristic. Before the burden of proof will shift, we must make some additional factual finding from which we may draw an inference that disability was causative of that treatment in some way. Unreasonable treatment alone may not be enough, unless it is connected to the protected characteristic.

106. We reminded ourselves that a successful direct discrimination claim depends on a tribunal being satisfied that the Claimant was treated less favourably than a comparator because of a protected characteristic. The Claimant bears the burden of proving both less favourable treatment and facts from which the tribunal could conclude in the absence of an explanation that the grounds for that treatment was something to do with the Claimant' s disability.

107. The question of whether the treatment complained of is less favourable, is a question or fact for the tribunal.

108. We reminded ourselves when considering whether the treatment the Claimant relied upon was as a matter of fact, less favourable treatment that the legislative test is an objective one.

109. The fact that a Claimant believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment. We had in mind the judgments of the EAT in *Burrett v West Birmingham Health Authority 1994 IRLR 7, EAT*, regarding a complaint by nurse that she had been treated less favourably by being required to wear a uniform which she could incident to be demeaning, and the judgement of the Court of Appeal in *HM Land Registry v Grant (Equality and Human Rights Commission intervening)* 2011 ICR 1390, CA, in which the Claimant's complaint that he had been outed at work and that this was less favourable treatment was rejected, because but the Claimant had already made his sexual orientation public at a previous workplace.

110. We also bore in mind however that the Claimant's perception about his treatment and its effect on him will often have a significant influence on the Tribunals conclusions. In *Chief Constable of West Yorkshire Police v Khan* 2001 ICR 1065, HL (a victimisation case), the House of Lords determined that the Claimant was treated less favourably when the employer refused, for allegedly discriminatory reasons, to provide him with a reference. It was almost certain that, had he been given a reference, it would have been very unfavourable and their Lordships took into account that that from an objective point of view, he was better off without one. Nonetheless, he was held to have been treated less favourably than a comparator. There is, according to Lord Hoffmann,

'a distinction between the question of whether treatment is less favourable and the question of whether it has damaging consequences'.

111. On the other hand, it is not enough simply to show that the complainant has been treated differently. As Lord Scott said,

'*there must also be a quality in the treatment that enables the complainant reasonably to complain about it. I do not think, however, that it is appropriate to pursue the treatment and its consequences down to an end result in order to try and demonstrate that the complainant is, in the end, better off, or at least no worse off, than he would have been if he had not been treated differently. I think it suffices if the complainant can reasonably say that he would have preferred not to have been treated differently.'* Here, the Claimant wanted a reference to be given, even though he knew that it would be likely to contain adverse remarks about him, and withholding it meant that he had suffered less favourable treatment.

112. The question that we had to consider in this case was whether or not the treatment of the Claimant, which was the letter written by the Respondent following the Claimant's request for reasonable adjustments in respect of his disability and mobility, was capable of amounting to less favourable treatment. We accept and found as fact that it was different treatment but the question we had to ask ourselves was whether or not as a matter of fact it was less favourable treatment of the Claimant.

113. Although Khan was a victimisation case under the RRA, and the definition of victimisation under the EqA is different and does not involve less favourable

treatment, the principle set down in that case is cited by the EHRC Employment Code when it explains less favourable treatment in the context of direct discrimination: *'The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated — or would have treated — another person'* — see para 3.5. 15.20

Discrimination for a reason arising from disability

114. When considering a complaint under s. 15 of the Equality Act, we must consider whether the employee was "*treated unfavourably because of something arising in consequence of her disability*". This means that there must first be *something* which arises in consequence of the disability and, secondly, there needs to be some unfavourable treatment which the Claimant says was suffered because of that '*something*' (*Basildon and Thurrock NHS-v-Weerasinghe* UKEAT/0397/14). Although there must be some causal connection between the '*something*' and the disability, it only needs to be a loose connection and there might be several links in the causative chain (*Hall-v-Chief Constable of West Yorkshire Police* UKEAT/0057/15 and *iForce Ltd-v-Wood* UKEAT/0167/18/DA). It does not need to be the only reason for the unfavourable treatment but it must have been a significant cause (*Pnaiser-v-NHS England* [2016] IRLR 170).

115. In *IPC Media-v-Millar* [2013] IRLR 707, the EAT stressed the need to focus upon the mind of the putative discriminator. Whether conscious or unconscious, the motive for the unfavourable treatment claim needed to have been "*something arising in consequence of*" the employee's disability.

116. We remind ourselves that there is no requirement for a comparator. '*Unfavourable*' treatment did not equate to '*less favourable treatment*' or '*detriment*'. It had to be measured objectively and required a tribunal to consider whether a Claimant had been subjected to something that was adverse rather than something that was beneficial. The test was not met simply because a Claimant thought that the treatment could have been more advantageous (*Williams-v-Trustees of Swansea University Pension and Assurance Scheme* [2019] ICR 230, SC).

Reasonable adjustments

117. The duty to make reasonable adjustments under section 20 EqA arises as follows;

> *(1)Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
>
> *(2) The duty comprises the following three requirements.*
>
> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with*

> *persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
>
> *(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
>
> *(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.*
>
> *(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.*

118. We remind ourselves *that the* failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

119. In considering the claims made under ss. 20 and 21 of the Act, we have borne in mind the guidance in the case of ***Environment Agency v. Rowan*** [2008] IRLR 20 in relation to the correct manner that we should approach those sections.

120. We have reminded ourselves that, in the context of defining a PCP, a 'practice' has been said to imply that an element of repetition was involved (*Nottingham City Transport-v-Harvey* [2013] Eq LR 4 and *Fox-v-British Airways* [2014] UKEAT/0315/14/RN).

121. In relation to the second limb of the test, it has to be remembered that a Claimant needed to demonstrate that he is caused a substantial disadvantage when compared with those not disabled. It is not sufficient that the disadvantage is merely some disadvantage when viewed generally. It needs to be one which is substantial when viewed in comparison with persons who are not disabled and that test is an objective one (*Copal Castings-v-Hinton [2005] UKEAT 0903/04*).

122. Further, in terms of the adjustments themselves, it is necessary for them to have been both reasonable and to operate so as to avoid the disadvantage. There does not have to have been a certainty that the disadvantage would be removed or alleviated by the adjustment. A real prospect that it would have that effect would be sufficient (*Romec-v-Rudham* UKEAT/0067/07 and *Leeds Teaching Hospital NHS Trust-v-Foster* [2011] EqLR 1075).

123. Furthermore, the duty to make adjustments did not generally arise unless or until a Claimant was able to return to work, although that is not always the case (*Home Office-v-Collins* [2005] EWCA Civ 598, *NCH Scotland-v-McHugh* [2006] UKEATS/0010/06 and *London Underground Ltd-v-Vuoto* [2009] UKEAT/0123/09, paragraphs 119-125). In *Collins* there was no evidence that the adjustments

contended for would have aided the Claimant 's return to work whereas, in *Vuoto* a more positive view was expressed by OH in relation to the proposed changes and the Claimant 's likely consequent return. What they demonstrated is that, in all questions of this sort, the focus should always be upon the extent to which the adjustment was said to have overcome or alleviated the disadvantage suffered *at* work, assuming a likely return if the employee was actually absent.

124. In a claim under s.20, time starts to run for the purposes of s.123 of the Act from the date upon which an employee should reasonably have expected an employer to have made the adjustments contended for (*Matuszowicz-v-Kingston upon Hull City Council* [2005] IRLR 288 and *Abertawe Bro Morgannwg University Local Health Board-v-Morgan* [2018] EWCA 640), which may not have been the same date as the date upon which the duty to make the adjustments first arose. Time does not start to run, however, in a case in which a Respondent agreed to keep the question of adjustments open and/or under review (*Job Centre Plus-v-Jamil* UKEAT/0097/13)

Time Limits in Discrimination Claims

125. The test of whether or not an ET can extend time in a discrimination case is whether it is just and equitable to do so. The discretion for tribunals to hear out-of-time claims within whatever period they consider to be 'just and equitable' is clearly broader than the discretion to allow late claims to proceed where it was not 'reasonably practicable' to present the claim in time (and then only if the claim was presented within a reasonable time thereafter).

126. To establish whether a complaint of discrimination has been presented in time it is necessary to determine the date of the act complained of, as this sets the time limit running.

127. S.123(3) EqA makes special provision relating to the date of the act complained of where there is a series of acts, said to form part of a continuing act or course of conduct. in these situations. It states that:
conduct extending over a period is to be treated as done at the end of that period

128. Failure to do something is to be treated as occurring when the person in question decided on it — S.123(3)(b). In the absence of evidence to the contrary, a person is taken to decide on a failure to do something either when that person does an act inconsistent with doing something, or, if the person does no inconsistent act, on the expiry of the period within which he or she might reasonably have been expected to do it — S.123(4).

129. When employment tribunals consider exercising the discretion under S.123(1)(b) EqA, 'there is no presumption that they should do so unless they can justify failure to exercise the discretion. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.' The onus is therefore on the Claimant to convince the tribunal that it is just and equitable to extend the time limit. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law simply requires that an extension of time should be just and equitable .

130. We remind ourselves that if we need to consider whether to exercise the discretion to allow the late submission of a discrimination claim, that we may consider any or all of the factors listed in S.33(3) of the Limitation Act 1980 — British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT. That requires the court to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the Claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the Claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

131. We remind ourselves that when considering whether or not it is just and equitable to extend time, we must not focus solely on whether or not the Claimant ought to have submitted the claim in time . We must weigh up the relative prejudice to the Respondent of extending or not extending time . (*Pathan v South London Islamic Centre EAT* 0312/13)

Unfair Dismissal

132. When considering a claim of unfair dismissal, we remind ourselves that it is for the employer to show a potentially fair reason for dismissal. Once an employer has shown a potentially fair reason for dismissal, we must then decide whether the dismissal for that reason was fair or unfair. This involves deciding whether the employer acted reasonably or unreasonably in dismissing for the reason given in accordance with S.98(4) of the Employment Rights Act 1996 (ERA).

133. That provision states that 'the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —

(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b)shall be determined in accordance with equity and the substantial merits of the case'.

134. This means that it is not enough that the employer has a reason that is capable of justifying dismissal. We must be satisfied that, in all the circumstances, the employer was actually justified in dismissing for that reason. There is no burden of proof on either party and the issue of whether the dismissal was reasonable is a neutral one for the tribunal to decide. (See for example *Boys and Girls Welfare Society v Macdonald 1997 ICR 693, EAT*.)

135. We reminded ourselves that we must assess question of reasonableness in the context of the particular reason we have found that the employer has established for dismissing the Claimant.

136. The wording has the effect of giving tribunals a wide discretion to base their decisions on the facts of the case before them and in the light of good industrial

relations practice. In order to assess whether or not an employer has acted reasonably we remind ourselves that we must consider whether or not the decision was within the band or range of reasonable responses, open to an employer hope the size under the administrative resource is of this NHS Trust.

137. Whilst the test of whether or not the employer acted reasonably is usually expressed as an objective one, there is a subjective element involved, and we remind ourselves that we must take into account the genuinely held beliefs of the employer at the time of the dismissal. We must not however put ourselves in the position of the employer and consider what we might have done, but rather assess whether this employer had genuinely held beliefs, which contribute to the conclusion fact the decision taken was a reasonable one.

Findings of fact, discussion and conclusions

The Workplace assessment and the chair

138. Mrs Winchester carried out a workplace assessment of the Claimant, on his return to work in 2017. Her evidence to us in chief, was that she had carried out the assessment and considered that the Claimant would require a special chair which would have armrests and lumbar support. She said that an existing suitable chair which the Trust already had, had then been provided to the Claimant on a loan basis.

139. Mrs Winchester told the Tribunal and we accept, that she informed the Claimant's line manager that they should purchase a chair for him and that she provided the relevant cost code and information to assist with the purchasing. In fact no such chair was ever purchased for the Claimant and we have heard no evidence from Mr Hammersley, the manager responsible, who we understand has now left the Respondents employment, or any one from the Respondents who has responsibility for this, as to why this did not happen.

140. The Claimant continued to use the chair which had been loaned to him for a long period of time. Neither he nor Mrs Winchester were entirely clear when she had approached him to take the chair back so that it could be loaned to another person, but from the evidence we have heard we find that the most probable time was around the summer of 2018.

141. We do not understand why the Respondent did not provide the Claimant with a replacement chair.

142. We accept that this was an adjustment that was considered necessary internally to assist him with sitting comfortably, even though it had not been recommended by Occupational Health. The Claimant has not relied upon this issue at any stage of his claim as being a failure to make reasonable adjustments although he has drawn our attention to it in his evidence in chief.

143. It is not a matter he referred to in his claim form or at any of the case management hearings or in his amendments, proposed amendments to the various

iterations of the list of issues. The Claimant told us and we accept that he did raise the question with Mr Hammersley in a meeting and was told there was no budget for purchase of the chair for him.

144. Had this matter properly being before the Employment Tribunal we may well have considered that there was a failure by the Respondent to make what appears on the face of it to be a reasonable adjustment.

145. However, it was not before us, as it is not an agreed issue, and no application to amend was made at any time by the Claimant in respect of this matter, although amendments were made in respect of other matters and granted, at this hearing.

146. As a result, the Respondent has not dealt with it as an issue, and cannot we think be criticised for not calling evidence to deal with the specific question of why the Claimant was not issued with a replacement chair.

147. We have taken this into account when considering the other claims and allegations, as a background fact. We are concerned about the failure by the manager Mr Hammersley to take any steps to order a piece of equipment to assist the disabled employee.

148. We have been told by Mrs Sorrell that all reasonable adjustments recommended by occupational health would usually be implemented. She gave evidence that she would have expected Mr Hammersley or another manager to have implemented the recommendations that occupational health made for the Claimant. She thought that Mr Hammersley would have been the line manager with responsibility but explained to us that the Claimant had refused to recognise Mr Hammersley as his line manager and that therefore somebody called Lauren had taken responsibility.

149. She told us and we accept that her experience was that it was standard practice to implement the recommendations from occupational health and that she would expect it to be done. We observe that the provision of the chair was not a specific recommendation of occupational health, but of Mrs Winchester.

150. The Claimant was absent from the workplace from 28 February 2018 until termination of his employment and as a matter of logic, the last date on which he could have been disadvantaged by the lack of provision of a chair must have been February 2018.

151. Mrs Sorrell gave evidence that she believed and understood that all the relevant adjustments, by which we understood her to mean those adjustments recommended by OH, had in fact been made for the Claimant. These would have included a phased return to work; a restriction of his duties so that he was not lifting heavy loads or carrying heavy loads and so that he was not required to do bending or kneeling or crouching, and restriction of the distances he was required to walk and the provision of time for rest.

152. Mrs Winchester explained to us that she had told the Claimant that he must ensure that he took rests regularly by leaning on windowsills or on the wall when he was required to walk around the building.

153. We also find that it was recommended that the Claimant be provided extra time so that he could use the lift where necessary.

154. The Claimant has suggested that adjustments were not made for him, but he has not been specific about what adjustments ought to have been made and when he says they were required. He has put his claim in terms of a provision, criterion or practice which was the requirements of his job and the physical shared busy office space, and the disadvantage that he was placed at as being the requirement to bend; stretch; walk long distances and work on his feet.

155. We have therefore considered first, whether there was such a PCP, whether it was applied to the Claimant and whether it placed him at a disadvantage compared to those who were not disabled as he was.

156. We then considered whether or not any adjustments could have been made which it would have been reasonable for the Respondent to make.

157. We have asked whether any particular adjustment would have removed the disadvantage, and whether it would be otherwise reasonable, taking into account factors such as cost.

158. We have then considered whether or not such adjustments were made.

159. The Respondent accepts that there was a PCP which was the requirements of the Claimant's job at all the material times and also accepts that the requirements placed him at a substantial disadvantage in comparison with individuals who did not share his disability. We agree. This was evident from each of the occupational health reports from 2017 onwards.

160. We find that the Respondent knew or ought to have known that the Claimant was likely to be placed at the substantial disadvantage he relies on, in respect of his job, which were the physical requirements of his job, including the requirement for bending and stretching and walking.

161. The Respondent therefore had a duty to make reasonable adjustments, from the point that the Claimant was found to be disabled.

162. The Claimant has suggested that he remained under an obligation to carry out audits, which he complains about, and suggested to us that these should have been removed from his workload.

163. We find that he is right that he had to carry out audits, but we accept the evidence from Mrs Sorrell that doing the audits was in fact considered to be one of the lighter duties. She described it as being a walk around the ward with a

clipboard checking that the standards of cleanliness and hygiene were being maintained.

164. The Claimant asserted that it involved a degree of bending or stretching and required him being on his feet. The Respondent agreed that the task involved some walking, but did not agree that looking at the general cleanliness on a ward involved any significant stretching or bending.

165. We accept that he was required to do audits on occasions, but we also find as fact that this was one of the lighter duties and was which he was able to do with existing adjustments. We find that the recommendations of OH were implemented and that the Claimant's other duties had been amended and that this work was to be done with those adjustments, such as rests and longer time allocations. We prefer the Respondent's factual characterization of this work.

166. We have looked at each of the occupational health reports and the specialist reports sent to the Respondents as well as the notes of the various meetings which the Claimant attended about his health and sickness absences.

167. We note that within the occupational health reports themselves there are references to the Claimant 's own comments about the work that he is doing and that there is also reference to the continuation of existing restrictions on the Claimant 's work. The Claimant refers on one occasion to his work being *mainly office based* and we find as fact that this was the reality of his working during the limited periods of time that he attended the workplace from November 2017.

168. We find as fact that the Claimant's role was amended so that he was given primarily office-based duties or duties which were lighter in nature, and which required limited amounts of walking and limited amounts of movement.

169. We find that the Claimant was able to return to work with phased return on each occasion that this was recommended for him.

170. We find that the Claimant was facilitated to take reasonable breaks and to rest during the time he was at work.

171. We conclude that adjustments were made which were reasonable to remove the disadvantage, and that the remaining tasks could be carried out with those adjustments. There was no failure to make a reasonable adjustment by the Claimant being asked on occasions to carry out audits with existing adjustments.

172. We have then considered the Claimant 's second PCP which is the requirement to work in a busy shared office space, which he says heightened his depression and anxiety, because he was required to have significant contact with others.

173. We have considered the period of time that the Claimant was physically at work and during which he was also a disabled person for the purposes of the Equality Act. This is the period of time from January 2018 until February 28, 2018.

174. We have considered the Claimant's evidence and the Occupational Health reports from that time and from the time before the Claimant returned to work in January 2018. There is no evidence at all that the Claimant raised with the Respondent or with Occupational Health or with his union that he had any concerns about the busy shared office space having an impact on his mental health. The Claimant accepted in evidence when asked that he had not in fact raised this or made it specific but suggested that it was implicit.

175. We do not agree. There is nothing at all on the face of any of the Occupational Health reports that suggest that the Claimant himself considered that the office environment was placing him at a substantial disadvantage at that point in time, or that it was in fact having that impact upon him. The Claimant was able to raise concerns he had, and did so, and we are satisfied that he would have raised this if it had been a concern for him. We find that the Claimant did not raise it, because it was not an issue for him at the time.

176. Further, we find that even if we are wrong and there was an impact on the Claimant, that the Respondent did not know and could not have been expected to know that this was alleged to be the case. This is because the Claimant did not tell them, and there was no suggestion of the office environment itself being an issue from anyone else.

177. We find that whilst the Claimant was required to work in a busy office space, and we observe that any office shared by seven people who are coming and going is likely to be busy, that there is no evidence that it placed the Claimant at the substantial disadvantage he alleges, and in any event the Respondent did not know of the alleged disadvantage.

178. In the absence of knowledge of a potential impact of a PCP, the Respondent does not have a duty to make any adjustment, because of section 20 of schedule 8 EqA 20210, which states that A is not subject to the Duty to make adjustments if A does not know or could not reasonable y be expected to know that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

179. We accept Mrs Sorrell's evidence that, had the Claimant raised the issue with her at any time, that she would have discussed it and considered whether or not alternative office space could be found for the Claimant. We accept that that this is what she would have done.

180. We therefore dismiss this part of the Claimant 's claim.

181. The Claimant asserts that the adjustments that should have been made for him included redeployment to a new role as well as adjustment to his current role, so that the more physical aspects of his work could be allocated to others. He also suggested that he should have been allocated his own or dedicated private desk and workspace.

182. From our findings above we find that the Respondent did make reasonable adjustments in respect of adjusting the Claimant 's current role and that they were not required to make the adjustment of allocating him his own dedicated private workspace

183. In respect of redeployment to a new role, we have considered that the Claimant's job did place him at a disadvantage, but we find that the adjustments made by the Respondent were ones which did remove the substantial disadvantages the Claimant was placed at, and that enabled the Claimant to continue to work during those periods of time when he was deemed fit for work.

184. We have considered whether or not redeployment to a different role would have been a reasonable adjustment which the Respondent ought to have made, at any stage whilst the Claimant was either at work, or during his lengthy absence from work.

185. Whilst the Claimant was at work, adjustments were made, and he was able to continue to work. We find that that allocation to another suitable job would have been a reasonable adjustment, if another suitable role had been available or if the adjustments that were made, had not removed the substantial disadvantage. However, at those times when he was in attendance work, redeployment to another role was unnecessary. It is correct to say that redeployment to a different role may well have removed the substantial disadvantage that the Claimant faced, but we find that, whilst the Claimant was at work, the adjustment's put in place did remove the substantial adverse impacts on him.

186. The evidence we have in respect of the effectiveness of any adjustment that may remove disadvantages whilst the Claimant was absent from work, is that of the Claimant and that of the Occupational health advisers.

187. We find that the Respondent did ask occupational health questions as to whether or not redeployment to another role may alleviate the Claimant 's situation. We find as fact that throughout the period of time that the Claimant remained absent from work, the view of occupational health was that he was unfit for work and that therefore he was not fit for any alternative role. We find that this was a fair and appropriate opinion, and we accept it as the Respondent did.

188. The view of occupational health and the view of the Respondents was that the appropriate step would be to consider adjustments to the Claimant's role once he was able to return to work. We accept that the Respondent needed to know what the Claimant could do before considering whether adjustments to his existing role were possible and would alleviate any disadvantage and if not, then consider whether or not alternative roles should be considered.

189. At all points whilst the Claimant remained off work, the Respondent needed to know what the Claimant could do, and the advice they received was that the Claimant was not fit for any work at all. It was never suggested that the Claimant was fit for a desk job, or an administrative role or any other role, and we conclude

that this was because the Claimant 's combination of health conditions meant that not only could he not do physical work but that he was not fit for work of any description because of the combination of his conditions, including his mental health disability.

190. We conclude from this that there was no adjustment that could be made whilst the Claimant was off sick, including redeployment, which would remove the substantial disadvantage to him. It was not the work that meant he was unable to return to work at all, it was his ill health. We conclude therefore that there was no duty to make any adjustment to look for or provide an alternative role at that time.

191. We find on balance that the evidence before us supports the conclusion that all the adjustments which it was reasonable for the Respondent to have to make, were made for him, in respect of the duties of his job. When the Claimant was unable to carry out the duties, he was signed off sick, and was unfit for work at all.

192. It is key to our findings that no one, including the Claimant, has suggested that any further adjustments could have been made to the job, which would have removed the disadvantages suffered by the Claimant, so that he would be able to return to work, once he started his long-term sick leave, as he remained unfit for any work in this period.

193. We understand that the Claimant considered that some sort of assessment should have been made, to see whether or not he could do some sort of job, but the advice of OH, whose task it was to advise the Respondent on this, was that it was only once the Claimant was fit for work, that any form of adjustments should be considered. The Claimant was never again deemed fit to return to work, despite his own fervent wish to do so.

194. In the circumstances of this case we conclude that, whilst redeployment may have been a reasonable adjustment to make once the Claimant was fit to return to work, and once it was known what tasks he could carry out, it was not a reasonable adjustment for the Respondents to make whilst the Claimant remained unfit for any sort of work from February 2018 until termination of his employment in May 2020.

195. On that basis we reject and dismiss the Claimant 's claims in respect or failures to make reasonable adjustments.

Direct discrimination

196. The Claimant has made claims of direct discrimination and discrimination for a reason arising from disability respect of a number of applications which he made for alternative work and for promotion.

197. The first of these was an application the Claimant made in January 2018 for the post of assistant domestic manager.

198. The Claimant gave evidence that he had been spoken to by Mrs Sorrell along with a number of his colleagues in January 2018. The post of assistant domestic

manager had become vacant because the postholder had left, and Mrs Sorrell told the Claimant and his colleagues, who were all band 3 post holders, that the post would be advertised and that they would all have the opportunity to apply for it. Mrs Sorrell did not recall the conversation, but accepted when asked by the Judge, that this was the sort of thing that she would have said. We find that this conversation did take place.

199. She also told us, and we accept, that she expected the post to be advertised and expected individuals to be able to apply for it.

200. We were also referred to the Respondent's policy on recruitment which states that vacancies will be advertised and available to all, in most circumstances.

201. We find that the meeting did take place in January 2018, and we also find that the post was not advertised and also was not in fact filled until roundabout the end of March or beginning of April 2018.

202. We heard evidence from Mr Harbutt, who had been responsible for filling the post. He told us that he considered he needed somebody who had existing skill and experience of certain aspects of the role at the higher level, and that he believed that Mr Hammersley, who was at that time a band 4 post holder, working at the Worthing hospital, had the necessary management skills to be able to act up.

203. He told us that but there were reasons for not filling the post in the early part of 2018 and that part of this was that there was some reorganisation taking place and that he was seeking to ensure that the management of both the two hospitals was run in the same way. He told us that he had taken advice from human resources, and that he had decided that Mr Hammersley would be appointed to act up into the position because he had the necessary skills to do so.

204. Mr Harbutt did not consider anybody else for the role and told us that he was not aware that the Claimant, any other band 3 individual was interested in the role.

205. We find that the Claimant 's description of the events is correct. We find that he was in the same position as all the other band 3 employees in that none of them were given the opportunity to apply for a vacant post. We find that on the face of it, this did not appear to be in line with the expectation of the internal policy and that Mr Harbutt chose someone he already knew to act up. We also find that Mr Harbutt did act on advice from Human Resources. None the less, the Claimant, who was not chosen, was treated differently.

206. We also find that Mr Hammersley was in different material circumstances to the Claimant. He was a band higher than the Claimant and he had relevant experience which Mr Harbutt considered necessary for acting up.

207. We also find that the reasons Mr Harbutt gave for not running an open recruitment process at that point, whilst not in line with the expectation of the internal policy, were his genuine reasons.

208. We accept that there was a reorganisation and a realignment of management processes taking place even though we also accept the Claimant ’s comments that this did not necessarily involve the band 5 individuals.

209. From our findings of fact we conclude that the Claimant was in different material circumstances to Mr Hammersley. He was not treated differently or unfavourably to somebody in the same or similar circumstances.

210. Even if we had found different treatment, and a difference between Mr Hammersley and the Claimant, in that the Claimant was disabled and Mr Hammersley was not, there are no facts found by us, from which we could conclude, in the absence of an explanation from the Respondent, that discrimination had taken place. We have no evidence that Mr Harbutt knew tht the Claimant was interested, and consciously or unconsciously acted so that he could not apply, which is the thrust of the claim. Nor do we find that the failure to follow the internal process was, on this occasion sufficient to shift the burden of proof, although we did consider it, and conclude it was unreasonable conduct. We remind ourselves that there is a difference between unreasonable and discriminatory conduct, and in this case, we conclude that the burden of proof does not shift.

211. Whilst we accept that the meeting took place and that Mr Harbutt told the Claimant the reasons he had for appointing an interim post and whilst we accept that the Claimant considered that this was contrary to the Trust's policy, on the basis of our findings the burden of proof does not shift to the Respondent and we dismiss the claim of direct discrimination.

212. If we are wrong, and the Claimant and the Mr Hammersley were in the same material circumstances, and if the fact of the apparent deviation from expected procedures is sufficient to shift the burden of proof, and we find it is not in this case, we would in any event, accept the Respondent’s explanation as a full and non-discriminatory explanation.

213. We could not conclude that the grounds or reason for Mr Hammersley being appointed rather than the Claimant were anything to do with the Claimant being disabled. We find that the explanation that Mr Hammersley required somebody with current experience to act up into the post, and was advised by HR that he could appoint someone to act up, and that he was not aware that other such as Claimant were interested in the post, is a wholly nondiscriminatory explanation .

214. We therefore dismissed the Claimant ’s claim of direct discrimination in respect of the assistant domestic manager post and in respect of the meeting which took place in April 2018 with Mr Harbutt, which was the subject of the Claimants amendment.

215. The second position about which the Claimant raises a direct discrimination claim is the position of Assistant Portering and Waste Manager at Worthing hospital, which he applied for in November 2019. He complains both that he was not appointed to the post, and he ins about an email which was written to him by Mrs Jacqui Campbell in advance of his interview.

216. The post had been advertised and the Claimant applied in November 2019. At that point the Claimant remained absent on sick leave.

217. He had been shortlisted and invited for interview, as had two other people.

218. As far as we are aware the Claimant was the only interviewee with a disability. We have no evidence to the contrary.

219. The interviews were to take place on the site of the Worthing hospital. Mrs Campbell told us, and we accept that the Worthing hospital is 22 miles from Saint Richards hospital where the Claimant worked.

220. Mrs Campbell told us, and we accept that she did not know the Claimant because she worked at Worthing, and he worked at St Richards.

221. Mrs Campbell also told us and we accept that prior to the Claimant writing to her about the interview she had no knowledge of his impairment or of the fact that he was disabled. Whilst there was some discussion before us about the information the Claimant had provided on his application, and whilst we accept that he did tick the box saying he was disabled and probably did provide further explanation as to the nature of his disability , we also accept that this information was not passed on to Mrs Campbell .

222. The Respondents representative told the Tribunal that this information was simply passed on to Human Resources. This is common practice and we have no reason to doubt that this is what would have been done by a large NHS hospital with human resources support on this occasion.

223. The Claimant was sent a date for an interview at the Worthing site in advance but the day before the interview the Claimant sent an email to Mrs Campbell in which he told her that he had a mobility disability and that because of his disability he would have difficulty attending at the Worthing site and asked if the interview could be moved to the Saint Richards hospital.

224. Mrs Campbell responded. Firstly, she agreed to his request for an adjustment so that he could be interviewed at the Saint Richards hospital site.

225. She then stated

I see from your e mail that you have a disability and wanted to ensure that you understood that this position is at Worthing Hospital and does involve a lot of walking which can be up to 5/10 miles a day as well as lifting, carrying and pushing. I would also like to confirm that the other candidates will have the opportunity to see the area and meet some of the staff of the area of responsibility. By requesting St Richards as an interview site we will be unable to do this prior to decision making.

We look forward to seeing you on Monday.

226. Mrs Campbell told us that but the reason she wrote back as she did was that firstly she wanted to ensure that the Claimant knew that the post he was applying for was based at the Worthing campus and that this could not be changed. She told us and we accept that it occurred to her that the Claimant had not realised this when he applied, because the job applications and information were not always clear. She wanted him to be aware of it in case it was an issue for him.

227. She also wanted to ensure that he was aware that the job at the Worthing site would involve a significant amount of walking, because of the site layout. She did not know whether the Claimant was familiar with the Worthing site, and did not want him to be disadvantaged, because he would lose the opportunity to see the site if his interview took place at Saint Richards. She told us and we accept that she wanted the Claimant to be aware the other candidates would have the opportunity of looking around the site which he would not have.

228. She told us and we accept that she did not intend to suggest to the Claimant that he would not be able to do the job.

229. The interview then took place. We have seen one of the score sheets from the colleague who interviewed with Mrs Campbell. Mrs Campbell's own score sheet was not any longer available, but she told us, and we accept, that her marks for each candidate were very similar to those of her colleague.

230. From the score sheet provided, we find sufficient evidence that all candidates were scored in the same way. We note that each of the candidates was assigned the same score for the same reason in respect of one question because each of them failed to provide a particular piece of information. The candidate who was successful at interview scored significantly more than either the Claimant or the other unsuccessful candidate.

231. The allegation made by the Claimant is that Mrs Campbell had stated that the Assistant Portering and Waste Manager role was very physically demanding and that she was querying whether the Claimant could carry out this role due to his disability.

232. We find as fact that Mrs Campbell did not state that the role was very physically demanding, but rather stated that the role involved walking distance each day, which was true, and that further she did not query whether the Claimant could carry out the role due to his disability. In fact, in her email, she makes no such comment. The Claimant may have inferred that, but it is not what Mrs Campbell said.

233. In respect of the email that was sent to the Claimant we have asked ourselves first, whether or not the Claimant was treated less favourably than another person in the same or similar circumstances was or would had been treated.

234. We find that the email intended to be helpful, but we have reminded ourselves that the intention of the party alleged to have been discriminated against is not relevant to a direct discrimination claim.

235. We do find however, that simply sending a letter following the Claimant himself raising his disability as an issue, was not less favourable or unfavourable treatment of the Claimant . Whilst it is true that she did not write to either of the other candidates, so that the treatment was different, neither of the other candidates had written to her stating that they would not be able to attend at interview at the Worthing site. For the purposes of a direct discrimination claim, the Claimant was in a different material circumstance than others in that respect. That is that he had raised his difficulty with attending at the site for interview, and the reason for it. He had asked for a reasonable adjustment, which had been granted.

236. From her explanations, we conclude that Mrs Campbell would have pointed out the place of work and the job requirements to any person who was expressing difficulty in physically attending at the site, for whatever reason.

237. We find that there was no unfavourable or less favourable treatment of the Claimant in the writing of the email, in the way that the Claimant alleges.

238. If we are wrong, and the email is written because the Claimant raised his disability, we have considered whether or not there are any facts from which we could conclude that the reason or grounds for the letter being written were that the Claimant was disabled, and we find that it was not , in the strict sense for this reason. The fact that the Claimant flagged up his disability would not have made any difference, we find, had it not been for the Claimant stating that he could not attend at the site as a result of his disability. It was the inability to attend, because of mobility issues, and this is something which arises from the disability and not the disability itself.

239. If we are wrong, and if the letter was on grounds of disability, and if it was less favourable treatment of the Claimant, and if it was sufficient to shift the burden of proof to the Respondent, we have considered whether the Respondents explanation is a non-discriminatory explanation and we conclude that it is. Mrs Campbell did not write an email on grounds of the disability; she wrote the email because the Claimant told her that he would have difficulty attending at the site and because she wanted to ensure that he understood both where the job was based and what it entailed and that he would not have the opportunity that the two other applicants would have of viewing the site. This was a wholly non-discriminatory explanation, even though it occurs in the context of a dibbled candidate revealing his disability.

240. We have also considered whether or not the decision not to appoint the Claimant was direct disability discrimination. The Claimant was treated less favourably than the person who was appointed, but the person who was appointed was in a different material circumstance to the Claimant because they scored higher than the Claimant .

241. Our findings of fact are that the process of scoring appears to be fair and in the absence of any evidence from the Claimant that his disability was taken into account, we could not conclude, absent an explanation from the Respondent, that the appointment was on grounds of the Claimant 's disability.

242. We have considered whether or not the email written by Mrs Campbell is evidence that might support a finding of discrimination. We consider that it is not, but we also accept Mrs Campbell's evidence that she did not take into account the Claimant 's disability when she was scoring him, and we also take into account that there is no evidence before us that the second interviewer was aware of the Claimant 's disability at all.

243. Even if we are wrong, and the burden of proof were to shift, we consider that the Respondents explanation of their reasons for appointing someone other than the Claimant is a wholly non- discriminatory. They appointed the person who did best at interview. This was nothing to do with the Claimant 's disability.

Section 15 – Discrimination for a Reason Arising from Disability

244. The Claimant also puts these two allegations as claims of discrimination for a reason arising from disability, contrary to section 15 EQA 2010. We dismiss these claims.

245. Firstly, we accept that something arising from the Claimant 's disability was his mobility and his difficulty in attending at the site at Worthing for interview and we have therefore considered whether or not in writing the email the Respondent was treating him unfavourably in consequence of that thing.

246. We find that part of the reason for writing the email to the Claimant was that he had raised the fact of his mobility. In that respect the email was written for a reason arising from the Claimant 's disability.

247. On the basis of the facts set out above we conclude however that it was not unfavourable treatment. It was an email sent in order to inform the Claimant that granting his request for reasonable adjustment had consequences and informing him of parts of the job.

248. In any event, we accept that Mrs Campbell had a wholly legitimate aim in sending the email she did send, which was to ensure that the Claimant understood that the post was based at the Worthing site and to ensure that he understood that part of the role included walking some distance because of the nature of the site, which he had not had the opportunity to see or visit as far as she was aware.

249. We observe that simply informing an applicant for a job of one of the elements of the job, is not obviously unfavourable or less favourable treatment. We accept that the Claimant considered that he had been treated unfavourably but we also take note of the fact that his characterization of the email is not factually correct. It is his interpretation of the meaning behind the words which we reject.

Failure to Organise a Workplace Assessment In December 2019.

250. The Claimant has also alleged that the Respondent discriminated against him by failing to arrange a workplace assessment by access to work in December 2019.

251. We accept that the Claimant approached access to work and that he had some correspondence with them whilst he remained absent on sick leave in December and in January 2020, about the possibility of organising a workplace assessment with them .

252. We also find this fact that the Respondent does not appear to have replied to access to work when they were contacted. We have been shown a number of emails which have been disclosed only during the course of this hearing and we find as fact from them, that the Respondent was contacted by a woman from access to work and that the Respondent were asked to make contact with access to work so that a workplace assessment could be arranged.

253. We find that when they did not do this, the Claimant contacted his trade union who also contacted the Respondent. We find that the Respondent did eventually contact access to work but that when they did so access to work had already decided to close the Claimant ’s case because of the Respondents lack of contact

254. We find that the reality in December 2019 and January 2020 the Claimant’s position was that he remained absent on sick leave and that whilst he was desperate to return to work and whilst he wanted to be able to return to work, he was not ever well enough to be able to do so.

255. We accept that the Respondent did not respond to access to work but we also find that but there is no evidence before us that their failure to respond was anything to do with the Claimant being disabled. The fact that access to work only assists disabled people does not mean that the Respondents failure to respond was on grounds of disability.

256. The Respondent considered that it was necessary to obtain a further occupational health report and or specialist report before the Claimant could come back to work. But the Respondent's evidence to us was that if access to work were to be involved in any workplace assessment, then that would necessarily have to take place once the Claimant was able to return and that in turn required the Claimant being certified fit for work.

257. Whilst the Claimant desperately wanted some form of assessment of his ability to work, we find that the Respondents failure was not an act of direct discrimination.

258. On the basis of the information we have before us, including the Respondents various explanations, we find that there was poor communication and error on the part of the Respondents. Once they did engage however , their reason for not arranging the assessment was, firstly, that Access to work had closed the file, and

secondly that they considered it was necessary for the Claimant to be fit for work, before considering a workplace assessment to consider what work he would be able to do and what may assist him to do it.

259. We have no evidence before us of how an Access to work assessment may have been handled for someone who was not disabled, or how a hypothetical other person may have been treated, but we do consider that the Respondents may be expected to respond to requests and enquiries from external bodies within a reasonable time. That did not happen here, and we consider it is probable that this was a different approach or treatment of the Claimant .

260. Was it on the grounds of disability? We have considered whether or not there are facts we have found from which we could infer it was on grounds of disability, or whether we have found facts from which we could conclude, in the absence of an explanation that discrimination had taken place.

261. We conclude that there are not. If we are wrong, we find that the explanation given by the Respondent is that there was an oversight, and that was a true reason and the whole reason for the failure to engage with Access to work. We are satisfied that their reasons for not organising an assessment were non-discriminatory. Once the Respondents did engage, they decided on advice from OH, that there was little point in assessing the Claimant until he was fit enough to return to work. The advice at the time was that Mr Havelec was not fit to return to any sort of work.

262. This was not different treatment on grounds of the Claimant's disability and we dismiss this part of the Claimant 's claim.

Unfair Dismissal

263. We turned to the final question which is that of unfair dismissal

264. The Claimant had been absent from work from February 2018 until January 2020. Before that, he had been at work between August 2017 and February 2018.

265. We find that the Respondent had followed their internal absence management process. In the early stages, the process had not been pursued according to the deadlines set by the policy and every stage had taken longer, although in later stages it had been followed using the applicable time frames. We accept the Respondent submissions, that this meant that the process had taken much longer that the timelines allowed, arguably to the Claimant 's benefit. He had had a longer time at the start to recover and be able to return to work, before the formal stages took place.

266. Unfortunately for the Claimant, his health deteriorated significantly in the relevant period, as is indicated by him being disabled by three specified conditions, as well as suffering with other health complications.

267. The Claimant has not brought a claim of discrimination for a reason arising from disability, on grounds that the Respondents had not taken into account the fact that his sickness absence was for the main part arising purely from the fact of his disabilities . Instead, he says that the failure to discount the sickness absence which arose from disability, is a factor relevant to the fairness of his dismissal.

268. He says that the Respondent should not have pursued him under the capability procedure, and should not have dismissed him, but should have discounted all his sickness absences because they arose from disability, and kept him in employment.

269. The Respondent asserts that they still have a duty to manage long term sickness absence and that it was reasonable for them to do so in this case.

270. We find, having considered the process that the Respondent followed over the Claimant 's lengthy absence, that the Respondent did not act in haste and that merely by following the time frame set out in their own policy they did not act in anyway unreasonably.

271. It is right that they did not discount the Claimant's disability related absence, but the process was, we find, a proportionate means of achieving the legitimate aim of managing long term sickness absences, including cases where there is a known disability. We have considered this as part of the consideration of whether or not the process followed was fair and reasonable, given that the Respondents knew that they were dealing with a disabled employee.

272. We find that at each stage of the process there were detailed meetings with the Claimant at which his disability and his health generally, and the prognosis for his return to work, and any possible reasonable adjustments to his role, or otherwise were considered, and implemented. These matters were discussed with him.

273. At each stage referrals were made to occupational health and where necessary, decisions were delayed so that further reports could be obtained. We have been referred to the OH referrals and reports, and the chronology and fact of these referral is not disputed by the Claimant. We find that the Respondents took into account and acted on the advice from occupational health as far as they were able and were required to do.

274. They did not discount periods of leave for the purposes of progressing the process, but it was not unreasonable, we find, for this employer to take each of the steps it took, at the times it took them. We take into account that the Claimant was able to appeal each stage.

275. We find that by January 2020 the Respondent considered that it was necessary to proceed to the final stage of their absence management procedure, and that the Claimant was given adequate warning of this and that arrangements were made to ensure that he was able to attend at the meeting. We find that this was a decision reached after a full consideration of history and the medical evidence and that it was a reasonable step to take at that time.

276. A further referral was made to occupational health and a specialist report was expected. Suzanne Fisher, Director of Operations and Facilities was a pointed ot deal with the final hearing, and we accept her evidence that she adjourned the hearing and delayed her decision, in order that a final expert report could be obtained and considered by her, before she decided what action to take in respect of the Claimant 's employment.

277. We find as fact that she did not make her decision about the Claimant's continuing employment until she had received and considered the final report, and had reconvened the meeting for any further comments or representations to be made.

278. Suzanne Fisher gave evidence to the tribunal in a detailed and comprehensive witness statement .

279. She referred us to the management report produced by Gillian Sorrell which was also detailed and comprehensive, and which we find sets out fairly and accurately the chronology of events and the steps taken by the Respondent.

280. She told us and we accept that she had taken into account all the matters set out within that report, including the history of the Claimant 's ill health absences , the occupational health reports that had been provided over the last three years and previously ; the prognosis for the Claimant's health going forward and in particular the advice that the Claimant remained unfit for work , and that there was no likelihood that he would be able to return or that he would be declared fit for work within the foreseeable future .

281. Whilst occupational health did not say that the Claimant would remain permanently unfit for work, it was noted that he had not responded well to treatment and that his conditions were not improving and that he remained unfit for work of any kind at the time of writing. The expert opinion was that it would be at least another two months before any prognosis could be given as to whether the Claimant would be likely to improve and if so when he may be able to return to work.

282. The Claimant himself suggested that the decision about his employment should be delayed until August so that he could see whether some of the proposed treatments will it be successful.

283. Miss Fisher had also taken into account the impact of the Claimant 's illness on his department. We accept that the department was prevented from recruiting a replacement whilst the Claimant remained employed, but also that it was not allowed to use agency workers to cover the absence but was required to cover it by allocating the Claimant 's work to other existing employers either by re-organising shifts or by offering staff overtime. Miss Fisher stated and we accept that she took into account that this was having a negative impact on other team members and that it was not sustainable longer term.

284. We have considered the factors which Miss Fisher took into account, and we accept that she did consider whether or not there might be alternative work that the Claimant could do and we accept her conclusion as genuine that given the medical advice that the Claimant was not fit for any sort of work, that consideration of redeployment was inappropriate at that time, and that there was no foreseeable date when such consideration may be appropriate.

285. Whilst the Claimant was not in receipt of contractual sick pay, and although the Respondent did consider costs, it was not a key factor. Although there was no information about the cost of continuing to employ the Claimant before us, Miss Fisher accepted that the Claimant was in receipt of SSP at the time.

286. We accept the Respondent's evidence that Miss Fisher considered whether or not adjustments could be made to the Claimant 's role and that she concluded that they could not, and that that she also considered whether or not the matter could be delayed any further . We accept that she formed the honest view that there was no prospect of his return to work at any foreseeable point in the future. Since none of the medics were suggesting any date by which they would be able to say when he could return to work, we accept her evidence that she formed the view that that dismissal was the only appropriate outcome.

287. We find that the Respondent had carried out a full and fair investigation. We find that the officers had taken into account all factors they were required to take into account and the decision to dismiss was reached following genuine conclusions which were reasonable and rational. We conclude that the decision to dismiss was one which fell within the range of reasonable responses open to this employer

288. The Claimant appealed and his appeal was heard by Mr McLaughlin. In his evidence he told us that following the appeal, he confirmed the dismissal, but that he had looked actively for any glimmer of hope that the Claimant might have been able to return to work at some point. He said that he hoped there might be some prospect of the Claimant returning, and we accept that if there had been, that the outcome may have been to overturn the dismissal, but we also find that Mr McLaughlin formed the view that that it was clear from what he was told at the appeal hearing that there was no such hope. We find that it was for those reasons that, having considered all the reasons set out by Miss Fisher and the other evidence before him, he came to the conclusion that the dismissal must be upheld .

289. This is a very sad case. We are all sympathetic for the situation that the Claimant finds himself in.

290. He has been extremely unlucky with his health, and we recognise that he desperately wanted to return to work at some point in the future. The fact that this Respondent decided to dismiss him is not a reflection of any failure on his part, or of unfairness or discriminatory action on their part. The Claimant was disabled and unable to work. There were no adjustments which would have removed the disadvantage to him, and the Respondent took all steps it could in order to see

whether or not he could return to work, and we conclude that their decision to dismiss him when they did was a fully fair and reasonable decision.

291. We therefore dismissed the Claimant 's claims in their entirety

Employment Judge Rayner
Southampton
Dated 6 May 2022

Sent to the parties on

24 May 2022 By Mr J McCormick

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Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.