EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Conrad Liburd	**v**	Central Bedfordshire Council

Heard at: Cambridge

In Person On: 6, 7, 8 December 2022
By CVP On: 16, 17 (am) January 2023

Chambers Discussions: 17 (pm) and 18 January and 14 April 2023

Before: Employment Judge Tynan

Members: Mr C Grant and Mr C Davie

Appearances
For the Claimants: In person
For the Respondent: Ms S Ismail, Counsel

RESERVED JUDGMENT

The Claimant's various complaints are not well-founded and, accordingly, the Claim is dismissed.

RESERVED REASONS

Background

1) The Claimant presented his Claim to the Tribunals on following ACAS early conciliation between 17 February 2020 and 31 March 2020. He is pursuing complaints of unfair dismissal and disability discrimination, all of which are resisted by the Respondent.

2) The Claimant made a detailed 49-page witness statement in support of his complaints. He also gave evidence at Tribunal, though the hearing had to be adjourned part-heard after the Claimant reported that he was unfit to continue beyond the second day of the hearing (he was able to speak to the Tribunal by phone on the morning of the third day to explain his

situation). Fortunately, the Tribunal was able to reconvene within a matter of weeks and the hearing continued via CVP. Given the Claimant's reported stressful experiences of travelling to Cambridge and stated concerns as to the health risks for him in coming back to Cambridge, including the prospect of being in a Tribunal hearing room with the Respondent's witnesses, he agreed that CVP would be the most appropriate format when the hearing resumed in January 2023.

3) On behalf of the Respondent we had written statements and heard evidence from the following:

   a) Tony Keaveney, the Respondent's Assistant Director – Mr Keaveney took the decision to dismiss the Claimant;

   b) Charlotte Gurney, Head of Housing Solutions – Ms Gurney oversaw the Claimant's phased return to work towards the end of 2019 following a lengthy period of sickness absence;

   c) Sinead Maguire, Senior Independent Living Officer – Ms Maguire was the Claimant's line manager from 1 April 2019.

4) In terms of evidence, there were two electronic hearing bundles, though following discussion with the parties and with their agreement the Tribunal used the hearing bundle entitled Joint Hearing Bundle that runs to 2567 numbered pages.

Findings of Fact

Introduction

5) The Claimant was employed by the Respondent from 13 June 2016 to 19 January 2020. He was initially employed on a fixed term contract as a Housing Solutions Assistant, within the local Welfare Provision Team. His job title would later change to that of Independent Living Prevention and Local Welfare Provision Officer.

6) The Claimant's employment with the Respondent became permanent on or around 18 March 2018. The Claimant worked in Welfare Provision throughout the entire period of his employment with the Respondent. The service would later be managed by the Independent Living Prevention and Tenancy Sustainment Teams. As far as we can identify, his Line Managers were Dr Terry Gilbey, Paul Sharpe, Terri Russo and latterly Sinead Maguire.

7) The Claimant was dismissed from the Respondent's employment on 19 January 2020 following a lengthy period of sickness absence that began on 16 July 2018. He was issued with notice terminating his employment on 19 December 2019 while on an extended phased return to work, having returned to the workplace on 1 November 2019. There had been an earlier unsuccessful one-day return to work in January that year.

8) As noted already, the Claimant has made a detailed witness statement which runs to some 49 pages. Whilst it has evidently been important to the Claimant to provide his detailed account of his employment with the Respondent, he seems not to have taken fully on board Employment Judge Maxwell's observations on 31 January last year when he refused the Claimant permission to amend his Claim to pursue complaints in respect of various of the matters referred to in paragraphs 16 to 129 of his witness statement. We refer in particular to the Judge's comments at paragraphs 66 and 67 of his Order (page 203). Notwithstanding those observations, a significant number of documents in the Hearing Bundle relate to events dating back some years, rather than to the matters with which we are directly concerned. The fact that various of the Claimant's proposed amendments were not permitted does not, of course, preclude the Tribunal from considering those matters either by way of background or as providing context. Nevertheless, we have necessarily remained focused on the complaints and carefully defined issues that we are required to determine within these proceedings, and which are essentially addressed in paragraphs 130 to 199 of the Claimant's witness statement. Accordingly, whilst, we have included below a summary overview of the Claimant's account of the background, it is neither desirable nor proportionate that we make detailed findings in respect of the extensive matters referred to by the Claimant that pre-date the matters formally complained of. In any event, given Employment Judge Maxwell's rulings, which are set out in some considerable detail in his Order at pages 190 to 209 of the Hearing Bundle, the Respondent could not reasonably have anticipated that so much of the Claimant's witness statement (approximately one half of the statement) would focus on issues that do not touch directly upon his claims and which, therefore, it has not addressed in its witness statements.

<u>The Claimant's health issues, including the Tribunal's observation of these</u>

9) It is not in issue that the Claimant is disabled within the meaning of the Equality Act 2010, by reason of post-traumatic stress disorder ("PTSD"), depression and anxiety.

10) On the last day of the Final Hearing, we discussed with the Claimant the fact that this Judgment will be a publicly available document and, accordingly, whether it might be appropriate to make a Restricted Reporting Order, at least in relation to any sensitive personal data. Whilst the Respondent was potentially supportive of such an Order being made, the Claimant himself was not. He was clear in expressing the view that there is no need for such an Order, on the contrary that he attaches some importance to there being a public record of the mental health issues he has experienced, as well as their origin.

11) The Claimant experienced significant childhood trauma which has had a profound, life-long impact on his mental health and wellbeing. In the course of his employment with the Respondent, the Claimant also

experienced bereavements which, understandably, exacerbated his underlying mental health issues. It is somewhat unfortunate that in a Hearing Bundle comprising over 2,500 pages of documents, the Tribunal has not been provided with a detailed medical report in relation to the Claimant or with copies of his GP and other relevant medical records that might better inform the Tribunal's view as to whether and how the Claimant was disadvantaged by reason of his claimed PCPs and, accordingly, what steps ought reasonably to have been taken to avoid or mitigate any such disadvantage.

12) For most of the 16 months or so that he was absent from work in 2018 and 2019, the Claimant was certified unfit for work with work related stress. A one month Fit Note issued on 27 February 2019 cited PTSD (p1075). Either way, the Fit Notes contain no additional information regarding the Claimant's mental health issues.

13) The evidence primarily available to the Tribunal regarding the Claimant's mental health comprises of the Claimant's evidence in his witness statement and four Occupational Health Reports dated 10 October 2018, 30 January 2019, 12 February 2019 and 7 June 2019. The first of those Reports, by Stella Perkins, Occupational Health Advisor, is of limited assistance to the Tribunal. Although Ms Perkins states that she obtained a detailed clinical history, it is not recorded in her Report. She refers in the Report to concerns that had been raised by Ms Russo in the referral form regarding a meeting with the Claimant during which he *"sounded a little paranoid"* (page 799). This issue was also picked up by Dr Charlie Vivian, Consultant Occupational Physician, in his Report of 29 January 2019 (we have quoted the relevant section of his Report below). However, the Respondent never saw Dr Vivian's report at the time, since the Claimant would not give his consent to the Report being released. Whilst the Claimant acknowledges in his witness statement and also acknowledged at Tribunal that some parts of Dr Vivian's Report are accurate, overall he complains that it is not an accurate and true record of his *"problems"*. In his Report, Dr Vivian made what we regard to be an uncontroversial observation that significant traumatic episodes from childhood can result in reduced resilience to general stress and may also impact a person's perception about their experiences. We find that Dr Vivian endeavoured to capture the Claimant's version of certain events, even if the Claimant says that he failed to do so in sufficient detail or with sufficient accuracy. We believe the Claimant has slightly unrealistic expectations of Dr Vivian in this regard.

14) In the recommendations section of his Report, Dr Vivian wrote,

> *"…there is a difference between an individual's subjective perception of events and objective reality. Conrad may feel very unhappy about how he perceives he is being treated at work, but this is not the same as stating that he has been subjected to bullying. His GP has commented that he does not feel Conrad has a formal paranoid disorder. Based on my assessment today, I think this is reasonable. However, because of his*

> *previous trauma, it is possible that Conrad is much more sensitive to words and actions that he perceives as unfair and hurtful and some psychological disorders can be quite subtle in their impact, and require careful assessment by specialists, thus the GP and I may not be best placed to reach a decision about this."* (page 962)

Had the Claimant permitted the Report to be released the Respondent might have followed these comments up with Dr Vivian and perhaps even secured further appropriate specialist input as Dr Vivian was recommending. Instead, the Respondent could only act upon the information that the Claimant shared and agreed should be shared with it.

15) On the issue of a potential divergence between how the Claimant perceived things and the objective reality, we note the Claimant's comments at paragraph 55 of his witness statement, in which he says,

> *"And because I never get through interviews, I feel paranoid in the way I feel people perceive me".*

We think this indicates some recognition on the Claimant's part that others do not always perceive things as he does.

16) We consider Dr Vivian's observations set out above to have been measured and sensitively expressed. They accord with certain of our own observations. For example, in terms of his resilience, the Claimant evidently found the Tribunal process stressful and difficult. Notwithstanding various adjustments in the course of the Hearing to support his participation and enable him to give his best evidence, the Claimant perceived Ms Ismail as hostile even though she conducted the proceedings and her cross examination of the Claimant in an exemplary manner, having the most careful and sensitive regard to the Claimant's evident vulnerability. In the course of his evidence, the Claimant became very distracted by the screen in the Tribunal Hearing room. It had been turned on to allow the Respondent's witnesses to observe the proceedings remotely. Given his PTSD, the Claimant had expressed his preference that they give their evidence remotely. That was entirely understandable, yet the mere fact of the screen being turned on, even though none of the Respondent's witnesses in fact joined the hearing remotely at that stage to observe the proceedings, was seemingly overwhelming for the Claimant. The screen was turned off.

17) The Claimant lacked resilience to continue beyond the second day of the Final Hearing, leading to the Hearing being adjourned part-heard. Amongst other things, the Claimant's travel arrangements caused him a great deal of anxiety, including the prospect of having to wait for his bus in central Cambridge and worrying that it might be cancelled. He articulated his concerns about this and various other matters in the course of the Hearing.

18) Putting aside the parties' differing perceptions and recollections, we observed some divergence between the Claimant's subjective perception

of events at Tribunal and the objective reality. We have referred already to how he perceived Ms Ismail's conduct of the Hearing. Another example was when the Claimant identified an error in the case details printed on the spine of the Hearing Bundle lever arch folders. This assumed such significance in the Claimant's mind that he was effectively unable to continue giving evidence. We were sufficiently concerned that he might experience a panic attack that we stopped the proceedings to ensure the offending words were redacted from the folder spines and then placed the files out of his direct line of sight, as well as ensuring the Claimant had sufficient time to recover. This episode was indicative of the sensitivity that Dr Vivian wrote about in his report, as well as the Claimant's reduced resilience once he perceived an issue with the folders.

19) In his Report, Dr Vivian noted that the Claimant was looking to be moved out of his current Team. It is not in dispute that this is what the Claimant wanted to happen and it remained his objective through to the termination of his employment. Dr Vivian observed that there obviously needed to be a suitable role for the Claimant to move to and,

> *"Secondly, if his perception of events is not universally shared, there is a risk that he would take this distorted perception into any new role."* (page 962)

We think Dr Vivian's reference to the Claimant's *"distorted perception"* would have been a difficult comment for the Claimant to read and we can understand why it carried potentially negative connotations. However, with the benefit of hindsight, whilst it might perhaps have been expressed in more nuanced terms, not least given that Dr Vivian was aware of the Claimant's heightened sensitivities, nevertheless we do not regard it as an unreasonable observation on Dr Vivian's part. Whether or not the Claimant's perceptions were well-founded, we think Dr Vivian was seeking to give expression to the reality that the Claimant's deep rooted and long standing mental health issues would continue to impact him in the workplace even if he moved to another Team. Whilst a change of Team might address any immediate issues of concern to the Claimant and the immediate workplace dynamic, and facilitate any 'flight response', it would not in and of itself address many of the Claimant's underlying triggers.

20) Whilst, as we say, Dr Vivian's Report was never disclosed to the Respondent, we note that Ms Perkins and Dr Khan's Reports each refer to issues of perception. We find that all three professionals identified some degree of disconnect between the Claimant's perception and the objective reality.

<u>The Claimant's account of the 15 month period prior to him commencing long term sickness absence</u>

21) On 16 July 2018, the Claimant experienced what he describes as a *"complete mental breakdown"*, namely a period of intense mental distress that included suicidal ideation. The Claimant's perception of the events

leading up to that breakdown are documented in paragraphs 17 to 134 of his witness statement. He believes that he was treated differently essentially from the outset of his employment with the Respondent. Within a few days of starting he says that he witnessed intimidating behaviour. One of his recurring observations, which we have also noted in various documents in the Hearing Bundle, is that he believed many people would not make eye contact with him and were rude and disrespectful. Whilst we are in no doubt that the Claimant's witness statement reflects his perception, we have significant doubts as to whether this reflects the objective reality.

22) What follows is a summary of the Claimant's account of events.

23) In March 2017, the Claimant applied for an internal Housing Register Officer position. In his statement the Claimant says,

> *"I also wanted to get away from the Team".*

This is one of a number of possible 'flight responses' we have noted in the Claimant's witness statement and in the documents in the Hearing Bundle. The Claimant's witness statement certainly points to a developing mental health crisis. He interviewed for the Housing Register Officer role on 24 March 2017 and states that he had an anxiety attack during the interview.

24) Paragraphs 35 – 48 of the Claimant's witness statement refer to events in April and May 2017. They indicate that the Claimant was experiencing significant stress and reduced resilience. Having been unsuccessful in a second application for a Housing Register Officer role, the Claimant was encouraged to apply for the position of Secondment Housing Options Officer on a temporary sabbatical. When the Claimant believed that he was being treated unfairly in the process he withdrew his application. He was encouraged by Nick Costin, Head of Housing Services and Ms Gurney to reconsider. A job interview was arranged for 17 May 2017. The Claimant states that he experienced a panic attack during the interview. He was unsuccessful for the role.

25) At paragraph 50 onwards of his witness statement, the Claimant refers to an earlier panic attack on the night/morning of 25 April 2017 when he had difficulty breathing and felt his heart was racing. He also had vertigo. The Claimant states that was up all night, unable to sleep, feeling sick and experiencing suicidal ideation. He contacted the Samaritans and early that morning also spoke with Claire Harding, Corporate Policy Advisor for Equality and Diversity. She followed the matter up by arranging a confidential face to face meeting with herself and Sonia Branagan, a Customer Relations Manager. In the course of his initial call with Ms Harding, the Claimant says he expressed his belief that,

> *"Housing Services use mystery shoppers, who call and frequently intercept calls to harass and abuse me"*

(paragraph 52 of his witness statement)

26) We accept, without reservation, Mr Keaveney's evidence that the Respondent does not engage mystery shoppers, let alone in order to harass and abuse staff. With the knowledge and agreement of staff, the Respondent does record calls for training purposes. The fact, however, that the Claimant perceives the Respondent to have engaged in such behaviour supports what Dr Vivian said in his Report about how the Claimant perceives things.

27) The Claimant seems to have felt able to open up to Ms Harding and Ms Branagan, albeit somewhat tentatively, about his current and historic mental health difficulties.

28) The Claimant had a relatively short period of sickness absence around this time. He had an informal meeting with Dr Terry Gilbey, Housing Assistance Manager, upon his return to work on 26 May 2017. The same day, the Claimant was threatened by a customer. The Claimant was understandably shaken and frightened. He came to feel let down by Dr Gilbey's response to this incident.

29) The Claimant subsequently met with Mr Costin on 27 June 2017. This was by way of follow up to his meeting with Ms Harding and Ms Branagan. Whilst the Claimant acknowledges that Mr Costin emphasised that he was valued both within the Team and the wider Service, it is one of many interactions where the Claimant alleges the other person, this time Mr Costin, looked away or looked down, with poor eye contact. We are unclear what, if any, action points emerged from this meeting. However, had formal adjustments been made to the Claimant's working arrangements, we believe that these would have been documented at the time and would now be included in the Hearing Bundle. As we have already observed, this is one of a significant number of matters that sits outside the Claimant's claim to the Tribunal. Nevertheless, the documents available to us in the Hearing Bundle would indicate that in spite of a pronounced mental health episode, indeed crisis, on 25 April 2017, which resulted in a period of sickness absence as well as the matter being escalated to the Head of Housing, no immediate further action was seemingly taken by the Respondent.

30) On 6 July 2017, the Claimant's brother passed away. The Claimant took some initial limited compassionate leave before being certified unfit for work by his GP on 17 July 2017.

31) Dr Gilbey had a Return to Work meeting with the Claimant on 7 August 2017. The notes of the meeting (pages 530 – 535) are focused entirely on the Claimant's bereavement and its impact upon him rather than events in April and the resulting sickness absence. Whilst Dr Gilbey noted that the Claimant was ready to return to work without additional support, he seems

to allude to other issues insofar as he refers to additional staff being trained *"to provide resilience"*.

32) With effect from 7 August 2017, the Claimant transferred to the Independent Living Prevention Team, to be Line Managed by Mr Sharpe, Team Leader for the Independent Living Prevention and Tenancy Sustainment Teams. The Claimant retained his existing job title. Mr Sharpe had originally recruited the Claimant. In paragraph 71 of his witness statement the Claimant refers to Mr Sharpe as looking at him in a strange way. He goes on to state at paragraph 72 of his witness statement,

> *"It wasn't long before cracks appeared."*

33) The Claimant evidently felt under pressure and was struggling with his mental health. At paragraph 77 of his witness statement there is further evidence of a possible 'flight response' insofar as the Claimant states,

> *"Due to the demands and mental health pressures, I needed to relocate".*

He describes feeling fed up and experiencing back problems.

34) By September 2017, the Claimant alleges that,

> *"When members of* [Kelly Hamilton's] *Team then visited LWP I noticed they would ignore me. They would look in a rude way and quickly look away."*

35) There is a similar allegation at paragraph 88 of the Claimant's witness statement where he says that on 9 October 2017 three individuals including Ms Maguire,

> *"said nothing, got up and walked away"*

as soon as he arrived at his work station. He felt as though they were instructed to give him a hard time. He does not identify who might have been responsible for any such instruction.

36) Around this time, a customer was threatening and abusive towards the Claimant during a telephone call. This was followed by Kayleigh Rafferty allegedly approaching the Claimant and shouting at him in front of others. The Claimant describes a stressful working environment, including challenging interactions with customers and difficult interactions with colleagues who were equally under pressure. The Claimant states that he,

> *"wanted desperately to get away".*

He applied for the role of Income Management Officer and was interviewed on 20 October 2017. He was unsuccessful in his application.

37) As part of the ongoing chronology, the Claimant refers to a meeting with Mr Sharpe on 14 December 2017, in which he refers again to a lack of eye contact. Immediately following this meeting, the Claimant returned to his work area and believed that his wallet had gone missing. Whilst this incident was referred to several times in the course of the Final Hearing, we have not felt it necessary to make any specific findings in relation to the matter. The Claimant alleges that during a further interaction with Mr Sharpe, he told him,

> *"The job is messing with my head, you are all messing with my head, now I can't sleep, this is a joke".*

Once again, the firm impression is of an escalating mental health crisis. The Claimant refers to ongoing situations where colleagues were shouting across the office.

38) The Claimant states that snow was forecast before Christmas 2017. He claims that he spoke to Mr Sharpe and asked if it would be possible for him to work from home until the weather improved. He alleges that his request was refused and it was only when Ms Rafferty voiced her own concerns on the matter that Mr Sharpe took a different approach and said they could both work from home for the remainder of that afternoon, albeit he expected the Claimant to return the following day.

39) At or around this time, the Claimant alleges that the Independent Living Prevention and Tenancy Sustainment Teams began to leave him out of correspondence. He says that by February 2018 he was not feeling well, mentally and that he was constantly tired, lacked confidence, had low mood and that everything was getting to him. He alleges that Mr Sharpe and Ms Russo would ignore him and that they would not make eye contact.

40) Notwithstanding these difficulties, on 3 March 2018 the Claimant was interviewed for and thereafter appointed to his position on a permanent basis, albeit with a new job title of Independent Living Prevention and Local Welfare Provision Officer.

41) The Respondent operates an agile working policy. Nevertheless, it was the Claimant's habit to sit in the same place most days. In paragraph 127 of his witness statement, the Claimant refers to being kept seated in the same area. That is not supported by the Claimant's own evidence at Tribunal when he acknowledged the Respondent's agile working policy, but said that it was his decision or habit to sit in the same place each day.

42) It is not in dispute that on 14 April 2018, the Claimant seated himself away from his normal work station. He describes feeling a sense of relief, like a burden had lifted from his shoulders. At paragraph 128 of his witness statement, the Claimant refers to arriving home that evening and noticing two parked cars a few metres from his home. He says there were two

female occupants in the first car and another car parked at the end of the road with a male occupant. The female occupants allegedly stared at him for about 15 seconds, but once he parked they drove away. The male driver allegedly did the same. The Claimant believes that the Respondent was somehow involved and that it was in response to the fact he had worked at a different work station that day. At paragraph 129 of his witness statement he says,

> *"It wasn't a coincidence. It felt deliberate. I had been taken by surprise. I was not going mad. Unfortunately it did not happen again. Since I decided to retreat to my normal seating arrangements."*

43) Whilst we can appreciate the Claimant's feelings of anguish, nevertheless, we are certain that whatever the Claimant observed when he returned home on 14 April 2018, this was not at the Respondent's instigation or in any way connected with it, let alone because the Claimant had seated himself somewhere else at work that day. Sadly, his perception of the situation does not reflect the objective reality, rather we find it reflects just how unwell he had become by that time. We think it relevant that the Claimant still perceives the events that day in the same way.

44) In April 2018, the Claimant's colleague, Joanne Daniels, applied for a temporary Housing Options Officer position within Ms Gurney's Team. She was successful in her application. The Claimant did not express an interest in or apply for position. He evidently reflected on Ms Daniels success as against his own ongoing lack of success in his search for a new role. It may have spurred him to apply for the role of Intensive Property Management Officer. He interviewed for the role on 2 June 2018 and describes having a mild panic attack. He was unsuccessful in his application and requested feedback, which was provided.

45) By now, the Claimant was plainly very unwell. At paragraph 133 of his witness statement, he refers to being approached by Ms Russo at his work station. He says,

> *"I can't recall the exact conversation, but what I did notice was she was not speaking directly at me, like from a side view like she was half turned, but not looking directly at me. In quite a strange fashion, I continued to communicate. I thought to myself* "why is she doing that?" *She finished and walked away. Paul Sharpe did the exact same thing. It felt intimidating. I knew what they were doing. I can't recall Sarah Dove, Senior Officer being like this. Her shortcomings where she favoured her team, by allowing them to work remotely and from home regularly. When I tried to get Terri Russo's attention, she'd respond half heartedly, in brief with small talk and quickly walk off saying, she was busy. Only three colleagues out of the entire Independent Living Prevention Team showed me any respect."*

The Respondent's management of the Claimant's long term sickness absence and certain events during that absence

46) As we have noted already, on 16 July 2018, the Claimant experienced a complete mental breakdown. Whilst his evidence is that he remained bedridden for nearly two months, he in fact attended a First Attendance Review meeting with Ms Russo on 31 July 2018 in accordance with the Respondent's Managing Attendance policy (pages 2546 – 2561). It was evidently a low key meeting since the outcome is confirmed in a brief letter from Ms Russo dated 17 August 2018, in which she noted that they had agreed the Claimant would keep her updated regarding a supported return to work. We infer that Mr Russo recognised, as perhaps did the Claimant, that a return to work was not imminent.

47) The Claimant was referred for a second Occupational Health assessment. In her Report of 10 October 2018, Ms Perkins noted that the Claimant had been referred *"due to concerns over [his] emotional and mental wellbeing"*. She also refers to a meeting in which he *"sounded a little paranoid"* (we understand this to have been Ms Russo's observation following her meeting with the Claimant on 31 July 2018). Ms Perkins' Report was commissioned ahead of a further First Attendance Review meeting with Ms Russo on 15 October 2018. There are multiple copies of the notes of that meeting (referred to as a reconvened First Attendance Review meeting) in the Hearing Bundle. It is not particularly easy to discern whether the notes were extensively reviewed or whether the Hearing Bundle simply includes several duplicate copies. However, in spite of the Claimant providing at least one extensive mark-up of the notes, the notes at numbered sections 43 and 44 (page 810) remained unaltered by him, namely that he was not bothered about working from home, but that he would be happy to work from Priory House, another one of the Respondent's offices, as it was nearer to his home. Page 845 of the Hearing Bundle evidences that the Claimant signed the final version of the notes to confirm his agreement that they were an accurate record of the meeting.

48) On 14 November 2018, Kristina Meadows, an HR Advisor within the Respondent's Human Resources Team, sent the Claimant a copy of the Respondent's Grievance Policy and its Grievance form. The Claimant did not avail himself of the Policy. Indeed, over the following 14 months or so he did not raise a Grievance. We recognise, of course, that he was unfit to work over the larger part of that period and accordingly that he may not have been sufficiently well to raise a grievance even had he been minded to do so.

49) The Claimant was invited to attend a further reconvened First Attendance Review meeting with Ms Russo on 5 December 2018. At that meeting the Claimant reported feeling a lot better. During the meeting the Claimant expressed dissatisfaction both with his own doctor and with the counselling available through the Respondent's Employee Assistance Programme. He described the Occupational Health situation as a

"disaster", though we find that he was in fact referring to his ongoing difficulties in getting his GP to provide information to the Respondent's Occupation Health advisors. Ms Meadows, who was providing HR support at the meeting, helpfully suggested that he perhaps contact MIND, albeit this was something he was then unwilling to consider. He was anticipating returning to work at the beginning of January 2019 and in the meantime explained that he was making job applications. Ms Meadows stressed the importance of securing a further Occupational Health Report, albeit this was dependent upon securing further information from the Claimant's GP. Ms Meadows confirmed that there would be a phased return to work and that this could be undertaken at Priory House. The Claimant said that his aim was to be in another position by the time he returned to work and expressed some confidence in that regard.

50) During the early part of December 2018, the Claimant made his third application for the role of Housing Register Officer based at Priory House. He was not short listed for interview. It is unclear when the Claimant learned that he had not been shortlisted. Whilst we cannot identify any adjustments that were made by the Respondent to support his return to work in a different team, we also note in this regard that during the meeting on 5 December 2018, the Claimant apparently said that if he changed roles he needed to do it for himself.

51) Ms Perkins' Occupational Health Report of 10 October 2018, had identified a need for further information from the Claimant's GP regarding his diagnosis and treatment, both to support a clearer picture of his overall health and to better equip Occupational Health to advise management on how to support the Claimant. There were evidently delays in this information being secured. At paragraph 151 of his witness statement the Claimant infers that any delays rested with the Respondent. However, the documents in the Hearing Bundle, including the notes of the 5 December 2018 meeting, evidence that it sat with the Claimant and his GP, and that the Respondent asked more than once that he follow up with his GP. However, there is also some evidence in the Hearing Bundle of miscommunication between the parties, with the result that time may have been lost towards the end of 2018. It seems that information from the Claimant's GP was finally forthcoming in late December 2018. Regrettably, whatever information was provided, it has not been included in the Hearing Bundle. It may be that it has never been disclosed to the Respondent.

52) Ms Maguire joined the Respondent on 2 October 2017 as an Independent Living Officer. On 7 December 2018 she applied for the role of Senior Independent Living Officer. The role was advertised both externally and internally. It was a customer facing role and involved lone working. She was interviewed for the position on 19 December 2018 and offered the position on 24 December 2018. As we shall return to, she became the Claimant's Line Manager in April 2019. The Claimant, who by December 2018 had been on sick leave for approximately four and a half months, did not apply for the position of Senior Independent Living Officer. He does

not say in his witness statement whether he was aware the role had been advertised. However, we accept his evidence that he was not informed that Ms Maguire had been appointed. It is worth noting that by the time Ms Maguire was appointed, the Claimant had been absent from work for five months. He seems to have learned of Ms Maguire's appointment as a result of an email in January 2019 that was issued to all staff within the Housing Services Team, congratulating Ms Maguire on her appointment.

53) Returning to the chronology of events, the Claimant attempted to return to work on 7 January 2019. However, he evidently remained very unwell as he was unable to maintain his attendance through to the end of the day before going sick again. We do not speculate whether the Claimant's failure to be short-listed for the Housing Register Officer role was a contributory factor in his failure to maintain his return to work on 7 January 2019. The Claimant himself simply refers to "further health complications" (paragraph 151 of his witness statement).

54) As noted already, the Claimant met with Dr Vivian in January 2019, albeit he would not consent to Dr Vivian's Report being released to the Respondent. Fortunately, any further delay was kept to a minimum as the Respondent was able to make a further Occupational Health referral within a matter of days, leading to a Report from Dr Khan on 12 February 2019 (pages 1033 – 1035).

55) In his Report, Dr Khan made a point to note that he was "just echoing" the Claimant's concerns, rather than making any comment on his views directly. In an echo of Dr Vivian's assessment of the situation, he referred to the Claimant's *"perceptions"*. He went on to say,

> *"If you are able to explore Mr Liburd moving to an alternate Team then there is a greater chance that he will feel able to return to work… He appears very willing to return and to put the issues behind him, particularly as many of them may not be resolvable."*

56) Unlike Dr Vivian, Dr Khan did not reflect on whether the Claimant could in fact realistically put the issues behind him given his underlying mental health.

57) Dr Khan also noted that the Claimant would decline any offer of a return to his existing role. That would continue to be the Claimant's position over the following 11 months until he was dismissed from the Respondent's employment.

58) The Claimant's ongoing absence triggered the Second Stage of the Respondent's Managing Absence Procedure. On 11 February 2019, he was invited to a Second Attendance Review meeting scheduled for 20 February 2019. The Claimant wished to be accompanied by a trade union representative and accordingly, the meeting was rescheduled to 26 February 2019.

59) It seems that in or around February 2019, the Claimant was formally diagnosed with Post Traumatic Stress Disorder. PTSD was briefly cited as the reason for the Claimant's ongoing sickness absence when a one-month fit note was issued on 27 February 2019, though a subsequent three-month fit note issued on 27 March 2019 once again cited work place stress.

60) The meeting on 26 February 2019 was led by Ms Russo, with Ms Meadows once again attending to provide HR support. The Claimant informed them that he had a formal diagnosis of PTSD and that he was due to commence four pre-treatment sessions in March, to be followed by a more formal Cognitive Behaviour Therapy programme, albeit this might take a number of months to be implemented. Mr Foster, GMB Branch Secretary, who attended as the Claimant's trade union representative, said that a decision on moving forward would be difficult if a change in working arrangements could not be facilitated. In response to Ms Russo asking whether it was the job or the location that was causing stress for the Claimant, the Claimant identified that it was the Team that was at the root of his need to secure a different position, and that he was flexible as to where he worked. He stated very clearly that it would not be beneficial to his mental health to return to the same Team. The meeting notes do not evidence that there were any further specific discussions around this. Ms Meadows said that she would need to meet with Ms Russo to explore potential options and, in the meantime, the Claimant was asked to provide Ms Meadows with a list of his skill set. It was agreed that Ms Meadows would contact Mr Foster by 7 March 2019 with an update. In the event, a reconvened Second Absence Review meeting was scheduled for 22 March 2019.

61) On 20 March 2019, the Claimant was one of a large number of recipients of an email highlighting two opportunities within the Community Support Team for an Independent Living Co-Ordinator and an Independent Living Officer based at Priory House.

62) The notes of the reconvened Second Attendance Review meeting on 22 March 2019, are at pages 1130 – 1131 of the Hearing Bundle. It was evidently a short meeting. Ms Meadows and Ms Russo's comments suggest that they had sought to identify other job opportunities for the Claimant within the Respondent, albeit without success, so that the only option was for the Claimant to return to his existing role. However, it was agreed that the Claimant would sign up to receive job alerts and that Ms Russo would send the Claimant and Mr Foster details of any potential job opportunities, should these arise. Finally, it was agreed that Mr Foster would meet with the Claimant to get his thoughts about a potential return to his existing role.

63) The following day, the Claimant was signed off work for a further period of three months.

64) On 25 March 2019, the Claimant emailed Ms Russo and Ms Meadows. He had identified three potential opportunities for redeployment, including it seems the two roles that had been communicated more widely to the Respondent's staff on 20 March 2019. He wrote,

> *"Whilst I understand that my current position / situation is different, I would like to think this procedure and policy has some resemblance and format within its own set of processes for managing redeployment under sickness management? I have asked on several occasions if a separate policy exists but can't seem to get an answer."*

65) The Claimant went on to ask whether his salary might be ring-fenced if he was redeployed into a new position. In our view the Claimant posed an entirely valid question in that regard. We cannot identify that he received any meaningful response to his enquiry. It may be that this was because Ms Russo stepped back from her role. On 26 March 2019 she advised the Claimant that Ms Maguire would assume management responsibility for him.

66) On 28 March 2019, Carol Commosioung, Independent Living Manager, emailed the Prevention Team stating that two volunteers were being sought to adjust their duties to meet the needs of a Government funding initiative to end rough sleeping. Ms Russo forwarded the email to the Claimant's personal email address in case he had not seen it.

67) A few days later, Ms Russo invited the Claimant to a further reconvened Second Attendance Review meeting to be held at the GMB's offices on 22 April 2019. On the issue of redeployment, Ms Russo wrote,

> *"As you are at the second review meeting stage at the moment formal redeployment would not be considered as this is one if the decisions available to the chair of a final review meeting as outlined above. However, as we discussed at our recent meeting, we can provide signposting to relevant support and guidance through services and organisations to support you in making any applications for positions that you may feel you would wish to apply for. This will include allowing reasonable time off to attend interviews and consideration would be given, as a reasonable adjustment, for you being accompanied by your MIND representative (subject to the agreement of any interview panel)..."*

She also provided him with contact details of a Programme Manager at the National Careers Service.

68) It seems that Ms Russo scheduled the reconvened Second Attendance Review meeting for Easter Monday. It was therefore necessary for the meeting to be rescheduled. A new date of 24 May 2019 was eventually settled upon, the meeting to take place at Priory House. The Claimant attended the meeting without Mr Foster. The notes of the meeting (annotated with the Claimant's comments) are at pages 1236 – 1238 of the Hearing Bundle. Once again, the Claimant was clear that he could not return to his existing post. Ms Meadows identified a need for an up to date

Occupational Health Report. Though he seems to have changed his mind later on, the Claimant agreed to this. We note that he also confirmed that he was *"100% happy"* for the matter to proceed to the third and final stage of the Managing Absence Procedure. The meeting on 13 May 2019 concluded with Ms Maguire and Ms Meadows identifying a target date of 3 June 2019 for the Claimant to return to work, with a target of 100% attendance over the following three months. The confirmed target return date is puzzling, since the Claimant's existing fit note, issued on 27 March 2019, had certified him unfit through to 26 June 2019. We do not understand on what basis he might have been expected to have returned to work three weeks before the end of his current fit note.

69) The Claimant was referred for a further Occupational Health assessment on 5 June 2019. The resulting Occupational Health Report dated 7 June 2019 is at pages 1257 – 1260 of the Hearing Bundle. This was the fourth Occupational Health Advisor the Claimant had interacted with. Ms Else confirmed that the Claimant was fit for work, albeit subject to both temporary and long term adjustments, though the only long term adjustment was expressed as follows:

> *"Explore options of supporting Mr Liburd back to work in alternative Team".*

70) In her Report, Ms Else referred to,

> *"very positive progress and considerable improvement in his overall mental health and wellbeing"*

However, she went on to say that the Claimant was saying he could not return to his previous role and she expressed concern that the factors that had contributed to his ill health had the potential to have the same impact once again.

71) On 27 June 2019, the Claimant was certified unfit for work by his GP for a further period of three months. That is at odds with Ms Else's assessment, seemingly based upon the Claimant's own comments, that he was fit to return to work.

72) On the same day, 27 June 2019, the Claimant was invited to attend a Final Review meeting scheduled for 16 July 2019. The meeting was rescheduled to 13 August 2019 as the Claimant was unhappy with the contents of a Management Report prepared by Ms Maguire. She volunteered at Tribunal that she had not previously prepared such a Report and that she had needed input from HR to get the Report right.

<u>The Final Review Process</u>

73) The Final Review process was led by Mr Keaveney. The meeting notes of the first Final Review meeting are at page 1311 – 1327 of the Hearing Bundle. They record that the meeting lasted nearly five hours. The

Claimant attended on his own. Five individuals attended on the Council side. We are surprised both that the meeting was allowed to continue for that length of time, regardless of what breaks were built into it, and that there were that number of attendees on the Council side. The Respondent knew that this was someone with significant mental health issues. The meeting outcome letter is at page 1308 – 1310 of the Hearing Bundle. Notwithstanding six months had elapsed since Dr Khan had first recommended that consideration be given to redeployment, Mr Keaveney decided to adjourn the meeting until the week commencing 28 October 2019 to allow him to seek clarification from Occupational Health regarding their advice that options for alternative roles be explored. It is particularly unfortunate that Mr Keaveney did not come to the meeting with that essential clarification. Be that as it may, in parallel, he also confirmed that he wanted to focus on a phased return for a period of up to two months, his stated intention being to give the Claimant confidence to return to work whilst these other enquiries were made. He confirmed that the phased return would be under the close supervision of Ms Gurney and Andrea Mayne, Team Leader.

74) Once again, the Claimant was clear during the meeting on 13 August 2019 that he would not return to his existing role. This prompted Mr Keaveney to say in his letter of 19 August 2019,

> *"* [I] *must emphasise that at present, your right to a job is limited to your contractual role".* (page 1309)

That comment sits uncomfortably with the Respondent's duties under §.20 and 21 of the Equality Act 2010.

75) The notes of the meeting on 13 August 2019 evidence that the Claimant was very much focused upon his perceived experiences within the Independent Living Team, in other words that he was pre-occupied with what had happened rather than how the situation might move forward. In our experience, that is not unusual. Mr Keaveney dealt with it by reminding the Claimant of the availability of the Respondent's Grievance Policy.

76) In his letter, Mr Keaveney warned the Claimant that one potential outcome at a reconvened meeting to be held at the end of October 2019 was that he could decide to dismiss the Claimant on grounds of incapability due to ill health or some other substantial reason. He also identified that the Respondent might be able to agree a change to the Claimant's contract of employment which could include redeployment to an alternative role. However, Mr Keaveney caveated this as follows,

> *"I will make this assessment based on whether you are successful in being able to undertake appropriate work, commensurate with your current grade, during the period between your return to the workplace and the end of October."*

77) On 13 September 2019, Mr Keaveney wrote to the Claimant to invite him to a reconvened Final Attendance Review meeting, to be held on 30 October 2019. He reminded the Claimant that in the absence of any significant change in his circumstances, the most likely outcome was either that the Claimant would be dismissed or that there would be an agreed change to his contract of employment. The letter might have been clearer as to what was envisaged under the second potential outcome.

78) Whilst the Claimant was aware from the August Final Attendance Review meeting that further Occupational Health advice would be sought, this was then questioned by the Claimant. Emails from 7 October 2019 evidence Ms Meadows and others at the Respondent becoming concerned for the Claimant's welfare. When the Claimant got in touch with Ms Calvert later that day he referred to being in bed ill over the weekend and whilst he referred to various health issues, he said he had discussed with his GP returning to work in the near future. Ms Calvert responded and noted that this was encouraging news and went on to ask what he had in mind. She also reminded the Claimant that the Respondent wished to refer him back to Occupational Health but that they needed his permission in this regard. The Claimant responded later that day stating,

> *"This new proposed referral is only going to repeat what was said with no new updates."*

79) As a result, the planned Occupational Health referral was put on hold. However, Ms Calvert arranged a conversation with the Claimant on 14 October 2019, during which the Claimant confirmed that he would be fit to return to work when his fit note expired on 31 October 2019.

80) Mr Keaveney wrote to the Claimant on 18 October 2019, confirming the Claimant's conversation with Ms Calvert and outlining the arrangements for a four week phased return. He noted that these arrangements would need to be further adjusted to reflect the fact the Claimant had a medical appointment on Thursday afternoons such that he would need to leave work by 2pm. Mr Keaveney also wrote,

> *"Charlotte will also ensure a stress risk assessment and a Wellness Action Plan is completed upon your return."*

The Claimant believes these should have been completed prior to his return to work, or at the very latest, immediately upon his return. As we return to, they were not completed until on or around the third week of the Claimant's phased return.

81) As the Claimant would be returning to work on a phased return, the scheduled reconvened Final Attendance Review meeting was deferred until 27 November 2019, Mr Keaveney's thinking being that he could factor into any decision what had been achieved during the period of the phased return to work. As he had done in his letter of 19 August 2019**,** Mr Keaveney indicated that the Respondent's agreement to redeploy the

Claimant may be conditional upon whether he was successful in being able to undertake appropriate work, commensurate with his current grade, during his period of phased return.

The phased return to work in November 2019

82) A detailed work schedule was prepared for the four week phased return (pages 1505 – 1509). It is a structured and well thought through plan, the focus of which is securing the Claimant's return to work and supporting his continued attendance. It involved a gradual re-introduction to the workplace, including bringing the Claimant up to date in terms of his personal learning. Weekly catch up meetings were scheduled with Ms Gurney, as well as meetings with Ms Mayne. The Plan envisaged limited customer facing activity, largely limited to shadowing others, again as a way to re-introduce him to the demands of the workplace.

83) A couple of weeks into his phased return, the Claimant expressed various concerns in a letter to Ms Gurney. Amongst other things, he noted that Ms Gurney had not been fully apprised of his health issues. He also referred to the office being busy and, at times, noisy and warm and that this was impacting his ability to concentrate. He described being anxious and stressed, being unable to sleep and feeling that he was in a working environment with a high performance threshold. He said that at times it could be a little overwhelming. He went on to say he did not feel he had a voice. In a series of bullet points at the end of his letter he summarised both his concerns and anxieties, though also identified a number of adjustments that could be made to his working arrangements. Amongst his seventeen bullet points the Claimant asked,

> *"What happened to the Return to Work Risk Assessment agreement?"*

84) Ms Calvert responded to the Claimant on 21 November 2019. Amongst other things she wrote,

> *"I was under the impression a Risk Assessment was going to be completed so I will follow this up with Charlotte and arrange for this to happen as soon as possible this week." (page 1524)*

85) She was in contact with Ms Gurney the same day to discuss the arrangements for the Wellness Action Plan and Stress Risk Assessment. It was agreed that Ms Mayne would complete the assessments with the Claimant in order to expedite matters. Ms Gurney had not been neglecting the matter. She responded to the concerns expressed by the Claimant in his letter by discussing and agreeing various adjustments with him during their scheduled catch up meeting on 19 November 2021.

86) The completed Wellness Action Plan is at page 1549 of the Hearing Bundle. If there was any delay in completing the Plan, this was no more than one or two weeks. We are satisfied that it was a pure oversight on the Respondent's part.

87) Ms Maguire prepared a Management Report for the Final Stage Attendance Review, a copy of which is at pages 2022 – 2129 of the Hearing Bundle. In the course of his evidence at Tribunal, the Claimant referred to it as a "falsified report". At page 14 of the Report, Ms Maguire identified a range of adjustments that had been implemented to support the Claimant's successful return to work. The Report is less specific in terms of longer term adjustments to support the Claimant's return, whether in his substantive role or in a redeployed position. In the course of his evidence at Tribunal, we asked the Claimant to identify what adjustments he felt should have been put in place during the phased return period (as distinct from the longer term). As the Claimant was struggling at this point in his evidence, we adjourned the Hearing to enable him to consider the matter further and to write down his response. When the Hearing resumed some while later, some of the adjustments he identified were longer term measures, for example, redeploying him into a new role. However, the adjustments which related to the phased return were identified as follows: a gradual build up; no customer facing; no answering telephones; agile working; regular breaks; working closer to home; quiet working; flexible working; a reduced workload; regular supervisions; regular training; colleague involvement and interaction; no one shouting across the office; and support with job interviews.

88) We find that all these adjustments were effectively implemented as part of the Claimant's phased return plan. The plan itself is at pages 1505 to 1509 of the Hearing Bundle. The Claimant met with Ms Gurney on the afternoon of Friday, 1 November 2019 and, in the following week, worked on the Monday, Wednesday and Friday afternoons only. Much of that first week was devoted to personal learning. In the second full week, the Claimant worked five half days. His work comprised a mix of personal and e-learning, as well as some work shadowing and training. As in the first week, he had scheduled catch ups with Ms Gurney and Ms Mayne. The third full week comprised two full days and three half days. There continued to be personal and e-learning, as well as structured training. Additional meetings were scheduled, as well as a supported Triage outbound call. In the fourth full week, the Claimant worked three full days and two half days. He continued to undertake personal learning, though there was greater emphasis upon work shadowing and Triage Duty, we find with a view to easing the Claimant back into the normal duties of his role. Once again, catch up meetings were scheduled. Overall, it was a thoughtfully structured return to work plan with many of the adjustments contended for by the Claimant 'baked' into the plan, namely a gradual, flexible build up, with significantly reduced workload and no, or minimal, customer facing activities or telephone answering. The Claimant would have been able to undertake the personal and e-learning in particular in quieter work areas or even remotely at home, and to take regular breaks. At least one of the work shadowing sessions was arranged at Priory House in Chicksands, which was closer to the Claimant's home. Even if, as the Claimant alleges, he only met with Ms Gurney on two out of their four scheduled catch ups, he also had regular 1-2-1s with Ms Mayne as

well as meetings with other colleagues. There was no lack of colleague support or interaction over the four week planned return. On the contrary, he was well supported throughout.

89) There is no allegation or evidence that any of the Claimant's colleagues shouted across the office during his phased return period. We accept Ms Maguire's evidence that she and others actively sought to include the Claimant, inviting him to sit with them during breaks and the like. We further accept her evidence that the Claimant generally preferred to be left alone. We are satisfied that there was very limited customer facing activity or calls for the Claimant to answer during his phased return, as he was largely shadowing others. At his reconvened Final Attendance Review meeting with Mr Keaveney on 27 November 2019, the Claimant described a potentially difficult customer interaction. When Mr Keaveney asked him how he felt about the matter he replied,

> *"Really good, that I got everyone involved, the mental health worker, and it worked".*

90) The Claimant did not have any job interviews during his phased return, so his suggestion of support with interviews does not arise.

<u>The reconvened Final Attendance Review meeting of 27 November 2019</u>

91) The notes of the reconvened Final Attendance Review meeting of 27 November 2019, are at pages 1586 – 1597 of the Hearing Bundle. The meeting commenced with Mr Keaveney asking the Claimant how things were going with his return to work, to which the Claimant responded,

> *"I am doing really well".*

He reiterated that he did not wish to pursue a Grievance. He identified that Ms Gurney had put him at ease, made eye contact, given him the opportunity to ask questions and given him a very good overall run down on what was happening; all of which supported his confidence. He also said that Ms Mayne was someone with whom he could discuss any issues and concerns. Regarding the seating arrangements at work, he alluded to the fact that he had previously not had the confidence to move, rather than that he had been prevented from changing where he sat.

92) Having explored with the Claimant his perceptions of the phased return to work, Mr Keaveney observed,

> *"My advice is that I don't want to lose you. You are a positive member of staff with a positive attitude. What more can you ask for?"*

Mr Keaveney went on to acknowledge that it was still early days. The Claimant agreed with Mr Keaveney that it was about identifying and deploying effective strategies to build resilience.

93) In the course of the meeting, Mr Keaveney referred to the fact that an Occupational Health report was expected back in relation to the Claimant in the following days (page 1590). The ongoing need for an up to date report had been raised by Ms Calvert with the Claimant on 21 November 2019. As noted already, this had previously been put on hold in October when the Claimant seemed to be resistant to it, though he seems to have a brief change of heart in the matter. As we shall return to, within a short time of the meeting with Mr Keaveney concluding, he had reverted to his previous position.

94) In the course of the meeting with Mr Keaveney on 27 November 2019, the Claimant described the Wellbeing Assessment Plan and Health and Safety Standards Tool as fantastic. He referred to the further Occupational Health Assessment as being all that was needed and then said,

> *"All this is welcoming and I couldn't thank the company enough".*

95) The conversation then turned to the issue of where they would go from there. Mr Keaveney noted that the Claimant had expressed, *"very strong"* views about returning to his former role. He challenged the Claimant whether work would be any different in a different Team (Dr Vivian's point, even if Mr Keaveney did not then know it), to which the Claimant responded that the issue was not the work, rather it was the Team. Mr Keaveney proceeded to identify three potential jobs at Scale 7 into which the Claimant might be redeployed, namely: Independent Living Support, Maintenance Advisor and Housing Assistant. He cautioned that in the absence of a job for the Claimant to be redeployed into, if he did not return to his existing role the Respondent would look to dismiss him. Mr Keaveney sought to explore the Independent Living Support role with the Claimant, but the meeting notes evidence that the Claimant was either unwilling, or unable, to engage with Mr Keaveney in relation to the three specific roles that had been identified. Mr Keaveney persisted and proposed that the Claimant remain with Ms Gurney's Team for a further period of three weeks with a view to transitioning into whichever role he was going to. He said his preference would be for the Claimant to return to his existing role, but that if the Claimant was unwilling to return to it he should think about the other three roles. He went on to explain what each job entailed and that if the Claimant was seeking a job outside Housing Services, he would need to apply for such a role. Mr Keaveney said,

> *"Have a think about it, take some time"*

and then wrote down the three vacancies for the Claimant to take away with him during a short adjournment.

96) The meeting resumed a little over 20 minutes later when the Claimant reiterated his unwillingness to return to the Independent Living Team. He touched briefly upon the reasons for this, but summarised that it was simply not conducive for him to continue in his existing role. He went on to refer to the proposed further Occupational Health assessment, something

he had previously agreed in August was important and earlier in this meeting still seemed to accept was required, but which he now questioned the worth of,

"I don't get that?"

97) There is a clear sense from the meeting notes that the Claimant was becoming increasingly stressed as he referred to feeling he was being pushed into a corner. Mr Keaveney acknowledged the change in tone in their discussion and endeavoured to get the discussion back on track. However, the Claimant returned to the issue of the Occupational Health Report and expressed the view that Ms Else's June Report should be sufficient. However, in our view this overlooks that it was written at a time when the Claimant had been absent from the organisation for approximately a year, whereas an up-to-date Report would capture his up to date health situation, including his experience of being back in the workplace. Mr Keaveney persevered and reiterated the three positions into which the Claimant might be redeployed. He proposed reconvening the Final Attendance Review meeting on 19 December 2021 on the basis that the Claimant would give continued thought to redeployment. This prompted the Claimant to say,

"I am losing my confidence".

We have difficulty in understanding that comment given that the Claimant himself was not offering any obvious way forward. When Mr Keaveney asked the Claimant why he felt this proposed approach was unreasonable, the Claimant responded that it was not a post he would get on with. We are unclear which of the three roles he was referring to or if in fact he was referring to all of them.

98) When Mr Keaveney tried to coax the Claimant to say what he wanted to do, the Claimant asked,

"Where are the adjustments?"

That observation has come to assume a significance within these proceedings which it did not have at the time: within these proceedings the Respondent's position is that adjustments could be considered once the Claimant indicated his interest, in principle, in one or more of the redeployment opportunities, whereas the Claimant asserts that adjustments needed to be agreed first before he could begin to consider any specific redeployment opportunity. However, save for the one documented comment above, the 12-page meeting notes do not support that at the time this was perceived by the Claimant to be an obstacle to progress in securing his redeployment into a new role.

99) The Claimant suggested to Mr Keaveney that the Let's Rent Team had a data inputting job which he said would help in his progress. Mr Keaveney responded that he was not aware of any vacancy and that if there was a

vacancy he would expect it to be on a lower grade given the manual nature of such a job. The Claimant suggested that it was in fact a role at a higher grade, Grade 10. Given that he was then in a Grade 7 role, the Claimant would have had to apply for a higher graded post rather than be considered for automatic redeployment. Mr Keaveney observed that if there was a role at Grade 10,

"It would be more than data inputting."

We agree and accept the Respondent's evidence in this regard, including the significant demands associated with Grade 10 posts, including likely Line Management responsibilities.

100) When Mr Keaveney questioned the Claimant whether there really was a data inputting role at Grade 10, we note the Claimant replied,

"Something like data inputting".

Evidently, he was not certain on the matter, even if he is now adamant in these proceedings that such a role existed.

101) Mr Keaveney steered the conversation back to the three redeployment opportunities that had been identified. As regards the Housing Assistant role, the Claimant ruled this out on the basis,

"Travelling to work, lone working. All too much for me."

102) As regards the Maintenance Advisor role, he said,

"My skill set doesn't match up, not for me."

103) In the course of the meeting, therefore, the Claimant had emphatically ruled out a return to his existing role and explicitly rejected two of the redeployment opportunities. The whole tenor of the discussion was that he did not wish to pursue any of the three redeployment opportunities that had been put forward for his consideration, notwithstanding they would be on a trial basis.

104) The conversation returned again to the need for an up to date Occupational Health Report. The Claimant was resistant, stating,

"It would be identical to the last Report"

before going on to say,

"It's bad enough being in this meeting with everyone looking at me."

105) The Claimant then brought up his lack of development. The meeting notes indicate that Mr Keaveney sought to bring the meeting to a conclusion, suggesting that they meet again on 19 December 2019 and in the

meantime that Ms Calvert would provide the three role profiles to the Claimant. Mr Keaveney also encouraged the Claimant to continue with his regular supervisions with Ms Mayne. When Mr Keaveney asked the Claimant if he would be okay for the next three weeks, he responded that he had no choice in the matter. Mr Keaveney confirmed that the organisation would continue to see what vacancies existed at Grades 6 and 7, and that if the Claimant did not take an opportunity for redeployment he would be at risk of dismissal. Following a further brief discussion during which Ms Calvert confirmed that the Claimant could apply for other roles, the meeting concluded with Mr Keaveney reiterating what would happen on 19 December 2019. He endeavoured to encourage the Claimant stating,

> *"You are doing good work and it is all positive."*

106) Following the meeting, the Claimant sent a short email to Ms Calvert asking if it was possible to cancel the forthcoming planned meeting with the Respondent's Occupational Health Advisors, Team Prevent. She responded to say that she would contact Team Prevent and let them know that the Claimant had withdrawn his permission. She pointed out that this meant Mr Keaveney would make any decision on the strength of the information previously received.

107) In a further email from the Claimant on 29 November 2019, he referred to the meeting on 27 November 2019 as having been really difficult for him. He said,

> *"I don't have a voice. The whole process is not about what I want but more about what the company wants."*

108) Other than an alleged Grade 10 data inputting role, like the Respondent, we are unclear what it was that the Claimant wanted. If he felt that he did not have a voice it was not for want of Mr Keaveney's efforts to afford him the opportunity to express his views. It is particularly unfortunate that the Claimant would not participate in any further Occupational Health assessment, given that this would have provided a further means by which his voice might have been heard.

<u>The Claimant's dismissal</u>

109) The Claimant was dismissed at a reconvened Final Attendance Review meeting on 19 December 2021. The notes of that meeting are at pages 1645-1649 of the Hearing Bundle. The meeting outcome letter is at pages 1620-1622.

110) The Claimant clearly understood from the outset of the meeting that it was to consider whether the Claimant would return to his existing role, or pursue redeployment. Whilst the Housing Assistant and Maintenance Advisor roles were then no longer available, there was no indication in the notes, and the Claimant did not suggest in his evidence at Tribunal, that

he had had a change of heart in relation to those roles such that they ought to have been kept open for consideration by him. As regards the two roles then available, namely the Independent Living Officer role and his existing role, the Claimant said,

> *"I don't want to go down that road."*

111) Mr Keaveney emphasised that redeployment to the Housing Service would be on a 12 week trial period,

> *"Giving you all the support you need to settle back in and an induction process."*

Whilst he did not need to do so, Mr Keaveney reiterated that his only option would be to dismiss the Claimant if he declined the two options then available. As he had done on 27 November 2021, Mr Keaveney confirmed that he would adjourn the Hearing to allow the Claimant a further opportunity to consider his position and that even if he was dismissed, he would still go into the Respondent's redeployment pool during his notice period, where he would be considered for suitable alternative employment.

112) Although the Claimant had no questions, Mr Keaveney reiterated the options that were available to him. He secured the Claimant's confirmation that he had been sent the job description for the Independent Living Officer post. When he suggested that the Claimant take a few minutes to think the matter over, the notes indicate that the Claimant instead immediately declined the position, albeit that he then went on to ask where the post would be based. Mr Keaveney explored this further with the Claimant. Ms Maguire confirmed that she had recently met Rachel Norton, the relevant Team Leader and described her as, *"fairly new and nice"*. When the Independent Living Officer role was formally offered to the Claimant again, he declined it. Following a short adjournment, the Claimant confirmed that he had not had any change of heart. On that basis Mr Keaveney confirmed that his employment would be terminated with four weeks' notice. He confirmed that the Claimant had a right of appeal and in the meantime that the Claimant would be placed in the redeployment pool, with any decision as to whether vacancies were a match for the Claimant being a matter for the Redeployment Team rather than Mr Keaveney. There followed a discussion about the redeployment process, as well as whether the Claimant would work his notice period or, as he seemingly preferred, take annual leave.

113) As we shall return to, during his notice period the Claimant subsequently expressed an interest in the Independent Living Officer role. The Claimant does not explain why he was resolute in rejecting the former role when this was proposed by Mr Keaveney, certainly once he understood that the Attendance Review process was coming to a conclusion and he was at immediate risk of being dismissed. We have considerable difficulty in understanding the Claimant's position given that he would have been redeployed into the role automatically had he accepted Mr Keaveney's

offer of a trial period, whereas he had no automatic right of appointment to the role once he was under notice.

The formal redeployment process

114) The Claimant's dismissal letter confirmed that Lesley Gilson, Senior HR Advisor, would contact the Claimant and support him through the redeployment process. This was, of course, shortly before Christmas. There is limited evidence of any interactions or activity during the first two weeks of the final redeployment period. The Claimant complains that he experienced difficulties reaching Ms Gilson and that she would not answer telephone calls, voice messages or email. However, he was in contact with Ms Meadows with whom he had had significant contact during the Absence Management process. She was in contact with the Claimant on 3 January 2020, immediately following the Christmas holiday period and back in contact with him again on 8 January 2020, alerting him to the Independent Living Officer Community Support role (which he had already refused). She also confirmed that the Recruitment Team were proactively looking at job matches for his consideration. In an email the same day, the Claimant highlighted concerns regarding risks associated with the role. Ms Meadows responded immediately to ask if she could share those concerns with the Recruitment Team and that they may need to speak with the Recruiting Manager for further information. The Claimant had also been provided with details of a Personal Advisor role on 8 January 2020. When the Claimant asked where the job was located, Ms Meadows responded in a timely fashion and thereafter let the Recruitment Team know he was interested in being put forward for the role.

115) There followed some slight confusion as to whether of not the Claimant was willing for information regarding his mental health to be shared. In the meantime, he withdrew his expression of interest for the Personal Advisor role on the basis that he understood it to be a part time position, renewing his interest on 21 January 2020 (after his employment had terminated) after it had been confirmed to him that the role was in fact full-time. He had an informal interview for the role on 22 January 2020.

116) In the meantime, the Claimant's employment had terminated. There are emails in the Hearing Bundle regarding his leaving arrangements, including the return of IT equipment. The Claimant's email of 17 January 2020, at page 1748 and 1749 of the Hearing Bundle, indicates no particular concern on his part that he may no longer be able to send or receive emails on his work email address. He provided the relevant Recruiting Manager, Carol Stewart, with his personal email address. As with Ms Meadows, Ms Stewart's emails evidence timely responses on her part.

117) Although the Claimant attended an informal interview on 22 January 2020 for the Personal Advisor role, the Claimant's evidence at Tribunal was that he went to the interview with the firm view that the role was unsuitable for him but that he felt there was no way out of the interview. Ms Stewart and

her colleague Rachel Williams who interviewed the Claimant on 22 January 2020, likewise, concluded that the role was unsuitable for him and provided detailed feedback to Ms Meadows in this regard.

118) The Claimant first expressed an interest in the Independent Living Team Level 1 role on 24 January 2020, namely five days after his employment with the Respondent had terminated. Ms Meadows responded to him within a matter of minutes confirming that she had let the Recruitment Team know that he wished to be considered for the role. She confirmed that she would be back in touch on Monday 27 January 2020 when she had some more information regarding the role. In the event, she was unable to contact him until the following day, 28 January 2020, as the Hiring Line Manager was on leave. Once again, she sought the Claimant's permission to discuss his mental health and any reasonable adjustments. Following a further exchange of emails, she asked the Claimant to identify what reasonable adjustments he would wish to be considered. He put forward a 35 bullet point list of potential adjustments, some of which reflected past concerns and observations such as,

> *"I do sleep a lot"*

and

> *"what happened to the Return to Work Risk Assessment agreement in periodic meetings with Charlotte?"*

119) It seems that Ms Gilson became involved again. She responded to the Claimant on 11 February 2020 and noted that his proposed adjustments were the ones that had been requested during his phased return. She asked him to highlight those he believed to be relevant to this particular vacancy. He responded in turn on 17 February 2020 with a revised list of adjustments. He copied in David Waller, HR Policy and Implementation Manager, who acknowledged his response in Ms Gilson's absence on leave and confirmed that whilst he would be out of the office the following day, he would be in touch further on his return. There is no evidence in the Hearing Bundle or in the Respondent's witness statements as to whether Mr Waller was thereafter in contact with the Claimant. However, in the meantime, on 17 February 2020, the Claimant had contacted ACAS under the Early Conciliation scheme in order to bring a claim against the Respondent.

Law and Conclusions

120) We shall address the harassment and direct discrimination complaints together since they are pursued by reference to same alleged facts.

Harassment Claims

121) Section 26 of the Equality Act 2010 ("EqA") provides,

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

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

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

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

122) In Richmond Pharmacology v Dhaliwal [2009] ICR724 it was observed,

> "A Respondent should not be held liable merely because his conduct has had the effect of producing a prescribed consequence: it should be *reasonable* that that consequence has occurred… overall the criterion is objective because what the Tribunal is required to consider is whether, if the Claimant has experienced those feelings or perceptions, and it was reasonable for her to do so. Plus if, for example the Tribunal believes that the Claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for the Claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the Tribunal as to what would be important for it to have regard to all the relevant circumstances including the context of the conduct in question. One question that may be material is whether it should reasonably be apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the prescribed consequence): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt…
>
> (22) …dignity is not necessarily violated by what was said or done which was trivial or transitory, which should have been clear but any offence was unintended. But it is very important that employers and Tribunals are sensitive to the hurt which can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

123) In Land Registry v Grant [2011] ICR 1390,CA, Elias J said,

> "It is not importing intent into the concept of effect to say that intent would generally be relevant to assessing effect. It would also be relevant to deciding whether the response of the alleged victim is reasonable".

124) The conduct relied upon by the Claimant as being unwanted conduct is set out at paragraph 5 of the List of Issues (page 205).

Direct Discrimination Claims

125) Section 13 of the Equality Act 2010 provides,

13. Direct Discrimination

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

126) In cases of alleged direct discrimination the Tribunal is focused upon the 'reasons why' the Respondent acted (or failed to act) as it did. That is because, other than in cases of obvious discrimination (this is not such a case), the Tribunals will want to consider the mental processes of the alleged discriminator(s): Nagarajan v London Regional Transport [1999] ICR 877.

127) In order to succeed in any of his complaints the Claimant must do more than simply establish that he has a protected characteristic and was treated unfavourably: Madarassy v Nomura International plc [2007] IRLR 246. There must be facts from which we could conclude, in the absence of an adequate explanation, that the Claimant was discriminated against. This reflects the statutory burden of proof in section 136 of the Equality Act 2010, but also long established legal guidance, including by the Court of Appeal in Igen v Wong [2005] ICR 931. It has been said that a Claimant must establish something "more", even if that something more need not be a great deal more: Sedley LJ in Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279. A Claimant is not required to adduce positive evidence that a difference in treatment was on the protected ground in order to establish a *prima facie* case.

128) It is for the Tribunal to objectively determine, having considered the evidence, whether treatment is "less favourable". Whilst the Claimant's perception is, strictly speaking, irrelevant, his subjective perception of his treatment can inform our conclusion as to whether, objectively, the treatment in question was less favourable.

129) The grounds of any treatment often have to be deduced, or inferred, from the surrounding circumstances and in order to justify an inference one must first make findings of primary fact identifying 'something more' from which the inference could properly be drawn. This is generally done by a Claimant placing before the Tribunal evidential material from which an inference can be drawn that they were treated less favourably than they would have been treated if they had not had the relevant protected characteristic: Shamoon v RUC [2003] ICR337. 'Comparators', provide evidential material. But ultimately they are no more than tools which may or may not justify an inference of discrimination on the relevant protected ground, in this case race. The usefulness of any comparator will, in any particular case, depend upon the extent to which the comparator's circumstances are the same as the Claimant's. The more significant the difference or differences the less cogent will be the case for drawing an inference.

130) In the absence of an actual comparator whose treatment can be contrasted with the Claimant's, the Tribunal can have regard to how the

employer would have treated a hypothetical comparator. Otherwise some other material must be identified that is capable of supporting the requisite inference of discrimination. This may include a relevant statutory code of practice. Discriminatory comments made by the alleged discriminator about the Claimant might, in some cases, suffice. We have found that there were no such comments in this case.

131) Unconvincing denials of a discriminatory intent given by the alleged discriminator, coupled with unconvincing assertions of other reasons for the allegedly discriminatory decision, might in some case suffice. Discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it.

132) It is only once a *prima facie* case is established that the burden of proof moves to the Respondent to prove that it has not committed any act of unlawful discrimination, so that the absence of an adequate explanation of the differential treatment becomes relevant: Madarassy v Nomura [2007] EWCA Civ 33.

133) In our discussions regarding the Claimant's direct discrimination complaints, we have held in mind that we are ultimately concerned with the reasons why each of the alleged perpetrators acted as they did in relation to the Claimant.

134) The matters relied upon by the Claimant as being less favourable treatment are set out at paragraph 10 of the List of Issues (page 206). They are exactly the same matters relied upon as being acts of alleged harassment.

135) Our conclusions in relation to the Claimant's harassment and direct discrimination complaints are as follows:

Issues 5.1/10.1

The Claimant wasn't promoted to the positions that Ms Daniels and Ms Maguire were respectively promoted to. Putting aside whether he would have been appointed over them in a competitive process, the primary reason he was not promoted to either position is that he did not seek appointment to them. The Claimant may be unhappy generally about his lack of career progression, but that is not his complaint in these proceedings. The specific promotions about which he complains did not give rise to unwanted conduct since the Claimant did not apply for or wish to be considered for either position. Even if he could persuade us that it was unwanted conduct, it did not relate to his disability and it would, in any event, be unreasonable for him to regard it as having violated his dignity or created an intimidating etc environment for him given he did not wish to be considered for either position. For the same reason, he was not treated less favourably than Ms Daniels and Ms Maguire were in respect of those positions. Again, his complaint has not been framed in terms that he was

generally treated less favourably than they were regarding his career development and progression. The specific complaints he makes are not well-founded.

Issues 5.2/10.2

The Claimant learned that Ms Maguire had been appointed to her new position as Senior Independent Living Prevention Officer as a result of a congratulatory email that he says was issued by Paul Sharpe in or around January 2019. If, which is not clear, his complaint is that he learned of her appointment after others did, he was not in her immediate team and, at the time of her appointment, she was not his line manager, so there was no reason why he should have been informed sooner than others in the Housing Services Department. If Mr Sharpe's email congratulating Ms Maguire on her appointment came to his attention after others had read it, that was because he was on sick leave and either not accessing emails or accessing them infrequently. In so far as that related to his disability it would be unreasonable for him to regard it as having violated his dignity or created an intimidating etc environment for him. Given he was on long term sick leave with debilitating mental health issues, it was inevitable that he might not learn about new joiners, leavers and promotions, or indeed a whole range of work related matters, at the same time that others did. He was not treated less favourably than other colleagues outside Ms Maguire's immediate team and certainly no less favourably than others who were not disabled but who may not have immediately read Mr Sharpe's email because they were on sick leave or otherwise absent from the organisation and not accessing work emails. The complaints are not well-founded.

Issues 5.3/10.3

It is an over-simplification to suggest that the Claimant's request for home working was refused. The available evidence is that the Claimant did not in fact necessarily want to work from home, but that he did want to work from Priory House in Chicksands. The Respondent was willing to explore this with the Claimant and to seek to reach an accommodation with him, recognising however that the Claimant's substantive role was one that necessitated a relatively high level of attendance on site in order to deal with customers. However, the Claimant was unwilling either to return to his own role or to one of the three positions that were put forward as redeployment opportunities, with the result that any discussion as to what adjustments could be made that would reduce his travel to work could not be progressed. The specific complaint is not well-founded, whether pursued as a complaint of harassment or of direct discrimination. In circumstances where the Respondent had confirmed its willingness to explore the issue further with the Claimant, it would be unreasonable for the Claimant to regard the Respondent as having violated his dignity or created an intimidating etc environment for him. In our judgement he was treated no differently to how others without his disability were treated or would have been treated in his situation. We are satisfied, for example

that the Respondent would have dealt with a request for flexible working in the same way, namely by seeking to explore this with the employee and to reach an accommodation with them.

Issues 5.4/10.4

As we have set out at paragraph 98 above, the issue on 27 November 2019 was not that Mr Keaveney would not commit to making adjustments, it was that the Claimant was unwilling to commit to return to his existing role or to one of the redeployment opportunities then available and was not otherwise identifying a way forward, other than redeployment into a significantly higher grade role which we are not persuaded in fact existed or, had it existed, would have been suitable alternative employment for him. Even if the Claimant has now come to regard this issue as the obstacle to his return, in our judgment it would be unreasonable for him to regard the Respondent as having violated his dignity or created an intimidating etc environment for him. It was entirely reasonable for Mr Keaveney to express the view that adjustments would be considered once the Claimant indicated his interest, at least in principle, in one or more of the redeployment opportunities. In the Tribunal's experience, adjustments are rarely one-size-fits-all, rather they have to be tailored to the content and demands of the role. We are satisfied that the Respondent would have approached any employee requests for adjustments in the same way, and accordingly that the Claimant was no treated less favourably than others, let alone because of disability. The complaints are not well-founded.

Issues 5.5/10.5

The Respondent did not refuse to discuss reasonable adjustments with the Claimant prior to his phased return to work on 1 November 2019. The phased return was of itself a reasonable adjustment and the clearest evidence of a willingness on the part of the Respondent to consider and explore reasonable adjustments that would support the Claimant's return to the workplace. Given that the Claimant was unfit for work for a period of over one year, in our judgement, there was a limit to what adjustments the Respondent could reasonably implement during the Claimant's ongoing absence if these would not facilitate his recovery and return to work. Nevertheless, we do not consider that the Respondent was closed to any discussion of adjustments with the Claimant. For the reasons set out at paragraphs 87 to 90 above, we are satisfied that all of the adjustments reasonably contended for by the Claimant in connection with the phased return to work were implemented by the Respondent. The specific complaints are not well-founded. Furthermore, and in any event, we do not consider that during his lengthy sickness absence the Claimant was subjected to unwanted conduct that related to his disability or which it would be reasonable for him to consider as having violated his dignity or created an intimidating etc environment for him. We are satisfied that the Respondent would have managed any employee's long term absence in the same way, namely by remaining in contact with them throughout their

absence, keeping their situation under review, securing appropriate Occupational Health input and putting in place a structured, phased return to work plan at the point at which they expected to return to work. In our judgement, the Claimant was treated no less favourably than how others without his disability, or a disability, would have been treated in the same or similar circumstances.

Issues 5.6/10.6

The Respondent did not complete or carry out a stress risk assessment or wellness action plan prior to or in the first two weeks of the phased return to work. It did not commit to, and the Claimant did not request that it, undertake these prior to his return from sick leave. If it could be said that there was a delay of a week or two in them being completed, this was purely an oversight on the Respondent's part. Whilst it did not relate to the Claimant's disability, in any event it would be unreasonable for him to regard any minimal delay as having violated his dignity or created an intimidating etc environment for him. On the contrary, he described the assessment and plan as "fantastic" and on 27 November 2019 told Mr Keaveney that he couldn't thank the company enough. Those were not the words of an employee whose dignity had been violated or who had experienced an intimidating etc environment. In our further judgment, he was not treated any differently to any other employee returning to work following a period of absence. The complaints are not well-founded.

Issues 5.7/10.7

The only specific adjustment identified by the Claimant as having not been implemented is referred to in paragraph 176 of his witness statement. He claims that during the phased return to work, he was asked by Ms Payne to sit near the team whenever he endeavoured to find a quiet space to work at. That is at odds with our findings, and the Claimant's own evidence at Tribunal both that he was in the habit of working in the same place each day and that last time he could recall being given any specific instruction as to where he should sit was from Paul Sharp in 2017. For the reasons set out at paragraphs 87 to 90 above, we are satisfied that all of the adjustments reasonably contended for by the Claimant in connection with the phased return to work were implemented by the Respondent.

Issues 5.8/10.8

The Respondent did not create an entirely new post for the Claimant as an alternative to dismissing him. We set out below why we do not consider that to have been a reasonable adjustment, as the Claimant contends. The Respondent was willing to make adjustments whether the Claimant returned to his existing role or was redeployed into a suitable alternative role. It would be unreasonable for the Claimant to regard the Respondent's approach as having violated his dignity or created an intimidating etc environment for him. Equally, we do not consider that he was treated any differently to a non-disabled employee, or one without his

specific disability, who would not or could not return to their existing role or into a redeployed role for a reason that was not related to disability. The complaints are not well-founded.

Issues 5.9/10.9

The Redeployment team did communicate with the Claimant in good time. The alleged facts that support the complaints are not established and the complaints cannot therefore succeed.

Issues 5.10/10.10

There is no record in the Hearing Bundle of the number, date or time of his alleged calls to Lesley Gilson and he does not include this information in his witness statement. He has the burden of establishing the essential facts upon which his complaints are based and has failed to discharge the burden upon him in relation to this matter. In any event, even had Lesley Gilson not responded to the Claimant's calls or voicemails we do not consider that this could have been said to relate to his disability or that she would have treated an employee without a disability any differently. Given that Ms Meadows progressed matters in early January 2020, was pro-active and responded very promptly to all communications from the Claimant, it would have been unreasonable for the Claimant to regard this as having violated his dignity or created an intimidating etc environment for him. The complaints are not well-founded.

Issues 5.11/10.11

The Claimant's access to his internal email account ended when his employment ended. That did not relate to his disability, it related to his employment status and was part of the Respondent's standard protocol where an individual leaves its employment. In any event it did not violate the Claimant's dignity or cause the Claimant an intimidating etc environment. His emails at the time evidence that he was untroubled by it and indeed expected his access to come to an end. It was unexceptional and it would be encouraging hypersensitivity on the Claimant's part to suggest that he came to regard it as violating his dignity or creating such an environment for him. He was plainly treated no differently to any other leaver. The complaints are not well founded.

Issues 5.12/10.12

An email was sent by Ms Meadows asking what reasonable adjustments the Claimant felt were required and this request was subsequently reiterated, supported with an explanation, by Ms Gilson on 11 and 14 February 2020. As we have observed already, adjustments have to be tailored to the demands of the role. That was all the Respondent was seeking to do; it was endeavouring to be sensitive to the Claimant's needs and to discharge its duties under the 2010 Act by seeking to identify potential adjustments relevant to the specific role. It was a straightforward

matter for the Claimant to provide that further clarity and it would be encouraging hypersensitivity on his part to suggest that such an enquiry might have violated his dignity or created an intimidating etc environment for him. We consider that the Claimant was treated no differently to how any other employee would have been treated had it been identified that they may have a need for adjustments for a non-disability related reason. The complaints are not well-founded.

Issues 5.13/10.13

The Respondent did respond when the Claimant asked to be considered for the role of Independent Living Team Level 1. It seems to us that the Claimant's complaint instead is that Mr Waller failed to progress matters in Ms Gilson's absence on leave. We conclude that this was an oversight on the Respondent's part rather than related to the Claimant's disability. In our judgment the same oversight would have occurred regardless of the fact the Claimant was disabled. The fact is that the Respondent was willing to redeploy the Claimant into an Independent Living Officer role during the Final Review stage of the Managing Attendance process and pro-actively highlighted the role to the Claimant once he was under notice, responding to his other queries on a timely basis. We are concerned with the reasons why the matter did not progress. Whilst there is limited direct evidence on the matter, the weight of evidence is not just that the Respondent was willing to consider the Claimant for the role, but positively encouraged him to pursue the role even when he placed barriers in its way. In our judgement, those were not the actions of an employer that was creating a hostile etc environment for the Claimant or treating him less favourably than it treated or would treat others. The complaints are not well-founded.

Issues 5.14/10.14

The loss of secure employment was undoubtedly unwelcome to the Claimant but it related to his inability to return to his substantive role or to be redeployed into an alternative role rather than to his disability. Even if it could be said to relate to his disability (a complaint that is more appropriately pursued under s.15 of EqA 2010), it would be unreasonable for the Claimant to regard the dismissal as having violated his dignity or created an intimidating etc environment for him since, for the reasons set out below, the Respondent did not discriminate against him or act unreasonably in concluding that his employment should be terminated. In dismissing the Claimant we consider that the Respondent treated him no differently any other employee who might have been unable to return to their substantive role for a non-disability related reason and who could not be redeployed into another role. The complaints are not well-founded.

S15 EqA Claims

136) Section 15 of EqA 2010 provides,

> 15 Discrimination arising from disability
>
> (1) A person (A) discriminates against a disabled person (B) if-
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

The things arising in consequence of the Claimant's disability

137) The matters (the 'somethings') arising in consequence of the Claimant's disability are identified in paragraph 15 of the List of Issues (page 207) and are as follows:

a. Absence from work;
b. Being unable to return to his original role or the alternatives offered.

The Claimant's absence from work clearly arose in consequence of his disability. The Occupational Health reports support that his disability was preventing his return to his original role. In our judgement, his mental health issues caused him to perceive, or even erect, barriers to redeployment. Dr Vivian made the point that if the Claimant's perception of events was not universally shared, he would take his (distorted) perception into any new role. This was a manifestation of his disability. Mr Keaveney (and others) would not accept the Claimant's perception of events uncritically and in our judgement this led the Claimant to perceive, or even erect, barriers to redeployment and caused him to reject the proposed opportunities for redeployment. This was something arising in consequence of his disability.

The unfavourable treatment and reasons for it

138) The only unfavourable treatment relied upon by the Claimant is that he was dismissed. He was not dismissed because he was absent from work. He was dismissed because, having returned to work on a phased return he was unable or unwilling to return to his existing role or to the redeployment opportunities being offered to him.

Justification

139) As to whether the Respondent's unfavourable treatment of the Claimant above was a proportionate means of achieving a legitimate aim, the Respondent has the burden in that regard. Once a legitimate aim is established, consideration of whether the employer acted proportionately in the matter requires an objective balance to be struck between the discriminatory impact of the PCP and the Respondent's reasonable needs.

140) We accept that the stated aims at paragraph 17.1 and 17.2 of the List of Issues are legitimate aims. We consider that the Respondent's treatment

of the Claimant was proportionate to its legitimate aims. In short, there was nothing more the Respondent could do to secure the Claimant's return to work. We find ourselves returning to Dr Vivian's observation that *"…if his perception of events is not universally shared, there is a risk that he would take this distorted perception into any new role."* The Respondent was sensitive to the Claimant's situation, but ultimately it did not share the Claimant's perception of events. In our judgement, the Claimant's unfounded perception of events became an insurmountable obstacle to him returning not only to his own role but to any suitable alternative role that might have been identified for him. Indeed, by November 2019 it was acting as a barrier to him even being able to make an objective evaluation of the suitability of the roles put forward by Mr Keaveney. In our judgment, the Respondent's legitimate aims and interests outweighed the discriminatory impact upon the Claimant. Dismissal was the only remaining option available to it.

S20/21 EqA Claims

141) Section 20 of EqA 2010 defines the duty to make adjustments as follows,

> 20 Duty to make adjustments
>
> (1) …
> (2) …
> (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.

142) It is not necessary in this case for the Tribunal to have regard to the second and third statutory requirements.

The claimed PCPs

143) The claimed provisions, criteria and practices ("PCPs") are set out at paragraph 21 of the List of Issues (page 208). These are the PCPs we must consider in determining the Claim.

144) What amounts to a PCP is not further defined within the Equality Act 2010, though the expression is to be construed broadly, avoiding an overly technical approach. According to the EHCR's Employment Code it extends to any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. The existence or otherwise of a PCP is to be assessed objectively. In Carerras v United First Partners Research Ltd EAT 0266/15 the term "requirement" was said to be capable of incorporating an "expectation" or assumption", which might be sufficient to establish the existence of a practice.

145) Our conclusions are as follows:

Issues 21.1 & 21.2 - returning to work without a stress risk assessment or a wellness action plan

In our judgement, where there is an identified need for a stress risk assessment or wellness action plan, the Respondent's practice is to undertake and complete these when staff return from sickness absence, rather than during their sickness absence. The claimed PCPs are therefore established.

Issues 21.3, 21.4 & 21.5 – a requirement to carry out the full duties of the substantive role, or one of the alternatives offered, to work normal hours and to work in the normal office environment

In our judgement, there is an expectation or assumption at the Respondent that staff who return from sick leave will resume the full duties of their role, or of any alternative role that is offered, working their normal hours in their normal office environment. Accordingly, the claimed PCPs are established.

Issue 21.6 - applying the attendance management trigger points

The Respondent's Managing Attendance policy is at pages 2168 to 2183 of the Hearing Bundle. The trigger points identified at page 2173 lead to a First Review of an employee's sickness absence record. Thereafter, progression to a Second and Final Review depends upon whether an employee meets any targets that have been set for their attendance. There are no fixed trigger points as such at the Second and Final Review stages.

The claimed disadvantages and the Respondent's knowledge of these

146) The List of Issues does not identify the disadvantages to which the PCPs gave rise and Claimant did not address these matters in his witness statement or evidence at Tribunal.

147) We conclude as follows:

Issues 21.1 & 21.2

We do not consider that the Claimant or a person with the Claimant's disability was placed at a disadvantage by the assessment and plan being undertaken on his return from sick leave rather than prior to his return. It might have been otherwise had he either returned to the full duties of his job immediately upon his return or been expected to do so at the end of the phased return without them having been completed. Instead, they were undertaken as part of a structured phased return under which he was gently reintroduced to the workplace and able to contribute to both documents with the benefit of being back in the workplace, albeit on very

light duties, and best placed therefore to consider and identify likely stressors and other factors liable to impact his wellbeing. If anything, delaying the assessment and plan until his return placed him at an advantage relative to any period when he was absent from the workplace and unfit to work.

Issues 21.3, 21.4 & 21.5

We are satisfied that the normal expectation that employees will undertake the full duties of their role, work standard hours and, certainly in relation to the Claimant's role, work in the normal office environment, all placed the Claimant and a person with the Claimant's disability at a disadvantage. His mental health issues were such that they impacted his ability to perform the full duties of his role, including answering phone calls and dealing with customers/members of the public, particularly others with mental health issues and/or who were stressed or in crisis. The Claimant's PTSD, depression and anxiety combined to impact his sleep, concentration and energy levels and also triggered 'flight responses', all of which made it more difficult for the Claimant to maintain attendance during normal hours. The Claimant's mental health issues also impacted his ability to work in a normal office environment as he was sensitive to noise, raised voices, changes in temperature and the general hustle and bustle of a busy office environment.

Issue 21.6

We conclude that the managing attendance trigger points (including setting attendance targets set at the conclusion of the First and Second Review stages) placed the Claimant and a person with the Claimant's disability at a disadvantage as his mental health issues meant that he was more likely to have regular and lengthier sickness absences than non-disabled colleagues that triggered the Policy and meant that his case was escalated through the various stages of the Policy.

Reasonable adjustments

148) We remind ourselves that reasonable adjustments are with a view to addressing the disadvantages identified above. Paragraph 24 of the List of Issues identifies a total of 22 potential adjustments that the Claimant considers might reasonably have been made in relation to him. The burden of proof does not, of course, ultimately lie with the Claimant. He need only identify in broad terms the nature of the adjustments that would address the disadvantages for the burden to shift to the Respondent to show that the disadvantages would not be eliminated or reduced by the proposed adjustments or that they would not otherwise be reasonable adjustments to make.

149) The proposed adjustments in paragraphs 24.1 and 24.2 fall away since we are not satisfied that the Claimant was placed at a disadvantage as a

result of the PCPs identified in paragraphs 21.1 and 21.2 of the List of Issues.

150) In our judgement, for the reasons set out at paragraphs 87 to 90 above, the Respondent fully discharged its duties in relation to the Claimant during the phased return to work period. As we have noted already, the phased return was of itself a reasonable adjustment. It was structured in such a way that it directly addressed the disadvantages experienced by the Claimant in terms of the work itself, his working hours and going to the office in Dunstable. The Respondent implemented the adjustments identified in paragraphs 24.4, 24.6-24.12, 24.16-24.17 of the List of Issues. It operated an agile working policy such that there was no expectation that the Claimant would be seated in a particular area, though he would, of course, need to interact with colleagues and be available for meetings. The established ways of working at the Respondent met the adjustment contended for by the Claimant at Issue 24.15. As regards Issue 24.16, the Claimant was able to undertake some of the personal and e-learning from home.

151) The Respondent extended the phased return, both to allow the Claimant more time to adjust to being back in the workplace without the associated stress of undertaking his substantive duties and to afford him additional time to come to a decision as to whether he would return to his existing role or be redeployed. We cannot identify any further adjustments that the Respondent might reasonably have made during that period.

152) It is not necessary to identify what adjustments might reasonably have been made in the longer term had the Claimant returned to his existing role or accepted redeployment, since the Claimant was unwilling to pursue either option and had not identified a reasonable alternative way forward. We are satisfied that the Respondent would have been receptive to most, if not all, of the adjustments referred to above, except of course that once the Claimant moved from the phased return to a more sustained return, the Respondent would reasonably have expected him to take on substantive duties and for his work output to have increased. Depending upon the role and to what extent it was customer facing, we are satisfied that the Respondent would have given careful consideration to options for home working. In the final analysis, unless and until a redeployment opportunity had been identified and agreed to by the Claimant, the Respondent cannot be said to have failed in its duty to make adjustments.

153) In our judgement, it was not reasonable to expect the Respondent to create a new role for the Claimant. We endorse the Respondent's approach, which was to identify potentially suitable vacancies for the Claimant and to then look at what adjustments might reasonably be implemented in respect of them if they were of interest in principle to the Claimant. The Respondent cannot be criticised in respect of the Claimant's failure to engage with them in that regard; it was not for want of trying on their part. The notes of the three meetings with Mr Keaveney evidence that he went to some lengths to facilitate a supportive discussion

with the Claimant in which the Claimant might feel confident to express his views. Regrettably, much of the Claimant's focus was his perception of what had happened in the past rather than on how the situation might move forward. As we have observed already, the Claimant's unfounded perception of events was an insurmountable obstacle to his return. The Claimant does not himself identify what any created role might have comprised. He has made vague reference to a Grade 10 role, albeit we are not satisfied any such role existed or that it would have been reasonable to require the Respondent to redeploy the Claimant into a role significantly above his existing Grade and which would ordinarily involve much greater responsibilities, including management of others. The Claimant had no demonstrable skills or experience at Grade 10 and, in our judgement, his mental health issues would have been aggravated by being redeployed to such a responsible position. The Claimant's suggestion in that regard runs entirely contrary to the tenor of the other proposed adjustments which are focused on reduced hours, responsibilities, targets, outputs etc.

154) The Claimant suggests that the Respondent should have applied to Access to Work for support in returning the Claimant to work. This was not something he proposed at the time and he does not identify what support they might have provided in addition to the adjustments that were made or which he identifies should have been made. We cannot identify that Access to Work would have brought anything further to bear, over and above the adjustments that had been identified and implemented in terms of supporting and maintaining the Claimant 's return to work.

155) The Claimant considers that he should have been shortlisted for the Housing Register Officer role (Issue 24.18). We cannot identify how this would have addressed the disadvantages identified in paragraph 148 above. The Claimant's section 20/21 EqA 2010 claim does not include any complaint that the Respondent's recruitment and promotion practices placed him at a disadvantage or that adjustments should have been made to address such disadvantage, for example automatically short-listing those with disabilities, including the Claimant's disability. Shortlisting the Claimant as he contends would not have addressed any disadvantages he experienced because he was expected to fulfil the full duties of any role, work normal hours and work in the normal office environment. Nor would it have any bearing upon the application of any attendance management trigger points.

156) Notwithstanding the Claimant's unproven assertions in relation to Ms Gilson, we have found that the Redeployment team did communicate with the Claimant in good time. We do not consider that they needed to adjust their response times or otherwise how they communicated with the Claimant. The Hearing bundle evidences a good standard of communication between them.

157) The Managing Attendance policy is explicitly intended to help the Respondent's employees to be effective in their job and to enable any

issues they may be experiencing to be managed. In our judgement, the policy exists precisely in order to support the Respondent in discharging in statutory obligations to those with disabilities. It provides a structured framework within which discussions can take place as to the reasons for absence and how best to manage absence, including making reasonable adjustments for those who are disabled and keeping their cases under review. Without the policy and its trigger points, the risk is that the Respondent would fail to identify and appropriately manage those with disabilities on a timely basis or keep their cases under review. In our judgement, the trigger points and escalation of cases to a Second and then Final Review represents a reasonable and proportionate method of managing sickness absence. In any event, it is clear that adjustments were made by the Respondent at each stage of the process, with Review meetings being reconvened more than once. The First Review stage was relatively informal and appropriately supportive, comprising three meetings rather than just one meeting, over a period of four months. The Second Review stage was only commenced after the Claimant had been absent from work for nearly seven months, and not until the Respondent had first secured an Occupational Health report in relation to him. The Second Review stage comprised three meetings rather than just one meeting, over a period of three months. The Final Review stage was not commenced until the Claimant had been absent from work for approximately 11 months, with the first meeting of the Final Review stage not taking place until he had been absent for nearly 13 months. The Claimant himself stated that he was 100% happy to proceed to the Final Review stage, which was deferred and extended once he embarked upon the phased return to work. The minutes of Mr Keaveney's meetings with the Claimant show the lengths he went to find a solution that might avoid the Claimant's dismissal. From the point at which the Final Review stage was commenced it would be a further four months before the decision was finally taken to dismiss the Claimant. In our judgement, there was nothing further the Respondent could reasonably have been expected to have done by way of adjustment to the Managing Attendance policy and procedure.

158) For the same reasons why we conclude that the Respondent acted proportionately in dismissing the Claimant, we conclude that there were no further adjustments it ought reasonably to have made short of dismissing the Claimant in circumstances where he had been absent from work on sick leave for over 15 months and following his return on a phased return basis had been unable or unwilling to return to his substantive role or to another suitable alternative position. In short, there was nothing more that could reasonably be done to support his return to a substantive role.

Unfair Dismissal

159) The Claimant was continuously employed by the Respondent for more than two years and in those circumstances had the right not to be unfairly dismissed by it (section 95 of the Employment Rights Act 1996). Section 98(1) of the 1996 Act provides:

> In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show —
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

160) If a Respondent establishes a potentially fair reason for dismissal, Section 98(4) of the Employment Rights Act 1996 goes on to provide:

> … 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.

161) The first question then is whether the Respondent has established, on the balance of probabilities, that it dismissed the Claimant for a potentially fair reason. We are satisfied that it dismissed the Claimant because he was unable or unwilling to return to his substantive role following an extended period of sickness absence and was unable or unwilling to be redeployed into a suitable alternative role. This was a substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

162) The second question is whether the Respondent acted reasonably in treating it as sufficient reason for dismissing the Claimant. It is a large employer with significant administrative, including HR, resources at its disposal, albeit as a Local Authority is subject to significant financial constraints. For the same reasons we conclude that the Respondent discharged its duties in relation to the Claimant under section 20 of the Equality Act 2010 and has established that its decision to dismiss the Claimant was proportionate to its legitimate aims, in our judgement the Respondent acted reasonably in dismissing the Claimant. There was, as we have said already, nothing more it could reasonably do to support the Claimant's return to work. In our judgement, its decision to terminate the Claimant's employment was plainly within the band of reasonable responses, namely a decision that other employers in the Respondent's position could reasonably have arrived at. Indeed, we go as far to say that we cannot envisage many employers in the Respondent's position persevering any further or for as long as it did. The decision to terminate

the Claimant's employment was only reached following a thorough and significantly extended process during which the Claimant had been afforded every reasonable opportunity to put forward his views and suggestions, and indeed prevailed upon to give consideration to redeployment opportunities that might have avoided his dismissal.

163) For all the reasons set out above, the Claimant's complaints are not well-founded and his Claim shall be dismissed.

_____
Employment Judge Tynan

Date: 24 April 2023

Sent to the parties on: 12 May 2023

GDJ
For the Tribunal Office.