EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
X	AND	University Hospital Southampton NHS Foundation Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT SOUTHAMPTON **ON** 29 November to 9 December 2021
(last day the parties attended 6 December 2021)

EMPLOYMENT JUDGE Gray **MEMBERS – Mr Flanagan & Mr Ruddick**

Representation

For the Claimant: **In person**
For the Respondent: **Ms B Criddle (Counsel)**

RESERVED JUDGMENT ON LIABILITY ONLY

The unanimous judgment of the tribunal is that:

- **the Claimant's complaints of unfair dismissal, indirect disability discrimination, discrimination arising from disability and for breach of the duty to make reasonable adjustments, all fail and are dismissed.**

REASONS

Background of the claim and this hearing

1. By claim form issued on the 19 April 2018, the Claimant makes complaints of unfair dismissal and disability discrimination.

2. It is accepted that the Claimant is a disabled person by reason of depression and anxiety at times material to this claim. The Claimant claims that he was unfairly dismissed and subjected to disability discrimination (indirect, arising from and for a breach of the duty to make reasonable adjustments).

3. The Respondent asserts the dismissal was fair for reason of capability and denies any discrimination.

4. With an ACAS certificate dated the 8 December 2017 to 22 January 2018 and a dismissal date of 21 December 2017, no time limit jurisdictional issues are raised in this claim relevant to the dismissal and complaints about the dismissal. However, the complaint for certain reasonable adjustments is potentially out of time (the parties referring to these being relevant in September to November 2016).

5. This claim was listed for a nine-day in person final hearing to deal with liability only. We would observe here that we appreciate the professional conduct shown by the parties during the hearing which included reflection back to some distressing recollections for the Claimant.

6. We were provided with hard copies of the following:

    6.1 The Claimant's witness statement and those of two supporting witnesses, Mr Lear and Dr Kelpie. Dr Kelpie did not attend this hearing, and it was confirmed that his evidence would therefore be given less weight than that of the witnesses who attended to give live evidence and be cross examined.

    6.2 The Respondent's five witness statements (see below).

    6.3 An agreed evidence Bundle – indexed with 637 pages.

    6.4 Respondent's Chronology and Cast List.

    6.5 Respondent's Reading list.

7. We were also provided electronic copies of the following:

    7.1 The agreed evidence Bundle of 637 pages.

    7.2 Additional Bundle Documents (pages 638 to 642). About these the Claimant initially objected to them being included, but after confirmation that he was relying upon such evidential matters as referred to in paragraph 15 (page 5) of his witness statement and the name of the other employee not being

disclosed, it was agreed they should be included. It was agreed that copies would be printed for the members and the evidence bundle for the witness table.

7.3 Witness Statements (the first five being in support of the Respondent):

7.3.1 Karen Grant ("KG")

7.3.2 Georgina Stanley ("GS")

7.3.3 Loretta Harrison ("LH")

7.3.4 Rachel Davies ("RD")

7.3.5 Stephen Hicks ("SH")

7.3.6 Claimant's and his supporting witness' statement (Mr Lear).

7.3.7 A statement from the Claimant's GP (not attending)

7.4 Agreed cast list.

7.5 Respondent's Chronology.

7.6 Joint Reading List (copies were also subsequently printed for the members). This had been agreed shortly before the hearing commenced.

7.7 A promotional video produced by the Health Services library of the Respondent which includes the Claimant, and which was submitted by the Claimant in evidence. It has a duration of approximately three minutes and the Respondent did not object to us watching it, but asserts it has no relevance to the matters we are to decide. This was viewed by the Tribunal panel as part of its reading.

8. This claim has a long case management and administrative history. There have been five case management preliminary hearings and an appeal to the Employment Appeals Tribunal.

9. There was a case management hearing before Employment Judge Gray on the 11 December 2020 in person. It was listed to "… consider and make the necessary case management orders in the case and consider what adjustments are needed for the hearing.". At that hearing the issues were confirmed with the parties and the adjustments the Claimant needed for this hearing discussed and agreed.

10. Most recently there was a Case Management Preliminary Hearing conducted by telephone before Employment Judge Midgley on 26 October 2021. The Claimant was unable to attend that hearing (being unable to take a flight back to the UK for health reasons), so the observations about the list of issues made by Employment Judge Midgley at that hearing were discussed with the parties at the start of this final hearing.

11. When confirming the documents and the issues a matter arose as to the witnesses the Claimant was expecting to attend. The Claimant submitted that Employment Judge Dawson at the preliminary hearing before him had said that Ms Rogers and Mr Evans are expected to attend as witnesses on behalf of the Respondent.

12. The Case Management Order of Employment Judge Dawson was reviewed (see pages 51 to 64 and in particular page 59, paragraph 14) and it was noted that it does not say this. It says Mr Evans is no longer employed by the Respondent.

13. After careful consideration of the issues, it was noted that these witnesses did not appear directly relevant to the matters we were to decide. We noted for example that Mr Hicks dismissed the Claimant (which makes up the majority of the Claimant's complaints) and he is attending.

Timetable and adjustments for this hearing

14. The hearing process was carefully and fully explained to the parties. It was agreed that the time at this final hearing would be used as follows (based on that previously agreed at the case management preliminary hearing before Employment Judge Gray):

Day 1	Tribunal reading and preliminary matters
Day 2 and 3	Claimant's evidence
Day 4 to 6	Respondent's evidence
Day 7	Closing submissions
	Tribunal deliberations
Day 8	Tribunal deliberations
Day 9	Judgment
	Case management to deal with determination of remedy if appropriate

15. As already recorded the Claimant is a disabled person by reason of depression and anxiety. To assist the Claimant in managing the impact of his disability at this hearing, it was agreed that he may need to take a break at least every hour. It was agreed he would indicate when a break was required if he felt unable to continue for up to an hour or if he was able to continue for more than an hour. The Claimant had made a sign that he could hold up when he needed to pause the hearing and take a break.

16. Throughout the hearing the Claimant was able to take breaks as and when he needed, including short breaks to reflect emotion of revisiting distressing incidents.

17. It was also understood that the Claimant was able to use a Tribunal waiting room for himself when not in the hearing.

18. The Claimant also requested that we provide confirmation of the format of each day of the hearing the day before. This was accommodated, with the structure and timings of each day being agreed the day before. This resulted in the Claimant's

evidence concluding on day two, his supporting witness in the morning of day three and then the Respondent's five witnesses in each of the morning and afternoons of the remainder of day three to the conclusion of day five. It was agreed for closing submissions to be presented on the morning of day six, and the format of those was discussed and agreed with the parties.

19. It was therefore possible to conclude the evidence and submissions by just after midday on day six, putting us in effect one day ahead of the previously anticipated timetable.

20. The parties had been asked at the end of day five to consider what format of judgment would assist them and the differences between oral and reserved judgments were explained. The parties were asked to confirm their position when we resumed on day six.

21. After closing submissions were concluded on day six the parties were asked for their submissions on the format for the delivery of the decision we were to make, potentially an oral judgment Wednesday afternoon (on day eight), or a reserved judgment.

22. The Respondent confirmed that it would want the judgment as soon as possible, so sought an oral judgment.

23. The Claimant confirmed that he would prefer written reasons to give him something to read and understand. He also noted that he had a hospital appointment on Wednesday (day eight).

24. After a short adjournment the panel confirmed that it would reserve its decision, this being proportionate, in line with the overriding objective and to assist the Claimant in being able to understand the judgment reached.

The complaints and the issues

25. The complaints and the issues as to liability have been agreed by the parties and were set out by Employment Judge Gray in his case management summary (see pages 72 to 74 of the bundle) based on those that were agreed by Employment Judge Gardiner and Employment Judge Dawson in their respective case management preliminary hearings:

Unfair dismissal – S.98 Employment Rights Act 1996

1. What was the reason for the claimant's dismissal (s. 98(1)(a) of the ERA)? (The Respondent asserts capability (ill health)).

2. Was that a potentially fair reason for dismissal (s.98(1)(b) of the ERA)?

3. Was the dismissal procedurally and substantively within the range of reasonable responses?

4. If the dismissal was procedurally unfair, would the claimant have been dismissed in any event if a fair procedure had been adopted? If so, by what proportion should any award be reduced as a result?

5. Did the Respondent unreasonably fail to follow the ACAS Code of practice on Disciplinary and Grievance Procedures by:

a. Not arranging a formal meeting to discuss the grievance (at stage one);

b. Not arranging a formal meeting to discuss the grievance without unreasonable delay (at stage two); and

c. Not hearing the appeal without unreasonable delay (at appeal).

Disability - The Respondent has confirmed that it accepts the Claimant was disabled by way of depression and anxiety at the relevant times.

Indirect disability discrimination – s.19 Equality Act 2010

6. Was the Claimant subject to the following provision, criteria or practice?

• The attendance management policy

7. If so, does the Respondent apply that PCP to staff who do not share the Claimant's disability?

8. If so, does or would the operation of the PCP put staff who share the Claimant's disability at a particular disadvantage (being dismissed), when compared with staff who do not share the Claimant's disability?

9. If so, does or would the operation of the PCP put the Claimant at that particular disadvantage (being dismissed)?

10. If so, was the PCP a proportionate means of achieving a legitimate aim? The Respondent relies on the following legitimate aims:

• To manage employee absence consistently in order to improve attendance;

• To ensure adequate staffing levels;

• To ensure a stable workforce; and

• To reduce the financial impact of employee sickness absence.

Discrimination arising from disability – s.15 Equality Act 2010

11. Was the claimant subject to the following unfavourable treatment:

• dismissal

12. If so, did this arise in consequence of his disability? The Claimant relies on his sickness absence.

13. If so, were the Respondent's actions a proportionate means of achieving a legitimate aim? The Respondent relies on the following legitimate aims:

• To manage employee absence consistently in order to improve attendance;

• To ensure adequate staffing levels;

- To ensure a stable workforce; and
- To reduce the financial impact of employee sickness absence.

Failure to Make Reasonable Adjustments – s.21 Equality Act 2010

14. Was the Claimant subject to a provision, criterion or practice which placed the Claimant at a substantial disadvantage in comparison to non-disabled colleagues? The Claimant is to identify the provision, criterion or practice and the extent of the substantial disadvantage caused by the application of that provision, criterion or practice.

15. If so, did the Respondent fail to comply with its duty to make reasonable adjustments for the Claimant by:

a) Failing to redeploy him in or around September 2016;

b) Failing to adjust the grievance procedure to enable the Claimant to be considered for redeployment when his stage one grievance was being considered in October / November 2016;

c) Postponing any absence review / management process until the Claimant was fit to return to work, and thereby continuing to employ the Claimant.

16. The Respondent contends that any failure to comply with a duty to make reasonable adjustments in September 2016 or in October/November 2016 is time barred and it would not be just and equitable to extend the primary time limit to enable those claims to be considered on their merits.

Then from the case management order of Employment Judge Dawson:

“10 - Mr X identified the following provisions criteria or practices and in respect of all of them the respondent was content that they could properly be identified from the pleadings and did not need further clarification.

a. The 1st PCP was that Mr X could be asked to do different things by different people which led to an overload of work. Mr X told me that on occasions that exacerbated his anxiety (and his asthma). The reasonable adjustments which he contended was required as a result was particularly his redeployment.

b. The 2nd PCP was that there was a lack of supportive line management. That would amount to a practice of the respondent and the claimant says that, again, exacerbated his anxiety and asthma. In this respect the claimant asserted that the reasonable adjustments would have been to deploy him elsewhere but also for the respondent to complete a fair grievance procedure. A reasonable adjustment of completing a fair grievance procedure does not appear within paragraph 5 of the order of Employment Judge Gardiner but does appear at paragraph 4.2.8 of the Grounds of Complaint.

c. The 3rd PCP was that there was no plan to help the claimant in the work environment he was in, that he was always required to work out his own way forward. Again, he stated that on occasions that exacerbated his anxiety and

asthma. In some respects, this PCP is simply a subset of the lack of supportive line management.

d. The 4th PCP was that Mr Evans was appointed as the claimant's line manager, or putting the point another way, the practice complained of is that the claimant was required to report to Mr Evans as his line manager. The claimant's case is that put him at a disadvantage because it increased his anxiety and stress and the reasonable adjustment would have been to redeploy him.

e. The 5th PCP was that the Employment Relations Department of the respondent did not talk to employees before processes were engaged. The claimant says that put him at a disadvantage because of his depression and anxiety. The reasonable adjustment which the claimant contends for was for redeployment to be considered before stage 2 of the grievance process and, therefore, falls within paragraph 4.2.2 of the Grounds of Complaint.

11. The claimant was asked to clarify which roles he would have accepted redeployment into and stated it would have been any role which required a lesser skill set than the emergency department."

26. The agreed issues were discussed with the parties at the start of the hearing. This included discussing with them the observations about the issues as raised by Employment Judge Midgley at the most recent case management preliminary hearing. From those discussions with the parties the following was agreed and noted:

26.1 The reason for dismissal, being capability as asserted by the Respondent, is not in dispute.

26.2 Capability is a potentially fair reason.

26.3 The arguments about the fairness of the dismissal focus on procedural fairness. Should the Claimant have been redeployed as an alternative to dismissal? Also, was the dismissal substantively unfair on the grounds that the Respondent had failed to make reasonable adjustments and/or treated the Claimant unfavourably as a consequence of something arising from his disability, and/or because the decision to dismiss was tainted by indirect discrimination.

26.4 That the ACAS code was breached when dealing with the Claimant's grievance is not accepted by the Respondent. It asserts that delay in the process was caused by the Claimant's health and requests to postpone, as well as the Claimant objecting to the first person identified to hear the appeal.

26.5 The Claimant does not dispute the Respondent's asserted legitimate aim and business needs against the complaints of indirect discrimination and discrimination arising from disability.

26.6 In respect of the asserted Provisions, Criterions and Practices (PCP)s these are in dispute. The Claimant will need to prove the PCPs, for example that he could be asked to do anything by anyone (he asserted that this was part of his contract / job description as a Health Care Assistant) and that there was a PCP of unsupportive management.

26.7 The Claimant will need to evidence the substantial disadvantage in comparison to non-disabled colleagues for any proven PCPs, and that the Respondent knew about it or had constructive knowledge of it. Further, that the proposed reasonable adjustments could alleviate any evidenced disadvantage.

26.8 In respect of the 4th alleged PCP, the Claimant confirmed that he does assert (as noted by Employment Judge Midgley) that changing his line manager or permitting him to report to a different individual would remove the asserted disadvantage (being increased anxiety and stress).

26.9 About the 5th alleged PCP that the Claimant asserts, he confirmed that he also argues that there should be a designated HR person to support the employee.

The Facts

27. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after considering and listening to the factual and legal submissions made by and on behalf of the respective parties.

28. About this case and our fact find we observe that there was little factual dispute between the parties on relevant matters.

29. In broad terms looking at matters in overview, the Claimant asserts that the Respondent should have done more to assist him sooner, as he asserted in his closing submissions, they should have heard his voice and enquired as to his wellbeing more. This is inviting us to look at what was communicated/documented at the time and consider if it would have been reasonable for the Respondent to do more to assist the Claimant at that time.

30. The Respondent on the other hand says it did act reasonably, responding to what was communicated to them and understood at the time.

31. With this dynamic we are assisted in determining what was known and understood at the relevant time by the contemporaneous documents, particularly as memories of matters four to five years ago are likely to have faded.

32. The Claimant commences his employment on the 13 May 2013 (see page 76). He was employed in a role as a full time Band 2 Health Care Assistant in Trauma and Orthopaedics (“T&O”) (see paragraph 2 of the Claimant’s witness statement).

33. It is not in dispute that the Claimant is doing well in the role as in July 2014 he is awarded an Inspirational Employee Award for excellent service towards patients, their families, and colleagues (see page 106). The Claimant was working to increase his skills and says that the T&O Matron and Emergency Department Matron seconded him to complete a Vocational Nursing Pathway. The Claimant says this led to him spending all his spare time in the Health Services Library and accepting a role in its promotional video.

34. The Claimant requested and transferred internally into a vacancy within the Emergency Department ("ED") around August 2014. He agreed in cross examination that it was not a redeployment.

35. The Claimant describes in paragraph 7 of his witness statement … "Although most Senior Nurses and Doctors were approachable there were the ones that were not. On any shift an HCA could be approached by any of the 4 consultants, 8 doctors, 20 staff Nurses and 6 HCAS to help out where needed. I became very versatile. This meant I could be approached by anyone of them at any time.".

36. The Claimant then describes at paragraph 8 of his statement… "Over the course of ED double shift, I could be asked to attend the approximate needs of between 150 -200 patients. My job description was not a general HCA description as the Respondent states in their ET3, ED is a speciality group of the medical spectrum and includes Emergency, Medical, Minor Injuries, Phlebotomy, Surgical, Trauma, Orthopaedics, Resuscitation [and] Paediatrics which all requiring different skill development.".

37. The Claimant's job description is at pages 79 and 80 of the agreed bundle. It notes the job roles main purpose is … "To assist in the provision of individualised care, under the supervision of the qualified nurse and others in the Health Care Professional team [and] … To work in a collaborative and co-operative manner, and to recognise and respect their particular contribution within the care team". Also, that the … "Key Working Relationships: Ward Staff, Admin & Clerical Staff, Therapy Staff, Medical Staff". The job description also sets out the General Duties expected (see page 79). In addition to those the Claimant clarified in oral evidence that he was also approved to do cannulation. He described it as an acquired skill, whereas KG confirmed in cross examination that it was a taught competency. What is not in dispute is the Claimant is able to do it.

38. As KG details in her witness evidence at paragraphs 6 and 7:

> "6 The job description for Band 2 Healthcare Assistants in the Emergency Department (X's role) is at pages 79 to 80. The role is essentially to support the registered nurses in delivering care to patients. In practice they are allocated to a specific section of the department (akin to a ward) for each shift, for example, Resus, Minor Injuries, Pitstop or the Clinical Decisions Unit, and would report to the nurse in charge of that section and the nurse in charge of the shift. Staff could be asked to move to a different area, either temporarily or for the rest of their shift if there was a need because the nature of the service required flexibility, but it is not the case that X (or any Healthcare Assistant) could be asked to do anything by anyone at any time, as he has suggested.

7 As day to day supervision was undertaken by all of the Band 6 and Band 7 nurses (as they would all be in charge of each section / the shift from time to time), staffing issues were discussed and handed over between them as appropriate and necessary, to ensure that they could be properly managed and there was always someone available to discuss any issues with. The senior nurses did an excellent job of managing staffing issues within the department on a day to day basis and issues were generally only escalated to me if there was a particular problem."

39. We accept the evidence of KG about the HCA role.

40. The patient numbers the Claimant says he could be asked to attend to (between 150 to 200 over the course of a double shift) were disputed by the Respondent.

41. In oral evidence the Claimant acknowledged to hit the numbers he suggests he would have to just be doing observations (and approximately 20 patients an hour), as other things would take longer. He confirmed however that his working shift did not consist of just observations. The Claimant was therefore not definitive in his evidence about this with actual examples.

42. KG on the other hand explained in oral evidence that she started as Matron on 30 May 2016 and at that time average attendance was 280 patients per day and on a big day about 300. 20% of those would be children and young people and of the remaining 80%, 40% would be minor injuries, and the remaining 40% would be adults and elderly through ED pitstop where they have assessment and then go to an adults assessment room, and if not admission go to CDU 1 or CDU 2. KG stated that it was unlikely that the Claimant would deal with 150 to 200 patients himself.

43. As to KG's assessment of how many patients a HCA would care for directly, she confirmed that it depends on where they are working. In the 6 bedded area, then it would be 6 or 7 supporting the senior team in delivering care. In majors there is a 20 bedded area and overcrowding was a problem, so they would have patients in a corridor getting up to 5 or 6 patients there. The turnaround would be different at different times. A HCA would have input on care over a 7.5-hour shift, with meaningful care for 10 to 15 patients. Small multiple tasks can also be asked to be done such as cleaning trollies and equipment, managing linen, helping patients with the toilet, and collecting urine samples.

44. We accept the description of the working environment given by KG.

45. Clearly though the ED is a front-line and busy area of the Hospital. The Hospital is also a Major Trauma Centre for the region, and KG confirmed in oral evidence that 1 to 2% of the patients were from that responsibility.

46. As Mr Lear refers in his witness statement (at paragraph 115) … "Without fail, X would politely introduce himself, gain consent from patients, explain his actions and seek confirmation for any actions he was unsure of. He treated everyone around him, staff, patients and relatives with respect and dignity. I found that at

times under pressure he could feel the strain, however never in a way that concerned me. I believe nursing to be stressful and this can happen to any individual at any given time. I also believe that a great percentage of the Emergency Department's nursing staff acted in a supportive manner towards X.".

47. In cross examination Mr Lear confirmed that he thought the ED was stressful but manageable and that you could say that it was like any other ED in the UK. He confirmed about the management that he had a lot of time for Mrs Stubbington and he thought she was great, but he was not convinced by Mr Evans, he didn't think he was a particularly good influence but he did not have knowledge of any direct incidents. He confirmed in oral evidence that he did not raise concerns about the Claimant or his treatment.

48. The Claimant does though appear to be initially performing well in the ED. As is noted in an email dated 13 May 2015 about the Claimant (see page 108) … "Today I worked with X [the Claimant] in Pitstop and he was fantastic. He was constantly sorting out patients, aware of who was going where and who needed what, and all the time continually reassuring patients and relatives. I managed to help him get his cannulation signed off and his practice was excellent.".

49. Within a record of an informal conversation dated 21 December 2015 between the Claimant and Ms Stubbington (his mentor) (see page 124) it records that the Claimant was doing okay and loves working in the ED. It also notes him informing that he is under his GP's care for anxiousness and that the ED may not be the best environment for him with a health issue such as anxiety and that they would need to be keeping an eye on him regarding his health. Ms Stubbington explained… "that if required, for a temporary time, a move to Amu, for example may be a good thing, if this were to assist with his current health issue.".

50. The record also records that issues from the 21 December 2015 concerning a confrontation between the Claimant and Charge Nurse Evans and Staff Nurse Clark were briefly discussed and that the Claimant would provide his account of what happened after his Christmas break.

51. The incident on the 21 December 2015 is the subject of an informal discussion note from Charge Nurse Evans (see pages 125 to 130). The Claimant provides his position in an email dated 6 January 2016 (see page 132). The Claimant says he thinks Mr Evans has made a mistake. The email also attached a "recent Reflective and Witness Statement from Mr David Lear", which it was confirmed in cross examination of Mr Lear formed the basis of the statement he submitted to this Tribunal.

52. This culminates on the 15 February 2016 with an informal meeting between the Claimant, Craig Evans and Jo-anne Stubbington to discuss a number of issues (see page 139). Issues about the Claimant's behaviour are raised, and it is noted that the Claimant agrees to an Occupational Health ("OH") review about current anxiety issues, raising the question of whether they are an influence on his behaviour. It notes that the Claimant does not wish to cannulate at present as he feels this impacts on his stress levels. It records that the Claimant was asked if he

needed a break in his learning, as it may be adding to his stress/anxiety levels. It is noted that the Claimant is keen to continue but will consider his options.

53. It is on the 15 February 2016 that the Claimant starts a period of sickness absence with work related stress (see page 140).

54. By email dated 16 February 2016 (see pages 142 to 143) the Claimant complains about Mr Evans and the accusations Mr Evans has raised with the Claimant at the meeting on the 15 February 2016.

55. On the 17 February 2016 the Claimant is referred to OH (see pages 145 to 147 of the bundle).

56. It can be seen from the OH referral at page 146 of the bundle that the Claimant has had four episodes of sickness as follows:

> "19/06/2015 - Exhaustion/Emotionally Drained (1 day)
> 09/07/2015 - Cough/Chest Infection (1 day)
> 04/10/2015 - 11/10/2015 Rt Wrist Injury (repetitive) {8 days)
> 15/02/2015 - current - Work related stress"

57. It notes that the Claimant is … "currently being managed for his conduct with staff and patients in the department. He has on a number of occasions shouted and become verbally aggressive towards staff, and has had a couple of similar episodes with patients. X appears to be unaware that he is shouting and it has been noted by staff in the ED and in the education team at UHS that he sometimes does not appear to have insight into appropriate behaviours such as talking to one of the education team on the phone at midnight to ask for a statement.". Also, … "X admits that he often struggles to understand the hierarchy and management structure within the department and struggles to understand when the team dynamic changes when for example the department becomes very busy.". Also … "It has been discussed with X that if given a particular task to work and concentrate on, he will often do it very well and to the best of his ability. However he dislikes being interrupted for example if he is asked to do something else if another more urgent task is to come up. X admits that at times this frustrates him.".

58. By letter dated 1 March 2016 the OH advice about the Claimant is provided (see page 148). It notes that the Claimant is currently absent due to symptoms of anxiety and depression which have been exacerbated by recent events at work. It notes he is temporarily unfit for work. It notes the Claimant has agreed to participate in mediation in order to resolve matters with his line manager (Mr Evans). OH confirms this would be helpful and that it should take place prior to his return to work. It notes that the Claimant says he would like to try to return to his normal hours and duties, and OH is happy for him to do so. We note that no reasonable adjustments are suggested at this stage.

59. Then on the 22 March 2016 there is a follow up to the OH advice (see page 150) and it notes that the Claimant is anxious about the facilitated meeting arranged for the 23 March 2016, however as long as the work related problems/issues are resolved the Claimant is likely to be fit to return to his normal hours and duties

once his medical certificate expires. We note that no reasonable adjustments are suggested at this stage.

60. On the 23 March 2016 the Facilitated meeting takes place between the Claimant and Mr Evans. The meeting summary (at page 151) records that the Claimant and Mr Evans agree be more forgiving of each other's behaviour where possible. It suggests that an understanding has been reached and a positive way forward agreed.

61. On the 30 March 2016 the Claimant returns to work (see page 154).

62. Between the 4 May 2016 and the 21 May 2016, the Claimant is off work with pneumonia (see page 156).

63. During the cross examination of the Claimant he was referred to a return to work record dated 6 June 2016 (page 157) and that it notes the Claimant expressing that his life appears to be improving socially and at work.

64. From the 8 July 2016 the Claimant is then off work with asthma (see page 176).

65. By letter dated 26 July 2016 OH provide advice following the Claimant's self-referral (see page 171). It records that the Claimant informs them … "that things are much better at work, and we have discussed his coping mechanisms and responses to other members of staff. He states that he feels well supported by senior staff". The Claimant confirmed in cross examination that overall, he did feel the department was supporting him well. At this point what the Claimant is recorded as communicating is inconsistent with there being unsupportive management in place.

66. The Claimant is also referred to OH by Mr Evans (see pages 175 to 177). In oral evidence the Claimant conveyed that he had a concern that boxes g ("injury work related") and h ("Disability under DDA") were not ticked by Mr Evans as being advice required. We note though that that these are not matters he raises in his own self-referral.

67. By letter dated 26 July 2016 the Claimant is invited to a "Rescheduled Formal Attendance Review" (see page 172). This letter contains a typographical error referring to a meeting being arranged for the 26 August, when it should say July. The Claimant raises this by email dated 3 August 2016 (see page 180).

68. The meeting then takes place on the 10 August 2016 and the Claimant is represented by his union the RCN and the outcome is he is issued a first written warning for absence. This is all confirmed by letter dated 17 August 2016 (see pages 191 to 192). The letter confirms the Claimant's right of appeal. The Claimant does not exercise that right. So as far as the Respondent is concerned the Claimant has accepted the warning.

69. It is not in dispute that the Respondent has a Managing Attendance Policy in place (an extract is provided at pages 94 to 104 of the agreed bundle).

70. LH gives evidence about this policy in her undisputed evidence at paragraphs 21 and 22 of her witness statement:

> "21 The Trust's sickness absence management policy is specifically drafted to manage periods of short and long-term sickness absence and in the case of long-term absence, aims to facilitate, if possible, an employee's return to work. The termination of employment is a last resort only in cases where there is no possible return to work for the employee within the Trust in the foreseeable future. It is critical, particularly in a healthcare organisation, that absence is managed effectively and consistently. In my experience, actively managing an employee's sickness absence improves their chances of returning to work as it allows the Trust to support and facilitate this return. Management of sickness absence is also necessary to ensure that staffing levels are maintained and that there is stability amongst the workforce. During an employee's sickness absence, to ensure appropriate staffing levels, the Trust has to engage agency or bank staff at additional cost to the organisation and is unable to make long term plans about the staffing or funding for the department.
>
> 22 Absence costs the NHS approximately £1.7 billion a year and the University Hospital Trust approximately £9 million plus. Staff shortages can also impact upon the service the Trust can provide due to low staffing levels and can increase patient waiting times, therefore it is important for absence to monitored and managed to ensure the employees are being looked after and address any issues that are preventing them from being at work short or long term."

71. We note that the policy provides for managing disability (see page 99) stating … "It should not be assumed that employees who have a disability will have more sickness absence from work than any other employee. For the most part disabled employees and non-disabled employees can be managed in the same way, through the application of the principles of best practice outlined in this policy. However, there will inevitably be times when an employee that has a disability will have particular needs relating to their disability which if not met might prevent them working to their full potential".

72. It is not in dispute that there is a stepped warning process applied to managing absence and the Claimant and his union representatives were engaged in that process at each of the stages applied to him, save for the dismissal hearing as by that point the Claimant had dismissed his union's services. It is not in dispute that the Claimant was aware of the risk of dismissal due to absence.

73. Advice from OH is confirmed in a letter dated 15 August 2016 (pages 188 to 189). It notes about the Claimant's stress absence that … "One episode is related to a long term underlying health condition which was exacerbated by events at work which have been resolved.". It confirms that the Claimant is fit to return on phased return. The letter also notes … "In my opinion I do not feel there are any workplace adjustments that are required in the long term and redeployment on health grounds is not necessary.".

74. The Claimant returns to work on the 17 August 2016.

75. It is then on the 25 September 2016 that there is an incident between the Claimant and Nikki Taylor. The Claimant is allegedly rude and challenging (see pages 197 to 198). In oral evidence the Claimant asserted mitigation of the stress of job but didn't assert the incident did not happen.

76. Then on the 28 September 2016 there is an incident involving alleged failure by the Claimant to flush a cannula (see pages 201 to 212). About this the Claimant does assert it didn't happen but if it did then it was sabotage.

77. We have been referred to meeting notes in the bundle (at pages 207 to 208) that record a meeting with the Claimant on the 29 September 2016 at 07:30 about the cannulation incident. It records … "The conversation then diverted to the management structured process in dealing with either conduct or sickness issues, it was again explained to X that policies are written, that both sickness and conduct issues are dealt with as per policy and that as a Band 7 mentor lead Craig is the person who needs to manage those areas of human resources, and not because Craig has a personal issues with you, X as an individual. X was asked about his mental health and he feels this is ok and that he is well currently, he feels generally well physically too since returning from sick leave. It was raised that X appeared paranoid, X became very agitated and his volume and tone of voice raised dramatically, by this remark. He rebuffed this comment, but then referred to an email that was sent, regarding his concerns at times by situations in the department that appears to see staff in huddles talking about others and X feels this isn't nice. X believes that this was a concern raised, not that he feels people are talking about him. On further conversation X then disclosed that he feels sad. X was offered for us to arrange an occupational health review, which he declined. It was repeatedly asked if X felt he was going to be happy to work tonight's night shift, due to the upset he has shown. X felt that he was going to be fine to attend for tonight's shift, however, it was agreed that he would not work in the Pit stop area of the department due to not being able to now cannulate. X was happy with this outcome.".

78. The Claimant does though self-refer to OH on the 29 September 2016 (see page 213). It records:

"X arrived in the department upset. He stated that he was accused of not flushing a cannula through when he set it up. He stated that he was sure that he did and was not initially happy to agree that he could have made a mistake, it has resulted in a conduct review.

He still feels that he is being 'picked on'. The regional union steward is looking at his case against his manager (who has now been promoted to a Band 8) and is discussing it with HR.

X had just finished his night shift and stated that he had several of the senior staff questioning him about his mental health and he was not comfortable speaking to them about it. He stated that he was feeling depressed, but he actually felt upset that people were treating him like this. Otherwise he was sleeping and eating well -

No suicidal thoughts or plans.

Alcohol, nil
Non smoker

The way forward discussed - he feels that it is probably time to look elsewhere for a job and move on. He took the recruitment and retention telephone number to contact.

The EAP number was also provided again so that he could access support.

He stated that he has been given a written warning for his sickness absence due to the episodes of stress and pneumonia this year. A management referral may be sent in.

Outcome:
• Fit to continue at work
• To discuss the way forward with his union representative, EAP and recruitment/retention.
• To return to OH if further advice/support required."

79. We note that it records the Claimant saying it is time to look elsewhere for a job. It notes that he is fit to continue at work. There is no flag raised of any reasonable adjustments being needed, such as redeployment or a change of line manager. The Claimant confirmed in cross examination that he did seek alternative employment and had a couple of interviews (this can also be seen from the telephone record at page 254).

80. The Claimant accepted in cross examination that by this point he had not raised any complaints about Mr Evans to any other manager since the facilitated meeting.

81. It is around this time that Mr Evans ceases to be the Claimant's line manager (see the email dated 19 October 2016 at page 216).

82. It is then by email dated 17 October 2016 that the Claimant complains to KG that he thinks that he was observed when he was eating by SCN Case and CN Earley (see pages 222 to 223). There is no complaint about Mr Evans. KG addresses this matter in paragraphs 23 and 24 of her witness statement:

"23 I received an email from X on 17 October 2016 whereby he felt his sandwich had been scrutinised by two other members of staff (p222 - 223). I agreed to look into this and intended to speak to the staff that had been named, but then the matters below took over.

24 On 18 October 2016 X did not attend work for his shift. Jo-Anne took advice from the Trust's HR department about how to handle this matter and was advised that it should be treated as a conduct concern (p220). During a telephone conversation with Jo-Anne that evening, X explained that he had got his shifts confused and part of the reason why he did not attend work was due to a problem with staff and fraud, which he had contacted me about directly. I believe this was a reference to the email he had sent me about his sandwich."

83. On the 18 October 2016 the Claimant does not attend shift (see pages 218 to 220). The Claimant confirmed in cross examination that he didn't turn up as he had misread his rota.

84. Then on the 19 October 2016 there is a meeting between the Claimant, Jo-anne Stubbington, Karen Ray and KG about why he did not attend for his shift (see pages 224 to 233). The Claimant agreed in cross examination that it was fair to have a meeting to find out why he had not attended.

85. The Claimant was asked about the meeting notes in cross examination and did not challenge the accuracy of the content. As to what was intended by him hugging and kissing his colleagues at the end of the meeting (as recorded in the meeting notes at page 233) he confirmed that he had intended to convey friendlessness.

86. At the conclusion of the meeting a taxi is organised by the Respondent to ensure the Claimant gets home safely.

87. KG refers to this meeting at paragraphs 25 to 30 of her witness statement. From that we note paragraph 30 … "The meeting ended amicably with X giving us all hugs and kisses, and there was a general consensus that redeployment should be explored, although it was not completely clear that X wanted to be redeployed in light of his ongoing studies.".

88. KG was also cross examined about this meeting. She explained that her involvement was for the welfare of the Claimant and the staff undertaking the meeting.

89. KG was asked about what the notes record her saying about the management of the Claimant after the Claimant expresses that he is not comfortable with Mr Evans, which read (at page 228) … "KG I can see a trend between developing regarding your attitude towards your managers that approach you when questioning your conduct at work. You have told me you're not comfortable with Corinne Rogers, Craig Evans and Mark Case. The basics of working in a department like this you have to be contactable and when we cannot contact you this causes our senior team great worry as to your welfare.".

90. KG explained that this was the first raising of an issue with her and she had never been asked to provide the Claimant with a different line manager. KG confirmed that Mr Evans line managed a lot of other staff and she had not heard any other complaints. Her actions after the meeting would be to manage and support the Claimant regarding his health as he was off sick from there. Secondly to do a broader review as he raises concerns and establish if Mr Evans was appropriate or not. KG explained that if she has a member of staff telling her they are not comfortable then she takes that seriously to protect the Claimant and Mr Evans.

91. We note that after his clarification to KG, a grievance is then raised by the RCN on behalf of the Claimant, the Claimant remains on sick leave and as already noted, by this point Mr Evans had ceased to be the Claimant's line manager.

92. On the 20 October 2016 there is the commencement of long-term sickness absence by Claimant from which he does not return to work (see page 234). The initial fit note confirming him being signed as unfit for work is at page 600 of the bundle and states the condition as “Anxiety states”. The Claimant remains signed off until his dismissal, a period of 14 months.

93. By letter dated 20 October 2016 a grievance is raised by the RCN (the Claimant’s then union) on the Claimant’s behalf (pages 238 to 239):

“Re: Mr X – Grievance – Bullying and Harassment

I am writing on behalf of the above RCN member to raise a number of issues that our member would like investigated, as he feels subject to victimisation in the workplace.

Mr X does not feel that he is being treated with the standard of dignity and respect that the Trust promotes.

Mr X does not believe that the process for his sickness management was correctly followed:
• There was no occupational health input prior to the initial meeting date;
• Mr X has no recollection of ever being issued a verbal warning;
• Mr X did not receive the letter inviting him to the meeting of 26 July;
• Mr X was not spoken to regarding the meeting date as stated in C Evans letter;
• Mr X was invited to attend the sickness meeting whilst he was on sick leave.

In addition, Mr X refers to the following to substantiate his assertion that he is subject to bullying behaviours:
• 15 October - Mr X was eating his lunch when SCN Case and CN Earley 238 entered the staff room. Mr X felt that they then scrutinised the packaging of the sandwich he was eating, as he thinks that they were of the belief that he was eating a patient sandwich, which he was not. This incident left him feeling uncomfortable;
• Mr X believes he was falsely blamed for an incident regarding the flushing of a canula and octopus. Mr X believes he witnessed CN Case instructing a SN on what to write in their statement of the incident. Mr X believes that what SN Case informed him he had observed in the octopus was different, he mentioned that he had seen a few bubbles. Mr X believes that he was immediately apportioned the blame for the incident without full consideration of the facts;
• Mr X has been informed that there is to be a conduct review by his band 7 mentor Evans, but to date has heard nothing of the review. Mr X feels under undue scrutiny, as if someone is waiting for him to make a mistake, he feels under threat and does not feel supported;
• There are instances when Mr X feels he is not included as part of the team and feels excluded from conversations and friendly interactions;
• CN case has asked Mr X if he would consider leaving the Trust and working for Thornbury, this is not appropriate and made Mr X feel uncomfortable;
• CN Evans asked Mr X about his mental health in front of 4 other managers
• In May 2016 someone filled our members shoes with grease, for which he raised an AER.

I understand that Mr X was sent home from work on 19 October after attending work for a night shift. I am surprised and concerned that it was decided that he should be met at the commencement of his night shift, at a time when he was unable to contact his union for support and advice.

I look forward to hearing from you regarding a mutually convenient date to meet to discuss the above."

94. We note from this grievance that the Claimant is asserting that the sickness absence process has not been followed correctly (albeit we would note that the union were involved in representing the Claimant in connection with the first written warning and it was not appealed), and the Claimant asserts he feels bullied and unsupported. The Claimant accepted in cross examination that none of his complaints relate to Corrin Rogers or Jo-anne Stubbington.

95. We also note that the letter reads to suggest that it is the RCN union officer that wants to meet with the Respondent … "I look forward to hearing from you regarding a mutually convenient date to meet to discuss the above." The Claimant is after all signed off sick at this point. The letter also does not expressly say that it is expected that it will be handled under the formal grievance process, albeit the heading clearly suggests a grievance is being raised.

96. This letter is not treated as a formal grievance upon receipt. KG seeks HR advice on what to do and LH advises her on what to do (see the emails dated 27 October 2016 at pages 240 and 241). LH explains that it was inexperience with working in a unionised workplace that meant she did not recognise that a letter submitted by a union on behalf of one of its members could be a formal grievance. LH confirmed that it was not a policy that drove the decision to deal with the grievance in the way it initially was, it was her understanding of the document submitted.

97. As KG confirms in her witness evidence (paragraph 32) … "I sought support and advice from HR in relation to the letter and was advised that the appropriate process was for me to look into the matters raised and respond in writing (p240-241). Ordinarily I would have discussed the issues with X but he was off sick at the time and I was conscious of not doing anything that could impact upon his mental health. I responded to the complaint by letter dated 8 November 2016 (p243-245) based on the information I had gathered and explained that the Emergency Department was trying to support X as best we could.".

98. Then at paragraph 33 … "I spoke to X on the telephone on 22 November 2016. He would not tell me how he was but directed me to his GP and provided a further fit note. We discussed the possibility of redeployment as X said he no longer wished to work in the Emergency Department, so I agreed to speak to HR and update him on this (p251).".

99. The issues raised in the letter from the RCN are considered and investigated by KG and by letter dated 8 November 2016 she sends a response to the RCN (see pages 243 to 245).

100. KG was cross examined about her response and what appeared to be a difference of phrasing between the witness statement of Sister Taylor and the way KG describes the matter in her letter. KG confirmed that although there may have been a switching of the emphasis between asking for a sip of water and for a break, the focus for her was on the alleged conduct of the Claimant in response, the raising of voice and shouting by the Claimant. KG confirmed that in her view the communication from the Claimant was not acceptable.

101. By letter dated 23 November 2016 the RCN write to Karen Grant asking to meet to discuss the grievance and at such a meeting the Claimant would like to discuss redeployment options (see page 252).

102. By letter dated 12 December 2016 (page 260) the Claimant is invited to a formal absence review meeting. The 20 or 28 December 2016 are proposed.

103. By an email dated 14 December 2016 from the Claimant to KG (see page 262) the Claimant seeks disclosure of his personal data and refers to false perceptions of him. It does not focus on the actions of Mr Evans, his management of the Claimant, or redeployment. The Claimant says … "The reason why I am writing today is because I have been informed by the RCN of our tentative meeting on the 15th and or the 16th December 2016 as being cancelled. I would like to take this opportunity to again voice my concerns about personal perceptions which I believe form the basis of written and verbal bias of my character and the collection and storage of this data whilst working in the Emergency Department.".

104. By letter dated 16 December 2016 from the RCN (see page 266) it is clear that efforts have been made to arrange a mutually agreeable date to meet. It also states that … "the delaying of a meeting is causing Mr X considerable distress. Mr Xs GP has agreed that he will sign him as fit to return to work if he is to return to another department. Therefore the Trust delays are extending his sick leave unnecessarily and for the purposes of any management of Mr Xs sickness, I will be objecting to the period during which Mr X was waiting for a meeting to be agreed, being considered".

105. There is then a letter dated 19 December 2016 from Jenny Miller to the Claimant inviting him to formal absence review meeting on the 5 January 2016 (see page 271).

106. By letter of the same date (19 December 2016) (see page 272) from the RCN to the Claimant, the RCN updates on what is happening in trying to arrange the meetings. It also requests for the Claimant to be respectful and courteous when contacting the RCN Newbury team.

107. We were referred to an email dated 21 December 2016 (see page 274) from Loretta Harrison to the RCN setting out the misunderstanding about the status of the "grievance" and the grievance arrangements to be applied moving forward. It notes (at the 3rd bullet point) that the RCN letter will be taken as the formal grievance.

108. We then note by letter dated 22 December 2016 (see page 275) the RCN states … "My letter dated 20 October was clearly titled grievance, therefore should have been managed as such. As you stated in your email, the matters had already been discussed with X, therefore my letter was in fact stage 2 of the process. Trust policy states 'in circumstances where an employee perceives informal attempts have failed to produce a satisfactory solution, they may raise their concerns formally through the formal grievance procedure'.

109. It is not being expressed to the Respondent that the Respondent should start the process from stage 1. LH confirmed in oral evidence that there was never communication to say that the RCN letter of 20 October should have been dealt with under stage 1.

110. The email of the 21 December 2016 from LH to the RCN also says … "I note your comments about redeployment. If that is an agreeable outcome from the hearing and I am unable to say one way or another at this point in time whether this will be an agreeable outcome, I need to remind you should X not secure a redeployed role and redeployment fail following the 8 week period of redeployment, then X will either need to return to his current role or his employment may have to be terminated. I am only saying this so that you can advise X of possible outcomes.".

111. This redeployment process is set out in the Respondent's Managing Attendance Policy (see page 101 – paragraph 4.14). The Claimant confirmed in cross examination that he understood the redeployment risk, and this is also confirmed by him in his email to LH dated 23 December 2016 (see page 282). In cross examination he accepted that the managers should be really sure if redeployment was the right way forward.

112. By letter dated 4 January 2017 from Rebecca Long to the Claimant he is invited to a formal grievance meeting on the 18 January 2017 (see pages 283 to 284).

113. On the 5 January 2017 the second sickness absence management hearing takes place. The Claimant is represented by his RCN representative. The notes of the meeting are at pages 290 to 295 of the bundle.

114. At page 290 we see that it is noted that the RCN representative asserts if the grievance had been dealt with in a timely manner the Claimant would have been back to work by now. Then at page 291, as to what is needed to get the Claimant back to work, it is for the grievance outcome to be given, and that the Claimant would like to express his voice first at the grievance hearing before he returns to work. At the conclusion of the meeting the Claimant is given a final written warning for sickness absence.

115. This is all then confirmed by letter dated 25 January 2017 from Jo-anne Stubbington to the Claimant (see pages 311 to 312). The letter records … "I asked if there was anything else the department could do to help with your attendance and you stated that you would like to come back to work once your grievance had been heard and had an appointment with your GP on 9th January to discuss a phase return. You were contacted by telephone on 8th December 2016 asking if the department could refer you to Occupational Health and you had advised the

department that you had self-referred and did not need to be re-seen by the Occupational Health team again.".

116. It appears with reference to the RCN file notes at pages 305 and 306, and handwritten notes at pages 307 to 309 of the bundle that on the 17 January 2017 the grievance meeting is postponed in response to the RCN raising concerns, apparently linked to the Claimant's health. At page 309 it is noted the Claimant is not well enough to attend. In cross examination the Claimant accepted it was because of his health.

117. There is then a meeting on the 25 January 2017 between Respondent HR managers and the RCN about the Claimant (see page 310). There is agreement for the Claimant to be referred to Dr Smedley (of OH).

118. By letter dated the 27 January 2017 the Claimant through the RCN appeals against the final written warning (see pages 313 to 314). It suggests that the Claimant has not been supported by the Respondent despite it having knowledge of his anxiety, stress and depression. It suggests that … "The Royal College of Nursing would consider as a reasonable adjustment NOT progressing with the Absence Policy until our Member is sufficiently recovered to be able to return to work.". We note that redeployment or a change of line management is not being requested as a reasonable adjustment.

119. By email dated 2 February 2017 (see page 316) the Respondent records that the Claimant is severely unwell. This is then expanded on with more detail in an OH referral dated 4 February 2017 (see pages 318 to 320).

120. Advice is provided from OH by letter dated 21 February 2017 (see pages 321 to 322). It notes that the Claimant would potentially qualify as being disabled under the Equality Act. Further, that he is not fit for work at present and is likely to be absent for a significant period, becoming potentially fit to return in two to three months provided the current medical treatment gives rise to improvement. Also, it records that whether it is appropriate for the Claimant's future health to return to the ED will need to be considered when the Claimant is fit to return.

121. By letter dated 24 February 2017 the RCN requests for the grievance and sickness appeal processes be postponed until the Claimant is well enough to attend a meeting (see page 323).

122. It is then by email dated 20 March 2017 from the RCN that it is requested for a grievance hearing to be arranged (see page 339), subject to OH saying that he is well enough.

123. The advice from OH as confirmed in the letter dated 28 March 2017 says that the Claimant is not fit to return to work or to participate in any investigation of his grievance (see page 341). It states that it is likely to be at least two months before he will sufficiently improve to address the issues.

124. By letter dated 24 May 2017 it is the advice from OH that the Claimant is fit to participate in a grievance hearing with support and to delay further could pose a risk to his ongoing health and recovery (see page 347 to 348).

125. Arrangements are then made for the grievance hearing to be heard by GS (see email dated 13 June 2017, pages 350 to 351).

126. The intention, as confirmed by GS in supplemental oral evidence, was that one person would hear both the grievance hearing and the appeal against the final warning for sickness absence as the matters overlapped. GS confirmed that they would be heard distinctly though, the grievance first and then the appeal.

127. Ultimately GS hears the grievance with reference to the Claimant's written submissions on the 30 August 2017 and in the morning of 1 September 2017. Then GS hears the appeal in the Claimant's absence on the 1 September 2017 in the afternoon.

128. Exactly how the intended hearings with the Claimant converted to him submitting written submissions is unclear, as the Claimant could not recall and none of the Respondent's witnesses could assist us.

129. We were directed to a letter from the RCN dated the 24 July 2017 (pages 378 to 379) that raised concern about the Respondent's proposals for hearing the grievance and appeal. The RCN requested matters were postponed while they agreed a way forward. It is then clear from the documents presented to us that the use of written submissions is a course that is agreed to by the Claimant as can be seen from the email dated 27 July 2017 (see page 384). It therefore appears that these matters proceed as the Claimant and the RCN wanted.

130. There is further OH advice by letter dated 26 July 2017 that the Claimant is not fit to return to work and unlikely to be fit before mid-October (see page 380).

131. The Claimant submits his written submissions for the grievance hearing (see pages 388 to 393). No written submissions are provided about the sickness absence appeal. The Claimant confirmed in cross examination that his written submissions for the grievance hearing do not ask for redeployment.

132. By letter dated 7 September 2017 GS provides details of the outcome of the Claimant's appeal against the final written warning (see pages 413 to 415). GS was asked in oral evidence what written submissions she refers to in her outcome as the Claimant's written submission (at pages 388 to 393) deal with the grievance. GS confirmed that it was the appeal letter the Claimant had submitted.

133. By letter dated 13 September 2017 GS provides details of the outcome of grievance hearing (see pages 416 to 422).

134. As to this outcome the Claimant cross examined GS as to how she arrived at the decision concerning the NVQ, the job references and the incident with the shoes.

135. GS was consistent in her responses to the reasons set out in the outcome letter.

136. GS confirmed that she had seen the Claimant's Appraisal Record Form (pages 629 to 631) dated the 16 January 2016 and that it noted that the Claimant … "feels much better supported with a new mentor and positive to move forward" (page 630).

137. As to the incident with the shoes and her referring to it as vandalism, GS confirmed that the changing rooms were used by lots of people and there was little evidence that this was direct bullying as there was no indication as to whose shoes they were as they were under the lockers. GS confirmed she thought of it as vandalism as she could find no direct evidence it was against the Claimant, but she appreciated how it would have made him feel.

138. The separate incident about wire around the Claimant's locker was not considered by GS because it was not raised with her, the focus of the Claimant being on the shoe incident (see pages 239 and 390).

139. We find that the explanations and conclusions reached by GS appear to be rationally formed based on the material she reviewed.

140. The grievance outcome does find in favour of the Claimant in respect of the cannula incident in that GS considered that the informal discussion within the open office was not fair or appropriate, although overall, the incident was followed in a fair and appropriate way. Further, that for the Claimant's absence in June 2015, many opportunities for the return to work discussion to happen before it did on the 21 July 2015 were missed.

141. Further OH advice is provided by letter dated 20 September 2017 (see pages 426 to 427). It confirms that … "In my opinion X is not fit for work at present. He is not fit for his former role. Moreover, I have explained to X that although we would in principle be happy to support a phased return to an adjusted or redeployed role in the future, he is simply not well enough to embark on this at present. Unfortunately his health condition is very long-term and I do not see him being fit to return to a rehabilitation plan in the foreseeable future at this stage.". It records that the option of ill-health retirement is discussed as an option of last resort if the Claimant remains unable to return to work because of poor health.

142. By letter dated 29 September 2017 the RCN submits an appeal on behalf of the Claimant against the outcome of his grievance (see pages 428 to 431).

143. It is recorded in an RCN file note dated 11 October 2017 that the person proposed to hear the grievance appeal, Katie Pritchard-Thomas is objected to by the Claimant as he did not believe she would be impartial (see page 432). This is heeded by the Respondent and by letter dated 21 November 2017 to the Claimant (page 455), RD is appointed to hear the appeal and it is proposed to take place on the 28 November 2017.

144. In view of the Claimant's continuing ill health and the most recent advice from OH the Respondent seeks to arrange a formal absence review meeting, as can be seen by the letter dated 1 November 2017 (see pages 441 to 442).

145. We can also see from the file notes at pages 446 to 450 that efforts are being made between early to mid-November 2016 between the Respondent and the RCN to find a convenient date for all the parties for the hearings.

146. As can then be seen by letter dated 22 November 2017 the formal absence review meeting is rescheduled for the 6 December 2017 to accommodate the RCN (pages 456 to 457).

147. We were referred to a letter from the RCN to the Claimant's GP, Dr Kelpie dated 17 November 2017 at page 451 to 452 of the bundle. A statement as to his views is requested because the RCN is … "concerned that Occupational Health Consultant Dr Smedley, is of the opinion that X is not fit to return to work either now or in the foreseeable future. It is highly likely that the Trust will rely on this evidence in reaching a decision to dismiss.".

148. As is then recorded in the RCN file note dated 23 November 2017 (page 460) Dr Kelpie is of the view after having had a long talk with Dr Smedley that … "If contradictory information is not uncovered then I would agree with the suggestion that X should pursue Ill Health retirement which both Dr Smedley and I would be happy to support. I understand from an email X sent yesterday that he is moving in that direction himself and I am relieved that he now seems willing to remove some of the pressure that he has been placing on himself with his ambitions.". The Claimant accepted in cross examination that there was no statement from Dr Kelpie saying that he thinks the Claimant is fit to come back to work.

149. The Claimant's grievance appeal hearing takes place on the 28 November 2017 (see pages 470 to 473) and the Claimant attends with his representative from the RCN.

150. By letter dated 29 November 2017 RD issues her grievance appeal outcome (see pages 475 to 477).

151. RD was questioned in cross examination as to how she formed the view expressed at the bottom of page 476 that the Claimant wanted to stay in the ED and complete his studies there (as the Claimant denied he said it when he was cross examined about it). RD was able to direct us to the part of the meeting notes that refer to this (see page 472) and we therefore accept what RD says about what she understood the Claimant to say.

152. RD also confirmed in cross examination that she had spoken with the Vocational Skills Team after the hearing and before her decision to better understand the position in relation to the NVQ matter.

153. As to her findings about the job references RD explained that she looked at why the references were different. RD explained that one manager had looked at the Claimant's personnel records, the other was written without doing so and that was not best practice. RD confirmed when someone is asked to provide a reference, they should consult the personnel file and both authors should have done that.

The reference the Claimant complains about is the one written with reference to his personnel file.

154. In relation to the Claimant feeling aggrieved that he was not visited by the ED when he was ill in May and July 2016 and admitted to the hospital (as set out in paragraph 58 of his statement). RD accepted that it was a difficult balance managing patient and employee confidentiality and if it had been her that had found out about the Claimant's admission (thereby holding the confidential information) she would have checked how he was and if he consented to the information being disclosed. We accept that there can be different views on what is right here.

155. About the meeting that took place with the Claimant on the 19 October 2016 after his missed shift on the 18 October 2018 RD did make a finding in favour of the Claimant about this. RD suggested in oral evidence that she thought it could have been done in a more supportive way but accepted that she could not recall reviewing the meeting notes at pages 225 to 233 before, in particular she said she did not believe that she had read the closing details of the minute of the meeting, which deals with the hugs/kisses and taxi (at page 233).

156. Even if as RD finds, the meeting because of the number of senior people present was not as supportive as she would have liked it to be, the Claimant does appear to have been supported at the meeting as is demonstrated by the way it ends.

157. It is then on the 6 December 2017, which was the date arranged for the formal absence review meeting, that the Claimant attends HR and threatens to take an overdose (see page 485). Our attention was also drawn to a file note of the RCN (page 484) which confirms the Claimant dis-instructed the RCN on that date. The Claimant confirmed this was so in cross examination and that he said to the union representative he considered her to be dishonest over the overpayment issue.

158. The Claimant does present evidence on the overpayment matter (see paragraphs 88 and 89 of his witness statement). LH was cross examined about the matter and we were referred to the HR emails about it dated 7 July 2017 (see page 362). It appears that it was believed the Claimant had been overpaid over £2,500. The Claimant contested this, and ultimately it is resolved in his favour (see letter dated 15 January 2018 at page 521). Clearly this is a matter that caused the Claimant distress, but we have not been presented evidence to show there was any discriminatory motive behind what happened, or that it was in some way part of a PCP of unsupportive management.

159. By letter dated 11 December 2017 the formal absence review hearing is then re-arranged to the 21 December 2017 and that the Claimant can submit a written statement (see pages 487 to 488).

160. We were referred to an email dated 12 December 2017 from the Claimant to Dr Smedley asking for the ill-health retirement application process to commence (see page 494).

161. By email dated 18 December 2017 the Claimant provides his absence management hearing submissions (see pages 504 to 510). In cross examination the Claimant confirmed that the reason he wrote it was to say why it is unfair he is in the situation he is in. He agreed that his assertion is he is not fit, and it is the Respondent's fault, although he would not say all its fault. He confirmed that it does not assert he is fit to return.

162. The sickness absence review hearing then takes place in the Claimant's absence on the 21 December 2017. The notes from this hearing are at pages 512 to 515 of the bundle. The notes conclude … "Due to the evidence of AN's ongoing ill health and that it does not appear that he is fit to return in the foreseeable future to any role within the Trust my decision is that AN should be dismissed due to ill health effective from today. AN will be paid 4 weeks PILON and any accrued annual leave payments. I will write to him with the outcome of this meeting and will set out my rationale with the right of appeal.".

163. By letter dated 22 December 2017 SH write to the Claimant notifying him of the decision to dismiss on grounds of ill-health with pay in lieu of notice and confirming he has a right of appeal (see pages 517 to 520).

164. SH was cross examined by the Claimant about the hearing and SH's thought process about the decision. SH confirmed that he had considered the Claimants' absence record (see pages 328 and 329), he was also aware that the grievance had been concluded (as was intended) before he looked at the matter.

165. SH was asked about the correspondence from management and HR about the various meetings and in particular the typos. SH confirmed that when he reviewed the letters, he didn't feel any of the inaccuracies made were in a discriminatory manner. He felt they were errors, and he would agree with the Claimant that spelling and accuracy should be spot on especially in anything official, but making a typo is very different to being deliberately discriminatory. He did not see any of that in those letters.

166. It is not in dispute what SH says at paragraph 31 of his witness statement that:

> "31 X's absence had had and was continuing to have a significant impact on the Emergency Department, and although he had exhausted his entitlement to sick pay at that time, it was not possible to employ somebody else to cover his role whilst he was still employed in it. As such the department was incurring financial costs engaging agency workers, which also had an impact on the rest of the department and on patient care, as explained above. I felt that we could not realistically continue to hold X's job open any longer and there was no other role he could do."

167. Nor what KG says at paragraph 42 that:

> "42 X's long-term sickness absence meant the Emergency department had been understaffed for over a year, which caused various difficulties. We had to engage agency staff in order to ensure adequate staffing levels, which was expensive and problematic because agency staff change frequently, meaning they are often

unfamiliar with the department, the work and the way things are run. This means that they need significantly more supervision, assistance and support than permanent staff, which impacts on the workload of the rest of the team. It also impacts on patient care because staff have less time to dedicate to patients and because there is less continuity of care when the department does not have an adequate number of full-time, permanent staff."

168. The Claimant agreed in cross examination that he was dismissed for capability due to long term absence.

169. The Claimant confirmed in oral evidence that he had received the dismissal letter, he could not recall when though or when he read it, as he was sick at the time. He acknowledged he had been given a right of appeal (see page 520). He confirmed though that he did not pursue it because when he read the letter it was after the appeal deadline and there was no point appealing as he was applying for ill-health retirement.

170. On the 15 August 2018 the Claimant's application for ill health retirement is granted by NHS Pensions (see pages 554 to 557). He is awarded tier 1 … "TIER 1-: there is a physical or mental infirmity which gives rise to permanent incapacity for the efficient discharge of the duties of the NHS employment.".

171. The Claimant confirmed in cross examination that he recalled writing in support of this application. He did not dispute the finding that he was permanently incapable of NHS employment as at December 2017. He also agreed that Dr Smedley's assessment of him (at page 555) was a fair assessment of his health, including … "He is permanently unfit for work as a healthcare assistant. He is not well enough to consider redeployment or change of duties within the hospital.".

172. The Claimant agreed with Dr Kelpie and Dr Smedley's opinion that as at November 2017 he was not capable of any form of employment in the NHS at that time. He accepted that it continued to be the case into May and July 2018 when the Doctors wrote their opinions to pensions. He accepted that to get ill-health retirement, two conditions needed to be met, that he needed two years' service and to have been dismissed on capability grounds. The Claimant confirmed in oral evidence that he has sought clarification on the tiers from the pension provider but has not sought to challenge that he should not have been ill-health retired.

173. In respect of time limits the Claimant confirmed in supplemental oral evidence that the reason he did not submit his claim before he did was to exhaust the internal grievance process, accounting to the ACAS code.

The Law

174. Having established the above facts, we now summarise the relevant law.

175. It is not in dispute that the reason for the dismissal was capability which is a potentially fair reason for dismissal under section 98(1)(b) of the Employment Rights Act 1996 ("the Act").

176. We have considered section 98 (4) of the Act which provides "…. 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".

177. The starting point should always be the words of section 98(4) themselves. In applying the section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to a set of factual circumstances within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

178. This is also a claim alleging discrimination because of the Claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The Claimant complains that the Respondent has contravened a provision of part 5 (work) of the EqA. The Claimant alleges indirect discrimination, discrimination arising from a disability and failure by the Respondent to comply with its duty to make adjustments.

179. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. The Claimant's disability is not in dispute being by reason of depression and anxiety at times material to this claim.

180. As for the claim for indirect disability discrimination, under section 19(1) of the EqA a person (A) discriminates against another (B) if A applies to B a provision criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. A provision criterion or practice is discriminatory in these circumstances if A applies, or would apply, it to persons with whom B does not share the characteristic; it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it; it puts, or would put, B at that disadvantage; and A cannot show it to be a proportionate means of achieving a legitimate aim. We also note from section 6(3) EqA (as highlighted to us by the legal submissions of Respondent's Counsel) that, in an indirect disability discrimination claim, the focus in assessing group and individual disadvantage must be on those having the same disability as the Claimant.

181. As for the complaint for discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Under section 15(2), this does not apply if A shows that A did not

know, and could not reasonably have been expected to know, that B had the disability.

182. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that 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, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person. However, under paragraph 20(1)(b) of Schedule 8 of the EqA, provides that a person is not subject to the duty to make reasonable adjustments if they do not know, and could not reasonably be expected to know that the relevant person is disabled but also that his disability is likely to put him at a substantial disadvantage in comparison with non-disabled persons.

183. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

184. We have also considered the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code"). In particular paragraphs 33 and 42 for a formal meeting and an appeal to be held/heard without unreasonable delay after a grievance is received/the grounds of appeal are submitted.

185. We have also considered (as referred to by Respondent's Counsel) The Equality and Human Rights Commission's Code of Practice on Employment which provides that a legitimate aim is one which is legal, not discriminatory and which represents a real, objective consideration (paragraph 4.28).

186. Reference was made to a number of case authorities by the parties in their helpful submissions.

187. From those we note in summary to assist with our application of the statutory tests relevant to the issues that we had to determine:

187.1 The *'basic question'* to be asked in any case of dismissal for capability is whether in all the circumstances the employer can be expected to wait any longer and if so, how much longer: ***Spencer v Paragon Wallpapers Ltd [1976] ICR 301***.

187.2 The fact that an employer may have caused or contributed to the employee's illness does not preclude him from ever effecting a fair dismissal. The question is whether it was reasonable for the employer to

dismiss the employee in the circumstances as they were at the time of the dismissal: ***Royal Bank of Scotland v McAdie [2008] ICR 1087***.

187.3 That it can be unfair under section 98(4) of the Act for an employer to dismiss an employee by reason of long-term ill health without first considering whether he was contractually entitled to be medically 'retired' and granted an ill-health pension. It was also unreasonable for the employer to require the employee to choose between being dismissed and forgoing his ill-health pension rights: ***First West Yorkshire Ltd t/a First Leeds v Haigh 2008 IRLR 182, EAT***.

187.4 The burden of proof in an indirect discrimination claim lies on the Claimant at all stages prior to consideration of objective justification. It is only if the Claimant proves that there is a PCP, causing both group and individual disadvantage to those suffering from his particular disability, that the burden shifts to the Respondent to establish the defence of justification: ***Dziedziak v Future Electronics Ltd UKEAT/0270/11/ZT***.

187.5 In assessing whether an indirectly discriminatory practice was objectively justified, the ET must make its own judgment as to whether, on a fair and detailed analysis of the working practices and business considerations involved, the practice was reasonably necessary: ***Hardy & Hansons plc v Lax [2005] ICR 1656***.

187.6 What must be justified is not the disadvantage which the Claimant suffers, but the PCP under, by or in consequence of which the disadvantageous act is done: ***Ishola v Transport for London [2020] ICR 1204***. Also, the concept of PCP does not apply to every act of unfair treatment of a particular employee. A practice requires some form of continuum in the sense that this is the way that things generally are or will be done.

187.7 The ET must consider whether (1) there has been unfavourable treatment; (2) there is something arising in consequence of the Claimant's disability; (3) the unfavourable treatment is because of the something arising in consequence of the disability; and (4) the unfavourable treatment is a proportionate means of achieving a legitimate aim: ***Secretary of State for Justice v Dunn UKEAT/0234/16/DM***.

187.8 There should be no real distinction between assessing the proportionality of a decision to dismiss a disabled person for long term sickness absence in relation to a s.15 EqA 2010 claim and the fairness of that decision to dismiss for the purposes of s.98(4) ERA 1996: ***O'Brien v Bolton St Catherine's Academy [2017] ICR 737***.

188. In respect of time limits we note:

188.1 Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the

complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

188.2 From the 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings. The Claimant obtained a valid ACAS certificate for these proceedings.

188.3 We have considered the principles from the cases of ***British Coal v Keeble [1997] IRLR 336 EAT***; ***Robertson v Bexley Community Service [2003] IRLR 434 CA***; and ***London Borough of Southwark v Afolabi [2003] IRLR 220 CA***.

188.4 We note the factors from section 33 of the Limitation Act 1980 which are referred to in the ***Keeble*** decision:

188.4.1 The length of and the reasons for the delay.

188.4.2 The extent to which the cogency of the evidence is likely to be affected by the delay.

188.4.3 The extent to which the parties co-operated with any request for information.

188.4.4 The promptness with which the claimant acted once he knew the facts giving rise to the cause of action.

188.4.5 The steps taken by the claimant to obtain appropriate professional advice.

188.5 We note that the Court of Appeal in the ***Afolabi*** decision confirmed that, while the checklist in section 33 of the Limitation Act provides a useful guide for tribunals, it need not be adhered to slavishly. The checklist in section 33 should not be elevated into a legal requirement but should be used as a guide. The Court suggested that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time and they are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

188.6 It is also clear from the comments of Auld LJ in ***Robertson*** that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the Claimant in this regard … "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant

convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule".

The Decision

189. Considering then the complaints and the issues as to liability which it was agreed we were to determine:

190. **Unfair dismissal – S.98 Employment Rights Act 1996**

191. The reason for the Claimant's dismissal was capability (ill health).

192. We find that the dismissal was procedurally and substantively within the range of reasonable responses. This is having considered the matter generally and then specifically against the procedural and substantive challenges to fairness the Claimant raises in his complaints of disability discrimination as set out below.

193. As to whether the Respondent unreasonably failed to follow the ACAS Code of practice on Disciplinary and Grievance Procedures by:

193.1 Not arranging a formal meeting to discuss the grievance (at stage one);

193.2 Not arranging a formal meeting to discuss the grievance without unreasonable delay (at stage two); and

193.3 Not hearing the appeal without unreasonable delay (at appeal).

194. We note that this matter was framed differently in the grounds of claim (see page 19 of the bundle) which asserted breaches in the ACAS code about the dismissal, such as not being invited to attend the hearing on the 21 December 2017, not being notified of the outcome until after the appeal deadline had lapsed and that ill-health retirement should have been pursued as an alternative to dismissal. These matters though are not pursued by the Claimant as confirmed in the agreed list of issues to be determined in this case. This is understandable as from the facts found they cannot be sustained evidentially.

195. Such as the alleged ACAS breaches are relevant to the dismissal (as the alleged breaches of the ACAS code focus on the Claimant's grievance) we have not found that the ACAS code was breached. It is not proven on the balance of probability that the Claimant was seeking and was then refused a stage one formal meeting, nor that there was unreasonable delay in arranging a formal meeting at stage two, nor that the appeal hearing was not heard without unreasonable delay.

196. We accept the submissions of Respondent's Counsel in support of this which state that:

196.1 "The Claimant never asked for a stage 1 grievance meeting. The complaint raised by the RCN on 22 December 2016 was that the Respondent had failed to treat the complaint on 20 October 2016 [238-239] as a stage 2 grievance [275-276]. There was no purpose to be served by convening a stage 1 grievance meeting as that would simply

have reiterated the written response on 8 November 2016 [243-245] which the Claimant had already rejected [252]."

196.2 "The Claimant was invited to a stage 2 grievance meeting on 18 January 2017 [283-284]. The meeting did not take place because of the Claimant's serious ill-health [309]. The Respondent was asked by the RCN on 24 February 2017 not to arrange a grievance meeting because of the Claimant's ill-health, a view that was supported by OH on 28 March 2017 [341]. It was not until 24 May 2017 that OH advised that the Claimant could attend a grievance meeting [347-348] and efforts were then made to find a convenient date for all parties [350-351]. Thereafter, the parties agreed to the grievance being dealt with by way of written submissions [384; 386-387]. The Respondent submits that there was no unreasonable delay."

196.3 "The appeal at stage 3 was lodged on 29 September 2017 [428-430]. The Claimant objected to the individual appointed to hear it, Katie Prichard Thomas [432]. Efforts were then made to find a convenient date for all parties [446-447]. The Respondent submits that there was no unreasonable delay.".

197. Procedurally there are areas where the Respondent could potentially have done better as has been recognised in the findings made by the Respondent at the grievance and grievance appeal stages. We would of course urge employers to do the best they can procedurally but recognise that what is reasonable should be assessed based on what was actually happening at the particular time of the alleged procedural imperfection. Further, that people can look back and subjectively say things could have been done better. In this case what we have found factually is that what did happen procedurally in the end, was done in agreement between the Respondent, the Claimant and his union representation. We also note that the Claimant does not appeal the first written warning for sickness so as far as the Respondent is concerned the Claimant has accepted the warning.

198. In respect of the complaints of disability discrimination. It is accepted that the Claimant was disabled by way of depression and anxiety at the relevant times.

199. **Indirect disability discrimination – s.19 Equality Act 2010**

200. It is not in dispute that the Claimant was subject to the provision, criteria or practice ("PCP") of the Respondent's attendance management policy. The Respondent accepts this was a provision.

201. It is not in dispute that the Respondent applies that PCP to staff who do not share the Claimant's disability.

202. It is not in dispute that the operation of the PCP put the Claimant at a disadvantage in that he was dismissed.

203. Considering then whether the operation of that PCP does or would put staff who share the Claimant's disability at a particular disadvantage (being dismissed),

when compared with staff who do not share the Claimant's disability, we do not find that the Claimant has proven this on the balance of probability.

204. Even if we are wrong in that we can confirm that we would accept that the PCP was a proportionate means of achieving a legitimate aim.

205. The Respondent has evidenced the following legitimate aims (which are not disputed by the Claimant):

205.1 To manage employee absence consistently in order to improve attendance;

205.2 To ensure adequate staffing levels;

205.3 To ensure a stable workforce; and

205.4 To reduce the financial impact of employee sickness absence.

206. We accept that the Respondent's attendance management policy is a proportionate means of achieving those legitimate aims. As is noted by Respondent's Counsel in her written submissions and which we accept … "There has been no challenge by the Claimant to the legitimate aims relied on by the Respondent [72-73] and on which evidence is given by Mrs Harrison [§§20-23 Harrison w/s]. Further, the Respondent submits that the policy is plainly proportionate. It provides for a system of stepped warnings (each of which can be appealed) prior to any consideration of a decision to dismiss [191-192; 311-312; 413-415]. It also provides for OH advice to be taken when an employee is absent on long-term sickness absence to assess whether reasonable adjustments can be made to facilitate a return to work [98; 321-322; 341; 347-348; 380; 426-427]. In short, the policy ensures that a decision to dismiss arises only where an employee has been put on notice of the consequences of their long-term sickness absence and advice has been obtained to inform whether dismissal is reasonably necessary.".

207. Discrimination arising from disability – s.15 Equality Act 2010

208. It is not in dispute that the Claimant was subject to unfavourable treatment with his dismissal.

209. It is not in dispute that this arose in consequence of his disability, through the Claimant's sickness absence.

210. As we note from the written submissions of Respondent's Counsel … "The Respondent accepts that dismissing the Claimant was unfavourable treatment. It equally accepts that this was because of something arising in consequence of his disability, namely his long-term sickness absence because of stress and depression from October 2016 to December 2017.".

211. Considering then whether the Respondent's actions were a proportionate means of achieving a legitimate aim.

212. The Respondent relies on the following legitimate aims:

212.1 To manage employee absence consistently in order to improve attendance;

212.2 To ensure adequate staffing levels;

212.3 To ensure a stable workforce; and

212.4 To reduce the financial impact of employee sickness absence.

213. We find that the Respondent has evidenced these legitimate aims (which are not disputed by the Claimant) and its actions were a proportionate means of achieving them.

214. As to proportionality we accept the submissions of Respondent's Counsel that:

214.1 "The Claimant had been continuously absent from work since October 2016."

214.2 "The consistent OH advice was that the Claimant was not well enough to return to his own role or any other role at the hospital [321-322; 341; 347-348; 380; 426-427]. The Claimant was clearly very unwell indeed in December 2017 as evidenced by the episode on 6 December 2017 [485]. The Claimant's condition was not improving, even after the Respondent had heard his grievance [416-422; 475-477]. The Claimant himself accepted in cross-examination that he embarked on the ill-health retirement process on 12 December 2017 [494] because he recognised that he was not well enough to return to work. Objectively, as evidenced by NHS Pensions' decision to grant the Claimant tier 1 illl-health retirement benefits, he was completely incapable of any NHS employment as at 21 December 2017, the date of his dismissal [554-557]."

214.3 Also, … "Whilst the Claimant remained off sick, his job had to be kept open and his work had to be covered by agency staff at a higher cost to the Respondent than a permanent employee [§42 Grant w/s; §31 Hicks w/s]."

215. **Failure to Make Reasonable Adjustments – s.21 Equality Act 2010**

216. Considering then the five alleged PCPs and the issues asserted by the Claimant:

216.1 That the Claimant could be asked to do different things by different people which led to an overload of work. Whether on occasions that exacerbated the Claimant's anxiety (and his asthma). Then whether a reasonable adjustment would have been his redeployment.

216.2 To not provide supportive line management. Whether that exacerbated his anxiety and asthma. Then whether reasonable adjustments would have been to deploy him elsewhere, and/or for the Respondent to complete a fair grievance procedure.

216.3 To not help the Claimant in the work environment he was in so that he was always required to work out his own way forward. Whether that on occasions exacerbated his anxiety and asthma. It is common ground between the parties and as articulated in the agreed issues that this alleged PCP is simply a subset of the second alleged PCP.

216.4 That the Claimant was required to report to Mr Evans as his line manager. Whether that increased his anxiety and stress. Then whether reasonable adjustments would have been to redeploy him and/or changing the Claimant's line manager or permitting him to report to a different individual.

216.5 That the Employment Relations Department of the Respondent did not talk to employees before processes were engaged. Whether that put the Claimant at a disadvantage because of his depression and anxiety. Then whether reasonable adjustments would have been for redeployment to be considered before stage 2 of the grievance process and/or that there should be a designated HR person to support the employee.

217. We accept as submitted by Respondent's Counsel that there is little or no dispute of fact on the issues which are relevant in this case. Our focus does appear to be on two key issues:

217.1 "Whether the Claimant should, consistently with the Respondent's obligations under the Equality Act ('EqA') have had his line management arrangements changed or been redeployed in the period from September to November 2016; and"

217.2 "The fairness and/or justifiability of the decision in December 2017 to dismiss him."

218. Also, of relevance is whether the Respondent completed a fair grievance procedure. As already noted, we do not find that the ACAS code was breached as asserted by the Claimant. Further, we have found factually that what did happen procedurally in the end, was done in agreement between the Respondent, the Claimant and his union representation.

219. About the alleged PCPs we note that they are asserted by the Claimant in a way that suggests they were particular to him, for example, him being asked to do things, him not being provided support/help and him being required to report to Mr Evans.

220. We also note from the written submissions of Respondent's Counsel as asserted generally that:

220.1 "There is no relationship between redeployment and PCPs 1 and 5. Put another way, redeploying the Claimant has no application to a PCP of requiring the Claimant to take instructions from anyone or to a PCP of HR engaging processes without speaking to employees."

220.2 "As PCPs of general application (which is what a PCP must be), redeployment prior to October 2016 would not have the effect of avoiding the disadvantage caused by PCPs 2 and 3, because the Claimant would be unsupported in any part of the hospital. This underscores the fact that this is a complaint by the Claimant about how he now perceives he was treated by Mr Evans."

220.3 "In any event, if it were relevant (which the Respondent submits it is not), the Respondent did not know nor could it reasonably have known that either PCP 2 or 3 placed the Claimant at a substantial disadvantage to trigger a duty to make a reasonable adjustment by way of redeployment prior to October 2016. The Claimant raised no concerns about Mr Evans from March to October 2016. Mrs Grant also said that she had received no complaints from others about Mr Evans, who had line management or mentoring responsibility for many other members of staff. There was also positive advice from OH, who knew about the Claimant's mental health condition, that he did not need to be redeployed [188-189]."

220.4 "Equally, if it were relevant (which the Respondent submits it is not), the Respondent did not know nor could it reasonably have known that PCP 4 placed the Claimant at a substantial disadvantage, in the absence of complaint about Mr Evans, to trigger a duty to make a reasonable adjustment by way of changing his line management prior to October 2016."

220.5 "In any event, none of the PCPs applied to the Claimant after October 2016. Therefore, none of them could have put him at a substantial disadvantage to trigger a duty to make a reasonable adjustment by way of redeployment after that date for the simple reason that he was not at work. Further, the Claimant conceded in cross-examination that the Respondent ought not to have embarked on a redeployment process in October/November 2016 before getting to the bottom of the outstanding issues (sickness absence, behavioural concerns and the grievance), not least because the Claimant was at risk of dismissal if no alternative post was found for him in the 8 week redeployment period [101; 274]. Additionally, Mr Evans was not the Claimant's line manager after October 2016 [216] and there was therefore nothing to adjust by way of changing his line management arrangements."

220.6 "None of the PCPs have any relationship at all with the claimed adjustment that the Respondent should have postponed the absence management process until the Claimant was fit to return to work. In any event, Mrs Harrison's evidence [§§20-23 Harrison w/s] shows clearly why that would not have been reasonable. In effect, it amounts to contending that someone on long-term sickness absence should not have their absence managed at all. That is plainly not a reasonable proposition."

221. Dealing with each of the alleged PCPs in turn we find that:

221.1 We accept the evidence of KG that the Claimant's work as an HCA would be directed by the nurse in charge of the area in which he worked on any given shift. We also accept the description of the working environment given by KG. The Claimant has not proven on the balance of probability the broadly asserted first PCP of HCAs being required to do different things by different people. We would also observe that even if a PCP were proven about this way of working, what has not been proven is that the Respondent was aware that the asserted substantial disadvantage, that on occasions it was exacerbating the Claimant's anxiety (and his asthma), continued after the facilitated meeting. Nor that a reasonable adjustment for that would have been his redeployment.

221.2 The Claimant has not proven on the balance of probability that the second alleged PCP existed. As we have noted in our fact find from the contemporaneous evidence the Claimant appears content with his line management from March to October 2016 (from the date of the facilitated meeting with Mr Evans to the date on which he went off sick). By letter dated 26 July 2016 OH provide advice following the Claimant's self-referral (see page 171). It records that the Claimant informs them … "that things are much better at work, and we have discussed his coping mechanisms and responses to other members of staff. He states that he feels well supported by senior staff". The Claimant confirmed in cross examination that overall, he did feel the department was supporting him well. At this point what the Claimant is recorded as communicating is inconsistent with there being unsupportive management in place. Mr Lear did not give evidence of either Mr Evans or Ms Stubbington being unsupportive of the Claimant. We note and accept as submitted by Respondent's Counsel that the Claimant's complaint is that Mr Evans was specifically unsupportive of him, so would not have the generality needed to be a PCP.

221.3 Our findings for the second alleged PCP also apply to the third alleged PCP.

221.4 As to the fourth alleged PCP. The Claimant was required to report to Mr Evans as his line manager, until Mr Evans ceased in that role in October 2016. The Claimant's complaint is specific in that he had to report to Mr Evans, so would not have the generality needed to be a PCP. The appointment of a specific individual to be a line manager of another specific individual is not in our view a PCP. Insofar as this is a complaint about Mr Evans' management of the Claimant, we refer to our findings about this in respect of the second alleged PCP.

221.5 The Claimant has not proven on the balance of probability the fifth alleged PCP that the Respondent's Employee Relations department did not talk to employees before processes were engaged. We do not find that the Claimant has proven that the Respondent knew of any substantial disadvantage to him about this, nor that the asserted reasonable adjustments would alleviate it.

222. For these reasons we do not find that the Claimant has proven the asserted PCPs, nor that the Respondent had knowledge of any associated disadvantage to him.

223. We would also observe from our fact find that in March 2016 there is support from OH for the Claimant to undertake a facilitated meeting with Mr Evans. This happens and appears to resolve matters. No reasonable adjustments are suggested at that stage.

224. We also note that by letter dated the 27 January 2017 the Claimant through the RCN appeals against the final written warning (see pages 313 to 314). It suggests that the Claimant has not been supported by the Respondent despite it having knowledge of his anxiety, stress and depression. It suggests that … "The Royal College of Nursing would consider as a reasonable adjustment NOT progressing with the Absence Policy until our Member is sufficiently recovered to be able to return to work.". We note that redeployment or a change of line management is not being requested as a reasonable adjustment.

225. As to an adjustment for the Respondent to not progress the Absence Policy until the Claimant is sufficiently recovered to be able to return to work, this in our view has not been evidenced as being a reasonable adjustment. We accept the submissions of Respondent's Counsel about this, that to exclude an employee from such an absence management process, which provides opportunity for communication and consideration of what could be done to assist the employee, could be to an employee's disadvantage.

226. As the Claimant confirmed in cross examination, his written submissions for the grievance hearing do not ask for his redeployment.

227. About the reasonable adjustment complaint we therefore find that the Claimant has not proven on the balance of probability the PCPs he asserts, nor that the asserted substantial disadvantage in comparison to non-disabled colleagues was known to the Respondent, nor that the asserted reasonable adjustments would remove it. As we have already noted the Respondent is not perfect procedurally as was also highlighted in the parts of the Claimant's grievance that were upheld. However, this in our view is not evidence of a PCP of unsupportive management, particularly as what did happen appears to be evidence the other way, of a supportive management. It is hoped however that the Respondent will learn lessons from this case as to how important it is to be as accurate as it can be when dealing with such matters.

228. With these findings it is not necessary for us to go on and consider whether any failure to comply with a duty to make reasonable adjustments in September 2016 or in October/November 2016 is time barred and whether it would then be just and equitable to extend the primary time limit to enable those claims to be considered on their merits.

229. In respect of the unfair dismissal therefore we also accept the Respondent's dismissal was justified and as highlighted in the submissions of Respondent's Counsel that:

229.1 "The Respondent could not consider redeployment as at December 2017 because the Claimant was too unwell to work in any capacity."

229.2 "There was no failure to make reasonable adjustments; the decision to dismiss was justified and there was no taint of indirect discrimination."

230. Further (as submitted by the Respondent's Counsel) that:

230.1 "There was nothing known to the Respondent prior to October 2016 which called for a change to the Claimant's line management arrangements or redeployment. From 19 October 2016, the Claimant was simply too unwell to work and changing his working arrangements became academic."

230.2 "A decision to dismiss the Claimant in December 2017 was plainly fair and justified. The Claimant had been off work for a continuous period of 15 months. Further, there was no prospect at all of a return to work; indeed the Claimant had begun the process of making an application for ill-health retirement, recognising that he was not fit to work."

231. For all these reasons we find that the Claimant's complaints of unfair dismissal, indirect disability discrimination, discrimination arising from disability and for breach of the duty to make reasonable adjustments, all fail and are dismissed.

232. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 25; the findings of fact made in relation to those issues are at paragraphs 27 to 173; a concise identification of the relevant law is at paragraphs 174 to 188; how that law has been applied to those findings in order to decide the issues is at paragraphs 189 to 231.

Employment Judge Gray
Date: 9 December 2021

Sent to the Parties: 26 September 2023

For the Tribunal Office